THE NEW RAPE SHIELD LAW AND THE *CHARTER*

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When evidence of a complainant's sexual history is admitted during a sexual assault trial, the evidence has the potential to prejudice the outcome of the trial. The trier of fact may give the evidence an exaggerated probative value when examining the issue of consent. Alternatively, the judge or jury might conclude, as the result of such evidence, that the complainant's worth as a person is suspect, and accordingly they might not take their task of carefully analyzing the evidence as seriously as they should; they might not see a conviction as important as it might be with respect to another victim.[1] On the other hand, a blanket exclusion of such evidence could cause an injustice. Parliament has tried, for the third time,[2] to draw the appropriate line which will ensure a fair trial and at the same time protect the legitimate interests of both the complainant and the accused. This paper suggests that Parliament has fallen short of the mark once again, and that the evidentiary provisions enacted are unconstitutional.

The former s. 276 of the *Criminal Code*[3] amounted to a blanket exclusion of evidence of sexual conduct of the complainant with persons other than the accused, subject to three exceptions: rebuttal evidence, evidence as to the identity of the assailant, and evidence of conduct on the same occasion as the charge relating to the accused's honest belief in consent. In *Seaboyer*,[4] the Supreme Court decided that s. 276 offended the *Canadian Charter of Rights and Freedoms*[5] since the section forbade evidence which might, in a particular case, be essential to an accused's defence. The legislation did not provide for any possible exercise of discretion by the trial judge to receive such evidence when the probative value of the evidence outweighed the potential prejudice to the proper outcome of the trial. The rigidity of the provision was found to be a violation of s. 7 of the *Charter*. The majority in *Seaboyer* noted an analogy with the situation when similar fact evidence is tendered by the Crown:

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[1]For discussion of how disclosure of the victim's sexual past can prejudice the outcome of the trial, and how myths and stereotypes get in the way of clear thought, see the dissenting opinion of Justice L'Heureux–Dubé in *R.* v. *Seaboyer* (1991), 7 C.R. (4th) 117 at 171-84 [hereinafter *Seaboyer*].

[2]See the judicial review of the first attempt in *Forsythe* v. *R.* (1980), 53 C.C.C. (2d) 225 (S.C.C.).

[3]R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

[4]For comments see C. Boyle & M. MacCrimmon, "*R.* v. *Seaboyer*: A Lost Cause?" (1992) 7 C.R. (4th) 225 and A. Allman, "A Reply to '*R.* v. *Seaboyer*: A Lost Cause?' " (1992) 10 C.R. (4th) 153.

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

> The Canadian cases cited above all pertain to [similar fact] evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.[6]

In addition to insisting on judicial discretion for constitutional validity, the majority insisted that the courts would have to be more reluctant to exclude evidence of the victim's sexual activity on other occasions when tendered by the defence, than they would be with respect to evidence of the accused's sexual activity when tendered by the Crown. After striking down the legislation, the Court recognized that the existing common law was not up to the task of protecting the interests of the complainant and the Court "legislated" new and more extensive protection than had ever before existed.[7]

The new legislation, s. 276(1) of the *Criminal Code*, following the guidelines set out in *Seaboyer*, provides that evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge, or that she is less worthy of belief. For evidence of prior sexual conduct to be admitted, it must be relevant to some other issue. The legislation then goes on to provide an elaborate procedure for the admission of such evidence when it is relevant to these other issues, and requires that the trial judge state reasons describing the manner in which the evidence was determined to be relevant. The trial judge is specifically directed to instruct the jury as to the uses that they can make of that evidence. The jury must be told that the evidence can be used only in determining these other issues and cannot be used to support an inference that the victim consented on this occasion.

What are these other issues to which this type of evidence might be relevant? In prosecutions for sexual assault there may be cases of mistaken identity and there may be cases where the accused defends on the ground that he was mistaken in his belief on the matter of consent. In those cases the evidence might be received. But what of trials of sexual assault where the accused and the complainant testify differently as to whether or not there was, in fact, consent? In those cases, which may be more common, the legislation provides that evidence

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[6]*Supra*, note 1 at 139.

