Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance

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Introduction

What follows is a discussion of the use of evidence of the complainant’s psychiatric history in sexual assault trials. I will argue that the introduction of this evidence is sought mainly for the purpose of discrediting the complainant’s testimony, as part of an “attack the victim” strategy. The admissibility of this evidence as relevant is the product of unfounded myths and sex-biased, if not misogynist, views about women. This evidence is rarely, if ever, relevant and its minimal probative value is, in most cases, far outweighed by its potential for exacerbating or perpetuating sex bias in the sexual assault trial. I will argue that the rationale for admitting such evidence in the name of a fair trial for the accused is flawed. Moreover, the victim and society have a legitimate interest in a trial based on relevant evidence rather than myth and this interest is worthy of protection.

In this paper I argue that the introduction of evidence of the complainant’s psychiatric history in a sexual assault trial should be restricted. This argument requires an exploration of truths and myths regarding sexual assault. Part I paints the backdrop against which the following discussion must be read. It points to the gendered nature of the crime of sexual assault as sexual violence and considers the characterization of the sexual assault trial as a “credibility contest.” Part II is an excavation of myths about women—about women’s psychological make-up, women’s sexuality and sexual assault. These myths are not distinct from one another. On the contrary, they are interconnected and form a powerful interpretive construct. This construct supports, and is perpetuated by, institutional and legal responses to women in general, and women as sexual assault victims in particular. Part III presents a brief discussion of sex bias within the traditional disciplines of psychiatry and psychology. Part IV considers what little caselaw there is on the

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1. While I recognize that the two disciplines are distinct, psychology and psychiatry will be treated together in this paper.
admissibility of psychiatric evidence of complainants and witnesses. Fundamental principles of relevance, probative value and the fair trial are discussed in Part V. Finally, I conclude that to avoid the dangers inherent in the use of victim psychiatric history evidence there must be a fundamental change in judicial determinations of relevance.

PART I: Sexual Assault and the Institutional Response

A. The Crime

The recognition of the unique character of the crime of sexual assault is crucial to the discussion of the use of psychiatric evidence relating to the complainant in trials of sexual assault. The gendered and sexual nature of the crime underlies and conditions the societal, institutional and legal response to the sexual assault complainant. It is at the core of understanding the response of the justice system when a woman reports a sexual assault, and when she testifies at trial.

Despite changes in sexual assault legislation that have de-gendered the crime of rape and given “women the legal right to be charged with rape and men the legal right to be victims”\(^2\), the fact remains that rape is a gendered crime. Women are raped because they are women. Sexual assault is not an “act of passion”; it is an expression of “power and hostility.”\(^3\) It is a “sex-based crime, the only crime in which men are the offenders and women the victims.”\(^4\) Indeed, sexual assault is an aggressive act against women as women.\(^5\) That 99% of those charged with sexual assault are male and 90% of the victims are female\(^6\) is no accident. Sexual assault is the product of a sex-unequal society. Indeed, sexual assault can be seen as a mechanism by which men maintain dominance over women and exclusive control of political, economic and social power. Brownmiller identifies rape as “nothing more or less than a conscious process of intimidation by which all men keep all women in a

\(^3\) Gunn & Minch, infra, note 10 at 47.
\(^5\) Ibid., at 1061.
\(^6\) Ibid. Other studies suggest that 91% of offenders are male. See Gender Equality in the Justice System (Vancouver: Law Society of British Columbia, 1992) at 7-68.
state of fear.” Sexual assault is a form of social control that keeps women in their place.8

Moreover, the sexual nature of the crime cannot be denied. Sexual assault is sexualized violence. In 1983 legislative reforms removed the crime of rape from the Criminal Code and replaced it with sexual assault.9 This change was clearly an effort to point to the violent nature of the offence.10 Although this effort is laudable, it failed to give full legal recognition to the nature of the crime. In renaming rape as sexual assault, the law suggests that it is an assault with a sexual motivation, or of a sexual nature.11 It separates the violence from its sexual nature and fails to point to the fact that in sexual assault, the two are one and the same. That is, sexual assault is not sex accompanied by an assault but sexual contact as an assault; it is not sex accompanied by violence, but sexual contact that is violence.

B. The Trial

Sexual assault is the product of the unequal division of power along sex lines in our society. The law of sexual assault “inevitably treads on the explosive ground of sex roles, of male aggression and female passivity [powerlessness], of our understandings of sexuality”12 and of the sex inequality of our society. The introduction of evidence of a complainant’s psychiatric history in a sexual assault trial both reflects and perpetuates the mythology that surrounds and determines the justice system’s response to the sexual assault complaint.

The sexual assault trial, and the institutional response to the sexual assault complainant, have been characterized as a “second rape.”13 This second victimization may be attributed to the historical and current perception of the crime of sexual assault and is the direct result of distrust and suspicion of the complainant’s veracity. The introduction of psychiatric history evidence is founded upon this distrust.

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9. C. Boyle, Sexual Assault (Toronto: Carswell, 1984), at 53.
It is widely believed that the victimizing nature of the sexual assault trial is the inevitable result of the peculiarly private nature of the crime. LaFree suggests:

[B]ecause rape cases rarely include eyewitnesses, processing is often reduced to direct confrontation between accuser and accused. ...[A] two party confrontation in which each party insists on a different reconstruction of an event is likely to be highly ambiguous. Without eyewitnesses processing may depend less on an assessment of whether a rape has occurred than on a perception of whether the victim and the assailant are the kind of people who could have been involved.14 [Emphasis in the original.]

While a lack of eyewitness, or any other “independent” evidence may result in a direct confrontation between the accuser and the accused, this does not fully explain the traumatic nature of the sexual assault trial for the victim.

Brownmiller notes that the rape trial is often an “oath against oath” situation.15 She points out, however, that there are many instances when a jury is required to deal with an oath against oath situation and must decide a case based on who it has decided to trust.16 The difference with sexual assault, she claims, is that the victim is female and the offender is male and that the offence is one that involves a “deliberate distortion of the primal act of sexual intercourse.”17 As a result “man’s law has sought to measure such relative, qualitative and interrelated concepts as moral character, force, fear, consent, will and resistance” in order to ensure that a crime was actually committed.18

Moreover, as MacCrimmon points out, despite the “fear that the trial will be a credibility contest between the victim and the accused, there is some evidence that this is not the case.”19 She suggests that, in fact, sexual assault trials are no more likely than nonsexual assault trials to entail the word of the victim against the word of the accused. In addition, eyewitness evidence is presented in the defence of rape charges more often than in many other offenses such as burglary, narcotics offences and drunk driving.20 MacCrimmon, thus, rejects the application of special evidence rules to sexual assault cases.

14. LaFree, supra, note 8 at 27.
15. Brownmiller, supra, note 7 at 368.
16. Ibid.
17. Ibid., at 369.
18. Ibid.
20. Ibid.
Special rules have been applied in sexual assault cases, argues MacCrimmon, because of "the assumption that the credibility of all victims of sexual offences is suspect when in reality this depends on the circumstances of each case."\textsuperscript{21} The argument in favour of the introduction of psychiatric history evidence, too, is founded on the belief that the complainant's credibility is always suspect. This belief is founded upon the myths and stereotypes that are explored in Part II of this paper.

