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An Evaluation

The New Sexual Assault Offences: Emerging Legal Issues
Report No. 2

THE NEW SEXUAL ASSAULT OFFENCES: EMERGING LEGAL ISSUES

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INTRODUCTION

On January 4, 1983 Bill C-127 was proclaimed in force. This Bill significantly altered both substantive and evidentiary laws relating to sexual offences. The crimes of rape, attempted rape, sexual intercourse with the feeble-minded and indecent assault were repealed. In their place Bill C-127 established a three-tiered structure of sexual assault offences:

(Simple) Sexual Assault,
Sexual Assault Involving Bodily Harm,
Weapons or Parties, and
Aggravated Sexual Assault.

Not repealed by Bill C-127 were the following sexual offences:

Sexual Intercourse with Females Under Fourteen,
Sexual Intercourse with Females of Previous Chaste Character,
Incest,
The Seduction Offences,
Sexual Intercourse with Children, Wards and Employees and
Gross Indecency.

The new sexual assault offences proclaimed in 1983, were included in Part VI of the Criminal Code entitled: "Offences Against the Person and Reputation." The repealed offences had come under Part IV of the Code entitled: "Sexual Offences, Public Morals and Disorderly Conduct." The inclusion of sexual assault in Part VI reflected the desire to treat sexual offences as crimes of violence and not morality.

Unlike the crime of rape, sexual assault is a gender-neutral offence. Theoretically, it can be committed by a male or female assailant upon a male or female victim. Proof of penetration is no longer required to obtain a conviction.

Bill C-127 also abolished special evidentiary rules applying to sexual offences. The doctrine of recent complaint was abrogated by section 246.5. Section 246.4 removed the requirement for corroboration in sexual cases. Sections 246.6 and 246.7 prevented the admission of evidence of the complainant's sexual history and reputation, subject to certain limited exceptions. All of these provisions were meant to ensure that general rules of evidence applicable to other violent offences against the person, would now apply in sexual assault cases.

The rationale for the amendments contained in Bill C-127 was articulated by the Law Reform Commission in its 1978 Report on Sexual Offences. The Commission stressed three major principles as providing the framework for reform:

1. The protection of the integrity of the person;

2. The protection of children; and

3. The safeguarding of public decency.

These principles were endorsed by the Department of Justice in 1980, in its information paper on sexual offences. Also stressed by the Department however, were the following goals:

4. The elimination of sexual discrimination from the Criminal Code

5. Concentrating on the violent nature of sexual assaults; and

6. Protecting complainants from harassment in the courtroom.

Since these principles or legislative goals have governed the reform process, they form the basis of this study. Goal number three however, has been excluded because it relates primarily to the regulation of child pornography. The child pornography provisions were ultimately dropped from the reform bill in its final form.

The purpose of this report is to examine the extent to which legal issues emerging in recent case law reflect the principles of reform as articulated by the Law Reform Commission and the Department of Justice. Included in this analysis are reported cases decided pursuant to the new sexual assault provisions between January 4, 1983 and April 30, 1985. Also included are selected cases decided at the supreme or court of appeal level after April 30, 1985 which have a significant impact on legislative goals. A total of 71 cases have been monitored.

Also reviewed is pertinent legal literature analyzing the 1983 provisions.

I. SUBSTANTIVE ISSUES

1. The Definition of "Sexual" for the Purposes of Sections 246.1, 246.2 and 246.3

Section 244 of the Criminal Code sets out the basic definition of assault:

> 244(1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has present ability to effect his purpose;[1]

According to the section the basic elements of the offence are the application of force to another without their consent or an attempt or threat to apply such force to another who believes he has the present ability to carry out the threat.

Section 244(2) provides that the above general definition applies to the specific offences of sexual assault, sexual assault with a weapon, threats to a third party, or causing bodily harm and aggravated sexual assault.[2]

The Code penalties provided for the commission of the sexual assault offences are generally higher than those for the equivalent levels of non-sexual assault.[3] This suggests that an assault which is sexual in nature is a more serious offence than the equivalent non-sexual assault.[4] Despite the significant consequences in terms of penalty, that flow from the distinction between the two types of assault, the term sexual for the purposes of section 246.1[5] is not defined. The crucial distinction between assault per se and sexual assault, has been left to the courts to determine.

Few cases have yet dealt comprehensively with this issue, particularly at the Supreme Court or Court of Appeal level.[6] The first major case, R v Chase was heard by the New Brunswick Court of Appeal.[7] It involved the forcible touching of a 15-year-old girl's shoulders and breasts by a 40-year-old male neighbour. The court held that these actions were not sexual and found the accused guilty of common assault only.[8]

In reaching this decision the court adopted a dictionary definition of sexual as ". . . limited to the sexual organs or

genitalia."[9] Sexual assault therefore, would consist of the application of force involving the sexual organs of another or the touching of another with one's sexual organs. According to the New Brunswick Court of Appeal, the forcible touching of the complainant's breasts was not a sexual assault since breasts were only a secondary sexual characteristic and not a primary sexual organ.

The court's rationale for distinguishing between primary sexual organs and secondary sexual characteristics or erogenous zones was that without the distinction absurd consequences would ensue. The forcible touching of a man's beard for example, or ". . . the stealing of a goodnight kiss," would necessarily constitute sexual assault.[10]

The Chase decision has been criticized as not achieving Parliament's goal of protecting citizens from what ". . . the reasonable man would view as sexual assault."[11] Nor have subsequent decisions consistently adopted the Chase definition of sexual assault.[12]

To understand some of the questions raised by Chase in terms of the achievement of legislative objectives, it is necessary to analyze different aspects of the decision in more detail.

In the absence of a statutory definition, the New Brunswick Court of Appeal chose to adopt what it termed the "natural" or "dictionary" meaning of sexual as being related to genitalia.[13] Other dictionary definitions were available to the court but were rejected.[14]

In his discussion of what was then Bill C-127, David Watt, citing The Shorter Oxford English Dictionary, defines sexual for the purposes of section 246.1 as follows:

> 'Sexual' means 'of or pertaining to sex or the attribute of being either male or female; existing or predicated with regard to sex; relative to the physical intercourse between the sexes or the gratification of sexual appetites; of or pertaining to the organs of sex.'[15]

Had the court in Chase applied any of the above listed definitions apart from the one referring specifically to "organs of sex," the actions of the defendant would likely have been characterized as sexual. Clearly, the act of grabbing a woman's breast pertains to an attribute she possesses by virtue of her sex. Alternatively, these actions could be related to a desire for sexual gratification, undertaken with sex in mind, or with regard to sex. Only the court's adoption of the narrowest of the dictionary definitions effectively excluded breast grabbing from the ambit of section 246.1.

Unfortunately the rationale for this choice is not clear from the decision. Certain clues are available, however, particularly the comments regarding the absurd consequences that would follow if beard-pulling were found to be a form of sexual assault. The court is suggesting that if acts are found to be sexual because they involve the secondary sexual characteristics of women, then they must also be sexual if they involve secondary sexual features of the male including the beard. This probably appears absurd to the court because beard pulling is not commonly considered to be sexual behaviour.

The problem with this approach is that it does not correspond to how men and women experience reality. For women the touching of breasts is generally experienced as a sexual act.[16] Furthermore, as suggested by Christine Boyle in her case comment, beard pulling is not a social problem whereas breast grabbing or pinching is. The theoretical equating of the two acts therefore, is misleading.[17] For these reasons, it is submitted that the definition of sexual set out in Chase fails to meet an important criterion of the criminal law, namely, that it be linked to basic social values.[18]

The analogy between breast pinching and beard pulling is problematic in another respect; it disregards the fact that although the secondary biological features which distinguish women from men are generally viewed in a sexual way, those of a man might not be.[19] This has been acknowledged to some degree by more recent decisions involving forcible breast touching. In R v Gardynik for example, the Ontario County Court decided that it was an "unacceptable construction" of section 246.1 to hold that an assault involving such "patently sexual" symbols as mammary glands is not sexual.[20] Similarly in R v Ramos, the Northwest Territorial Court did not follow Chase on the grounds that the court must ". . . deal with common sense and basic societal values . . ." and that ". . . breasts are intimately and inextricably associated with things sexual."[21]

In utilizing the beard/breast analogy, the court in Chase rejected such a "common sense" approach in keeping with "basic societal values." Instead it sought to create a general definition of sexual for the purposes of section 246.1 which could be applied in a gender-neutral way. Unfortunately this approach presents problems when applied to specific actions such as breast pinching which are gender-based; that is to say, committed *because* the victim is of a certain sex.

Apart from its desire not to criminalize beard pulling, the New Brunswick Court of Appeal was concerned also that the adoption of a broader definition of sexual would result in the absurdity of turning the ". . . stealing of a goodnight kiss" into a criminal act.[22] The court is implying that criminal sanctions are not appropriate for assaults involving minimal violence and violation of bodily integrity.

This is a legitimate concern. To respond by defining sexual as necessarily involving genital contact however, presents its own problems. Although it may effectively screen out minor violations, it also excludes potentially serious invasions of bodily integrity such as forced anal penetration with the finger or an object or the biting of a woman's breast.[23] The exclusion of such behavior from the ambit of section 246.1, it is submitted, is not in keeping with one of the basic goals of the amendments namely, protecting the integrity of the person from non-consensual sexual contact.[24]

Even the decriminalization of the "stolen goodnight kiss" potentially violates this objective if it results in such actions being excluded from the ambit of the section without consideration of the totality of circumstances. These might involve the combination of a non-consensual kiss with other assaultive behavior. In R v Gardynik for example, the accused tried to kiss the complainant against her will. He also bit her breast, dragging her back into the bedroom after she tried to escape.[25]

Had the Chase definition been applied in Gardynik, it is unlikely the accused could have been convicted of sexual assault although his actions taken as a whole, combined with the location of the offence, gave the attack an unmistakeably violent and sexual dimension.

Perhaps the court's reluctance to characterize "stolen kisses" as sexual assault in Chase was not meant to extend to situations such as that in R v Gardynik. Unfortunately, however, the New Brunswick Court of Appeal did not elaborate on when, if ever, criminal sanctions might be appropriate for "stolen kisses." Nor did it discuss what other combination of factors apart from genital contact, might warrant a sexual assault charge. The suggestion is that only the application of force involving the primary sexual organs is sexual assault.

According to Boyle, this approach ". . . is essentially a mechanism for trivializing and giving a false air of innocence to the denial of a woman's physical integrity."[26] Because Chase excludes from the ambit of section 246.1 serious physical violations commonly perceived as sexual, Boyle maintains the decision will likely be overturned at the Supreme Court of Canada.[27]

This is difficult to assess. Nevertheless, the Chase decision does illustrate a basic problem with the legislation which may surface in future cases or at the Supreme Court of Canada.

The new Code provisions in effect ask the court to define sexual--a politically sensitive term[28]--in the absence of clear legislative direction.[29] The Chase decision demonstrates a judicial reluctance to fully engage in this process. By

focussing on biology, the New Brunswick Court of Appeal avoided an analysis of contextual factors and how they might contribute to the perception of an assault as sexual. Some of these factors might include: the physical location of the offence, the relationship between complainant and accused, the activities occurring immediately prior to or after the assault and the motivation for the attack. Confronted with totally open-ended legislation, the court in Chase adopted a relatively narrow, simplistic definition of sexual. This definition does not reflect the diverse nature of sexual attacks. For this reason it fails to adequately protect the sexual integrity of individuals.

The difficulty with the legislation is not merely one of definition, but also one of viewpoint.[30] The Code does not set out whether assaults are to be judged as sexual on the basis of the subjective view of the complainant, the intention of the accused, or the objective perceptions of the trier of fact.

The question of viewpoint is paramount given the "gender-gap" that exists in sexual communications.[31] Sociological literature suggests that men and women do not communicate effectively in the sexual sphere and that their perceptions of sexual events are not necessarily shared.[32] While a woman might experience a pinch on the buttocks as sexual, a man might simply consider it a gesture of affection. Is it possible to apply a gender-neutral approach in such ambiguous situations? The Criminal Code does not provide a clear answer.[33].

Recent lower court decisions have responded differently to the problems of definition and perspective raised by section 246.1. Although of limited authority, these cases merit analysis. Given the paucity of Supreme Court or Court of Appeal cases, they may be considered in future decisions.

Unlike Chase, the majority of the lower court decisions do not formulate an abstract legal definition of the term sexual for the purposes of section 246.1.[34] Instead they characterize sexual assault as an assault accompanied by *factual* circumstances creating an "aura of sexuality"[35] or "sexual overtones."[36] In R v Dore for example, the Vancouver Island County Court stated that it was a question of fact to be determined by the jury or trier of fact having regard to all the circumstances involved, whether an assault was sexual.[37] Here the court was consciously adopting an analysis analogous to that traditionally applied in indecent assault cases.[38]

A similar approach was taken in R v Gardynik,[39] a decision of the Ontario County Court. In Gardynik, the court expressly declined to follow Chase and held that a sexual assault did not require an assault on genitalia. The court found that although the involvement of the primary sexual organs would prima facie satisfy any reasonable test of sexuality, the analysis should not stop there. Where the genitalia were not involved, it was

necessary to determine on the totality of facts whether a sexual assault occurred. This would involve an examination of the circumstances surrounding the assault. It was not dependent upon the involvement of particular parts of the body or the finding of a specific intention to be sexually assaultive on the part of the accused.

On the basis of this analysis the accused in R v Gardynik was convicted of sexual assault where he forcibly attempted to kiss the complainant and bit her breast in her bedroom. The complainant was clothed only in a nightgown and had her breasts and genitalia exposed.

In R v Ramos,[40] the Northwest Territorial Court also declined to follow the biological approach articulated in Chase. Instead the court followed Dore and examined all of the circumstances surrounding the assault to determine whether it was sexual. In Ramos the accused's forcible grabbing of the complainant's breasts and kissing of the nape of her neck was found to be a sexual assault because the acts represented ". . . a gender-based assault on a woman qua woman."[41]

The court in Ramos had no trouble finding an assault on a woman's breasts to be sexual. In reaching this conclusion the court considered human rights cases where tribunals have characterized unsolicited breast touching as "sexual harassment."[42]

A similar result was reached in R v Bigmore[43] where the cupping of the complainant's breast without her consent was found to be an assault with "sexual overtones" and hence a sexual assault.

In an Ontario Provincial Court case decided before Chase, it was also suggested that sexual conduct would include contact with buttocks or breasts.[44] In reaching this conclusion the court basically adopted the full Shorter Oxford Dictionary definition of "sexual" set out by Watt earlier in this discussion.[45]

According to all of these lower court decisions, if an assault is accompanied by circumstances of sex then a sexual assault has occurred. Forcible breast touching on its own or combined with some other sexual element such as an unsolicited kiss, would be sufficient to create sexual circumstances.

This objective approach, it is submitted, is more in tune with legislative goals than the Chase analysis. It is flexible enough to include some of the more serious violations of physical integrity not involving genitalia.[46] In this sense it provides at least potentially, greater protection of complainants from non-consensual sexual contact. At the same time, by allowing the trier of fact to take into account a variety of contextual factors, this approach guards against the imposition

of criminal sanctions for errors of judgment involving only a minor violation of physical integrity.

The lower court decisions also recognize that the secondary sexual features of women are commonly viewed as sexual and that sexual attacks against women often take the form of an attack on these features.[47]

Given the lack of interpretive provisions, there is no guarantee that the approach articulated in these lower court decisions will be followed. Also, in the absence of clear legislative direction, future courts may be unwilling to depart from past notions of what constitutes sexually criminal behavior based on their knowledge of the repealed rape laws.

The most recent Court of Appeal decision interpreting the term sexual, adopts a different analysis from that set out in the lower court decisions. It also rejects the views of the New Brunswick Court of Appeal in Chase.

Rather than concentrating on contextual factors, the Ontario Court of Appeal in The Queen v Alderton focusses on the intention of the accused.[48] Without meaning to be comprehensive, the court in Alderton held that sexual assault included an assault committed with the intention of having intercourse with the complainant without her consent. It also included an assault committed for the purposes of sexual gratification.[49]

The accused in Alderton broke into the complainant's apartment, jumped onto her bed forcing her back into the pillows. He then held her down with one hand covering her mouth and nose at which point she managed to escape. This was found to be a sexual assault by the court.

The definition of sexual set out in Alderton is potentially broader than that in Chase. According to Alderton, whether an accused forcibly touches a complainant's buttocks or genitals, he is equally responsible provided he did so for the purposes of sexual gratification. The court seems to be making an attempt to break with the notion reminiscent of the repealed rape laws, that unless non-consensual contact is genital, it is not serious enough to warrant conviction for a sexual offence.

In terms of legislative goals however, Alderton presents difficulties. First it concentrates on the sexual instead of the violent nature of sexual assaults.[50] Also, by focussing only on sexual motivation, the Ontario Court of Appeal unnecessarily limits the protection provided to complainants.

In her critique of such an approach, Boyle suggests that any definition of sexual assault should be broad enough to cover different motivations.[51] She argues on the basis of the psychological literature, that sexual offenders cannot be grouped into a single category. Some use force as a means to achieve sexual

gratification while others use sexual violence to express generalized aggressive and anti-social feelings. Sexual assault laws concerned with providing maximum protection for the individual from non-consensual sexual contact, it is submitted, should cover both types of attack.

The different approaches taken by the New Brunswick and Ontario Appeal Courts in Chase and Alderton reflect contrasting responses to the thorny question left unanswered by the 1983 amendments: Whose viewpoint is to be adopted in formulating a definition of sexual assault? Alan Mewitt and Morris Manning state the issue succinctly:

> [The problem] . . . is whether the test of sexuality is objective or subjective. That is to say, whether what turns an assault into a sexual assault depends upon the objective circumstances of the assault--the part of the body touched, the method of touching or the reaction of the accused when he is touching--or whether it depends upon the intent of the accused when he is touching, regardless of the objective circumstances.[52]

In terms of the Mewitt and Manning framework, Chase applies an objective test while Alderton a subjective one.

Commentators do not agree on which is the better test. Mewitt and Manning favour a subjective approach. They suggest an assault be characterized as sexual if ". . . accompanied by a mental elemented directed towards sexual gratification."[53] Where no direct evidence of this mental element exists it can be inferred from surrounding circumstances. According to Mewitt and Manning, an inference of sexual motive would generally arise where a touching of a ". . . private part of the body . . ."[54] had taken place.

On its face this analysis is consistent with Alderton. Mewitt and Manning are quick to point out however, that the mental element they require not be equated with *mens rea*. In their view sexual gratification is a motive, not an intention. Drunkenness therefore would not necessarily negative a desire for sexual gratification as it might a sexual intention.

In Alderton the court made no such distinction between motive and intent. In fact, the words used by the court to define sexual assault are ". . . an assault with the *intention* of having sexual intercourse."[55] [emphasis added] The significance of Alderton in terms of the defence of drunkenness is discussed elsewhere in this report.[56] In the context of the present discussion however, it is submitted that in requiring proof of a sexual intention rather than a sexual motive, the Alderton case goes too far in it's adoption of the subjective analysis.

Apart from the possible confusion it raises regarding the availability of the defence of drunkenness, the subjective approach is not in keeping with the analysis traditionally adopted by the courts in indecent assault cases.[57] These cases suggest it is the circumstances under which the assault is committed which make it indecent and not the intention to perform an indecent act.

With respect to the offence of sexual assault, this approach was favoured in Dore, Gardynik, Ramos and Barrett as discussed earlier.[58] It also appears to have been the test applied in Chase, although the court there adopted a narrower view of precisely which circumstances were necessary for an assault to be deemed sexual.[59]

Unfortunately neither Mewitt and Manning, nor the Ontario Court of Appeal in Alderton, present a rationale for requiring the additional mental element of motive or intention in sexual assault cases.

Given the additional burden it places on the Crown, it is doubtful the subjective approach will foster a higher conviction rate for sexual offences.[60] Also, as pointed out earlier in this discussion, requiring a sexual intent unnecessarily limits the degree of protection afforded to the complainant.[61]

David Watt in his book The New Offences Against the Person: The Provisions of Bill C-127 favours an objective test for sexual assault:

> There would seem to be no reason in principle to characterize the mental element of sexual assault as anything different in kind than that which was held to exist in respect of the repealed offence of indecent assault, viz., to intentionally apply force to another.[62]

Watt argues that this approach is consistent with the statutory history of indecent assault and rape both of which only required proof of the basic mental element.

In terms of which factors the court should consider in determining whether circumstances of sex in fact exist, Watt proposes an examination of the acts which constitute the assault or the words or gestures of the accused accompanying an assault not in itself sexual.[63] According to this approach genital contact is not necessarily required nor is a sexual motivation or intent.

