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## Sexual Assault in Abusive Relationships: Common Sense About Sexual History

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# Articles

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Christine Boyle\*

Sexual Assault in Abusive  
Relationships: Common Sense  
About Sexual History

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*In this paper, the author, using a hypothetical fact scenario as a focus, discusses competing interpretations of the new "rape shield" provisions in ss. 276–276.4 of the Criminal Code. In spite of identifying appealing arguments based on the importance of examining context in the resolution of legal issues, she argues that s. 276(1) should be read as barring all evidence of sexual history between the complainant and the accused, including "pattern evidence", unless it relates to something other than consent or credibility.*

*Dans son exposé, l'auteur analyse les différentes interprétations soulevées à l'égard des nouvelles dispositions du Code Criminel ayant rapport à la preuve concernant le comportement sexuel du plaignant relevant des articles 276–276.4, à la lumière d'une certaine situation de fait hypothétique. Elle identifie certains arguments attrayants concernant l'importance d'examiner l'ensemble des circonstances qui entourent une question en litige. En revanche, elle maintient la thèse selon laquelle l'article 276(1) doit être interprété de façon à exclure toute preuve du comportement sexuel antérieur de l'accusé et du plaignant, y compris toute preuve tendant à démontrer un comportement sexuel habituel, sauf si une telle preuve se rapporte à autre qu'une question de consentement ou de crédibilité.*

## Introduction

Do we need to know about a complainant's sexual history in order to decide whether she really was sexually assaulted? This issue has been the subject of argument and analysis for several decades now, and indeed could be said to epitomize the challenge for feminist legal theorists to ensure that women receive equal protection and benefit of the law. It is an issue which resists resolution. Provisions protecting complainants from unrestricted questioning about their sexual history were first introduced in the reform of the law of sexual assault in the early eighties. These were struck down as infringing an accused's right to a fair trial in

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*R. v. Seaboyer*.<sup>1</sup> The legislative response to *Seaboyer* can be found in sections 276–276.4 of the *Criminal Code*,<sup>2</sup> which sections are, themselves subject to constitutional challenge.<sup>3</sup> As will be discussed later, the scope of section 276 is contentious, but it is clear that it creates some sort of exclusionary rule where sexual history evidence relates to consent or credibility.

Given the need for frequent references to section 276 in particular, its three components are set out here.

Subsection (1) states when sexual history evidence is not admissible:

(1) In proceedings in respect of [listed sexual offences] evidence that the complainant has engaged in sexual activity, *whether with the accused or with any other person*, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

Where evidence is not excluded under (1), sub-section (2) establishes a balancing exercise following which sexual history evidence may be excluded or admitted.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, *whether with the accused or with any other person*, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

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1. (1991), 7 C.R. (4th) 117 (S.C.C.) [hereinafter *Seaboyer*]. The majority stated at 155: "As all counsel on these appeals accepted, the reality in 1991 is that evidence of sexual conduct . . . in itself cannot be regarded as logically probative of either the complainant's credibility or consent. Although they still may inform the thinking of many, the twin myths which s.276 sought to eradicate are just that—myths—and have no place in a rational and just system of law." For comment on the construction of relevance that leads decision-makers to see such aspects of a complainant's life as her sexual and psychiatric history as relevant to whether she has been sexually assaulted, see T. Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987–88) 2 C.J.W.L. 310, S. Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 Dal.L.J. 416, D. Majury, "*Seaboyer and Gayme: A Study In Equality*" in J. Roberts and R. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 268.

2. S.C. 1992, c. 38, s. 2.

3. See *R. v. Darrach*, [1994] O.J. Nos. 3161 and 3162 (Ont. Ct. of Justice Prov. Div.), reported as *R. v. A.S.D.* (1994), 28 C.R. (4th) 201 (Ont. Prov. Div.), presently before the Ontario Court of Appeal. The author is co-counsel to a coalition intervening in the case.

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Subsection (3) sets out the factors which a judge must consider before deciding such evidence is admissible under s. 276(2):

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (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 offences;
- (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 fact-finding 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 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.<sup>4</sup>

One significant, and innovative, aspect of these provisions is that they cover sexual history between the accused and the complainant. A range of issues has arisen since these sections were passed, but the focus of this paper is on their applicability to situations where the accused and the complainant are, or were, cohabitees. I will concentrate on the abusive relationship since this seems most realistic in its potential for sexual assault. However, I will be referring to other possibilities, for instance relationships in which there are sexual practices likely to be perceived as unusual or even deviant.

While the issues are technical on one level, on a more significant level they relate to the sexual autonomy and sexual accessibility of people in relationships. Rules of evidence which suggest that one needs to look at the sexual history of a relationship in order to determine whether there

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4. Emphasis added. Sections 276.1–3 then deal with certain procedural and publication matters.

was consent on a particular occasion tend to dilute the substantive law that there must be consent on each occasion. If, for example, a woman who has had sex with her abusive partner is less likely to be believed when she says that he raped her than a woman raped by a stranger then the law is instrumental in creating categories of women to whom some men have privileged access irrespective of their wishes. An inference that people who have had sex in the past give some kind of on-going consent looks very like an evidentiary version of the old marital exemption, wherein the Crown had to first prove that the alleged victim was “not his wife”.<sup>5</sup>

What we think of as having probative value in this context will of course have substantive outcomes in terms of who is granted protection by the law of sexual assault. There is a danger that certain groups of women, that is women in relationships (and I will suggest later those who engage in “distinctive” sexual practices) will not be protected to the same extent as women who testify to being sexually assaulted by strangers. Another way of stating the issue is to ask whether if women in relationships want the protection of the law of sexual assault, they have to end the relationship, because as long as they are still involved (or only recently out of it) the law will see them as sexually accessible to their partners?

Analysis of the admissibility of sexual history in this context is likely to be distinctive. Where a woman says she was sexually assaulted by her partner and her sexual history with that partner is examined there may be less danger of the distorting effect of the unchaste woman stereotype. There is less scope for the ‘she is a tramp so she must have consented’ line of reasoning and there may be more receptiveness to arguments for admission. Another way of putting this is that there is less general understanding of the harm that may flow from admission. While debate continues about the admissibility of sexual history evidence generally, I think it is fair to say that there is increased understanding that relying on the “twin myths” identified in *Seaboyer* (that unchaste women are more likely to consent to intercourse and are less worthy of belief) has significant costs. In my view the inclusion of accused-complainant evidence in *Seaboyer* was not grounded in a similar shift in perception. So it may be useful at this stage to state the harms of admitting propensity (to have sex in particular ways or in particular contexts) evidence about the relationship between the complainant and the accused.

