EVIDENCE OF SEXUAL HISTORY IN SEXUAL OFFENCE TRIALS

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Introduction

In the last few years, legislative attempts have been made to reduce the trauma experienced by complainants in trials of persons charged with a sexual offence. Numerous reforms have been introduced in order to control evidentiary and procedural aspects of such trials. Commendable changes have included permitting judicial control over the publication of the complainant's or accused's name[1] and abolition of the strict corroboration requirement applying to evidence given by the complainant.[2] Changes have also been made with respect to evidence of a complainant's sexual history. One of the most controversial of the areas of sexual offence law, several sound procedural innovations relating to this category of evidence have been introduced in a number of jurisdictions. It is sensible that the question of the admissibility of evidence of a complainant's sexual history should be decided in a voir dire hearing, out of the presence of the jury[3] and it is also reasonable that a trial judge ruling on the admissibility of such evidence should be required to record the reasons for his or her decision.[4] It is appropriate that the relevant rules of admissibility should apply to unsworn statements made by an accused person during the trial.[5]

But it is the contention of this article that changes made to the actual rules of admissibility of evidence of a complainant's sexual history have not been satisfactory. There is very little uniformity between the various Australian jurisdictions. Some States have done little more than leave the question to the unguided discretion of the trial judge. Others, while reacting understandably against discredited theories relating to a woman's "chastity", have in some cases gone too far, excluding relevant evidence which an accused should be permitted to adduce. To the extent that it is possible rules should be adopted, but they must be based upon principles which take into account differences in probative value and the differing ways in which such evidence may be relevant.

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[1] E.g., ss. 6, 7, Sexual Offences (Evidence and Procedure) Act 1983 (N.T.).
[2] E.g., s. 36A(6), Evidence Act 1906 (W.A.).
[3] E.g., s. 37A(5)(a), Evidence Act 1958 (Vic.).
[4] E.g., s. 409B(7), Crimes Act 1900 (N.S.W.).
[5] E.g., s. 36A(5), Evidence Act 1906 (W.A.).

The Common Law

The common law relating to the admissibility of evidence of a sexual offence complainant's sexual history is not entirely clear. The orthodox view, until recently, was that while a complainant could be cross-examined as to her general sexual reputation, her sexual relations with the accused on occasions other than that complained of in the trial, and her sexual relations with persons other than the accused,[6] evidence could only be tendered on the first[7] and second[8] points. Evidence as to the complainant's sexual relations with persons other than the accused was admissible only with respect to her credibility,[9] although an exception to this was apparently acknowledged where it was suggested that she was a prostitute, a "woman of abandoned character" or a woman of "notoriously loose morals".[10] Such evidence, as with the first and second categories noted above, was admissible on the issue of consent, as well as credibility.

This orthodox analysis, however, will have to be reconsidered in the light of the High Court judgment in *Gregory* v. *The Queen*.[11] While the Court considered that evidence of a complainant's sexual relations with persons other than the accused will usually go only to her credibility, "in some cases, however, the other acts of consensual intercourse may be so closely connected with the alleged rape, either in time and place, or by other circumstances, that evidence as to those other acts may be relevant to the issues at the trial . . . ."[12] The two accused persons sought to adduce evidence that the complainant had had consensual intercourse, on the occasion in question, not only with both of them, but with a number of young men who had also been present. The High Court held that such evidence was admissible on the issue of consent because it related to events which formed part of a connected set of circumstances with the alleged offences. Because the two accused knew, at the time, of these particular events, the evidence was also admissible on the issue of whether they believed the complainant was consenting.

On a narrow interpretation, the High Court required some close temporal connection between the alleged sexual offence and the complainant's sexual relations with persons other than the accused. But there are strong suggestions in the judgment that no such limitation exists; indeed, that no rule other than relevance prevents the admission of evidence of the complainant's sexual history. The Court said:

> If evidence of this kind is relevant to an issue in the case, and not merely to credit, there is no rule of law that excludes it. The

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[6] See *R.* v. *Krausz* (1973) 57 Cr.App.R. 466 at 472.

[7] *R.* v. *Clarke* (1817) 2 Stark. 241; 171 E.R. 633.

[8] *R.* v. *Cockcroft* (1870) 11 Cox C.C. 410; *R.* v. *Riley* (1887) 18 Q.B.D. 481; *R.* v. *McCready* [1967] V.R. 325; *R.* v. *Thompson* [1951] S.A.S.R. 135. Including evidence of the complainant's acts of intercourse with the accused *after* the alleged "rape": *R.* v. *Aloisio* (1969) 90 W.N. (Pt. 1) (N.S.W.) 111 (C.A.).

[9] *R.* v. *Bashir* [1969] 3 All E.R. 692 at 693; *R.* v. *Holmes* (1871) 12 Cox C.C. 137; *R.* v. *Thompson* [1951] S.A.S.R. 135. Thus, in accordance with the orthodox principle that a party may not call witness to contradict an opponent's witness on a matter going only to credibility, the complainant's answer could not be rebutted.

[10] *R.* v. *Tissington* (1843) 1 Cox C.C. 48; *R.* v. *Clarke* (1817) 2 Stark. 341; 171 E.R. 633; *R.* v. *Bashir* [1969] 3 All E.R. 692; *R.* v. *Krausz* (1973) Cr.App.R. 466.

[11] (1983) 57 A.L.J.R. 629.

[12] *Id.* at 631.

> submission that there is some special rule of exclusion applicable to evidence of this kind is misconceived; the evidence of other sexual experience is excluded because, and only when, it is logically irrelevant to a fact in issue.[13]

If the only test is one of logical relevance, considerable scope exists under the common law for an accused person to adduce evidence relating to the complainant's sexual history.