The nature of the sexual assault trial as a \textit{second rape} for the victim is the result of the institutional response to the sexual assault complaint, and the woman who makes it, rather than the particular circumstances of the offence. Indeed, adherence to the notion that the sexual assault trial by its nature entails a "her word against his" situation obscures reality. If sexual assault trials are inherently credibility contests, it is not because the offence is usually committed in private (although that may be true) but because of the gendered nature of the offence. Because sexual assault is a crime committed by men against women, the contest is between the credibility of men as men and the credibility of women as women. This credibility contest is inherent in the societal division of power along sex lines.

Furthermore, because sexual assault is a crime of dominance, the sexual assault trial is a manifestation of that dominance. As Estrich states:

\begin{quote}
Most of the time, a criminal law that reflects male values and male standards imposes its judgment on men who have injured other men. It is "boys' rules" applied to a boys' fight. In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims.\textsuperscript{22}
\end{quote}

The conduct of the victim and thus the credibility of her complaint are tested by the application of male standards which are dominant in our legal culture.

In addition, the sexual assault trial is conducted based on the assumption that the accused is particularly vulnerable to false accusations. In fact, statistics suggest that sexual assault complaints are no more likely to be false than reports of any other crime.\textsuperscript{23} Nevertheless, the law and the conduct of sexual assault trials are grounded on the fear of false accusations. Edwards states: "Whilst the statutory provisions relating to rape

\begin{footnotes}
\end{footnotes}
have evolved to protect women, procedural rules have evolved with the protection of the (male) defendant in mind." This concern to protect the accused means that the sexual assault trial becomes the trial of the victim as much as of the offender.

In this context, the key defence strategy is to discredit the victim. As the trial focuses on the conduct of the victim at the time of the assault or, more generally, on the victim’s character and credibility defence counsel will inevitably attack the victim. While undermining the credibility of the victim is a common tactic of defence lawyers in a variety of criminal cases, it is more prevalent in rape trials. This reality is recognized by many commentators on sexual assault. Sheehy states that although victim history evidence may be admissible in other criminal trials, "for no other offence is it introduced so consistently as a basic feature of the defence, and for no other offence is this sort of evidence used to harass and intimidate the victim." An American study found that defence attorneys routinely investigate the background of the complainant in preparation for trial. It suggests that since the enactment of rape shield laws that restrict the use of sexual history evidence, the focus has shifted from sexual history to general character and reputation. Defence lawyers:

seek information related to the complainant’s credibility, character and general reputation (including whether the complainant has a criminal record, a history of reporting sexual assaults, or a psychiatric history). The preliminary inquiry is often used as a “fishing expedition” for the same purpose.

Victim history evidence may be used to suggest that the complainant is not trustworthy and that, therefore, her testimony should not be believed. It may also be used to raise or take advantage of antipathy towards the victim by attacking her character to show that she is a “bad” person. As Holstrom and Burgess point out:

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25. Estrich, supra, note 12 at 766.
27. Torrey, supra, note 4 at 1059.
29. Sheehy, ibid., at 751.
31. Ibid. Emphasis added.
32. Gunn & Minch, supra, note 10 at 70.
A multitude of things can be used to discredit the rape victim’s general character. Indeed, almost anything other than completely proper and respectable behaviour can be used: food stamps, criminal record, mental problems, psychiatric history, alcohol use, drug use, absence from school, religious views and vague innuendos.3

As the introduction of the victim’s sexual history is now restricted in Canada by statute,34 the use of psychiatric history evidence is likely to be seen by defence counsel as an attractive alternative. Moreover, such evidence will be seen as relevant by trial judges and therefore held admissible. While the law regarding the admissibility of past sexual history has changed in Canada, the attitudes that resulted in its admission in the past have not. These same attitudes will result in the admission of psychiatric history evidence.

The reasons why such evidence is held to be relevant, and the reasons why the defence tactic of attacking the victim is successful, are the same. The supposed relevance of victim history evidence of various kinds is based on myths regarding women and sexual assault. The success of this defence strategy is related to the extent to which those myths are widely believed by judges and jurors alike. As Sheehy states: “Predictably, victim vilification as a defence has had considerable success in cases where the victim history evidence can be used to invoke negative stereotypes.”35 Psychiatric history evidence may also be used to invoke or support negative stereotypes and thus become part of a successful defence strategy.

My argument is that the introduction of psychiatric history evidence is sought for the purposes of undermining the credibility of the complainant. This strategy may indeed be successful because mythology continues to operate in the justice system’s response to the sexual assault complaint. This mythology is explored below.

PART II: Mythology

The operation of rape myths in sexual assault trials was recognized by the Supreme Court of Canada in R. v. Seaboyer; R. v. Gayme.36 McLachlin J., for the majority, discussed the use of sexual history evidence in sexual assault trials:

33. Supra, note 26 at 184. Emphasis added.
35. Sheehy, supra, note 28 at 774.
Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and, in any event, were less worthy of belief. These twin myths are now discredited.37

If the myths that support a perceived connection between past sexual conduct, the likelihood of consent and lack of trustworthiness have been discredited, other myths about sexual assault complaints, and women who make them, have not. There remains a de facto, if not a legal, presumption that any given sexual assault complaint is false. This presumption is rooted in the longstanding myths that hold that women lie about sex in general and rape in particular, that women fantasize or hallucinate about rape, and that only “good” women can truly be raped. Although these myths are interrelated, for the sake of clarity, they will be considered separately.

A. Myth: Women frequently lie about sexual assault

The ultimate statement of the fabrication myth comes from Wigmore, whose treatise on evidence, written in the early 1900’s, is still influential. Bienen claims: “If there is a single source of the law’s concern with false reports in sex offence cases, it is Wigmore’s doctrine.”38 The core of the Wigmore doctrine is that women and young girls tend to fabricate charges of sexual assault. Bienen’s analysis of the basis for Wigmore’s conclusion clearly demonstrate that it is unfounded. However, as Bienen points out, the influence of Wigmore is ongoing because it reinforces societal prejudices.39 Wigmore’s doctrine may be the definitive legal statement of the myth but it is by no means the source. The myth has been, and remains pervasive.

Scholars point out that the source of the myth is an underlying distrust of women generally. Brownmiller points to the depth and fundamental nature of this distrust by noting that when female police officers began to take sexual assault complaints in New York the number of complaints labelled as false dropped from 15% to 2%. This, Brownmiller claims, indicates that “women believe the word of other women. Men do not.”40 Whether distrust of the sexual assault complainant is because she is a

37. Supra, note 36 at 134.
39. Ibid., at 241.
40. Supra, note 7 at 387.
woman or because her allegation is of a sexual assault is immaterial. Whatever the basis, the distrust is drawn along gender lines and is deep, pervasive, and discriminatory.

The fabrication myth includes two articulations. One is the image of the “scheming, lying vindictive woman” from whom men must be protected.\textsuperscript{41} Woman is seen as “fickle,” “filled with malice” and “seeking revenge on past lovers.”\textsuperscript{42} This image suggests that the woman is claiming to have been assaulted as a way of getting back at a man with whom she is angry.

The second articulation is based on a view of female sexuality as subject to restrictions external to women themselves. It is the image of the woman under surveillance:

\begin{quote}
It is assumed that the female’s sexual behaviour, depending on her age, is under the surveillance of her parents or her husband, and also more generally of the community. Thus, the defense argues, if a woman says she was raped it must be because she consented to sex she was not supposed to have. She got caught, and now wants to get back in the good graces of whomever’s surveillance she is under. A variation is to argue that she was out later than she was supposed to be, got caught, and needed an excuse for her tardiness.\textsuperscript{43}
\end{quote}

This view suggests that women are unable or unwilling to take responsibility for their sexual behaviour and are willing to make false accusations in order to keep themselves out of trouble.

