SEX, LIES AND RELEVANCE

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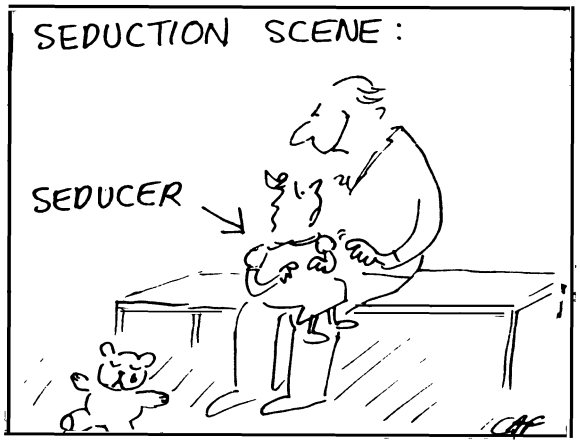
The admissibility of evidence based on rape myth in New Zealand.



Relevance in the law of evidence has recently been examined by feminists who suggest the term operates to obscure the fact that decisions on admissibility are based on personal bias or prejudice.[1] Decisions based on what is viewed as 'relevant' are no more objective and value-free than those based on what is 'reasonable'. Relevant to whom? Reasonable according to whose world view? The concept of relevance, as in all decisions on admissibility, also has a significant role in the admissibility of both recent complaint evidence and sexual history evidence. In this article I examine two recent New Zealand Court of Appeal decisions:

- *R v R* unreported, 15 December 1993, Court of Appeal CA 240/93 which concerns recent complaint evidence; and
- *R v M* unreported, 9 July 1993, Court of Appeal CA 268/93 which deals with the admissibility of sexual history evidence.

I argue that these decisions reinforce notions about female sexuality and credibility.

There is a widely held belief that the application of s.23A of the *Evidence Act 1908* (NZ) (the 'rape shield' provision) successfully prevents inappropriate questioning about the sexual history of a sexual abuse complainant. Unfortunately, the latest word from the Court of Appeal indicates that the section enables the use of rape myths as part of the inquiry into direct relevance. In *R* v *M* the rape myth that was supported is the belief that women, or girls, are prone to lie about rape.

Prior sexual abuse

In *R* v *M* the Court of Appeal ruled admissible, evidence that the nine-year-old complainant had been sexually abused two years previously by another man. In two separate High Court rulings (the first trial was aborted) by two different judges, leave had been declined. The Court of Appeal found the 'strong test' *(McClintock* [1986] 2 NZLR 99,104) under s.23A of the *Evidence Act* was met. The defendant in *R v M* was the child's grandfather. The reasons given for finding that evidence of prior sexual abuse was of 'such direct relevance to facts in issue . . . that to exclude it would be contrary to the interests of justice' (s.23A(3)) was that the defendant's claim that the abuse did not occur would be more readily believed if the jury could satisfy itself there were other reasons why the girl had complained (other than the fact of abuse). The Court stated:

> In that situation a jury inevitably would ask itself twin questions: how the complainant came to be familiar with the concepts and language of sexual abuse, and what motivation she might have to raise a false complaint against a member of her family. [at 3]

In other words, a jury is more likely to find the defendant guilty when it hears a child describe sexual acts which would not normally be known by a child because the explanation for the familiarity is likely to be sexual abuse. This rationale for allowing evidence of prior sexual experience has found favour in some overseas jurisdictions.[2] There is no local research, however, which indicates that juries are more likely to convict in

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this situation. One question about introducing evidence for this purpose is whether it meets the strict test in s.23A(3) for admissibility. This kind of evidence (prior sexual abuse) seems to be related to the identification of the defendant as the person responsible for the complainant's most recent 'sex education'. If this rationale for admissibility is used, there is seemingly no debate that some abuse has occurred. Rather the issue is one of identification and credibility.

Credibility will almost invariably be at issue in a sexual abuse case. It will arise whenever the complainant and the defendant tell different stories. The focus in *R* v *M* on the desire for the jury to explain the complainant's story, if the members choose to believe the defendant, is troublesome because the search for motivation becomes the basis for the admissibility of sexual history evidence. In this case, the Court of Appeal relied on the mother's sympathy and attention in handling the first incident of sexual abuse as the motivation for a false complaint two years later. Because the child's mother had believed her daughter and had been supportive, this arguably provided enough incentive for the child to falsely complain about her grandfather in order to receive more sympathy and attention. It is submitted that significantly more evidence is needed to support this kind of rationale for the introduction of sexual history evidence, given the strong threshold imposed by the legislation. Is it a tenable argument that this child would complain, just to get attention? It surely cannot be the case that every tenuous explanation for the making of the complaint can provide the basis for cross-examination of the complainant about matters which almost invariably invoke painful memories. A similar criticism can be made in relation to the decision in *R* v *Phillips* (1989) 5 CRNZ 405 to allow sexual history evidence, on the basis, inter alia, that the complainant had consensual sex with other men to make her ex-boyfriend jealous.

