

2012

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Citation Information

Shaffer, Martha. "The Impact of the Charter on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 57. (2012).

DOI: <https://doi.org/10.60082/2563-8505.1243>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/15>

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The Impact of the Charter on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose

Martha Shaffer*

I. INTRODUCTION

The law of sexual assault has undergone enormous change in the 30 years since the *Canadian Charter of Rights and Freedoms*¹ came into effect. In 1982, the Canadian *Criminal Code* still contained the offence of rape, an offence that was defined narrowly. It included only one sexual act — vaginal intercourse without consent.² It was defined in such a way that married men could not be convicted of — or even charged with — raping their wives. A man accused of rape could be acquitted on the basis that he mistakenly believed that the complainant had consented to sexual activity, even where his belief was unreasonable. In addition to rape, the *Criminal Code* also contained other sexual offences, including indecent act against a male, indecent act against a female person and sexual intercourse with the feeble-minded.³ Finally, even sexual acts between

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² In 1982, the *Criminal Code* contained the following definition of rape in s. 143:

A male person commits rape when he has sexual intercourse with a female person who is not his wife,

- (a) without her consent, or
- (b) with her consent if the consent
 - (i) is extorted by threats or fear of bodily harm
 - (ii) is obtained by personating her husband, or
 - (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

R.S.C. 1970, c. C-34 [repealed 1980-81-82, c. 125, s. 6].

³ There were also other more specific provisions, including sexual intercourse with a step-daughter or female employee, sexual intercourse with the feeble-minded and various seduction offences. For an excellent description of the law of sexual offences at the time the Charter became

consenting adults could be prosecuted as “sexual offences” if they were seen as constituting acts of gross indecency, a provision that was frequently used to criminalize consensual sexual acts between gay men.

Fast forward to 2012. The offences of rape and indecent assault have been replaced by the offence sexual assault, and by special offences dealing with sexual assault of children.⁴ Sexual assault encompasses far more than unconsensual vaginal intercourse and includes any sexual touching to which the complainant has not consented.⁵ The *Criminal Code* now contains a definition of sexual consent and a non-exhaustive list of situations in which consent cannot be legally obtained. The scope of the defence of mistaken belief in consent has been narrowed to situations where the accused has taken reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting. The offence of gross indecency no longer exists.⁶

In this paper, I examine the extent to which the Charter is responsible for this dramatic transformation. I will argue that the Charter has been instrumental in modernizing the law of sexual assault, in part through legal challenges brought by men accused of sexual offences and in part through its use by equality-seeking groups as a tool in law reform efforts that took place during the 1990s. These two mechanisms have brought about changes to the “law on the books”, the *Criminal Code* provisions dealing with sexual assault, which have created a framework for prosecuting sexual offences that has the potential to vindicate women’s rights to sexual autonomy, dignity, equality and privacy.

I will also argue, however, that the potential of this Charter-influenced sexual assault legislation is not being realized. My argument here is that the promise of the law is being thwarted through the operation of deeply engrained assumptions and belief structures about women and about sexual assault. These belief structures inform the reasoning in sexual assault trials at a fundamental level. They inform the application of the sexual assault provisions themselves, but they also inform the

law, see Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984). Many of the provisions that were in place in 1982 were changed the following year as a result of amendments contained in *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125.

⁴ See, for example, ss. 151-153 of the *Criminal Code*, R.S.C. 1985, c. C-46.

⁵ *R. v. Chase*, [1987] S.C.J. No. 57, [1987] 2 S.C.R. 293 (S.C.C.).

⁶ This offence was repealed in 1987: *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3rd Supp.), c. 19. (Originally *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24.)

determination of evidentiary issues, rulings that are made even *before* the court gets to the application of the sexual assault provisions. These evidentiary rulings have a profound impact on the success of sexual assault prosecutions, since they control the material the trier of fact is entitled to consider in determining whether a sexual assault occurred. Using examples of evidentiary rulings made in two Supreme Court of Canada sexual assault cases, I will attempt to show how these deeply embedded assumptions erode the promise of the Charter-influenced law reforms by injecting problematic views into the reasoning process.

