RAPE IN MARRIAGE

Farewell to the fiction of implied consent

The recent High Court decision to uphold South Australia's rape in marriag law is examined by LEA ARMSTRONG.

In a unanimous decision, the High Court of Australia has upheld laws against rape in marriage passed in all Australian States and Territories in the 1970s and 1980s. A Full Court rejected the notion that the *Family Law Act* 1975 (Cth) recognised any marital or conjugal rights to insist on sex with one's spouse. The proposition that consent to sexual intercourse is to be implied from marriage, regardless of the circumstances, does not represent the common law; and no such notion is imported into federal law.

R v L (1992) 103 ALR 577 came before the court as the result of a challenge to the constitutional validity of South Australian criminal laws involving rape in marriage. The accused, named in the judgments only as 'L' was charged in South Australia with the rape of his wife pursuant to s.48 of the *Criminal Law Consolidation Act* 1935 (SA). He challenged the prosecution on the grounds that s.73(3) of that Act, which removes any presumption of consent to sexual intercourse where the victim is married to the accused, is invalid by reason of inconsistency with Commonwealth laws governing marriage pursuant to s.109 of the Constitution. The accused sought to rely on the marital exemption to rape said to exist at common law, that a man cannot be charged as principal for the rape of his wife. He argued that such a rule is enshrined in s.114 of the *Family Law Act*. Sub-section 114(2), which empowers a court exercising jurisdiction under the Act to 'make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights', was said to be a statutory recognition that unless such an order is made there is an obligation on the wife to consent to any demand whatsoever by her husband for sexual intercourse while the marriage subsists.

No common law rule

In 1976, South Australia was the first of the Australian States to pass legislation amending what it perceived as the traditional Anglo-Australian rule that nonconsensual sexual intercourse forced by a husband on his wife could not be prosecuted as rape.[1] Some of the justices in *R v L* doubted whether such a rule ever existed in Australia, although it was strictly unnecessary to decide that point. The court declared that there is no such common law precedent now existing.

The so-called 'marital exemption' in the law of rape relied on the position of the wife in marriage as little more than a chattel, at least in the eyes of the law. It apparently originated from the *dictum* of Sir Matthew Hale who, in his *History of the Pleas of the Crown* (1736), wrote that a man may not be guilty of the rape of his wife because 'by their mutual matrimonial consent and contact the wife hath given up herself in this kind unto her husband, which she cannot retract'. Further support for what has been described as the 'right to rape' is found in various *dicta* in *R v Clarence* (1888) 22 QBD 23, a case which declared that a man who had sexual intercourse with his wife while he was suffering from venereal disease was not guilty of rape. While the case was clearly not directly on point, a majority of the 13 judges who sat on it appeared to accept Hale's theory of implied consent. English case law developed to the point where a husband could be prosecuted for any actual or grievous bodily harm accompanying the rape of his wife, but not for the act of nonconsensual sexual intercourse itself. Until recently, the English legal system generally regarded Hale's proposition as an accurate statement of the common law in that country.

In their joint judgment in *R v L*, Mason CJ, Deane and Toohey JJ, acknowledged some support in academic writings and in non-binding judicial statements for the theory of implied consent but refused to concede that it ever represented the law in Australia. Nonetheless, their Honours stated that if it once was the law that a man cannot be prosecuted for the rape of his wife, it is 'so out of keeping with the view society now takes of the relationship between the parties to a marriage' as to be obsolete. Justice Dawson expressed his view in a similar vein. The SA criminal law seeks to rebut the presumption that a wife consents at all times to sexual intercourse with her husband, but that presumption is 'nothing more than a fiction which forms no part of the common law'. He stated that

> [W]hatever may have been the position in the past, the institution of marriage in its present form provides no foundation for a presumption which has the effect of denying that consent to intercourse in marriage can, expressly or impliedly, be withdrawn.

Australia is not the only common law jurisdiction to have rejected emphatically the theory of implied consent in the law of rape. In *Reg v R* (1991) 3 WSLR 767, the House of Lords also held in 1991 that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband when she married. Lord Keith, delivering the judgment of the court, stated that 'in modern times the supposed marital exception in rape forms no part of the law of England'. The Lords went on to say that marriage is now regarded as a partnership of equals, 'and no longer one in which the wife must be the subservient chattel of the husband'.

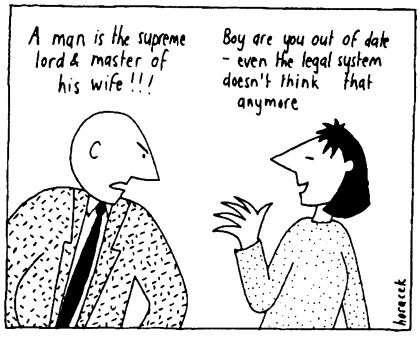
Similarly in Scotland in 1989, following the decision by the High Court of Justiciary in *S v HM Advocate* (1989) SLT 469, the marital exemption no longer applies. Hale's theory of implied consent had been embraced

by Scottish writers, including Hume in the *Commentaries on the Law of Scotland* (1797). The court considered that Hale and Hume were writing at a time when the status of women, particularly married women, was entirely different, and by the second half of the twentieth century there was no longer any justification for the marital exemption. As Lord Emslie said 'the fiction of implied consent has no useful purpose to serve today'.

