Equality, Fairness and Relevance: Disclosure of Therapists' Records in Sexual Assault Trials

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In some ways the *Canadian Charter of Rights and Freedoms*[1] has had a dramatic impact on the law of evidence, for instance with respect to the admission of illegally-obtained evidence. In other ways, however, the law of evidence has not been subjected to a thorough Charter analysis. It is not yet possible, for example, for lawyers and judges to draw on established principles for assessing whether particular rules of evidence are consistent with the right to the equal protection and benefit of the law, found in section 15. The fact that such an analysis is embryonic, at best, presents difficulties when complex issues arise such as whether disclosure has to be made of a witness's therapists' records in sexual assault trials.

That is the issue in the *O'Connor*[2] case and is the subject of this paper. The authors participated in the drafting of legal argument in the appeal[3] and what we would like to do here is explore some of the difficulties and dilemmas that case presented to us as well, no doubt, to the judges obliged to reach a decision.

Before we look at that issue in more detail, however, two very general points may be useful.

The first one relates to the embryonic equality analysis already in existence. There are signs of recognition that rules of evidence have to be tested against an equality standard. For example, in *R.* v. *Salituro*,[4] a spouse who would have been incompetent to testify for the prosecution at common law was permitted to testify when the accused and his wife were separated without any reasonable possibility of reconciliation. The Court emphasized that the common law rule which excluded evidence against the accused was inconsistent with equality rights:

> *The rule reflects a view of the role of women which is no longer compatible with the importance now given to sexual equality. In particular, the rule making an irreconcilably separated spouse an incompetent witness is inconsistent with the values enshrined in the* Canadian Charter of Rights and Freedoms, *and preserving the rule would be contrary to this Court's duty to see that the common law develops in accordance with the values of the* Charter.[5]

The second point is that such emerging recognition is important where crimes are not committed randomly, indiscriminately by or against individuals. Some crimes are themselves the exercise of inequality, the discriminatory abuse of power, committed against victims chosen primarily for their membership in a particular social group. It is here that the law has to be particularly scrupulous to reject, rather than mirror, the discriminatory attitudes underlying the offenses themselves.

A clear example can be drawn from the cluster of offenses entitled hate propaganda.[6] Here the victims, socially and legally, are members of identifiable social groups. Take promotion of anti-Semitism as an example. If there were a rule of evidence that Jewish people should be treated as less credible than Christians or members of other religious groups, then this would have obvious implications for the equality rights of Jewish people, not to mention their peace of mind, their physical safety, and their access to justice.[7] Similar concerns would arise were there to be unusually onerous disclosure requirements in incitement to hatred cases, based on the idea that Jewish people are prone to make false accusations that crosses were burned on their lawns or that they might have fantasized incidents and confessed this to therapists, or that disclosure of their income tax records is necessary because they might provide evidence of dishonesty.

It is easy to make the point in the abstract that evidence law and equality are connected. Incitement to hatred is a particularly obvious illustration since the potential victim group is legally defined in such a way as to make the link to groups vulnerable to discrimination clear.[8] *O'Connor* is a sexual assault case, where the equality implications are less clear.[9] However, it can certainly be argued, as we did in *O'Connor*, that pre-trial disclosure in sexual assault cases is an equality issue. The social practice of sexual assault is certainly an equality issue in the broadest sense. Sexual assault is by its nature a crime that directly affects and directly harms women and children. They are the overwhelmingly predominant victims of sexual assault.[10] Women with disabilities and aboriginal women are particularly vulnerable to sexual assault. Unique and heightened vulnerability is experienced when more than one basis of discrimination operate together.

The Parliament of Canada has recognized that the law of sexual assault raises issues of equality in its reference to section 15 of the Charter in the Preamble to *An Act to amend the Criminal Code* (*sexual assault*), dealing with the admissibility of sexual history evidence:

> *Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the* Canadian Charter of Rights and Freedoms.[11]

With respect to the law, then, the question is whether the law mirrors or challenges the discriminatory practice of sexual assault. Specialized rules which set up distinctive barriers to access to justice for a crime distinctively experienced and feared by women and children would be a strong signal that they do not receive the equal protection and benefit of the law.

O'Connor raised the issue of pre-trial disclosure in sexual assault cases. In the pre-trial proceedings the defence obtained a court order that:

> [...] *the complainants authorize all therapists, counsellors, psychologists and psychiatrists whom have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all of this material to counsel for the accused forthwith.*[12]

This order was apparently made without arguments as to the relevant constitutional rights of the witnesses. In what circumstances must therapists' and counsellors' records be disclosed to the defence? Since *R.* v. *Stinchcombe*[13] requires the Crown to disclose all relevant information to the defence, the issue is whether therapists' records are "relevant" to the defence in sexual assault trials. The basic filtering rule at trial has been adopted as the filtering rule pre-trial. This presents a problem, as the concept of relevance has been subjected to little legal analysis. If determinations of relevance are left to hunch, they can be influenced by conscious, or unconscious, discriminatory assumptions about the class of person to which the witness belongs. Such discriminatory

assumptions can affect the fairness of the trial, as has now been recognized by the Supreme Court of Canada in *R.* v. *Seaboyer*.[14]

The importance of the meaning of "relevance" is particularly acute in sexual assault cases because the Canadian legal system has a tradition of inquiring into the personal background of people who come forward to give evidence that they have been sexually assaulted. This extends from the police station and the decision to "found" a complaint[15] to the Supreme Court of Canada with its decision that sexual history can sometimes, albeit rarely, be relevant at trial.

What is included within the scope of "relevance": medical and therapists' records, diaries, welfare and child protection records, educational records, income tax and banking records, and sexual history itself? Does *Stinchcombe* require disclosure of any or all of the above? In preparing arguments for *O'Connor* we came to the view that the answer requires examination of the meaning of relevance, the evolving concept of a fair trial, and the equality rights of the primary Crown witnesses in sexual assault trials.

I. MUTUALLY SUPPORTIVE CONCEPTS: THE RIGHT TO A FAIR TRIAL, EQUALITY AND RELEVANCE

One of our difficulties was in finding authority for our analysis. Judicial analysis has tended to focus on one right (for example, to a fair trial) at a time, at best giving an impression that rights have to be balanced off against each other rather than as providing mutual support for each other. However, if we step back to obtain a broader perspective on the emerging values in Canadian evidence law, one can discern elements in both judicial and legislative decisions of an evolving analysis of the way in which the concepts of fairness, relevance, and equality co-exist.