I conclude by offering some observations on the highly publicized Dominique Strauss-Kahn case from the United States. I argue that the public responses to the complainant's allegations have much to teach us about attitudes about sexual assault that operate in a less visible way in the courtroom. Acknowledging the existence of these attitudes — and their prevalence — is essential in assessing the role of the Charter in transforming the law of sexual assault. My argument here is that even though the Charter has not succeeded in eradicating myths and stereotypes that undermine sexual assault prosecutions, it is unrealistic to expect the Charter to do so. Changing the law on the books is often difficult, but it is almost always easier to bring about legislative change than it is to change deeply held attitudes and beliefs.

II. THE CHARTER'S ROLE IN RESHAPING THE LAW OF SEXUAL ASSAULT

The modernization of sexual assault law began with a package of *Criminal Code* amendments that took effect in 1983, less than a year after the Charter became law.⁷ Although the Charter may not have figured prominently in this initial stage of the law's transformation, it has played an important role in subsequent developments. The impact of the Charter is most apparent in two law reform initiatives during the 1990s that resulted in important changes to the *Criminal Code*.⁸ The first of these initiatives, Bill C-49,⁹ brought in section 273.1 and the current version of section 276 of the *Criminal Code*. An important milestone in

⁷ These amendments were contained in *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, *supra*, note 3. Among other changes, these amendments were responsible for creating the offence of sexual assault and for removing the marital rape exemption.

⁸ R.S.C. 1985, c. C-46.

⁹ *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38.

the law's transformation, section 273.1 changed the law in three significant ways: (1) it introduced a definition of sexual consent into the *Criminal Code*; (2) it set out a non-exhaustive list of situations in which as a matter of law no consent to sexual touching is obtained; and (3) it limited the defence of mistaken belief in consent, a defence that had been strongly criticized by feminists. Section 276 brought in new rape shield provisions and a new procedure for determining whether an accused person could introduce evidence of a complainant's sexual history as part of his defence.

The second reform initiative, Bill C-46,¹⁰ brought in section 278 of the *Criminal Code*. Section 278 set limits on the defence practice of routinely seeking disclosure of the complainant's personal records, including therapeutic records, medical records, child protection records, and educational records. This practice, which became widespread in the early 1990s, was denounced by women's groups as violating the privacy of sexual assault complainants and as a tactic designed to discredit complainants and to discourage them from coming forward with allegations of sexual assault.¹¹ Section 278 restricted this practice and set out a process for determining when a complainant's personal records would have to be produced to the court and disclosed to the defence.

Both of these reform initiatives share two salient features in terms of the role the Charter played in their development. First, both of these reforms came about as responses to successful Charter based legal claims mounted by men accused of sexual offences. Second, in the law reform process that followed, women's organizations were able to use the Charter as a tool for arguing for better protection of women's Charter rights. Although women's organizations did not obtain all of the changes they sought in the ensuing sexual assault reforms, they succeeded in obtaining provisions that afford complainants greater legal protection than the provisions they replaced. Ironically, legal victories by men accused of sexual assault were the catalyst for reforms that — at least on the books — have the potential to strengthen complainants' rights to autonomy, dignity, equality and privacy.

¹⁰ *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30.

¹¹ One of the earliest cases in which the accused sought to cross-examine a complainant on her medical records is *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595 (S.C.C.). The sexual assault alleged in that case took place in 1987.

The impetus behind Bill C-49 was the Supreme Court of Canada's 1991 decision in *R. v. Seaboyer*.¹² *Seaboyer* was a constitutional challenge to the "rape shield" provisions of the *Criminal Code*, sections 276 and 277. Section 277, the more straightforward of the two provisions, prohibited the admission of any evidence of the complainant's sexual reputation for the purpose of challenging or supporting her credibility.¹³ This provision had been introduced to stop accused men from relying on what had been a well established inference at common law, that a woman with a sexual past was less worthy of belief.¹⁴ Section 276 prohibited the accused from introducing evidence of the complainant's sexual activity with other people, unless that evidence fell within three specific exceptions.¹⁵ This provision attempted to prevent the accused from relying on another long-standing inference, that a woman who had consented to have sex with men in the past would be more likely to have consented to sex with the accused. The defence argued that these rape shield provisions violated an accused person's right to a fair trial and right to make full answer and defence, guaranteed by sections 7 and 11(d) of the Charter. Although the Supreme Court unanimously upheld section 277, a 7-2 majority¹⁶ struck down section 276 on the ground that it prevented

¹² *R. v. Seaboyer; R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.) [hereinafter "*Seaboyer*"].

¹³ Although this provision speaks of sexual history evidence used to support a complainant's credibility, s. 277 was designed to prohibit defence counsel from relying upon an inference that had been deeply entrenched in the common law, that an unchaste woman was less worthy of belief.