Legislative Reforms

The High Court's decision in *Gregory* tends to run against the tide of legislative attempts to restrict the admissibility of evidence of a complainant's sexual history. Within the last decade every State and Territory has enacted such legislation.[14] But these provisions fall over a wide spectrum in terms of their limits on admissibility.[15] At one end of the spectrum, the Tasmanian provision disallows any cross-examination as to prior sexual activity with persons other than the accused "unless, in the opinion of the magistrate or of the court, as the case may be, the question asked is directly related to or tends to establish a fact or matter in issue before the magistrate or court". This has done little more than restrict cross-examination of complainants which is allegedly relevant to credit.[16] At the other end, New South Wales and Western Australia prohibit evidence relating to the sexual reputation of the complainant and to her sexual history in general. Limited exceptions to the latter prohibition include evidence of surrounding circumstances and a sexual relationship with the accused, but the probative value of such evidence must outweigh "any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission". In between, Victoria, Queensland, South Australia and the Northern Territory do not permit evidence of the general reputation of the complainant with respect to chastity to be adduced[17] but other evidence may be adduced of the complainant's sexual history if it has "substantial relevance to facts in issue", other than by any inference as to "general disposition", or "would be likely materially to impair confidence in the reliability of the evidence of the complainant". Queensland and the Northern Territory also expressly permit evidence of an act or event that is "substantially contemporaneous with" or "explains the circumstances" of an offence with which a defendant is charged. The Australian Capital Territory makes sexual reputation inadmissible while evidence of the complainant's sexual experience with a person other than

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[13] *Ibid.*

[14] S. 102A, Evidence Act 1910 (Tas.); s. 34i, Evidence Act 1929 (S.A.); s. 37A, Evidence Act 1958 (Vic.); s. 4, Criminal Law (Sexual Offences) Act 1978 (Qld.); s. 409B, C, Crimes Act 1900 (N.S.W.); s. 36A, Evidence Act 1906 (W.A.); s. 4, Sexual Offences (Evidence and Procedure) Act 1983 (N.T.); s. 76G, Evidence Ordinance 1971 (A.C.T.). Most of the enactments provide that evidence inadmissible at common law remains inadmissible—thus requiring a trial judge to work his or her way through the common law before considering the legislation.

[15] They also vary considerably in terms of the types of offences and form of judicial proceedings to which they apply.

[16] Tasmanian Law Reform Commission, Report No. 31, *Report and Recommendations on Rape and Sexual Offences* (Hobart, 1982) at 22. The English provision is even less restrictive, leaving the matter entirely in the discretion of the trial judge: s. 2, Sexual Offences (Amendment) Act 1976. The evidence should be admitted if "it would be unfair to that defendant to refuse to allow the evidence to be adduced".

[17] The prohibition is total in Victoria, Queensland and South Australia, but leave may be granted in the Northern Territory if the evidence has "substantial relevance to the facts in issue".

the accused may only be adduced if the trial judge is satisfied that inadmissibility "would prejudice the fair trial of the accused person".

Formulating Rules of Evidence

The reasons for this disparity lie partly in the familiar need for a choice between a rule-based, and a discretion-based, approach. In many areas of the law, particularly the law of evidence, a decision must be made whether to attempt to formulate a strict rule, with or without exceptions, or to rely on the more flexible but less precise solution of a judicial "discretion" based on such vague general concepts as "fairness" and "justice", "probative value" and "prejudice". Of course, some combination of rules and discretions is possible, and commonly adopted. But the ultimate question is what particular mix to adopt.

The first principle determining the admission of evidence in a trial, civil or criminal, is the pursuit of truth. A legal system cannot be legitimate if the law does not operate on an accurate assessment of material facts. As a general proposition, the way to find the truth is to consider all evidence which has a rational bearing on the questions at issue. Adopting legal terminology, relevant evidence is prima facie admissible. "Relevant" does not, as some authorities have asserted,[18] mean that the evidence renders the existence of a fact in issue probable (or proven); rather, it means that it increases or diminishes the probability of the existence of such a fact in issue.[19] The extent to which it affects that probability[20] is its "probative value".[21]

But not all relevant evidence is admitted in a trial. A trial is not simply an attempt to accurately determine past facts—there may be reasons of policy requiring the exclusion of certain types of evidence notwithstanding logical relevance.[22] More important, even if accurate fact finding were the only concern, relevant evidence must on occasion be excluded because it is more likely to hinder, rather than facilitate, the pursuit of truth. There may be a significant danger that it will mislead the tribunal of fact because of the difficulties of accurately ascertaining its probative value; that it will produce an irrational reaction; or generate errors because of its complexity or apparent, but undeserved, importance.[23] Relevant evidence, either by itself or when it forms part of a particular class of evidence, is often excluded from a trial because such "prejudicial" dangers are seen as overbalancing its probative value.[24]

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[18] Sir James Stephen, *Digest of the Law of Evidence* (London, 12th ed.) article 1. Cross thought it difficult to improve upon Stephen's definition: J. A. Gobbo, D. Byrne and J. D. Heydon (eds), *Cross on Evidence* (2nd Aust. ed., 1979) at 18.

[19] *Director of Public Prosecutions* v. *Kilbourne* [1973] A.C. 729 at 756, 757. See Australian Law Reform Commission, Evidence Reference, R.P. 7, *Relevance* (Sydney, 1982). For the purposes of this article, "relevant evidence" is taken to mean evidence which could "rationally affect, however minimally and whether directly or indirectly, the probability of the existence of a fact in issue in the trial".

[20] I.e. the probability of the existence of the fact in issue before the particular item of evidence is considered.

[21] Or its "weight"—a matter, generally, for the tribunal of fact (e.g. the jury).

[22] E.g. the rules relating to public interest privilege. Many rules of evidence relate, in part, to a concern to limit the time and cost of trials.

[23] The reliability of hearsay evidence, for example, is difficult to assess because the person who made the assertion is not giving evidence and not subject to cross-examination in court.

[24] Rules relating to hearsay, character, similar fact and opinion evidence derive, at least in part, from such considerations. The judicial discretion in criminal cases to exclude evidence adduced by the prosecution if it is more prejudicial than probative may be seen as a specific manifestation of this principle.

Problems with Evidence of Sexual History

Evidence of a sexual complainant's sexual history, even when perceived as logically relevant, should not necessarily always be admitted. On the one hand, there are policy concerns which favour exclusion:

(1) Protection of Witnesses. A person who takes the stand should be protected from attacks designed to harass, annoy or humiliate. Sexual offence trials should not degenerate into a trial of the complainant rather than the accused.
(2) Sexual Privacy. A person's right to privacy in the highly sensitive area of sexuality should be taken into consideration.
(3) Prosecution of Sexual Offenders. Victims of sexual offences may be unwilling to come forward to give evidence because their sexual history may be revealed.

Of course, legislation in all Australian jurisdictions gives a trial judge power to disallow questions asked of a witness which are "vexatious", "indecent or scandalous", "intended to insult or annoy" or "needlessly offensive in form".[25] But this power has been rarely, if ever, exercised to protect a complainant from exposure of her sexual history. Nevertheless, it is not clear whether the fear of giving evidence is a more significant factor in not making a complaint than family pressure or a desire to forget the incident.[26] More important, there are very important policy concerns which may support the admission of relevant evidence of a complainant's sexual history. A central principle of the criminal justice system is a concern to minimise the risk of conviction of innocent people, even if this may sometimes result in the acquittal of the guilty.[27] Whatever indignities are suffered by the complainant in a criminal trial are not likely to compare with those a convicted sexual offender must suffer. Some authorities have argued that "rape" is a special offence requiring particular care to protect someone accused of it.[28] Even rejecting this argument, great care should be taken before excluding on policy grounds probative evidence adduced by an accused.

