

Consent: A Relevant Distinction?

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Mary and Gwen allege being the victims of sexual assault by the same man, in separate incidents. As a child Mary also alleged sexual abuse by her step-father, though he was never prosecuted, while Gwen has only ever been involved in consensual sexual activity prior to the current assault. Defence counsel seeks to introduce the sexual history of both complainants, contending that Mary has a history of fabricating accounts of sexual assault, and that Gwen is lying about consensual sexual activity to avoid feelings of shame and guilt.

Section 276 of the Criminal Code,¹ which establishes limits on judicial discretion in deciding to admit or exclude evidence of a complainant's sexual history, governs treatment of both Gwen's and Mary's histories. This provision exists to prevent reliance on myths about women and rape in determining material issues at trial, and as such can be seen by the defence as an obstacle to securing an acquittal for an accused. For both women, defence counsel will attempt to link sexual activity to credibility – an inference prohibited by section 276. However, while the section would likely prevent the admission of Gwen's history, Mary's position is less predictable, since it is unclear if section 276 extends to evidence of prior non-consensual sexual activity. If a narrow interpretative approach is adopted, without regard to legislative intent, policy and common sense, Mary's evidence of non-consensual sexual history would be more vulnerable to harmful myths about women and rape than Gwen's consensual sexual history. This paper will argue that a more contextual approach should be used to prevent an illogical and irrelevant distinction from deciding how such evidence, and thus how sexual assault complainants, shall be treated.

History of Section 276

The history of section 276, or the "rape shield" provision, demonstrates the tension between what are perceived to be two competing legal interests: the fair trial of a person charged with sexual assault, and protecting the dignity of the complainant and the administration of justice. Courts have traditionally found these two interests to be incompatible, failing to recognize that the use of myths and stereotypes about women

¹ Criminal Code, Revised Statutes of Canada 1985, c. C-46 (hereinafter "the Code").

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and sexual assault do not ensure, but rather prevent a fair trial. Section 276 and its predecessors were enacted to prevent the use of such detrimental pre-conceptions to determine the guilt of an accused person and to ensure trial fairness. At common law, all such evidence, be it of consensual activity or not, was considered relevant to guilt, indicative of a prevailing belief that unchaste women were less truthful and/or more prone to consent to sexual activity.

Procedural safeguards were first introduced in 1976 with section 142 of the Code. This section prevented defence counsel from using the witness stand to humiliate the complainant, and required the judge, before admitting potentially harmful evidence about the complainant, to be satisfied that excluding it would prevent a just determination of an issue of fact, such as the credibility of the complainant. However, the Supreme Court of Canada in *Forsythe v. the Queen*² interpreted the provision as a measure designed to protect the dignity of the complainant, and as such it had to be counterbalanced by extending even greater powers of cross-examination to an accused.³ The Supreme Court thus reversed the rules governing the use of this evidence by making the complainant a compellable witness for the accused during an *in camera* hearing, and by allowing the accused to adduce evidence to rebut the testimony of a complainant regarding prior sexual history.⁴ The decision in *Forsythe* illustrates two important judicial trends relating to legislative restrictions on the admission of evidence of sexual history. First, courts view the goals of ensuring a fair trial for the accused and preserving the dignity of the complainant as being mutually opposed and exclusive interests. Second, courts routinely use trial fairness as a reason to frustrate and ignore the legislative purpose behind provisions which limit their discretion to admit such evidence.⁵

Following the judicial perversion of section 142, a second attempt to curtail judicial discretion was made in 1982 with the introduction of section 276 of the Code. Section 276 significantly restricted the defence's ability to cross-examine a complainant on her sexual history by delineating circumstances when such evidence might be admissible and by requiring its relevance be demonstrated prior to admission. Thus, for the first time in legislative history, the Code established an evidentiary rule creating a presumption against relevance and admissibility of such evidence. However, with the Supreme Court's decision in *R. v. Seaboyer; R. v. Gayme*,⁶ section 276 was struck down as violating an accused's constitutional right to a fair trial. Again, despite legislative

2 *R. v. Forsythe*, [1980] 2 Supreme Court Reports 268; 112 Dominion Law Reports (3d) 385 (Supreme Court of Canada) (hereinafter "*Forsythe*").

3 The Supreme Court in *Forsythe* used section 142 to extend the ability of an accused to adduce evidence of a complainant's prior sexual history by holding that this evidence was not bound by the collateral evidence rule which would have limited the ability of an accused to rebut testimony about prior sexual history.