[7]*Ibid.* at 157-59. For comments on this see my earlier article, *supra*, note *.

of sexual activity on other occasions cannot be admitted to prove consent. Thus, evidence of the complainant's sexual activity is rigidly foreclosed.

The common law had always recognized that previous sexual conduct with the accused was relevant to the issue of whether the complainant consented on the occasion under review. Professor H.R. Galvin's article, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade,"[8] quoted heavily in *Seaboyer*, proposed a rape shield law, but confined the same to the exclusion of evidence of sexual conduct with persons *other* than the accused. Professor Galvin wrote:

> Even the most ardent reformers acknowledged the high probative value of past sexual conduct in at least two instances. The first is when the defendant claims consent and establishes prior consensual relations between himself and the complainant. ... although the evidence is offered to prove consent, its probative value rests on the nature of the complainant's specific mindset toward the accused rather than on her general unchaste character. ... All twenty-five statutes adopting the Michigan approach [to rape shield laws] allow the accused to introduce evidence of prior sexual conduct between himself and the complainant. The high probative value and minimal prejudicial effect of this evidence have been discussed.[9]

Another article quoted by the majority in *Seaboyer* is Professor Vivian Berger's "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom."[10] Professor Berger justified the reception of evidence of sexual conduct with the accused in this way:

> The inference from past to present behaviour does not, as in cases of third party acts, rest on highly dubious beliefs about "women who do" and "women who don't" but rather relies on common sense and practical psychology. Admission of the proof "supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion."[11]

Suppose A and B have been living together for a year. The evidence is clear and undisputed that the parties regularly engaged in consensual sexual intercourse. On the evening brought into question before the court, sexual intercourse occurred. A says it was consensual and B says it was not. Consent is the sole issue. The new legislation states that evidence of the previous consensual activity is inadmissible. No one, of course, would suggest that such previous conduct would be determinative of the issue, but is it not relevant and at least worth considering along with the other evidence? The commonly accepted meaning of

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[8](1986) 70 Minn. L. Rev. 763.

[9]*Ibid.* at 807, 815.

[10](1977) 77 Colum. L. Rev. 1.

[11]*Ibid.* at 58–59.

relevance bespeaks a very low threshold: Does the evidence offered render the desired inference more probable than the inference would be without the evidence?[12] To be relevant, evidence does not have to render the proposition for which it is tendered more probable than not. By relevance we mean, solely, that the evidence has some legitimate influence on reason. If we decide that evidence of sexual activity with the accused on other occasions is relevant, the trial judge would normally have the discretion to next decide whether the probative worth was outweighed by the possibility of prejudice. If she decided that the probative worth outweighed the possibility of prejudice she would, normally, receive the evidence. The new legislation, however, provides for no discretion in this regard. Because of the absolute, rigid nature of the prohibition, which operates regardless of whether the probative value of the evidence outweighs the potential prejudice to the trial's outcome, the legislation must be unconstitutional for the same reasons given by the Court in *Seaboyer*. Applying the test there announced, the new s. 276, just like the old, must violate s. 7 of the *Charter*. There is no discretion in the trial judge to receive the evidence when the probative value outweighs the prejudice.

Professor Galvin's proposal stated that the trial judge could receive:

> Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of the alleged encounter with the victim as to tend to prove that the victim consented to the act charged ... .[13]

The majority in *Seaboyer* wrote that "similar fact evidence ... cannot be used illegitimately merely to show that the complainant consented,"[14] and where evidence of sexual conduct on other occasions was admitted the trial judge should warn the jury against this prohibited use. The new legislation, although not using the language of similar fact, by its absolute prohibition against any evidence being admitted to prove consent, similarly would foreclose such evidence no matter how strikingly similar. Why? Are we to take it as a given that previous sexual conduct of the complainant can never be indicative of a propensity, a disposition, a willingness, to have sexual intercourse, from which a trier could infer that she acted in conformity with the same?