Of arguably greater significance than policy factors are the dangers of confusion, irrational use and misestimation of probative value that may flow from the admission of sexual history evidence. Evidence of specific occasions of sexual activity other than the occasion in question may inject distracting collateral matters into the trial, on questions relating to whether

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[25] See, for example, ss. 56-58, Evidence Act 1898 (N.S.W.).

[26] The Royal Commission on Human Relations found the latter more important: Final Report (A.G.P.S., Canberra, 1977) Vol. 1 at 91. A New South Wales Health Commission Report did find in 1982 that, of 457 people not making a formal complaint, 35% and 30% gave court and police procedures as the reason, while only 17% wanted to forget: *Help Centres for Victims of Sexual Assault* (Sydney, 1982) Table 22. But a 1983 study by the N.S.W. Bureau of Crime Statistics and Research did not find that the number of complaints had increased after significant changes to sexual offences law. In fact there had been a decrease. See also Law Reform Commission of Tasmania, Report No. 31, *Report and Recommendations on Rape and Sexual Offences* (Hobart, 1982) at 22.

[27] Lord Devlin, *Trial by Jury* (London, 1956) at 110-6.

[28] Arguments have also been advanced that, in the case of sexual offences, there are many opportunities for plausible but unfounded allegations, consent will usually be in issue and the credibility of the complainant witness will often be crucial. See Victorian Law Reform Commissioner, *op. cit.*, 12-14, 16, Appendix B. But it is difficult to argue today that the danger of false charges is greater for sexual offences than for any other kind of crime. The fact that sexual offences are significantly under-reported suggests the opposite. See, generally, K. Warner, "An obstacle to reform: 'False' complaints of rape" (1981) 6 *Legal Service Bulletin* 137.

the complainant in fact "dated Jack or slept with John or attended 'wild parties' with Jim".[29] Information that a woman has consented to extra-marital sexual intercourse in the past may well be given considerable weight by a jury trying to decide whether consent was given on the occasion in question. Partly this is a result of ignorance. Powerful taboos still inhibit the dissemination of accurate knowledge about human sexual behaviour. But it is also an aspect of the general tendency to give too much weight to evidence from which a character inference can be drawn, to overestimate the unity of personality and to underestimate the importance of situational factors. One of the more enduring propositions supported by psychological studies is that most persons attribute their own actions to situational and environmental concerns, but attribute the same action in others to stable personality dispositions.[30]

There is a real danger of prejudice from such information, in the sense that it will produce an irrational reaction. Justice Zelling of the South Australian Supreme Court identified in *R* v. *Gun; ex parte Stephenson*[31] the problem

> . . . which has been referred to in a number of publications in this area, and which I have observed for myself when watching women members of a jury, and that is that quite a number of woman jurors will not convict for rape when the girl admits she is not a virgin, on the basis that if the girl puts so little value on her chastity why should we the jurors by our verdict cause a boy to be sent to gaol for violating it. Again this is not logical, but it is a fact of life which has been attested to in a number of jurisdictions.

In fact, prejudice of this kind is not limited to women jurors or to evidence that the complainant is not a virgin. In their study of the behaviour of juries, Kalven and Zeisel[32] noted that in 42 cases of "simple rape",[33] a verdict of guilty on that charge was rendered only three times.[34] The judges in the same sample would have convicted the accused of rape in more than half the cases.[35] Not only did they document a widespread inclusion of tort concepts of contributory negligence and assumption of risk,[36] they concluded that the jury imported equitable notions of unclean hands into the criminal prosecution. Specifically, the jury punished sexually active women by refusing to credit their accusations even in clearly meritorious cases involving no hint of precipitating conduct. In another case studied, a girl alleged that three men kidnapped her from the street in the early hours, then took her to an apartment and raped her. The jury

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[29] V. Berger, "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom" (1977) 77 *Columbia L.Rev.* 1 at 18.

[30] J. H. Davis, "From Acts to Dispositions: The Attribution Process in Person Perception" in L. Berkowitz, *Advances in Experimental Social Psychology* (1965); K. Shaver, *An Introduction to Attribution Processes* (Cambridge, Mass., 1975).

[31] (1977) 17 S.A.S.R. 165 at 174.

[32] H. Kalven and H. Zeisel, *The American Jury* (Boston, 1966).

[33] The authors' term for situations involving only one assailant, non-strangers and no proof of extrinsic violence.

[34] *Id.* at 254 (Table 73).

[35] It should be noted, however, that Kalven and Zeisel do not indicate what percentage of the cases studied involved evidence as to the complainant's sexual history. Moreover, the cases did not include ones where the victim was injured, assaulted by more than one person or assaulted by a stranger—in the latter cases, disparity between judges and juries was considerably less.

[36] *Id.* at 242-5.

acquitted, in apparent response to evidence that the unmarried victim had borne two illegitimate children.[37] The judge in the case called the result "a travesty of justice".[38]

An experimental study carried out in 1973 revealed the attitude that if a woman was involved in a sexual incident with an individual to whom she was not married and which she claimed was rape, the incident downgraded her status dramatically and she could thus be held responsible for the event.[39] Another, more detailed, study carried out in 1976[40] sought to ascertain the way in which male and female subjects perceive the victim in a rape trial. The results of this study indicated "quite clearly that irrelevant characteristics of the victim (her marital status, her sexual experience, and her profession) influence judgments about her responsibility" for the events in question. Thus, although subjects read identical case accounts, a prostitute was seen as more responsible than any of the other victims. The less respectable the victim, the greater was the attribution of responsibility.

> Hence, if a "respectable" woman is raped, it is unlikely that she will be perceived as responsible, because lying about the act (or taking an active role in it) would be inconsistent with our conceptions of respectability. However, if a "less respectable" woman is raped, it is more likely that she will be held responsible because lying or taking an active role (both "bad" actions) would be perceived as consistent with lack of respectability.[41]

As an American writer has noted:[42] "It is not fanciful to suppose that jurors confronted with evidence of a previously sexually active rape complainant will adopt unarticulated premises such as: 'She got what she deserved' i.e., even if she were raped, she had at long last been punished for past misdeeds; she is previously 'damaged property', i.e. she lacks purity and has therefore suffered no great additional harm". Thus, if "the harm to her is slight, the cost to the defendant, if convicted, would be out of all proportion to the offense. The ultimate travesty, in this view, would be to convict a man for raping a prostitute. How much, the jury might reason, could she have suffered?" As an extreme example, the fact finder might reason " 'All women want to be raped', and the evidence of prior 'unchaste' conduct is somehow seen as brilliant confirmation of these widespread male fantasies". It might be argued that because this prejudice bears on someone other than a party (in this case, a complaining witness) it is not a matter for serious concern. But the prejudice does affect a party—the prosecution—by inhibiting its ability to enforce the law.