4 See note 2.

5 For further discussion of how courts used section 142 to actually expand the trial rights of an accused, see Christine Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" (1981) 23 Criminal Law Quarterly 253 at 264.

6 *R. v. Seaboyer; R. v. Gayme*, [1991] 2 Supreme Court Reports 577, 83 Dominion Law Reports (4th) 193 (hereinafter cited to Dominion Law Reports as "*Seaboyer*").

attempts to admit only relevant evidence to determine an accused's guilt, the Supreme Court viewed protecting the interests of the complainant and the accused as mutually exclusive concerns, of which the latter required ultimate protection by the courts.

The current section 276 represents the most recent attempt by Parliament to structure judicial discretion. It offers far less protection to a complainant than its predecessor. The section outlines circumstances which would make evidence of prior sexual activity *inadmissible*. Under this section, evidence is not admissible to support the inference that because of prior sexual activity, the complainant is more likely to have consented, or is less worthy of belief. To be admissible, evidence must be of a specific instance of sexual activity, must be relevant, and the prejudicial effect of the evidence must not outweigh its probative value. Thus, the revised restrictions allow for a greater amount of judicial discretion in determining the admissibility of evidence of prior sexual activity of a complainant than its precursor. Judicial decisions have subsequently narrowed the breadth of restrictions Parliament established to control admission of irrelevant evidence. It is within the context of this most current section that the relevance and admissibility of evidence of prior, non-consensual sexual activity must be discussed. Will this provision be interpreted to restrict the admission of Mary's non-consensual sexual history or will it again solely cover Gwen's consensual sexual history?

The Issue: Narrow Interpretation Versus a Contextual Approach

Recent judicial decisions concerning the admissibility of the recorded history of a complainant highlight the importance of the application of section 276 when considering evidence of prior non-consensual sexual activity. The Supreme Court decision of *R. v. O'Connor*⁷ has eliminated many of the restrictions on evidence the defence may access and may put to a complainant in cross-examination. The decision requires that complainants disclose personal therapeutic records if the judge determines they are necessary for the accused to make full answer and defence.⁸ It is thus more probable that information concerning a complainant's previous non-consensual sexual activity will be available, and thus become the subject of an admissibility argument.⁹ In examining the current wording used in section 276, the provision can be interpreted to extend the restrictions on the admission of such information. It is this interpretation which clearly coincides with Parliamentary intent as well as with policy considerations. However, if a narrow, non-contextual approach is taken, the opposite conclusion may be reached, and legislative goals will be frustrated once again

The Narrow Approach

Section 276 was drafted in accordance with the guidelines and principles espoused by Madame Justice McLachlin in *Seaboyer*, and thus that decision may be used to define the scope and extent of the provision. McLachlin, writing for the majority, states that "evidence of *consensual* sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial" [emphasis added].¹⁰ It is arguable that if the current section 276 is modelled upon the decision in

7 *R. v. O'Connor*, [1995] 4 Supreme Court Reports 411; 130 Dominion Law Reports (4th) 235 (hereinafter "*O'Connor*").

8 See above. For further discussion on the implications of the *O'Connor* decision on disclosure of therapeutic records, see John Epp, "Production of Confidential Records Held by a Third Party in Sexual Assault Cases: *R. v. O'Connor*" (1996) 28 *Ottawa Law Review* 191.

9 The significance of the availability of a complainant's history in defence counsel's strategy is amplified by the recent decision of *R. v. Carosella*, [1997] 1 Supreme Court Reports 80; 142 Dominion Law Reports (4th) 595, which allows the remedy of a stay of proceedings where a third party fails to provide disclosure of a complainant's history.

10 See note 6 at 281.

Seaboyer, McLachlin's use of the word "consensual" places evidence of non-consensual sexual activity beyond the scope of the legislative restrictions. However, the exact drafting of the provision should be more relevant in determining its scope and breadth.