It is important to note that although the objective approach proposes an *analysis* analogous to that in indecent assault cases, it does not equate the *substance* of the two offences:

> . . . to equate the past and present offences is at once too wide and too narrow. It is too wide because 'indecent' comprehends activity which is not exclusively sexual in nature as well as conduct that is and too narrow in that the equation tends to artificially limit sexual assault to that which had been heretofore known as indecent assault and thereby fails to take into account sexually assaultive behavior which goes beyond that which was formerly described as indecent assault.[64]

The cases that deal with this question in any way agree that sexual assault should not be equated with indecent assault.[65]

Like Watt, Boyle suggests that courts will likely adopt an objective test to determine the meaning of sexual rather than focussing on the subjective view of the accused or the complainant. Boyle herself advocates an analysis she terms the "resemblance approach."[66] Here the distinction between an assault and a sexual assault would be made on the basis of the attack's resemblance to what would generally be considered as sexual:

> . . . a touching might be considered sexual if it is the type of touching which in a non-assault situation might be related to sex. A violent act which bears some resemblance to those acts which society thinks of as providing sexual gratification is offensive to human dignity because it is important for one to be free to decide with whom one is going to be intimate.[67]

The utilization of the differences between the sexes to humiliate and degrade, Boyle suggests, also should come under the ambit of sexual assault.[68]

This type of approach, unlike that of Mewitt, Manning and Watt, has not yet been utilized by the courts.

Conclusion

Two major gaps in the 1983 amendments have limited the realization of legislative goals in this issue area. These are: the lack of interpretive provisions in the Code to assist the courts in defining sexual for the purposes of section 246.1; and the Code's failure to clarify from whose perspective an assault is to be deemed sexual. These highly political questions have been left unanswered by the legislation.

The major cases of Chase and Alderton have responded by avoiding a thorough analysis of what is not acceptable sexual conduct. Instead, these cases opt for simplistic definitions of sexual assault which mask the complex nature of sexual violence and further prevent the realization of certain legislative goals.

In Chase, an abstract definition of sexual was applied which required genital contact in all cases. The court rejected the notion that the sexual nature of an assault might be dependent upon the totality of circumstances. This definition seems strangely reminiscent of the former statutory requirement of penetration in rape cases and may in practice operate in the same way.

By singling out as the key fact the presence or absence of genital contact, Chase draws attention to the sexual aspect of the assault rather than its violence. This is in direct opposition to the purpose of the amendments.

Like the former penetration requirement, this sexual emphasis creates systemic barriers which must be overcome by those wishing to report such incidents. In their testimony complainants will still be compelled to highlight certain intimate physical details. This may contribute to the continued harassment of victims of such attacks during cross-examination.

Furthermore, placing undue emphasis on genital contact as the key factor, may act as a disincentive to the reporting of sexual crimes since it perpetuates the moral stigma traditionally attached to complainants.

By focussing on sexual gratification alone as the determining factor, the Alderton analysis presents similar problems. Like Chase, Alderton lends credence to the traditional conception of sexual offences as crimes of morality rather than violence. As stated earlier, this perpetuates the moral stigma suffered by complainants and is a disincentive to reporting.

Chase and Alderton present unnecessarily restricted notions of what constitutes sexual behavior for the purposes of 246.1 not in keeping with basic societal values.[69]

In Chase the court found that forcible breast touching was not sexual assault despite the fact that commentators and most lower court decisions seem to agree that breasts are commonly perceived in a sexual way and that sexual assaults take many forms apart from genital contact.[70]

In Alderton the court disregarded evidence suggesting sexual attacks can be motivated not only by a desire for sexual gratification, but also by a desire to express generalized aggressive feelings.[71]

Neither decision, therefore, reflects the full range of physical and mental elements which evidence suggests often make up violent sexual encounters.[72]

If Chase is upheld by the Supreme Court of Canada, then potentially serious violations of physical integrity such as

forced anal penetration with an object or the finger, will not be covered.

If Alderton is followed, then even non-consensual genital manipulation might not come within the ambit of 246.1 if it is done purely as a means to exercise control or to humiliate or degrade.

These two examples illustrate how the courts' interpretation of sexual in Chase and Alderton in fact recognizes and protects the physical integrity of complainants in a fairly limited range of situations. This limited protection, it is submitted, is not sufficient to satisfy the legislative goal of protecting the physical integrity of the individual from non-consensual sexual contact.

The lower court cases adopting the objective approach seem more in keeping with legislative goals. This is because they allow the trier of fact to take into account a variety of contextual factors in determining whether an assault is sexual. Complainants therefore, are *potentially* protected in a greater range of situations.

Unfortunately, given the lack of interpretive provisions in the Code, future triers of fact applying the objective approach may fill in the gap by resorting to past notions of what constitutes unacceptable sexual behavior based on their awareness of rape cases. Furthermore, the lower court decisions which utilize an objective analysis are not binding on future courts.

Apart from the interpretive problems it presents, section 246.1 may be unconstitutional for vagueness.[73] Section 7 of the Charter provides that everyone has ". . . the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[74] Fundamental justice may require that before criminal sanctions can be imposed, more specific notice to the public of what constitutes criminal behavior than that set out in section 246.1 be provided.[75] Alternatively, section 246.1 may violate the right not to be arbitrarily detained or imprisoned as set out in section 9 of the Charter.[76]

The vagueness of section 246.1 in terms of viewpoint and definition therefore, is problematic in terms of the achievement of legislative goals and constitutionality. It has resulted in the adoption of relatively narrow, simplistic definitions of sexual in the two major cases to date. Both decisions avoid a thorough analysis of the boundary between acceptable and unacceptable sexual conduct. Chase does so by setting up an abstract biological test to be applied in all circumstances. Alderton does so by focussing on the presence of a desire for sexual gratification.

Both approaches limit the protection provided to complainants and highlight the sexual as opposed to the assaultive aspect of such attacks.

At this point in time it is difficult to know how future courts will respond to the vagueness of section 246.1. The enactment of interpretive provisions however, might assist the courts in developing a definition of sexual assault more in keeping with the expressed goals of the 1983 amendments.

In this regard, it is submitted that the resemblance approach proposed by Boyle[77] is particularly worthy of future consideration by legislators. In keeping with legislative goals, it concentrates on the violent aspect of sexual attacks while not entirely discarding the relevance of sexual gratification. Such an approach reflects the diverse origins and nature of sexual assaults. In this way it could provide maximum protection for complainants.

REFERENCES

1 Sections 244(1)(a) and (b); Section 244(c) also provides that a person commits an assault when while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

2 Section 244(2).

3 Sections 246.1, 246.2, and 246.3 as compared to sections 245, 245.1 and 245.2.

4 C.L.M. Boyle, "Sexual Assault and the Feminist Judge" (draft article for Canadian Journal of Women and the Law) (Summer: 1985), p. 7.

5 Throughout this part of the study where the author refers to the definition of sexual for the purposes of section 246.1 the comments would apply equally to the offences set out in sections 246.2 and 246.3 since one element of these offences is the commission of the basic offence of sexual assault set out in section 246.1.

6 R v Barrett (1984), 13 W.C.B. 96 (Ont. Prov. Ct.); R v Stennett (1984), 12 W.C.B. 422 (Ont. Cty. Ct.); R v Dore (1984), 12 W.C.B. 360 (B.C. Cty. Ct.); R v Chase (1984), 40 C.R. (3d) 282 (N.B.C.A.) leave to appeal to S.C.C. granted; R v Bigmore, [1984] B.C.D. Crim. Conv. 6108-03 (B.C. Cty. Ct.); R v Gardynik (1985), 42 C.R. (3d) 362 (Ont. Cty. Ct.); R v Ramos (1985), 42 C.R. (3d) 370; R v Alderton January 31, 1985 (Ont. C.A.) (not yet reported).

7 R v Chase, supra, footnote 6.

8 Ibid. at p. 288.

9 Ibid. at p. 287.

10 Ibid.

11 R v Gardynik, supra, footnote 6 at p. 365.

12 Bigmore, Gardynik, Ramos and Alderton, supra footnote 6.

13 R v Chase, supra, footnote 6 at p. 287.

14 C.L.M. Boyle, R v Chase: "Comment" (1984), 40 C.R. (3d) 282.

15 D. Watt, The New Offences Against the Person: The Provisions of Bill C-127 (Toronto: Butterworths, 1984) p. 99.

16 Boyle, supra, footnote 14.

17 Ibid.

18 Working Paper on Sexual Offences, No. 22 (Law Reform Commission of Canada: 1978) p. 3.

19 Boyle, supra, footnote 4.

20 Supra, footnote 6, at p. 369.

21 Supra, footnote 6, at p. 374.

22 R v Chase, supra, footnote 6, at p. 287.

23 Boyle, supra, footnote 4.

24 Report on Sexual Offences, (Law Reform Commission of Canada: 1978), pp. 6-7.

25 R v Gardynik, supra, footnote 6.

26 Boyle, supra, footnote 4, at p. 12.

27 Boyle, supra, footnote 4, at p. 14.

28 As evidenced by the years of debate and controversy surrounding the introduction of the amendments. For historical accounts of some of the controversial issues raised see: Watt, supra, footnote 15 at pp. 1-4; C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984) pp. 1-30; D. Kinnon, Report on Sexual Assault in Canada (Ottawa: Canadian Advisory Council on the Status of Women, 1981) pp. 36-43.

29 Section 246.1 does not define "sexual" but merely establishes the penalty for commission of the offence of sexual assault.

30 S. Parker, "The 'New' Sexual Offences" (1983) 31 C.R. (3d) 317; see also: Mewett and Manning infra, footnote 52.

31 R.D. Wiener, "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983), 6 Harvard Women's Law Journal 143; S. Katz and M. Mazur, Understanding the Rape Victim (Wiley-Interscience, 1979) pp. 143-145; L. Clark and D. Lewis, Rape: The Price of Coercive Sexuality (Toronto: The Women's Press, 1977) pp. 141-142

32 Ibid.

33 Parker, supra, footnote 30.

34 R v Dore; R v Bigmore; R v Gardynik; and R v Ramos; supra, footnote 6.

35 R v Gardynik, supra, footnote 6.

36 R v Bigmore, supra, footnote 6.

37 R v Dore, supra footnote 6; On the evidence in Dore however, there was no conviction for sexual assault since the trier of fact was not satisfied beyond a reasonable doubt that a sexual assault was committed.

38 Ibid, at p. 2. (Complete reasons for judgment)

39 R v Gardynik, supra, footnote 6.

40 R v Ramos, supra, footnote 6.

41 Ibid., at p. 375.

42 Ibid.

43 R v Barrett, supra, footnote 6.

44 Ibid., at p. 9. (Complete reasons for judgment)

45 Ibid; see also p. 4 of this paper.

46 See p. 6 of this paper.

47 J. Brickman et al. Winnipeg Rape Incidence Project, a paper presented at the annual Conference of the Canadian Association of Sexual Assault Centres, May 1980, p. 1.

48 R v Alderton, supra, footnote 5. See also: R v Stennett, supra, footnote 6 where sexual was held to mean "anything connected with sexual gratification or the urge for this"; and see R v Lang Oct. 22, 1984 (Alta Q.B.) (not yet reported). In Lang the court found that ". . . if the purpose of the touching is sexual gratification, then the assault is sexual."

49 R v Alderton, supra, footnote 6.

50 According to the Law Reform Commission's Report on Sexual Offences, supra, footnote 24, at p. 15-16, the reforms were intended to shift the focus from the sexual to the assaultive aspects of such attacks.

51 Boyle, supra, footnote 4, at p. 9.

52 A. Mewett and M. Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) p. 594.

53 Ibid., at p. 595.

54 Ibid.

55 R v Alderton, supra, footnote 6, at p. 10.

56 See p. 35 of this paper.

57 R v Maurantonio, [1968] 1 O.R. 145 (C.A.); R v Resener, [1968] 4 C.C.C. 129 (B.C.C.A.); R v Pharo, [1970] 12 C.R.N.S. 151 (Ont. Co. Ct.); R v Rhynard, [1980] 41 N.S.R. (2d) 104 (C.A.); but see contra: Laskin J. A. as he then was, in dissent in R v Maurantonio at p. 149.

58 See p. 35 of this paper.

59 R v Chase, supra, footnote 6, for example, genital contact as opposed to breast biting, buttock pinching or forcible kissing.

60 See: Jean Chretien commenting on Bill C-53, the predecessor to Bill C-127 where he suggests that ". . . the procedure must be used in such a way that we obtain the maximum number of convictions." Standing Committee on Justice and Legal Affairs, Proceedings, 77:43, April 22, 1982.

61 See p. 9 of this paper.

62 Watt, supra, footnote 15, at p. 99.

63 Ibid.

64 Ibid.

65 R v Chase; R v Gardynik; R v Stennett, supra, footnote 6.

66 Boyle, supra, footnote 28, p. 75.

67 Ibid., at pp. 74-75.

68 Boyle, supra, footnote 4, at p. 8.

69 Report on Sexual Offences, (Law Reform Commission of Canada: 1978), p. 3.

70 Parker, supra, footnote 30; Boyle, supra, footnote 4; Boyle, supra, footnote 28; Watt, supra, footnote 15; R v Gardynik; R v Dore; R v Bigmore; and R v Ramos, supra, footnote 6.

71 Boyle, supra, footnote 4.

72 See Law Reform Commission Report, supra, footnote 69, at p. 50 where the explanatory notes accompanying the draft legislation proposed by the Commission outline the reason for excluding a requirement for "sexual gratification":

72 (cont'd)

> It was pointed out in our consultations that there could be a sexual 'touching' or 'contact' (as might occur in a bar-room brawl) without any sexual purpose. 'Sexual gratification' was not used because it indicated satisfaction and motive which might not be present. Even where the motive of the offender might be to humiliate and degrade his purpose is nonetheless 'sexual' . . . .

73 Boyle, supra, footnote 28, at p. 73.

74 The Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.) c.11, Schedule B].

75 Boyle, supra, footnote 28 at p. 73; see also: Law Reform Commission Report, supra, footnote 24 at p. 5 where the Commission focussed on the need for specificity as one reason justifying the reform of the sexual offences:

> The Commission believes that especially in criminal law, legislationprohibiting certain types of behavior of a general, rather than purely technical, nature ought to be readily understandable by the public. Yet it is abundantly apparent that the present provisions of the Criminal Code are far from clear.

Unfortunately the same could be said of section 246.1.

76 Boyle, supra, footnote 28 at p. 73. Boyle suggests section 9 may be relevant while pointing out that American cases have found similar provisions to be constitutional.

77 See p. 12 of this paper for an outline of this approach.

2. The Significance of the Degenderization of the Sexual Offences

Unlike the crime of rape, sexual assault can be committed by a male or female upon a male or female victim.[1] The sexual offences were degenderized in this way ostensibly to help eliminate sexual discrimination from the Criminal Code.[2]

Of the 71 sexual assault cases analyzed in this study, only two did *not* involve a male principal and female complainant. In R v Dore both the complainant and the accused were adult males.[3] The accused was ultimately acquitted however, because on the evidence a reasonable doubt was raised as to whether a sexual assault had been committed.

In The Queen v LeGallant,[4] the complainant and accused were also both male. The victim however, was 13 years of age while the principal was an adult. An acquittal also resulted in this case on the grounds that the child was the sexual aggressor.

Sociological study is needed to determine the reason for the apparent continuation of the established pattern of male accused/female complainant. It may be that police and Crown prosecutors in investigating and laying charges, are continuing to operate according to assumptions based on the repealed rape laws. Alternatively, perhaps other Criminal Code provisions such as sections 157 (Gross Indecency) or 155 (Buggery and Bestiality) are being favoured by law enforcers in situations involving male complainants.

Social factors might also be playing a role. Male complainants may be less inclined to report sexual assaults for psychological reasons or due to a lack of awareness of the new sexual assault provisions. Also, the continuation of the established sex role pattern likely reflects the social reality that women in our culture make up the majority of victims of gender-based attacks.

On a theoretical level it appears that the legislative goal of removing *de jure* discrimination has been satisfied given the gender-neutrality of sections 246.1, 246.2, and 246.3. Whether or not these provisions will actually be enforced and applied in a gender-neutral fashion by the courts can only be determined once more cases are heard which do not involve male principals and female complainants.

REFERENCES

1 Section 246.1; The same is also true of Sexual Assault With a Weapon, Threats to a Third Party or Causing Bodily Harm (246.2) and Aggravated Sexual Assault (246.3).

2 Information Paper: Sexual Offences Against the Person (Department of Justice: 1980) pp. 7-9.

3 (1984), 12 W.C.B. 360 (B.C. Cty. Ct.).

4 June 12, 1985 (B.C.S.C.) (not yet reported).

3. The Impact of Section 246.1(2) on the Availability of the Defence of Mistake

Section 246.1(2) relieves the Crown of the obligation to prove lack of consent to obtain a conviction for sexual assault where the complainant is less than 14 years of age and the accused is not more than three years older than the victim:

> 246.1 (2) Where an accused is charged with an offence under subsection (1) or section 246.2 or 246.3 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

This section seems to parallel section 146[1] with a few important differences. Section 146 provides:

> 146 Every male person who has sexual intercourse with a female person who
> (a) is not his wife, and
> (b) is under the age of fourteen years,
> whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

Certain obvious differences emerge upon an initial reading of the two provisions. Section 246.1(2) could apply in a husband-wife situation whereas 146 could not. Furthermore, only men can be charged under the latter section, while any person can be charged with the sexual assault offences to which 246.1(2) applies. To obtain a conviction under section 146, the Crown must also prove penetration while sections 246.1, 246.2 and 246.3 encompass a broader range of sexual activity.[2] Finally, section 146 sets out a blanket prohibition against intercourse with under-aged females whereas section 246.1(2) countenances a certain degree of consensual sexual contact between young people in situations where the parties are less than three years apart in age.

A more subtle distinction between the two provisions involves the availability of the defence of mistake. Section 146 explicitly states that a conviction may result *whether or not* the accused mistakenly believes the complainant is over 14. Liability under this section is therefore absolute upon proof of the *actus reus* (the act of intercourse with a female under 14 who is not the wife of the accused).

Section 246.1(2) is less explicit. Although it states that consent is no defence, this provision does not refer specifically to the presence or absence of a mistaken belief regarding the age of the complainant. The question then

arises: does section 246.1(2) exclude the defence of mistake by necessary implication?

This issue was raised in R v Roche, the major case to date interpreting section 246.1(2).[3] In Roche the accused was 20 years of age while the complainant was only 13. The accused however, honestly believed that the complainant was 15. On this basis he argued that he be acquitted. The defence maintained that to convict in a situation where the accused honestly believed in facts which if true would have made him innocent, would in the absence of clear statutory language to this effect, violate the principles of fundamental justice and the right to be presumed innocent until proven guilty.[4]

The Crown in Roche argued on the basis of R v Hurd[5], a 1972 decision, that Parliament intended in section 246.1(2) to exclude the defence mistake of fact by necessary implication. To interpret the provision in any other way, the Crown maintained, would render it meaningless.

In Hurd the accused was charged with indecent assault contrary to what was then section 141(1) of the Code. The complainant who clearly consented to the sexual encounter, was just under 14 but the accused reasonably believed her to be older. Like the present section 246.1(2), what was then section 132, provided that the defence of consent was not available to an accused charged with indecent assault where the complainant was under 14. Also, section 132, like section 246.1(2), did not *expressly* exclude the mistake defence.[6]

The court in Hurd held that sections 141(1) and 132 disclosed a clear intention to exclude *mens rea* as an essential ingredient of the offence. This meant that the accused was guilty regardless of whether he intended to indecently assault someone under-aged. In reaching this conclusion, the court stressed that section 132 did not create a new offence, but merely deprived the accused of the defence of consent. This meant that a mistake as to the victim's age was immaterial since it did not go to one of the constituent factual elements making up the offence of indecent assault as set out in section 141(1).[7]

Despite the obvious similarities between the former section 132 and section 246.1(2), the court in Roche did not apply the Hurd analysis on the grounds that it was pre-Charter. The court in Roche was of the view that Parliament had not made it clear that guilt would follow proof of the proscribed act alone. This was because section 246.1(2) did not contain express language excluding the defence of mistake. On this basis the accused was acquitted.

A similar result was reached in R v Carroll, where Provincial Court Judge Robson found:

> I am not certain that I must convict on the basis of absolute liability where the accused could reasonably believe and did honestly believe that the girl was fourteen years or over. I am reinforced in not finding absolute liability by the words of 246.1(2) in that there would be no absolute liability if Carroll were fifteen years old.[8]

Unlike Roche, the Carroll case made no reference to the Charter.

The only other case to date referring to section 246.1, R v Barrett,[9] does not deal with the question of mistake of fact.