Acknowledging, therefore, that there are real dangers with the admission of information relating to a complainant's sexual history, the

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[37] In addition, the accused had claimed, without offering additional proof, that the complainant worked as a prostitute.

[38] *Id.* at 251.

[39] C. Jones and E. Aronson, "Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim" 26 *J. Personality & Soc. Psych.* 415 (1973).

[40] S. Feldman-Summers and K. Lindner, "Perceptions of Victims and Defendants in Criminal Assault Cases" 3 *Crim. Justice & Behaviour* 135 (1976).

[41] *Id.* at 145. See also L. Feldman-Summers and G. Palmer, "Rape as viewed by Judges, Prosecutors and Police Officers" 7 *Crim. Justice & Behaviour* 19 (1980).

[42] L. Letwin, " 'Unchaste Character', Ideology, and the California Rape Evidence Laws" (1980-81) 35 *S. Calif. L.R.* 35 at 57-8.

ultimate issue is whether admission is nonetheless justified. As discussed above, relevant evidence is often excluded because such prejudicial dangers are seen as overbalancing its probative value. It would be a mistake, however, to assume that such an equation is easily measured, at least in this context. While the prejudicial dangers of evidence of the complainant's sexual history are likely to be fairly constant,[43] the probative value of such evidence cannot be assessed in isolation. It is likely to vary enormously, depending on what fact it is adduced to prove, the way it is established, and the mode of reasoning involved.

Assessing Probative Value

One of the primary distinctions in the law of evidence is between evidence relevant to the "issues" and evidence relevant to the "credit" of a witness. In one sense, this distinction is quite misleading, since evidence affecting the reliability of evidence given by a witness will, indirectly, affect the probability of the existence of facts in issue. Nonetheless, the distinction is a useful one in practice, and a convenient starting point. In the context of evidence of sexual history, another distinction is between different categories of evidence. That history may be established in three different ways.[44] In the first place, evidence of specific conduct of the complainant on other occasions may be adduced.[45] Secondly, a witness might be asked to give an opinion of the complainant's sexual habits and propensities. Finally, evidence might be given of the complainant's reputation (for particular sexual behaviur) in a particular community.

But the primary point of distinction adopted in this article is in terms of mode of reasoning. It is possible to distinguish two quite separate classes of reasoning process involving evidence of a sexual complainant's sexual history. The first may be called "propensity reasoning". Essentially, this involves a two step reasoning process:

(1) Evidence about a person's behaviour, in the form of reputation, opinion or specific conduct, is used to infer that person's "propensity" (i.e. tendency) to behave in a particular way.
(2) The person's inferred "propensity" then forms the basis for an inference to behaviour in conformity with that propensity.

For example, "propensity reasoning" is used when evidence that a person has committed a series of assaults on a particular person is used to infer that he was responsible for another, similar assault; or when evidence that a person has committed a series of (intentional) burglaries is used to infer that he intended to commit a burglary when found in a stranger's house. The second category is simply any mode of reasoning *other* than propensity reasoning, involving the use of evidence of a person's behaviour on occasions other than the one in question. For example, if an accused person denies being in the area where the crime charged was committed, evidence that he committed another crime in that area at about the same time could

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[43] In the sense that prejudicial effect will be independent of the purpose for which that history is admitted or the way it is established. But changes in sexual mores and community attitudes are likely to reduce the overall prejudicial effect over time.

[44] See Cross, *op. cit.*, at 341.

[45] Such evidence might even include prior convictions for crimes with a sexual component e.g. prostitution.

be used to show that he did in fact have the opportunity to commit the crime charged, not to show a propensity to commit crime.

Propensity Reasoning—Relevant to Substantive Issues

Propensity reasoning is being adopted when it is argued that evidence of a sexual complainant's reputation for promiscuity (showing a "propensity" for consensual intercourse) increases the probability that she[46] consented to intercourse with the accused (behaved in conformity with that propensity on the occasion in question). Evidence of another person's opinion as to her sexual behaviour patterns, or evidence of specific acts of consensual intercourse at other times, may also be used as a basis for the same inference. The question is whether the inference has any validity.

In fact, general evidence of a person's sexual history—her "chastity"—is of very little value. Chief Justice Bray of the South Australian Supreme Court pointed out in 1977 that no reasonable person could believe that "a willingness to have sexual intercourse outside marriage with someone is equivalent to [a willingness to] have sexual intercourse outside marriage with anyone".[47] Prior consensual activity, without regard to surrounding circumstances, does not suggest subsequent consent. Contemporary sexual behaviour comes in many varieties reflecting differing degrees of interpersonal commitment.[48]

The assumption underlying an inference from, say, reputation for a propensity to consent, to consent with the accused, is that the former evidence shows some character trait, some stable element of personality, which is likely to produce generally consistent behaviour across varying situations. But while this assumption has a great deal in common with traditional personality theory in psychology,[49] empirical research has failed to verify the existence of personal dispositions or even that behaviour is consistent across different situations.[50] Modern psychology, while not rejecting the existence of character traits, emphasises the importance of situational factors. Behaviour of an individual in a given instance is likely to be determined by an interaction between "psychic structure" and "situation". Psychological studies suggest that, in the absence of comprehensive information about an individual's history and personality, the chances of accurate prediction are very low unless the individual is placed in substantially similar situations.[51]

It follows that a woman's reputation with respect to "chastity" is of little use in deciding whether she consented to intercourse with the accused. The non-specific nature of such evidence, divorced from the circumstances in which the behaviour on which it is based occurred, makes it of minimal probative value. It suffers from other limitations as well. In a "mobile,

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[46] Although a complainant in a trial for a sexual offence may be male or female, it is convenient to concentrate on the latter group.

[47] *R.* v. *Gun; ex parte Stephenson* (1977) 17 S.A.S.R. 165 at 167.

[48] Letwin, *op. cit.*, at 60.

[49] G. Allport, *Personality—A Psychological Interpretation* (New York, 1937).

[50] H. Hartshorne and M. A. May, *Studies in Deceit* (New York, 1928); W. Mischel, *Personality and Assessment* (New York, 1968).