Another argument put forward by the defence in *R v M* was that, given the previous incident of abuse, the complainant would have known such incidents should be unsolicited and reported immediately, not a year later after an enquiry from a third person. This argument appears to have been accepted by the Court of Appeal. This overlooks the difference between the two defendants. In the first case, the defendant was an employer of the child's mother. In the second case, the alleged abuser was the child's grandfather. Surely most juries would understand how hesitant a child might be to complain about a family member, *especially* one who knows the result of such a complaint. The time delay is not proof of fabrication; it is merely arguable, and certainly does not amount to meeting the 'direct relevance' test under s.23A(3).

It is the final words of the decision which are of most concern:

> Absent knowledge of the previous events, the jury would be proceeding on a misapprehension. It is contrary to the interests of justice to keep such knowledge from the jury in a case where *to succeed the defence must raise at least a reasonable possibility that the child fabricated her complaint.* [at 3, emphasis added]

The unfortunate outcome of a case decided on this rationale is that where the defendant denies the allegation and credibility is the issue, the defence may justifiably argue that sexual history evidence which supports this argument is of direct relevance because the complainant may have fabricated her story. In other words, where sexual history supports an argument about credibility, it is admissible. It is of concern that this link made between credit and sexual experience is exactly the one that s.23A sought to remove, or at least severely restrict. An argument which supports a 'reasonable possibility', it is submitted, does not amount to a fact of 'direct relevance.' There is simply no empirical evidence that women or girls with a sexual past are more likely to lie about rape or sexual abuse. The assumption, or the argument, that they may do so, merely reinforces the outdated and insupportable view that women should not be believed merely because they claim something happened. Most unbelievable are women or girls 'with a past.' This judgment of the Court of Appeal reaffirms these beliefs for the 1990s.

Motivation

R v *M* is similar to the decision of the Court of Appeal in *R* v *Accused* [1993] 1 NZLR 553. In that case the Court stated:

> The existence of the second complaint is on the record; and although one can point to differences, there is a remarkable similarity to the complaints in that again the incident is said to have happened while the complainant was sitting on a couch watching television with a male outside the family circle . . . [The defence's] assertion of inherent unlikelihood was perhaps pitched a little high, but it can be seen as an odd coincidence that two such incidents, the one not the subject of any immediate complaint, should have happened to the same complainant within the space of a few months.
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> As stated earlier, plainly this is one of those cases, common enough at present, where the outcome will depend heavily on the jury's impression of the complainant's credibility. *Any matter bearing on her credit in a significant way, at any rate where closely connected with the complaint against the accused, is of assistance to the defence and difficult to dismiss as remote or trivial.* [at 556, emphasis added]

The message from both these decisions is that where women or young girls are unfortunately assaulted more than once, in similar ways, this evidence is of direct relevance because it supports the argument that on one of the occasions they made the assault up. In other words, prior sexual abuse makes women less credible as witnesses. There is no enquiry into why a woman, having gone through the arduous process of making a complaint in the past, in the absence of any malice or other motivation, should want to repeat it. In *R* v *M* it is hard to believe that the motivation is attention seeking by a nine-year-old girl.

Yet attention seeking by a nine-year-old girl was also proffered as a judicial explanation for a complaint of indecent assault in *R* v *R*. In this case the defendant was the step-grandfather of the complainant and he had been convicted at first instance. He appealed on two separate grounds: first, that the evidence of the girl's complaint to her teacher, two months after the offence, should not have been admitted as recent complaint evidence; and, second, that evidence of the complainant's mother's sexuality (a lesbian) should have been admitted. The trial judge had ruled that any reference to the mother's sexuality was inadmissible.

On the first ground, the Court of Appeal held that the complaint to the teacher was not admissible as it was not made at the first reasonable opportunity. The Court considered the arguments for more flexibility in this requirement; for instance, when the complainant is a young child who does not understand until a later date that the conduct should be complained about (see *R v Duncan* [1992] 1 NZLR 528). The Court stated:

> The present case is not one of a girl so young as to not appreciate that the conduct is such as should be complained about. She had within one year before the offending attended a school programme including a video and she understood about 'naughty touching'. It is apparent from the videotape in this case that what she said to N and A [school friends] within a few days of the offending amounted to a complaint. None of the young girls or the boy to whom the complainant had complained were called to give evidence. [at 5]

The Court found that as the complaint to the teacher was made two months after the first incident and one month after the second, it was not made at the first reasonable opportunity, and

no acceptable explanation was given for the delay. The prosecution argued that an exception should be made when the first person hearing the complaint is a young child. This was rejected. The Court accepted that 'the decision as to what is the first reasonable opportunity is a matter of degree'. The concern, however, not to put child witnesses on the stand and the effort it may have taken for a 9-year-old to approach a school teacher did not allow an interpretation of the rule which would have allowed the teacher's evidence to be heard. The result was that the Court quashed the conviction, giving the Crown the right to a new trial if desired.

