The difficulty of striking a balance in the law on rape: sexism, stereotypes and some examples from other countries

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Introduction

The law on rape in many jurisdictions has been shaped by the perception that women are prone to lie, and particularly prone to lie about sexual matters.

This myth has proved to be incredibly widespread and persistent, despite the absence of a shred of empirical evidence to support it. In fact, studies in various jurisdictions have shown that the rate of false reports of rape is the same as for other serious crimes -- or even lower. | For example, a study in one US city found that 1.6 percent of rape complaints proved false, as compared with 2.6 percent of reports of stolen cars. | In Namibia, research conducted in 1988 showed that the police considered only about one percent of all rape reports to be unfounded. |

But the unsupported statement of a prominent seventeenth-century English jurist that "rape is an accusation easily to be made and hard to be proved" has nevertheless echoed through the years and around the world as "common sense" wisdom. |

Another oft-quoted statement from a male jurist is that rape cases "are particularly subject to the danger of deliberately false charges, resulting from sexual neuroses, phantasy, jealousy or simply a girl's refusal to admit that she consented to an act of which she is now ashamed". For example, this statement was directly quoted in a 1979 Australian case and in 1987 and 1989 South African cases. |

The idea that women are inherently unreliable, especially when it comes to sex, has become structurally imbedded in the law on rape, in the treatment of consent, and in procedural matters such as the drawing of negative inferences from delays in reporting a rape and the requirement of special corroboration of the evidence of the complainant or warnings to juries to treat such evidence with special caution. |

The influence of gender bias in the law on rape is by now well-established. Many countries have implemented statutory reforms which attempt to eliminate the various manifestations of sex-based myth which characterise rape law. Namibia is poised to become one such country.

Many jurisdictions have grappled with the problem of how to eliminate unfounded stereotypes while still protecting the right of the accused to a fair trial. For example, several jurisdictions have attempted to replace the emphasis on the absence of consent with an emphasis on the presence of coercion. As another example, various approaches have been adopted to try and exclude irrelevant evidence about the previous sexual history of the complainant, without excluding anything which might be genuinely relevant to the accused's efforts to prove his innocence.

The efforts to use law reform to eliminate sexist stereotypes can only be applauded. What is frightening, however, is that the myths about rape are so deeply rooted that such reform efforts do not always achieve their intended purpose.

This paper will not attempt to provide an exhaustive analysis of the success of various attempts at law reform or even any kind of a representative sample. It will rather highlight a few examples from other countries where stereotypes about rape have been remarkably resilient, finding their way through the interstices of even the most well-intentioned and well-designed law reforms. It is offered as a cautionary tale, in the hope that Namibia can find ways to make its law reforms in this area truly meaningful and effective.

Some examples of judicial response to law reform initiatives

(1) Michigan: the absence of consent

In 1974, the US state of Michigan redefined rape in a "Criminal Sexual Conduct Act" which has been used as a model in many other countries. One of the major reforms contained in this legislation was the removal of the absence of consent as an element of the crime. The intention was to shift the focus of the rape trial to the presence of coercion.

The Michigan statute sets forth specific coercive circumstances which constitute "criminal sexual conduct" of varying degrees. For example, in terms of the amended Michigan Penal Code, a person is guilty of first degree sexual conduct if he or she engages in sexual penetration with another person in certain defined circumstances. These circumstances include situations in which the actor is armed with a weapon, or when force or coercion is used to accomplish the sexual penetration, including threats of violence or retaliation as well as physical force. | The infliction of personal injury, the involvement of more than one perpetrator, or the fact that the rape took place in the course of a felony are considered to be aggravating circumstances. |

The Michigan law reforms attempted to move away from stereotypical notions of rape altogether, by articulating a new crime with a new name. The original idea was to make the presence or absence of consent completely irrelevant if there was coercion -- or at least in cases where the coercion involved aggravating circumstances. |

It has been asserted that the elimination of consent as a defence in such circumstances can be justified on either of two grounds; that lawful sexual contact should be inconsistent with violence, or that any "consent" given in such circumstances is meaningless. |

However, the courts in Michigan have held that consent is still available as a defence, even in situations where coercion which rises to the level of aggravating circumstances is clearly present.