Despite the fact that sexual assault complaints are no more likely to be false than any other offence,\textsuperscript{44} a woman who brings a sexual assault complaint to the justice system encounters profound distrust and hostility.\textsuperscript{45} Studies have continued to show high rates of “unfounding” of sexual assault complaints by police.\textsuperscript{46} Taylor notes that:

\begin{quote}
“Although unfounding statistics are often cited as evidence of how frequently rape victims lie, many reasons that cases are marked unfounded have nothing to do with false accusations.”\textsuperscript{47}
\end{quote}

The twin images of the vindictive, spiteful woman and the ashamed, fearful woman provide officials in the justice system with possible stories or scenarios in which to ground their distrust and disbelief. Psychiatric

\begin{thebibliography}{99}
\bibitem{41} Supra, note 7 at 387.
\bibitem{42} Supra, note 26 at 190.
\bibitem{43} Ibid., at 192.
\bibitem{44} Supra, note 4 at 1028.
\bibitem{46} See Gunn and Minch, supra, note 10 at 56; Clark and Lewis, supra, note 8 at 57, Gender Equality in the Justice System, supra, note 6 at 7-70.
\bibitem{47} Supra, note 45 at 91.
\end{thebibliography}
history evidence may be introduced by defence counsel to support these possible scenarios or it may offer other, perhaps more complex, reasons for a woman's "false accusation." It is important to note that there is no need for the defence to set out a specific defence of fabrication. Mere suggestion or innuendo may be sufficient to allow for the operation of the fabrication myth.

B. Myth: "Bad" women can't be raped

As Clark and Lewis point out, whether or not a particular event will be classified as rape by the criminal justice system—from the police to the jury—depends very much on the characteristics of the victim.48 "In effect, the law is saying that some women can be raped and some women can't...."49 The judicial system, claim Clark and Lewis, defines certain women as "open territory"; they are women who are seen as not being "respectable" and therefore "valueless" and not worthy of the law's protection.50 The complaints of these women are held to be "unfounded" by the police at the first stage in the criminal justice process.

If a complaint does get to the trial stage, the victim-specific definition of sexual assault will be applied. Susan Edwards points out that:

in the actual process of a rape trial, considerable partiality seems to be exercised regarding legal protection of a particular victim. For instance, case law announces its preparedness to protect women who are true victims of sexual assault. But the complainant is much more likely to qualify if her behaviour is congruous with the appropriate female sexual and social role. If it is not, her testimony is far less likely to be regarded with credulity.51

Deviation from the appropriate female role may be identified in the victim’s behaviour at the time of the event or it may be identified in her being labelled as deviant in a broader context.

Included among the grounds for "unfounding" identified by Clark and Lewis, is the victim's "mental state."52 They identify the presence of a psychiatric history as one of the characteristics that places women outside that category of protected women.53 The influence of a psychiatric history on the attitude of the judge is illustrated in an American study on the effects of rape shield laws. It found that some judges exercise their

48. Clark and Lewis, supra, note 8 at 91.
49. Ibid., at 92.
50. Ibid., at 157.
51. Supra, note 24 at 50.
52. Clark and Lewis, supra, note 8 at 89.
53. Ibid., at 92.
discretion to admit evidence of past sexual history when the complainant has a psychiatric history. Psychiatric history evidence, then, may be used to identify the woman as “deviant” and outside the law’s sphere of protection.

In this regard, it is interesting to note the recent case of R. v. Ross. In Ross, an appeal against a sexual assault conviction was based on fresh evidence brought forward by the complainant’s former psychiatrist. The decision of the court was reserved and prior to its release the appellant sought to have the appeal re-opened for the purpose of hearing further fresh evidence. This further evidence was of the complainant’s past sexual conduct with another person. In its decision, the Nova Scotia Court of Appeal held that the further fresh evidence was admissible, noting that it tended to bolster the evidence of both Mr. Ross and the psychiatrist. The appeal was allowed and a new trial ordered.

C. Myth: Women fantasize rape

A myth that is clearly connected to the fabrication myth and has particular significance when considering the use of psychiatric history evidence is that women fantasize sexual assault. There are two basic premises underlying this myth. One is that woman’s basic psychological make-up is characterized by a deep psychological need to be overpowered in sex. The other is that some women are subject to hallucinations or delusions of sexual assault. Taken together, these notions lay a foundation for discrediting complaints of sexual assault.

It is important to distinguish between the fantasy myth and the fabrication myth in this context because of the supposed support for the fantasy myth in psychology theory. As Torrey suggests, “dubious psychoanalytic theory has profoundly imprinted the notion that false charges are rooted in women’s fantasies of rape.” This dubious psychoanalytic theory had its beginnings with Freud and was carried on and expanded by his disciples. Despite current rejection or reinterpretation of Freudian doctrine, however, the notion of the “lying, hysterical, fantasizing female...persists even in contemporary consciousness.”

54. Marsh, Geist and Caplan, supra, note 30 at 60.
55. Brownmiller, supra, note 7 at 315.
56. Edwards, supra, note 24 at 99.
57. Torrey, supra, note 4 at 1026.
58. Brownmiller, supra, note 7 at 317.
59. Edwards, supra, note 24 at 134.
The myth that women actually fantasize about sexual assault is grounded in part on a failure to distinguish between seduction fantasies and fears of sexual assault. At least one study suggests that what have been identified as rape fantasies were either rape nightmares or fantasies of seduction. So-called fantasies of rape were in fact fantasies of seduction in which the women wanted to have sex with the subject of the fantasy. On the other hand, dreams or fantasies of forced sex were in fact nightmares and were accompanied by feelings of fear, not desire.

While the fabrication myth suggests that women purposefully lie about sexual assault for various “rational” reasons, the fantasy myth suggests that the woman is subject to psychological forces beyond her control that lead her, not to lie, but to misperceptive reality. This myth is particularly insidious because it is rooted in a “construct of woman [that] was saturated with a belief in gynaecological determinism from which no woman could escape.” It is rooted in an image of woman as determined by her physiological difference. Edwards documents the history of medical and legal discourse regarding female sexuality and concludes that:

the issues of false accusation, female masochism and female sexual fantasy have become so readily assimilated into legal practice that they often go unnoticed. Yet the medico-legal discourse has had profound consequences for the routine management of the rape complainant ever since the early nineteenth century.

Freudian psychoanalytic theory, despite having been largely discredited in contemporary psychology and psychiatry, continues to have influence over the institutional response to the sexual assault complainant. In this context, the introduction of psychiatric history evidence in the sexual assault trial reflects a belief in the rape fantasy myth. Such evidence is particularly dangerous as it suggests that the woman does not know her own mind.

D. Psychiatric history, evidence, and mythology

Thus far I have described the myths regarding women and sexual assault that make discrediting the victim a successful defence strategy in a sexual assault trial. The pervasiveness of the myths means that the credibility of the victim is a primary issue in the trial of a sexual assault complaint.