At first glance, the specific wording used in Parliament's drafting of section 276 also appears to favour the exclusion of evidence of non-consensual sexual activity from its restrictions. The provision states that "evidence that the complainant has engaged in sexual activity ... is not admissible." If the word "engaged" is interpreted to require some wilful participation by the complainant, then arguably a complainant could not have engaged in a sexual assault, and evidence of such activity would thus be beyond the scope of the section 276 protections. Indeed, some courts have opted to follow this line of reasoning. In *R. v. Vanderest*,¹¹ Justice Lysyk of the British Columbia Supreme Court concluded that Parliament's use of the word "engaged" limited the scope of the section, restricting its application to evidence of previous consensual sexual activity. The case was thus sent back to the trial level to determine the admissibility of the evidence according to the general rules of admissibility.¹² This reasoning was echoed in *R. v. Sakakeesic*¹³ wherein Justice Stach of the Ontario Court of Justice (General Division) stated that the scope of section 276 was limited by the word "engaged".¹⁴ Similarly, Justice Roscoe of the Nova Scotia Court of Appeal in *R. v. B. (O.)*¹⁵ adopted the rationale espoused in *Vanderest*, and thereby overruled the trial judge who had held that section 276 did apply to non-consensual activity. Roscoe, citing Lysyk in *Vanderest* held that it is illogical to contend that a complainant somehow "engaged" in a sexual assault, in the same way that it would be illogical to say that a bank teller "engaged" in a robbery.¹⁶

However, even if a narrow approach to the interpretation of section 276 is preferred, it is possible to reach the opposite conclusion: that evidence of prior non-consensual sexual activity of the complainant should be subject to the section 276 restrictions on admissibility. While McLachlin used the word "consensual" in *Seaboyer* when discussing the type of prior sexual activity subject to section 276,¹⁷ the current provision does not include this important modifier. Rather section 276 refers to "evidence that the complainant has engaged in sexual activity." Parliament's choice not to adopt the word "consensual" may indicate its intent not to limit the scope of the section to consensual sexual history, in the way McLachlin did. Further, the Standard College Dictionary definition of the term "engaged" includes being "involved in conflict."¹⁸ Such a definition brings evidence of prior non-consensual sexual activity within the scope of section 276. At the least, such a definition renders the precise scope of the section more ambiguous than that adopted by the courts discussed above.

Similarly, if the literal phrasing chosen by Parliament is to decide the application of section 276 to this evidence, its choice not to adopt the exact wording in *Seaboyer* is indicative of its intent. In *Seaboyer*, McLachlin held that "evidence that the complainant has engaged in *consensual sexual conduct* on other occasions ... is not admissible solely to support the inference that the complainant is by reason of such conduct..."¹⁹ [emphasis added].

In contrast, section 276 states: "evidence that the complainant has engaged in

11 *R. v. Vanderest* (1994), 91 Canadian Criminal Cases (3d) 5 (British Columbia Supreme Court) (hereinafter "*Vanderest*").

12 See above at 7.

13 *R. v. Sakakeesic*, [1994] Ontario Judgments No. 2021 (Ontario General Division).

14 See above at 7.

15 *R. v. B. (O.)* (1995), 146 Nova Scotia Reports (2d) 265 (Nova Scotia Court of Appeal).

16 See above at 286.

17 See note 6 at 281.

18 Funk & Wagnall's Standard College Dictionary, Longmans: Canada, at 438.

19 See note 6 at 281.

sexual activity ... is not admissible to support an inference, by reason of the *sexual nature of that activity*" [emphasis added].

While McLachlin specifically referred to the conduct which she defines as consensual sexual activity, Parliament only refers to the sexual nature of the activity. This difference indicates Parliament's intent to prevent the use of myths about women and sexual assault from determining key issues at trial – it is the sexual nature of the activity which triggers the use of these myths, and thus the wording of section 276 is indicative of its greater breadth of application. A sexual assault clearly is an activity which is sexual in nature, and as such is within the scope of the provision.

Further confusion about the boundaries of section 276 is caused by subsection (2) which states that "no evidence shall be adduced ... that the complainant has engaged in *sexual activity* other than the *sexual activity* that forms the subject matter of the charge"[emphasis added]. This subsection therefore refers to "sexual activity" when discussing both the alleged assault by the accused, and the evidence of a complainant's sexual history. Given Parliament's use of the same term to refer both to consensual activity (from a complainant's past), and non-consensual activity (the subject matter of the charge), any legislative distinction between consensual and non-consensual sexual activity, such as that drawn by Lysyk in *Vanderest*, seems to disappear. Again, the language of section 276 renders the exact scope of the section more ambiguous than the decisions discussed above would suggest.