Credibility and sexuality

In the context of discussing the possibility of a new trial, the Court dealt with the second ground of the appeal, the reference to the sexuality of the complainant's mother which had been disallowed by the trial judge. The Court's discussion of this point follows:

> The issue is one of relevance. In the event of the mother's credibility not being in issue, it is irrelevant whether the mother was gay or not.[3]
>
> However, counsel for the appellant wished to submit to the jury that the nine-year-old complainant was being teased by her friends about her mother being gay and having a weird friend and that this teasing might have caused the complainant, in order to draw attention to herself, to make a false complaint of indecent assault by her step-grandfather and might have explained the complainant's upset condition at the time of making the complaint. It was also desired to submit to the jury that the complaint to the teacher was not a genuine complaint but that she had been 'forced' to do so because of the teasing of her friends.
>
> The relevance of the circumstances leading to the making of the complaint ceases to exist now that we have ruled that the complaint is not one permitted to be led as a recent complaint. Nevertheless we do not feel able to rule that the possibility of this child, because of the teasing, making a false complaint in order to draw attention to herself or to seek sympathy, can be said to be so fanciful as to justify refusing the appellant the right to put the possibility to the jury. In order to do so counsel must be permitted to lay the foundation notwithstanding the right to privacy which the complainant's mother might otherwise expect. [at 9-10]

The finding of the Court of Appeal was that the complainant's alleged concern about her mother's sexuality may have lead her to falsely complain about sexual abuse by her grandfather in order to receive sympathy and attention. The Court therefore ruled that the mother's lesbianism was relevant.

In the absence of other evidence to support such a claim, it is of considerable concern that the Court was prepared to rule this evidence admissible. The Court's decision both reinforces the belief that children can be this upset by their parents' homosexuality or lesbianism, *and* suggests that such children may reflect this distress by fabricating a charge of sexual assault.

Children, or indeed this girl, may well feel concerned or confused by their parents' sexual behaviour, but a child's concern about her parents would not be limited to issues of homosexuality, or even sexuality per se. The reinforcement of a view that 'abnormal' sexual behaviour may produce this kind of reaction in a child is, in the absence of other supporting evidence, unnecessary and uniformed. It is of even more concern when this view is linked with the belief that women and girls have a tendency to lie about rape. It may well be, as the Court stated, that the possibility was not 'so fanciful as to justify refusing the appellant the right to put [it] to the jury'. The test for admissibility, however, should not be satisfied by how fanciful an argument is, but how relevant the evidence is. Can it really be said that a mother's lesbianism is relevant to the credibility of her daughter? Without significantly more evidence to support arguments about both the daughter's concern *and* the manifestation of it in a sexual assault complaint, the link between the sexuality of a third party and the credibility of the primary witness should not be made, just as it should not be made in the case of heterosexuality.

The suggestion about the complainant's concern in this case was in fact contradicted by the appellant in another argument, although the Court of Appeal accepted both points.

> Counsel also wished to challenge the evidence of the complainant as to the date on which the first offence was alleged to have occurred. He submitted that he should have been allowed to put to the jury that the complainant had deliberately been persuaded to give the wrong date *so as to protect her mother from enquiries into possible lesbian activities* by the mother on the night that the appellant admitted babysitting. We were not persuaded that this rather far fetched submission would alone have affected the jury's verdict but we are not a jury and it would have been preferable to have allowed defence counsel to put the issue. [at 10, emphasis added]

The complainant is presented here as a child worried about protecting her mother from questions about her sexuality, which seems inconsistent with the image of a child so upset by her mother's 'weird friend' that she would make up an allegation of sexual abuse.

These two Court of Appeal decisions on the relevance of sexuality to a complainant's credibility reinforce notions of inherent female mendacity. Although the contested evidence in both cases may be considered relevant on the grounds suggested, without supporting material the decisions operate as powerful messages about the untrustworthiness of sexual assault complainants. The link between sexuality and credibility that s.23A of the *Evidence Act 1908* sought to question, if not remove, is still being drawn at Court of Appeal level. In making this link, New Zealand courts are continuing to question the veracity of all female witnesses: questioning which keeps popular the mythology of rape.

References

1. Dawson, T. Brettel, 'Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance', (1987-1988) 2 *Canadian J of Women and the Law* 310; Bond, S., 'Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance', (1993) 16 *Dalhousie LJ* 416; Sheehy, Elizabeth 'Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?', (1989) 21 *Ottawa Law Review* 741.
2. See Reid, C.B., 'The Sexual Innocence Inference Theory as the Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct' (1993) 91 *Uni Mich LR* 827.
3. The question that must be asked is whether her sexuality would be relevant to her credibility at all, unless, of course, as support for her claim that she did not consent to sexual activity with a man. In other words, a lesbian complainant in a rape case, once the physical evidence is established, must be the most believable witness on the issue of her consent.