[51] The similarity, however, need not be unusual or "striking". Such requirements relate to a form of non-propensity reasoning familiar as "modus operandi", relying not on a person's propensity but on the improbability of coincidence.

sexually active society" there may be "no such thing as a 'reputation for unchastity' ".[52] The only knowledge of the complainant's sexual history may be held by her and a few other people, not by some hypothetical "community". Reputation evidence will thus often be no more than the witness's opinion of the person about whom he or she is testifying. Opinion is unreliable unless supported by evidence of specific instances of conduct; if such evidence is available, it should be given and not the evidence of opinion. Reputation is particularly unreliable when it relates to sexual matters. Sex lends itself to sensationalism and exaggeration. Since sexual activity is usually private, sexual reputation often reflects little more than speculation. Normal social processes tending to ensure that "the truth will out" are ineffective to offset such exaggeration and speculation. "Because people value privacy, it is unlikely that a woman who is rumoured to be promiscuous will seek to correct the record by detailing the true facts of her sex life".[53]

Similarly, prior consensual sexual activity would have minimal relevance in a case of a sudden assault by a complete stranger, or an attack by a violent burglar. The dissimilarity of people and circumstances means that propensity reasoning is simply not likely to have any validity. Of course, as has recently been pointed out, "things are not always what they seem. Bruises on C's face may be there because, after consensual intercourse, D resented her taunts on his inadequate performance".[54] However, as a general rule, most aspects of the alleged sexual offence will not be in issue, and the trial judge will be able to make an assessment of the similarity of that situation to others in which the complainant has engaged in sexual activity.

On the other hand, consider evidence that the complainant has consented to sexual intercourse with the accused on one or more other occasions. It might be argued that admission of such evidence would pander to the male prejudice that having once consented she would surely consent again; or that regardless of whether she consented on the relevant occasion, "rape" by one to whom she has previously given her consent is of relatively little moment. But the fact remains that the evidence is of some probative value, unless other evidence shows that the circumstances were clearly dissimilar. Indeed, it would be unduly restrictive to limit such evidence to a *prior* consensual relationship—consensual sexual activity after the events in question may form the basis for an inference to earlier consent. And it would be artificial to require that such other occasions fell within a rigid time period.[55] Where the circumstances are significantly dissimilar, however, no propensity inference would be open. Thus, prior incidents of consensual intercourse with the accused may not be probative of consent to group sex, or sex in a public place, or sex after the infliction of violence.

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[52] B. Babcock, A. Freedman, E. Norton and S. Ross, *Sex Discrimination and the Law* (New York, 1975) at 839-40.

[53] H. Ordover, "Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity" (1977) 63 *Cornell L. Rev.* 90 at 104. Therefore, those States which prohibit reputation evidence as to sexual history may well be right, at least to the extent that propensity reasoning is involved.

[54] D. W. Elliott, "Rape Complainant's Sexual Experience with Third Parties" [1984] *Crim. L. Rev.* 4 at 4, 13.

[55] See, e.g., s. 409B(3)(b), Crimes Act 1900 (N.S.W.).

Where evidence of sexual history relates to conduct with persons other than the accused, it will usually only have minimal probative value in the case in question. But where proof of previous sexual conduct pertains narrowly to facts evincing a pattern of consensual encounters characterised by distinctive facts similar to the events alleged, one cannot simply assume that a woman's behaviour on one occasion has no relationship at all to her conduct or state of mind on another. In *R.* v. *De Angelis*[56] the complainant alleged that she had been raped by the four accused (whom she knew prior to the alleged rape). The accused claimed that she consented and sought to cross-examine her in respect of a large number of group sex incidents in which, it was alleged, she had had intercourse with groups of boys in similar circumstances to the alleged rape.[57] Chief Justice King of the South Australian Supreme Court held that the

> . . . alleged habitual indulgence of the girl in group sex incidents rendered it less unlikely that she would consent to sexual intercourse in these circumstances with four boys in succession. Where the circumstances in which an alleged rape occurs themselves possess probative value, because of the unlikelihood that a woman would consent to intercourse under those circumstances, it must be relevant to show that she has consented to intercourse under those circumstances on previous occasions.[58]

The reasoning is that the prior behaviour in substantially similar circumstances showed a propensity to consent in such circumstances. Other examples may be suggested. The accused may adduce evidence that the complainant was a prostitute who customarily met her clients during a particular period in a particular area and drove them in her car to a particular room to complete the transaction. Coupled with evidence that she and the accused had met in similar circumstances, and that the alleged sexual offence had occurred in that particular room,such evidence of sexual history would be highly probative of consent.[59]

Victoria, Queensland and South Australia are thus correct to prohibit evidence of sexual history relevant via "general disposition", but New South Wales and Western Australia have gone too far in prohibiting any type of propensity reasoning. Of course, if consent were not in issue, as, for example, if the accused admitted the complainant had been "raped" but claimed someone else had done it, the complainant's sexual "propensities" would be irrelevant.

Propensity Reasoning—Relevant to Credibility

A propensity reasoning process is being used when it is argued that past illegal or immoral behaviour by a witness affects the probability of that witness being truthful when testifying. Some courts,[60] even some law

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[56] (1979) 20 S.A.S.R. 288.

[57] Only some of the occasions included one or more of the accused.

[58] (1979) 20 S.A.S.R. 288, at 292. Jacobs and Legoe, JJ. concurring.

[59] Although, of course, the sexual offence may still have occurred notwithstanding the similarity of circumstances.

[60] *R.* v. *Riley* (1887) 18 Q.B.D. 481; *R.* v. *Cargill* [1913] 2 K.B. 271; *Halsbury's Laws of England* (4th ed., 1977) vol. 11, para. 374.

reform commissions,[61] have asserted that the sexual history of a rape complainant is relevant to her credibility on this basis. In the words of the Victorian Law Reform Commissioner: "There are, it is thought, still forms of intercourse that would be generally regarded as seriously discreditable and therefore as weakening confidence in the reliability of a witness."[62]

Illustrations given were prostitution, intercourse in the presence of the public, participation in "gang bangs", intercourse with more than one man at the same time and fellatio.[63] The traditional view is that "if the witness has, for his own purposes, chosen to do things which he must have been aware were serious breaches of accepted codes of proper behaviour in the community, then the court or jury may reasonably feel a doubt as to how far it can rely on his having refrained, in his evidence, from committing, for his own purposes, breaches of the accepted code against giving false evidence".[64]