We begin by placing all of the concepts to be discussed here - fairness, relevance and equality - within the context of one of the primary goals of our adversarial system - truth. The Supreme Court of Canada has, in several decisions, adopted the goal of accurate fact determination

as a principal goal of the criminal justice system and has seen this goal as being consistent, in many instances, with the goal of fairness.[16] For instance, the majority stated in *Seaboyer*, a fair trial is "one that permits the trier of fact to get at the truth and properly and fairly dispose of the case".[17] The Supreme Court recognized that scrutiny of relevance assessments can no longer be avoided because distorted fact finding prevents the determination of the truth and the proper and fair disposal of the case. In our view, this concept of fairness should apply to pre-trial assessments of relevance. The search for "truth" is not simply one that begins at trial. The fairness of the trial is affected by the pre-trial investigatory process. The "facts" are ultimately determined at the culmination of a process in which many human beings participate: potential witnesses, police, crown counsel and defence counsel. This process can be influenced by stereotypes, myths, and irrational assessments of information and as such can be distorted unfairly by irrelevant information. Indeed, distorted fact finding is inconsistent with the goal of disclosure as stated in *Stinchcombe*, that is "the ascertainment of the true facts of the case".[18]

Accurate fact determination can also be linked to equality. The Court has emphasized that the process of fact determination must be rational and unbiased. In *R.* v. *Généreux*, Lamer C.J. stated that one purpose of the independence and impartiality embraced by section 11(d) is:

> [...] *to ensure that a person is tried by a tribunal that is not biased in any way and is in a position to render a decision which is based solely on the merits of the case before it, according to law. The decision-maker should not be influenced by the parties to a case or by outside forces except to the extent that he or she is persuaded by submissions and arguments pertaining to the legal issues in dispute.*[19]

A "blind spot" in the legal system such as an unwillingness to test relevance decisions against a standard of equality while there is a willingness to apply other constitutional standards such as the right to a fair trial, can be seen as a partial analysis, (in both sense of the word, incomplete and biased), rather than impartial.

Whatever doctrinal route one uses to enter the complex interaction of equality, fairness and relevance, the result is the same. For the accused to have a fair trial, he can only claim access to information which would assist with accurate fact determination. He cannot claim assistance from prejudice. Only information which could assist with accurate fact determination is required to be disclosed. Relevance is a convenient short-hand way of capturing this idea.

It is relevance which constitutes the boundary of both fair trial and equality rights. A legal system which required all witnesses to tolerate the disclosure of relevant information could be said to respect both equality and fair trial rights. A system which required members of a particular group to provide irrelevant information would not be equal. At the same time the extra information could distort the process and create an unfair trial. When the issue is seen in this way, equality and fairness are not competing rights, balancing each other off. (The more fairness, the less equality and vice versa). Equality and fairness both appear and disappear together.

Witnesses may expect to sacrifice their interests to assist with accurate fact determination but no more. The expectation that a particular group of witnesses (identified here largely on the basis of sex and age) would do more than this is the practice of inequality. These ideas are explored in more detail below.

A. Recent Decisions

Recent judicial decisions and legislative changes provide some guidance in elaborating on the relationship between the right to a fair trial, equality and relevance.

There is a linkage between promoting a fair trial by respecting the equality rights of witnesses and *Seaboyer*. This linkage is made most strongly in the dissent but the majority view can be said to be consistent with the view the discriminatory stereotypes must be rejected in order to achieve a fair trial. L'Heureux-Dubé J., dissenting, states:

> *If the only thing that renders a determination of relevancy understandable is underlying stereotype, it would seem contradictory to conclude, then that 'truth' has been found.*[20]

Indeed the majority in *Seaboyer* provide a practical example in upholding as constitutional section 277 which excludes evidence of sexual reputation. "The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical, or practical link between a woman's sexual reputation and whether she is a truthful witness".[21] The Supreme Court has re-enforced its rejection of stereotypical thinking in other decisions. In *R.* v. *W.(R.)* McLachlin J. stated:

> *What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.*[22]

Generalizations underlying common law rules are being scrutinized by Parliament and the courts for discriminatory effects. Witnesses, victims, and accused[23] may be denied access to the justice system when the assumptions underlying evidence rules do not reflect their experiences. For instance, the Supreme Court recognized that generalizations about factors which are relevant to assessing the credibility of an adult witness may not apply to children. Applying generalizations about adult credibility to children may effectively disqualify children as a source of knowledge and deprive them of a legal remedy because the process of assessment of testimony is flawed.[24]

The generalizations underlying the common law doctrine of recent complaint have been rejected. Section 275 of the *Criminal Code* which abrogates the doctrine of recent complaint excludes evidence assumed to be relevant at common law. The Supreme Court has recognized that inferences from the absence (or presence) of a recent complaint by a complainant in sexual assaults cases rest on "a stereotype which found expression in the now discounted doctrine of recent complaint".[25]

The Supreme Court has held that rules of evidence which make it possible for a witness to give a "full account of the circumstances surrounding the alleged offence" and for fact finders to evaluate the witness's account on a rational basis are consistent with the concept of a fair trial even though the accused does not have the same opportunity for cross-examination or confrontation as common law rules provided. For instance, a rule which requires the witness to confront directly the accused face to face may make it difficult for the witness to give a full and candid account of what happened or may hinder the fact finders' assessment of the evidence. Section 486(2.1) of the *Criminal Code* recognizes this danger by providing that a witness under 18 may testify outside the courtroom or behind a screen or other device. The Supreme Court dismissed an appeal from the Ontario Court of Appeal decision which held that this provision is consistent with the right to a fair trial under sections 7 and 11(d). The Court of Appeal stated that procedures should not frustrate the obtaining of a true account[26] and that requiring a complainant to face the accused may not further the search for truth but "in some cases, eye-to eye contact may frustrate the obtaining of as true an account from the witness as is possible".[27]

Similarly, the Supreme Court has held that the admission of video-taped statements of witnesses under 18 as provided for in section 715.1 of the *Criminal Code* is consistent with the Charter right to a fair trial and the goal of an accurate truth determination process. A rule which excludes prior statements of witnesses may effectively deny those who have difficulty producing credible, coherent in-court testimony, or who are so perceived, access to a legal remedy. In *R.* v. *D.O.L.*,[28] the Supreme Court reversed the decision of the Manitoba Court of Appeal which had held that the accused's right to a fair trial requires that all evidence be presented in a public courtroom in the presence of the accused and that the accused have the opportunity to be present when the evidence was recorded in order to cross-examine the witness.