Despite the availability of a narrow interpretation which would apply section 276 to evidence of non-consensual activity, and the fact that the ambiguous drafting requires a more purposive approach, courts have generally rejected both responses. Instead, the admissibility of this evidence has been left to judicial discretion, and thus is more vulnerable to myths and stereotypes about sexual assault complainants.

A Contextual Approach

As discussed, the narrow interpretation of section 276 yields an ambiguous answer as to whether the provision applies to evidence of the complainant's prior, non-consensual sexual activity. Should the restricting provisions of the section therefore extend to this type of evidence? In the Supreme Court decision of *R. v. Hasselwander*,²⁰ Mr. Justice Cory, writing for the majority, stated that where doubt exists as to the exact meaning of a statute, "the real intention of the legislature must be sought, and the meaning compatible with its goals applied."²¹ Further, Madame Justice Wilson, in *Edmonton Journal v. Attorney-General for Alberta et al.*,²² affirmed the contextual or purposive approach to statutory interpretation, by requiring consideration of Parliament's intention in formulating a provision or statute.²³ A contextual approach to interpreting section 276 would also require a consideration of the legislative goals being addressed, the history and judicial perversion of "rape shield" legislation, and the policy considerations for limiting the breadth of the section. When these contextual factors are considered in determining the section's scope, its application to evidence of non-consensual sexual activity is clear – the restrictions must apply.

20 *R. v. Hasselwander*, [1993] 2 Supreme Court Reports 398.

21 See above at 413.

22 *Edmonton Journal v. Attorney-General for Alberta et al.*, [1989] 2 Supreme Court Reports 1326; 64 Dominion Law Reports (4th) 577 (hereinafter cited to Dominion Law Reports).

23 See above at 581.

Legislative Goals of Section 276

The preamble to An Act to Amend the Criminal Code²⁴ which outlines the current section 276, is a useful tool in determining the legislative intent of the provision. The preamble states that Parliament is:

gravely concerned about ... the prevalence of sexual assault against women and children ... intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 ... wishes to encourage the reporting of incidents of sexual violence or abuse ... believes that at trial of sexual offences, evidence of a complainant's sexual history is rarely relevant.²⁵

Logically, there is no reason why the intention of Parliament, preventing the use of harmful myths and stereotypes about women from influencing the trier of fact, would not also include protecting complainants with a previous incident of non-consensual sexual activity. Nothing in the preamble indicates that victims of a previous sexual assault are somehow less worthy or deserving of such protection, or that a distinction should be made between evidence of prior non-consensual activity and evidence of consensual activity.

Research has revealed that women who have been sexually victimized as children are at least 2.4 times more likely to be re-victimized as adults than women who have not suffered victimization as children.²⁶ Further, Holly Johnson and Vincent Sacco conclude that 39 per cent of all women have been victims of sexual assault, and 25 per cent of all women have experienced both unwanted sexual touching and violent sexual attacks²⁷ – both of which would be characterized as non-consensual sexual activity for our purposes. If this distinction continues to be used to limit the application of section 276, it will further marginalize an already marginalized group: women who have suffered sexual abuse in their past. It will also send a dangerous message that these women somehow require or deserve less respect and protection of and from the law; a message not only inconsistent with, but antithetical to, the intention of Parliament.

The legislative intention to encourage the reporting of sexual assault is an important consideration in the contextual interpretation of section 276. If a distinction between prior consensual sexual activity and non-consensual sexual activity were to be drawn, it would serve as a disincentive for victims of sexual assault to report these offences. Victims of sexual abuse would be discouraged from reporting and seeking therapeutic help, knowing not only that any records may be made available to the defence, but further, that evidence of non-consensual sexual activity will be more readily admissible than other evidence of sexual conduct. Arguably, examination in court would be a more painful experience for a complainant with a prior sexual assault than for a complainant with previous consensual activity. This result is clearly contrary to both social policy and the intention of Parliament.

Policy Considerations

A contextual interpretative approach to section 276 highlights particular policy considerations. Firstly, there exists a concern that evidence which the defence seeks to admit will be characterized as non-consensual so as to allow it to bypass the scrutiny of section 276. It is conceivable that defence counsel may introduce evidence by characterizing it as non-consensual, and thus avoid the requirement of first demonstrating its probative value. Further, if such evidence is admitted, and a jury then perceives the evidence actually to be

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24 An Act to Amend the Criminal Code (Sexual Assault), Revised Statutes of Canada 1992, c.38.

