Dignifying Equality

The Challenge of Reform in Sexual Assault Proceedings

BY MARGARET DENIKE

Les auteures recensent les façons dont la standardisation actuelle des pratiques de la collection d'évidences médico-légales continue de perpétuer les biais invoqués quand il s'agit de corroborer les agressions sexuelles.

On February 25, 1999, the Supreme Court of Canada released its unanimous decision in *R.* v. *Ewanchuk*, a case from Alberta in which the accused, Steve Ewanchuk, was charged with sexually assaulting a 17-year-old woman during a job interview. This case has granted public exposure to some of the insidious features that are unique to sexual assault trials. Not the least of these features include what Supreme Court Madame Justice Claire L'Heureux-Dubé has previously described as the "tenacity" of discriminatory beliefs and stereotypical assumptions about sexual assault complainants in the judiciary and in society in general (*R.* v. *Seaboyer* 269–81). The "bonnets and crinolines" case, as it has been called, has heard the trial court judge and the majority of the Alberta Court of Appeal give voice to notions about women's sexual proclivity, as well as their credibility, that should have no place in Canadian law.

In *Ewanchuk*, the evidence at trial was that the complainant, having arranged to meet Mr. Ewanchuk for a job interview at a shopping mall, reluctantly followed him into his trailer. After closing the door, he made progressively intrusive sexual advances to which the complainant said "no" three times. She testified that she was very afraid, yet she tried to project a confident demeanor, in the hope of warding off a more violent assault. The trial judge, Alberta Queen's Bench Justice John Moore, accepted the complainant's testimony that she did not consent in her own mind to any of the sexual touching; however, he acquitted Ewanchuk on the basis that her conduct, *objectively construed*, constituted "implied consent" to the sexual touching. On appeal, the majority of Alberta's Court of Appeal (with Chief Justice Catherine Fraser vigorously dissenting) upheld the acquittal on the basis that the complainant's dress and conduct raised a reasonable doubt about her lack of consent. The lower courts fully accepted the evidence that the complainant said "no," that she explicitly refused the sexual advances, and that she did not consent "in her own mind." The critical issue in this case then was not about whether the complainant consented, it was rather about the discretion of judges to determine whether, and if, the complainant's behaviour or dress "implied" consent.

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"It must be pointed out," Justice John McClung said in his decision,

> that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines.... She was the mother of a six-month-old ... along with her boyfriend, she shared an apartment with another friend. (*Ewanchuk* 1998, para. 4)

The Supreme Court of Canada took to task the inappropriateness of the sexual ideology that informs Justice McClung's remarks. It unanimously held that, first, the trial judge erred in his understanding of the defence of consent in sexual assault, and that the defence of "implied consent" did not exist in Canadian law. In convicting Ewanchuk, it ruled that contrary to the findings of the lower courts,

> The trial record conclusively establishes that the accused's persistent and increasingly serious advances constituted a sexual assault for which he had no defence. (*Ewanchuk* 1999, para. 59)

It is ironic that the case has achieved its notoriety less from the inappropriateness of the comments made about the complainant by the Alberta Appeal Court Justice John McClung, both in his decision and extra-judicially to the media, than those made by him later in an open letter to *The National Post*, attacking Supreme Court Madame Justice Claire L'Heureux-Dubé (McClung 1999a). Targeting her separate, concurring

reasons for the judgment in this case, McClung claimed that L'Heureux-Dubé's "personal conviction ... could be a plausible explanation for the disparate (and growing) number of male suicides being reported in the province of Quebec" (McClung 1999a).

Together with his subsequent remarks to *The National Post* that L'Heureux-Dubé harboured "consistently anti-male attitudes" (Schmitz), Justice McClung transformed this case into a spectacle of the very forms of misogynist judicial and extra-judicial reasoning and behaviour that have been challenged by reform initiatives of advocacy groups, public education campaigns, and Parliament for the past 20 years.