For example, in one 1982 case the Michigan Court of Appeals overturned the conviction of a kidnapper for the rape of his victim. The court stated that it was "not persuaded that consensual sexual intercourse is necessarily impossible in the course of kidnapping". | In a 1984 case, the Court of Appeals suggested (with equal implausibility) that a woman might have freely consented to sexual intercourse with one man while another held a gun at her head. |

Thus, despite law reforms efforts to define areas in which no reasonable concept of "consent" can be relevant, the emphasis on consent still slips in through the back door.

(2) Australia: warnings to the jury about the need for special corroboration of the complainant's evidence

Under Australian common law, judges would commonly warn juries in rape or sexual assault cases that they should beware of relying on the testimony of the complainant unless there was independent corroboration of her story by another witness or some other evidence. In recent years, all states and territories in Australia (except for Queensland) have introduced legislation which attempts to change the common-law position by stating that a judge in a rape or sexual assault trial is not obliged to warn the jury that corroboration of the complainant's evidence is necessary.

One of the most direct statements of this principle is the state of Victoria. The amended act now states: "The judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual cases as an unreliable class of witnesses." | Most of the analogous provisions in other Australian jurisdictions simply state that the judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the basis of the uncorroborated evidence of the complainant. It is possible under the new legislative regimes for someone who is convicted on a charge of rape or sexual assault to appeal against the conviction on the grounds that no warning about the reliability of the complainant's evidence was given.

A 1989 court case made the following comments on the statutory provision regarding corroboration warnings in Western Australia: "The victims of sexual assault no longer form a class of suspect witness, but neither do they form a class of especially trustworthy witnesses..." Thus, it is permissible for a trial judge to comment on the reliability of the complainant's evidence, so long as such a comment does not stem from a belief that all sexual assault complainants are suspect witnesses. As the Court stated: "...the judge's discretion to comment should not be exercised so as to convey to the jury, whether by phrase, gesture or intonation, a caution about the general reliability of the evidence of alleged victims of sexual offences ..." |

However, in practice, it is difficult to separate attitudes about one individual complainant from attitudes about women in general.

In 1991 an appeal court in Western Australia overturned a conviction in a sexual assault case because no warning was given to the jury, asserting that a warning about the need to scrutinise the complainant's evidence with care was justified because there had been a considerable lapse of time between the rape and the trial; because the complainant had delayed in making a complaint; and because there was evidence of considerably enmity between the complainant and the accused. | Yet these factors are typical of many rape cases -- meaning that the old stereotypes about rape can easily re-emerge through the operation of judicial discretion.

In 1992, another sexual assault conviction was overturned by Australia's High Court. In this case, the complainant was a 14-year-old girl, and the accused was her father. She had previous been sexually assaulted by him when she was 10 -- offences which he had admitted to in court. The trial judge had given a warning to the jury, bringing in the same old inaccurate stereotype about the ease of bringing false charges (without mentioning women specifically); he stated that "people do tell an entirely false story which is very easy to fabricate and extremely difficult to refute". But the conviction was overturned because the trial judge had pointed out to the jury which portions of the evidence corroborated the complainant's testimony. The High Court suggested that the complainant might be likely to make "irresponsible allegations" against her father, who would be extremely vulnerable to such behaviour because of his prior convictions. | In other words, the court seemed

to imply that, as a convicted sex offender, he was in need of special protection against false charges.

The most shocking judicial departure from the intention of the law reforms on corroboration warnings occurred in a 1992 case in the High Court of South Australia, more than seven years after the relevant law reform was enacted. In his summation in this case, the judge warned the jury to consider the evidence with special care because the charge involved a sexual offence, saying: "It is a very easy allegation to make. It is often very hard to contradict." Thus, the old saw from the seventeenth century was resurrected once again. But then the judge went even further; to illustrate his point, he related a detailed anecdote about a false allegation of rape which allegedly occurred in England, involving a "respectable married businessman" who was joined in a train compartment by a "respectably dressed woman":

> The train then set off to go through a long patch of countrywide before the next station. The woman approached the man; sat near him; tore at her dress to expose her chest; knocked her hard head against the wooden side of the train and scratched herself, thus producing bruising and bleeding; and pulled the communication cord.
>
> The train stopped; the guard came running. "He tried to rape me,": she said. The guard said he would have to call the police and did. With the woman making this allegation, the police felt it their duty to charge the respectable businessman. So he was arrested, brought before a magistrate and released on bail. It was a shocking thing for him to have to face. It was too much for him. He took his own life..." |