The concept of a fair trial may require the admission of information. The Supreme Court has formulated rules of evidence which provide for the admission of reliable and necessary evidence. The Supreme Court's development of the concept of "necessity" in decisions on the admissibility of evidence recognizes that existing procedures may prevent certain types of

witnesses from giving a full account of what happened. In *R.* v. *Khan*, the Supreme Court held that out of court statements of a child victim of sexual assault are admissible if they are reliable and admission is necessary although the accused has had no opportunity for contemporaneous cross-examination.[29]

The Supreme Court has indicated that a fair trial is one in which the capacity of all to participate in the legal system is promoted. Iacobucci J. in *R.* v. *Salituro* stated:

> *If our expectations for a society founded on respect for the dignity of the human person are to have meaning, we must encourage and protect everyone in the exercise of their rights and responsibilities as equal members of our society.*[30]

In summary, the Supreme Court of Canada has held that rules and procedures (such as the procedure of face to face confrontation) which frustrate the obtaining of a true account from the witness; which exclude reliable information (for example, video taped statements) unlikely to be reproduced by in-court testimony; or which result in a discounting of testimony based on erroneous assumptions about credibility (for example, requirements that details such as time and place be remembered and be consistent over time) may adversely affect the fairness of the trial and the process of fact determination. Both Parliament and the Supreme Court have recognized that the admission of irrelevant evidence may be inconsistent with the concept of a fair trial (*Seaboyer*, the abrogation of the recent complaint doctrine). The Supreme Court's decisions support the principle that both the admission and the exclusion of evidence can have the effect of infringing the right to a fair trial if the consequence is that irrelevant evidence which prejudices the fact finding process is admitted, witnesses are not able or are perceived as not able to give a full and candid account, or their testimony is discounted on irrational grounds including a failure to treat them with respect and dignity.

Support in such cases can be found for principles relating to assessments of relevance which display respect for equality rights:

1. Stereotypical assumptions based on race, sex and analogous factor should be eliminated from the fact finding process.

2. Procedures or rules of evidence should promote the ability of witnesses to give and for fact finders to perceive a full, candid account of what happened.

3. Assessments of relevance and probative value should rest on generalizations that reflect the experiences of all persons.

4. Irrelevant evidence the admission of which has a discriminatory effect should be excluded.

5. All participants in the judicial process should be treated with dignity and respect.

O'Connor provides an opportunity to incorporate such values in the approach to the question of whether therapists' records should be disclosed. We felt that difficult decisions about values would be hidden beneath a simple assertion that therapists' records were (or were not) relevant. So we thought it important to explore the meaning of relevance itself.

II. THE TEST OF RELEVANCE, EQUALITY RIGHTS AND THE RIGHT TO A FAIR TRIAL

A traditionally accepted definition of relevance at trial is:

> [...] *any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other*.[31]

The test of relevance sets the boundaries of potentially admissible evidence at trial and *Stinchcombe* used it to set the boundaries for what has to be disclosed by Crown pre-trial. However, as mentioned earlier, the process whereby relevance is determined lacks judicial elaboration. In practice determinations of relevance have been more a matter of intuition and hunch than of conscious analysis. It is generally understood that such determinations involve "common sense" and the decision maker's experience of life rather than logic. "The answer [to questions of relevance] must filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation".[32]

Our initial difficulty flowed from the fact that *Stinchcombe* leaves the definition of relevance applicable to pre-trial disclosure open. There was no analysis of whether the Court had in mind the trial definition of relevance (whether the information in question makes a matter to be proved more or less probable), or some other broader, pre-trial test of relevance.

Stinchcombe did provide, however, some guidance on the interests protected by the adoption of relevance as a filter of information in the pre-trial process. The fact that *Stinchcombe* set a relevance boundary and did not require the disclosure of all information appears to imply more than the obvious point that it is impossible to share all information. The decision recognizes other concerns such as protection of the physical safety of witnesses and the usefulness of informers in law enforcement. The decision was silent, however, on the other interests discussed above which have been recognized by the Supreme Court as central to assessments of relevance and the fairness of procedures at trial such as avoiding discriminatory fact finding, helping witnesses give a full and candid account, and treating witnesses with respect and dignity.

These concerns would appear to be just as important at the pre-trial as the trial stage. The Court in *Stinchcombe* expected that disclosure would result in more pre-trial settlements: "There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings".[33] Consistent with the Court's adoption of the goal of disclosure to ascertain the true

facts of the case,[34] these settlements must necessarily be based on accurate findings of fact. But, there is a real danger that irrelevant information might provide a breeding ground for discriminatory fact finding on the part of police, crown and defence counsel in addition to the fact finder at trial.[35] A requirement that a witness make pre-trial disclosure of irrelevant and possibly private and prejudicial information can prevent witnesses from giving a full account and hinders the search for truth in several ways: victims will be discouraged from making complaints, fewer complaints will proceed to trial, and trial outcomes may not be based on rational assessments of evidence. Both the account delivered by the complainant and the account received by the fact finders can be distorted by the introduction of irrelevant material, particularly if that material builds prejudicial screens of myths and biases complementing those already prevalent in society. No matter how scrupulous a judge in the conduct of the trial, the effects of the pre-trial treatment of witnesses can distort the outcome.

Given this background, should the definition of relevance be adjusted for pre-trial purposes? It may well be that the trial definition should be broadened because pre-trial disclosure has an investigatory function not so clearly present at trial. Information disclosed pre-trial may lead to the discovery of other information, even if it could not meet the trial test of relevance in itself. We were of the view that while it might make more technical sense to construe *Stinchcombe* as relating to relevance in that sense, a broader sense of relevance is justified pre-trial.

In many cases, a broader pre-trial test of relevance will not present problems and indeed has positive advantages in protecting vulnerable accused persons. The Crown can err on the side of disclosing irrelevant information without significant costs. For instance, a statement of a prospective witness to the police or Crown may turn out to have no relevance at all in the trial or even the pre-trial sense and yet should be disclosed. Difficulties arise, however, where disclosure does have significant costs and where the disclosure of irrelevant information will affect the rights to the equal protection and benefit of the law. The forced disclosure of irrelevant private and prejudicial information may create a significant barrier to access to justice. Women forced to chose between therapy and giving evidence may well not proceed with a complaint at all. The

result will be that certain sexual assaults may be committed without any practical means of recourse to the criminal justice system. The problem can be illustrated very simply. *Seaboyer* says that sexual history can be (rarely) relevant. Should this mean that defence counsel can demand an investigation into the witness's sexual history in every case simply by asserting that such an investigation might turn up something relevant in the *Seaboyer*, trial sense? Here the Crown and the Court must be scrupulous in avoiding the unconstitutional disclosure of information the relevance of which in either the pre-trial or trial sense could only be assumed on the basis of discriminatory assumptions.

