Dalhousie Journal of Legal Studies

Volume 1 Article 13

1-1-1992

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> The myth is that a 'bad woman' is incapable of being raped... we have to deal with the myth that the credibility of a 'bad woman' is immediately in question. I was never sure what that phrase meant. As a lawyer, all I knew was that it was of benefit to hurl as much dirt as possible in the direction of such a woman hoping that some of it would stick and that the jury would disbelieve what she said.[2]

In the recent *R. v. Seaboyer and Gayme*[3] decision, the Supreme Court of Canada, in a decision split seven to two ruled that Section 276 of the *Criminal Code*[4] was unconstitutional. Section 276 had restricted the right of defence counsel, in a trial for a sexual offence, to cross-examine and lead evidence of a complainant's sexual conduct on other occasions. The majority of the court ruled that this Section violated the accused's right to a fair trial guaranteed in Sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*[5].

The fundamental issue in the *Seaboyer* and *Gayme* appeals was the evidentiary relevance of the past and/or present sexual activity of a complainant in a trial for sexual assault. In this commentary, I will outline the reasoning and mode of analysis of both the majority and dissent on the issue of relevance. I will focus on the decision's turning point: the majority's lack of reference to empirical evidence, social science research, and feminist legal scholarship as compared to the dissenting judges' reliance on such material as the starting point for their analysis.

Factual Background

The *Seaboyer* and *Gayme* appeals arose from two separate events in Ontario. Both matters involved the same primary issues. As a result, the two appeals were joined at the Ontario High Court of Justice level.

In *Seaboyer*, the accused was charged with sexual assault of a woman with whom he had been drinking in a bar. At the preliminary hearing, the judge refused to allow the accused to cross-examine the complainant on her sexual conduct on other occasions. In *Gayme*, the complainant was fifteen years old, the accused eighteen, and the two were school acquaintances. The Crown alleged that the accused sexually assaulted the complainant at school. The accused raised the defence of

consent or, in the alternative, honest but mistaken belief in consent. He argued that there had been no sexual assault and that the complainant had been the aggressor. At the preliminary hearing, the accused sought to present evidence and cross-examine the complainant on her prior and subsequent sexual conduct. The preliminary judge refused to allow this evidence.

Both Gayme and Seaboyer appealed these decisions on the grounds that Sections 276 and 277 of the *Criminal Code* violated their right to a fair trial guaranteed under Sections 7 and 11(d) of the *Charter*.

Decision of the Majority

In relation to the principal issue before the court, the majority, in a decision written by Madame Justice McLachlin, found that evidence of a complainant's past and present sexual activity, excluded by Section 276, could be relevant in a trial for sexual assault. Therefore, it was held that Section 276 of the *Criminal Code* violated the accused's right to a fair trial as guaranteed by Sections 7 and 11(d) of the *Charter*.

Madame Justice McLachlin discussed the rights inherent in Sections 7 and 11(d) of the *Charter*, and considered the content of the "principles of fundamental justice". She stated that the principles of fundamental justice include a wide spectrum of interests involving those of both the accused and society as a whole. These interests coalesce to establish a fundamental right of our criminal justice system: the right of the innocent not to be convicted. Madame Justice McLachlin maintained that a key aspect of this right is the right of the accused to make a full answer and defence.

Madame Justice McLachlin categorized evidence of a complainant's sexual activity based on the use to which such evidence would be put. The decision of the majority held that evidence of sexual activity which is pertinent to the issues of a complainant's credibility and consent to the acts in question is irrelevant and, therefore, inadmissable in a trial for sexual assault. In contrast, evidence of a complainant's sexual activity for any other evidentiary purpose could potentially be relevant.

Extrapolating from this evidentiary distinction based on use, the majority ruled that Section 276's blanket exclusion of sexual activity evidence was too all-encompassing and that certain components of such evidence could be relevant and, thus, admissable. Admissability would be determined in a *voir dire*. It was, therefore, held that Section 276 violated the accused's right to a fair trial.

Dissenting Opinion

Madame Justice L'Heureux-Dubé, in the dissenting judgement, held that evidence of a complainant's past and present sexual activity, excluded by Section 276, is irrelevant in a sexual assault trial.