60. Torrey, supra, note 4 at 1026; Taylor, supra, note 45 at 113.
61. Ibid.
62. Supra, note 24 at 99.
63. Ibid., at 135.
Moreover, I have suggested that the introduction of evidence of a sexual assault complainant’s psychiatric history reinforces these myths in the courtroom setting. The acceptance of this type of evidence is based on the assumption that a complainant’s character is in issue and that the accused must be protected from the lying or fantasizing female. The introduction of psychiatric history evidence, as a subset of character evidence, has a dual effect. It is part of the basic attack-the-victim strategy, similar to questioning regarding sexual history, and, at the same time, it carries with it the suggestion that there is a psychiatric basis for the “false” accusation.

There is no need for the defence to explicitly articulate the myth it seeks to invoke. The mythology is continually operative within the justice system’s response to the sexual assault complainant. The mere introduction of psychiatric history evidence is enough to activate it.

PART III: Sex-Bias in Psychiatry and Psychology

Psychiatric evidence is introduced into the courtroom along with all of the sexism inherent in the discipline of psychiatry. Several scholarly works have identified and documented the sex bias that historically, and currently, characterizes psychiatric views of women.64 The conclusions of these studies provide the foundation for feminist critique of psychiatry. For present purposes it is sufficient to identify several themes that emerge from these studies.

First, the history of psychiatry, from Victorian times through Freud to the present, shows that the discipline “has gone hand in hand with the rest of the medical profession in supporting existing views of women.”65 Psychiatry is conditioned by and reflective of the social context in which it exists and develops. “Where women are concerned, most psychiatric theories and practices validate the male as prototype...and reflect descriptions and prescriptions based on archetypal images.”66

Second, psychiatry is “a force of social control” that reinforces socially determined sex roles by labelling as deviant and, if deemed necessary, hospitalizing, women who do not conform to their prescribed roles.67 “Much psychiatric theory containing images of women is based on

66. Ibid.
archetypes and stereotypes of ‘good’ and ‘bad’ women.” Thus, not only has psychiatry accepted traditional sex roles for women, it has reinforced those roles by identifying conforming behaviour as good and deviating behaviour as bad.

Finally, and perhaps most importantly, the mentally healthy adult is defined by clinicians as equivalent to the mentally healthy man rather than the mentally healthy woman. A recent study, involving psychiatrists, psychologists and social workers, found that the subjects generally agreed about the characteristic attributes of the mentally healthy man, woman and adult, independent of sex. What it found, however, was that “descriptions of a mentally healthy adult independent of sex closely matched the description of a healthy man but not that of a healthy woman.” What this suggests is that women are caught in a no win situation. In conforming to the mentally healthy woman image, they deviate from that of the mentally healthy adult.

This sex biased classification of mental disorder is present within the DSM (Diagnostic and Statistical Manual of Mental Disorders), the “bible” of mental disorders. Larkin and Caplan point out that as the psychiatric establishment is dominated by men, definitions of normalcy are based on male characteristics and that these definitions have been institutionalized in the DSM. The apparent scientific objectivity and medical basis of the DSM hides “a nest of value judgements” and subjectivity. “From this [male dominated psychiatric] perspective much of what has been determined to constitute psychological pathology is linked to females’ behaviour.” Larkin and Caplan point to the inclusion of self-defeating personality disorder (SDPD) in the DSM as an example of the labelling of traditional female behaviour as pathological. A criterion of the disorder, originally called masochistic personality disorder, is the “sacrifice of own interests for the sake of others.” As Caplan and Larkin point out, this is a traditional female behaviour and may in fact be an attempt, on the part of an abused woman to protect herself and her children from an abusive partner. What may be traditional or self-protective behaviour is labelled as indicative of mental or personality disorder.

68. Penfold and Walker, supra, note 67 at 11.
71. Supra, note 69 at 299.
72. Ibid.
73. Supra, note 70 at 19.
Against this background of sex-bias, it is not surprising that legal scholars, judges and defence counsel have turned to psychiatry and psychology to support their arguments about sexual assault. As Taylor points out, they have generally found a sympathetic ear.\textsuperscript{74} She suggests that a review of medical literature of the last one hundred years discloses a general consensus amongst medical writers that rape complaints are frequently unfounded and that women are likely to fabricate or fantasize the assault.\textsuperscript{75}

To summarize, the preceding discussion establishes several propositions relevant to the use of victim psychiatric history evidence in the sexual assault trial. First, because much of psychiatric theory is based on images of “good” and “bad” women, psychiatric history evidence may be used to invoke the bad-women-can’t-be-raped myth. Second, because the fantasy myth is supported by dubious, but still influential, psychoanalytic theory regarding women’s psychology, the introduction of psychiatric evidence draws upon and reinforces that myth. Third, because psychiatric definitions of normalcy and pathology are sex-biased (constructing women’s behaviour as pathological) psychiatric evidence may introduce a false identification of pathology.

Further, psychiatric evidence carries with it the presumed credibility of scientific evidence. As the following discussion of the caselaw will indicate, the potential danger of this evidence has not been addressed by the courts.

\textbf{PART IV:  Case Law on Admissibility}

It should be noted that the caselaw dealing with the admissibility evidence of the psychiatric history of a victim or a witness is scant. Recent cases such as \textit{R. v. Ross} and \textit{R. v. Nickerson},\textsuperscript{75a} however, indicate that the introduction of psychiatric history evidence may become a more common phenomenon. As I have suggested, since the use of sexual history evidence is restricted, defence counsel may turn to psychiatric history for evidence with which to attack the credibility of sexual assault complainants. Because of this possibility, it is essential that the potential dangers of this evidence be recognized and addressed. What little caselaw there is tends to deal with the usefulness of the evidence to the trier of fact and the right of the accused to make full answer and defence without consideration of its potential misleading or discriminatory effect.

\textsuperscript{74} Taylor, \textit{supra}, note 45 at 76.
\textsuperscript{75} \textit{Ibid.}
\textsuperscript{75a} (1993), 121 N.S. R. (2d) 314 (N.S.C.A.).
Psychiatric evidence may take any one, or any combination of, three forms. It may be introduced through the testimony of a psychiatrist, through the introduction of records of a complainant’s psychiatric history, or simply through the cross-examination of the complainant herself. Although, in the final analysis the issue comes down to a determination of relevance, I will consider the rules governing each type of evidence in turn.

A. Expert Opinion

The key Canadian case dealing with the admissibility of psychiatric opinion evidence regarding the credibility of a witness is *R. v. Hawke*. The charge in *Hawke* was murder and the psychiatric evidence introduced was regarding the chief Crown witness who was intimately involved with the accused and had apparently been present when the alleged murder was committed. The witness had been an involuntary patient at a psychiatric facility just prior to the events leading to the murder charge. In considering the trial judge’s exclusion of psychiatric opinion evidence regarding the witness, the Court of Appeal first found that the trial judge had erred in failing to properly distinguish between issues of competence and credibility. The Court then went on to consider the issue of psychiatric opinion going to credibility. In so doing, the Court applied the principle enunciated in *Toohey v. Metropolitan Police Com’r*. In *Toohey*, the House of Lords stated:

Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their [sic] best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them.

In *Hawke*, the Court of Appeal held that, based on *Toohey*, the trial judge’s exclusion of the expert evidence was in error regardless whether the evidence went to competence or credibility.