Here was the core of our dilemma. We wanted to support a broad conception of relevance in the interests of vulnerable accused persons. At the same time, we were of the view that it would be outrageous if defence counsel could routinely insist on the exposure of witnesses' personal backgrounds such as their sexual histories and their consultations with therapists. Some legal mechanism, therefore, seemed necessary to set the mutual boundary of the right to a fair trial and equality. The most likely candidate in terms of existing legal ideal was the notion that the defence cannot go on fishing expeditions and must lay a foundation for a conclusion of relevance.[36]

III. LAYING A FOUNDATION FOR ASSESSMENTS OF RELEVANCE

Sensitivity to the possibility that disclosure or admission of irrelevant information can infringe the right to a fair trial is most clearly captured in the ideas that the defence cannot go on fishing expeditions and must lay a foundation for the conclusion of relevance.[37] Similarly, the rules of evidence often require the party offering evidence to lay a foundation before the evidence is admissible. For instance, there must be a finding that the conditions of the exceptions to the hearsay rule have been established before a hearsay statement is admissible.[38]

One way to minimize the risk of disclosing irrelevant information is to require accused to lay a foundation for disclosure. The idea of laying a foundation requires analysis. Assessments of relevance rest on conscious or unconscious generalizations based on experience and common

sense. In order to ensure that such generalizations do not incorporate discriminatory assumptions, they must be carefully examined. Indeed, an unwillingness to question underlying generalizations and place the costs of over-disclosure on a particular segment of society (in this case the witnesses in sexual assault trials, primarily women and children) can be seen as inconsistent with equality itself.

Assessments of relevance require an examination of these generalizations about facts specific to the case as well as background facts. For example, on a charge of robbery, the logical connection between evidence the gun used in the robbery was purchased by the accused and the proposition the accused committed the robbery rests on the generalization that "persons who purchase guns subsequently used in a robbery are the robbers". Whether decision-makers decide this generalization is never, rarely, sometimes, usually true depends on their common sense and experience.

The strength of this inference is assessed within a particular context or under certain conditions. Examination of the context helps the decision-maker to identify the foundational or preliminary facts which must be established before the information is relevant. The context includes both information about the particular actor and situation and information about the behaviour and actions of people and objects generally. For instance, in the above example, the evidence was described as "the gun used in the robbery was purchased by the accused". There is no inferential connection between the information a gun was purchased by the accused and the issue of identity, if the gun purchased by the accused was not used in the robbery. The relevance of the accused's purchase of a gun is conditional on proof the gun was used in the robbery. Without this foundational fact, evidence the accused owned a gun would be irrelevant.

The context for assessing relevance also includes propositions about the general behaviour of people and things, sometimes referred to as social facts. Examples are information about the prevalence of personal ownership of guns, the ease or difficulty of acquiring a gun, the possibility

of tracing ownership, the feasibility of connecting a particular gun with a particular wounding, etc. These facts are often assumed to be generally known to be merely a matter of common sense.

An example of a foundational fact can be found in *R.* v. *Riley*.[39] The defence sought to cross-examine the complainant concerning other allegations of sexual assault. The accused argued these allegations implied the complainant had a propensity to make false allegations. This inference would rest on the foundational fact that the complainant had reliably recanted her earlier accusations or that they were demonstrably false. It would furthermore depend on generalizations about social facts: that women who have made earlier false accusations of sexual assault are making a false allegation in the particular case. Failure to lay a foundation for relevance on both levels would leave the relevance decision-maker open to the danger of using discriminatory generalizations. One could be the generalization that women who have not been believed in the past are more likely to make a false accusation. Another could be that previous experiences of sexual assault make a further allegation of sexual assault less credible. Such generalizations would involve scepticism about vulnerability to sexual assault and repeated sexual assault which would create a built-in bias in the criminal justice system against those most vulnerable to repeated victimization.

A process is necessary to avoid endangering the fairness of the trial by discriminatory determinations of relevance. An appropriate process with respect to requests for disclosure and decisions to disclose or order disclosure should therefore include the following. Where there is potential for infringement of a witness's right to equality or security of the person, defence counsel should explain how the information sought could contain or might lead to information relevant in the trial sense; establish the foundational facts, including the social facts, articulate the underlying generalizations; and explain how disclosure would be consistent with both fairness and other Charter values. The Crown should refuse disclosure unless such a non-discriminatory foundation is laid. If the issue goes before a court, both argument and reasons should address the foundation for disclosure; specifically, whether there is a non-discriminatory foundation for finding that the information sought is relevant.

IV. ARE ASSESSMENTS OF RELEVANCE CONSISTENT WITH THESE PRINCIPLES ALSO CONSISTENT WITH FAIRNESS TO THE ACCUSED?

The foregoing analysis was focused on equality. We started with a concern that an exclusive focus on fair trial rights is a partial one in its neglect of co-existing constitutional rights such as equality. However, we did not wish to weaken the importance attached to a fair trial. An impartial analysis, one that takes into account all constitutional rights, would require that we now ask a challenging question. Is requiring the accused to lay a foundation in cases where the disclosure could infringe the equality rights of witnesses unfair? Is it unfair in that it might prevent the accused from obtaining information that could lead to a just acquittal?

The argument that the defence must show a nondiscriminatory generalization underlying the conclusion of relevance is not unfair. This simply amounts to requiring the defence to give a reason why the information could be relevant that is consistent with the equality rights of witnesses. There is no danger here that some fact pointing to innocence could be missed. This simply requires the defence to imagine what could be there that is justifiably (that is in a non-discriminatory way) seen as relevant.

But this is not sufficient protection for witnesses vulnerable to extensive invasions of privacy. The requirement of a nondiscriminatory imagination will certainly provide some protection but may not be enough in all cases, for example with respect to past sexual history. We are obliged to accept as a matter of law, since *Seaboyer*, that in rare cases false accusations can be relevant to credibility. However, this should not be taken to mean that the defence can simply seek all information it wishes in order to uncover an arguably false allegation. Hence, the requirement of a factual as well as an imaginative foundation.

The problem with this can best be illustrated by continued use of the sexual history analogy. The requirement of a factual foundation would stop the defence from demanding disclosure of the whole of a witness's sexual history just in case something relevant in the *Seaboyer*

sense appeared. It also means that the defence has to find some other source of information to justify disclosure by the prosecution when the only realistic source of that information could be the prosecution. This problem is obviously particularly acute for accused persons with very little or nothing in terms of investigative resources. Is this fair? So long as we can strain to think of one remote hypothetical situation in which the defence could only learn of exculpatory information through the Crown, then we will worry that we might convict an innocent accused, and put the most disadvantaged innocent accused at most risk.