The application of Charter sections 7 and 11(d) to section 246.1(2) in Roche has been criticized[10] as being inconsistent with the recent Ontario Court of Appeal decision of R v Stevens.[11] In Stevens the court held that the express exclusion of the mistake defence in section 146 did not violate section 7 of the Charter.

In his annotation of R v Roche, Don Stuart suggests that it is inconsistent to find the *implicit* exclusion of the mistake defence in 246.1(2) unconstitutional while at the same time finding the *explicit* exclusion in section 146 constitutional.[12] Furthermore, Stuart questions the power of the court to apply sections 7 and 11(d) of the Charter to matters of substance such as the availability of the mistake of fact defence. According to Stuart, the bulk of authority limits judicial review powers under sections 7 and 11(d) of the Charter to matters of procedure.[13]

Since the Stevens case is being appealed to the Supreme Court of Canada, the general relationship between the imposition of absolute liability by statute for "true criminal offences"[14] and the requirement of fundamental justice, may soon be clarified. Also, it is hoped that the question of whether sections 7 and 11(d) of the Charter permit judicial review of substantive content will be determined.[15] The resolution of both these issues will have a bearing on future cases interpreting 246.1(2).

In considering Stuart's criticism of Roche however, it is worth noting that a similar result might be reached without the application of the Charter as was the case in Carroll. Although the reasons for judgment are not absolutely clear on this point, the court there seemed to be applying the basic interpretive principle of criminal law that an intention to impose absolute liability must be clear and unambiguous from the section in question.[16]

Whether sections 7 and 11(d) of the Charter or the basic principles of statutory construction are employed by the courts in interpreting section 246.1(2), it remains to be considered whether the legislative objective of protecting children from sexual contact[17] can be achieved by preserving the defence of

mistake in relation to sexual assaults involving victims under 14.

Initially it would appear that the courts' interpretation of 246.1(2) as requiring *mens rea*, unnecessarily limits the protection of young people. It means that even an accused who unreasonably believes the complainant is over 14 will be exonerated.

Despite its apparent desirability, however, the imposition of absolute liability in relation to sexual assault with those under 14 is problematic. First, depending on what the Supreme Court of Canada decides in Stevens, the creation of absolute liability offences where more than a slight penalty is possible, may be unconstitutional.[18] Also, deterrence would hardly be achieved by punishing the accused who reasonably but mistakenly believed the complainant was over 14, while exonerating an accused who actually believed the complainant was under 14 although she was not, and engaged in a sexual encounter regardless of his belief.[19]

The courts' refusal to interpret section 246.1(2) as imposing absolute liability in Roche and Carroll despite precedent to the contrary,[20] may have been motivated by a desire to avoid just such an unjust result. Concern about convicting an accused who reasonably believed the complainant to be over 14 may be warranted. Unfortunately the approach taken in Roche and Carroll will not protect children from the accused who suspects the complainant is under 14, but doesn't bother to find out and then uses his age to influence them to consent to a sexual encounter.

As a possible solution to this problem legislators might consider the following compromise: (1) expressly providing in section 246.1(2) that an unreasonable mistake as to age is no defence; and (2) making available to the accused by statute, the defence of due diligence. Such an approach was recommended by the Law Reform Commission in relation to section 146.[21]

In relation to section 246.1(2), enacting such a defence would give an accused the option of proving that after exercising due diligence to ascertain the age of the complainant, he believed them to be over 14. If this were found to be the case, an acquittal would result.

By penalizing the careless defendant while protecting the reasonable one, the enactment of a due diligence provision in relation to section 246.1(2) it is submitted, strikes a better balance between the interests of the accused and the need to protect children from sexual contact.

Conclusion

Unlike section 146, section 246.1(2) does not refer specifically to the presence or absence of mistaken belief regarding the age of the complainant as a possible defence in sexual assaults involving those under the age of 14. As a result, decisions interpreting this section have held that it does not exclude the defence of mistake.

In R v Roche this conclusion was justified as being in keeping with the Charter principles of fundamental justice and the right to be presumed innocent until proven guilty. In R v Carroll, the same result was reached by applying a basic criminal law principle requiring clear and unambiguous language before absolute liability can be imposed.

The general question of the relationship between the imposition of absolute liability for true criminal offences and sections 7 and 11(d) of the Charter has yet to be determined by the Supreme Court of Canada. This will have a bearing on the future interpretation of section 246.1(2).

The existing interpretations provided in Roche and Carroll appear to satisfy the constitutional requirements of fundamental justice and the right to be presumed innocent until proven guilty. Unfortunately however, these interpretations do not adequately reflect the need to protect children from sexual contact.

The realization of this legislative goal could be better achieved by making sexual assault with children under 14 a strict liability offence by providing expressly in section 246.1(2) that an unreasonable mistake regarding the age of the complainant is no defence and creating a statutory defence of due diligence in relation to section 246.1(2).

REFERENCES

1 This section was not repealed by Bill C-127 and is therefore still in force. Its constitutionality, however, is in some doubt given the fact that it is gender-specific and hence may violate section 15 of the Charter and that it effectively excludes a *mens rea* requirement for a true criminal offence with a heavy maximum penalty thus possibly violating section 7. In fact a recent Ontario District Court decision has struck down section 146 due to its violation of section 15. See: "Child Advocates Alarmed by Rulings Favouring Molesters", Toronto Globe and Mail, July 16, 1985.

2 See: pp. 3-20 of this study for a discussion of what types of behavior come under the ambit of sections 246.1, 246.2 and 246.3.

3 (1984) 40 CR (3d) 138 (Ont. Cty. Ct.).

4 The Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.) C.11 Schedule B] ss. 7 and 11(d).

5 [1972] 2 O.R. 322 (Ont. Cty. Ct.); aff'd R v Hurd (1972), 7 C.C.C. (2d) 90 (Ont. C.A.).

6 The provision read as follows:

> 132 Where an accused is charged with an offence under section 138, 141 or 148 in respect of a person under the age of 14 years, the fact that the person consented to the commission of the offence is not a defence to the charge.

This section was reenacted as section 140 [en. R.S.C. 1970 C-34] and subsequently repealed by the passage of Bill C-127 [en. S.C. 1980-81-82, C.125, s. 5].

7 Supra, footnote 5 at p. 323.

8 (1983), 11 W.C.B. 353 (Ont. Prov. Ct.) (at p. 6 complete reasons for judgment).

9 (1984), 13 W.C.B. 96 (Ont. Prov. Ct.).

10 D. Stuart, R v Roche: "Annotation" (1984), 40 C.R. (3d) 138.

11 (1983), 3 C.C.C. (3d) 198 (Ont. C.A.); leave to appeal to S.C.C. granted.

12 Stuart, supra, footnote 10.

13 Ibid; see also: Re Potma (1983), 2 C.C.C. (3d) 383, (Ont. C.A.); leave to appeal to S.C.C. refused; contra: Ref. Re S. 94(2) of the Motor Vehicle Act (1983), 33 C.R. (3d) 22 (B.C.C.A.); In the Stevens case the court assumed for the purposes of argument only, that section 7 of the Charter permitted judicial review of the substantive content of legislation. The court expressly stated it was not actually deciding this point. Supra, footnote 11 at p. 200.

14 As set out in: R v City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 at p. 362.

15 It has been suggested that even if the Supreme Court finds that section 7 of the Charter does not grant powers of substantive review, the imposition of absolute liability for true criminal offences may still be subject to judicial review as being a matter of procedure since it relates to the burden of proof on the Crown. See: C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984), p. 106.

16 A. Mewett and M. Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) p. 307; As was suggested by the Crown in Roche, however, a good argument could be made on the basis of the Hurd decision that section 246.1(2), like its predecessor section 132, does indicate a clear intention to impose absolute liability.

17 Report on Sexual Offences, (Law Reform Commission of Canada: 1978) p. 7.

18 Boyle, supra, footnote 15, at p. 107.

19 Boyle uses this example in relation to section 146 but the same problem could arise with respect to section 246.1(2); See: Boyle, supra, footnote 15, at p. 107.

20 R v Hurd, supra, footnote 5.

21 Law Reform Commission of Canada, supra, footnote 17, at pp. 20, 22; The Commission proposed the enactment of the following provision:

> (1) An accused is not guilty of an offence under sections 4 [Sexual Interference with Persons Under Fourteen Years of Age] and 5 [Sexual Interference Due to Dependency] if, after the exercise of reasonable diligence, proof of which lies upon him, he believed at the time of the offence the person to be older than the age specified in those sections.

4. The Relationship Between Section 246.1(2) and Section 15 of the Charter

As set out in the preceeding section of this report,[1] section 246.1(2) provides that consent is no defence to a sexual assault charge where the victim is under 14 and the accused is more than three years his senior.

Because this section deprives an older accused of a defence which would be available were he younger, it has been argued that it discriminates on the basis of age contrary to section 15 of the Charter.[2] In The Queen v. LeGallant, the accused, an adult male schoolteacher, was charged with assaulting a thirteen year old boy.[3] The defence maintained that the boy had sufficient knowledge and experience[4] to give a fully informed consent and did in fact consent to the sexual acts constituting the alleged assault. Because proof of these facts would result in an acquittal were the accused under 16 years of age, the defence claimed the operation of section 246.1(2) in relation to this accused violated section 15's prohibition against age discrimination.

The B.C. Supreme Court accepted this argument. It held that because section 246.1(2) denied the defence of consent to an older person, while granting it to a 16 year old, it made a distinction on the basis of age which was discriminatory.[5]

The court did not find this infringement of section 15 to be reasonably justified under section 1 of the Charter:

> I cannot accept the rationale of deterring exploitation by older persons as a valid ground for discriminating on the basis of age. Exploitation by anyone--old or young--is equally abhorrent.[6]

The judge maintained that if the justification for section 246.1(2) was based on a desire to prevent the abuse of authority, this was better dealt with under section 244(3)(d). This section provides that no consent is obtained where the complainant submits to an assault because of the exercise of authority.

In the judge's view there was no real justification for granting to those juveniles less than three years older than the complainant the benefit of the defence of consent, while denying it to older individuals.[7] According to the judge, if section 246.1(2) meant to suggest that sex between those of disparate age was objectionable, whereas the same acts committed by those of close age were acceptable, this was a "questionable rationale."[8] The court weighed this rationale against the significance of denying equal benefit of the law to those engaged in similar conduct, and found the distinction unjustified under section 1 of the Charter.

Conclusion

The constitutionality of section 246.1(2), which limits the availability of the defence of consent in sexual assault cases involving children under 14, has been called into question by a recent B.C. Supreme Court decision. In The Queen v. LeGallant, section 246.1(2) was struck down as violating section 15 of the Charter's prohibition against age discrimination.[9]

In terms of the legislative goal of protecting children from sexual contact, this decision raises fundamental problems.[10] According to the Badgley Report, young people are especially vulnerable to sexual abuse and exploitation,[11] particularly in relationships with adults whom the child trusts and who are prominent in the child's life.[12] The court in LeGallant did not take account of these findings. In weighing the rationale justifying section 246.1(2) as against the infringement of equality, the court did not adequately distinguish between the particular vulnerability of children vis a vis adults, and their status in relation to other children or juveniles. Because of this fact, the interpretation of section 246.1(2) as violating section 15 of the Charter, fails to adequately protect children from sexual contact.

The LeGallant decision also presents problems in terms of the consent issue. In this case, defence counsel maintained that the complainant had sufficient knowledge and experience to give a fully informed consent to the sexual acts in question and that he in fact did consent.[13] Since LeGallant was ultimately acquitted, it can be assumed that the court accepted this argument.[14]

This analysis disregards psychological evidence suggesting that although they may appear to consent to sexual activities, children of tender years do not really understand the emotional consequences of these actions.[15] Given their relative lack of knowledge and experience in comparison to most adults, children cannot realistically be described as equal sexual partners in our society.[16] To speak of the informed consent of the child as grounds for acquittal under these circumstances, it is submitted, is to open the door to the sexual exploitation of children.

It may be that section 244(3)(d) will be of some assistance here as suggested by the judge in LeGallant. A recent Ontario case for example, has held that adults in a position of authority cannot claim their child victims consented simply because they silently submitted to sexual acts.[17] This conclusion was reached on the basis of section 244(3)(d).

This decision indicates that section 244(3)(d) may be a useful adjunct to section 246.1(2). Nevertheless, because the former section only applies where the accused is unequivocally in a position of authority, the protection it provides to children is more limited than that set out in 246.1(2).

It is not clear that section 244(3)(d) would vitiate consent merely because of the age of the accused in relation to the child victim. It may be that an additional factor indicating the exercise of authority is required by the section.[18] In situations where a child victim is exploited by an adult whom the child trusts but who is not clearly in a position of authority apart from his age, section 244(3)(d) will be of little assistance. It is submitted therefore, that despite the existence of 244(3)(d), the legislative goal of protecting children from sexual contact will not adequately be met if The Queen v. LeGallant is followed.

REFERENCES

1 See: Part I, section 3 at p.23.

2 The Queen v. LeGallant, June 12, 1985 (B.C.S.C.) (not yet reported). An appeal to the B.C.C.A. is pending.

3 Ibid.

4 For a discussion of the relevance of this experience to the defence see: Part II, section 3 of this report at p. 63.

5 The Queen v. LeGallant, supra, footnote 2, at p. 11.

6 Ibid., at p. 12.

7 Ibid.

8 Ibid.

9 Ibid.

10 For a discussion of the problems raised by the decision in terms of its impact on the legislative goals of protecting complainants from courtroom harassment and protecting the integrity of the person from non-consensual sexual contact, see: Part II, section 3 of this report at p. 69.

11 Report of the Committee on Sexual Offences Against Children and Youths (The Badgley Report), Vol. I, (Ottawa: Ministry of Supply and Services, Canada, 1984), p. 44.

12 Ibid., at p. 57.

13 The Queen v. LeGallant, supra, footnote 2, at p. 9.

14 Since this was a jury decision it is difficult to know precisely what the reasons for the acquittal were.

15 D. Finkelhor, "What's Wrong with Sex Between Adults and Children?" (1979), American Journal of Orthopsychiatry, 49(4), 692 at p. 696; R v. Barrett (1984), 13 W.C.B. 96 (Ont. Prov. Ct.) per Silverman J. at p. 24 (complete reasons for judgment) citing: B. Hogan, "On Modernising the Law of Sexual Offences" in P. R. Glazebrook, ed., Reshaping the Criminal Law - Essays in Honour of Glanville Williams (London: Stevens and Sons, 1978), p. 180.

16 Finkelhor, supra, footnote 15.

17 "Child's Consent Not a Defence in Sexual Assault, Judge Rules," Toronto Globe and Mail, April 5, 1985, p. 4.

18 In the Ontario case for example, the accused as well as being many years older than the victim, was her father.

5. The Availability of the Defence of Intoxication for a Sexual Assault Charge Under Sections 246.1, 246.2 and 246.3

Generally, drunkenness, or voluntary intoxication by ingestion of alcohol or drugs, can only operate as a defence for crimes of specific or ulterior as opposed to general intent.[1] The distinction between the two types of intent has been described as follows:

> If the mental element of a crime does not go beyond intention or recklessness as to the external circumstances of the crime, the offence is one requiring but a *basic mental element*. On the other hand, if the mental element of the offence includes an intention to produce some further consequence beyond the external circumstances of the crime, it is one requiring proof of an *ulterior mental element*.[2]

Intoxication operates as a defence by negating the ulterior mental element required for certain offences. It does not however, negate the basic mental element or general intent.

Prior to the enactment of Bill C-127, common assault,[3] indecent assault,[4] and rape[5] were considered to be crimes of general intent only. Since the basic definition of assault set out in section 244 of the Code, applies to all three of the sexual assault offences, it would seem logical that they too be deemed crimes of general intent.

Most commentators[6] and cases agree with this analysis. They suggest that the only mental element required is that of common assault, namely, the intention to apply force to another without their consent.[7] The corollary of this approach is that drunkenness could not operate as a defence to a sexual assault charge.

A recent Ontario Court of Appeal decision however, has cast doubt on this proposition. In R v Alderton the court, without meaning to be comprehensive, held that sexual assault included an assault committed with the intention of having intercourse with the complainant without her consent.[8] Because of its suggestion that sexual assault involves a secondary mental element--the intention to have intercourse--Alderton could form the basis of an argument that intoxication operates as a defence to such charges.

This issue was raised in R v Bernard,[9] also heard before the Ontario Court of Appeal. Bernard was charged with sexual assault causing bodily harm contrary to section 246.2(c). Defence counsel argued that unlike rape, sexual assault was now a crime of specific intent since according to Alderton, it was committed with the further consequence of intercourse in mind. Intoxication therefore, should be available to his client as a defence.

The court disagreed:

> We do not read the judgment in Alderton, . . . as in any way holding that drunkenness is a defence to a charge of sexual assault causing bodily harm, nor as defining such an offence as one of specific intent.

This court's analysis was based partly on the fact that assault causing bodily harm had already been characterized as a general intent offence to which drunkenness was no defence.[11]

Since both common and indecent assault and rape have also been held to be crimes of general intent, there is no reason to assume the result would be any different if Alderton were argued in relation to sexual assault per se and aggravated sexual assault.

Conclusion

Commentators and the majority of case authorities to date suggest that sexual assault, sexual assault causing bodily harm, and possibly, all other forms of sexual assault are offences of general intent to which the defence of drunkenness does not apply.

Because this approach facilitates prosecutions under sections 246.1, 246.2 and 246.3, it indirectly serves the legislative purpose of protecting the integrity of the person from non-consensual sexual contact. Furthermore, by requiring a mental element analogous to that applied to other assault offences, this interpretation is consistent with the goal of focussing on the violent aspects of sexual crimes.

REFERENCES

1 R v George, [1960] S.C.R. 871.

2 D. Watt, The New Offences Against the Person: The Provisions of Bill C-127 (Toronto: Butterworths, 1984) p. 33; see also: D.P.P. v Morgan, [1976] A.C. 182; and R v George, supra, footnote 1.

3 R v George, supra, footnote 1.

4 Swietlinski v The Queen, [1980] 2 S.C.R. 956.

5 R v Leary, [1978] 1 S.C.R. 29.

6 Watt, supra, footnote 2, at pp. 103, 112, 121; C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984) at p. 89; S. Parker, "The 'New' Sexual Offences" (1983) 31 C.R. (3d) 317; Parker does suggest that Sexual Assault With a Weapon, Threats to a Third Party or Causing Bodily Harm (S. 246.2) and Aggravated Sexual Assault (S. 246.3) may require proof of specific intent.

7 R v Chase (1984), 40 C.R. (3d) 282 (N.B.C.A.); R v Dore (1984), 12 W.C.B. 360 (B.C. Cty. Ct.); R v Bigmore, [1984] B.C.D. Crim. Conv. 6108-03 (B.C. Cty. Ct.); R v Gardynik (1985), 42 C.R. (3d) 362 (Ont. Cty. Ct.); R v Ramos (1985), 42 C.R. (3d) 370; See pp of this report under the heading "The Definition of 'Sexual' for the Purposes of sections 246.1, 246.2, and 246.3" for a more detailed analysis of these decisions.

8 January 31, 1985 (Ont. C.A.) (not yet reported); See also the author's discussion of the definition of "sexual" for the purposes of sections 246.1, 246.2 and 246.3, at pp.3-20;

9 March 12, 1985 (Ont. C.A.) (not yet reported); According to defence counsel an application for leave to appeal to the S.C.C. will be made in this case.

10 Ibid., at p. 3.

11 D.P.P v Majewski, [1976] 2 All E.R. 142,

II. EVIDENTIARY AND PROCEDURAL MATTERS

1. Effect of Section 246.4's Removal of the Requirement of Corroboration for Certain Sexual Offences

Section 246.4 abolishes the corroboration requirement in relation to certain sexual offences:

> 246.4 Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Also of significance here was Bill C-127's repeal of former section 139(1).[1] This section required corroboration for the following sexual offences: sexual intercourse with the feeble-minded, incest, seduction of sixteen to eighteen year olds, seduction under promise of marriage, seduction of female passengers and parent or guardian procuring defilement.[2]

The justification for these amendments becomes clear upon a historical analysis of the laws of corroboration in relation to sexual offences.