These appellate court rulings in major common law jurisdictions, decided within the space of two years, demonstrate changed social and juridical attitudes towards women. The 'chauvinistic premise' of implied consent had come under increasing attack in modern times. The inadequacies of the rule, and the artificiality of a theory of consent implied from marriage, had been recognised in various jurisdictions and, in the case of Australian States and Territories, remedied by legislation. The court rulings represent the culmination of substantial judicial criticism, beginning with the minority judgments in *Clarence*. The House of Lords in *Reg v R* approved the decision in *Reg v C* [1991] 1 All ER 755, a case in which a single judge rejected outright Hale's traditional rule on the basis that this was the 'only defensible stance' in the late twentieth century. And, while there is little Australian case law dealing with marital rape, the rule had been labelled by lower court judges in this country as an unjust and discriminatory rule (*Bellchambers* [1982] 7 A Crim R 463), an 'archaic and artificial doctrine' and a principle which is 'out of tune with modern thinking' (*R v McMinn* [1982] VR 53). The judicial repeal of implied consent is the ultimate recognition that the supposed traditional rule is obsolete; and it is an important move towards providing married women with the equal protection of the law.

No conflict with *Family Law Act*

All five justices in *R v L* declared that there was no inconsistency between the *Family Law Act* (Cth) and s.73(3) of the State Act. The Commonwealth Act does not provide any comprehensive definition of the rights and obligations of the parties to a marriage, nor does it attempt to regulate such rights or obligations. Mason CJ, Deane and Toohey JJ said that while s.114(2) recognises that there are or may be obligations to perform 'marital services' or render 'conjugal rights', it does not identify those services or rights, let alone give statutory endorsement to any particular service or right. All that s.114(2) does is to make available, without specifying or defining what constitutes 'marital services' or 'conjugal rights', a remedy in the form of an order relieving a party from any obligation to perform or render them. There is nothing to suggest that the notion of conjugal rights carries with it a continuing obligation on the part of a spouse to consent to sexual intercourse as a necessary legal consequence of marriage. Neither s.114 nor any other section of the Commonwealth Act has anything to say about the extent to which consent to sex is to be implied from the marriage contract and s.73(3), in removing any presumption of consent, does not therefore impinge on the operation of the former enactment. Indeed, Brennan J points out



that the Act could not provide that a husband has a right to sex without consent because to do so would be to purport to change the 'essential incidents of marriage' and the Commonwealth Parliament does not have the power to do so under s.51(xxi) of the Constitution.

The High Court also rejected the submission put forward by the accused that the Commonwealth has covered the entire field of marriage by its legislation, thus precluding the States and Territories from passing their own laws on the subject. Mason CJ, Deane and Toohey JJ in their joint judgment state that there is no indication evidenced in the *Family Law Act* of any intention on the part of the Commonwealth Parliament to touch on behaviour within the marital relationship which may amount to a criminal offence involving rape. Their Honours also state that the *Marriage Act* 1961 (Cth) is concerned with the capacity to marry and formalities for the recognition of marriages, and in no way regulates the rights and obligations of spouses.

Conclusion

Federal legislation does not confer on a husband the 'right to rape' his wife. State and Territory laws against rape in marriage are now immune from challenges to their validity based on an alleged conflict with the *Family Law Act*. And as marital rape is not permissible at common law, presumably State laws making it a crime are unnecessary.[2]

The consensual nature of the marriage relationship is emphasised in the judgments in *R v L*. It is pointed out that the *Family Law Act*, and in particular s.114(2), does not regulate behaviour within marital relationships which may breach criminal laws involving serious personal violation. The supreme role of the husband within marriage in the eyes of the law is no longer tolerated. Judicial repeal of the supposed traditional rule (or the recognition of its non-existence) removes a glaring example of a wife's former legal subjection to her husband. As Brennan J observed:

> Marriage is an institution which casts upon a husband an obligation to respect a wife's personal integrity and dignity; it does not give the husband a power to violate her personal integrity and destroy her dignity. It would be impossible to preserve, much less to foster, the institution of marriage as an exclusive union of man and wife for life if it were otherwise.

Lea Armstrong is a Sydney solicitor.

References

1. Note that the SA Act criminalises marital rape only in the aggravating circumstances set out in s.73(5).
2. Presumably now cases of rape falling outside the circumstances described in s.73(5) can be prosecuted as common law crimes.