¹⁴ This inference is similar to the credibility inference we continue to permit with respect to witnesses with criminal records — triers of fact are entitled to conclude that a person who has been convicted of an offence is less worthy of belief. See *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.).

¹⁵ Section 276 provided:

276(1) In proceedings in respect of an offence under section 271, 272 or 273, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless

- (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
- (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.

¹⁶ Justices L'Heureux-Dubé and Gonthier dissented.

the defence from leading relevant evidence that could be “essential to the presentation of legitimate defences and to a fair trial”.¹⁷

Bill C-46, which led to the provisions dealing with personal records, was precipitated by the proliferation of cases in which men accused of sexual assault sought disclosure of the complainant’s personal records. This practice drew legal support from the Crown’s obligation to disclose all relevant information to the defence, an obligation that was given constitutional status by the Supreme Court’s decision in *R. v. Stinchcombe*.¹⁸ In *Stinchcombe*, the Court held that the principles of fundamental justice guaranteed by section 7 of the Charter include the right to make full answer and defence and that this right mandates full disclosure by the Crown. In sexual assault cases, defence counsel invoked this holding to argue for disclosure of the complainant’s personal records on the basis that the records might contain something relevant to the sexual assault allegations.

The practice of seeking production and disclosure of the complainant’s personal records was given explicit constitutional imprimatur in *R. v. O’Connor*,¹⁹ a 1995 decision of the Supreme Court of Canada. O’Connor was a Catholic Bishop accused of sexually assaulting four Aboriginal girls at a residential school.²⁰ Before trial, he sought disclosure of the complainants’ entire medical, counselling and school records, claiming that he needed these records to make full answer and defence. In a complex ruling, a 5-4 majority of the Court held that section 7 of the Charter guarantees the accused access to information necessary to make full answer and defence and this could include the complainant’s personal records.²¹ The majority held that where these records were held by the Crown they should be disclosed as a matter of course according to the *Stinchcombe* holding. Where the records were in the hands of third

¹⁷ *Seaboyer, supra*, note 12, at para. 75. The majority also held that any statutory provision that excludes evidence the probative value of which is not substantially outweighed by its potential prejudice will infringe s. 7 of the Charter.

¹⁸ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) [hereinafter “*Stinchcombe*”].

¹⁹ [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

²⁰ The initial drafting of Bill C-46 occurred before the release of the Supreme Court’s decision. For a helpful discussion of the history of the Bill, see Women’s Legal Education and Action Fund, “Submissions to Standing Committee on Justice and Legal Affairs, Review of Bill C-46, March 1997” [available from LEAF and on file with the author].

²¹ The majority drew a distinction between records in the possession of the Crown and records in the hands of third parties. Disclosure of records in the possession or control of the Crown was to be governed by the Court’s decision in *Stinchcombe, supra*, note 18, which held that the Crown must disclose all information in its possession to the defence, unless it is clearly irrelevant or privileged. For records held by third parties, courts were to balance the accused’s right to make full answer and defence with the complainant’s constitutional right to privacy. *Id.*, at para. 17.

parties, such as the clinicians or counsellors who made them, the accused's right to full answer and defence would have to be balanced with the complainant's privacy rights.

These legal victories by men accused of sexual assault prompted Parliament to respond by introducing Bill C-49 and Bill C-46. During the consultation process leading up to these Bills, women's organizations used the Charter to argue for — and to secure — reforms to the sexual assault provisions that took women's rights seriously.²² The Charter played an enormous role in this process and its influence is clear from both the Preambles to the Bills and from the content of the amendments themselves. The Preambles to both Bills explicitly state that it is Parliament's intention to craft sexual assault provisions that respect the Charter rights of *complainants* as well as the Charter rights of persons accused of sexual offences.²³ The inclusion of complainants' Charter rights in the drafting process had a profound impact on the provisions contained in both Bills C-49 and C-46. These amendments enhance the protection of women's Charter rights by explicitly attempting to root out discriminatory beliefs that have bedevilled sexual assault prosecutions and by defining consent in a way that takes women's sexual autonomy seriously.