Prior to 1976, section 142[3] of the Criminal Code required the judge to instruct the jury that it was dangerous to convict solely on the basis of the female victim's uncorroborated evidence where the accused was charged with the following offences: sexual intercourse with a female under fourteen, sexual intercourse with a female between fourteen and sixteen, rape, attempted rape, and indecent assault on a female. The section read as follows:

> 142. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 144, 145, subsection 146(1) or (2) or subsection 149(1), the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

Unlike section 142, section 139(1) made corroboration not only desirable, but mandatory before a conviction could be made. Both sections represented a departure from the general rule of evidence that the court may act upon the uncorroborated testimony of one witness.[4]

Although section 142 and its predecessor section 134, had been based on a common law rule of practice requiring corroboration in sexual offence prosecutions[5] regardless of the sex of the victim, the statutory requirement in section 142 was only applied to the testimony of female victims.[6]

In 1976 section 142 was repealed.[7] Initially this created some doubt as to whether this revived the common law rule of practice requiring corroboration for sexual offences. Ultimately it was held that it did not.[8] Nevertheless, the repeal of section 142 was not interpreted as depriving judges of their discretionary powers to make a direction to the jury suggesting that uncorroborated evidence of female complainants in respect of sexual offences was not to be relied on:

> . . . the effect of the repeal does not limit the discretion of a trial Judge, nor relieve him of the duty in appropriate cases, while commenting on the weight to be given to the evidence of a complainant, to caution the jury in simple language as to the risk of relying solely on the evidence of a single witness, and to explain to them the reasons for the necessity of such caution.[9]

The presence of this *duty* to instruct, along with the mandatory corroboration requirement in section 139(1), meant that the evidence of female complainants in sexual offence cases continued to be viewed with distrust despite the repeal of section 142. This effect was discriminatory. Furthermore, because discretionary or mandatory corroboration rules made it more difficult to obtain convictions, they indirectly limited the degree of protection provided to potential victims.

The enactment of section 246.4 addressed some of these problems. With respect to the newly created sexual assault offences set out in sections 246.1, 246.2 and 246.3, and the offences of incest and gross indecency, section 246.4 confirms that corroboration of an adult complainant's evidence is not a prerequisite to conviction. Also, the section gives a clear direction to the judge not to instruct the jury that it is unsafe to convict in the absence of corroboration.

Although section 246.4 does not require the introduction of corroborative evidence, it has been suggested that the section does not preclude the introduction of otherwise admissible evidence simply because it corroborates the complainant's testimony.[10]

This analysis has been supported by recent case law interpreting section 246.4. In R v Barrett, where the accused was charged with five counts of sexual assault involving several victims, the testimony of each complainant was admitted as supporting the testimony of the others, although the court recognized that corroboration was not required.[11] In R v Mohr,[12] evidence of the emotional condition of the victim after the attack was admitted to support her allegation of non-consent, despite the existence of section 246.4. Similarly, the New Brunswick Court of Appeal in R v Chase, allowed in corroboratory medical evidence regarding the complainant's physical state while recognizing this was not essential.[13]

If courts continue to admit such evidence under 246.4 without endorsing the notion that it is unsafe or alternatively, impossible to convict where it is not available, then the legislative goal of providing greater protection from non-consensual sexual contact will be fostered. Unfortunately, however, this depends in part on the nature of the judge's instructions to the jury regarding the evidence as a whole. Traditionally, judges exercise broad discretionary powers here. Despite the limitation on these powers contained in section 246.4, it is unclear whether judicial discretion will operate in favour of legislative goals in this issue area.

In his book The New Offences Against the Person, Watt posits the following interpretation of 246.4 in relation to the limits it sets on the discretionary powers of the judge:

> . . . s. 246.4 expressly enacts what a trial judge shall *not* tell the jury in a case governed by the section but is silent about what may be told to the jury. It is submitted that a prudent course to follow is to ensure that the trial judge points out the frailties alleged in V's [the victim's] evidence, refreshes the jury's memory as to their nature and extent, and reminds them of the evidence supportive of D's [the defendant's] testimony.[14]

There is a fine line between commenting on the "frailties" in the victim's evidence and directing that it is desirable for it to be corroborated. Despite the limits on judicial discretion set out in section 246.4, therefore, there is no guarantee that the historical distrust displayed towards the testimony of the female complainants will not continue to operate through the vehicle of the judge's charge. This may counteract the positive impact of the section in terms of its attempt to eliminate discrimination and provide greater protection to potential victims.

The majority of cases interpreting section 246.4 are complicated by the fact that the victims are under 14 years of age. Their testimony therefore, was subject to a separate set of corroboration rules governing children's evidence.[15]

The one case involving an adult complainant, R v Vokey (No. 2) was heard by the Ontario District Court.[16] In Vokey, without explicitly stating that it was unsafe to convict without corroboration of the complainant's evidence, the judge in fact displayed a marked reluctance to convict without such evidence. In this case testimony regarding the physical and emotional state of the victim after the alleged attack indicated the following: vaginal bleeding, a pale and weak appearance, crying, hysteria, and evidence of a tear in the victim's panties. The judge concluded that this evidence was consistent with the loss of the complainant's virginity through intercourse *with* or *without* her consent. It could not, therefore, "support" or "confirm" the woman's testimony.[17] This raised a reasonable doubt as to guilt and resulted in an acquital. In making his decision the judge was also influenced by the complainant's failure to flee from the scene of the alleged assault and the ". . . absence of any marks of violence or force . . ."[18] on her person or that of the accused.

The Vokey case illustrates the way in which historical prejudices against the testimony of female complainants can continue to operate in the form of judicial discretion despite the limits set out in section 246.4. The analysis in Vokey is reminiscent of pre Bill C-127 case law suggesting that corroboratory evidence must unequivocally implicate the accused independently of the complainant's testimony.[19] The continued application of this historic approach--with the substitution of words such as "confirm" or "support" for the term "corroborate"--may mean that the changes contained in section 246.4 *vis-a vis* the sexual assault offences and gross indencency, are little more than cosmetic.

Because Vokey is a lower court decision, it is unlikely higher-level court judges will consider themselves bound by it. It is hoped that in future, judges instructing juries regarding the evidence as a whole, will take section 246.4 as a clear indication that complainants' testimony be viewed in the same way as that of the victims of any violent crime.

With respect to the offence of incest, section 246.4 contemplates a more fundamental change. This offence was formerly subject to section 139(1). For the offences listed under this provision corroboration was not only desirable, but essential in order for a conviction to be entered. Section 246.4 removes this corroboration requirement.

Young people are often the victims of the offences listed in section 246.4. The relationship between that section and the special corroboration rules governing children therefore, remain to be considered. Traditionally, witnesses under the age of 14 are not presumed capable of giving sworn testimony. Their capacity to understand the moral obligation to speak the truth[20] therefore, is tested in a *voir dire* in the presence of the jury. If they are found competent on the basis of this test, they can

give sworn testimony. A rule of practice then comes into play however, requiring the judge to warn the jury of the danger of convicting without corroboration.[21]

If however, children are found incompetent section 16(1) and (2) of the Canada Evidence Act and section 586 of the Criminal Code apply:

> 586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.
>
> 16(1). In any legal proceedings where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge or other presiding officer, understand the nature of an oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
>
> (2). No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.[22]

Neither of these sections was repealed by Bill C-127.

Two major issues emerge when one juxtaposes these statutory and common law rules governing children's evidence with section 246.4. First, if a child under 14 gives sworn testimony does section 246.4 abolish the rule of practice requiring the judge to instruct of the danger of convicting without corroboration? Second, if unsworn evidence is admitted pursuant to section 16(1) of the Canada Evidence Act, is corroboration still mandatory pursuant to sections 16(2) of that Act and 586 of the Code?

Cases decided since the passage of section 246.4 suggest that the cautionary instruction is still necessary where children's evidence is sworn. In R v Breckinridge[23] the accused allegedly had intercourse with a child under 14. He was charged under section 246.1 with sexual assault. On the basis of the medical evidence, there was no doubt in the judge's mind that someone had sexually assaulted the victim.[24] The question was whether this act had been committed by Breckinridge or someone else. The only evidence on this particular issue was that of the child victim.

The judge ruled that despite the fact that corroboration was not required, he was still obliged to direct himself to the "frailties" of evidence given by young children.[25] He based the existence of this obligation on the pre Bill C-127 cases of

Horsburgh v The Queen and Kendall v The Queen.[26] These cases justify the rule as follows:

> The basis for the rule . . . is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation, 2. His capacity of recollection, 3. His capacity to understand questions put and frame intelligent answers, 4. His moral responsibility.[27]

Without specifically mentioning section 246.4, the court in Breckinridge applied the above rationale and found the accused not guilty.

A similar result was reached in R v Bird.[28] In that case Bird was also charged with committing sexual assault contrary to section 246.1. The victim was a 10 year old girl. A direct conflict between her evidence and that of the accused was found. She maintained he inserted his finger into her vagina, he denied the incident ever took place. Apart from the child's testimony there was no direct evidence implicating the accused.

On the basis of Horsburgh, the judge directed his mind to the particular frailty of children's evidence:

> As with any witness, even though a child of tender years may be sworn and gives evidence, . . .the evidence of a child is subject to certain frailties, and the evidence of any witness, whether a child of tender years or an adult given under oath, must be weighed in light of the capacity of the witness to observe and recall events, his or her general level of intelligence, ability to understand questions and to give intelligent answers.[29]

Because of the "frailty" of the child's evidence the judge had a reasonable doubt as to guilt and acquitted Bird.

In R v Barrett,[30] although corroboratory evidence was found and the accused ultimately convicted, the Ontario Provincial Court adopted a similar approach to that in Breckinridge and Bird. The accused in Barrett was charged with five counts of sexual assault involving four girls between the ages of 10 and 13. Their evidence was taken under oath. Although the court acknowledged that pursuant to section 246.4 corroboration was not required, it did address its mind to the frailties of children's testimony along the lines of Horsburgh.[31] Because the evidence of each girl was corroborated on all major issues by the testimony of the other girls however, Barrett was convicted despite the "frailty" of the evidence implicating him.

These cases indicate that with respect to the sworn evidence of child complainants courts are still directing their minds to the danger of convicting without corroboration and drawing

special attention to the frailties of such evidence despite the existence of section 246.4.

This analysis is endorsed by Watt. He suggests that the cautionary instruction still is required not on the basis of the sexual nature of the attack, but on the basis of the mental immaturity of the witness.[32] Although such an approach may be a legitimate reading of section 246.4 which makes no mention of children's evidence, it does not take account of empirical evidence indicating that the conventional assumptions about the truthfulness and powers of recall of child witnesses are unfounded.[33]

Unlike Watt, Boyle suggests a broader interpretation of section 246.4 as abolishing any requirement for a cautionary warning with respect to the sworn evidence of children.[34] Certainly this analysis is more in keeping with empirical evidence. If Barrett, Breckinridge, and Bird, are followed however, it is doubtful such a broad interpretation will prevail.

The relationship between statutory requirements for corroboration where a child's evidence is unsworn and section 246.4 has not yet been determined by the courts. Watt's analysis is that the new section does not override older provisions so as to make mandatory corroboration unnecessary in cases of sexual assault, gross indecency and incest involving young children. According to Watt:

> To construe the provisions of s. 246.4 otherwise than as being in a position of subservience to those of s. 16(2) of the *Canada Evidence Act* . . . would mean, in effect, that section 16(2) had been, to that extent, repealed, notwithstanding the absence of a non obstante clause in relation to such provisions and any clear statutory intention to do so.[35]

Boyle on the other hand, proposes that sections 156 of the Code and 16 of the Canada Evidence Act are subservient to section 246.4 thereby rendering mandatory corroboration unnecessary in situations contemplated by section 246.4.[36] Boyle bases her analysis on certain principles of statutory interpretation. These suggest that in situations where two statutes are inconsistent, the more recent legislation should be read as implicitly repealing the older.[37] Also, since section 246.4 is the more specific provision it should prevail over other more general provisions. Boyle maintains that such an interpretation is supported by the repeal of section 139. This change demonstrated a general intention to remove corroboration requirements for offences often involving children.

Boyle's arguments are compelling. Unfortunately, if the cases of Barrett, Bird and Breckinridge are any indication, in the absence of clearer statutory direction than that set out in

section 246.4, our courts seem reluctant to depart from traditional notions regarding the unreliability of children's evidence.

Conclusion

With respect to adult victims, the enactment of section 246.4 and repeal of section 139 appears to be in keeping with legislative objectives. The discriminatory effect of earlier corroboration rules affecting primarily female victims is alleviated. By removing an unjustifiable evidentiary barrier and making it easier to convict, the amendments indirectly provide greater protection from non-consensual sexual contact. Finally, by treating the victim of a sexual attack more like the victim of any violent attack against the person--at least in evidentiary terms--the amendments appropriately focus on the violent nature of sexual assaults.

Given the present dearth of cases interpreting section 246.4 as it applies to adult victims, it is difficult to determine whether the courts' interpretation of the section will be consistent with the aforesaid goals. In the one such case analyzed in this study, R v Vokey, the Ontario District Court displayed a marked reluctance to convict in the absence of corroboratory evidence despite the existence of section 246.4. Higher level court judges will not consider themselves bound by Vokey. Nevertheless, this case demonstrates that the traditional skepticism with which the courts have viewed female complainants' evidence may continue to operate notwithstanding the 1983 amendments.

Commentators have suggested that section 246.4 will not necessarily prevent judges from focussing on the frailties of the victim's evidence in their charge to the jury. There is a danger legislative goals will not be met in this issue area unless judges take 246.4 as a clear message to give complainants' testimony the same weight as evidence given by any assault victim.

The courts' interpretation of section 246.4 in relation to the evidence of child victims under 14 also limits the realization of legislative goals. Historic notions of the unreliability of such evidence continue to prevail. In the case of sworn testimony, the lower court decisions of Bird, Barrett and Breckinridge, have found that judges are still required to direct their minds or the minds of the triers of fact, to the particular frailties of children's evidence. Watt suggests that such an approach is justified not on the basis of the sexual nature of the attack, but on the basis of the mental immaturity of the victim.

In the case of unsworn evidence of child witnesses, section 246.4 fails to address the apparent conflict between it and sections 16 of the Canada Evidence Act and 156 of the Code. This issue has not yet been resolved by the courts and commentators do

not agree on the correct interpretation. Watt suggests that 246.4 is subservient to the older provisions. Boyle on the other hand maintains that section 246.4 takes precedence thus dispensing with mandatory corroboration where children's evidence coming under the 1983 provision is unsworn.

The application of the traditional corroboration rules with respect to the sworn and unsworn evidence of child complainants despite the passage of section 246.4, is problematic. Given the fact that sexual attacks involving children are often performed in private,[38] strict corroboration rules unnecessarily limit the protection from sexual contact provided to children. Also, because the traditional rules are based on[39] and perpetuate the notion that the child's powers of observation and recollection are inherently suspect, their continued endorsement by the courts indirectly contributes to the harassment of child complainants in court. This may result in trauma to the child. Also it might contribute to a reluctance to testify and thereby prevent the laying of charges.

The rationale underlying the traditional corroboration rules applying to children can no longer be justified empirically. According to the Badgley Committee, the universally applied assumptions about the limited powers of observation and recall of young children are unfounded or vary from child to child as they would between individual adults.[40] The cases interpreting section 246.4 in relation to child complainants fail to take these empirical findings into account.

It is submitted that with respect to children, legislative objectives in this issue area could be better met by a general relaxation of the special rules of corroboration applying to their evidence.[41] One possible approach would be to provide more emphatic legislative direction to judges than that in section 246.4, indicating that the sworn evidence of child complainants be treated in the same manner as that of an adult witness. No direction regarding the frailty of such evidence therefore, would automatically be made simply because of the witness's age. A direction might however, be made on the basis of an evaluation of that particular child's powers of observation and recall.

With respect to the unsworn evidence of child complainants, legislators may also wish to consider the Badgley Committee's recommendation to repeal sections 586 of the Criminal Code, 16(2) of the Canada Evidence Act, 61(2) of the Young Offenders Act, and corresponding sections of provincial evidence acts, requiring corroboration in the case of the unsworn evidence of a child witness.[42] As well as facilitating prosecutions, this would remove any confusion regarding the correct interpretation of section 246.4 in relation to other statutory provisions requiring corroboration.

REFERENCES

1 Repealed S.C. 1980-81-82, C.125, C.125, S.5. This study focusses on the repeal of the corroboration requirement primarily in relation to the new sexual assault offences created by Bill C-127. It does not purport to provide a comprehensive analysis of corroboration in relation to all of the sexual offences listed in former section 139(1), most of which involve child victims.

Many of the major questions regarding the sexual exploitation of young persons were left unanswered by Bill C-127, pending further research and public input. This task was subsequently undertaken by the Committee on Sexual Offences Against Children and Youths (The Badgley Committee). The committee's report now forms the basis of a separate legislative review. See: "Ottawa Looks at New Law on Molesting: Evidence Rules Would Validate Testimony by Abused Children," Toronto Globe and Mail, June 20, 1985, p. 1.

2 The offence of sexual intercourse with the feeble-minded was also repealed by Bill C-127: S.C. 1980-81-82, C.125, S.8; Originally the intention of the amendments as contained in Bill C-53 was to abolish all of the other offences listed in section 139(1) except incest.

3 Repealed S.C. 1974-75-76, C.93, S.8.

4 Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, (Toronto: Carswell, 1982), p. 361.

5 Ibid., at p. 362.

6 C. Backhouse and L. Schoenroth, "A Comparative Study of Canadian and American Rape Law" (1984), 7 Can. U.S. L.J. 172.

7 S.C. 1974-75-76, C.93, S.8.

8 R v Camp (1977), 36 C.C.C. (2d) 511 (Ont. C.A.); R v Firkins (1977), 37 C.C.C. (2d) 227 (B.C.C.A.).

9 R v Camp, supra, footnote 8 at p. 521.

10 D. Watt, The New Offences Against the Person: The Provisions of Bill C-127, (Toronto: Butteworths, 1984), p. 176.

11 (1984), 13 W.C.B. 96 (Ont. Prov. Ct.) at p. 19 (complete reasons for judgment).

12 [1984] B.C.D. Crim. Conv. 1608-02 (B.C.S.C.) at p. 4 (complete reasons for judgment).

13 (1984), 55 N.B.R. (2d) 97 (N.B.C.A.) at p. 99, leave to appeal to S.C.C. granted. Despite the admission of this evidence however, the accused was convicted of common assault only.

14 Watt, supra, footnote 10.

15 Section 586 Criminal Code; Canada Evidence Act R.S.C. 1970, c. E-10 s.16; Young Offenders Act S.C. 1980-81-82-83, c.110; and corresponding sections of provincial evidence acts.

16 R v Vokey (No. 2) (1984), 13 W.C.B. 119 (Ont. Dist. Ct.). I am assuming the victim was over 14 years of age since no question arose regarding her capacity to take the oath nor did the judge address his mind to the frailties of her evidence.

17 Ibid, at p. 2 (complete reasons for judgment).

18 Ibid.

19 Backhouse and Schoenroth, supra, footnote 6 at p. 201; Task Force, supra, footnote 4 at p. 363.

20 C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984), p. 159.

21 Ibid at p. 161; See also: Horsburgh v The Queen, [1967] S.C.R. 746; Kendall v The Queen, [1962] S.C.R. 469.

22 Also applicable are section 61(2) of the Young Offenders Act S.C. 1980-81-82-83, C.110, and corresponding sections of provincial evidence acts.

23 (1984), 13 W.C.B. 14 (Ont. Dist. Ct.).

24 Ibid, at p. 1 (complete reasons for judgment).

25 Ibid, at p. 2 (complete reasons for judgment).

26 Supra, footnote 21.

27 R v Kendall, supra, footnote 21, at p. 473.

28 (1984), 13 W.C.B. 168 (Ont. Cty. Ct.).

29 Ibid, at pp. 4-5 (complete reasons for judgment).

30 (1984), 13 W.C.B. 96 (Ont. Prov. Ct.).

31 Ibid, at p. 16 (complete reasons for judgment).

32 Watt, supra, footnote 10, at p. 175

33 Report of the Committee on Sexual Offences Against Children and Youths, (The Badgley Report), Vol. I, (Ottawa: Ministry of Supply and Services, Canada, 1984), p. 67.

34 Boyle, supra, footnote 20, at p. 162; Boyle adds however, that it is not clear whether section 246.4 abolishes this rule of practice in relation to only child victims or all child witnesses.

35 Watt, supra, footnote 10, at p. 175.

36 Boyle, supra, footnote 20, at p. 162.

37 See: E. A. Driedger, The Construction of Statutes, (Toronto: Butterworths, 1974), p. 174.

38 Badgley Report, supra, footnote 33.

39 Horsburgh v The Queen and Kendall v The Queen, supra, footnote 21.

40 Badgley Report, supra, footnote 33.

41 Such changes are in fact being considered by the federal Justice Department. See: Toronto Globe and Mail, supra, footnote 1.

42 Badgley Report, supra, footnote 33, at p. 69.

2. Significance of the Abrogation of the Rules Respecting Recent Complaint in Sexual Assault Cases

By enacting section 246.5, Bill C-127 abolished the common law doctrine of recent complaint:

> 246.5 The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

To understand the scope of the section, a historical overview of the rules respecting recent complaint is necessary.