True or not, this illustrative story had absolutely nothing to do with the case at hand. The jury acquitted the accused on all counts -- even though he had already pleaded guilty to a charge of assault as part of the same incident. The judge's instructions were ultimately found to be an error of law by the appellate court, but the appeal affirmed the discretion of a trial judge to give a warning of the dangers of acting on uncorroborated evidence whenever aspects of "human nature and behaviour" make it appropriate. The appeal case also quoted with approval a statement from an earlier case to the effect that the trial judge may have a duty to remind the jury that sexual appetite or sexual fantasy may be possible motives for false complaints. |

As one commentator concluded, "despite the clear message of new legislation attempting to restore some measure of credibility to women who report that they have been victims of sexual assault, these recent decisions demonstrate ongoing judicial skepticism towards female complainants". |

(3) Canada and Australia: exclusion of evidence of the complainant's previous sexual history and character

In the past, in many jurisdictions, evidence of the complainant's previous sexual behaviour was considered to be relevant on the question of whether or not the complainant consented to the sexual intercourse, and more generally relevant to her credibility as a witness. The theory was that a woman of questionable "moral character" was particularly likely to be untruthful in a case involving a sexual offence. |

In recent years, many countries have attempted to introduce statutes protecting complainants against intrusive cross-examination based on generalised stereotypes, while preserving the right of the accused to cross-examine witnesses on all issues which are genuinely relevant to the disposition of the particular case.

The problem is that "relevance" is a subjective concept, which takes its content from judges' "common sense", experience and understanding of the world -- meaning that there is ample scope for the persistence of sexism and old-fashioned stereotypes about the behaviour of women.

One sensible approach is to circumscribe the notion of relevance by statute. Canada attempted to provide blanket protection against the admission of certain kinds of evidence, but this law reform was found by the courts to be an unacceptable interference with the rights of the accused.

Law reforms limiting the introduction of evidence relating to previous sexual activity with persons other than the accused were introduced in Canada in 1982. Such evidence was completely excluded, except for certain limited exceptions. Evidence of sexual reputation was allowed where it was relevant to the issue of consent, but the admission of evidence of sexual reputation in relation to the general credibility of the complainant was explicitly prohibited. Evidence of previous sexual activity was allowed only where it related to the identity of the person who had the alleged sexual contact with the complainant; where it related to the accused's defence of an honest belief in consent; or to rebut evidence of sexual history introduced by the prosecution.

In the 1991 case of R v Seaboyer, the Canadian Supreme Court struck down portions of the new law, on the grounds that it infringed the accused's right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. The problem identified by the court was that the legislative approach was too categorical, excluding certain kinds of evidence without giving the trial judge an opportunity to balance the possible prejudicial effect of the evidence against its potential value to the truth-finding process.

However, two dissenting judges found the statutory limitations to be justifiable methods of eliminating sex discrimination in trials of sexual offences, asserting that the concept of "relevance" has become imbued with stereotypical notions about female complainants and sexual assault and therefore should not be left open to discretion. In the opinion of the dissenters, the evidence excluded by the 1982 reforms would be irrelevant in a decision-making context which was truly free of myth and stereotype.

In 1992 the Canadian Criminal Code was again amended on the issue of previous sexual history, along the lines suggested by the majority decision in Seaboyer. Essentially, a greater degree of discretion was re-introduced, accompanied by statutory guidelines on how that discretion should be exercised. The Code now explicitly provides that evidence that the complainant engaged in sexual activity with the accused on other occasions is not admissible to support an inference that she is more likely to have consented to the sexual activity that forms the subject matter of the charge, or is less worthy of belief. However, the admissibility of evidence of previous sexual activity for other purposes lies in the discretion of the trial judge and is admissible only if, in the opinion of the judge, it has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice".

The 1992 reforms do, however, attempt to guide the exercise of judicial discretion on this point by setting forth a list of specific factors which the judge must take into account. These factors include (among others) the right of the accused to make a full defence; society's interest in encouraging the reporting of sexual assault cases; the need to remove discriminatory bias from the fact-finding process; and the potential prejudice to the complainant's personal dignity and right of privacy.