In *R. v. Desmoulin*, the accused was charged with the murder of the child of the woman with whom he was living. The chief Crown witness was the child’s mother. The defence sought to introduce evidence of a

76. (1975), 22 C.C.C. (2d) 22 (Ont.C.A.).
77. Ibid., at 26.
79. Ibid., at 512.
psychiatric resident who had treated the witness and was of the opinion that the witness was mentally retarded. It was also intended that he would testify as to the circumstances of her hospitalization and to her fabricating stories while in hospital. It was held that the doctor’s “evidence did not provide a foundation for the reception of medical evidence relating to [the witness’s] credibility under the principle enunciated in *Hawke.*”

The court held that there was no evidence that the mental retardation of the witness affected her reliability as a witness. Psychiatric evidence, then, must be of a mental disorder or deficiency that clearly affects the reliability of the witness’s testimony.

The *Toohey* principle was also applied in *R. v. French,* a murder case, where it was held that the mental disorder about which the psychiatrist is to give evidence must be *hidden.* In *French,* psychiatric opinion evidence was sought to be introduced by the defence regarding a Crown witness who was a friend of the wife of the deceased. The witness testified at trial regarding a conversation she had overheard in which the accused and the wife of the deceased discussed a life insurance policy held by the deceased. A psychiatrist, who had not treated or interviewed the witness but who had observed her testimony and who had her hospital records, testified that she suffered from a character disorder and was capable of lying on the stand. The court stated that there was no “hidden fact for medical science to reveal” and that the frailties of the witness’s evidence would be apparent to the jury without the psychiatrist’s testimony. The psychiatrist’s evidence was excluded.

A similar ruling was made more recently in *R. v. Osolin* where the psychiatric evidence was held to have been properly excluded by the trial judge. In *Osolin,* the accused was convicted at trial by a jury of one count of sexual assault and one count of kidnapping. The defence had tendered evidence of a psychiatrist who was prepared to testify that the complainant suffered from mental disorder which would affect the reliability of her evidence. The trial judge held that the psychiatrist’s evidence did not show an incapacity to tell the truth, but rather only a capacity to lie, which is a matter for the jury.

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80. (1976), 30 C.C.C. (2d) 517 (Ont.C.A.) at 522.
81. (1977), 37 C.C.C. (2d) 203 (Ont. C.A.) at 212.
82. *Ibid.,* at 209.
Finally, in *R. v. Julien*, a psychiatrist's evidence that the key Crown witness suffered from hysteria and thus had a tendency to fabricate and invent, if not outright lie, was held to be admissible. In that case, the accused, having been charged with two counts of first degree murder arising out of the setting of a fire, was convicted at trial of one count of second degree murder and one count of manslaughter. The appellant contended that evidence of a psychiatrist as to the credibility of the principal Crown witness, who had been with one of the deceased on the night of the fire, and who had spoken to the accused before the fire, was improperly excluded at trial. The psychiatrist had treated the witness for several years prior to the trial and testified in a voir dire that the witness suffered from hysteria and as a result had a tendency to fabricate and invent. L’Heureux-Dubé J.A., as she then was, emphasized that the decision to admit or exclude this type of evidence is to be left in the hands of the trial judge to be made with regard to the particular facts of the case. The question, she points out, is one of relevance and that in this instance the jury ought to have been informed of the disorder to enable it to “render an enlightened verdict.”

The principle which can be extracted from this line of cases is this: expert opinion evidence regarding the credibility of the witness is admissible where it provides to the trier of fact a hidden fact disclosed by medical science that would be necessary to make a proper determination of the reliability of the witness’ testimony. In addition, the question of relevance must be determined by the trial judge based on the facts of the particular case.

The danger, of course, is that in both the psychiatric determination of a hidden medical fact and in the determination of relevance, myths will be determinative. Although the charge in *Julien* was murder, not sexual assault, the case is a prime example of this danger. The doctor’s diagnosis of hysteria was based, in part, on his observations of the female witness’ “exaggeration” of her physical ailments (removal of a breast, uterine cancer, a cardiac complaint and distension of the large intestine) as well as on her apparent discomfort with being questioned by a lawyer. Although it is perhaps imprudent to draw any conclusions from the scant facts available in the case report, it is at least possible that the “diagnosis”

86. The etymology of the term “hysteria” and the belief in the gynaecological foundation of the disorder makes it particularly offensive.
87. (1981), 57 C.C.C. (2d) 463 (Que.C.A.), at 472.
is based on a misunderstanding of what might be a “reasonable” response for this woman in this context. Moreover, it is doubtful that her response to her ailments has any relevance to the credibility of her testimony in a murder trial. It is indeed interesting to note that in all of these cases, all murder charges except Osolin, the witness whose credibility is attacked by the use of psychiatric opinion is a woman.

B. Records

The production of psychiatric treatment records has been dealt with primarily by weighing the interests of justice against the privacy rights of the witness. Medical records are clearly admissible in criminal proceedings. It has been held by the Supreme Court of Canada that provincial legislation dealing with the confidentiality of records cannot fetter the administration of criminal justice. Therefore, the question becomes whether the production of the records is required in the interests of justice.

In R. v. Ryan, the Nova Scotia Court of Appeal, without citing case law, held that social work files related to the sexual assault complainant had to be produced in the interests of justice. The trial judge, after reading the complainant’s files, found that they contained information necessary for the accused to make full answer and defence but were also privileged. He then entered a stay of proceedings. The Court of Appeal pointed out that the accused has a constitutionally protected right to make full answer and defence and that this, plus the societal interest in “the correct disposal of litigation,” must override the value of confidentiality. It is interesting to note the Court of Appeal’s comments regarding the interests of the complainant in this case:

Presumably she has a vital interest in having her complaint pursued and disposed of, else she would not have made it in the first place. It is reasonable to assume she is prepared to run the risks of disclosure that may be made from her files in the interest of a “correct disposal of the litigation” she has caused to be started.

The files were held not to be privileged. With regard to admissibility of the evidence the court states: “The trial Judge is able to apply the well-established rules and tests to determine whether any given piece of evidence is relevant.”

92. Supra, note 81 at 214.
95. Ibid., at 229.
96. Ibid., at 230.
In *R. v. Coon*, the defence sought the production of the sexual assault complainant’s psychiatric hospital records. The Ontario *Mental Health Act* requires that records be disclosed only if disclosure is essential in the interests of justice. The Ontario Court (General Division) set out a list of factors to be considered in determining whether the defence had provided a sufficient foundation for the production of records. The court stated:

While I do not pretend that this list is exhaustive some of the factors that may be considered as to whether a substantial foundation has been established are (1) the nature and seriousness of the offence; (2) the importance of the witness to establishing the guilt of the accused; (3) the proximity of the mental disorder to the date of the offence; (4) the existence of evidence to suggest a motive to fabricate; (5) criminal antecedents of the witness; (6) the mode of life or other discreditable conduct which may tend to discredit the testimony; (7) evidence of bizarre or incompetent behaviour.

These factors would be used to determine whether there is at least a basis of relevance to the evidence to warrant the production of the records. The danger, of course, is that the determination of relevance that would render the evidence admissible and sanction the order for production of the records will be made with reference to myths. Indeed, the presence of the myths is apparent in the factors listed. In particular, reference to possible motive to fabricate on the part of the complainant suggests the influence of the fabrication myth. The factors relating to the complainant’s criminal antecedents and mode of life or discreditable conduct suggest the possibility of using psychiatric records to attack her character and thus place her in the category of unprotected “bad” women. Finally, consideration of what is bizarre or incompetent behaviour leaves the door open to sex-biased determinations of what might be the appropriate response of a woman to a sexual assault similar to those used to support the now abrogated doctrine of recent complaint. In *Coon*, the court ordered the disclosure of the records to defence counsel, in part, on the basis that there was evidence that the complainant had “exaggerated” sexual abuse on the part of her adoptive father and that there was evidence of criminal activity and discreditable conduct on the part of the complainant.