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5. The *Criminal Code*, R.S.C. 1970, C-34, s. 143, repealed by the *Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125, s. 6.

First, a fact finder may not pay sufficient attention to the fact that propensities only manifest themselves intermittently.<sup>6</sup> This is a particular concern here, since as I shall argue later, it is not feasible to admit the whole story (or competing stories) of a relationship. Second, a fact finder may feel that sex does not matter if it happened before and err on the side of acquittal because of indifference to harm. The fact that certain information may affect our sense of regret at the prospect of a wrong decision is a familiar form of prejudice.

These are very general comments. What follows is a factual scenario designed to provide a practical focus.

John (23) and Mary (21) lived together until they split up last July. While they were together, they would occasionally have disagreements, and sometimes John would assault Mary while he was angry. At other times they would get on well and at these times they were optimistic that they could work things out.

In August, John called Mary and asked her to come to see him to talk things over. She went to his apartment one evening. Their conversation became a quarrel. John became very angry and punched Mary several times in the face, injuring one eye and causing her lip to bleed. Later Mary went to the police and reported that John had assaulted her and forced her to have sexual intercourse during the assault.

John was later charged with sexual assault causing bodily harm contrary to section 272(c) of the Criminal Code.

At the beginning of the trial John's lawyer made an application to lead evidence of John and Mary's sexual history. John admitted assaulting Mary, but wished to lead evidence of a pattern of their behaviour prior to the assault. The pattern alleged was that John would assault Mary and that later consensual sex would take place as an aspect of reconciliation. The defence argument was that consensual sex was so "weird" after an assault that it was essential to make full answer and defence to present evidence to the jury that this had happened on previous occasions.

The Crown objected and the trial judge held this evidence to be inadmissible.<sup>7</sup>

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6. A passage in J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 520, in the discussion of the similar fact rule, captured my concern. "While evidence of the general disposition of individuals is not admissible, the *lesser species*, whose conduct is allegedly more predictable, are subject to the same rules as places and things. Thus, the propensity of an animal to bite people is admissible in order to establish the negligence of the owner." Emphasis added.

7. An issue which does not need to be addressed in this paper is whether the trial judge should hold a *voir dire* to determine admissibility on these facts or whether it is so obvious that the evidence is inadmissible that such a hearing is not necessary. In a case with similar facts in British Columbia, the trial judge ruled the evidence inadmissible without a hearing. In *R. v. Wellman*, [1996] B.C.J. No. 1478, appeal allowed on other grounds, the author was co-counsel for the respondent Crown on the appeal.

At the trial, John and Mary testified to quite different versions of what happened.

Mary said that John punched her in the face and knocked her to the ground. He then proceeded to force sexual intercourse on her, while she was distressed and protesting. Later, she made a report to the police.

John said that as soon as he hit her he moved away to another room and sat crying and feeling remorseful. Mary then came and comforted him. He said that he felt terrible. Mary said that they both had problems but she thought that with help they could each work through these problems. Mary then went and cleaned up her face. While she was doing this, John went to lie down on the bed. Mary joined him there and initiated sexual contact. They then had consensual sexual intercourse.

John was convicted of sexual assault causing bodily harm.

He has now appealed on the basis that the trial judge was in error in holding that the evidence was inadmissible.

Is the alleged pattern of sexual behaviour between John and Mary admissible? Decisions about this issue may depend on what we think is normal behaviour. For instance, it could be argued that it is "common sense" that people do not consent to sex after being beaten up and so the evidence of a pattern is necessary to disabuse the finder of fact of such a mistaken assumption.

This scenario raises a number of questions in my mind. What we consider common sense may depend a lot on what we think happens in abusive relationships and on a construction of the rapist as stranger.<sup>8</sup> What common sense assumptions should we assume the fact finder (whether a jury or a judge sitting alone) might make? How can one argue about what we assume they assume? What should the defence be permitted to do to counteract such assumed assumptions? In particular, should the defence be permitted to lead sexual history evidence by analogy to, and by extension of, *Lavallee*?<sup>9</sup> A great deal of attention has

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8. There is an extensive literature on the role of schemas in fact finding generally. Scripts are a type of schema and are a set of expectations about how others may act in conventional situations. See, e.g. M. MacCrimmon, "Developments in the Law of Evidence: The 1988-89 Term. The Process of Proof: Schematic Constraints" [1990] 1 Sup. Ct. L.R. (2d) 345 at 351.

9. In *Lavallee v. R.* (1990), 55 C.C.C. (3d) 97 (S.C.C.) a majority of the S.C.C. was of the view that the battering relationship is subject to a large group of myths and stereotypes. As such it is beyond the ken of the average juror and suitable for explanation through expert testimony. It seems clear that on the basis of *Lavallee* the defence in our hypothetical could call expert testimony to show that sex does indeed occur in battering relationships. The defence might however argue that it should be able to call even better evidence of the actual relationship in question. With respect to the stranger being part of the "common sense" view of violence against women, authoritative sources have discredited this supposition.

"When women are victims of [violent crimes] most occur in their own homes [and are committed] by someone they know, quite often a spouse." Canadian Centre for Justice Statistics, "Violent Crime in Canada" (1996), 16(6) Juristat, at 2.

been paid in the feminist legal literature to “contextualization”.<sup>10</sup> Should not the defence be able to “contextualize” the question of what actually happened between John and Mary?

That question can be broken down into two interconnected issues. Was the sexual contact consensual? When did that sexual contact take place? John’s story is of later, consensual sex, while Mary’s is of intermingled assault and sexual assault.

### I. *The Consent Issue*

The starting place for analysis of the question of whether the John’s lawyer can lead evidence of a previous pattern of sexual activity is section 276(1). It states that “evidence that the complainant has engaged in sexual activity . . . with the accused . . . is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge. . . .”

At first glance it would appear that this bars the pattern evidence, if it is seen as going to consent. The fact finder is not permitted to reason from consent in the past to consent on the occasion in question. It is my view that *any* such reasoning is inconsistent with the sexual autonomy of sexual partners, which must presume the need for a new consent for every sexual encounter. However, it is far from clear whether section 276(1) will have this effect.

This is partly because section 276(2) then goes on to set certain conditions, of specificity, relevance and probative value not outweighed by the danger of prejudice, for admissibility. Does this mean that some or all consent evidence is admissible if these conditions are met, as an exception to section 276(1), or is section 276(2) only relevant to evidence not already excluded by section 276(1), for instance, that relating to mistaken belief in consent or identity?