The Australian experience shows that sexist notions about rape can still creep in even when the exercise of discretion is limited. In the Australian state of New South Wales, law reforms were

enacted in 1981 to prohibit the introduction of evidence about the complainant's previous sexual experience with anyone (including the accused), except in certain specified circumstances:

* where the evidence relates to sexual experience (or lack of sexual experience) at about the time of the alleged offence, or is closely connected with the circumstances surrounding the alleged offence;
* where the evidence concerns a recent or existing relationship between the accused and the complainant at the time of the alleged offence;
* where the evidence is relevant to the question of whether or not semen, pregnancy, disease or injury is attributable to the alleged offence;
* where the evidence is relevant to whether the complainant first reported the offence after she discovered that she was pregnant or suffering from a disease;
* where the issue is introduced by the prosecution. |

Where the defence counsel wishes to introduce evidence which it believes to fall into one of the specified circumstances, a detailed written statement of the proposed evidence must be submitted to the judge, who must then decide whether or not it may go to the jury. If the judge decides that the evidence is admissible, then he or she must give written reasons for this decision.

An assessment of the impact of this legislative provision was published in 1987. The study found that the new law had been successful in many respects: it had substantially reduced the frequency with which evidence of the complainant's previous sexual experience was admitted; it had reduced references to the complainant's sexual experience with persons other than the complainant; and it had reduced the introduction of evidence as to whether or not the complainant was a virgin. However, the study also found that the new legislation was simply ignored in many cases: in about half of all committal proceedings, evidence of the complainant's previous sexual experience was introduced by the defence without making any prior application to the presiding officer. |

Recent court cases in New South Wales also indicate that even the limited degree of discretion which is afforded by the reformed legislation is still shaped by stereotypes about women. For example, the concept of "relationship" has been broadly interpreted to justify opening the door to cross-examination on previous sexual experience. In one case, a young woman was dragged into a car and gang-raped by five men who were all (by their own admission) drunk or stoned. The medical examination showed that she had received extensive bruising and bleeding. She had known one of the men while at school and had seen him about a month before the incident. The appeal court held that there was therefore a "relationship" which might be relevant to the issue of consent, and that cross-examination to determine whether there had been a previous sexual relationship between the two should have been allowed. |

However, another appeal case attempted to provide clarity on what validly constitutes a "relationship" for the purposes of the statutory exclusions. The evidence indicated that the complainant and the accused were casual acquaintances. They met on a beach near the complainant's home, and she invited him to come to her house for coffee, after which he sexually assaulted her. The appeal court found that the trial court had correctly excluded evidence of an existing "relationship", noting that a "relationship" contemplates "an emotional connection between two people, sometimes involving sexual relations". |

Thus, although the Australian reforms on this topic have had some impact, much still seem to depend on the attitude of the presiding judge.

Identifying the problem

These examples of the difficulty of successfully implementing law reforms on rape are not isolated ones. For example, a study of rape cases in six US cities over a 15-year period concluded that law reforms had produced limited effects, primarily because of the large amount of discretion retained by professionals in the criminal justice system. |

Similarly, an analysis of recent Court of Appeal cases in England concludes that law reforms which attempt to restrict the introduction of evidence about a complainant's prior sexual experience have had little impact in practice because of stereotyped judicial notions about consent and credibility. |

A 1987 analysis of rape law reform efforts in 40 American states found substantial judicial resistance to reforms which try to exclude the application of myths about consent. |

Why are so many courts so resistant to change in this field? According to one observer:

The short answer is that too many people in the community and on the bench continue to hold prejudices against women and to believe myths and stereotypes about women generally and about rape victims in particular. Judges continue to regard women as untruthful, and empirical studies show that "rape myths insidiously infect the minds of jurors, judges and others who deal with rape and its victims [yet generally] know very little about rape and ... much of what they believe about it is wrong." |

Furthermore it has been suggested that as men have lost the protections previously provided by the biased rules which were built into the substantive and procedural laws on rape, "the underlying distrust of women and the myth that women lie about rape have reasserted themselves even more forcefully". |

Methods for tackling sexist stereotypes

(1) Law reforms which restrict judicial discretion in specific areas

One way to prevent myths about rape and other sexual offences from creeping back in around law reforms is to restrict judicial discretion on certain aspects of the law, or at least to guide the exercise of such discretion decisively away from sexist notions about sex.