This problem is inherent in the *Seaboyer* style of reasoning. It would disappear were we able to say in good conscience that therapists' records are never relevant (as we would indeed argue in effect) and that sexual history is never relevant. *Seaboyer* requires a case-by-case analysis of relevance, thus putting the interests of the witness at risk. It attempts to balance this by denying the accused the right to go on a fishing expedition, but without discussion of the realities of the accused's access to information.[40]

It may be useful to place the issue in the broader context of the meaning of an accused's right to a fair trial. The issue is one of how much a state can legitimately demand of a private individual (a witness) as a contribution to the conduct of fair trials. As the law now stands, the accused does not have the general right to the investigative resources of the state. There is no such thing as the defence police who would put as much energy into exculpatory investigations as the police now do into inculpatory investigations. The fact that the right to investigative services is not included within the right to a fair trial means that the innocent risk conviction. If private individuals (in some cases) were called upon to share extensive private information in the name of a fair trial while the accused were left to his own devices (apart from legal aid) in other cases, then an equality issue would again arise.

The exposure of the private lives of sexual assault victims is not something we would ever support but certainly it would appear in a different light in a legal system in which investigative services were supplied as a right to the accused and all witnesses were required to suffer such

exposure of, for instance, their therapists' records, their banking and income tax records and their sexual histories (since false accusations can occur with any crime).

We would argue that until that scenario materializes the risk involved in requiring the accused to lay a foundation is the same risk that is involved in letting acquittal hinge on defence investigation in any case. We are reinforced in this argument by the fact that in our view there is no risk with respect to therapists' records. The idea of risk is one that flows from the case-by-case format of the reasoning in *Seaboyer* with respect to sexual history, which could influence the analysis of therapists' records.

It does not seem to us to be a radical argument to refuse to require the women and children harmed by sexual assault to make an extraordinary contribution to the "fairness" of trials well ahead of similar requirements for the community as a whole or individuals harmed by other crimes. Our understanding of a fair trial must be fair.

V. THERAPISTS' AND COUNSELLORS' RECORDS

The following discussion applies the principles discussed above relating to assessments of relevance which display respect for equality rights to the disclosure of therapists' and counsellors' records of complainants in sexual assault cases.[41] It should be noted, however, that there are many other types of records which raise the same concerns about invasion of privacy, access to justice and the risk that information in the records will be improperly used.[42] When these concerns are present, it is submitted that decision-makers should avoid making determinations of relevance without an adequate foundation. This requires, among other things, an analysis of the process whereby the record was produced and an express identification of the assumptions underlying evidentiary rules. For instance, as is discussed below, the answer to the question whether an "inconsistent" statement can be found in therapists' and counsellors' records requires an analysis of the process of therapy and an understanding of the meaning of an "inconsistent" statement. Or, in the case of mental health records of those who have a background of mental illness or handicap,

there is a particular danger of discriminatory generalizations about such persons. An analysis consistent with equality rights would include a willingness to question psychiatric categories of mental illness, the linkage to cognitive impairment, and the necessity for access to mental health records as compared to other methods of testing credibility.

Requests for disclosure of therapists' records rest initially on an assumption that the private, personal background of complainants of sexual assault is relevant. This is in contrast to victims of other crimes, such as robbery, who are typically not asked to produce these records. The investigation of personal background information rests on stereotypes about sexual assault and complainants of sexual assault, such as false accusations are easily made and result from fantasy; women are mentally unstable; certain women have a propensity to consent such as sexually experienced women, minority women, and sex trade workers; and false allegations are often made due to motives of revenge, or attempts to cover up sexual activity.

The investigation of complainants' backgrounds rests often on a belief that victims precipitate the assault by their lifestyle, relationships, sexual permissiveness, respectability, etc. Victims are assumed to be likely to "have a psychological propensity, or even possess 'basic inner drives' leading toward victimization".[43] There is an assumption that examination of the complainant's personal background, behaviour and characteristics will help us to determine her role in the assault.

The unreasonableness of such fishing expeditions is indicated by imagining how the legal system would operate if all victims and witnesses faced the prospect of disclosure of all their medical, health and other personal records, such as income tax and banking records prior to a criminal proceeding. Similar reasoning can be seen as underlying the boundary setting function of the collateral fact rule.[44]

VI. TYPES OF INFORMATION THAT MIGHT BE FOUND IN THERAPISTS' RECORDS

In *O'Connor*, defence counsel was successful in arguing pre-trial that the records were self evidently relevant to credibility, recent complaint, corroboration, and contradictory statements.[45] Would disclosure on these bases be consistent with the rights to a fair trial, equality and security of the person?

A. Recent Complaint

Assertions that the presence or absence of a recent complaint of sexual assault is relevant on a charge of sexual assault rests on an erroneous generalization which fails to take into account the experiences of women and children who are the predominant victims of sexual assault.

The presence or absence of a recent complaint does not tell us anything about the truthfulness of an allegation of sexual assault. Women are just as likely, if not more so, to wait to tell a person they trust, than to make an allegation at the first reasonable opportunity.[46] We referred earlier to a recent case in which the Supreme Court of Canada acknowledged that the presence or absence of a recent complaint is irrelevant:

> *Finally, the Court of Appeal relied on the fact that neither of the older children was 'aware or concerned that anything untoward occurred which is really the best test of the quality of the acts.' This reference reveals reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.*[47]

The Law Reform Commission of Canada has stated, "in contemporary society, there is no longer a logical connection between the genuineness of a complaint and the promptness with which it is made". This analysis is supported by Parliament's abrogation of the common law rule regulating the admissibility of recent complaints by *Criminal Code* section 275 in 1983.[48] It follows that the lack of complaint (or even the presence of complaint) is not probative of

anything.[49] The accused is not being denied relevant evidence, if defence counsel is denied the opportunity to see if a complaint was or was not made.

B. Corroboration

All information must be relevant to a matter required to be proved. Corroboration is not a matter to be proved - it is not analogous to such categories as inconsistent statements, convictions, confessions, etc. Information can only be corroborative if it is relevant, so that the concept standing by itself does not assist with relevance determination. Furthermore, Parliament has made it clear that conviction for sexual assault is not unsafe in the absence of corroboration.[50] This is consistent with an equality analysis since fact finders cannot be told that sexual assault complainants are to be treated with a scepticism beyond that implied in the requirement that there must be proof beyond reasonable doubt. A generalization that uncorroborated complaints of sexual assault are less likely to be true than those supported by evidence other than that of complainants (primarily women and children) would be a discriminatory generalization inconsistent with legislative policy.

C. Inconsistent Statements

The assumption that prior statements inconsistent with testimony imply the complainant is lying at trial rests on a broad generalization about self-contradiction: persons who make inconsistent statements about a factual matter may be lying about that factual matter.

Is it is possible to lay an adequate foundation for the relevance of therapists' records in order to trigger this generalization? In other words can "inconsistent statements" of the witness be found in therapists' records? In order to utilize the generalization, therapists' records must be seen as capable of containing a witness's factual statements that could be true or false. The assumption is that it is possible to get at the words of the complainant that were spoken and that those words are statements of fact, capable of being inconsistent with evidence given at trial.