Focusing on consent for ease of discussion, one can state the issue in another way. Is section 276(1) an absolute bar to ‘consent’ evidence, so that the defence must point to something *other* than consent to move on to section 276(2)? *Or* does section 276(2) qualify section 276(1), so that

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“Women were more likely to be sexually assaulted by someone known to them than by a stranger.” Canadian Centre for Justice Statistics, “Criminal Justice Processing of Sexual Assault Cases” (1994), 14(7) Juristat, at 3.

10. The classic reference is to J. McCalla Vickers, “Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research” in A. Miles and G. Finn, eds., *Feminism in Canada: from Pressure to Politics* (Montreal: Black Rose Books, 1982).



if its tests are satisfied, in relation to the factors under s.276(3), then consent evidence is admissible?

Any discussion of this has to take place with *Seaboyer* in the background. It provides the constitutional underpinnings of the new provisions and is used as a guide to interpretation. The debate over the structure of section 276 with *Seaboyer* in mind already appears in the academic literature. An early comment on *Seaboyer*, written by myself and Professor Marilyn MacCrimmon,<sup>11</sup> is implicitly relevant to section 276. The majority in *Seaboyer* was of the view that sexual history evidence is sometimes relevant, but that “it may be important to remind jurors that they not allow the allegations of past sexual activity to lead them to the view that the complainant is less worthy of belief, or was more likely to have consented for that reason.”<sup>12</sup> How would jurors then be able to use the evidence? The majority listed a number of possibilities including mistaken belief in consent. The most relevant possibility is that of similar act evidence. Here the majority stated:

Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used *illegitimately* merely to show that the complainant consented or is an unreliable witness.<sup>13</sup>

In our article, we argued for the rejection of even strikingly similar conduct as involving a generalization based on disposition, interpreting *Seaboyer* to prohibit *any* generalization that the complainant had a disposition to consent. We emphasized the comment of Madame Justice L’Heureux-Dubé, that consent is to a person and not to a circumstance.<sup>14</sup> We suggested that the similar act scenario could be given meaning that did not involve the prohibited propensity inference by confining it to situations where the sexual conduct was inextricably intertwined with other conduct exhibiting a pattern, as in the extortion hypothetical used by the majority.<sup>15</sup>

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11. “*R. v. Seaboyer: A Lost Cause?*” (1991) 7 C.R. (4th) 225.

12. *Supra* note 1 at 158.

13. *Ibid.* at 159. Emphasis added. The inappropriateness of the similar fact analogy is discussed, *infra*, in the text accompanying notes 33–36.

14. *Supra* note 11 at 228–29. “The similar fact evidence rule expressly recognizes that evidence of bad conduct of the accused is relevant via a generalization based on disposition, but limits admission as a matter of policy. In contrast, the majority in *Seaboyer* categorically prohibits any inferences based on a generalization that the complainant has a disposition to consent or to bring false allegations. This should logically exclude all generalizations about a disposition to consent no matter how “strikingly similar” the circumstances.”

15. This approach bears some similarity to the reasoning in *R. v. Crosby* (1995), 39 C.R. (4th) 315 (S.C.C.). With respect to credibility, the Court found sexual history evidence admissible where it was inextricably linked to some other evidence.

We took the view, transferable to section 276, therefore, that there is a bar on evidence that relies for its relevance on a generalization about disposition to consent. Some other route to relevance must be found. Applying this approach, section 276(2) would not be seen as an exception to the general ban in section 276(1) but as applicable only to those situations where some other route can be found, such as mistaken belief in consent or identity.

Another way of stating this interpretation is through a focus on the word "illegitimately" in the passage quoted above. Evidence cannot be used illegitimately to show consent or lack of credibility. This is ambiguous. It is not clear whether it means that it would in all cases be illegitimate to use the evidence for such purposes or that use is only prohibited in those cases where it is illegitimate. In other words, are there legitimate uses, where section 276(2) would come into play to determine admissibility even of consent evidence?

This is at the core of the differences of opinion among later commentators. Professor David Paciocco explicitly disagreed with our attempt to reconcile the prohibited propensity inference and the similar act scenario in the process of arguing for an interpretation which envisages legitimate uses of consent and credibility evidence.<sup>16</sup>

Paciocco argued that section 276(1) prohibits only general inferences about consent and credibility. Specific inferences can be permitted if the other requirements of subsection (2) and (3) are satisfied. I will call this the narrow view of section 276(1), since it is limited in its exclusionary effect. For Paciocco, it meant that the section was constitutional, (making clear how impossible it is in this context to separate issues of constitutionality and interpretation).<sup>17</sup>

If one applied Paciocco's approach to the story of John and Mary, it is not clear what the outcome would be, since that would depend on whether the inference was general or specific. On the one hand, the inference could be seen as general, that is that women who have had sex with abusive partners in the past are more likely to have consented. On the other hand, while it is not clear how an inference could indeed be specific (that is, not draw on *some* generalization about human behaviour), it may

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16. "The New Rape Shield Provisions in Section 276 Should Survive Charter Challenge" (1993) 21 C.R. (4th) 223, endorsed in *R. v. Darrach* (1994), 28 C.R. (4th) 201 (Ont. Prov. Div.), at 212-213; *R. v. J.(T.)* (1994), 28 C.R. (4th) 195 (Ont. Gen. Div.); *R. v. Ecker* (1995), 37 C.R. (4th) 51 (Sask. C.A.).

17. This presents difficulties when courts called upon to interpret the provisions are unlikely to have the benefit of a full, or indeed any, constitutional analysis, in the absence of a direct constitutional challenge.

be possible to see it as a specific response to a generalization that women do not have sex with abusive partners.

A different view was taken by both Hart Scharztz<sup>18</sup> and Professor Ron Delisle,<sup>19</sup> although with very different objectives in mind. Delisle was of the view that evidence of sexual activity going to consent is rigidly foreclosed. He used an example of A and B who have been living together and engaging in sexual intercourse. Consent is the issue in a trial of A for sexual assault. Delisle argued that the previous sex should be admissible as *some* evidence going to consent. The fact that it cannot be admitted makes section 276 unconstitutional.

Because of the absolute, rigid nature of the prohibition, which operates regardless of whether the probative value of the evidence outweighs the potential prejudice to the trial's outcome, the legislation must be unconstitutional for the same reasons given by the Court in *Seaboyer*. . . .<sup>20</sup>

It is clear that Delisle would say that *any* pattern of sexual activity (or possibly any sex at all) between the accused and the complainant should be admitted and that section 276 would have to be declared unconstitutional, (at least to the extent that it forbids this) in order to do so.