But Chief Justice Bray of the South Australian Supreme Court "found it hard to believe that any reasonable person at the present time could assent to [the proposition that] the unchaste are also liable to be untruthful".[65] It is suggested that the only classes of conduct that could have more than minimal relevance to the question of whether the witness should be believed are those involving truth-telling. A conviction for murder may have some relevance on the witness's propensity for violence but says little about the witness's willingness to lie. The use of general character to reflect on credibility is based on a belief that individual units of personality are highly integrated and exert themselves pervasively across diverse situations. But this has already been established to be an unsound assumption. Bentham illustrated the absurdity of the proposition:

> Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that rather than suffer a stain to remain upon it, he determines to risk his life, challenge his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear—and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it—has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie—and the inference of the law is, that he cannot open his mouth but lies will issue from it. Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion.[66]

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[61] Law Reform Commissioner (Victoria), Report No. 5, *Rape Prosecutions (Court Procedures and Rules of Evidence)* (Melbourne, 1976); Law Reform Commission of Tasmania, Report No. 3, *Report and Recommendations for Reducing Harassment and Embarrassment for Complainants in Rape Cases* (Hobart, 1979). But *cf.* a more recent report of the Tasmanian Law Reform Commission: Report No. 31, *Report and Recommendations on Rape and Sexual Offences* (Hobart, 1982).

[62] *Id.* at 29.

[63] This latter example was included in the Working Paper, but excluded in the Report.

[64] *Id.* at 29.

[65] *R.*, v. *Gun; ex parte Stephenson* (1977) 17 S.A.S.R. 165 at 167-7. See also Zelling, J. at 173-4; *R.* v. *Zorad* [1979] 2 N.S.W.L.R. 764 at 774 (*per* Reynolds, J.A.).

[66] J. Bentham, *Rationale of Judicial Evidence* (London, 1827) at 406.

A 1979 report of the Tasmanian Law Reform Commission, now superseded, justified its adoption of the Victorian approach on the basis that a different view might prevent the uncovering of false accusations of rape.[67] But no evidence has been advanced to support the assumption that sexually active women are more likely to make false rape accusations than sexually inactive women.[68] Any connection between sexual activity and veracity is wholly unproven. Few would assert that a witness's virginity is an indicator of her credibility. The English Heilbron Report concluded that the sexual history of the alleged victim is of no significance so far as credibility is concerned.[69]

Nevertheless, there may be situations in which a complainant's sexual history may be relevant to her credibility via propensity reasoning. A far-fetched example would be evidence that a complainant was a prostitute who, on a considerable number of previous occasions, had consented to sex and then threatened a false charge of rape unless money was paid. Such evidence may show a propensity not only to consent to sex but also to falsely accuse clients with rape. Similarly, it may be shown that the complainant had previously committed perjury, even though the lie under oath was with respect to some aspect of her sexual history.

Non-Propensity Reasoning—Relevant to Substantive Issues

It is impossible to detail all the ways in which evidence of a complainant's sexual history may be relevant to the issues in a trial via some reasoning process other than one relying on propensity. Nevertheless, several examples may be noted:

Origin of Physical Evidence. Evidence of sexual history may be tendered to show that certain specific consequences of intercourse could have resulted from events prior to those in question. For example, the accused may assert that penetration did not occur and the prosecution may lead evidence to suggest that the complainant had been a virgin. In those circumstances, the accused should be able to lead evidence that she had in fact engaged in previous sexual intercourse, not for any propensity reasoning purpose but to negate the prosecution case on the issue of penetration. Such evidence might take the form of reputation for sexual behaviour, an opinion to that effect or, preferably, specific prior acts of intercourse. Similarly, where the accused denies that intercourse occurred he should be able to lead appropriate evidence of the complainant's prior sexual history to explain, for example, the presence of semen or blood of a type or grouping the same as the accused. The same result would

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[67] Tasmanian Law Reform Commission, Report No. 3, *Report and Recommendations for Reducing Harassment and Embarrassment for Complainants in Rape Cases*, 1979, at 5. The more recent report, No. 31, *Report and Recommendations on Rape and Sexual Offences* (Hobart, 1982) rejects this view (at 22).

[68] A New South Wales Inter-Departmental Task Force, in its Report on *Care for Victims of Sexual Offences* (Sydney, 1978), while noting that 65% of all complaints are recorded as "false" or rejected, concluded that the vast majority of decisions to terminate an investigation had nothing to do with the truth of the complaint. See Warner, *op. cit.*, at 137-8. In the words of the Royal Commission on Human Relationships, *op. cit.*, vol. 5 at 178, "there are no statistics of false complaints".

[69] Home Office, United Kingdom, *Report of the Advisory Group on the Law of Rape*, Cmnd. 6352 (London, 1975) at 22.

follow where the prosecution leads evidence relating to the presence of a sexually transmitted disease, physical injury or pregnancy.[70]

Identity. Where an accused argues that someone other than he committed the act for which he is charged, he should be permitted to adduce evidence of such other person's sexual activity with the complainant. For example, an accused arguing that the guilty person was in fact an ex-lover of the complainant whom the latter is reluctant to implicate should be able to adduce evidence supporting that argument, including the sexual nature of the relationship.[71]

Belief in Consent. Where an essential element of a sexual offence is an intention to have intercourse without consent, it may be negated if the accused believed he had the woman's consent.[72] Therefore, evidence that the accused had reason to think the complainant willing because of her sexual reputation, or her prior sexual conduct, could be crucial to the accused's case. Certainly, such evidence could only be relevant on this question if the accused knew of it at the time of alleged offence. Moreover, it would be fairly rare for the facts of the case to lend themselves to this sort of defence—it would be difficult for someone accused of a violent rape, corroborated by physical evidence, to argue that he nonetheless believed consent was present.[73] In many cases, the probative value of the evidence will be so low that it is outweighed by the risk of prejudice and other disadvantages to the complainant—discretionary exclusion would be appropriate. But there will be cases in which the accused should be permitted to adduce evidence of the complainant's sexual history which helps to explain his mistaken belief. For example, adding to the facts of *Morgan*, a husband may have taken considerable pains to establish a reputation for his wife taking part in sado-masochistic sex involving rape fantasy. An accused, aware of this reputation, and invited by the husband to take part, may well interpret the complainant's resistance as feigned. It may well be that a jury would take the view that in the particular circumstances such reputation was not sufficient for the accused to believe the complainant was consenting, but the jury should at least be informed of it as one of the circumstances upon which he claims to have based his belief. Similarly, the facts of *Gregory* fall, as the High Court concluded, within this category.[74]

Accused's Record of Interview. The prosecution may adduce evidence of an accused person's pre-trial admissions. If such evidence is adduced, the accused is permitted to put those admissions in context by putting into evidence any other statements made by him at the time. This may include what he said about the complainant's sexual history. It would

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[70] The N.S.W. (s. 409B(3)(c), (d), (e)) and W.A. (s. 36A(2)(c), (d), (e)) provisions permit evidence relating to the presence of semen, pregnancy, disease or injury; but not blood type.