The ruling of Madame Justice Claire L'Heureux-Dubé, supported by Justice Charles Gonthier, also questioned Justice McClung's rationale for finding occasion to make such reference to the complainant's per-sonal and sexual circumstances. McClung's comments suggested that the complainant was "a person of questionable moral character because she is not married and lives with her boyfriend and another couple" (*Ewanchuk* 1999, 88). Justice L'Heureux-Dubé held that the majority decision of Alberta's Court of Appeal, like that of the trial judge before it, was derived not from findings of fact, but from inappropriate myths and stereotypes. Citing Chief Justice Catherine Fraser in dissent of the Alberta majority, L'Heureux-Dubé concurs that such assumptions effectively "den[y] women's sexual autonomy and impl[y] that women are in a state of constant consent to sexual activity" (*Ewanchuk* 1999, 84).[1]

The provincial court decisions in *Ewanchuk* make apparent the extent to which members of some judicial circles have aggressively resisted the objectives of Parliament to enact reforms to judicial procedure, and the extent to which notions about women's sexual proclivity continue to be cultivated within the judiciary. *Ewanchuk* also revisited questions about the interpretation of the laws on "consent" and the relevance of the personal and sexual history of the complainant to the issues at trial.

Ewanchuk is the first of three important sexual assault cases that the Supreme Court of Canada is to decide in 1999. These decisions, together, will close a decade of a struggle between Parliament and the courts to implement reforms in sexual assault proceedings, to eradicate the ideologies and practices of discrimination, and to eliminate the barriers that have deterred women from pursuing rape charges. They will close a millennium of common law that has reproduced and reinforced patriarchal assumptions about the sexual availability and credibility of rape victims, which have compromised sexual equality, and have served as impediments to achieving fundamental justice.

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Still to be decided by the Supreme Court of Canada this year are two constitutional challenges to the new sexual assault provisions. *R.* v. *Mills*, another case from Alberta, was heard in January and is yet to be released. This case challenges the latest *Criminal Code* amendments introduced by Parliament through Bill C-46[2] in May 1996. These legislative amendments were aimed at restricting defence counsel's practice of compelling the production of the complainant's personal medical and psychiatric records, largely to impugn their credibility. Also to be heard this year is *R.* v. *Darrach*, an Ontario appeal, which challenges the very "rape shield" amendments at issue in *Ewanchuk*. These were introduced through Bill C-49[3] in August 1992, and were aimed at prohibiting the examination of a complainant's sexual history. Two decades of equality-seeking activism have informed this legislation through extensive consultations, court case interventions, and lobbying initiatives by organizations such as the National Association of Women and the Law (NAWL), the Women's Legal Education and Action Fund (LEAF), the Disabled Women's Network (DAWN), and the Canadian Association of Sexual Assault Centres (CASAC).

Interestingly, what was not admitted into evidence in *Ewanchuk* was that the accused, Mr. Ewanchuk, had three prior sexual assault convictions. Respecting the s.7 *Charter* rights to a fair trial, the "past acts" of the accused are typically excluded, even if they involve sexual violence resulting in convictions, and "would therefore be much more probative of the matter at issue between the accused and the victim" (Sheehy 164). This form of "past act" evidence, as Sheehy explains, is viewed as

> too prejudicial to the "right" of the accused to be presumed innocent until proven guilty, and as an unreliable indicator of the accused's subsequent behavior. (164)

The fact that this consideration of fundamental rights holds only for the accused has thrown into relief the differential treatment of complainants and witnesses in sexual assault trials. It also shows the extent to which only women's personal histories, including their sexual

activity, and their medical, therapeutic or psychiatric records, are used as evidence to impugn their credibility when they testify as witnesses. These defence tactics of personally attacking complainants, and making use of discriminatory myths to do so, are used almost exclusively in sexual assault proceedings. They are very rarely tolerated in other domains of criminal law. Various writers and advocates, in conjunction with women's legal organizations and support services for victims of violence and sexual assault, have worked to raise awareness about the effects of defence counsel's tactics of intimidating victims, and the extent to which their "fishing expeditions" have been tolerated by evidentiary procedure in sexual assault trials.