25 See above.

26 Gail Wyatt, Donald Guthrie & Cindy Notgrass, "Differential Effects of Women's Child Sexual Abuse and Subsequent Sexual Victimization" (1992) 60 *Journal of Consulting and Clinical Psychology* 167 at 170.

27 Holly Johnson & Vincent Sacco, "Researching Violence Against Women: Statistics Canada's National Survey" (1995) 37 *Canadian Journal of Criminology* 281 at 294.

of consensual acts, the jury might inadvertently draw the improper inferences that section 276 was designed to prevent. This policy consideration underscores two important points: first, the distinction between evidence of consensual and non-consensual sexual activity is, in this context, an artificial one; and second, to allow such a distinction to operate in the application of section 276 could lead to illogical and harmful results.

Further, if section 276 is narrowly interpreted to apply only to evidence of prior consensual activity, any prior non-consensual act will be available to the defence to attempt to introduce without adherence to the section's procedural requirements. Following *O'Connor*, an accused will have greater opportunity to search the therapeutic and other records of a complainant, increasing the likelihood that an incidence of non-consensual activity will be found. Indeed, since the introduction of the current section 276, defence counsel have increasingly sought access to a complainant's personal records, in part due to the difficulties in demonstrating the relevance that section 276 creates.²⁸ If the narrow interpretation of section 276 remains predominant in judicial decision-making, the result will be that complainants who have been sexually abused in the past will be at a greater risk of abuse during the trial procedure than complainants who only have a history of consensual sexual acts. This is an unfair and illogical distinction, contrary to the objectives and goals identified in the preamble to section 276.

Moreover, a narrow approach to the determination of the scope of section 276 would yield absurd results. For example, section 150.1 of the Code removes consent as a defence to sexual offences where the complainant is under the age of fourteen years, but allows the defence of consent provided the accused is under the age of sixteen years, is less than two years older than the complainant and is in neither a position of trust nor authority in relation to the complainant. Therefore, prior sexual activity of a complainant will be characterized as consensual depending on her age at the time of the activity. It would be unfair to afford a complainant the protections of section 276 because she was 14 at the time of the previous activity, and thus legally able to give consent, but to deny that protection to a complainant who was 13 at the time of this previous activity. A narrow and non-inclusive interpretation of section 276 may, however, lead to this illogical result. Policy and common sense require that either the interpretation be made more broad and inclusive, or there be a legislative amendment to the provision to specifically extend the present restrictions to evidence of prior non-consensual sexual activity.

Is a Legislative Amendment Required?

Given the current judicial trend of interpreting section 276 in a narrow fashion, one must question whether a legislative amendment or judicial correction is required. Do the existing rules of evidence governing relevance and admissibility sufficiently protect evidence of prior non-consensual sexual activity from improper use?

Other Limits of Section 276

While a narrow interpretation of section 276 may result in evidence of non-consensual sexual activity not being subject to its restrictions, it may be argued that the other factors a court is to consider in determining the applicability of section 276, nonetheless, restrict the admission of this evidence. Subsection 276(3) states that a

²⁸ For further discussion of the tactics of defence counsel seeking access to personal records of complainants, see Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9.1 *Canadian Journal of Women and the Law* 148.

court should consider:

society's interest in encouraging the reporting of sexual assault offences ... the need to remove from the fact-finding process any discriminatory belief or bias ... the potential prejudice to the complainant's personal dignity and right of privacy ... the right of the complainant and of every individual to personal security and to the full protection and benefit of the law.

These interests are clearly at stake if evidence of non-consensual sexual activity is not afforded the protections of the section. The application of the factors in subsection 276(3), like the application of general rules of admissibility, involve a great deal of judicial discretion – this discretionary element therefore requires scrutiny.

General Evidentiary Rules of Admissibility

Assuming a court's decision is to restrict section 276 to evidence of consensual sexual activity, it is this author's contention that the general rules of relevancy and admissibility are insufficient to prevent the use of myths and stereotypes from improperly influencing a trier of fact. The amendments made in 1976, 1982 and most recently in 1992, creating the current section 276, were all Parliament's responses to the courts' treatment of complainants and their use of misguided notions of relevance. Indeed, Andrea Bowland contends that "at all levels, courts took the 1976 provision, designed to improve upon the common law rules, and made the ordeal of testifying in sexual assault trials even worse for complainants."²⁹ For evidence to be admitted, its relevance must be demonstrated, and its probative value must outweigh its prejudicial effect. Relevance, however, must be understood to be a subjective concept, vulnerable to the personal opinions and beliefs of an individual judge.