The author of the majority opinion in *Seaboyer* also wrote, just the year before, the majority opinion in *R.* v. *B.(C.R.)*.[15] That case is the most fully reasoned Supreme Court of Canada opinion on the issue of similar fact evidence ever delivered. The issue there, in a sexual assault case, was the admissibility of similar

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[12]See E.W. Cleary, ed., *McCormick's Handbook of the Law of Evidence*, 2d ed. (St. Paul: West Publishing Co., 1972) at 436–38; and *Morris* v. *R.* (1983), 36 C.R. (3d) 1 (S.C.C.) Lamer J.

[13]*Supra*, note 8 at 903.

[14]*Supra*, note 1 at 159.

[15](1990), 76 C.R. (3d) 1 (S.C.C.) McLachlin J [hereinafter *B.(C.R.)*].

fact evidence when tendered by the Crown. The majority opinion reads:

> It is no longer necessary to hang the [similar fact] evidence tendered on the peg of some issue other than disposition. ... the preponderant view prevailing in Canada is ... [that] evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.[16]

Why is it that evidence of previous conduct of the accused can be received to show his disposition, his propensity, in a sexual assault case, and the trier is permitted to infer therefrom that he acted in conformity with that disposition on the occasion under review, but it is forbidden to similarly treat such evidence concerning the complainant? Where the accused defends on the basis that there was no sexual assault because the complainant consented, *Seaboyer*, and the new legislation, says that the complainant's similar acts cannot be used to show consent and such evidence is then completely foreclosed.

Suppose the evidence is that the accused and complainant met in Sam's Bar one Saturday night and left to go to her apartment. It is agreed that sexual intercourse occurred, but the parties disagree on the issue of consent. Consent is the sole issue. The accused testifies that he was sitting at the bar when the complainant approached him, offered him a drink and propositioned him. The accused wants to call the owner of the bar to testify that each Saturday night for the previous 4 weeks the complainant came into his bar, offered a stranger a drink, propositioned him and left in his company. This similar fact evidence is evidence relevant to the issue of consent, but according to *Seaboyer*, and the new legislation, the evidence would not be receivable. There is no ability in the trial judge, in dealing with this situation, to exercise discretion, to assess probative worth on the issue of consent and weigh the same against potential prejudice. By the test for constitutional validity announced in *Seaboyer*, the law would necessarily contravene s. 7.

On the issue of receiving similar fact evidence tendered by the accused, Professor Berger writes:

> What if the accused were offering to show that the victim habitually goes to bars on Saturday nights, picks up strangers and takes them home to bed with her, and that over the past twelve months she has done so on more than twenty occasions. Now could one assert with assurance that this particular sexual record does not substantially reinforce the defendant's version of the night's events? And if it does, should he not be permitted as a matter of constitutional right to place this

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[16] *Ibid.* at 22.

evidence before the jury?[17]

R. v. *Scopelliti*[18] dealt with a trial for murder. Justice Martin, writing for the Court, decided that previous violent acts of the victim, unknown to the accused at the time of the incident, could be received to support an inference that the deceased had a propensity for violence of a kind likely to result in conduct that might have caused the accused to consider it was life threatening. Previous similar acts of the victim were received to show a disposition for violence in the victim and the jury was invited to infer that the victim acted in conformity with that disposition on the occasion under review. There the accused was charged with murder. Are the evidence rules different depending on the nature of the charge? Why? In *B.(C.R.)*, Justice Sopinka wrote that "there is no special rule with relation to similar fact evidence in sexual offences."[19] There, he was dealing with the admissibility of similar fact evidence introduced by the Crown. Should that same sentiment be applicable here, to similar fact evidence tendered by the defence?

This short note suggests serious defects in the new legislation. The attempt at reform was obviously well intended. The legislature, however, has not drawn the appropriate line to ensure a fair trial and at the same time protect the legitimate interests of both the complainant and the accused. Sometimes legislation cannot do the job. Education of all the individuals in the system, eliminating the myths and stereotypical thinking in this area, is absolutely necessary if we are to accomplish true reform.

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[17]*Supra*, note 10 at 59-60.

[18](1981), 63 C.C.C. (2d) 481 (Ont. C.A.). *R.* v. *Yaeck* (1991), 10 C.R. (4th) 1 (Ont. C.A.) is authority that the reasoning in *Scopelliti* is still with us, at least on a charge of murder.

[19]*Supra*, note 15 at 4.