The doctrine developed as an exception to the general rule of evidence excluding witnesses' previous out of court statements consistent with in-court testimony. This exclusionary rule was known as the rule against narrative or self-serving statements.

The rationale for this exclusionary rule was that such statements were superfluous since there was no reason to doubt the witness's credibility. It was also felt that such evidence would unnecessarily delay proceedings by raising collateral issues. The admission of previous consistent statements was not deemed appropriate in an adversarial court system based primarily on oral testimony. Nor was such evidence trustworthy given the danger of fabrication.[1]

Other exceptions to the rule against narrative included:

a) evidence of prior identification of the defendant by an eye-witness;
b) evidence offered to rebut an impeachment of a witness's credibility by the suggestion that their evidence is a recent fabrication or concoction; and
c) evidence admitted as part of the *res gestae*.[2]

Prior consistent statements falling within exceptions a), b), and the recent complaint doctrine were admissible only to support the credibility of the witness and not to prove a fact in issue. Statements forming part of the *res gestae* on the other hand, were admissible to prove the truth of their assertions.

Historically, the recent complaint exception to the rule against narrative applied in prosecutions for sexual offences and matrimonial proceedings where an allegation of cruelty was being made.[3] The exception was based on a particular fear of false accusations in rape cases and the notion that the "truly virtuous" woman who was raped would complain at the first reasonable opportunity.[4] The doctrine had evolved from the early common law rule that a hue and cry be made prior to the commencement of a rape prosecution.[5]

Traditionally, there were two aspects to the doctrine. The first had to do with the nature of the complaint and its admissibility. The second involved the inferences which could be

drawn by the trier of fact in the absence of evidence of a complaint. Before a complaint was admissible, the following conditions had to be met:

> 1. There had to be a statement made by the complainant which if believed by the trier of fact, would tend to negate the adverse inference that would otherwise be drawn with respect to the victim's credibility;
>
> 2. The complaint must have been spontaneously made and not elicited by leading or intimidating questions; and
>
> 3. The complaint must have been made at the first reasonable opportunity that presented itself after the offence.[6]

Whether these preconditions to the complaint's admissibility were met was determined in a *voir dire* in the absence of the jury.

If the complaint were deemed admissible, the second aspect of the rule came into play requiring the judge to instruct the jury that the contents of the complaint could only be used to bolster the complainant's credibility by establishing consistency.[7]

If, however, the complaint were inadmissible, the judge was required to instruct the jury to draw an adverse inference as to the victim's credibility.[8]

An adverse inference could therefore be drawn in two situations: if the victim were silent, or if she made a complaint consistent with trial evidence but not satisfying the preconditions for admissibility. In the latter situation, there was conflicting authority as to whether a complainant was permitted to testify as to the reasons for her failure to complain within a "reasonable" time.[9]

In effect then, the doctrine of recent complaint operated as a universal allegation of recent fabrication against the victims of sexual attacks. According to Boyle ". . . the [introduction of] the complaint does not enhance credibility but counters the very negative assumption that would otherwise be made that the witness was lying."[10]

As an exception to the rule against narrative, the doctrine of recent complaint failed to recognize the demonstrated reluctance of rape victims to complain due to feelings of embarrassment, or humiliation, and legitimate concerns about the nature of police investigation of such crimes.[11] Nor has the rationale for the exclusion--the fear of false accusations in sexual cases--been empirically established.[12]

By placing an unjustifiable burden on the complainant as a witness, the doctrine of recent complaint indirectly contributed to her harassment in the courtroom. Also, because the rule disproportionately affected women, it was discriminatory in its effect. The abrogation of the rule by the enactment of section 246.5, therefore, would appear to be in keeping with the achievement of legislative goals in this issue area.

Unfortunately, the section leaves unanswered certain important questions involving the relationship between the abolition of the recent complaint doctrine and the application of other related exceptions to the rule against narrative in sexual assault cases. Also, it is not clear whether the section is meant to apply to both aspects of the doctrine of recent complaint. These questions have emerged in recent cases.

In R v Colp, the Nova Scotia County Court examined the relationship between the *res gestae* exception to the rule against narrative and section 246.5.[13] The court held that although the section relieved the Crown of the requirement to lead evidence of a recent complaint, it did not disentitle them from introducing a complaint by choice. The vehicle used to admit evidence of the complaint in Colp was the *res gestae* exception. According to the Nova Scotia County Court, because the complaint in this case was made at the first reasonable opportunity after the assault, it was part of the *res gestae* and hence admissible. Had the complaint been so closely connected to the assault as to amount to a "spontaneous outflow" from it, it would also have been admissible under the *res gestae* exception.[14]

Apart from its admissibility under the *res gestae* exception, the Nova Scotia County Court also found that according to the general rules of evidence, a complaint could be introduced by the prosecution to rebut a defence allegation of recent fabrication against the complainant.

A similar result was reached in R v Page.[15] The Ontario High Court in Page did not however, adopt the first reasonable opportunity test set out in Colp to determine what was part of the *res gestae*. Instead, the court held that in order to fall within this exception to the rule against narrative, a complaint would have to be a "spontaneous exclamation."[16]

Although it adopted a narrower test for the *res gestae* exception, the Ontario High Court agreed with Colp that a complaint was also admissible to rebut an allegation of recent fabrication. In this regard, the court in Page went on to say that despite the existence of 246.5, the defence still had a right to cross-examine the complainant as to her failure to complain. Furthermore, although the judge was no longer obliged to instruct the jury that an adverse inference with respect to credibility could be drawn on the basis of the victim's failure to complain, defence counsel was free to recommend just such an adverse inference to the jury.

The court also held that, should the contents of a complaint not be admissible under any of the other exceptions to the rule against narrative, evidence of the *fact that it was made* did not offend section 246.5 and was therefore admissible.

Unlike Page, the Colp decision made no explicit statements regarding defence counsel's right to cross-examine or make comments to the jury about the victim's failure to complain. Nevertheless, these rights are the logical implication of the Nova Scotia County Court's comment that the defence can allege recent fabrication on the part of the victim, presumably on the basis of her failure to speak when it would have been natural to do so.[17]

Clearly the application of the *res gestae* and recent fabrication exceptions to the rule against narrative, in Colp and Page has effectively revived court practices traditionally associated with the doctrine of recent complaint.

The two other reported cases interpreting section 246.5 come to somewhat different conclusions than Page and Colp. In R v Temple, an Ontario County Court decision heard before Page, the court found that section 246.5 excluded not only statements made by the witness in the form of a complaint, but also evidence as to her conduct after the attack.[18] More significantly, the court maintained that the section prevented cross-examination by defence counsel as to the lack of any recent complaint. The judge based his interpretation on the use of the word "rules" in section 246.5:

> . . . the intent of Parliament is clear. Firstly, I emphasize that the word 'rules' is in the plural. Secondly, the section does not say 'the rules relating to the admissibility of a recent complaint are abrogated,' which would refer only to the complaint itself. It is much wider in scope *and is intended to cover the whole branch of the law of evidence touching on and compendiously described as recent complaint.*
>
> Before this amendment, the Crown could introduce evidence of recent complaint on the issue of the complaint's credibility to show the consistency of her conduct with her evidence in the witness box. The other side of the coin was that if there were no recent complaint, defence counsel could bring that out in cross-examination to reflect adversely on the complainant's credibility and to suggest consent. Both are rules relating to evidence of recent complaint, and in my view, both are now inadmissible.[19] [emphasis added]

Unfortunately, it is not clear from the judgment whether the limit on cross-examination would extend to situations where the defence was alleging recent fabrication. Certainly the use of this technique to impeach the credibility of a complainant

"touches on" the doctrine of recent complaint. On the other hand, in stressing the use of the plural "rules" in section 246.5, the judge may have been referring only to the two aspects of the doctrine of recent complaint discussed earlier.[20]

No mention is made in Temple of the possible use of the *res gestae* exception to the rule against narrative to introduce evidence of a complaint in sexual cases.[21]

A recent decision of the Supreme Court of British Columbia, conflicts with Temple on the question of the admissibility under section 246.5 of evidence of the emotional state of the complainant immediately after the assault. In R v Mohr,[22] the court held that section 246.5 prevented the introduction by the Crown of statements made by the complainant to others. It did not, however, prevent the introduction of relevant evidence as to the complainant's conduct after the attack.

Conclusion

On its face section 246.5 appears to help prevent courtroom harassment of complainants and alleviate the discriminatory impact of the recent complaint doctrine. Also, by effectively making the general rules of evidence applicable to sexual assault cases, the section is consistent with the goal of concentrating on the assaultive nature of such attacks.[23]

Problems have arisen however, as a result of section 246.5's failure to clarify the status of related exceptions to the rule against narrative apart from the doctrine of recent complaint.

The most authoritative decision to date[24] interpreting the section has suggested that it would not prevent defence counsel from attacking the victim's credibility by alleging a recent fabrication. The grounds for such an allegation would likely be the failure of the victim to speak when it would have been natural for them to do so.[25] Other traditional grounds for an allegation of recent fabrication include charges of bias, interest or corruption. These would not generally be relevant in sexual assault prosecutions however.

The application of this rule of evidence in sexual assault cases it is submitted, defeats the purpose of section 246.5. The historical presumption that the virtuous woman would complain at the first possible opportunity could continue to operate against complainants who delayed complaining for reasons of privacy or feelings of shame.[26] Depending on the particular strategy adopted by defence counsel, complainants in sexual assault cases could therefore be in the same position they were in under the doctrine of recent complaint.

Theoretically section 246.5 treats the complainant just like the victim of any other type of assault. In practice however, it

might still result in courtroom harassment and the adoption of particular negative assumptions regarding credibility, not applied to the victims of other violent crimes.

Given the limited number of higher court decisions dealing with section 246.5, another interpretation proposed by commentators[27] could still be argued before the courts. Generally, this approach maintains that questions by defence counsel regarding the absence or untimeliness of a complaint are irrelevant since the rationale justifying such questions has been discredited or abolished by section 246.5:

> . . . courts should not permit to be done on a case by case basis, what Parliament has rejected overall. What can be seen to have been abrogated here is the idea that any adverse inference can be drawn from failure to complain quickly in a sexual assault case.[28]

The adoption of this construction by the courts would effectively abolish both aspects of the recent complaint doctrine. There would not be any need to admit complaints because the adverse inference would not be universally applied. Furthermore, this interpretation would disallow defence counsel from suggesting on a case by case basis that the jury make an adverse inference after cross-examination alleging recent fabrication on the basis of the complaint's failure to complain when it would be natural to do so.

Such an interpretation of section 246.5, it is submitted, is more in keeping with legislative goals than the narrower construction set out in the recent decision of R v Page.[29]

The application of the *res gestae* principle as set out in R v Colp in relation to the achievement of legislative goals remains to be considered. The decision held that a complaint made at the first reasonable opportunity would be admissible as part of the *res gestae* . This aspect of the decision was overruled by Page which found that the complaint must be a spontaneous utterance in order to qualify as part of the *res gestae*.

It has been suggested that the broader test set out in Colp facilitates sexual assault prosecutions[30] and thereby indirectly provides greater protection to potential victims of such attacks. It has also been suggested that the rejection of this test in Page represents a "retrograde step" not intended by the new legislation and that the broader approach in Colp is justified by the need to overcome the historic distrust with which triers of fact have viewed rape victims.[31]

Both these arguments raise valid concerns. Both however, are based on the assumption that the defence could allege recent fabrication thereby permitting the Crown to introduce a complaint in rebuttal. In this context, the prosecution would gain a potential strategic advantage by simply introducing the evidence

in chief as part of the *res gestae* rather than having to wait for the defence's cross-examination. If however, such a cross-examination were deemed to be irrelevant, then there would be no need to introduce the complaint to rehabilitate the witness either under the *res gestae* principle or to rebut an allegation of recent fabrication. Maximum protection to the complainant as witness is provided by avoiding the need to overcome negative inferences which are not empirically justified.

The use of the *res gestae* to admit evidence of a recent complaint raises a further issue. Unlike the other exceptions to the rule against narrative, under the *res gestae* principle, statements are admitted for truth and not just to show consistency. If a recent complaint were admitted as part of the *res gestae* therefore, it would be open to Crown to argue that it be used as proof of a fact in issue.

It is unclear whether this result was contemplated by the court in Colp since the judgment is silent on this point. Given the fact this decision has been overruled by Page on the *res gestae* question, it is unlikely this issue will emerge. If however, future courts do admit recent complaints under either the Colp or Page test for the *res gestae* , presumably the general rules of evidence would apply to admit such statements for truth and not just consistency.

The cases analyzed in this study interpreting section 246.5 all involved sexual assault charges. Because the section abrogates ". . . the rules relating to evidence of recent complaint *in sexual assault cases* . . ."[32] [emphasis added] the question emerges: Does 246.5 apply only to the triology of sexual assaults enacted by Bill C-127? Traditionally, the doctrine of recent complaint applied to consensual and non-consensual crimes involving sexual interference.[33] A narrow construction of section 246.5 therefore, might result in the continued application of the doctrine to sexual offences such as seduction and incest where consent is irrelevant.

Such an interpretation of the section it is submitted, would present problems in terms of the achievement of legislative goals. As stated earlier, the hue and cry rationale for the rule has been discredited by empirical evidence. Thus no justification exists for subjecting victims of such crimes to traumatizing cross-examination regarding their failure to complain at the first reasonable opportunity.

REFERENCES

1 Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, (Toronto: Carswell, 1982), p. 29.

2 Ibid, at p. 295; The *res gestae* exception generally permits the introduction of statements made by the witness which are so closely connected with a fact in issue as to form part of the transaction which is the subject of the legal proceedings.

3 Ibid; at p. 299.

4 Ibid, at p. 300; J. J. Gindin, "Recent Complaint in Sexual Cases After the Amendments" (1984), 3 Crown Coun. Rev. 12; C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984), p. 153; Timm v The Queen [1981] 2 S.C.R. 315 at 321.

5 Task Force supra, footnote 1 at p. 300.

6 Timm v R, supra, footnote 4 at p. 337; see also: D. Watt, The New Offences Against the Person: The Provisions of Bill C-127 (Toronto: Butterworths, 1984), p. 179.

7 Timm v R, supra, footnote 4; Kribs v The Queen, [1960] S.C.R. 400.

8 Kilby v R (1973), 129 C.L.R. 460 (Aust. H.C.); R v Kistendey (1975), 29 C.C.C. (2d) 382 (Ont. C.A.); R v Boyce (1974), 28 C.R.N.S. 336 (Ont. C.A.).

9 R v Mace (1975), 25 C.C.C. (2d) 121 (Ont. C.A.); R v Kistendey, supra, footnote 8; R v Walters (1980), 53 C.C.C. (2d) 119 (Ont. C.A.); See also: Watt, supra, footnote 6, at pp. 180-81; D. F. Dawson, "The Abrogation of Recent Complaint: Where Do We Stand Now?" (1984), 27 Crim. Law Q. 57; and Task Force supra, footnote 1 at p.303. The Task Force maintained that Kistendey, which did not permit the complainant to so testify, was contrary to well-established rules of practice and fair play as applied to witnesses.

10 Boyle, supra footnote 4, at p. 153; see also: Watt, supra, footnote 6 at p. 180 where he states:

> . . . V. [the victim] was expected to complain upon the first reasonable opportunity and her failure to do so was taken as a *virtual self-contradiction of her story.* The introduction of evidence of the complaint served to *rebut the presumption against V. which arose in the absence thereof.*
> [emphasis added]

11 T. Danow, "Jury Instruction in a Rape Trial: Recent Revisions and the Argument for Further Reform," (1976) 1 Crim. Just. J. 113 at p. 115.

12 M. T. MacCrimmon, "Consistent Statements of a Witness" (1979), 17 Osg. Hall L. J. 285 at pp. 309-313.

13 (1984), 36 C.R. (3d) 8 (N.S. Cty. Ct.).

14 Ibid., at p. 284.

15 (1984), 40 C.R. (3d) 85 (Ont. H.C.J.).

16 Ibid.

17 According to this exception to the rule against narrative, not every attack on a witness's credibility results in the admission of prior consistent statements. Generally, the types of impeachment resulting in admission include: express or implied allegations of bias, interest and corruption, and failure to speak when it would have been natural to do so. See: Boyle, supra, footnote 4, at p. 154; and Task Force supra, footnote 1, at pp. 304-311.

18 (1984),, 12 W.C.B. 71 (Ont. Cty. Ct.)

19 Ibid., pp. 5-6 (complete reasons for judgment).

20 The two aspects being first, the preconditions which must be satisfied before the complaint is admissible, and second, the instructions which may be made to the jury in the event the complaint is inadmissible or in the absence of evidence of a complaint. See p.50 of this paper for an outline of the two aspects to the doctrine.

21 On the facts it was probably not applicable since the complaint in question was made four days after the alleged assault.

22 [1984] B.C.D. Crim. Conv. 6108-02 (B.C.S.C.).

23 Dawson, supra, footnote 9; Gindin, supra, footnote 4.

24 R v Page, supra, footnote 15.

25 Boyle, and Task Force, supra, footnote 17.

26 Evidence suggests that these feelings often result in a reluctance to complain. See: Danow, supra, footnote 11 at p. 115.

27 Boyle, supra, footnote 4, at pp. 154-155; R v Page: "Annotation" (1984), 40 C.R. (3d) 85; Dawson supra, footnote 9. Dawson outlines the rationale for this interpretation without advocating its adoption by the courts; This approach

was also favoured by the Ontario County Court in Temple, supra, footnote 18.

28 Boyle, supra, footnote 4 at p. 154.

29 On the question of defence counsel's right to cross-examine and comment via an allegation of recent fabrication on the basis of the complainant's silence, Colp was also in agreement with the Page construction. See: Colp, supra, footnote 13.

30 R v Colp: "Annotation" (1984), 36 C.R. (3d) 281.

31 R v Page: "Annotation," supra, footnote 27.

32 Section 246.5.

33 Watt, supra, footnote 6, at p. 184.

3. The Relationship Between Sections 246.6, 246.7 and Sections 7 and 11(d) of The Charter

Section 246.6 sets out a general rule excluding evidence regarding the complainant's sexual activity with another who is not the accused. This general exclusionary principle is subject to certain listed exceptions:

> (a) . . . evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
>
> (b) . . . evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
>
> (c) . . . evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge, where the evidence relates to the consent that the accused alleges he believed was given by the complainant.

According to section 246.6(2), no evidence is admissible under any of the exceptions unless an in camera hearing is held in which the complainant is not a compellable witness.

Section 246.6 provides stricter controls on the introduction of evidence than its predecessor, section 142(1). This section provided that evidence of sexual conduct was inadmissible unless the judge felt that its exclusion would prevent the making of a just determination of fact, including the credibility of the complainant. Unlike section 142(1), 246.6 leaves virtually no room for the exercise of judicial discretion to determine the relevance of evidence of sexual activity with a third party. If such evidence falls within one of the *statutory* exceptions, it is admissible under 246.6(1)--otherwise it is not.

Section 246.7 is related to 246.6. It provides that general or specific evidence of sexual reputation is inadmissible to attack or support the complainant's credibility. Commentators do not agree on the exact meaning to be attached to this section.[1] It seems clear however, that at the very least, this section prevents the introduction of evidence of *sexual 'reputation'* --as opposed to evidence concerning *specific sexual activities* of the complainant with someone other than the accused--for the purposes of establishing or challenging credibility.[2] Under the common law the accused had the right to cross-examine the complainant regarding her general reputation for chastity as a matter affecting credibility.[3]

Both sections 246.6 and 246.7 only apply to the newly created sexual assault offences set out in sections 246.1, 246.2 and 246.3.

Because sections 246.6 and 246.7 restrict the type of evidence which can be introduced by the accused, it has been suggested[4] that they violate the principles of fundamental justice and the right to a fair trial as set out in sections 7 and 11(d) of the Charter respectively.[5] This issue has emerged in four major cases interpreting the sections: Re Bird and Peebles v The Queen,[6] The Queen v. LeGallant,[7] R v. Mikunas[8] and R v. Oquantag.[9] A fifth case, R v. Gran, interprets section 246.6(1)(a) without reference to the Charter.

In Bird and Peebles, the accused was charged with sexual assault under section 246.1. He wished to lead evidence that the victim commonly got drunk at parties and consented to intercourse with men present. In particular, he wanted to establish that at a party where the accused was present one week before the alleged assault, the complainant had sex with five men.

According to the accused, he was aware the victim had a reputation for this type of conduct. In his view all of the aforesaid evidence was relevant to the defence of actual consent or alternatively, apprehended consent. He wanted to establish that, because the complainant had often consented to such acts in the past, she probably consented at the time of the alleged assault. Alternatively, if she did not actually consent, the accused, on the basis of his knowledge of her reputation, honestly believed that she had.