As a result of this Charter infused law reform process, the sexual assault provisions in the *Criminal Code* today create a framework that appears to vindicate women's rights to equality, autonomy, dignity and privacy. This statutory framework is augmented by the 1999 decision of

²² The briefs submitted by the Women's Legal Education and Action Fund in the consultation process for both Bills are excellent examples of using the Charter as a law reform tool. See Submissions to Standing Committee on Justice and Legal Affairs, Review of Bill C-46, *supra*, note 20, and Women's Legal Education and Action Fund, "Submissions to the Legislative Committee of Parliament on Bill C-49, An Act Respecting Sexual Assault", available from LEAF and on file with the author.

²³ The Preamble to Bill C-49 states that Parliament is gravely concerned about the prevalence of sexual assault against women and children, intends to promote the full protection of the rights guaranteed under ss. 7 and 15 of the Charter, and wishes to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons. The Preamble to Bill C-46 is even more explicit about the goal of safeguarding women's Charter rights. It states that Parliament recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by ss. 7, 8, 15 and 28 of the Charter. It also states that Parliament intends to ensure the full protection of the Charter rights of those accused of sexual violence and of the victims of sexual violence, and to provide for the prosecution of offences within a framework consistent with the principles of fundamental justice that are fair to complainant as well as to accused persons. Finally, the Preamble states that Charter rights are guaranteed equally to all and, where Charter rights conflict, they are to be accommodated and reconciled to the greatest extent possible.

the Supreme Court of Canada in *R. v. Ewanchuk*,²⁴ which interpreted key aspects of section 273.1 and section 273.2. Now, as a result of section 273.1, we have a definition of sexual consent that focuses on whether there was “voluntary agreement of the complainant to engage in the sexual activity in question”. According to *Ewanchuk*, it is the complainant’s state of mind at the time of the activity that determines the existence of consent.²⁵ Now, as a result of section 273.2, it is more difficult to secure an acquittal on the basis of a mistaken belief in consent. An accused person cannot rely on the defence if he “did not take reasonable steps in the circumstances known to [him] at the time, to ascertain that the complainant was consenting”. In addition, in *Ewanchuk* the Supreme Court held that an accused person cannot rely on a mistaken belief in consent unless he can point to something in the evidence that is capable of supporting his belief that the complainant *had communicated her consent* to the sexual activity in question.²⁶ Both sections 273.1 and 273.2 — as interpreted in *Ewanchuk* — enhance women’s autonomy by ensuring that consent is defined from the complainant’s perspective, that a woman’s consent cannot be assumed or implied, and that before an accused person engages in sexual conduct, there must be some indication through words or conduct, that the complainant communicated her consent to the activity. This approach to consent is further underscored by section 273.1(2), which sets out a non-exhaustive list of five situations in which an accused cannot claim to have obtained consent.²⁷ These situations ensure that the accused cannot rely on outdated beliefs such as “no means yes” but must instead focus on the complainant’s expressions of consent and take any indications of lack of consent seriously.

The rape shield provisions in section 276 and the personal records provisions in section 278 also attempt to eradicate the operation of

²⁴ [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 (S.C.C.) [hereinafter “*Ewanchuk*”].

²⁵ *Id.*, at para. 26.

²⁶ *Id.*, at paras. 46-49.

²⁷ Section 273.1(2) provides:

- No consent is obtained, for the purposes of sections 271, 272 and 273, where
- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

discriminatory beliefs from sexual assault prosecutions. The rape shield provisions are drafted to prevent the use of sexual history evidence for discriminatory or improper purposes and to respect the complainant's privacy and dignity. They specifically prohibit the admission of sexual history evidence to support the two discriminatory inferences that were deeply rooted at common law, that a woman who had consented to sexual activity in the past was more likely to have consented on this occasion and that a woman with a sexual past was less worthy of belief.²⁸ In determining whether the evidence is admissible for other inferences, the court must consider "the need to remove from the fact-finding process any discriminatory belief or bias", the "potential prejudice to the complainant's personal dignity and right of privacy" and the "right of the complainant ... to personal security and to the full protection and benefit of the law".²⁹ To further protect the complainant's privacy and dignity, the hearing to determine whether sexual history evidence should be admitted is held *in camera*³⁰ and the complainant is not a compellable witness.³¹

Similarly, the provisions governing production and disclosure of personal records attempt to safeguard the equality and privacy rights of complainants by limiting fishing expeditions by the defence and by ensuring that production of records is not based on discriminatory beliefs and bias. Section 278 identifies several assertions as being insufficient to found a claim that the complainant's records are likely relevant to an issue at trial. These include assertions that are so generic that they amount to nothing more than fishing expeditions (the record relates to the incident in question³² or the record might contain a prior inconsistent statement³³). They also include assertions rooted in various stereotypes (the record may relate to the reliability of the complainant because she has received psychiatric treatment, therapy or counselling,³⁴ the record relates to sexual activity of the complainant with any person,³⁵ and the record relates to the presence or absence of recent complaint³⁶). Like section 276, section 278 provides that the hearing to determine whether

²⁸ Section 276.1(a) and (b).