Schwartz, in general, shared Delisle's view that section 276(1) creates an absolute prohibition against evidence of sexual activity, in and of itself, being used on the issue of consent, the difference being that he sees that as a positive quality, consistent with *Seaboyer*. He criticized Paciocco's analysis, as well as several Ontario cases, for admitting it,<sup>21</sup> drawing support from a number of recent cases.<sup>22</sup> However, he went on to open the door to the possibility that sexual activity might sometimes be relevant to consent via the similar act scenario. He states that it might require the exercise of the "pornographic imagination" to decide what could meet the requirements for the reception of similar act evidence, but suggests "some form of ritual, such as the donning of costumes, or acquisition of certain paraphernalia."<sup>23</sup> This raises the question of the appropriate

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18. "Sex With the Accused on Other Occasions: the Evisceration of Rape Shield Protection" (1994) 31 C.R. (4th) 232.

19. "Potential Charter Challenges to the New Rape Shield Law" (1992) 13 C.R. (4th) 390, and "The New Rape Shield Law and the Charter" (1993) 42 U.N.B.L.J. 335.

20. *Ibid.* (U.N.B.L.J.) at 338. See now R.J. Delisle, Annotation to *R. v. Crosby* (1995), 39 C.R. (4th) 315 (S.C.C.), pointing out that the trend in the case law is to adopt the narrow construction.

21. *Supra* note 18 at 236-240. For a reply, see D. Paciocco, "Techniques for Eviscerating The Concept of Relevance: A Reply and Rejoinder to "Sex With The Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1995) 33 C.R. (4th) 365.

22. *Ibid.* at 240-42.

23. *Ibid.* at 243.

approach to sexual activities which might be stigmatized as abnormal, which I will return to below.<sup>24</sup>

Thus one of the strongest voices in favour of a broad approach to section 276(1) opens the door to the possibility that John may be able to introduce the pattern evidence.

The views expressed in annotated Criminal Codes may be particularly accessible and thus influential. David Watt and Michelle Fuerst, without showing any awareness of the debate summarized above, simply assert that “[s]ections 276(2) and (3), read together, enact an *exception* to the general exclusionary rule of s.276(1). . . . The evidence, otherwise barred, may be received where the presiding judicial officer, after conducting a hearing in accordance with s.276.1 and 276.2, determines that the evidence”<sup>25</sup> meets the requirements of ss. 276(2) and (3).<sup>26</sup>

There is support in the case law for the view that section 276(1) does not create an absolute bar to consent evidence. The Saskatchewan Court of Appeal has addressed this issue, in a split decision, in *Ecker*.<sup>27</sup> The accused was charged with breaking and entering, and sexual assault. The evidence in question was that the complainant, shortly before the alleged offences, sat on the accused’s knee in a bar and touched his genital area. The trial judge, applying section 276(1), ruled this inadmissible. The Court of Appeal ordered a new trial. The majority focused on the idea that the evil addressed by section 276 was the *misuse* of sexual history evidence. It is inadmissible to support general inferences with respect to consent or credibility. However, sexual history evidence may permit other inferences, “specific, logical, and reasonable inferences grounded in fact not myth”.<sup>28</sup> Thus “evidence of other consensual activity, *especially between a complainant and an accused*, may on occasion be legitimately used . . . to lay the basis for *specific inferences* relative to an issue at trial, including consent or credibility”.<sup>29</sup> The dissenting judge was

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24. Schwartz recognizes the dangers, commenting that “[a]ttempts by jurists to spell out so-called “normal” activity surrounding sexual conduct are sometimes laughable, often insensitive, and in some instances dead wrong.” *Ibid.* at 232.

25. 1996 Tremear’s *Criminal Code* (Toronto: Carswell, 1995) at 524.

26. E. Greenspan, *Martin’s Criminal Code* 1996 (Toronto: Canada Law Books Inc., 1996) is less clear but suggests a similar approach. The editor refers to s.276(1) as setting out the purpose for which the evidence is not admissible, and then describes s.276(2) as codifying the test—that evidence can only be excluded if the prejudicial effect substantially outweighs the probative value. G. Rodrigues, *Crankshaw’s Criminal Code*, Cumulative Case Law Supplement August 1995 (Toronto: Carswell, 1995) refers to a number of cases, notably *R. v. Ecker* (1995), 37 C.R. (4th) 51 (Sask. C.A.), discussed below.

27. *Ibid.*

28. *Ibid.* at 71.

29. *Ibid.* at 71–72 [emphasis added]. See also *R. v. Osolin* (1993), 26 C.R. (4th) 1, at 24 per Cory J., (Major and Iacobucci JJ. concurring). “Generally, a complainant may be cross-

of the view that, given the reason for admission ("to challenge the credibility of the complainant"), the evidence was clearly inadmissible because of section 276(1). Even if the reason had been the one advanced on appeal, (mistaken belief in consent), the evidence would not meet admissibility requirements, given how "difficult it is to see how the accused could infer consent to the second sexual encounter on the basis of the alleged first touching."<sup>30</sup>

Where do we stand at the moment? It seems that the narrow view of section 276(1), prohibiting only general inferences about consent and credibility, has momentum. This is based on faith in two propositions, both of which are questionable. One is that it is possible to distinguish between legitimate and illegitimate uses. The second is that there is such a thing as a specific inference.

It may be that the floodgates are already open to the admission of *any* sexual history between the complainant and the accused,<sup>31</sup> and so the question of whether pattern evidence is admissible is irrelevant. However, the issue is yet to be authoritatively determined by the Supreme Court of Canada, and it is important that there continues to be a challenge to the idea that there is some proper evidentiary use to be made of prior sexual activity.

To apply this general discussion to the pattern issue, the question is whether it is completely barred by section 276(1) as going to consent, or does the analysis proceed to the balancing of probativeness and prejudice? I would start from the proposition that section 276(1) must have *some* content, so that we cannot go straight to the balancing analysis in all cases. Furthermore, section 276(1) must have *some* content with respect to sexual activity between the complainant and the accused. There is *some* evidence that Parliament has determined is totally inadmissible, and is not subject to judicial discretion. The question then becomes a matter of

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examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from it."

30. *Ecker, supra* note 26 at 89. It is indeed difficult to see how the majority thought that it could be escaping stereotypical thinking in seeing the evidence as potentially admissible. The generalizations seem to be that a woman who had touched a man's genitals in a bar was more likely to have consented to sex on a later occasion, and that a person may deduce consent to sex on one occasion from a sexual touching on another. Neither of these meet the test of being specific, logical and reasonable. The court does not address the problem of how to give any content to s.276(1) in relation to complainant/accused evidence if such evidence is admissible.