The evidence of previous sexual conduct was therefore, relevant to the accused's state of mind at the time of the offence. To exclude it, the defence argued, would result in the denial of a fair trial and the violation of the principles of fundamental justice. Furthermore, the defence maintained that the evidentiary limits applying to sexual assault could not be justified since they were substantially different than the evidentiary rules governing a non-sexual assault charge.

The Manitoba Court of Queen's Bench rejected these arguments.[10] The court held that sections 246.6 and 246.7 were constitutional because as evidentiary provisions, they did not actually shift the onus of proof or abnegate a defence. This finding was based on American cases where similar rape shield provisions were upheld.[11]

The judge did not accept the notion that because sexual assault was analogous to non-sexual assault, special evidentiary provisions could not be justified. In the court's view, two important distinctions could be made between the different forms of assault. First, one could result in impregnation while the other could not. Second, in sexual assaults the issue of consent was often paramount, whereas in other assaults it was not.[12]

In obiter, the judge added that even if sections 246.6 and 246.7 did violate the Charter, they could be justified as reasonable limitations under section 1. This was because the probative value of such evidence was outweighed by its prejudicial effect. This effect was described by the court as follows:

1. Such evidence might arouse the jury's emotions of prejudice, hostility or sympathy;

2. it might create a side issue which would distract the jury;

3. it would consume an undue amount of time; and

4. it would unduly surprise the prosecution.

In applying section 1 to sections 246.6 and 246.7, the court balanced the rights of the accused against the interests of society in having such crimes reported and found the balance tipped in favour of the latter interest.

The result in Bird and Peebles is criticized by David Doherty in his article "'Sparing' the Complainant 'Spoils' the Trial."[13] Although he concedes that the majority of American cases have upheld similar exclusionary provisions, Doherty suggests that certain qualifications were attached to these findings of constitutionality. As an example he cites the West Virginia case of The State v. Green.[14] In Green the court upheld rape shield laws more restrictive than 246.6 and 246.7, but cautioned that there might be unusual cases where the probative value of such evidence far outweighed its prejudicial effect. According to the West Virginia Court of Appeal, the exclusion of evidence of previous sexual conduct in such cases might result in an unfair trial.

Doherty argues that the weighing of probative value against prejudicial effect cannot be universally predetermined by statute. It requires the exercise of judicial discretion in each case. According to Doherty, judicial discretion is an essential aspect of an exclusionary rule which purports to be constitutional. Because section 246.6 precludes the exercise of such discretion, it might exclude probative evidence which is not prejudicial. On this basis, section 246.6 could be found unconstitutional.

In terms of section 246.7, Doherty is less critical. Because evidence coming under this section is of such limited probative value on the question of credibility and so potentially prejudicial, it does not according to Doherty, significantly impair the accused's right to a fair trial.

Along the same lines as the defence in Bird and Peebles, Doherty also criticizes section 246.6 because it puts the accused charged with sexual assault at a greater disadvantage than someone charged with other violent offences against the person.

Some of the arguments made by Doherty in relation to section 246.6 were raised by defence counsel in the recent B.C. Supreme Court case of The Queen v. LeGallant.[15] In LeGallant the accused, an adult male school teacher, was charged with sexually assaulting a boy of thirteen contrary to section 246.1(1). The incidents in question occurred at the accused's apartment during a visit by the complainant and his two older brothers. The defence maintained that the boy committed sexual acts upon the accused and hence was the aggressor. There was no sexual assault since LeGallant was the passive and reluctant partner in the encounter. The Crown on the other hand, alleged that the accused was the aggressor.

To support his version of the facts LeGallant sought to introduce evidence showing that two years earlier, the complainant and his brother went to the house of 2 or 3 men and engaged in homosexual activities. Also, LeGallant wished to bring evidence indicating the victim may have engaged in other homosexual encounters prior to the assault in question. The defence hoped to prove his assertions through cross examination of the complainant and a police officer.

None of the aforesaid evidence was admissible under 246.6. The accused however, maintained that it was of great probative value in relation to his particular defence. To exclude it therefore, would deny him the right to a fair trial and to make a full answer and defence guaranteed by sections 7 and 11(d) of the Charter.

Unlike the Manitoba Court of Queen's Bench in Bird and Peebles, the B.C. Supreme Court accepted this argument. It found that the *effect* of 246.6 violated sections 7 and 11(d) although its *purpose* did not.

The B.C. court considered Parliament's goal of giving added protection to the complainant as valid.[16] A problem arose with the effect of the section in this particular case, however, because the jury had to decide between two totally different versions of the alleged assault--the complainant's and the accused's. In the judge's view the jury could not fairly decide which was the truthful version without being made aware of the complainant's previous sexual encounters.

The B.C. Supreme Court's analysis in LeGallant was based on the Ontario Court of Appeal decision of R v. Scopelliti.[17] Scopelliti, who was charged with murder, claimed he acted in self-defence. He wished to introduce evidence of the deceased's character or disposition for violence which the accused was not aware of at the time of the alleged murder. The court held that such evidence was admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased. It was not however, admissible to show the state of mind of Scopelliti at the time of the attack.[18]

The court in LeGallant made an analogy between Scopelliti's claim of self-defence and LeGallant's assertion that he was the reluctant partner in a sexual encounter:

> [In R v. Scopelliti it was] . . . held that evidence of an alleged victim's character or disposition for violence is admissible to show the probability of his having been the aggressor, and to support the accused's evidence that he was attacked by the deceased. Character or disposition for homosexual acts with older men must be equally relevant on a charge of sexual assault, where the accused's defence is that the complainant was the aggressor in the homosexual acts in question, and that he, the accused committed no assault. This is subject to the limitation imposed in Regina v. Scopellinti that the evidence of the previous acts in question must be confined to those which legitimately and reasonably assist the jury in arriving at a just verdict.[19]

In LeGallant evidence of the victim's sexual activity with third parties was necessary to rebut the "common sense inference" that would otherwise be made by the jury that an older man would be more likely to initiate sexual activity than a thirteen-year-old.[20]

As in Scopelliti, the court in LeGallant did suggest that caution be exercised in admitting such evidence:

> . . . there must inevitably be some element of discretion in the determination of whether the preferred evidence has sufficient probative value for the purpose for which it is tendered, and great care must be taken to ensure that such evidence if admitted, is not misused by the jury.[21]

This is reminiscent of Doherty's suggestion that the retention of judicial discretion is essential for a finding of constitutionality.

According to the B.C. Supreme Court, section 246.6's violation of sections 7 and 11(d) was not justified by section 1 of the Charter. This section guarantees the rights and freedoms set out in the Charter subject to reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.[22] In determining whether the limits set out in section 246.6 were reasonable, the B.C. Supreme Court weighed the evil which the section addressed against the significance of the infringement. On the one hand the court examined the complainant's interest in avoiding the embarrassment of such questions and the public interest in encouraging the reporting of such offences. On the other hand, the court considered the accused's right to make full answer and defence and the serious consequences that would result from an unjust conviction. The court

also took account of society's interest in the delivery of a "true verdict."[23]

The protection of the right to make a full defence was found to be fundamental to our society. Only very significant countervailing interests therefore, could justify infringement of this right. The need to protect complainants from disconcerting questions was not in the court's view, a weighty enough consideration to tip the scales in favour of exclusion.

In striking down section 246.6 the court in LeGallant did consider Bird and Peebles and R v. Mickunas,[24] a B.C. Supreme Court decision following Peebles. These cases were distinguished however, on the grounds that they raised issues dissimilar to those before the court in LeGallant. In Mikunas and Bird and Peebles the defence was consent. In LeGallant, the accused simply claimed that no assault had taken place since the victim was the aggressor. The court in LeGallant maintained that where only consent was at issue, and there was no indication that the victim was the aggressor, the introduction of evidence of sexual activity with a third party would *generally* be of little probative value.[25] Its exclusion in such cases would not therefore, violate the Charter.

The court also distinguished Bird and Peebles on the grounds that the test for constitutional validity set out by the Supreme Court of Canada in R v. Big M Drug Mart Ltd.,[26] and applied in LeGallant, had not been formulated at the time of the earlier decision. In the case of Mikunas, it was simply not argued.

The precise impact of the LeGallant decision in relation to the future application of section 246.6 is difficult to assess. In this particular case the defence was permitted to cross-examine the complainant and a police officer regarding previous sexual activities of the complainant. This occurred in a *voir dire*. This procedure was followed in order to allow the judge to determine whether the evidence was of any probative value before it was put before the jury.[27] The fact that such questioning of the complainant was permitted suggests that the court struck down the procedural aspects of section 246.6 as well as the exclusionary provisions set out in 246.6(1). Section 246.6(3) provides that the complainant is not a compellable witness in the event that evidence of sexual activity with a third party is admitted under section 246.6(1).

The impact of LeGallant on the constitutionality of section 246.7 remains to be considered. It appears that this exclusionary provision was also struck down by the court.[28] This flows logically from the analogy made between the facts in Scopelliti and LeGallant. In the former case the judge held that the violent disposition of the victim could be established by proof of specific acts or evidence of general reputation.[29]

If LeGallant is applied in future sexual assault cases where the accused claims he is the passive partner, it means a return

to common law principles governing the admissibility of evidence of previous sexual conduct and sexual reputation. In the past these principles have been found to inadequately protect complainants from courtroom harassment. They have also acted as a disincentive to the reporting of such crimes.[30] A brief summary of these principles illustrates the problem.

Under the common law, in cases of rape and indecent assault, evidence of the complainant's sexual history was admissible as relevant to the question of consent or as a means of attacking credibility.[31] This was an exception to the general rule excluding character evidence regarding the victim since it was considered irrelevant:

> Neither the Crown nor the defence can lead such evidence--the Crown, because the victim's character is presumed to be good and therefore does not require support, and the defence because the nature of the victim's character can be no justification for a crime against him.[32]

An exception was also made in homicide cases where self-defence was being argued.[33]

In cases of rape and indecent assault, the victim's character was not "presumed to be good." Evidence of previous sexual conduct was considered relevant to consent on the grounds that an unchaste woman would be more likely than a virgin to agree to sexual activities with the accused.[34] Evidence traditionally admitted according to this rationale included:

> (1) other acts of sexual intercourse with the accused,
> (2) the opinion of a witness, that the complainant is a prostitute, and specific incidents of the complainant's prostitution,
> (3) the complainant's general reputation as a common prostitute,
> (4) the complainant's general reputation for unchastity or notoriously bad character for chastity, and
> (5) evidence that the complainant 'is in the habit of submitting her body to different men without discrimination, whether for pay or not.'[35]

Cross-examination of the victim regarding previous sexual conduct was also permissible as being relevant to credibility. This practice was based on the notion that unchaste women were more likely to be untruthful witnesses.[36]

If evidence of sexual history was admitted as relevant to consent, the complainant was required to answer all questions in cross-examination. Furthermore, if she denied any of the defence counsel's allegations, her answers could be contradicted by

additional evidence.[37] If however, evidence of sexual history was admitted solely on the question of credibility, the complainant could not be compelled to answer since this was relevant only to a collateral issue.[38] Also, the judge could use his discretion to relieve the complainant of the obligation to answer degrading questions.[39]

These common law rules have been extensively criticized for putting the sexual morality of the victim on trial rather than the violent behavior of the accused.[40] Unfortunately, on the basis of LeGallant, in cases where the accused claims the victim is the aggressor, these common law rules are effectively revived.

Of far greater concern in terms of the achievement of legislative objectives however, is the suggestion by the judge in LeGallant that there may be individual cases where rejection of evidence of sexual activity with third parties would violate the Charter even if it is only consent which is at issue.[41] Certainly on the basis of Mikunas and Bird and Peebles it could be argued that the effect of the exclusionary rules contained in sections 246.6 and 246.7 does not violate the Charter in such cases. Nevertheless, the fact that the test for constitutionality endorsed by the Supreme Court of Canada in R v. Big M Drug Mart Ltd., was not before the courts in Mikunas and Bird and Peebles, may be used as a rationale for limiting their future application.

Of relevance here is a recent decision of the Supreme Court of the Northwest Territories which did not follow Bird and Peebles. In R v. Oquantaq[42] the accused wished to introduce evidence showing that after the alleged assault, the complainant returned to her residence where on the same night, she had intercourse with a second man. The accused maintained that this evidence was necessary to establish the defence of consent.

The court held that both sections 246.6 and 246.7 were unconstitutional. This was because they left no room for the exercise of judicial discretion. On the basis of R v. Scopelliti, the judge maintained that his discretion to consider this type of evidence should be retained. To support this view he drew an analogy between the victim's propensity for violence in homicide cases where self-defence is claimed, and the complainant's sexual activity with third parties in sexual assault cases where consent is claimed.

After weighing the evidence in question the judge in Oquantaq ultimately excluded it. He believed it was of limited probative value in this particular case. Nevertheless, if the reasoning in Oquantaq is adopted by other courts, it will mean that in sexual assault cases the exclusion of evidence of the complainant's sexual activities with third parties will be dependent upon the individual discretion of members of the judiciary. Given the prevalence of the defence of apprehended or

actual consent in sexual cases, this result may severely limit the protection provided by sections 246.6 and 246.7 from courtroom harassment.

One further decision interpreting section 246.6 remains to be considered. In R v. Gran[43] the accused wished to cross-examine the complainant regarding the fact that she had allegedly been raped before and forced to submit to "sexual perversions."[44] Gran maintained she had discussed this with him. He wished to introduce this evidence under section 246.6(1)(a) to rebut the complainant's assertion that she became uncomfortable during a conversation they were having prior to the alleged assault. During this conversation the accused described to the complainant men's reactions to pornographic movies at a "stag" party he had just attended. According to subsection (a) of section 246.6(1), evidence of the complainant's sexual activity with another may be adduced if:

> (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution.

The B.C. Court of Appeal excluded the evidence. The court agreed with the defence that the evidence of the alleged rape was of a sexual nature. It was not however, introduced in the course of the complainant's examination in chief and did not therefore fall within the exception provided by subsection (a). No reference to Charter sections 7 and 11(d) was made in this decision.

Conclusion

Sections 246.6 and 246.7 reflect a legitimate desire to protect complainants from courtroom harassment and thereby encourage the reporting of crimes of sexual violence. Despite the legitimacy of these objectives, major concerns regarding the constitutionality of both sections have emerged.

Two cases at the Supreme Court level,[45] have held that these provisions violate the accused's right to a fair trial and to make full answer and defence.[46] In The Queen v. LeGallant the finding of unconstitutionality was limited to situations where the accused wished to introduce evidence of sexual activity with third parties to support a claim that the victim was the aggressor. In R v. Oquantaq, sections 246.6 and 246.7 were found unconstitutional where the accused alleged the victim consented to the acts in question.

Two other cases at the Supreme Court level: Re Bird and Peebles v. The Queen and R v. Mickunas come to different conclusions on the question of constitutionality. Both decisions uphold sections 246.6 and 246.7 in cases where the defence of consent is asserted.

The results in these two decisions are difficult to reconcile with R v. Oquantaq. Arguably, LeGallant can be distinguished on the basis of the nature of the defence in that case.

If the decisions of LeGallant and Oquantaq are followed, common law rules governing evidence of previous sexual conduct will be revived. This will perpetuate problems associated with the former rape laws--in particular the harassment of the complainant during cross-examination and the reluctance to report such crimes.[47]

Evidence also suggests that conviction rates may increase as a result of the application of rape shield laws such as sections 246.6 and 246.7.[48] Indirectly, therefore, the striking down of these provisions limits the protection provided to potential victims through the operation of the deterrence principle.

Fundamental problems arise with the revival of the common law rules governing the admissibility of evidence of previous sexual conduct. The rationale supporting the admission of such evidence as relevant to credibility, cannot be justified empirically.[49] Nevertheless, it has been found that cross-examination of the victim in the presence of the jury regarding previous sexual conduct creates a "negative halo" around the complainant and results in the juror perceiving the accused as "less guilty."[50]

Past experience also suggests that the exercise of judicial discretion to determine the admissibility of such evidence, as proposed in LeGallant and Oquantaq, will not foster legislative goals. Section 142, the predecessor to sections 246.6 and 246.7, granted just such discretionary powers of exclusion to the judge. In its analysis of this section the Task Force on the Uniform Rules of Evidence notes that its application by the courts did not adequately protect the complainant.[51] The Task Force describes the effect of such provisions as "innocuous."

According to the Task Force, although section 142 was meant to provide greater protection to the complainant, it was in fact construed so as to make her more vulnerable to courtroom harassment. If the courts' application of section 142 is any indication, the exercise of judicial discretion as a substitute for sections 246.6 and 246.7, will not foster legislative objectives related to the protection of victims and potential victims.

On the basis of R v. Scopelliti, it has been suggested that sections 246.6 and 246.7 put the accused charged with sexual assault at a greater disadvantage than someone charged with other violent offences against the person.[52] This argument implies that sections 246.6 and 246.7 are inconsistent with the overall attempt of Bill C-127 to concentrate on the violent aspects of sexual assault.

In evaluating this proposition, it is important to remember that *generally*, in non-sexual cases, neither the Crown nor the defence is permitted to lead evidence of the victim's character.[53] The introduction of evidence of the victim's previous conduct in such cases is considered to be irrelevant. In Scopelliti, evidence of the victim's disposition to violence was admitted as an exception to the general rule. This exception is traditionally applicable in homicide cases where self-defence is claimed.[54] To allow in evidence of previous sexual conduct in sexual assault cases on the basis of Scopelliti, therefore, is merely creating another exception to the general rule.

In Scopelliti the application of this exception may or may not have been justified. Its application by analogy to sexual assault cases however, is problematic. In effect the court is equating a previous disposition to violence with a disposition to be sexually active. The former is in itself criminal behavior outside the range of acceptable social interaction. The operating principle is: if you physically assault someone or have a violent character which someone is aware of, that person is entitled to defend themselves against the actual or perceived threat you present.[55] To apply this line of reasoning to a sexually active individual suggests that this behavior, like violence, is somehow undesirable or criminal and therefore entitles others to respond in kind.

The implicit endorsement of this proposition represented by the application of Scopelliti to sexual assault cases it is submitted, is not in keeping with 20th century sexual mores. Nor can it be justified as consistent with evidentiary rules applied to the accused charged with other violent offences against the person.

REFERENCES

1 C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984), p. 149; S. Parker, "The 'New' Sexual Offences" (1983), 31 C.R. (3D) pp. 148-150; W. B. Smart "Adducing Evidence Concerning the Sexual Activity of the Complainant With Persons Other Than the Accused" in The New Sexual Assault Legislation (Vancouver: Continuing Legal Education, 1983), pp. 4.1.04-4.1.07; D. Watt, The New Offences Against the Person: The Provisions of Bill C-127 (Toronto: Butterworths, 1984), pp. 202-204, 193.

2 Watt, supra, footnote 1.

3 Smart, supra, footnote 1 at p. 4.1.02.

4 D. H. Doherty, "'Sparing' the Complainant 'Spoils' the Trial" (1984), 40 C.R. (3d) 55; Doherty admits that 246.7 may pass the test of constitutionality.

5 The Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.) c.11, Schedule B].

6 (1984), 40 C.R. (3d) 41 (Man Q.B.).

7 June 12, 1985 (B.C.S.C.) (not yet reported). An appeal to the B.C.C.A. is pending.

8 May 24, 1985 (B.C.S.C.) (not yet reported).

9 (1985), 6 C.R.D. 725.300-01 (S.C.N.W.T.).

10 The defence appealed to the Manitoba Court of Appeal but the appeal was quashed on procedural grounds. See: Re Bird and Peebles v. The Queen (1984), 12 C.C.C. (3d), 523.

11 Re Bird and Peebles v. The Queen, supra, footnote 6.

12 The judge is here adopting the analysis formulated by the Law Reform Commission of Canada in its Working Paper on Sexual Offences. See: Working Paper on Sexual Offences, No. 22 (Law Reform Commission of Canada: 1978), p. 20.

13 Doherty, supra, footnote 4.

14 (1979), 260 S.E. (2d) 257 (West Virginia C.A.).

15 Supra, footnote 7.

16 The Queen v. LeGallant, supra, footnote 7, at p. 5.

17 (1981), 63 C.C.C. 481 (Ont. C.A.).