For example, law reform on the issue of consent could provide that if certain coercive circumstances are found to be present, then sexual intercourse constitutes rape -- going a step farther than the Michigan law reform by refusing to allow for the possibility of consent as a defence in the defined circumstances, on the grounds that any meaningful conception of consent is inconsistent with the coercion which was present. |

Where consent is retained as an element of the crime of rape, or allowed as a defence, it can be clearly defined in a way which shows respect for the dignity and autonomy of women. For example, a 1992 Canadian law attempts to eliminate the common idea that "women say no when they really mean yes", by enacting a "no means no" provision. This provision states that there is no consent to sexual activity where "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity". Of course this reform does not exclude the possibility that some judges may still believe that a "no" was expressed in such a way as to mean something other than lack of agreement. |

The law on issues relating to consent should be stated in such a way as to place the risk of ambiguity or misunderstanding on those who wish to engage in sexual activity, rather than on those who are vulnerable to being coerced; in other words, anyone who engages in sexual contact should bear the burden of ensuring that whatever is perceived as a "yes" really means "yes". For instance, one author has suggested that consent could be redefined as "the unequivocal communication of voluntary agreement to the sexual activity in question" to eliminate subjective interpretations which rely on unwarranted stereotypes about women. |

The Canadian and Australian examples of law reforms to limit the introduction of evidence about previous sexual history are examples of guided discretion. As the Australian example illustrates, stereotypes can still find their way into court under this approach. However, if the application of new laws is closely monitored, guidelines can be tailored to combat the myths about sexual offences which prove to be the most persistent. Progressive judges can also give guidance on the appropriate interpretation of new laws on a case-by-case basis.

The wisdom of placing limitations on judicial discretion has been questioned. Referring to the statutory limitations on the introduction of evidence of previous sexual experience in New South Wales, one court stated: "[T]his is a distinctly stronger protection for the victim than a mere judicial discretion to disallow any irrelevant question... [T]he legislature has endeavoured to foresee all the exceptions which justice requires and to provide specifically for them... the wisdom of so Draconic restriction upon judicial discretion and of so bold an assumption of perfect prescience may be questioned". |

As one commentator noted:

Critics of these recommendations [for placing guidelines on judicial discretion to determine relevance] contend, first, that they limit the court's ability to guarantee a fair trial in particular circumstances and, second, that they place the evidence of women as victims of certain crimes in a uniquely (and impliedly unjustified) protected position. |

However, the defenders of such guidelines assert that such changes are intended only to correct the gender bias and the imbalances which have distorted rape trials in the past. The goal is to ensure that rape trials are just as fair to all the concerned parties as any other kind of criminal trial. |

(2) Training

As one observer has noted, "new laws applied by those with old values may lose all force". | In order to have the desired practical effect, law reform must be accompanied by fundamental changes in attitudes, values and behaviour on the part of those responsible for implementing the laws. |

This paper has no intention of singling out judges for their misperceptions about women and rape. The attitudes of judges grow out of the attitudes of the societies in which they operate. These attitudes are shared by prosecution and defence lawyers, the police and members of the legal profession -- including both men and women. | Such attitudes are reinforced by the fact that the law is a patriarchal institution; "legal concepts are rules are informed by values, assumptions and experiences which are not those of women". |

Both the United States and Canada have had successful experiences with judicial training programmes aimed at combating gender bias. | The Canadian approach is particularly instructive.

In 1993 a former judge of the Canadian Supreme Court recommended that "sensitivity courses for judges on gender and racial bias be made compulsory not only for newly appointed judges but for all judges". | Some judges objected that compulsory education which "might tend to influence the mind of a judge in one direction rather than another" might undermine the "neutrality" of the court. So, in 1994, the Canadian Bar Association compromised by passing a resolution which stated: "Recognizing the principle of judicial independence, the Canadian Bar Association recommends that the judiciary assume the responsibility to educate itself regarding the social context in which judicial decision-making takes place, including gender and racial issues". In 1994 the Canadian Judicial Council also passed a unanimous resolution calling for the establishment of "comprehensive, in-depth and credible" education programmes relating to social issues, including gender and race. | As one judge pointed out, "judicial independence should not be used as justification for judicial isolation or lack of awareness of social issues". |

Dean Smith of the University of British Columbia, who has been involved in developing judicial training courses for several years, stresses that such education programmes must be presented by credible judicial leaders if they are to be taken seriously. While academics and community representatives can provide useful information on specific topics, the emphasis must be on "judges working with judges" and the educational programmes must offer detailed insights and constructive practical guidance. |

Appropriate training programmes should also be offered for police, prosecutors, defence or legal aid lawyers, interpreters, and others who administer the criminal justice system.