[71] See Law Reform Commissioner (Victoria), *op. cit.*, at 24. Contrast the N.S.W. (s. 409B(3)(b)) and W.A. (s. 36A(2)(b)) provisions.

[72] See *D.P.P.* v. *Morgan* (1975) 61 Cr.App.R. 136. It is not necessary, in this context, to consider whether the belief must be reasonable as well as genuine.

[73] In fact, *Morgan* comes close to this scenario.

[74] Evidence of sexual history adduced for this process of reasoning may be admitted in the Northern Territory (s. 4 Sexual Offences (Evidence and Procedure) Act 1983). But contrast the New South Wales and Western Australian provisions.

be admissible to put his admissions in context, not as evidence of the complainant's propensities.[75]

Rebuttal. The accused must be permitted to adduce evidence of the complainant's sexual history to rebut evidence introduced by the prosecution.[76] The prosecution may attempt to create an inference of non-consent by introducing evidence that the complainant was a virgin prior to the alleged offence or, in the case of an alleged heterosexual assault, that the complainant was a homosexual. The accused must be able to rebut this argument by leading relevant evidence of the complainant's prior sexual behaviour, or, in the latter case, heterosexual sexual activity. The prosecution evidence is adduced for a propensity reasoning purpose. But the rebuttal evidence adduced by the accused, while also relevant via propensity, is admitted to negate the prosecution case. Even if insufficiently probative via propensity, it should be admitted for the latter purpose.

Non Propensity Reasoning—Relevant to Credibility

Bias or Interest. The credibility of a witness may be impugned by cross-examining him or her about the existence of bias or some motive to lie. Indeed, according to general evidence law, evidence may be led to rebut any denial of such bias or interest.[77] The probability of bias may be high if it could be shown, for example, that the accused had recently terminated a (sexual) relationship with, given a sexually transmitted disease to or made pregnant, the complainant.[78] Similarly, the complainant's self interest may indicate a motive to testify falsely. A married woman may have had a number of extra-marital affairs until her husband threatened her with violence if she continued. The accused claims intercourse with consent but asserts that discovery by the husband led the wife to press charges. In such circumstances, the accused should be permitted to adduce evidence as to the prior sexual relationships and the husband's threat. Alternatively, taking a hypothetical case considered earlier, the complainant may be a prostitute who consented to sex and then threatened a false charge of rape if a large sum of money were not paid. Evidence of such previous events would support the accused's claim that the complainant had a motive (money) to falsely accuse him of a sexual offence.

Psychological or Physiological Incapacity. The accused may seek to adduce evidence of the complainant's sexual history to support a psychiatric opinion that she has a pathological predisposition to fantasise about rape. Assuming such expert opinion evidence were admissible,[79] it may be necessary for the complainant's sexual history to be admitted if it is an important basis of the opinion.

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[75] *Lopes* v. *Taylor* (1970) 44 A.L.J.R. 412 at 421-2; *Herbert* v. *The Queen* (1982) 42 A.L.R. 631 (Fed. Ct.). Such self serving statements would be admissible as evidence of the facts asserted. But the evidence would not be so admissible in New South Wales and Western Australia.

[76] See *R.* v. *Byczko (No. 1)* (1977) 16 S.A.S.R. 506. Rebuttal is permitted expressly in the N.S.W. legislation (s. 409B(5)), but not in Western Australia.

[77] *R.* v. *Umanski* [1961] V.R. 242 at 244; *R.* v. *De Angelis* (1979) 20 S.A.S.R. 288.

[78] The latter two possibilities, only, are dealt with in the N.S.W. and W.A. provisions.

[79] The law is somewhat reluctant to open up the courts to psychiatric evidence about a person's tendencies, because of problems with terminology, consistency and danger of jury confusion. See *Lowery* v. *The Queen* [1974] A.C. 85; *R.* v. *Turner* [1975] 1 Q.B. 834; *R.* v. *Murray* [1980] 2 N.S.W.L.R. 526; *R.* v. *McBride* (1983) 7 Crim.L.J. 352 (S.A. C.C.A.). See also Scutt, *op. cit.*, 829.

Improbability of Numerous Rapes. The defence may seek to adduce evidence that the complainant had made ten (or more) rape complaints in the same year as the one in issue. Although they may all have been truthful, this seems improbable. It follows that at least some, if not all, of the complaints were false—evidence clearly relevant to the complainant's credibility. *A fortiori* if the defence leads direct evidence to show that some of the other complaints were false.

Contradiction. Where the prosecution, intentionally or not, elicits from the complainant favourable testimony about her sexual history, the accused must be able to cross-examine the complainant in an attempt to expose such testimony as untrue. Such cross-examination will relate to the complainant's sexual history, but its purpose is to show that the complainant is not a credible witness by demonstrating that she has not been truthful when testifying. For example, cross-examination may be directed to demonstrating that she has tried to deceive the court by implying that she is sexually inexperienced when the reverse is true.[80]

Conclusions

The probative value of evidence of a complainant's sexual history is not constant. It varies considerably according to considerations such as the type of evidence adduced, the mode of reasoning employed and the proposed end point of proof. It may on occasion be virtually irrelevant, but it may sometimes be enormously convincing and crucial to the accused's defence. Notwithstanding the dangers of prejudice associated with this category of evidence, and the policy concerns supporting inadmissibility, a general rule of exclusion is inappropriate. Indeed, as has been demonstrated, it is highly dangerous to attempt to formulate specific exceptions to such a prohibition since it is impossible to predict in advance all the ways in which evidence of a complainant's sexual history might be properly relevant to what are the real issues in a particular case. The author of a recent article in England on this question argues that:

> . . . to forbid by rule potentially legitimate tactics, i.e. those which may help an innocent man to escape conviction, is to cross a hitherto uncrossed line. Those who invite us to cross it require us either to prejudice the defendant and assume his guilt, or (the only alternative) to decree that, although innocent, he must nevertheless be hampered in his defence so that genuine rapists may be put down. If either course were ever proposed in stark terms, it would get short shrift; dressing them up in terms of justice for complainants does not make them any less unacceptable.[81]

One answer is to rely, as have a number of Australian legislatures, on judicial discretion. "The trial judge can view the unique circumstances in each case and apply the test with the benefit of full knowledge of the context in which evidence is offered. He can make the fine decisions about admitting similar evidence in similar trials based on the individual witnesses

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[80] See *R.* v. *Holt* [1983] 2 Qd. R. 462. Under present law, such "contradiction" can only extend to cross-examination. Adducing contradictory evidence in rebuttal is not permitted.