31. An example could be *R. v. J.(T)* (1994), 28 C.R. (4th) 195 (Ont. Gen. Div.) where the court simply admitted evidence of a past sexual relationship, saying, at 197, that to "accept into evidence the full history of the relationship of the parties . . . is not inconsistent with the intention of s. 276 or . . . *Seaboyer*."

what lifts particular evidence out of the subsection (1) prohibition and into the (2) and (3) balancing.<sup>32</sup>

One argument, drawing on Schwartz, could be that there is something distinctive and unusual about the sexual activity, bearing on the question of consent, that transcends the mere "she consented before so she consented this time" line of reasoning. While that could sometimes permit 'consent' evidence, there is support in *Seaboyer* for the idea that similar act evidence can sometimes be relevant.

Even evidence as to pattern of conduct may on occasion be relevant. Since this use of evidence of prior sexual conduct draws upon the inference that prior conduct infers similar subsequent conduct, it closely resembles the prohibited use of the evidence and must be carefully scrutinized. . . .<sup>33</sup>

What the Court seems to be saying here is that the similar fact rule can be applied to evidence about the complainant.<sup>34</sup> A recent ruling from the Supreme Court of Canada can be found in *R. v. B (F.F.)*.<sup>35</sup> This case reverts to the rule that evidence of similar acts cannot be admitted simply to show propensity, that is, that the accused is a person likely to have committed the offence. (The parallel to this would be that sexual history evidence cannot be admitted simply to show propensity to have sex.) The evidence must relate to some other fact or matter in issue, such as motive,

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32. There may be some similarities between the issue, i.e. the extent to which Parliament has deferred to the exercise of judicial discretion, and the issue which is likely to arise if Bill C-46 (on the production of records in sexual assault cases) becomes law. After First Reading, the draft Bill attempted to limit the records which can be seen as "likely relevant" and thus producible, by providing a list of assertions which are not sufficient "on their own" to meet the test. An example is the assertion that the record may disclose a prior inconsistent statement (Bill C-46, s.1, amending s.278.3(4)). A judge however, may balance the "salutory and deleterious effects" of production for review, taking into account factors very similar to the ones set out in s.276(3). The structure is similar since an accused should have to point to 'something more' than the listed irrelevancies in order to get to the balancing exercise. It seems likely that resistance to legislative limitation of judicial discretion and confidence in judicial ability to apply fairly such vague concepts as relevance will mean that it will be made as easy as possible to proceed to the balancing stage.

33. *Supra* note 1 at 142. One of the sources cited is *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. C.A.). Here a majority of the Court stated in *obiter*, at 340, that if there was evidence of sexual activity with "very distinctive characteristics" then this could be admissible. "It could indicate a disposition to consent to sexual activity of that very distinctive kind or in those very distinctive circumstances. Such evidence should be admitted in circumstances roughly analogous to those in which similar fact evidence is admitted."

34. It is not clear to me whether what is intended is that a mirror image of the rule as it relates to an accused be applied, or whether there is room for some contextual adaptation of the rule to the different situations of the complainant and the accused.

35. [1993] 1 S.C.R. 697. See L. Hanson, "R. v. B(F.F.) Revisited: Possibilities for Admitting Similar Fact Evidence Via Relevance to Other Matters in Issue" (1994) 20 Queen's L.J. 139.

opportunity, or identity. Possibly the most relevant hook to hang relevance on is the one relating to striking similarity, or a system.<sup>36</sup>

It is difficult to apply this to sexual history. With respect to the accused, the issue does not arise in relation to normal activities. He is charged with a criminal offence, which at least in a positivistic sense, takes the behaviour out of the realm of the "normal". There is no parallel between having sex and committing an offence. Hence the temptation to create an *offence-like* analogy, by introducing the idea of distinctive sexual practices, unravels very quickly. Thus, we start from the assumption that the accused did not commit the offence so evidence that he has done strikingly similar things before may help us infer that he did. We do not start from the assumption that the complainant did not consent, so that we need similar fact evidence to infer that she did. We start from the assumption that she did consent (via the presumption of innocence). The Crown must then prove that she did not, and does not normally seek evidence of a pattern of non-consent to assist it in this task. One has to superimpose an assumption on top of the assumption of non-consent, that is that the complainant would only consent to "non-distinctive" or normal sex, in order to make sense of drawing on evidence of strikingly similar abnormal sex to help us infer that she did consent.

There are dangers in setting up a dichotomy of distinctive and non-distinctive sex so that pattern evidence of distinctive sex can be admitted as going to consent. Apart from the obvious difficulties of classification, there is the risk that people seen as engaging in distinctive sexual practices will be marginalized and given less respect for their sexual autonomy.<sup>37</sup> Assume for example that the cohabitants are lesbian. Is lesbian sexual activity distinctive? On what basis would we take a pattern of lesbian activity into account in determining consent any more than 'ordinary' heterosexual activity. The distinction between general and specific inferences does not assist since any inference has to draw on a generalization that a woman who has consented to engage in lesbian sexual activity in the past is more likely to have consented on the occasion in question.

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36. See *R. v. Green*, [1988] 1 S.C.R. 228, where the evidence was admitted because it showed that the accused had a system in that previous incidents were strikingly similar. The accused was convicted of sexually assaulting a young girl by touching her breasts. He claimed this was accidental touching in the course of a hug. Evidence of other children that he had touched them in a sexual way was admitted.

37. Sheila Duncan argues in "Law's Sexual Discipline: Visibility, Violence, and Consent" (1995) 22 J. Law and Soc. 326, that the law disciplines bodies differentially as between different genders and different sexual orientations. She notes that it "is a central argument of this study [Foucault's *History of Sexuality*] that pleasures outside of or unrelated to heterosexual intercourse are constructed outside of the normal. . . ."