Such training programmes could be reinforced with codes of conduct which address gender bias. |

(3) Monitoring the effectiveness of law reforms

Law reforms which are introduced in the area of rape and sexual offences should be carefully monitored to see if they are producing the desired effect. For example, studies in other jurisdictions have made comparative assessments of such variables as the rate of reporting, the number of complaints considered by the police to be unfounded, the arrest rate, the number of prosecutions relative to the number of complaints, the conviction rate and the trends in sentencing. | Information has also been gathered by means of interviews with key players in the criminal justice system and through surveys of complainants. |

Information of this sort can be used to assess whether or not law reforms relating to sexual offences are adequately accomplishing their goals, and to identify any places where gender bias and outdated stereotypes are continuing to intrude. This makes it possible for the legislature to fine-tune the law reforms if necessary.

Conclusion

This paper has not been designed to discourage the Namibian Parliament from reforming rape laws. On the contrary, changing the law on rape has proved to bring about improvements on many fronts. For instance, changes in the law on rape were found to have a positive impact on arrest and conviction rates in both Michigan and New South Wales, with the most striking positive effects occurring, not surprisingly, in places which introduced the most comprehensive packages of reforms. |

Furthermore, law reform around rape can have symbolic significance which can be very empowering for women by giving certain attitudes and values legitimacy through official sanction. |

One commentator has suggested:

The best method is to move forward on several fronts at once, relying on approaches to improve particular rules and also to address the gender-biased context in which substantive and procedural rules operate. It is important as well to acknowledge the special place of the legal system: it is simply not acceptable for the law to reflect general bias present within the community. The law has a unique responsibility to insure fairness and must act vigorously to remedy bias especially where the legal process itself is infected. |

It is submitted that Namibia should look to the examples of other countries in an attempt to find ways to make law reform around rape and other sexual offences as practically effective as possible, and to combat the persistent, pervasive myths about the women who supposedly "cry rape". |

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See, for example, South African Law Commission, Project 45, The Report on Women and Sexual Offences (1985) at 59, which states that "there is no empirical foundation to be found anywhere for the contention that a large number of false complaints are laid in rape cases. On the contrary, a study in New Zealand found precisely the opposite" (citing Law Reform Commission Tasmania, Working Paper 47).
See also S Brownmiller, Against Our Will (New York: Penguin, 1975) at 366; K Mack, "Continuing Barriers to Women's Credibility: a Feminist Perspective on the Proof Process", 4 Criminal Law Forum 327 (1993) at 336; K Gilmore & L Pitman, "To Report or not to Report: A study of victims/survivors of sexual assault and their experiences of making an initial report to the police", Campaign Against Sexual Assault (CASA) House, Royal Women's Hospital, Victoria, Capitol (1993) at 12, quoted in J Bargen & E Fishwick, Sexual Assault Law Reform: A National Perspective, Office of the Status of Women, Australia (1995) at 47.
Mack (n1) at 336, citing LH Schafran, "Writing and Reading about Rape", 66 St John's L Rev 979 (1993) at 1012-13 (referring to Portland, Oregon).
D Hubbard, A Critical Discussion of the Law on Rape in Namibia (University of Namibia, 1991) at 58-59.
The statement comes from Lord Chief Justice Matthew Hale and can be found in The History of the Pleas of the Crown 634 (1736). See Brownmiller (n1) at 369; Mack (n1) at 329.
Recent examples of cases quoting this "common sense wisdom" appear in Mack (n1) at 348 (quoting a 1992 Australian case) and S Lees, "Judicial Rape", 16 Women's Studies International Forum 11 (1993) at 18 (quoting 1989 English case).
Glanville Williams, The Proof of Guilt at 158-9; R v Sherrin (No. 2) (1979) 21 SASR 250, quoted in an excerpt from an Australian textbook which appears in J Bargen & E Fishwick (n1) at 70; S v Balhuber 1987 (1) PH H22 (A) at 40; S v F 1989 (3) SA 847 (A). Williams actually advocated the use of lie detectors to weed out false charges. Mack (n1) at 335.
Wigmore on Evidence, a classic American treatise on evidentiary rules, asserts a rationale for the myths about unreliable which purports to be based on psychiatric studies, in another frequently cited statement:
Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.
Wigmore, Evidence (1970), revised by JH Chadbourn, para924A at 736. See also Brownmiller (n1) at 370; P Schwikkard, "A critical overview of the rules of evidence relevant to rape trials in South African law" in S Jagwanth, PJ Schwikkard and B Grant, eds. Women and the Law (Pretoria: HSRC 1994) at 61. Wigmore further recommended that no rape cases should proceed unless the victim underwent a psychiatric examination. Mack (n1) at 335.
A 1983 examination of the "evidence" which Wigmore relied on for this assertion concluded that he actually suppressed data which contradicted his assertions. LB Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence (1983) 19 California Western Law Review 235 (cited in Schwikkard (n4) at 217(n61)). Nevertheless, the statement is quoted authoritatively in numerous cases, including S v Balhuber 1987 (1) PH H22 (A) at 40; S v F 1989 (3) SA 847 (A).