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98. Ibid., at 157.
99. Ibid., at 158.
C. Cross-examination

As a basic principle, it is fair to say, that the only limit on the right of defence counsel to cross-examine a witness is relevance. Moreover, particularly where the purpose of the questioning is to "test" credibility, the concept of relevance is broadly construed. As stated in Osolin, "That which is relevant to the credibility of a witness may be asked." The British Columbia Court of Appeal, in Osolin held that the trial judge's restriction of cross-examination of the complainant on mental health records was in error. The trial judge had ruled that defence counsel could use the records in cross-examination only where they disclosed a prior inconsistent statement. He had ruled that to allow defence counsel to cross-examine the complainant on the basis of her mental health records in general would be a violation of her right to privacy. The Court of Appeal held that in determining the limits of cross-examination the issue is relevance. As it was impossible to know what questions defence counsel would have asked had it been permitted, the Court of Appeal could not decide on the issue.

It is interesting to note that the defence in Osolin sought to cross-examine the complainant regarding an argument that had occurred between her and her mother at the psychiatric ward of a hospital to which the complainant had been committed following the alleged incident. The defence submitted that the argument was relevant to the defence theory that the complainant was "fabricating her story of sexual assault in order to prevent further confrontation with her parents." The image of the woman under surveillance was thus sought to be invoked in a case where there was evidence sufficient for a jury to convict the accused of kidnapping and sexual assault.

D. Summary

In summary, then, the admissibility of psychiatric history evidence—whether in the form of expert opinion, records or elicited from the complainant in cross-examination—will be determined on the basis of its relevance. The issue of relevance and the operation of sex-bias in its determination is the subject of the following section of this paper.

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100. Supra, note 84 at 36.
101. Ibid.
102. Ibid., at 38.
PART V:  Relevance

The statutory restrictions on cross-examination regarding the past sexual conduct of the complainant, in section 276 of the Criminal Code, were intended to be “an exhaustive list of situations in which such evidence could be relevant.” These provisions were struck down by the Supreme Court of Canada in R. v. Seaboyer; R. v. Gayme for violating of the accused’s right to make full answer and defence. In Seaboyer, L’Heureux-Dubé J., in dissent, states: “Evidence that is excluded by these provisions is simply, in a myth- and stereotype-free decision-making context, irrelevant.” Although the majority refuses to accept that the evidence excluded by s.276 is in all cases irrelevant, it does refer to the evidence of the complainant’s past sexual conduct as often of “limited probative value.” The problem, argues McLachlin J., is that the provision “fails to distinguish between the different purposes for which the evidence may be tendered” and therefore excludes evidence for “purposes where the evidence would not be misleading, but truly relevant and helpful.” Although the evidence may be irrelevant to the general credibility of the complainant, the court suggests, it may be relevant to show bias or motive to fabricate, the physical condition of the victim, or a pattern of conduct analogous to similar fact evidence. These purposes, the majority claims, would be relevant to the determination of the truth. L’Heureux-Dubé clearly disagrees. The differences between the majority and dissent in Seaboyer can, in fact, be reduced to a disagreement about the possible relevance of past sexual conduct evidence introduced through cross-examination.

It is important to recognize here that the distinction between relevant and irrelevant uses of prior sexual conduct evidence, as articulated by the court in Seaboyer, is not as clear as is suggested. Indeed, the distinction between evidence going to credibility and evidence going to motive to fabricate or pattern of conduct is a spurious one. Whatever the avowed purpose of the introduction of such evidence, it is meant to show that the complainant’s story is not to be believed. As such it is grounded in the myth that women frequently and successfully fabricate complaints of

103. Shilton and Derrick, supra, note 2 at 113.
104. Supra, note 36 at 198.
105. Ibid., at 134.
106. Ibid., at 145.
107. Ibid., at 142 and 143.
sexual assault. Moreover, it is based on the assumption that the sexual assault trial will inevitably be a credibility contest. As I have suggested, this too, may be a myth.

An example of this, regarding psychiatric history evidence, may be found in the recent decision of the Nova Scotia Court of Appeal in *R. v. Ross*. In allowing an appeal based on fresh evidence from the complainant’s former psychiatrist, the court stated:

The evidence of Dr. Hansen is, in my opinion, relevant in that it bears on the believability of the evidence of the complainant. It does not relate to credibility in the ordinary sense because the evidence does not suggest that his former patient may be telling an untruth. It merely presents a psychiatric reason for the complainant having given a version of the facts which she may believe to be true but which may not, in fact, represent what actually occurred.

The distinction between credibility in the “ordinary sense” and the issue of whether or not the story given by the complainant represents “what actually occurred” is difficult to see. The Court of Appeal points out that all counsel agree that the jury trial was “properly conducted and that there was ample evidence to support the conviction that resulted.” However, the Court adds:

If on the other hand the jury had believed Mr. Ross rather than the complainant or had a reasonable doubt, the verdict would have had to be one of acquittal. Credibility was the issue of vital importance.

The introduction of psychiatric evidence in this case, the content of which is unavailable because it was heard by the Court of Appeal in camera, is clearly for the purpose of showing that the complainant’s story is not credible.

A. *Sex-bias in the determination of relevance*

As the admissibility of psychiatric evidence will be decided based on a determination of relevance, it is important to investigate further the relationship between relevance and the myths and stereotypes discussed thus far.

Sheehy states: “The legal test of relevance is whether a reasonable trier of fact could find the proffered evidence helpful as tending to shed light on some matter at issue in the case.” She suggests that, in relation to the introduction of past sexual conduct evidence the difficulty is that the

109. Ibid., at 238.
110. Ibid., at 235.
111. Sheehy, supra, note 28 at 753.
determination of relevance is “informed by beliefs which the dominant culture labels as ‘truth’.” This statement can be applied equally to evidence of the psychiatric history of the sexual assault complainant. The question of relevance is decided based on beliefs rather than truth.

In an article dealing with the nature of judicial decision-making, MacGuigan states that in their undeniable role as law-makers judges cannot apply their own “individual sense of justice.” Judges, he suggests, cannot place themselves above their community and must apply the “accepted standards of the community”, “the mores of the times.” MacGuigan submits that “it is only because judges are true members of their society that they are able to be its spokesmen [sic], its poets.” Of course, in making determinations of relevance, that is precisely the problem. Judges internalize and reflect the beliefs and values of our male-dominated culture.

In reference to sexual history evidence, Sheehy states:

The beliefs which give life to our notions of “relevance” are reflective of a patriarchal culture. ...[They] are not only without empirical foundation: they also systematically deny control and credibility to those who do not belong to the dominant culture. Even more problematic is the fact that these beliefs are insidious because they are taken for granted and are therefore almost irresistible to the trier of fact who has absorbed our culture. Seen in this context, the legal construct of “relevance” actually projects an unarticulated political agenda which involves the reinforcing of mythologies about rape and women’s sexuality.

This statement may be applied equally to the issue of psychiatric history evidence. To it must be added sex-biased notions of mental health reinforced by the mental health disciplines and professionals. With the introduction of psychiatric history evidence, societal mythologies about women and sexual assault are supported by a sex-biased discipline that purports to be scientific and objective.