In a brief issued by NAWL to the Standing Committee on Bill C-46, Diane Oleskiew and Nicole Tellier's 1997 study of the nature and frequency of defence counsel requests for third-party records, indicates that over 80 per cent of all recorded requests were made in sexual assault trials. A more recent Quicklaw study by Karen Busby[4] has subsequently confirmed these findings. The frequency of such requests and of corresponding judicial orders which have found personal records "relevant" to the issues at trial convey what Oleskiew and Tellier describe as a "defacto assumption that women lie about rape." It is an assumption that thrives particularly in and through judicial discretion. As Sheehy has argued, the beliefs which give life to our notions of "relevance" are reflective of patriarchal culture," and they reinforce myths about female sexuality that "systematically deny control and credibility to those who do not belong to the dominant culture" (166).

Common law has always viewed victims of sexual assault with suspicion and distrust, as both the Supreme Court and Parliament have acknowledged (Department of Justice 2). It has actively participated in the cultivation and dissemination of such beliefs in the determination of "relevant" evidence.

Typical rape myths that have "improperly formed the background for considering evidentiary issues in sexual assault trials," as was the case in the lower court decisions in *Ewanchuk*, include "false concepts" that only "bad girls" are raped and that any woman who is not clearly of "good character" is more likely to have consented (*Ewanchuk* 1998, 94). A constitutional equality analysis of this situation begins with the recognition that sexual offences are committed primarily by men against women. The familiar use of a complainant's sexual history, like the much newer tactic of ordering the production of medical and psychiatric records, in this context gives rise to corollary inequalities:

> The production order is directed at one gender; it is undertaken for the "benefit" of the other gender; it perpetuates stereotypes and societal myths directed at women; and it impedes effective access by women to the criminal justice system. (Department of Justice 2)

Furthermore, equality advocates have argued that women's access to the criminal justice system is consequentially impeded in ways that are much more subtle, particularly in view of the judicial tolerance of "fishing expeditions" into the complainant's personal history. Although these practices are explicitly employed to silence and intimidate women who have been sexually assaulted, they operate more subtly by reinforcing perceptions that complainants who have sought counselling are unstable, unreliable, and suspect as witnesses in a criminal court of law. Additionally, the impact of such tactical disincentives for reporting sexual assaults and pursing convictions supports the prevalence of violence committed by one gender against another (Department of Justice 2).

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The recent historical context of advocacy work sheds light on the significance the Supreme Court's revisitation of the evidentiary issues pertaining to sexual assault. As is succinctly summarized by Roberts and Mohr's study of the extensive consultations and the correlative reforms of the past 15 years, we have seen tremendous activity around sexual assault in the legislative and judicial arenas, and perhaps more immediately through the media, public awareness campaigns, and social and political advocacy. Since the repeal of the rape laws and the creation of sexual assault legislation in 1983 (Bill C-127), legislative amendments have been introduced to eliminate the unique evidentiary and procedural biases of sexual assault trials, and particularly those that compromise the equality rights of complainants and serve as impediments to women seeking redress through the judicial system.

In 1992, through Bill C-49 legislative amendments to the sexual assault provisions in the *Criminal Code* were introduced in the wake of "public outrage" over the *Seaboyer* case. In this case the Supreme Court of Canada struck down s.276 of the *Criminal Code*, which limited the questioning of victims in sexual

assault trials about their sexual history. Steven Seaboyer and Nigel Gayme, two men accused of rape, successfully argued that the "rape shield" laws which provided a blanket restriction on the use of complainants' sexual histories violated their rights to a fair trial. The majority decision was described as a "devastating blow to women's rights in Canada" as it repealed the short-lived protections introduced in 1982 (Roberts and Mohr 10).