See generally C Hall, "Rape: The Politics of Definition", 105 SALJ 67 (1988); Brownmiller (n1); Mack (n1); S Estrich, "Rape", 95 Yale Law Journal 1087 (1986).

The key sections of the amended Michigan penal code are set forth in their entirety in Hubbard (n3) at 97. The statute is critically analysed in Estrich (n6) at 1147-ff. See also J Temkin, "Women, Rape & Law Reform" in S Tomaselli & R Porter, eds., Rape: An Historical and Social Enquiry (1986) at 26-ff.

Estrich (n6) at 1154; M Carter, "Judicial Sexism and Law Reform" 16 Legal Services Bulletin 29 (1991) at 30.

Bargen & Fishwick (n1) at 64; Carter (n8) at 30; Estrich (n6) at 1155.

Estrich (n6) at 1155-56.

People v Thompson, Michigan Court of Appeals (1982), quoted in Carter (n8) at 30.

People v Benard, Michigan Court of Appeals (1984), quoted in Carter (n8) at 30-31.

1991 amendment to the "Crimes Act", quoted in Bargen & Fishwick (n1) at 71.

Longman v R (1989) 168 CLR 79 at 87, 89. In the Longman case, the conviction of the accused was reversed because the trial court failed to give a warning about the danger of relying on the complainant's uncorroborated evidence. The facts were somewhat unusual, in that a 32-year-old complainant was testifying about several incidents of indecent assault by her stepfather which began when she was 8 years old and continued over several years. According to the High Court, the long delay limited the accused's ability to test the allegations. However, the court also stressed the theoretical possibility that the accusations may have arisen from sexual fantasy or hatred -- statements which seem rooted in the same old prevalent myths about hysterical and revengeful women. See Mack (n1) at 342-3.

Butun v R, WA, unreported, 15 February 1991, discussed in Bargen & Fishwick (n1) at 72.

B v R (1992) 110 ALR 432. discussed in Bargen & Fishwick (n1) at 72 and Mack (n1) at 345.

R v J, No. SCCRM/91/452 (S Aust Sup Ct, 26 Aug 1992), quoted in Mack (n1) at 348-9.

R v J, No. S3896.1 (S Aust Crim App 20 Apr 1993), quoted in Mack (n1) at 349 (n106), 341-2.

Mack (n1) at 345.

Bargen & E Fishwick (n1) at 74. This approach was followed in the past in Australia, Canada, New Zealand, the USA and the UK, among other jurisdictions.
See also H Swartz, "Sex with the accused on other occasions: The evisceration of rape shield protection" 31 CR (4th) 232 (1994) at 233.

See Temkin (n7) at 35.

R v Seaboyer (1991) 83 DLR (4th) 193 (SCC).

Canadian Criminal Code, sections 276, 276.1 and 276.2, as amended in 1992.
If the defence wishes to apply for the admission of evidence of previous sexual activity, a hearing to determine the issue of admissibility must be held in closed court. A decision that the evidence is admissible must be supported by written reasons.