B. Power to exclude relevant evidence.

A possible solution to the problem may be found in looking beyond the question of relevance and considering the probative value of the evidence tendered as weighed against the danger of introducing myths into the

112. Sheehy, supra, note 28 at 753.
114. Ibid., at 32.
115. Ibid., at 33.
judicial decision-making process. In other contexts, the power of a court to exclude relevant evidence on the grounds that its probative value is outweighed by the negative effect it has on the trier of fact’s ability to make an objective determination of truth has been endorsed.

The issue in *R. v. Corbett* was the admissibility of the accused’s criminal record under s.12 of the *Canada Evidence Act*. In that case, the Supreme Court of Canada confirmed that “a salutary judicial discretion exists to ensure that this otherwise relevant and admissible evidence will be excluded where the interests of justice so require.” In *Corbett*, the Court confirmed the judicial discretion to exclude evidence if its prejudicial effect outweighed its probative value. This discretion had been severely restricted in *R. v. Wray*. LaForest J., dissenting on other grounds, hinted that, contrary to *Wray*, and its subsequent interpretation, the circumstances where otherwise admissible evidence could be excluded may not be limited to cases where the probative value is “trifling” and the prejudicial effect great. Without definitively confirming a broader discretion, LaForest suggests that the discretion ought to be exercised with an eye to ensuring that the trial is fair. This view was confirmed in *R. v. Potvin*, although the breadth of the general discretion was not articulated.

This general discretion to exclude evidence that is otherwise admissible because its prejudicial effect would outweigh its probative value offers a mechanism for arguing that psychiatric history evidence ought to be excluded in a given case. However, it should be remembered that the bias and stereotypical thinking that determines the relevance decision will be active in the probative value versus prejudice balancing act. Moreover, while affirming the general discretion to exclude, LaForest and Dickson (for the majority) enunciate a fundamental principle of inclusion. Dickson states:

I agree with my colleague La Forest J. that basic principles of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. ... If error is to be made, it should be on the side of inclusion rather than exclusion, and our efforts, in my opinion, consistent with the ever-increasing open-ness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

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121. *Supra*, note 117 at 404.
Given this inclusionary policy and the recognition that “discretion has not protected women” in sexual assault trials122 we should not place our faith in this power to exclude. This is true despite the clearly demonstrable danger that the introduction of psychiatric history evidence will foster the operation of myths that skew the decision making process.

Cogent evidence regarding the influence of victim history evidence on jurors provided by mock jury studies123 may not be sufficient to convince a court of the overriding discriminatory effect of such evidence. In Corbett, Dickson C.J.C. payed little heed to similar studies regarding the inability of juries to make the distinction between evidence going to credibility and that going to guilt. Instead, he confirmed “our strong faith in juries”124 and stated that “it would be wrong to make too much of the risk that the jury might use the evidence for an improper purpose.”125

C. The fair trial

It is important to note that both Corbett and Potvin dealt with evidence the admission of which might render the trial unfair to the accused. In Potvin, the issue was the admissibility of testimony taken at a preliminary inquiry where the witness was no longer available at the time of trial. After finding that the accused has a constitutional right to the opportunity to cross-examine Crown witnesses, the court held that there is a judicial discretion to exclude the testimony. In exercising this discretion the trial judge is to consider the “‘two competing and frequently conflicting concerns’ of fair treatment of the accused and society’s interest in the admission of probative evidence in order to get at the truth of the matter in issue.”126 In Corbett, too, La Forest J. states that the notion of a fair trial includes consideration of society’s interests. He states:

But fairness implies and in my view demands, consideration also of the interests of the state as representing the public. Likewise, the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.127

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123. See, for example, studies quoted supra, note 4, at 1047 and 1054; and supra, note 2, at 114. See also S.M. Kassin et al., “Dirty Tricks of Cross-Examination” (1990), 14 Law and Human Behaviour 373.
124. Supra, note 117 at 402.
125. Ibid., at 401.
126. Supra, note 120 at 212.
127. Supra, note 117 at 443.
L’Heureux-Dubé J., in dissent in Seaboyer, also points to the societal interest in maintaining the integrity of the trial process to be considered under s.11 and s.7 of the Charter. She goes on to suggest that:

interpreting the Charter in a manner that systematically excludes considerations of the harm done by evidence sought to be elicited by the accused may, ironically, operate to undermine and trivialize notions of fairness.\(^{128}\)

Her view, unfortunately, is not shared by the majority. While recognizing that “s.7 reflects a variety of societal and individual interests”\(^{129}\) the majority declares that “a measure which denies the accused the right to make full answer and defence would violate s.7 in any event.”\(^{130}\) The difference between the majority and the dissent, as I have suggested, lies in their respective views on the relevance of the evidence excluded by the impugned provision. There is a difference, too, in their respective views on the content and status of the right to make full answer and defence.

For the majority, the accused has the right to introduce any and all evidence that might lead to an acquittal.\(^{131}\) Moreover, this right is seen as overriding. Indeed, the majority invokes the ghosts of Donald Marshall and the Birmingham Six to buttress its overriding concern that the accused be allowed to establish its defence.\(^{132}\) The supremacy of the accused’s right to make full answer and defence is found, too, in Coon dealing with the production of psychiatric records of the sexual assault complainant. The court states:

First, in ordering production a balance must be struck between the right of the accused to full answer and defence and the right of the complainant (the disclosure of whose records are at issue) to privacy and confidentiality which is embodied in the legislation [Mental Health Act]. Secondly, the right of the accused to full answer and defence will prevail if a sufficient foundation is laid to enable the judge to determine that disclosure is necessary in the interest of justice.\(^{133}\)

In Hawke, the Court rejected the suggestion that defence counsel’s bid to introduce psychiatric evidence, in an effort to undermine the credibility of the witness, was an “unwarranted attack” on the witness. There it was held that to have “acquiesced in the evidence of Miss Thomas as being that of a thoroughly credible witness would have been a complete abdication of the role and duty of defence counsel.”\(^{134}\)

\(^{128}\). Supra, note 36 at 215.
\(^{129}\). Ibid., at 133.
\(^{130}\). Ibid., at 134.
\(^{131}\). Ibid., at 137.
\(^{132}\). Ibid., at 135.
\(^{133}\). Supra, note 97 at 152.
\(^{134}\). Supra, note 76 at 52.
It seems, then, that the discretion to exclude evidence the negative effect of which might outweigh its probative value will function only in favour of the accused. As the majority states in Seaboyer, although there is indeed a discretion to exclude otherwise relevant evidence, "Canadian courts ... have been extremely cautious in restricting the power of the accused to call evidence in his or her defence...." As a result, I would posit that arguments that psychiatric evidence ought to be excluded on the basis that its discriminatory effect outweighs its probative value are likely to fail whether made in the lower courts or at the Supreme Court of Canada.

What is needed is a redefinition of the right to make a full answer and defence with full recognition of the equality issues inherent in the sexual assault trial. Unfortunately such arguments failed to convince the majority in Seaboyer although they were clearly articulated in the judgement of L'Heureux-Dubé. L'Heureux-Dubé makes it clear that the right to make full answer and defence does not include the right to introduce irrelevant evidence, nor does it include a right to trial based on mythology. Moreover, her section 1 analysis recognizes that the objective of the elimination of sex discrimination in the adjudication of sexual assault complaints is buttressed by the equality guarantees in s.15 and s.28 of the Charter.