18 Ibid., at pp. 492-493.

19 The Queen v. LeGallant, supra, footnote 7, at p. 6.

20 Ibid.

21 Ibid.

22 Supra, footnote 5, section 1.

23 The Queen v. LeGallant, supra, footnote 7, at p. 7.

24 Supra, footnote 8.

25 The Queen v. LeGallant, supra, footnote 7, at p. 8.

26 April 24, 1985 (S.C.C.) per Dickson C.J. (not yet reported).

27 The Queen v. LeGallant, supra, footnote 7, at p. 9.

28 No mention was made of section 246.7 in the Trial Proceedings reviewed by the author. (Which it should be noted had not yet received the judge's signature.) According to counsel and newspaper accounts of the trial however, in her oral comments Madame Justice McLachlin suggested that 246.7 was also effectively struck down by her judgment. See: "6 Sex Laws Violate Rights, says Judge; Teacher Acquitted," Victoria Times Colonist, June 15, 1985, p. 1.

29 Supra, footnote 17, at p. 495.

30 Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Toronto: Carswell, 1982), p. 67.

31 Ibid.

32 Ibid., at p. 89.

33 R v. Drouin (1910), 15 C.C.C. 205 (Que. K.B.); R v. Scott (1910), 15 C.C.C. 442 (Ont. H.C.).

34 Task Force, supra, footnote 30, at p. 66; C. Backhouse and L. Schoenroth, "A Comparative Study of Canadian and American Rape Law" (1984), 7 Can. U.S. L.J. 172, at p. 194.

35 Task Force, supra, footnote 30.

36 Smart, supra, footnote 1, at p. 4.1.03.

37 Task Force, supra, footnote 30, at pp. 66-67.

38 Ibid.

39 Ibid., p. 67.

40 Ibid, pp. 67-68; J. Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979), 53 A.L.J. 817; K. Catton, "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim - It's Effect on the Perceived Guilt of the Accused" (1975), 33 Univ. of Tor. Fac. of Law, Rev. 165.

41 The Queen v. LeGallant, supra, footnote 7, at pp. 8-9.

42 Supra, footnote 9.

43 (1984), 13 W.C.B. 86 (B.C.C.A.).

44 Ibid., at p. 2 (complete reasons for judgment).

45 The Queen v. LeGallant, supra, footnote 7; R v. Oquantaq, supra, footnote 42.

46 Supra, footnote 5, sections 7 and 11(d).

47 According to Backhouse and Schoenroth a reduction in victim trauma and a significant increase in reporting has been linked to the enactment of rape shield provisions in the state of Michigan. See: Backhouse, supra, footnote 34 at p. 197.

48 Ibid.

49 Catton, supra, footnote 40.

50 Ibid; See also, Task Force, supra, footnote 29 at p. 67. According to the Task Force:

> The rules allowed an accused, through his counsel's cross-examination of the complainant particularly, to shift the focus of the trial from an inquiry into the guilt of the accused into a close examination of the complainant's morality.

51 Task Force, supra, footnote 30, at p. 73.

52 Doherty, supra, footnote 4, at p. 58.

53 Task Force, supra, footnote 30, at p. 89.

54 Ibid.

55 In LeGallant the analysis was somewhat different since the accused was not aware of the victim's previous sexual encounters. LeGallant merely wished to introduce evidence of sexual history to indicate the *likelihood* the victim was *in fact* the aggressor.

4. The Relationship Between Section 442(3) of the Code and Section 2(b) of the Charter

Section 442(3) of the present Code provides that where an accused is charged with incest, gross indecency or any level of sexual assault, and an application is made by the prosecution or complainant, the judge shall make an order directing that the identity of the complainant not be published in any newspaper or broadcast. Also subject to the order would be any information disclosing the complainant's identity. According to section 442(3.1), the judge is also required to inform the complainant of the right to apply for the non-publication order under subsection (3).

Sections 442(3) and (3.1) are meant to relieve the complainant of the psychological stress connected with publicity in relation to a crime which traditionally stigmatizes the victim.[1] By protecting the privacy of the complainant, these sections have also acted as an encouragement to report crimes of sexual violence.[2]

The future of section 442(3) is however, in some doubt given a recent Ontario Court of Appeal decision. In Canadian Newspapers v. Canada,[3] the constitutionality of section 442(3) was challenged as violating freedom of the press and the right to a public hearing.[4] In this case the accused was charged with sexually assaulting his wife. She applied for an order pursuant to section 442(3), that her identity not be published. A newspaper company (Canadian Newspapers Co.) then applied to have section 442(3) declared unconstitutional as violating sections 2(b) and 11(d) of the Charter.[5]

The Ontario Court of Appeal declared that section 442(3) prima facie violated the guarantee of freedom of the press. The court also held that the portion of section 442(3) making it mandatory for the judge to make the non-publication order, was not reasonably justified under section 1 of the Charter. This part of the subsection was therefore invalid. The discretionary portion of the section, however, was reasonably justified. The end result was a declaration that section 442(3) was valid with the exception of the words "or if application is made by the complainant or prosecutor, shall."[6] These words were severed from the section as a whole.

Complete s.442(3)	s.442(3) with mandatory portion severed
(3) Where an accused is charged with an offence mentioned in 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall,	(3) Where an accused is charged with an offence mentioned in 246.4, the presiding judge, magistrate or justice may make an order directing that the identity of the complainant and any

make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.

information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.

As a result of the Canadian Newspapers case, the confidentiality of the complainant's name is not guaranteed. It is a matter to be determined by the judge in each particular case.

In reaching their decision, the Ontario Court of Appeal maintained that any limitation on public accessibility to court proceedings could only be justified where countervailing social values of superordinate importance were at stake.[7] The necessity of bringing those who commit sexual offences to justice, as reflected in section 442(3), was considered to be a value of superordinate importance. Nevertheless, the court believed this interest could be sufficiently protected by the exercise of the judge's discretionary powers:

> The administration of justice is dependent on public confidence in the judiciary. The discretion given to the trial judge under s. 442(3) to make a prohibition order is a sufficient safeguard for the protection of the identity of the complainant. In most cases it will no doubt be made as a matter of course. However in an exceptional case where it is not merited the presiding judge should have an opportunity to make it.[8]

The court was influenced by equivalent legislation in other "free and democratic societies."[9] These provisions do not make non-publication mandatory upon application, but leave it to the court's discretion.

With respect to Canadian Newspaper's claim that section 442(3) violated the right to a public hearing, the court came to a different conclusion. The Criminal Code provision was found not to infringe section 11(d) on the grounds that the right to a public hearing is the right of the accused and not the right of media representatives or the public generally.[10]

Conclusion

Section 442(3) reflects a legitimate desire to protect the privacy of complainants and thereby encourage the reporting of crimes involving sexual violence. A recent Ontario Court of Appeal decision however, has raised questions regarding the constitutionality of this section given its limitation on freedom of the press.

According to Canadian Newspapers v. Canada, that portion of section 442(3) requiring the judge to make an order protecting the identity of the complainant from publication or broadcast, is unconstitutional. The remainder of the subsection however, is still valid.

As a result of Canadian Newspapers v. Canada, in cases of sexual assault, gross indecency, and incest, the privacy of the complainant will not automatically be protected upon her request. This matter will be left to the judge to determine. Because of the uncertainty this creates for the complainant, it may well result in a reluctance to report sexual assaults.[11] Since prosecutions are thereby hindered, the decision indirectly limits the protection from non-consensual sexual contact, provided to individuals.

In terms of consistency, it could be argued that if the intent of Bill C-127 was to treat sexual assault victims in a similar fashion to victims of other violent offences, there is no justification for the special rule contained in section 442(3). The section does imply that the complainant has something to hide. This suggests she is partially responsible for what happened or has been morally tainted by the experience.

In the long-term this analysis may have merit. In the short-term however, it disregards the fact that despite the change in terminology from "rape" to "sexual assault" contained in the 1983 amendments, the stigma associated with being the victim of a sexual offence remains in place.

Perhaps because sexual assaults, unlike other crimes of violence, closely resemble intensely private activities which in other circumstances we engage in by choice,[12] it is sometimes difficult to remember they are public crimes of violence rather than personal acts of immorality.

Sexual assaults are also the subject of particularly intense media attention. Arguably, therefore, the consequences of the victim's identity being revealed through publicity, are more serious than they would be had she been the victim of a simple assault. On this basis it is submitted, that the special protection provided in section 442 can be justified. In the words of the Law Reform Commission:

> Because of the private nature of sexual behavior and the intense interest in it by some sectors of the media, the state has a responsibility for providing protection when the consequences of publishing information gained through the investigation or trial process go far beyond any official punishment.

REFERENCES

1 Working Paper on Sexual Offences, No. 22 (Law Reform Commission of Canada: 1978), p. 16.

2 "Court lifts Ban on Identifying Rape Victims," Toronto Star February 14, 1985, p. 18.

3 Indexed as: Canadian Newspapers Co. v. Canada; R v. D.D. (1985), 7 O.A.C. 161.

4 The Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.) c. 11, Schedule B] sections 2(b) and 11(d).

5 This application was commenced by way of originating notice in a civil proceeding. The company also applied to intervene in the criminal case against the accused. The Ontario High Court of Justice however, refused to grant the newspaper leave to intervene in the criminal proceedings. An appeal of this decision was quashed. The company was successful in the civil proceeding however.

6 Canadian Newspapers v. Canada; R v. D.D., supra, footnote 3, at p. 179.

7 Ibid., at p. 175.

8 Ibid., at p. 178.

9 Ibid., at pp. 176-178. The countries considered included: the United Kingdom, Australia, New Zealand, and the United States.

10 Ibid., at p. 179.

11 According to Sexual Assault Centre counsellors, confidentiality is a major concern for women considering going to the police. See: supra, footnote 2; and "To name or not to name, that's the question," Montreal Gazette, April 11, 1985, p. B3.

12 Law Reform Commission, supra, footnote 1 at p. 20.

III. SENTENCING

According to section 246.1, the first level of sexual assault is a hybrid offence. As such, it can be prosecuted summarily or by indictment. If proceeded with summarily, this offence can result in a fine of not more than $500. or imprisonment for 6 months or both.[1]

Under section 246.2, sexual assault with a weapon, threats to a third party or causing bodily harm, is treated as a more serious offence. It is indictable and subject to a maximum penalty of fourteen years.

Aggravated sexual assault is the most serious form of sexual assault. The maximum penalty for this offence is life imprisonment.

The following chart[2] indicates the severity of the penalties for the 3 levels of sexual assault in relation to comparable offences in place prior to the 1983 amendments:

Indecent assault on a female	5 years	Sexual assault	10 years
Indecent assault on a male; Attempted rape	10 years	Sexual assault with a weapon, etc.	14 years
Rape	Life imprisonment	Aggravated sexual assault	Life imprisonment

Although the maximum sentences for the three levels of sexual assault are set by statute, the range of sentences to be applied will be determined by judges on a case by case basis. The new provisions provide little direction here.[3] If past sentencing practices associated with the repealed sexual offences are any guide, the principle of deterrence will be emphasized by judges in determining sentence for the more serious forms of sexual assault.[4]

In his article "Making a Silk Purse? Sentencing: The 'New' Sexual Offences," Paul Nadin-Davis has suggested that in changing the statutory maxima applicable to the different levels of sexual assault, Parliament was not attempting to increase or lessen the severity of the penalties applicable to the sexual offences.

Rather, the intention was to provide judges with greater flexibility in setting sentence, thereby facilitating conviction.[5] According to Nadin-Davis, apart from enhancing judicial discretion, ". . . there is little either express or implied regarding Parliament's wishes in respect of sentencing patterns."[6]

Given the broader scope for the exercise of judicial discretion with respect to sentencing contained in the 1983 amendments, there is a danger that many of the objectionable features of the former substantive and evidentiary provisions relating to sexual offences will now reemerge at the sentencing stage.[7] Examples of this might include: (1) an undue emphasis on the absence of penetration; (2) considering the complainant's previous sexual history in general, or past sexual liaison with the accused in particular, as mitigating factors;[8] (3) viewing the complainant's lifestyle as somehow contributing to her chances of being sexually assaulted.[9]

If sentences are significantly reduced as a result of these factors, the realization of certain legislative goals will be negatively affected. The protection provided to potential victims through the operation of the deterrence principle will be reduced. Also, the problem of courtroom harassment of complainants will continue.

A review of the sentencing cases decided under sections 246.1, 246.2 and 246.3, reveals to what extent both the range of sentence being applied, and the factors considered by the courts in setting sentence, reflect legislative goals in this issue area.

With respect to section 246.1, sentences imposed range from 7-12 years[10] at the upper end of the scale to a suspended sentence to 3 months[11] at the other end. This compares with a range of between 3-8 years for the repealed rape provisions.[12] At least as far as section 246.1 is concerned therefore, present sentencing patterns do seem to reflect to some degree the greater flexibility provided by the 1983 amendments.

Factors affecting the severity of sentence under section 246.1 include: the nature of the sexual acts engaged in, the degree of violence involved, whether any threats were made on the victim's life, the abuse of a position of trust, and the chances of the accused's rehabilitation.

Generally, in cases where sentences of four years or more were imposed, acts of intercourse took place.[13] Less severe penalties resulted where acts short of intercourse were performed such as fellatio, cunnilingus, or genital manipulation.[14]

The degree of violence involved in the assault also seems to be a factor resulting in the setting of sentences in the higher range.[15] In R v. Imlay[16] for example, the accused was found to

be a dangerous offender and a four year sentence was imposed where a young woman was attacked and her arm twisted and broken. Threats on the life of the victim and the use of a weapon have also resulted in higher penalties. In R v. Barr,[17] the accused broke into the victim's home, held a knife to her throat and threatened to kill her if she screamed. A sentence of 8 years was imposed here--the court remarking that in cases of this type the normal range would be 6 to 8 years. Similarly, in R v. Lafford[18] a sentence of 8 years was upheld where the accused made threats with a knife and inflicted bodily harm on the victim by beating her. The court considered these events as aggravating factors.

The age of the victim and the abuse of a trust relationship seem to be aggravating factors.[20] Nevertheless, in a number of cases involving particularly young victims, sentences at the lower end of the scale were imposed. In R v. Munsie[21] for example, the accused performed cunnilingus on a 2 1/2 year old child. A sentence of only 3 months plus 3 years probation was imposed on the grounds that, despite the young age of the victim, no previous relationship of trust existed. Similarly in R v. Sandeman-Allen,[22] a sentence of 9 months and 3 years probation was imposed where the accused fondled a 2 year old's genitals and ejaculated into her mouth.

In cases like these at the lower end of the scale, the courts were influenced by the accused's chances of rehabilitation or the unlikely possibility of a repetition of the offence.[23]

Cases at both the upper and lower end of the spectrum stress the need to focus on general deterrence[24] in determining the appropriate sentence for an offence under 246.1. In cases at the lower end of the scale however, the courts weighed heavily the need to deter that particular accused.[25]

In general, mitigating and aggravating factors considered by the courts in the sentencing cases decided under 246.1, do not suggest an adoption of the more objectionable features of the pre-1983 substantive and evidentiary provisions. The complainant's previous sexual history or lifestyle were generally not considered relevant to the determination of sentence. In one case, for example, the fact that the complainant was hitchhiking when the accused picked her up in his car, was found to be a neutral factor by the court.[26]

The presence or absence of penetration on the other hand, still seems to be considered as relevant to sentence. By concentrating on this aspect, the court shifts the focus of the inquiry from a concern about physical violence to the disclosure of intimate sexual details. This focus may contribute to courtroom harassment of complainants.

With respect to section 246.2, sentences imposed are somewhat higher than those under section 246.1, reflecting the

more serious nature of the offence.[27] Sentences at the upper end of the scale range from 8 years to an indeterminate period[28] (under the dangerous offender provisions). At the lower end of the scale sentences range from 2 to 4 years.[29]

As with section 246.1, sentences in the upper range were imposed under section 246.2 in situations involving a particularly high degree of violence.[30] The possibility of rehabilitation seemed to be viewed as a mitigating factor under this section.[31]

The need for both general and specific deterrence was stressed by the courts in imposing sentence under 246.2.

As with section 246.1, when the complainant's conduct was raised by defence counsel under section 246.2, it was generally found to be irrelevant by the court. In R v. Terceira[32] for example, the fact that the complainant was a prostitute did not make the offence any less serious in the eyes of the court. Similarly, the fact that the complainant voluntarily entered a residence where the offence ultimately occurred, was found irrelevant by the court in R v. Baynham et al.:

> The issue to which I refer is the alleged foolishness on the part of the complainant for having entered this residence in the first place. Whether the complainant was or was not foolish in doing what she did at the time is, in my view, a non-issue . . . . To suggest otherwise leads only to the conclusion that this complainant or anyone else in similar circumstances 'asked for it,' to use a common expression. That is an unacceptable and intellectually unsound approach to matters such as these.[33]

These cases in particular represent a retreat from the more objectionable features of the repealed rape laws which suggested that sexually active women were suspect and not entitled to the full protection of the law.[34]

With respect to section 246.3, the limited number of reported cases to date make it difficult to detect sentencing patterns.[35] In R v. Smith,[36] the accused beat and choked the complainant into silence and threatened her life. He then forced her to perform oral sex acts upon him and committed several acts upon her, short of intercourse. A sentence of 3 years plus a five year firearms prohibition was imposed. The court considered this a minimum sentence for this type of offence. The need for general deterrence and the fact that the chances of the accused's rehabilitation were good were stressed by the court.

In R v. Connors a sentence of 14 years was imposed.[37] In this case the accused abducted a 7 year old for 12 hours during which time he forced her to commit sexual acts. The court felt that the violence involved was not sufficient to justify a life

term. However, considering sentences imposed on others for similar offences, the seriousness of the offence and the fact that the accused had been convicted of indecent assault a few years earlier, the court found that a 14 year term was appropriate.

Conclusion

The maximum penalties set by statute for the three levels of sexual assault are higher than the statutory maxima for the comparable offences set out in the pre-1983 provisions. Apart from the upper limit set by statute, however, sections 246.1, 246.2, and 246.3 provide little direction to the courts in terms of the appropriate range of sentence for the different levels of assault. According to Nadin-Davis, this was done not to encourage the courts to impose higher penalties, but to provide greater sentencing flexibility to judges, thereby facilitating conviction.[38]

In terms of sections 246.1 and 246.2, the diverse range of sentences imposed by the courts seems to reflect the flexibility built in to the new provisions. If this indeed facilitates convictions, greater protection from sexual assaults will be provided to individuals through the operation of the deterrence principle.

It has been suggested that given the degree of discretion exercised by judges in determining sentence under sections 246.1, 246.2, and 246.3, some of the more problematic features of the repealed rape laws may be revived at the sentencing stage. Generally speaking, sentencing cases reviewed in this study do not follow this pattern. These cases emphasize the need to impose sentences which deter others from committing similar offences. This is consistent with the legislative goal of protecting the integrity of the person from non-consensual sexual contact.

Sentencing cases decided under sections 246.1 and 246.2 have also viewed violence accompanying the assault as an aggravating factor. This appropriately emphasizes the assaultive aspects of such attacks.

Generally, courts have not considered the complainant's sexual history or lifestyle as justifications for less severe penalties under sections 246.1 and 246.2. In fact, in certain cases where the conduct of the complainant was raised, its irrelevance to the severity of sentence was emphasized by the courts. In R v. Terceira[40] for example, the fact that the complainant was a prostitute did not affect the setting of sentence.[41] Similarly, in R v. Page, the fact that the complainant was hitchhiking when picked up by the accused was not viewed as a mitigating factor.

Although lifestyle and previous sexual conduct do not seem to affect sentencing decisions, the presence or absence of

penetration is still seen as an aggravating factor. This may be justifiable if intercourse is viewed as a more serious violation of bodily integrity than other non-consensual sexual acts. Nevertheless, if this feature is highlighted without regard to the general degree of violence involved, complainants may be compelled to focus on the intimate physical details of the attack. This may result in courtroom harassment of complainants.

Of even greater concern however, is the court's approach to sentencing in cases involving victims of tender years. Although the age of the victim and the abuse of a position of trust are cited as aggravating factors, minimal sentences were imposed in a number of cases involving child victims.[42] Given the gravity and extent of the problem of sexual abuse of children, these relatively light sentences are somewhat anomalous. If this pattern continues, the protection of children from sexual contact will be limited.

With respect to section 246.3, the number of reported cases to date is too limited to indicate any sentencing pattern.

REFERENCES

1 This is the general penalty for summary conviction offences. See: section 722(1) of the Code.

2 C.L.M. Boyle, Sexual Assault (Toronto: Carswell, 1984), p. 172.

3 Ibid.

4 R. P. Nadin-Davis, "Making a Silk Purse? Sentencing: The 'New' Sexual Offences" in The New Sexual Assault Legislation (Vancouver: Continuing Legal Education, 1983) p. 10.2.01 at pp. 10.2.08-10.2.09.

5 Ibid., at p. 10.2.02.

6 Ibid., at p. 10.2.04.

7 Ibid., at p. 10.2.11.

8 See: "Judge's comments on assault case anger women's groups," Ottawa Citizen, May 17, 1985, p. A5, where an Ontario Supreme Court Judge in determining sentence for a sexual assault charge, concluded that the gravity of the offence was reduced due to the fact that the victim had been previously involved with the accused.