[81] Elliott, *op. cit.*, at 14. But note the contrary view expressed by J. Temkin, "Regulating Sexual History Evidence—The Limits of Discretionary Legislation" (1984) 33 *I.C.L.Q.* 942; J. Temkin, "Evidence and Sexual Assault Cases: The Scottish Proposal and Alternatives" (1984) 47 *Mod. L. Rev.* 625.

and juries and the nuances of the factual development. A legislature cannot conceivably envision all circumstances that may arise, and its determination of relevance will undoubtedly be flawed in some unforeseen situations".[82] Thus it may be argued that legislatures should leave the question to the trial judge. He or she can be required to consider whether introduction of the evidence would, in all the circumstances of the case, be "justified", or "fair", or "desirable in the interests of justice". More precision can be employed by requiring him or her to balance "probative value" against the possible "distress, humiliation or embarrassment of the complainant". Alternatively,[83] the balance could be between "probative value" and "prejudicial dangers", including misestimation of probative value, irrational use, and confusion.[84] It is not clear whether a trial judge possesses any such discretionary power under the common law. Under the orthodox analysis, the only judicial discretion to exclude evidence which is more prejudicial than probative is one limited to evidence adduced by the prosecution against an accused.[85] Nevertheless, some formulations of "relevance" import a similar sort of balancing test on a general basis.[86] At least in cases where a complainant's sexual history is tendered by an accused person in a sexual offence trial, it would be appropriate for the trial judge to have an expressly recognised discretion to exclude evidence which is more prejudicial (to any party) than probative.

Nevertheless, to the extent that rules can legitimately be formulated, it is desirable they should be adopted. A test balancing probative value and considerations of prejudice is, by itself, amorphous, indefinite and subjective. The interests of justice are not best served by leaving with the trial judge a wholly unfettered discretion in relation to evidence of a complainant's sexual history. "To take that course would not only create the possibility that different approaches would be taken by different judges but also it would make it very difficult for those preparing for a trial to anticipate with any degree of confidence whether or not a particular line of questioning or evidence was likely to be allowed."[87] General discretions also make satisfactory appellate review virtually impossible. One could criticise all rules of evidence, indeed all rules, on the ground that they deal in generalities. Of course, if greater precision would introduce arbitrary and illegitimate distinctions, a purely discretionary approach would be unavoidable. But, it is suggested, that is not the case here. A legitimate distinction can be drawn between propensity and other reasoning processes. While it is virtually impossible to generalise about the latter, either in terms of the end point of proof (issues/credibility) or

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[82] J. A. Tanford and A. J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 *U. Penn. L.Rev.* 544 at 571.

[83] It would be very difficult for a trial judge to compare such different things.

[84] The policy concern to protect the complainant from "distress", etc. might also be included but, if it were perceived to outweigh the rights of the accused in this context, it may be more appropriate simply to weight the balance in favour of exclusion of the evidence by requiring that probative value substantially outweigh prejudicial dangers.

[85] *Perry* v. *The Queen* (1982) 57 A.L.J.R. 110 at 112, 120; *Cleland* v. *The Queen* (1982) 57 A.L.J.R. 15 at 29; *Sutton* v. *The Queen* (1983) 58 A.L.J.R. 60 at 73. But *cf.* J. Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979) 53 *A.L.J.* 817 at 818-9.

[86] See Cross, *op. cit.*, 21.

[87] Scottish Law Commission, Report No. 78, *Evidence, Report on Evidence in Cases of Rape and other Sexual Offences* (Edinburgh, 1983) at 13. See also Z. Adler, "Rape—The Intention of Parliament and the Practice of the Courts" (1982) 45 *Mod. L. Rev.* 664 at 675; Z. Adler, "The CLRC's Report on Sexual Offences: Implications for Rape and Indecent Assault" (1984) *New. L.J.* 738 at 739.

the kind of evidence adduced, that is not true of propensity reasoning. A complainant's sexual "reputation" is likely to be of such little assistance in establishing a propensity to behave in a particular way in particular circumstances[88] that the prejudicial dangers associated with such evidence justify a general rule of exclusion. A similar view may be taken of opinion, other than expert opinion, evidence in this context. As for evidence of specific conduct, psychological studies indicate that substantial similarity in circumstances should be the primary prerequisite for its admission to show a specific propensity. This approach has been taken by the Australian Law Reform Commission in its *Interim Report on the Law of Evidence.*[89] Its proposed Evidence Act includes the following provisions:

> 91. (1) Evidence that a person did a particular act or had a particular state of mind (in this section referred to as the "other act" and "other state of mind", respectively) is not admissible to prove that the person has or had a tendency (whether because of the person's character or otherwise) to do a similar act or have a similar state of mind . . .
> (3) Where it is reasonably open to find that–
> (a) the person did the other act or had the other state of mind; and
> (b) all the acts or states of mind, and the circumstances in which they were done or existed, are substantially and relevantly similar;
> sub-sections (1) and (2) do not prevent the admission or use of such evidence.
> 94. (1) Evidence of reputation or of an opinion is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way or have a particular state of mind.
> 114. Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in undue waste of time, the court may refuse to admit the evidence.

One final problem must be considered. That is the difficult issue of multiple relevance. A complainant's sexual history may be relevant in a number of different ways. For example, a reputation for prostitution, for example, may be adduced as relevant via propensity reasoning to the question of consent and via the same reasoning process to her credibility. It may also be relevant to the question of whether the accused believed the complainant to be consenting. It is even possible that a case may occur in which the accused may argue that the complainant is biased against him because he was one of the disseminators of that reputation. While the probative value of the evidence on the first two bases is likely to be minimal, outweighed by the dangers of prejudice associated with it, it may be considerably more probative on the other two grounds. Inadmissibility for one purpose should not generally prevent evidence being admitted for another, permissible purpose. Of course, the tribunal of fact would have to be warned of the use(s) that may be made of it. Nevertheless, it may

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[88] Relevant either to the issues or to credibility.

[89] Australian Law Reform Commission, Report No. 26 (Interim), *Evidence*, A.G.P.S., Canberra, 1985.

be that there will be cases where the trial judge considers the evidence will simply do more harm than good. The fact that evidence is received on one basis does not mean that it will be taken solely or even primarily for that purpose by the tribunal of fact. It is still subject to misuse, whatever the nominal theory of admissibility. The trial judge, exercising the discretion proposed above, must strike a balance by which admission would depend on how clearly the permissible purpose predominated and the extent to which it was not a mere pretext for prejudicing the tribunal of fact.