A conclusion that therapists' records must be seen as capable of containing factual statements capable of being inconsistent depends on a number of sub-generalizations about the maker of the record, the therapist, about the nature of the therapeutic relationship, and about the witness. Such sub-generalizations need to be examined in order to avoid discriminatory assumptions and/or preparedness (willingness or receptivity) to harm sexual assault complainants without examination of whether a particular form of reasoning is justified.

With respect to the maker of the record, there is a generalization which links the record to what was actually said, as a matter of historical fact. There is an alternative generalization which would lead to the conclusion of irrelevance, that is that records are not made according to procedures which indicate that they reliably reproduce the statements of the complainants. Records could range from a video-tape recording to a summary of the therapist's reaction to the therapy session recorded much later. Records are not likely to be checked for accuracy. Even what appears to be the most reliable record, a video tape, lacks the unrecorded context which might change the meaning of what was recorded.

With respect to the therapeutic relationship one generalization is that it is one suitable for the elicitation of factual accounts, capable of being inconsistent with later evidence. An alternative generalization is that the role of the therapist and the therapeutic procedures adopted may vary widely. There is no agreement among therapists about what therapy is, what are the best methods, or what professional qualifications should be required.[51] The lack of uniform therapy procedures means that no generalizations can be made about the role of leading questions, assumptions about self-blame, victim precipitation, or assumptions underlying interpretations of behaviour. For instance, were the complainant's responses in response to leading questions which assumed she was to blame? Therapists themselves question the capability of the therapeutic meeting to produce historical truth.[52]

Ideally, the objective of a therapist would be to build an empathetic, helpful relationship with the witness offering acceptance, sympathy and understanding.[53] At its worst, "therapy" may

revolve around blaming the woman for what has happened, intensifying guilt and self-blame. It is well recognized that therapists are, like other decision-makers, subject to ideological biases. The therapist "exercises considerable power to redefine the experience of the victim in terms consistent with generally accepted societal explanations".[54] The nature of the particular ideological screen through which the information has passed will be unknown to fact finders or else the subject of (potentially discriminatory) guess-work. Few therapists are First Nations or have lived or worked in residential schools. Even the most supportive (as compared to misogynist) therapist is likely to approach the therapy process with personal, subjective assumptions about reality and about sexual assault.

A further generalization underlying a conclusion that a therapeutic relationship is capable of producing a record of statements of fact is that there is widespread knowledge of the legal standards to which the facts may be seen as relevant. For instance, a statement by the witness that she "consented" would only have meaning where it is assumed that she knew the legal meaning of consent. As it stands, such a statement is mere opinion incapable of being inconsistent with factual evidence given at trial.

With respect to the witness, one generalization is that therapy involves the making of statements capable of being inconsistent with later evidence. An alternative generalization is that therapy is a process by which the witness explores what has happened and attempts to assimilate and integrate past events. This process may involve self-blame and denial.

One generalization is that witnesses who have engaged in self-blame or denial to a therapist may be fabricating an allegation of sexual assault. An alternative generalization is that self-blame and denial are two common adaptive responses to trauma caused by all sorts of crimes, accidents and diseases rather than "statements" that are capable of being inconsistent. The generalization chosen reflects a view of what the witness was doing in therapy.

One generalization about therapy is that it is a process sufficiently similar to the criminal justice process to produce "statements" which could be meaningfully compared and found inconsistent. An alternative generalizations is that therapy is such a different process in which the goals of the individual may differ so markedly from her goals in giving evidence in court that comparisons are dangerous.

Thus "denial" could be seen as a statement of "fact" or as a defensive mechanism protecting a victim of a traumatic event from some painful aspect of reality. Victims deny both external reality as well as internal feelings and thoughts. "Stated succinctly, denial is a term for almost all defensive endeavors which are assumed to be directed against stimuli originating in the outside world, specifically some painful aspect of reality. Perhaps even more succinctly, one might define it as a refusal to recognize the reality of a traumatic perception".[55]

Researchers point out that denial is "neither conscious nor voluntary in the ordinary sense of the word".[56] It is an automatic process that is designed for protection. Ronnie Janoff-Bulman states:

> *For most people, who view the world as benevolent and meaningful and themselves as worthy and effective, the initial impact of traumatic events is nothing short of overwhelming. Trauma-associated images and thoughts reside within the victim's inner world. They are powerful, intensely painful, and threaten to completely overwhelm the survivor. It is the process of denial that prevents a steady, unmodulated attack on the victim's cognitive-emotional world. Denial enables the survivor to more gradually face the realities of the victimization and incorporate the experience into his or her internal world.*[57]

Self-blame may help to make sense of a traumatic event by minimizing the possibility of randomness in the world. "If the woman can believe that somehow she got herself into the situation, if she can make herself responsible for it, then she's established some sort of control over rape. It wasn't someone arbitrarily smashing into her life and wreaking havoc".[58]

Disclosure of information in therapists' records confers clinical decision-makers with a major role in assessments of guilt or innocence. The therapist is not merely acting as a "court reporter". Therapists frame the issues and ask questions. Based on the inferences and opinions they form, they make further inquiries. Basing findings of fact pre-trial and at trial on records produced by this process necessarily requires placing reliance on the expertise of the therapists. An expert preparing to give expert testimony is performing a very different function from the expert giving therapy and counselling. Preparation of an opinion for a legal case requires that the expert direct their mind to the issues as defined by the law and confines the expert to their area of expertise. Therapists, counsellors, psychiatrists and psychologists are not experts in determining the historical facts. Their opinion as to what actually happened should not be seen as relevant.

CONCLUSION

In this paper we have explored the urgent need for an equality analysis of the issue of disclosure in sexual assault trials. We have found the arguments difficult to make within current legal priorities and discourse. Our preference would be that it would no more occur to participants in a sexual assault trial to seek (or give) disclosure of therapists' records than it would to follow Wigmore's old advice to subject every sexual assault complainant to a psychiatric examination. If that is not possible, then it is vital for a process to be introduced which would require all participants to challenge their own assumptions about reality and the scope of legal concepts. We are not optimistic.

FOOTNOTES

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the Charter].