A propensity inference that is permissible for certain groups but not others justifies concern about the selective protection of the law. While the story of John and Mary does not raise the issue directly it may be that the most practical context in which this concern could arise would involve sado-masochistic forms of sexual expression. There are two problems here. First, there is the danger that an abusive relationship be construed as sado-masochistic. Second, there might be a readiness to reason that a person who actually did engage in sado-masochistic sex in the past was more likely to have consented to this type of sex on the occasion in question, that is, that they might be a "lesser species", a mere bundle of predictable propensities.<sup>38</sup>

Assuming a commitment to the idea that there must be fresh consent on each occasion, it may be argued that there is no reason to treat the most unusual sexual habits (if we know what they are) as any different to those perceived as normal. One may in the past have had sex with one's partner hanging from the chandelier instead of in the missionary position, but

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38. The question of whether there was consent to sado-masochistic sex is separate from the issue of whether consent is effective as a defence, although the two issues are interconnected. There has been a number of cases recently touching on the perspective which the law should adopt to consent in this context. For example, in *R. v. Welch* (1995), 43 C.R. (4th) 225 (Ont. C.A.), the accused was charged with sexual assault causing bodily harm. The complainant testified that the accused tied her to his bed, beat her with a belt on the breasts and buttocks, inserted his finger into her vagina and an object into her rectum. The accused testified that she consented, vigorously encouraging him to continue. The Court held, following *R. v. Jobidon* [1991] 2 S.C.R. 714, that consent is not a defence to sexual assault causing bodily harm, stating at 249–250:

The sadistic sexual activity here involved bondage . . . and the intentional infliction of injury to the body and rectum of the complainant. The consent of the complainant, assuming it was given, cannot detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.

There are a number of issues arising out of the complex interaction of substantive law and evidence here. It would be ironic if there were certain distinctive sexual practices to which we could not consent at all, while there were others which facilitated the finding of consent. Respect for sexual autonomy and physical integrity underlies the rejection of pattern evidence no matter what the level of distinctiveness, but is there a point where the values of sexual autonomy and physical integrity part company? Of more direct relevance is the fact that the accused was permitted to testify about earlier occasions on which he and the complainant had "rough sex". The judgment does not reveal why this evidence was admitted. The case illustrates that there are different ways in which willingness to look at such sexual history is linked to a low value given to sexual autonomy. The law may shade through some attention to (hetero?)sexual autonomy through treating certain sexual behaviour as outlaw (in the sense that less legal protection may be given) to outright rejection of certain activities, whatever the perspective of the participants.



does that help the fact finder resolve a conflict of evidence over whether chandelier sex was consensual on the occasion in question?

The problem, however, is the fact finder may lack information about the range of sexual practices in the world and reach a conclusion as to non-consent based on an assumption that no one could possibly have consented to activities perceived as bizarre. Further, the fact finder could be as open-minded about sex as it is possible to be but the defence may still fear a rejection of the defence version of what happened.

An illustration may be found in a case which I consider to be a progressive one in this field, *R. v. R.G.*<sup>39</sup> The appellant was charged with assault and sexual assault on his estranged wife, who had brought the children for a visit. The appellant assaulted the complainant in a fit of anger, tearing her clothing, bruising her arm and scratching her breast. She lay down with the children as they were falling asleep by the fireplace. Her evidence was that after some time he lay down beside her, and intercourse followed, while she lay crying on the floor, not daring to protest. The following morning, she again submitted to sexual activities, fearing that he would become violent again. She also testified that there had been many verbal fights during the marriage, and that physical abuse, while kept to a minimum by her submissive nature, occurred from time to time.

He testified that he felt badly after what he claimed was a consensual fight, and wanted to comfort her. They engaged in what was normal sex for them, the way it had always been after they had argued and were making up. She at no time indicated that she did not want to have sex or resist his advances. The trial judge preferred the evidence of the complainant and found that none of the acts of sexual intercourse were consensual stating that "the responsibility is his to make sure that he has an unequivocal consent".<sup>40</sup> On appeal it was argued that the trial judge erred in suggesting that there was an onus on the accused to show unequivocal consent before he could argue mistaken belief; that the trial judge erred in placing an onus on the accused to show that he took reasonable steps to ascertain consent, there being little or no need for inquiry given the perception of the accused of two lovers "making up" after a quarrel, and that the accused had indeed taken reasonable steps.

It can be seen therefore that the case is about mistaken belief in consent and in particular the new section 273.2(b), requiring reasonable steps, in the circumstances known to the accused at the time, to ground such a

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39. (1994), 38 C.R. (4th) 123 (B.C.C.A.).

40. *Ibid.*, at 129.

defence.<sup>41</sup> The notable thing for the purposes of this paper was that the accused argued that what happened was consistent with their previous making up behaviour after quarrels. In that context, Wood J.A., speaking for himself and Macfarlane J.A., stated:

His attempt to characterize what followed [the assault] as normal sex in the context of “making up” after a fight, is an affront both to the law and to common sense.

The notion that any woman, who has just been assaulted to the point where panic caused her to become physically sick, would then freely consent to have sex with the man responsible for her anguish, is one that defies belief in a civilized country which has given constitutional protection to the dignity and worth of the individual. As I have already noted, in such circumstances it would require the most compelling evidence of a subsequent unequivocal indication of consent by the complainant to give a defence of honest but mistaken belief in consent any air of reality.<sup>42</sup>

On one level, and indeed in the context of the case, what this means is that once a woman has been assaulted, that will be a significant factor in the “circumstances known to the accused” which will affect the content of the reasonable steps requirement. A stance of extreme scepticism to a mistaken belief defence seems to be appropriate here. However, the quote above also provides support for the view that not only should the accused take steps commensurate with extreme scepticism but also that there is a “common sense” rejection of the possibility of consent itself. If this common sense rejection can be anticipated then the accused may be justified in trying to counter it with evidence of previous sexual activity in similar situations.

In other words, John may not simply be inviting an illegitimate deduction of consent from previous occasions but trying to counteract a negative common sense reaction in the fact finder. In other words he may not be saying: “She consented before so she consented this time” but “Don’t reject my argument out of hand because you think a woman would never have sex after she had been assaulted by her partner.”

Further support for this as a legitimate fear can be found in *R. v. Lavallee*.<sup>43</sup> Madame Justice Wilson, speaking for the majority, stated:

The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why

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41. For a discussion see J. McInnis & C. Boyle, “Judging Sexual Assault Law Against a Standard of Equality” (1995) 29 U.B.C. L. Rev. 341.

42. *Supra* note 39 at 131. The open statement of the assumptions about human behaviour animating the approach to fact determination in this case stands in considerable contrast to the approach of the S.C.C. in *Sansregret v. R.* (1985), 45 C.R. (3d) 193, with its doctrinal manipulation of the doctrine of wilful blindness.

43. *Lavallee*, *supra* note 9.

should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.<sup>44</sup>

*Lavallee* makes clear that just because a woman stays in a relationship does not mean that she is not being battered. The Court relied heavily on research by Dr. Lenore Walker, which formed the basis of her "Cycle Theory of Violence". This theory is that there are three distinct phases in a battering cycle: tension building; acute battering; and loving contrition.<sup>45</sup> John could argue that he needs to show the court that consensual sex has taken place in the loving contrition phase in the past, in order to anticipate a common sense rejection.