Relevance is heralded as an objective legal standard capable of being applied in a neutral fashion. This is a dangerous belief, not only because of its falsity, but more importantly because it paints judicial decisions with the brush of neutrality, obscuring their underlying subjectivity and perpetuating the very myths and judgments section 276 seeks to eliminate. Madame Justice L'Heureux-Dubé notes in *Seaboyer* that "the concept of relevance has been imbued with stereotypical notions of female complainants and sexual assault"³⁰ thereby rendering so-called "common sense" or "logical determinations of relevance" vulnerable to the influence of inappropriate and improper myths about complainants.³¹ Similarly, Sadie Bond notes the prevalence of the myth that "bad women cannot be raped", which implies that for sexual activity to be assaultive, characteristics such as chastity and innocence are required of the victim.³² Therefore, if a woman has an incident of non-consensual sexual activity in her past, in absence of the protective restrictions of sections 276, this myth may influence a judge's determination of relevance, and improper inferences and admissions of evidence may be made.³³ The prevalence of stereotyping under the subjective test of relevance is perhaps best illustrated by the fact that, until recently the Code required a complainant's evidence be corroborated in order for there to be a conviction for rape.³⁴ Similarly, only recently, with the enactment of section 278 of the Code, did rape become legally recognized within the context of marriage. Thus, there is evidence that myths about women and sexual assault have indeed influenced legislative decisions in the past, and further

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– Andrea Bowland

29 Andrea Bowland, "Sexual Assault Trials and the Protection of 'Bad Girls': The Battle Between the Courts and Parliament" in J.V. Roberts & R.M. Mohr, eds., *A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 241 at 242.

30 See note 6 at 227.

31 See above at 228.

32 Sadie Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 *Dalhousie Law Journal* 416 at 418.

33 For further discussion of the myths about women and sexual assault and their impact on the determination of relevance, see Szuzsanna Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" (1985) *Criminal Law Review* 769 at 779; T. Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987) 2 *Canadian Journal of Women and the Law* 310.

34 See note 6 at 224.

evidence that judicial decisions are not immune from these persistent myths.³⁵

For example, in Wigmore's treatise on evidence, he comments on the "nature" of some women alleging rape:

their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts...one form taken by these complexes is that of contriving false charges of sexual offences by men.³⁶

This author's authority in judicial thought makes this statement particularly alarming. Similarly, in 1984, Mr. Justice Allen of the Manitoba Provincial Court stated that "unless you have no worldly experience at all, you'll agree that women occasionally resist [sexual activity] at first but later give in to either persuasion or their own instincts."³⁷ Such comments from courts and legal scholars reflect how myths about women remain prevalent in legal thought, and how they may influence the supposedly "objective" determination of relevance. McLachlin, writing in *Seaboyer*, identifies two now apparently unfounded myths: unchaste women were more likely to have consented, and were less deserving of belief.³⁸ Her contention that these myths are now "discredited"³⁹ is a naïve assumption, contradicted by her own reasoning. McLachlin provides examples of situations where evidence of prior sexual activity would be relevant, though excluded under the previous section 276, but these examples draw upon the same myths she claims no longer affect judicial reasoning. For example, she identifies the "extorting prostitute" and the "teenage girl crying rape" to hide promiscuous but consensual sexual activity as situations where previous sexual activity may be relevant.⁴⁰ The only way these examples require evidence of prior sexual history to legitimately advance the inquiry is if the evidence leads to an inference that the complainant is more likely to have consented, and is likely to have lied about the consent – an inference that clearly engages these supposedly "discredited" myths.⁴¹ As relevance is a subjective concept, and myths about women and sexual assault persist in the judicial consciousness, the general rules of evidence do not provide sufficient protection against improper inferences being drawn from evidence of prior, non-consensual sexual activity of the complainant.