In stark contrast to the majority judgement, Madame Justice L'Heureux-Dubé began her analysis by setting out the context of the constitutional issues before the court. Through reference to a large

number of empirical sources, social science research, and feminist legal scholarship, she established the context within which the issues must be examined. This context includes the following:

1. Sexual assault is a uniquely gender sensitive issue because:

   (a) in most cases the perpetrator is a man and the target is a woman;
   (b) 98.7 per cent of those charged with sexual assault are men;
   (c) all women live in fear of sexual assault and this fear shapes women's daily lives; and
   (d) a large number of women are sexually assaulted. (Most conservative estimates state that one in five women will be sexually assaulted.)[6]

2. There is a large gap between the reporting of sexual assault and the actual extent of victimization. There are a number of reasons why women do not report victimization including, the perception by victims that institutions will view victimization in a stereotypical and biased fashion.[7]

3. Stereotypes, myths, and discriminatory beliefs regarding female complainants, sexual assault, women's sexuality, and rapists detrimentally affect many aspects of our criminal justice system including:

   (a) police conduct;
   (b) the Crown's decisions of which charges to prosecute;
   (c) judges and juries in their findings of fact and perception of guilt of the accused; and
   (d) the development of substantive and evidentiary law surrounding sexual assault.[8]

4. Sexual assault has the lowest conviction rate of all offences. (In 1973, the conviction rate for all crimes was 66.7 per cent, whereas for 'rape', it was 39.3 per cent. In 1980, it was estimated that a rapist has only four chances in one hundred of being arrested and convicted).[9]

5. Victim 'misconduct' (such as mothering children outside of marriage, having sexual relations with a boyfriend, being a runaway or a drug dealer) has a direct impact on the jury's perception of the guilt of the accused.[10]

6. The likelihood of an accused being convicted by a jury also decreases directly as more evidence is presented regarding the prior sexual experiences of the complainant even where the information is not verified and/or denied.[11]

7. Stereotypes and discriminatory beliefs regarding victims of sexual assault are common in our society.[12]

Madame Justice L'Heureux-Dubé continued by asserting that, once it is revealed that any notion of evidentiary relevance of a complainant's past or present sexual activity, in a trial for sexual assault, is based on discriminatory beliefs, myths, and stereotypical notions of female complainants, sexual assault, women's sexuality, and rapists, it, therefore, follows that evidence excluded by Section 276 is simply irrelevant. She concluded, therefore, that Section 276 of the *Criminal Code* does not violate the accused's right to a fair trial.

Reference to Empirical Evidence, Social Science Research, and Feminist Legal Scholarship

The distinguishing feature of the dissenting opinion is its reference to empirical evidence, social science research, and feminist legal scholarship. In contrast, the majority judgement is relatively void of such considerations. There was almost no reference in this judgement to empirical evidence and social science research regarding sexual assault, nor to the feminist legal scholarship which helps to interpret and explain both. This evidentiary gap prevented the majority from analysing the extent to which notions of the relevance of evidence of a complainant's past and present sexual activity rest on a foundation of stereotypes, myths, and discriminatory beliefs, not the truth and facts of present day reality. To the extent that the majority failed to examine the issue of relevance within a proper context they failed to examine the issue of relevance. Moreover, by beginning the analysis at the constitutional level and failing to establish an evidentiary foundation, the Supreme Court of Canada, in essence, gives persons charged with sexual assault a constitutional right to a fair trial and full answer and defence which is based on stereotypes, myths, and discriminatory beliefs.

The distinguishing feature of the reasoning in the dissenting judgement is the use of an evidentiary foundation as a beginning point of analysis. This foundation was used to establish the extent to which notions of relevance are informed by inaccurate assumptions about sexual assault, female complainants, rapists, and women's sexuality. It was also used to analyse how these inaccurate assumptions are utilized within the criminal justice system by police, Crown attorneys, juries, and judges.

At the time of writing this commentary, legislation was being developed to replace the now unconstitutional Section 276 of the *Criminal Code*. It is hoped that this legislation will reflect the reasoning of the

dissent, thereby according people charged with sexual assault offences the constitutional right to a fair trial and full answer and defence based on the truth and facts of the nature of sexual assault, female complainants, women's sexuality, and rapists, and not on stereotypes, myths, and discriminatory beliefs.

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1. (1991), 128 N.R. 81 (S.C.C.).
2. Mr. Jarvis, former defence lawyer and Member of Parliament speaking about the reform of law surrounding sexual assault and evidence of a complainant's sexual activity. Canada, *H.C. Debates* (19 November 1975) at 9252. Quoted by Madame Justice L'Heureux-Dubé, dissenting in *R.* v. *Seaboyer and Gayme*, ibid., *at 216-217.*
3. [hereinafter *Seaboyer and Gayme*].
4. R.S.C. 1985, c. C-46.
5. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].
6. *Seaboyer and Gayme*, *supra*, note 1 at 156.
7. *Ibid.*, at 157.
8. *Ibid.*, at 158ff.
9. *Ibid.*, at 164-167.
10. *Ibid.*, at 173-177.
11. *Ibid.*
12. *Ibid.*, at 170.