9 See for example: R v. Brown (1983), 34 C.R. (3d) 191 (Alta C.A.) as cited by Boyle supra, footnote 2, at p. 176, where an eight year sentence was reduced to four years on the grounds that the complainant was contributorily negligent in going up to the accused's apartment between 2:00 and 3:00 a.m.; See also: "Bowlby J. catches flak over courtroom remarks," Ontario Lawyer's Weekly, February 22, 1985, p. 2, where Judge Bowlby in a sentencing hearing for a sexual assault charge, described the complainant who was a stripper, as being in the profession of promoting "lust."

10 R v. Lizotte, [1985] B.C.D Crim. Sent. 7517-03 (B.C.C.A.); R v. Barr, [1985] B.C.D. Crim. Sent. 7517-01 (B.C.C.A.); R v. Bouck (1983) Cdn. Sentencing Digest par. 75A.5 (B.C.C.A.); R v. Lafford (1983), 11 W.C.B. 47 (N.S.C.A.).

11 R v. Baillie (1984), 12 W.C.B. 458 (Ont. H.C.J.); R v. Munsie (1983), 9 W.C.B. 487 (B.C.C.A.); R v. King, [1984] B.C.D. Crim. Sent. 7517-06 (B.C.C.A.); R v. Smaaslet, [1985] B.C.D. Crim. Sent. (B.C.C.A.); R v. Kippenhuck (1984), 45 Nfld. and P.E.I.R. 179 (Nfld. C.A.); R v. Herritt (1984), 12 W.C.B. 179 (N.S.C.A.).

12 R. P. Nadin-Davis, Sentencing in Canada (Toronto: Carswell, 1982) pp. 234-237; In contrast, Ruby sets the range at between 1 and 12 years for rape. See: Boyle, supra, footnote 2 at p. 173.

In comparing the range of sentences applied to the old offence of rape and the new offence of sexual assault, it is important to remember that some of the more serious forms of sexual assault which would formerly have resulted in a rape charge will now result in charges being laid under sections 246.2 and 246.3 and not under 246.1.

13 R v. Barr, supra, footnote 10; R v. Bouck, supra, footnote 10; R v. Lafford, supra, footnote 10; R v. T (1984), 12 W.C.B. 114 (Alta C.A.).

14 R v. Munsie, supra, footnote 11; R v. Sandeman-Allen (1984), 12 W.C.B. 82 (B.C.C.A.); R v. Smaaslet, supra, footnote 11; R v. Kippenhuck, supra footnote 11; R v. Baillie, supra, footnote 11; R v. F.T. (1984), 12 W.C.B. 346 (Alta C.A.); R v. Williams (1984), 60 N.S.R. (sd) 29 (N.S.C.A.).

15 R v. Barr, supra, footnote 10; R v. Bouck, supra, footnote 10; R v. Lafford, supra, footnote 10; R v. Lizotte, supra, footnote 10; R v. Imlay (1984), 65 N.S.R. (2D) 57 (N.S.C.A.).

16 Supra, footnote 15.

17 Supra, footnote 10.

18 Supra, footnote 10.

19 R v. McPherson (1984), Cdn. Sentencing Digest par. 75A.6 (N.W.T.S.C.); R v. Nungaq (1984), 12 W.C.B. 179 (N.W.T.S.C.).

20 R v. Munsie, supra, footnote 11; R v. Sandeman-Allen, supra, footnote 14; R v. Smaaslet, supra, footnote 11; R v. Kippenhuck, supra, footnote 11.

21 Supra, footnote 11; See also R v. Milligan (1984), 12 W.C.B. 433 (B.C.C.A.) where a 6 month term along with 3 years probation was imposed for the sexual assault of a 3 year old.

22 Supra, footnote 14.

23 Ibid., R v. King, supra, footnote 11; R v. Baillie, supra, footnote 11; R v. F.T., supra, footnote 14.

24 That is, deterring others in society from committing similar offences as opposed to specific deterrence, which refers to deterring this particular accused from committing similar offences.

25 R v. Page (1984), 12 W.C.B. 479 (Ont. H.C.J.); R v. Milligan, supra, footnote 21; R v. McCann (1984), 13 W.C.B. (B.C.S.C.); R v. Williams, supra, footnote 14.

26 R v. Page, supra, footnote 25. But see: R v. Brown, supra, footnote 9 and "Judge's comments on assault case anger women's groups," supra, footnote 8.

27 As indicated by the higher statutory maximum for this offence.

28 R v. Terry (1984), 11 W.C.B. 390 (Ont. Cty. Ct.); R v. Lyons (1984), 65 N.S.R. (2d) 29 (N.S.C.A.); R v. Baynham et al. (1983), 12 W.C.B. 379 (Ont. H.C.J.). With respect to the accused Tuckey, a sentence of 8 1/2 years was imposed.

29 R v. Tustin (1984), 12 W.C.B. 115 (Ont. H.C.J.); R v. Baynham et al., supra, footnote 28. With respect to the accused Walsh, a sentence of 4 years was imposed; R v. Terceira (1984), 13 W.C.B. 167 (Ont. Cty. Ct.).

30 R v. Terry, supra, footnote 28; R v. Lyons, supra, footnote 28; R v. Baynham et al., supra, footnote 28 with respect to Baynham and Tuckey; R v. Williams (1983), 10 W.C.B. 401 (N.S.C.A.); R v. Fulton (1984), 12 W.C.B. 459 (Ont. H.C.J.).

31 R v. Tustin, supra, footnote 29; R v. Baynhgam et al., supra, footnote 28 with respect to the accused Walsh; R v. Terciera, supra, footnote 29.

32 Supra, footnote 29.

33 Supra, footnote 28, at p. 489. (Complete reasons for judgment.)

34 For a discussion of the former sexual history provisions see: Part II, section 3 of this report at p. 60 .

35 The two reported cases to date are: R v. Smith (1984), 12 W.C.B. 480 (B.C.C.A.); R v. Connors (1984), 60 N.S.R. (2d) 219 (N.S.C.A.).

36 Supra, footnote 35.

37 Supra, footnote 35.

38 Nadin-Davis, supra, footnote 4 at p. 10.2.02.

39 Ibid., at p. 10.2.11.

40 Supra, footnote 29.

41 Supra, footnote 25.

42 R v. Munsie, supra, footnote 11; R v. Sandeman-Allen, supra, footnote 14; R v. Milligan, supra, footnote 21.

III. CONCLUSION

Judicial interpretation of the 1983 provisions has not generally fostered the achievement of legislative objectives in most issue areas. The protection provided to victims has been limited by the application of Charter sections 2(b), 7, 15 and 11(d). Also, the exercise of judicial discretion has resulted in the resurgence of traditional principles associated with the repealed rape laws.

This is best demonstrated by a review of the emerging legal issues in relation to each legislative goal.

1. Protecting the Integrity of the Person From Non-Consensual Sexual Contact.

Prior to the enactment of Bill C-127, protection from crimes of sexual violence was limited by substantive and evidentiary rules which discouraged victims from reporting. The low reporting rate interfered with the operation of deterrence by endorsing the individual and collective notion that sexual crimes could be committed with impunity.

Unfortunately, complainants may still be reluctant to report given judicial interpretation of the new provisions. The courts' interpretation of the term "sexual" for the purposes of sections 246.1, 246.2 and 246.3, illustrates the problem. According to R v Chase, genital contact is required for a conviction under section 246.1. R v Alderton, requires an assault with the intention of having intercourse. Since Chase is being appealed to the Supreme Court of Canada, the long term impact of the two decisions is not yet clear. The existing definitions they provide however, are narrow and tend to shift the focus from the assaultive to the sexual/moral aspects of the crime. This perpetuates the social stigma traditionally attached to complainants and therefore acts as a disincentive to reporting.

Victims are also stigmatized and discouraged from reporting by judgments in other issue areas. Examples include two Supreme Court decisions striking down sections 246.6 and 246.7. These sections limit the introduction of evidence of the complainant's sexual conduct and reputation.

According to R v Oquantaq and The Queen v LeGallant, sections 246.6 and 246.7 violate sections 7 and 11(d) of the Charter. By striking down the rape shield provisions, these decisions effectively revive antiquated common law principles linking female chastity to credibility. These principles have discouraged reporting in the past and will likely continue to do so if adopted in future. This will depend to some extent

on whether LeGallant is upheld at the B.C. Court of Appeal.

Further limitations on the protection of the complainant's privacy have arisen as a result of the Canadian Newspapers v Canada case. This decision strikes down the portion of section 442(3) which makes non-publication of the complainant's name mandatory upon application. As a result, the complainant does not know for certain whether her privacy will be respected. Under these circumstances, fear of adverse publicity may discourage reporting.

Case law interpreting the new provisions limits protection from non-consensual sexual contact in other respects. The narrow definitions of sexual assault set out in Chase and Alderton, for example, recognize and protect individual physical integrity in a fairly limited range of situations. Chase does not include the forcible touching of breasts or buttocks in its definition of sexual assault. Alderton excludes assaults which involve sexual organs, but are performed in order to humiliate and degrade the victim and not to provide sexual gratification for the accused. Neither definition encompasses the full range of physical and mental elements which evidence suggests often make up violent sexual encounters. This problem may be resolved when the Supreme Court of Canada hears the Chase appeal.

The protection provided to potential victims may also be limited by the courts' interpretation of section 246.4. This provision abolishes the corroboration requirement in relation to certain sexual offences.

On its face section 246.4 appears to facilitate convictions. Nevertheless, the section does not prevent judges in their charge to the jury, from focussing on the frailties of the victim's evidence. In the one reported case under this section, a reluctance to convict without corroboration was still evident although the victim was an adult. If this attitude continues to prevail despite the existence of section 246.4, the number of convictions could be limited unjustifiably.

Although cases in most issue areas have the effect of limiting protection from non-consensual sexual contact, exceptions to this pattern are worth noting. The recent Ontario Court of Appeal decision of R v Bernard for example, has found that sexual assault causing bodily harm is a crime of general intent for which intoxication is no defence. It seems likely that this ruling will also be applied to the other sexual assault offences. This case facilitates convictions by ruling out a defence which might otherwise be available.

In the area of sentencing, the diverse range of penalties imposed by the courts under sections 246.1 and 246.2, also seem to reflect a desire to facilitate conviction as suggested

by Nadin-Davis. Furthermore, the sentencing cases' emphasis on general deterrence is consistent with the legislative goal of providing greater protection.

2. Protecting Children From Sexual Contact.

Many of the major questions affecting the sexual exploitation of young people were left unanswered by Bill C-127, pending further research and public input. This report does not therefore, purport to deal comprehensively with sexual offences as they relate to children. Nevertheless, certain aspects of Bill C-127 are particularly relevant where child victims are involved. Judicial interpretation of these provisions is reviewed here.

Under the 1983 amendments, fundamental problems have arisen with the courts' handling of sexual assault cases involving children. The purpose of section 246.1(2), which was to protect children under 14 from sexual exploitation, has been thwarted by case law. Two of the three reported cases applying the section have interpreted it as not excluding the defence of honest mistake. This approach will not protect children from the assailant who suspects the victim is under 14, but doesn't bother to find out, and then uses his age to influence them to consent to a sexual encounter.

Of greater concern however, is the recent B.C. Supreme Court case of The Queen v LeGallant. This decision strikes down section 246.1(2) as violating the Charter's prohibition against age discrimination. An appeal of the case is presently pending.

If LeGallant is upheld by the B.C. Court of Appeal and followed in other cases, children will no longer be protected by section 246.1(2) if they appear to consent to sexual acts with an adult without understanding the emotional consequences of their own actions.

In situations of this kind it is not clear that section 244(3)(d) provides adequate protection as suggested by the court in LeGallant. This section vitiates consent where a complainant submits because of the exercise of authority. Unfortunately, however, the section may only apply where the adult involved is unequivocally in a position of authority vis a vis the child and the consent was obtained by virtue of that authority. Section 244(3)(d) provides no protection in situations where a child is sexually exploited by an adult whom the child trusts, but who is not in a position of authority. Given its limited application, therefore, section 244(3)(d) is no substitute for 246.1(2).

The protection of children from sexual contact is further limited by the continued application of the traditional corroboration rules despite the passage of 246.4. Case law interpreting this section suggests that with respect to the sworn evidence of child complainants, judges must still direct their minds or the minds of the triers of fact, to the particular frailties of children's evidence. This practice continues despite evidence indicating that a child's powers of observation and recall are not necessarily as limited as once thought. Sexual abuse of children often occurs in private. The continued application of the traditional rules of corroboration therefore, will make it particularly difficult to obtain convictions where children are involved.

Sentencing practices may also restrict the protection provided to children through the operation of deterrence. Although sentencing courts have cited the age of the victim and the abuse of a position of trust as aggravating factors, a number of cases have imposed minimal sentences where child victims were involved. If this pattern continues, protection from sexual contact will be limited.

3. Eliminating Sexual Discrimination from the Criminal Code.

Many of the provisions contained in Bill C-127 were meant to degenderize the sexual offences and thereby eliminate sexual discrimination from this part of the Code. The crime of rape, for example, which by definition could only be committed by a male upon a female, was changed to sexual assault, which could be committed by a male or female upon a male or female victim.

Given the limited number of cases *not* involving a female victim and male principal, it is too soon to know whether the new provisions are in fact being applied and enforced in a non-discriminatory fashion. Only two cases analyzed in this study did not follow the predominant pattern of male principal and female victim. In both cases one male was charged with sexually assaulting another male. In both situations acquittals resulted.

It may be that the traditional pattern predominates because of discriminatory enforcement practices at the pre-trial stage. On the other hand, the pattern may simply reflect the fact that the majority of sexual assault victims are female, and the majority of assailants, male.

Bill C-127 also attempted to abolish certain prejudicial evidentiary rules which had a disproportionate impact on women. Section 246.4 for example, removes the corroboration requirement for the 3 sexual assault offences, gross indecency,

and incest.

The new evidentiary provisions have been interpreted by the courts in such a way as to perpetuate historical biases against victims of sexual crimes. In the one case interpreting section 246.4 as it applies to adult victims, for example, the court acquitted because of the absence of evidence implicating the accused independently of the victim's testimony. This analysis is reminiscent of pre Bill C-127 case law suggesting that corroboratory evidence must unequivocally implicate the accused independently of the complainant's testimony. The reemergence of this type of approach indicates that the evidence of female victims may still be considered unreliable by the courts despite the 1983 amendments.

Similar problems have arisen with the courts' interpretation of section 246.5, which abolishes the rules of recent complaint. Cases construing this section have suggested that it does not prevent the defence from attacking the victim's credibility by alleging recent fabrication on the basis of her failure to complain when it would have been "natural" to do so. These rulings effectively put the complainant in a sexual assault case in the same position she was in prior to the amendments. The new cases revive the historically unfounded presumption that the virtuous woman would complain at the first possible opportunity.

Given the limited number of higher court decisions interpreting section 246.5, it is difficult to know whether these early cases will be followed. If they are, the 1983 amendments will not have fully achieved the legislative goal of eliminating discrimination.

4. Concentrating on the Violent Nature of Sexual Assaults.

Bill C-127 abolished the crimes of rape and indecent assault. These offences were included in Part IV of the Criminal Code which was entitled "Sexual Offences, Public Morals and Disorderly Conduct." They were replaced by the three levels of sexual assault set out in sections 246.1, 246.2 and 246.3. The new offences were included in Part VI of the Code entitled: "Offences Against the Person and Reputation." The inclusion of the new sexual assault offences under Part VI was symbolic. It reflected a desire to treat sexual offences as crimes of violence, and not morality.

Generally, in interpreting the new provisions, courts have had trouble shifting their focus from morality to violence. Two major cases to date have construed the substantive provisions in such a way as to highlight the sexual/moral aspects of the crime of sexual assault. In R v Chase, the New Brunswick

Court of Appeal singled out as the key fact the presence or absence of genital contact. In The Queen v Alderton, the Ontario Court of Appeal highlighted the presence or absence of a desire for sexual gratification on the part of the accused. Since Chase is being appealed to the Supreme Court of Canada, an authoritative definition will soon be provided. If Chase is not overturned however, there is a danger that issues of personal sexual morality will resurface as the major preoccupation in sexual assault cases.

This danger is also manifest in the courts' interpretation of evidentiary provisions contained in Bill C-127. Both sections 246.4 and 246.5 attempt to abolish special rules of evidence applicable only to victims of sexual attacks and not to victims of other violent offences against the person. The one case interpreting section 246.4 as it applies to adults, R v Vokey (No. 2), resulted in an acquittal on the grounds that there was no independent evidence confirming the complainant's testimony. Section 246.4 was meant to abolish the corroboration requirement with respect to certain sexual offences.

Although the court in Vokey did not actually state it was unsafe to convict without corroboration, in fact the court seemed unwilling to convict in the absence of evidence independent of the victim's testimony. The adoption of this approach by other courts is not consistent with an intention to treat sexual assault victims more like the victims of any violent attack against the person. In fact this case perpetuates the notion that special considerations ought to be made when evaluating the evidence of a sexual assault victim.

Traditional attitudes are also evident in the courts' interpretation of section 246.5. This section abolishes the rules respecting recent complaint. Prior to the enactment of Bill C-127, these rules applied in prosecutions for sexual offences. Cases decided under section 246.5, do not prevent defence counsel from attacking the victim's credibility by alleging recent fabrication on the basis of her failure to complain when it would have been "natural" to do so.

On a theoretical level this ruling is consistent with general principles of evidence. In practice however, it specifically penalizes sexual assault victims who do not complain promptly. This effect arises because of the historical assumption that rape victims lack credibility if they do not complain at the first reasonable opportunity.

Sentencing cases reflect more closely the desire to concentrate on the assaultive aspect of sexual assault. Cases imposing sentence under sections 246.1 and 246.2 have appropriately viewed a high degree of violence accompanying the

attack as an aggravating factor. With respect to section 246.3, the number of reported cases is too limited to indicate any sentencing pattern.

Problems arise with the courts' tendency to view penetration as an aggravating factor however. The consideration of this element in isolation, may shift the focus from violence to sex.

Courts have suggested that sexual assault is a crime of general intent to which the defence of intoxication does not apply. By requiring a mental element analogous to that applied to other assault offences, this interpretation is consistent with the goal of focussing on the violence of such crimes.

5. Protecting Complainants From Harassment in the Courtroom.

With respect to sexual offences, many of the traditional evidentiary and substantive rules had the effect of traumatizing the victim in court, thereby contributing to a low reporting rate. Particularly problematic was the requirement of proving penetration in rape cases and the practice of cross-examining the complainant regarding her previous sexual conduct or her reputation for chastity.

Proof of penetration is not required to obtain a conviction for sexual assault. Nevertheless, emerging definitions may still contribute to courtroom harassment of complainants.

In R v Chase, the New Brunswick Court of Appeal held that in order for an assault to be sexual, there had to be genital contact. As a result of this ruling complainants in their testimony will still be compelled to highlight intimate physical details. Like the penetration requirement, this may contribute to continued harassment during cross-examination.

Sentencing cases which consider the presence of penetration as an aggravating factor, may have a similar effect.

In terms of evidence of the victim's previous sexual conduct and reputation, sections 246.6 and 246.7 now exclude such evidence with limited exceptions. Two cases at the Supreme Court level The Queen v LeGallant and R v Oquantaq, however, have struck down these new sections as violating the accused's right to a fair trial and to make full answer and defence.

The impact these two decisions will have on complainants in court is not yet clear. LeGallant is being appealed to the B.C. Court of Appeal. Also, both decisions seem to conflict

with earlier cases, upholding sections 246.6 and 246.7.

The future application of LeGallant and Oquantaq may revive common law rules regarding evidence of sexual history and reputation. These rules permit cross-examination of the victim regarding previous sexual conduct and reputation. Such practices have been extensively criticized in the past for putting the sexual morality of the victim on trial rather than the violent behavior of the accused. If they are resumed now, many of the potential gains provided by Bill C-127 will be lost -- particularly the alleviation of courtroom trauma for the victim.

Additional problems are raised by the decisions interpreting section 246.5. This section abolishes the recent complaint doctrine. Cases interpreting the section have found that it does not prevent defence counsel from attacking a sexual assault victim's credibility if she does not complain when it would have been "natural" to do so. According to these cases, this could be done by an allegation of recent fabrication on the basis of the victim's silence.

Given the limited number of higher court decisions interpreting section 246.5, it is not clear whether the above construction will prevail. If it does, sexual assault victims may be subjected to traumatizing cross-examination regarding their failure to complain promptly. This could occur even if the delay were due to feelings of shame or legitimate concerns about going through the process of investigation and trial.