Sexual assault must be recognized as an equality issue. Unfortunately, the majority in Seaboyer did not perceive it as such. As Kathleen Lahey points out, in order for the law to give full recognition to equality, it must be grounded in a theory of inequality. This approach, she suggests:

would require judges to ask whether the rule or practice that is being challenged contributes to the actual inequality of women, and whether changing the rule or practice would actually produce an improvement in the material conditions of the specific woman or women before them.

The methodology of judicial analysis will have to change in order to make such a shift in focus possible. Judges will have to begin to listen to women, to what they have to say - as witnesses, as experts, as lawyers - and they will have to ascribe as much validity and importance to that viewpoint

135. Supra, note 36 at 139.
136. Ibid., at 210.
137. Ibid., at 216.
138. Shilton and Derrick, supra, note 2 at 112.
139. Ibid., at 117.
as they do to the men's voices they are used to hearing. Judges will have to insist on contextualizing the issues they are analyzing, taking into account the history of the rule or practice in question, the realities of the social, economic, and legal relations that surround it, and the fact that the private oppression of women has been very much a part of the public agenda.\textsuperscript{141}

This shift in focus to a recognition of equality and the particular context of the rule is required in judicial decisions about the admissibility of evidence of the sexual assault complainant's psychiatric history. Judges must be cognizant of the power of the myths that surround sexual assault complaints and the contributions that psychiatric and psychological theory have made to these myths.

D. The victimization spiral

In addition, judges must be aware of what I call the \textit{victimization spiral}. There is an undeniable link, supported by empirical studies, between childhood sexual abuse and mental health difficulties in adulthood. It has been shown that "childhood molestation is associated with multiple short- and long-term psychological difficulties."\textsuperscript{142} Among the problems that have been repeatedly associated with a history of sexual abuse are: low self-esteem and guilt, anxiety and depression, interpersonal dysfunction, eating disorders, substance abuse and a propensity towards suicide.\textsuperscript{143} Any of these problems might lead a woman to seek the help of mental health professionals.

Moreover, there is a clear link between past sexual abuse and further victimization. One study suggests that women who have suffered childhood sexual abuse are 2.4 times more likely to be revictimized as adults.\textsuperscript{144} Speculation about the nature of this link and the construction of causality is unnecessary for present purposes. However, it is worth quoting an American study which concludes:

\textit{[T]he high frequency of adult assault after the onset of mental illness suggests that in addition to [past] victimization as a predisposing factor, the mentally ill are more vulnerable to victimization because of their illness. ... It is interesting to note that the victimization that occurred after

\begin{itemize}
\item \textsuperscript{141} \textit{Supra}, note 40.
\item \textsuperscript{142} J. Briere, "Methodological Issues in the Study of Sexual Abuse Effects" (1992), 60 J. of Consulting and Clinical Psychology 196, at 196.
\item \textsuperscript{143} \textit{Ibid.} See also Wyatt, Guthrie and Notgrass, "Differential Effects of Women's Child Sexual Abuse and Subsequent Revictimization" (1992), 60 J. of Consulting and Clinical Psychology 167.
\item \textsuperscript{144} Wyatt, Guthrie and Notgrass, \textit{ibid.}, at 170.
\end{itemize}
the onset of mental illness was most likely perpetrated by a stranger or casual acquaintance; whereas...assaults that occurred prior to the illness were more likely to involve a family member.145

There appears to be a link, then, between childhood victimization and revictimization that goes beyond the predisposing factors identified in one study as "low self esteem and a perceived inability to control what happens to one’s body and to develop nonexploitative relationships that can increase the likelihood of revictimization."146 As Derrick and Shilton point out, disabled women are more vulnerable to sexual violence: "But the problem clearly goes beyond that; the multiple disadvantage can also be a motivating factor in a sexual assault."147

Whatever the causal relationship, the victimization spiral is clear. Childhood victimization is linked to psychological and psychiatric difficulties, which in turn are linked to further victimization. The cycle is complete when the operation of myths and stereotypes leads to the discrediting of the victim’s complaint. In a sense, the childhood victimization is brought back to haunt the victim as it nullifies whatever protection the law would have provided her.

In order for judges to deal adequately and fairly with evidential issues in sexual assault trials, they must begin thinking from a theory of inequality. As Lahey suggests, they must ask “does this rule or practice contribute to the inequality of women.” To the extent that routine introduction of, and admission of, psychiatric history evidence acquiesces in and reinforces the application of myths in sexual assault trials, it contributes to women’s inequality. It denies women a fair trial; denies them full protection of the law as guaranteed by s.15 of the Charter. Moreover, given the victimization spiral, it denies women who use mental health services redress and further reinforces their victimization and double vulnerability. In addition, to the extent that the prospect of the introduction and disclosure of mental health history discourages women from reporting sexual assaults it contributes to the vulnerability and inequality of all women.

146. Wyatt, Guthrie and Notgrass, supra, note 143 at 167.
147. Supra, note 2 at 123.
Conclusion

I can offer only limited solutions. One would be to enact legislation similar to the current Criminal Code section that deals with evidence of past sexual activity. This provision provides a list of factors to be considered by the trial judge in determining admissibility:

(a) the interests of justice, including the right of the accused to make a full answer and defence;
(b) society’s interest in encouraging the reporting of sexual assault cases;
(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
(d) the need to remove from the factfinding process any discriminatory belief or bias;
(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
(f) the potential prejudice to the complainant’s personal dignity and the right of privacy;
(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
(h) any other factor that the judge, provincial court judge or justice considers relevant.

The value of these factors is limited by the fact that the question is still to be determined through the exercise of judicial discretion which carries with it the application of bias and myth. They do little more than codify the common law discretion.

An alternative, or additional solution, is to provide expert evidence as a “method of expanding the lens of legal relevance to include other experiences that are not reflected in the dominant schemes” as was allowed in Lavallee. A major problem with this proposed solution, recognized in relation to evidence of rape trauma syndrome, is that “syndrome evidence may give sexual assault a psychiatric component which creates a perception that it is a problem peculiar to women rather than a violent crime.” The Report of the British Columbia Law Society recommends the acceptance of such evidence but cautions against “syndromization.” The syndromization of women’s experience denies it as normal. This process, as I have indicated, is a common feature of psychiatric discourse and ought not be imported into the law.

148. Supra, note 34 at s. 276(3).
150. Gender Equality in the Justice System, supra, note 6 at 7-87.
151. Ibid., Recommendation no. 7.78.
My conclusion is inevitably bleak. The possible solutions held out by
determinations of relevance or the weighing of the discriminatory effect
of psychiatric history evidence against its probative value in the name of
a trial characterized by fairness are elusive. Relevance and probative
value will be determined with reference to the myths and stereotypes of
the dominant culture. The discriminatory effect of the introduction of
psychiatric evidence in a sexual assault trial will not be recognized.
Legislation that would mandate the exclusion of such evidence would no
doubt be struck down as the accused’s right to an acquittal eclipses all
other considerations. As a result, I feel the fear and despair that Christine
Boyle and Marilyn MacCrimmon expressed in response to the Seaboyer
decision.152 The cycle of victimization will be entrenched in, and sup-
ported by, our legal system.

The only real solution lies in a “sea-change” in judicial thinking about
women and sexual assault.

255.