2. *R.* v. *O'Connor* (1993), 18 C.R. (4th) 98 (B.C.S.C.). Bishop O'Connor was charged with rape and indecent assault of four aboriginal women 25 years ago at a Williams Lake residential school. Prior to the trial, defence counsel obtained a court order which directed the complainants to authorize the disclosure of all their therapists', counsellors', psychologists' and psychiatrists' records with respect to allegations of sexual assault or sexual abuse. These records along with extracts from a complainant's diary were disclosed to the defence prior to the trial. The trial judge, Thackray J., issued a stay of proceeding soon after the trial began, based, it appears, on his lack of confidence that full disclosure of all relevant information had been made by the Crown. The Crown appealed this decision and the appeal was heard on September 15th to 17th, 1993. The British Columbia Court of Appeal allowed the Crown's appeal, set aside the stay of proceedings granted by the trial judge and ordered a new trial. The Court held that the trial judge had erred in his finding that there had been an abuse of process, and that there was no evidence that the Crown intended to deprive O'Connor of his right to a fair trial. *R.* v. *O'Connor* (1994), 29 C.R. (4th) 40 (B.C.C.A.). In further reasons the Court addressed the issue of disclosure of medical records. *R.* v. *O'Connor* (1994), 30 C.R.(4th) 55 (B.C.C.A.). In a unanimous decision, the Court adopted guidelines for the admission of medical records which "include all records relating to treatment which may be described as 'therapeutic' in nature". It adopted a two step procedure whereby an applicant for disclosure must first establish a foundation satisfying the trial judge that the material is "likely to be relevant either to an issue in the proceeding or to the competence of the witness to testify". Only if this test is met, will the trial judge review the documents to determine whether they are material to the defence. The Courts also reviewed grounds for disclosure which do not meet the test of relevance. The Court held that a submission that the documents should be produced solely because they may

relate to credibility or to "recent complaint", or that they might disclose a prior inconsistent statement is an adequate foundation for an order of disclosure. The Court also held that it is not sufficient to say that because a witness received counselling or psychiatric assistance as a consequence of an alleged sexual assault that the records must be relevant nor are psychiatric and counselling records relevant on the supposition that the very fact that witnesses obtained therapy justifies the conclusion that their evidence may be unreliable". Bishop O'Connor has appealed as of right to the Supreme Court of Canada. The case will be heard in the spring of 1995.

3. A Coalition consisting of the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, DAWN Canada: Disabled Women's Network Canada, and the Women's Legal Education and Action Fund was given permission to intervene in the appeal. Counsel for the Coalition were Frances Watters and Gail Dickson. Many other people were involved in various ways with the preparation of the argument. The focus of this paper is on the questions we asked ourselves in the work we did.

4. *R.* v. *Salituro*, [1991] 3 S.C.R. 654.

5. *Ibid.* at 671 per Iacobucci J. speaking for the Court.

6. See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 318-319.

7. Such an example may seem unlikely to some now, but the work of Wigmore, still an influential authority with respect to the Canadian law of evidence, gives support to the notion that findings of credibility can be influenced by such factors as race. See J.H. Wigmore, *The Principles of Judicial Proof as given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials* (Boston: Little & Brown, 1913) at 314-317 quoting E. Westermarck, *Origin and Growth of Moral Ideas* (1908): "The regard in which truth is held by the Eskimo seems to vary among different tribes. Armstong blames the Western Eskimo for being much addicted to falsehood [...] We are told by Polack that among the Maoris of New Zealand lying is universally practiced by all classes, and that an accomplished liar is accounted a man of consummate ability. But Diefenback found that, if treated with honesty, they were always ready to reciprocate such treatment [...]. Nowhere in the savage world is truth held in less estimation than among many of the African races [...]. Lying has been called the national vice of the Hindus [...]".

8. In Part VII of the *Criminal Code*, *supra* note 5 at s. 318(4) dealing with hate crimes against identifiable groups, identifiable group is defined as "any section of the public distinguished by colour, race, religion or ethnic origin".

9. This is illustrated by the failure of the Martin Report on *Charge Screening, Disclosure, and Resolution Discussions* (Report of the Attorney General's Advisory Committee, The Hon. G.A. Martin, Chair, 1993) to discuss the equality implications of disclosure and by the range of arguments in *O'Connor* itself. While another intervenor, the Canadian Mental Health Association, raised equality arguments, a third intervenor, the Attorney General of Canada did not. Nor did the Crown base its appeal on infringement of the witnesses' equality rights, although it did argue that there were policy reasons which would justify non-disclosure. Counsel for the defence did not attempt to argue that disclosure was consistent with the constitutional rights of the witnesses and appeared to think that an argument with respect to gender bias made by the Crown pre-trial was a personal attack rather than an argument about relevant constitutional standards. "In this kind of case extra precautions had to be taken not to let the political context within which this trial was taking place impede dispassionate professional judgment. The suggestion by Crown counsel [...] that the Associate Chief Justice and Counsel for the Respondent were guilty of 'gender bias' [...] reflects that perhaps that important principle was somehow lost". Respondent's Factum, at 21. This may illustrate quite well some of the difficulty in raising equality arguments. Imagine if the Crown had responded to an argument that non-disclosure infringed the accused's right to a fair trial by taking offence at an accusation of personal unfairness.

10. Statistics Canada, *Juristat Service Bulletin*, vol. 10, No. 7 (Canada: Ministry of Supply and Services Canada, May 1990); J. Ridington, *Beating the Odds: Violence and Women with Disabilities* (Vancouver: DAWN Canada, 1989); Ontario Native Women's Association, *Breaking Free: A Proposal for Change to Aboriginal Family Violence* (1989).

11. *An Act to amend the Criminal Code (sexual assault),* S.C. 1992, c. 38.

12. *R.* v. *O'Connor* (4 June 1992), Vancouver Court file No. CC920617 (B.C.S.C.), No. 91-6947, Williams Lake Registry.

13. *R.* v. *Stinchcombe* (1992), 8 C.R. (4th) 277.

14. *R.* v. *Seaboyer* (1991), 7 C.R. (4th) 117. (In the process of finding that section 276 of the *Criminal Code* which limited the admissibility of evidence of sexual history

infringed the Charter, the Court recognized that relevance can be determined in a discriminatory manner and that findings of relevance based on stereotype and myth are prejudicial to the fact finding process.)

15. See generally L.M.G. Clark & D.J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press 1977). Ekos Research Associates Inc., *Report on the Treatment of Sexual Assault Cases in Vancouver, British Columbia* (Canada: Department of Justice, 1988a).

16. There is a conflict between the goal of an accurate fact determination process and fairness to accused when detainees are conscripted to provide evidence against themselves in the pre-trial investigatory process. As the Supreme Court of Canada has held, such information affects the fairness of the trial and should in most cases be excluded even if it would assist in the determination of the truth - *Collins* v. *R.* (1987), 56 C.R. (3d) 193 (S.C.C.). In most instances, however, the goals of an accurate fact determination process and a fair trial do not conflict but are mutually supportive. For instance, cross-examination could be seen as a necessary component of a fair trial and a necessary condition for the admission of information at trial regardless of the reliability of the information. The Supreme Court, however, views the process of cross-examination as a tool for the accurate determination of facts. Cross-examination is not a necessary process in and of itself; the function of cross-examination can be performed by other mechanisms. For instance, if there are other circumstances indicating a statement is reliable, an uncross-examined inconsistent statement is admissible against the accused - *R.* v. *K.G.B.* (1993), 19 C.R. (4th) 1 (S.C.C.).