It can be seen therefore that there is judicial support for the idea that the average person is likely to assume that a battered woman would leave her partner rather than staying with him (and having consensual sex with him). I have found no similar authorities to draw on with respect to an anticipated reaction to "unusual" sexual practices, so I will stay with Mary and John for the moment, while remembering that the issues go beyond battering relationships.<sup>46</sup> It may be useful to continue the analysis in three stages:

- (a) on the assumption that the defence is incorrect in anticipating a common sense rejection;
- (b) on the assumption that the defence is correct in anticipating a common sense rejection; and
- (c) by asking how courts should approach such assertions of common sense.

(a) If the defence is incorrect in its assertion of common sense, then I would argue that there is no justification for admission of the evidence. Use of such evidence would simply invite an inference from consent in the past, even if there is some perceived distinctiveness. Even people perceived by others as engaging in odd sexual practices deserve, and may

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44. *Ibid.* at 112.

45. See sources cited, *ibid.* at 117.

46. Some research has been done on sexual attitudes. See K. Wellings et al., "Sexual Attitudes", in A. Johnson et al. eds., *Sexual Attitudes and Lifestyles* (Oxford: Blackwell Scientific Publications, 1994), Ch. 8. There is evidence, for example, that older people are more likely to think that sexual intercourse should not occur before marriage, although acceptance of pre-marital sex is now nearly universal, and that women tend to be more accepting than men of same-sex relationships, although homophobic attitudes are widespread.

especially need, to be shielded from the generalization that they did it before so they did it again. Either this is completely barred by section 276(1) or it is an illegitimate inference in its lack of respect for individual autonomy. If such evidence were admitted then section 276(1) would have no content with respect to sexual activity between the accused and the complainant.

(b) If the assertion is correct, then the issue becomes more complex. I find the argument that the defence should be able to counter the 'common sense' rejection quite persuasive. That does not mean however that pattern evidence should be admissible, but that more than a straightforward inference is involved. Arguably that is enough to take the argument out of section 276(1) and into the probativeness/prejudice balancing exercise in section 276(2) and (3). There are a number of points that might be useful in that balancing exercise.

First, while there are certainly benefits in looking at the broader context of any legal issue, there are recognized dangers here that an examination of the context can distort the search for truth. The problem partly lies in the complex cultural meaning of sexual activity, but also the impossibility of truly examining the whole context. It would be an enormous task to look at the whole sexual history of a relationship. Focusing on make-up sex after abuse is only part of the picture, a part chosen to assist the defence. To put that part in context in turn would require an examination, at the very least, into whether and how often Mary refused to have such sexual contact after abuse and whether there had been any sexual components to the abuse before. This carries with it the obvious danger of turning the trial into an investigation of the entire relationship rather than into a single allegation of assault.<sup>47</sup> Such a profusion problem, akin to the concerns underlying the collateral fact rule, which sets limits on reply evidence in order to avoid a multiplicity of side issues, can be taken into account under section 276(3)(h), relating to any other relevant factor.

Second, is there any other way of addressing the defence concerns? Sexual history evidence is not the only way to address anticipated jury reactions. Other evidence, not the subject of Parliamentary concern or of co-existing constitutional rights, could be used. For example, expert

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47. The point I am making here has to do with the impossibility of examining the whole sexual context. Ideally, however, once one moves beyond testimony having to do with the events in question, there is no logical stopping point. If part of the picture is to be painted, then I would like to know about Mary's material and emotional circumstances and the realistic options she had at any particular time. This of course is impossible and carries its own significant costs and potential for prejudice.

evidence on the cycle theory of violence could be introduced,<sup>48</sup> showing that abusive relationships are not necessarily unremittingly brutal, but can move through different phases. The court can be informed about physical, emotional and financial constraints, and the frequent need for time and support in order to come forward with a complaint, whether the assault is of a sexual nature or not. The court can be informed about what the Supreme Court of Canada has had to say in *Lavallee* about the unreliability of “common sense” assumptions about human behaviour in this context.

It is legitimate for a judge to incorporate within the notion of probative value whether there are other ways of achieving a legitimate defence goal. Even assuming that individual evidence has more probative value than human behaviour evidence, it is the difference between the two that should go into the balance. This could be taken into account both under section 276(3)(a) in that the accused is not deprived of his right to make full answer and defence if there is another way to make the same point, and under section 276(3)(h), which permits the judge to look at any other factor.

While the defence may argue that it should not be confined to testimony about behaviour in general when there is better evidence available about the behaviour of the specific individuals, there are a number of reasons why this is not persuasive. First, the danger being addressed is a general one about human nature, which can reasonably be addressed on that level. Second, evidence that does not raise concerns about the equality rights of witnesses in sexual assault trials should be preferred over evidence which does. Third, there is the danger of prejudice, that the jury may go beyond counteracting their common sense rejection and go on to draw the illegitimate consent inference, a danger not, or less, present with more general human behaviour evidence.

In sum, if the defence concern is that the jury might base its decision on an erroneous assumption about human behaviour, the response should be to openly challenge such assumptions rather than to invite the jury to deduce that there was consensual sex on the occasion in question because there had been consensual sex before.

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48. See *Lavallee*, *supra* note 9 at 117–118. See R.A. Schuller, “The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes” (1992) 16 *Law and Human Behaviour* 597. Analysis of simulated jury deliberations showed that expert testimony led to interpretations more favourable to a battered woman’s claim of self-defence. This is not to suggest that expert evidence does not carry its own dangers of distortion and bias. The point is simply that the concern that the fact finder may assume that a person would not consent to sex after being beaten up can be met in ways other than through evidence of the relationship in question.

(c) This takes us to a more complex question, avoided in the discussion above. How should courts approach assertions about the common sense of fact finders? Is one reduced to counter-assertion? *Lavallee* raises an interesting evidential question about how the Court knew what the average member of the public thinks. Judicial notice seems to have been taken of this social background information.<sup>49</sup> Now of course there is the additional question of how to determine whether the average member of the public still thinks the same thing.

Evidence arguments are replete with assertions about common sense. Indeed the whole evidence edifice seems to be based on faith in our ability to make common sense generalizations underlying decisions both about admissibility and weight. Nevertheless, where one party is simply making an empirical assertion (people think that battered women would not consent to sex with their batterers) there should be some responsibility to support that assertion. This is especially the case where the assertion forms the basis for admission of evidence recognized as potentially harmful to witnesses and to the search for truth.