Various writer have acknowledged the role of the dissenting judgement of L'Heureux-Dubé, in particular, in informing the "reactive" legislation that was introduced in the immediate wake of this decision. Roberts and Mohr, for example, describe her 80-page dissenting judgement in *Seaboyer* as a strong and passionate argument against the striking down of the rape shield laws. Her dissent, they added, "provided the grounds for perhaps the strongest and most effective lobby effort of women's groups that Canada has ever witnessed" (10). So even though the *Seaboyer* decision

> signaled an end to what many women had seen as a decade of important changes in attitudes and perceptions surrounding the "new" sexual assault laws, it also inaugurated an active new phase of redefining and restructuring the legal terrain. (Roberts and Mohr 10)

Thus the guiding principles of Bill C-49 acknowledge that evidence of a complainant's sexual history is "rarely relevant" at sexual assault trials, so "its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence" (Bill C-49). It also provides for the first time in Canadian legal history a positive definition of the concept of "consent" as it applies to sexual assault, and it restricts the defence of mistaken belief in consent in respect to sexual assault offenses.

Roberts and Mohr, however, identify the concern shared by writers and advocates who have participated in the extensive consultation processes, and have monitored the social and legal reforms relating to sexual assault. Despite the promise of Parliament's objectives, there is good reason to be skeptical about the "degree to which statutory revisions ... can effect changes in the behavior of criminal justice personnel" (13). Writers and advocates have lamented the failure of sexual assault legislative reform among the judiciary to result in

> a corresponding change of attitudes on the part of those who were and are in a position to develop legal definitions.... It may be a long while before the "no means no" intent of the law is understood by judges and lawyers alike. (Roberts and Mohr 4)

Justice L'Heureux-Dubé acknowledges the "history of government attempts to remedy the demonstrated inability of the judiciary to change its discriminatory ways." She adds that it was the discretion accorded to trial judges which "saturated the law in this area with stereotype" in the first instance, and the "tenacity of these discriminatory beliefs" today only shows that "discretionary decision making in this realm is absolutely antithetical to the achievement of government's pressing and substantial objective" (*Ewanchuk* 1999, 95).

Conversations with some counsel

> indicate that in some judicial settings, the mere suggestion that gender equality is relevant to the delineation of the rights of an accused person, or to the assessment of the relevance of evidence, sets one up as a hysterical crusader, rather than as a responsible and thorough advocate. (McInnes and Boyle 344)

McInnes and Boyle offer as an example the exchange between Crown counsel ("a woman noted for her commitment to improving the experience of sexual assault complainants in sexual assault trials") and the trial judge, as recorded in the pre-trial transcript of the *O'Connor* case (McInnes and Boyle 344, note 12). After Crown explained that the practice of ordering the production of a complainant's personal records was almost exclusive to sexual assault offences, and was thus "tantamount to gender bias," the trial judge responded: "Excuse me, I do not know if you are now on a crusade or if you are acting as Crown counsel because it seems to me that your personal views are clouding your professional integrity." Interrupting Crown's submissions, he demanded that he would "not hear any more of this" and that Crown should instead "get on with the issues in this case" (McInnes and Boyle 344). The integration of equality rights into judicial reasoning has not been without profound resistance.

McInnes and Boyle acknowledge that if there is to be any meaningful recognition within the judiciary of the forms of conduct that are particularly harmful to society, then the issue of equality rights cannot be ignored or treated superficially as a "special interest."