17. McLachlin J., *supra* note 14 at 137.

18. *Supra* note 13 at 292, Sopinka J. speaking for the Court.

19. *R.* v. *Généreux,* [1992] 1 S.C.R. 259 at 282-283.

20. *Supra* note 14 at 197.

21. *Ibid.* at 140.

22. *R.* v. *W.(R.),* [1992] 2 S.C.R. 122 at 134.

23. Stereotypes can operate to the disadvantage of the accused. In the Donald Marshall case, Marshall's testimony may have been discounted partly because he did not conform to the stereotype of a truthful witness. See M. Harris, *Justice Denied: The Law v. Donald Marshall* (1990) at 186-203.

24. As L'Heureux-Dubé J. states in *R.* v. *D.(L.E.)*, [1989] 2 S.C.R. 111 at 134: "The fact that most child sexual assaults occur under circumstances where the problem is hard to detect and even harder to prosecute places an obligation upon the judiciary to ensure that the abuses suffered by the victims are not perpetuated by an inability of the legal system to respond to the particular nature of the crime".

25. *Supra* note 22. See text *infra* note 47.

26. *R.* v. *Levogiannis* (1991), 62 C.C.C. (3d) 59 at 75 (Ont. C.A.), Morden J.A. speaking for the Court; appeal dismissed, June 15, 1993, reasons to follow (S.C.C.).

27. *Ibid.*

28. *R.* v. *D.O.L.*, appeal allowed, June 15, 1993, reasons to follow (S.C.C.), reversing (1991), 65 C.C.C. (3d) 465 (Man. C.A.), *sub. nom. R.* v. *Laramee.*

29. *R.* v. *Khan* (1990), 79 C.R. (3d) 1 (S.C.C).

30. *Supra* note 4 at 677.

31. Sir J.F. Stephen, "A Digest of the Law of Evidence", 12th ed., Art. I, 1907 in J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 22. Part of the difficulty with relevance as a test of disclosure is that the issues or facts to which the information is supposed to be relevant may not be clear pre-trial.

32. *C. McCormick's Handbook of the Law of Evidence*, 2d ed. (St. Paul: West Publishing Company, 1972) at 438 quoted in S. Schiff, *Evidence in the Litigation Process*, 3d ed. vol. 1 at 19.

33. *Supra* note 13 at 284.

34. *Ibid.* at 292.

35. See for example, Ekos Research Associates Inc., *supra* note 15. (Found that the "perceived moral character and conduct of the complainant appear to influence the founding decision" by the police (at 50 and 174). Where the police report "indicated that the complainant was vulnerable due to physical or mental disabilities, the report was almost three times more likely to be considered unfounded" (at 53).)

36. In *R.* v. *Seaboyer, supra* note 14 at 158, the majority stated in relation to the use of sexual history of the complainant in sexual assault cases that "the fishing expeditions which unfortunately did occur in the past should not be permitted".

37. *R.* v. *Young and Young* (19 June 1992), New Westminster Registry No. CC 920751 (B.C.S.C.); *R.* v. *Learn* (1 April 1992), Cranbrook Registry No. SC 2310 (B.C.S.C.); *R.* v. *Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.).

38. There has been a lack of judicial consideration of the burden of proof for foundational facts. See R. Mahoney, "Similar Fact Evidence and the Standard of Proof" (1993) Crim. L. Rev. 185. The Supreme Court in *R.* v. *K.G.B.*, *supra* note 16, applied the standard of a balance of probabilities to proof of the foundational facts necessary for the admission of an inconsistent statement for its truth.

39. *R.* v. *Riley* (1993), 17 W.C.B. (2d) 292 (Ont. C.A.).

40. See *supra* note 36. Indeed it is striking that no attempt was made by the Supreme Court of Canada to connect *Seaboyer* and *Stinchcombe.*

41. See discussion of recent decision *supra* note 16.

42. Medical and mental health records, private diaries, welfare and child protection records, school records, etc.

43. R. Elias, *The Politics of Victimization* (New York: Oxford University Press, 1986) at 83-85.

44. *A.G.* v. *Hitchcock* (1847), 154 E.R. 38 (Ct. of Exchequer).

45. Trial Transcript, June 4, 1992 *supra*, note 12 at 5.

46. Law Reform Commission of Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 301.

47. *Supra* note 22 at 136, McLachlin J.

48. The *Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125 (now s. 275 of the *Criminal Code, supra* note 6).

49. Given the general agreement that no inference can be drawn from the presence or absence of a complaint, it is illogical to assert, as some commentators do, that section 275 prevents an adverse inference being drawn if no specific mention is made of a complaint, but does not prevent cross-examination by defence counsel on the absence or untimeliness of a complaint. This interpretation rests on an assumption that the absence or untimeliness of a complaint is relevant to show a failure to speak when it would have been natural to do so. However, as is now generally accepted, there is no "natural" timing to complaints of sexual assault. D.F. Dawson, "The Abrogation of

Recent Complaint: Where Do We Stand Now?" (1984-85) 27 Crim. L.Q. 57 at 69-70 quoted in J. Sopinka, S.N. Lederman & A. Bryant, *supra* note 31 at 317-318.

50. *Criminal Code*, *supra* note 6 at s. 274.

51. K. Mair, "The Myth of Therapist Expertise" in W. Dryden & C. Feltham, eds., *Psychotherapy and Its Discontents* (1992) at 135-166.

52. B.J. Socor, "Listening for Historical Truth: A Relative Discussion" (1989) 17 Clinical Social Work J. 103 at 113-114.

53. A.R. Roberts, *Crisis Intervention Handbook-Assessment, Treatment and Research* (California: Wadsworth Publishing Company, 1990) at 137-138.

54. C.H. Hutchinson & S.A. McDaniel, "The Social Reconstruction of Sexual Assault by Women Victims: A Comparison of Therapeutic Experiences" (1986) 5 Can. J. of Community Mental Health 17 at 18.

55. L. Goldberger, "The Concept and Mechanism of Denial: in S. Breznitz, ed., *The Denial of Stress* (New York: International Universities Press, 1983) at 85.

56. R. Janoff-Bulman, *Shattered Assumptions: Towards a New Psychology of Trauma* (1992) at 97.

57. *Ibid.* at 98.

58. A. Medea & K. Thompson, *Against Rape* (London: P. Owen, 1974) at 105.