Relevance of Evidence of Prior Non-Consensual Sexual Activity of a Complainant

The final argument in favour of excluding this evidence from the purview of section 276 is that such evidence may actually be relevant to the assertion by the defence that the complainant has a history of, and a motive to, fabricate allegations of sexual assault. Counsel for the defence will contend that the history of a complainant demonstrates a pattern of fabrication, and that the current allegation of sexual assault is false. However, how are the courts to determine if a prior allegation is "false"? Falsity of an allegation is difficult to ascertain given the significant under-reporting of sexual offences and the reluctance on the part of the police to charge, the Crown to prosecute, and the courts to convict. A mere failure to report, charge, or convict cannot be used as evidence of a pattern of fabrication. It would be ironic if a woman could be accused of fabrication by the same justice system which, in the past, failed to charge or convict an accused of sexual assault, and thereby created the appearance of dishonesty on her part.

In *R. v. Riley*,⁴² the Ontario Court of Appeal held that the only reasonable

35 For further discussion of how myths about women and rape have pervaded judicial and legislative reasoning, see the dissenting judgment of Supreme Court Justice L'Heureux-Dubé in *Seaboyer*, see note 6.

36 *Evidence in Trials in Common Law*, Volume 3A (1970), at 376.

37 "Woman Assaulted by Boyfriend to File Complaint Against Judge", *The [Toronto] Globe and Mail* (27 March 1989) A8.

38 See note 6 at 258.

39 See above.

40 See above at 265-8.

41 For further discussion of the influence of social myths on McLachlin's decision see Elizabeth Sheehy, "Feminist Argumentation Before the Supreme Court of Canada in *R. v. Seaboyer*; *R. v. Gayme*: The Sound of One Hand Clapping" (1991) 18 *Melbourne University Law Review* 450.

42 *R. v. Riley* (1992), 11 *Ontario Reports* (3d) 151 (Ontario Court of Appeal).

justification for cross-examining a complainant on evidence of previous non-consensual sexual activity is to establish a pattern of fabricating allegations, and then only if the defence is in a position to demonstrate that she had recanted earlier accusations, or that they were “demonstrably false.”⁴³ While the application of section 276 to evidence of prior non-consensual sexual activity was not at issue before the Court, it did identify the potential unfairness created by a discussion of false accounts, and ruled that there should be extreme restrictions placed on the admissibility of evidence of previous allegations of non-consensual sexual activity to prevent irrelevant, illogical and prejudicial assertions from being drawn from such evidence.⁴⁴ Further, if evidence is introduced to argue that an inference from past conduct can be drawn, it closely resembles evidence specifically excluded by section 276. Indeed, in *Seaboyer* McLachlin stated that evidence introduced for such a purpose parallels the “prohibited use of the evidence and must be carefully scrutinized.”⁴⁵ Where myths are used as the foundation of a defence, restrictions on the admissibility of this evidence cannot be said to violate an accused’s right to a fair trial – the Canadian Charter of Rights and Freedoms⁴⁶ guarantees a fair, not favourable trial. Protecting of the administration of justice through restricting evidence of non-consensual sexual activity and protecting one’s right to a fair trial are not mutually exclusive and opposed interests. In fact, limiting admission of previous non-consensual activity is an appropriate way to maintain their balance.

Is a Legislative Response Appropriate?

In the wake of *Seaboyer*, many are questioning the benefit of seeking traditional “legal” solutions to the imbalance faced by complainants in the court. Consistently the Supreme Court has failed to act in accordance with Parliament’s intent to protect the administration of justice and the complainant by restricting the use of irrelevant evidence. By interpreting the right to a fair trial and the right of a complainant to have her dignity protected as mutually opposed concerns, courts have repeatedly undermined the procedural safeguards Parliament has deemed necessary. If this illogical distinction continues to prevail, victims may be even more hesitant to report and pursue sexual assault prosecution through the criminal trial process. Defence counsel’s increased access to a complainant’s personal and therapeutic records, coupled with an erosion of procedural protections applied to the admission of this evidence, greatly reduces the benefit of a complainant pursuing a response from the criminal justice system. If the ultimate goal of prosecuting sexual assault is to eliminate the incidence of sexual assault, and truly provide assistance to complainants, energy may be better directed towards education and more accessible and confidential therapy, rather than towards pursuing an elusive criminal justice response. The narrow approach to interpreting section 276 can only hamper society’s interest in criminalizing sexual assault. Thus, the legislature should amend the Criminal Code to extend the restrictions of section 276 to all evidence of sexual history.

43 See above at 154.

44 See above.

45 See note 6 at 266.

46 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982 being Schedule B of the Canada Act 1982 (UK), 1982, c. 11.