> The judicial understanding of notions such as relevance and consent in the context of sexual assault crimes ought to be premised on the equality of men and women, so that egalitarian concerns begin to influence prevailing institutions about what is or is not fundamentally unjust. (McInnes and Boyle 356)

Judicial discretion, and particularly substantive (as well as procedural) rules can either confront or reinforce the long-standing practice of trivializing equality (McInnes and Boyle 357), just as it can the mythology that buttresses this practice. As is the case with the lower court judgements in *Ewanchuk*, *Mills*,

and *Darrach*, the toleration of defence tactics of attacking the credibility of female complainants on the basis of archaic stereotypes shows equality being eclipsed by the s.7 rights of an accused to a fair trail. Such a practice should be seen as a "judicial blindness or indifference to the fact that sexual assault is a form of the relegation of women to a lower social status" (McInnes and Boyle 357). If indeed we are to realize the possibility that both the s.7 rights of the accused and the s.15 rights of the complainant may coexist, then the equality rights of those predominantly targeted for sexual assault must be "taken into account directly and explicitly in defining the principles of fundamental justice" (McInnes and Boyle 358). Such an objective has been tirelessly promoted and, at times, successfully introduced in judicial circles, particularly through legislative reform. It is, however, immediately compromised and eroded by the stereotypical assumptions and rape myths that continue to thrive in and beyond the judiciary, even if, as Justice McLachlin ruled in *Ewanchuk*, in support of Justice L'Heureux-Dubé, such assumptions "no longer find a place in Canadian law" (*Ewanchuk* 1999, 103). In the sexual assault appeals of the1980s and early 1990s, the majority of the Supreme Court consistently interpreted the provisions of parliament in a way that emptied them of their equality guarantees.But if the spirit of such comments by McLachlin signals a new judicial hermeneautics, we can only hope that they will now inform the majority of decisions to come.

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[1]Here L'Heureux-Dubé is citing Chief Justice Catherine Fraser's earlier dissent in *Ewanchuk* (1998, 67).
[2]*An Act to Amend the Criminal Code (production of records in criminal proceedings)*, S.C. 1997, c. 30.
[3]*An Act to Amend the Criminal Code*, S.C. 1992, c. 38.
[4]See Appendix to LEAF's Factum in *R.* v. *O'Connor.*

References

An Act to Amend the Criminal Code (production of records in criminal proceedings), S.C. 1997, c. 30.
An Act to Amend the Criminal Code, S.C. 1992, c. 38.
Department of Justice. "Confidential Records and Communications of Sexual Assault Complainats: Access and Disclosure." Ottawa: 1995.
McInnes, John, and Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality." *University of British Columbia Law Review* 29.2 (1995): 341–381.
McClung, John. Letter. *National Post* 26 February 1999a: A19.
McClung, John. Letter. *National Post* 27 February 1999b: A19.
Oleskiew, Diane, and Nicole Tellier, "Submissions to the Standing Committee on Bill C-46, An Act to Amend the *Criminal Code* in Respect of Production of Records in Sexual Offence Proceedings." Ottawa: National Association of Women and the Law, 1997.
R. v. *Ewanchuk,* [1999] S.C.J. 10 (Q.L.).
R. v. *Ewanchuk,* [1998] A.J. 150 (Q.L.).
R. v. *Mills,* [1997], 12 C.R. (5th) 138 and 163 (Alta. Q.B.).
R. v. *Darrach,* [1998] S.C.C.A. 184 O.J. 338.
R. v. *Seaboyer*, [1991] 2 S.C.R. 577.
R. v. *O'Connor*, [1995] 4 S.C.R. 411.
R. v. *O'Connor*, [1994] 30 C.R. (4th) 55 B.C.C.A.
Roberts, Julian V., and Renate M. Mohr. *Confronting Sexual Assault: A Decade of Legal and Social Change.* Toronto: University of Toronto Press, 1994.
Schmitz, Cristin. "McClung, Dubé Square Off." *Lawyers' Weekly* 12 March 1999: 10.
Sheehy, Elizabeth A. "Canadian Judges and the Law on Rape: Should the *Charter* Insulate Bias." *Ottawa Law Review* 21.1 (1989): 151–197.