²⁹ Section 276(3)(d), (f) and (g).

³⁰ Section 276.2(1).

³¹ Section 276.2(2).

³² Section 278.3(4)(c).

³³ Section 278.3(4)(d).

³⁴ Section 278.3(4)(f).

³⁵ Section 278.3(4)(h).

³⁶ Section 278.3(4)(i).

the records should be produced to the court will be held *in camera* and that the complainant is not a compellable witness.³⁷

For those committed to women's equality, these Charter-influenced sexual assault provisions have vastly improved the law on the books. These provisions appear to create a substantive law of sexual assault that enshrines women's ability to make meaningful choices about whether, when and with whom they will engage in sexual activity, and a court process for the prosecution of sexual offences that ensures the protection of women's dignity, privacy and equality rights.

III. THE LAW IN OPERATION: PROMISE THWARTED

Despite their promise, the Charter influenced sexual assault provisions have not succeeded in living up to their potential to protect women's Charter rights. Like all laws, the sexual assault provisions are only as good as their implementation. Historically, sexual assault laws have been implemented against a backdrop of formal legal rules and informal assumptions that have treated women who allege sexual victimization with deep suspicion. These rules reflected the view infamously expressed by Sir Matthew Hale in the 17th century that "rape ... is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." The law instantiated this suspicion in many various ways. Women who had been sexually violated were expected to raise a "hue and cry" at the earliest available opportunity. Failure to make a "recent complaint" would invariably be fatal to the prosecution.³⁸ A complainant's testimony had to be corroborated as it was seen as unsafe to convict based solely on her allegations.³⁹ As discussed earlier, women's sexual reputation and sexual history were seen as critical factors in sexual offence prosecutions, as they were seen to affect her credibility and her willingness to consent.

Other less formal assumptions about women and sexuality have also pervaded — and continue to pervade — the prosecution of sexual offences. Although these assumptions do not take the form of legal rules, they affect the findings of fact that are made at trial and the application

³⁷ Section 278.4(1) and (2). Section 278.4(2) also grants standing to any person who has "possession or control" of the record and "any other person to whom the record relates" to appear and make submissions at the hearing.

³⁸ See, for example, *R. v. Kribs*, [1960] S.C.J. No. 16, [1960] S.C.R. 400 (S.C.C.).

³⁹ For a discussion of the corroboration rules immediately before the reforms, see: Christine Boyle, *Sexual Assault*, *supra*, note 3.

of the formal legal rules. These assumptions include: that women who dress “provocatively” or who behave a certain way (flirtatiously) are “asking” for it, that consenting to go to a man’s home is consenting to sexual contact, that women say no (at least initially) when they really mean yes, that women often put up some “token” resistance, or that silence or lack of resistance amount to consent.

Whether formal or informal, these assumptions inject stereotypes into the law that prevent the law from protecting women’s interests. Herein lies the reason that the promise of the Charter-inspired sexual assault provisions remains unfulfilled. While these provisions have removed stereotype and bias from the *formal* rules governing sexual offences, they have not eradicated bias and stereotype from the *informal* assumptions at play in the application of the formal rules. Moreover, even though formal rules may be changed so that they no longer explicitly embody stereotyped assumptions, the underlying stereotypes do not automatically disappear with the formal changes. Instead, the same stereotypes may resurface in a different location, sometimes in a modified form.