In effect, in our example John is asking the court to take judicial notice of public attitudes to battered women. When one tests the assertion against the requirements for judicial notice, then it can be argued that knowledge of these attitudes is not so notorious that there will be no dispute among reasonable people.<sup>50</sup> This argument may be reinforced by seeing *Lavallee*, not simply as a counteraction to prevailing public attitudes, but as an important aspect of the change in such attitudes.

However, a recognition that *Lavallee* took a rather casual approach to proof of what the average person thinks, and that sexual history evidence should not be admitted on a bald assertion that it is necessary to neutralize an uninformed negative reaction, does not address the much bigger question of how vigorously to test empirical assertions in a world of unevenly-available research.

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49. There is some research on public attitudes. See M. Dodge & E. Greene, "Jurors and Expert Conceptions of Battered Women" (1991) 6 *Violence and Victims* 271; C.P. Ewing & M. Aubrey, "Battered women and Public Opinion: Some Realities About the Myths" (1987) 2 *J. Fam. Violence* 257; K.M. Gentemann, "Wife Beating: Attitudes of a Non-Clinical Population" (1984) 9 *Victimology: An International Journal* 109; E. Greene, A. Raitz & H. Lindblad, "Jurors' Knowledge of Battered Women" (1989) 4 *J. Fam. Violence* 105; D.G. Saunders et al., "The Inventory of Beliefs About Wife Beating: The Construction and Initial Validation of a Measure of Beliefs and Attitudes" (1987) 2 *Violence and Victims* 39. The most recent study by M. Dodge and E. Greene, found, at 280-1, that jurors were less knowledgeable than researchers about the fact that *e.g.* a battered woman might stay if the batterer promises not to hurt her again or because she feels dependent. However, while they felt that experts can supply information that is beyond the jurors' ken, on the whole jurors, especially younger jurors, did not subscribe to myths about battered women.

50. *Supra* note 6 at 976.

## II. *The Timing Issue*

There is an additional issue to be addressed in the case of John and Mary. It is not a straightforward case of a conflict of evidence over consent, *per se*. The conflict goes deeper than that to the timing and context of the sexual assault. Mary says that there was a sexual component to the assault. John says consensual sex took place later after time for contrition and conversation. So, to simplify the issue somewhat, there is a conflict over timing as well as consent. Can past sexual history be admitted as going to the timing and circumstances of sexual activity? In other words, can the accused say we had a pattern of abuse followed by sex, so it more likely that that is what happened than that I raped her as part of an assault?

This is a significant issue. Assume that the courts adopt the view that section 276(1) is an absolute bar to 'consent' evidence. It could be argued that the evidence in this case was going not to consent but simply the likelihood of X (later sex) happening rather than Y (sex as part of the assault). Thus the evidence could be seen as relevant to timing and circumstances rather than consent. Thus, its admissibility could be addressed through the probativeness/prejudice balancing exercise in section 276(2) and (3).<sup>51</sup>

A number of arguments can be made that this evidence is still inadmissible. First, to say that the evidence makes it more likely that there was later consensual sex rather than earlier non-consensual sex is still to argue that the evidence goes to consent. Second, it has little if any probative value. The fact that X happened before does not help to resolve a conflict over whether X or Y happened on this occasion. How can evidence that Mary consented in certain circumstances in the past help to show that she was not raped in different circumstances on this occasion?

The argument that the previous pattern is helpful to choosing which version of events to believe is essentially based on the good character of the accused. The discussion so far has proceeded on the assumption that the focus of the inquiry is the behaviour of the complainant. Did she consent? Can we look at her past sexual life with the accused to help us decide if she consented? The issue changes if we remind ourselves to focus on the behaviour of the accused. John is saying "let me introduce evidence of *my* past behaviour. In the past I have abused my partner,

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51. One could I suppose take a very pedantic view of the admissibility of the later sex. John is denying that Y (sex as part of the assault) took place at all, and wishes to lead evidence of X (later sex). In other words the argument could be that X does not go to consent but rather to whether Y took place at all. This sidesteps the problem of the consent bar (if any) but begs the question of what probative quality the later sex has. How does his version help to test or throw doubt on her version?

expressed contrition and then had consensual sex with her, so you can infer that is what happened this time. In other words he is saying “infer that I did *not* rape Mary because in the past I said I was sorry and waited for consensual sex”. To a certain extent this is evidence of bad character, but its significance lies in its attempted use as support for the accused’s *good* character. The crucial inference here from the accused’s perspective is that he did not rape her in the past so he did not rape her this time. It is important to examine the generalization that underlies any claim to probativeness for this evidence. It is that people who have had consensual sex in the past would not rape their partners.

What little, if any, probative value such good character evidence may have, should be seen as outweighed by the danger of the evidence being used for an impermissible inference of propensity inconsistent with respect for sexual autonomy on each occasion.

### *Conclusion*

The analysis has so far raised some difficult questions which begin as an exercise in statutory interpretation. However, it is impossible to separate the meaning of section 276 from its constitutional validity. A narrow (in the sense that it does as little as possible to address the socio-legal problem which is the focus of section 276) interpretation could ensure the constitutional validity of the provisions. A broad approach could be seen as fatally undermining constitutional validity. I have argued above for a broad approach, albeit one that permits section 276(2) and (3) analysis where something more than a straightforward consent inference is involved. I have also argued that pattern evidence should not pass the probative value/prejudice balancing test. While I have not included the constitutional issues in this paper, it is implicit in my analysis that I think this approach is constitutionally sound.

More fundamentally, the issue of the admissibility of the sexual history of relationships raises difficult questions about legal reasoning. I have argued that in essence we are in danger of classifying certain groups of people, such as women in abusive relationships, and people considered to engage in “distinctive” sexual practices, as creatures of their own propensities rather than fully autonomous human beings. In order to do this, I find myself questioning what is a commonplace of feminist method—attention to context. Indeed it is standard for groups of people who do not feel that their experiences are taken into account in the framing of laws to argue for consideration of a broader context including those experiences.

It seems odd in a sense therefore to be arguing that decisions should be made about whether a sexual assault took place in a relationship without



delving into the history of the relationship, which carries with it the risks of an evidentiary sexual privilege. John's argument is an attractive one in that it is in tune with the insight that fact finders bring their own cognitive filters to the fact finding process and that ways should be sought to expose and challenge these filters. However, I think that what is really happening in the case of John and Mary is an attempt to introduce selective contextual information which will reinforce dominant prejudices about women. The attraction of John's argument is that it looks as if it is challenging misconceptions about battered women, but in the end it is an invitation to weaken respect for sexual autonomy. In other words it is a progressive method in service of a regressive outcome.