Amendments to the "Crimes Act 1900 (NSW)", summarised in Bargen & Fishwick (n1) at 83-4.

Bonney, summarised in Bargen & E Fishwick (n1) at 85.

R v Henning, unreported, 11 May 1990, summarised in Bargen & E Fishwick (n1) at 86.

R v White (1989) 18 NSWLR 332 at 341, quoted in Bargen & E Fishwick (n1) at 86.

C Spohn and J Horney, Rape Law Reform (1992), summarised in A Morris, "International reform initiatives regarding violence against women: successes and pitfalls" in S Jagwanth, PJ Schwikkard and B Grant, eds. Women and the Law (Pretoria: HSRC 1994) at 360.

J Temkin, Rape and The Legal Process (1987), summarised in A Morris (n28) at 361-2.

S Estrich, Real Rape, Harvard University Press (1987). at 80-91, as summarised in Carter (n8) at 30.

Mack (n1) at 346-7, quoting NY Task Force on Women in the Courts, Final Report (1986) at 5.

Mack (n1) at 339, drawing on S Estrich, "Palm Beach Stories", 11 Law & Phil 5 (1992) at 11.

Bargen & E Fishwick (n1) at 67, drawing on S Bronnit [source omitted from bibliography].

Bill C-49, discussed in C Boyle (n34) at 183-4. This law defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question". It then lists the situations in which no consent cannot be present, including situations where the complainant is "incapable of consent" and situations where the accused abused a position of "trust. power or authority".

C Boyle, "Recent developments in the Canadian law of sexual assault" in S Jagwanth, PJ Schwikkard and B Grant, eds. Women and the Law (Pretoria: HSRC 1994) at 183 (emphasis added). Canadian law at present defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question".

M v R (1993) 67 A Crim R 549 at 557-558, quoted in Bargen & E Fishwick (n1) at 89-90.

Mack (n1) at 352.

See Mack (n1) at 353.

C Murray. "Violence Against Women: Legal Activism", 3 SAJHR 382 (1988) at 383.

A Morris (n28) at 362.

For example, a female police officer employed at the Woman/Child Abuse Centre recently gave remarks at a public forum which indicated that she believed that women sometimes invited rape by their clothes or their behaviour. A male police officer who participated in a recent training session on rape at the Police Training College in Windhoek flatly denied that such a crime as rape exists in practice. Information from Women's Solidarity, July 1996.

C Albertyn, "Women and the criminal justice system" in S Jagwanth, PJ Schwikkard and B Grant, eds. Women and the Law (Pretoria: HSRC 1994) at 20.

Another commentator put it this way: "The problem is not that individual judges or barristers are necessarily sexist or even that the law is unfair, but that both the substance and the practice of the law embraces sexist assumptions..." Lees (n4) at 33.

Mack (n1) at 350.

The Honorable B Wilson, Touchstones for Change: Report on Gender Equality in the Legal Profession (1993), quoted in M Friedland, A Place Apart: Judicial Independence and Accountability in Canada (1995) at 167.

Friedland (n44) at 168.

Friedland (n44) at 168, quoting Chief Justice C Fraser, Alberta.

Friedland (n44) at 171, quoting Dean Smith. The gender equality programme of the Western Judicial Education Centre, developed with the assistance of Dean Smith, has been praised as a model programme of it type.

See J Bargen & E Fishwick (n1) at 29.

Examples of such assessments are detailed in Estrich (n6) at 1157-ff.

See, for example, J Bargen & E Fishwick (n1) at 15-22.

Morris (n28) at 358; Carter (n8) at 31. See also Temkin (n7) (which cites JC Marsh, A Geist & N Caplan, Rape and the Limits of Law Reform (1982)).

As another example, police action to investigate allegations of rape in Western Australia has improved since wider definitions of sexual assault were introduced. Carter (n8) at 30, citing R Broadhurst & R Maller, "Sex Offenders or Criminal Career: An Analysis of Recidivism of Sex Offenders in the WA Prison Population", University of Western Australia (1990) at 10-13.

But see Estrich (n6) at 1157-ff for a gloomier set of assessments of US law reforms on rape.

See A Morris (n28) at 358; P Searles & RJ Berger, "The Current Status of Rape Reform Legislation: An Examination of State Statutes", 10 Women's Rights Law Reporter 25 (1987) at 10.

Mack (n1) at 350.

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