Stereotypes and bias can enter into the application of the new sexual assault provisions in several places. They can creep into the determination of whether the complainant consented, a determination that is based in part on whether we believe that the complainant responded in the way that a “real victim” of sexual assault responds. If the complainant did not behave in this way, she is likely to be seen as not credible and her testimony about consent is not likely to be believed.⁴⁰ Problematic beliefs and assumptions can also enter into the defence of mistaken belief in consent when we determine, for example, whether there is evidence that is capable of showing that the complainant communicated consent to the sexual activity in question. This question requires us to interpret the complainant’s behaviour and to assess what it was that she was communicating. How we read a woman’s behaviour will depend on deeply entrenched attitudes about how women are supposed to conduct them-

⁴⁰ As Emma Cunliffe discusses in greater detail in her paper in this volume, the case of *R. v. H. (J.M.)*, [2011] S.C.J. No. 45, [2011] 3 S.C.R. 197 (S.C.C.) provides a good example of this problem. The trial judge acquitted the accused of sexual assault in part because the teenage complainant behaved in ways that in the trial judge’s view were not consistent with the behaviour of a person who had been sexually assaulted. Although the trial judge rejected the accused’s testimony that no sexual activity occurred, the actions of the complainant contributed to raising a reasonable doubt on the issue of consent. See Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?”

selves in social/sexual situations and what specific actions mean in these contexts.

But problematic beliefs and assumptions can also enter into the sexual assault trial in less obvious ways through the application of other legal rules. One of the places where this occurs is in the rules of evidence. Evidence law has a profound effect on the trial process because evidentiary rulings determine what material the trier of fact is entitled to see and what material will be withheld from the fact-finders' consideration. Many of these evidentiary rulings turn on deeply held, and often unstated, assumptions about how the world works, how people behave, and about what people know. For example, the test for relevance — the first prerequisite for determining whether a piece of evidence is admissible or not — is whether, based on logic and human experience, the evidence makes a fact in issue more or less likely to be true. Both of these concepts, human experience and logic, depend very much on the individual fact-finder's experience, world-view, and background assumptions about human behaviour. And, although these background assumptions are often thought of as "common sense" — that is, as underlying truths about the world that everyone knows and that all reasonable people share — they are often deeply contested.⁴¹

The pivotal role played by background assumptions and common sense makes evidence law an area rife for the introduction of bias and stereotype. The determination, for example, of whether a piece of evidence is relevant, whether evidence can be admitted under the similar fact evidence rule, and whether expert evidence on human behaviour is admissible, often turn on our common sense beliefs about human behaviour, about whether facts are related to one another, or about the inferences that can legitimately be drawn from proven facts. Where common sense is tainted by myth and stereotype, or where common sense is the product of limited human experience, evidentiary rulings can reflect this bias. In an area like sexual assault, where stereotyped assumptions continue to abound, the concern that common sense notions might distort the reasoning process is particularly acute.

To illustrate the critical role that common sense plays in evidentiary determinations in sexual assault cases, I will discuss two recent Supreme Court of Canada cases, *R. v. D. (D.)*⁴² and *R. v. Handy*.⁴³ While both of

⁴¹ Albert Einstein made this point well when he famously described common sense as "the collection of prejudices acquired by age eighteen".

⁴² [2000] S.C.J. No. 44, [2000] 2 S.C.R. 275 (S.C.C.) [hereinafter "*D.D.*"].

⁴³ [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908 (S.C.C.) [hereinafter "*Handy*"].

these cases involved sexual assaults, the arguments at the Supreme Court of Canada focused on two very different evidence issues, expert evidence and similar fact evidence. In both of the cases, the question of admissibility turned in large part on common sense assumptions and in both cases the common sense assumptions employed by the trial judges differed sharply from the common sense assumptions invoked by the Supreme Court of Canada. In both of the cases, the common sense assumptions invoked by the Supreme Court of Canada worked to the detriment of the sexual assault prosecutions.

In *D.D.*, the Court's background assumptions operated to prevent the admission of expert evidence on the meaning of delayed disclosure of childhood sexual abuse. *D.D.* involved a man charged with sexually assaulting his stepdaughter on numerous occasions when she was five and six years old. The child did not disclose the abuse until two-and-a-half years later when, in the course of a conversation about "gross things" she told a school friend. The fact that the child had delayed disclosing the abuse was a prominent plank in the defence's argument. Defence counsel cross-examined the complainant about why she had waited so long to tell anyone about the abuse, and suggested that she had made up her allegations to be able to outdo her friend in telling gross stories.⁴⁴ He also indicated that he intended to argue that "the fact that the victim did not tell anybody is certainly evidence that it didn't happen to her."⁴⁵ In response, the Crown sought to admit expert evidence on disclosure patterns of children who have been abused. The essence of the expert's testimony was that the timing of disclosure is affected by many factors and that the length of time before a child discloses an incident is neither proof that it happened nor proof that it did not.⁴⁶

The trial judge ruled this evidence admissible. Applying the test for the admissibility of expert evidence, he held that the evidence was relevant because the defence was taking the position that the jury could draw a "common sense" inference from the delay that the complainant was fabricating her allegations.⁴⁷ He also held that the evidence was necessary because the information was outside the knowledge and expertise of the jury and that its admission was necessary for the jury to reach a just verdict.

⁴⁴ *Supra*, note 42, at para. 4.

⁴⁵ *Id.*, at para. 7.

⁴⁶ *Id.*, at paras. 5-6.

⁴⁷ *Id.*, at paras. 17-18.

In a 4-3 decision, the Supreme Court of Canada disagreed.⁴⁸ Justice Major, for the majority, held that the expert evidence was not necessary. In the majority's view, the expert's evidence boiled down to a simple proposition, that the "timing of the disclosure, standing alone, signifies nothing."⁴⁹ All jurors would be capable of understanding this. Although the majority recognized the possibility that some jurors might engage in stereotypical reasoning and assume that a true victim complains at the earliest opportunity, it held that a jury instruction from the trial judge would prevent jurors from engaging in reasoning of this sort. Accordingly, there was "no possibility that the jury would reach an erroneous conclusion if not assisted by the expert".⁵⁰

The majority at the Supreme Court of Canada had a very different view of common sense than the trial judge. The trial judge was clearly worried that the jury's "common sense" about delayed disclosure would distort their reasoning process. The majority of the Supreme Court was not. The majority's confidence that the jury would not rely on a stereotyped understanding of delayed disclosure is both puzzling and problematic. It is puzzling in light of the majority's explicit recognition that the belief that a real victim of sexual violence will make an immediate "hue and cry" has been so deeply entrenched within Anglo-Canadian law that it can be traced back to the 13th century. It is problematic in light of the fact that defence counsel was explicitly urging the jury to rely on this "common sense" proposition. For the trial judge — and the dissenting judges at the Supreme Court of Canada — the congruence of the defence argument with long-standing and deeply held prejudices signalled the need to dispel, through expert evidence, the common sense beliefs jurors might bring to bear on the issue of delayed disclosure. In contrast, the majority at the Supreme Court operated on a different background assumption, that stereotypes that have operated since the 13th century no longer pose a serious concern in sexual assault cases. As a result of this background assumption, evidence aimed at countering stereotypes about sexual assault complainants, stereotypes that defence counsel was explicitly invoking, was ruled inadmissible.

Common sense assumptions played a different role in *Handy*, the leading Supreme Court of Canada decision on similar fact evidence. In *Handy*, the complainant alleged that she had consented to a sexual

⁴⁸ The majority consisted of Iacobucci, Major, Binnie and Arbour JJ. Chief Justice McLachlin and L'Heureux-Dubé and Gonthier JJ. were in dissent.

⁴⁹ *Supra*, note 42, at para. 59.

⁵⁰ *Id.*, at para. 70.

encounter with the accused, but during the encounter she told him to stop when he began to hurt her. He refused to stop, and then abruptly switched from vaginal to anal intercourse. The complainant again told him to stop and again he refused. In an attempt to stop the activity, the complainant slapped Handy's face. He responded by hitting her on the chest, squeezing her stomach, punching and choking her. Handy was charged with sexual assault causing bodily harm.

At trial, the Crown sought to introduce as similar fact evidence several incidents in which Handy was alleged to have sexually assaulted his ex-wife during the course of their very turbulent, seven-year relationship. The trial judge admitted this evidence, holding that the way that Handy had acted on previous occasions with his ex-wife could assist the jury in determining how he had acted with the complainant.⁵¹ The Supreme Court of Canada held that the evidence should not have been admitted. The Court gave several reasons for this conclusion, but the reason relevant here is the Court's rejection of the trial judge's view that Handy's treatment of his ex-wife was probative of the way he might have treated the complainant.

Justice Binnie, for a unanimous nine-member Court, held that there was an important difference between the act alleged by the complainant and the assaults against the ex-wife, and that was that the act in question took place in the context of a one-night stand whereas the assaults against the ex-wife took place in the course of what Binnie J. called a "long-term dysfunctional marriage". For Binnie J. and the other eight judges, it was not at all clear that the way that Handy treated his wife was predictive of how he would treat another woman in the context of a night of casual sex. Justice Binnie reasoned here that there were numerous periods of consensual sex during Handy's relationship with his ex-wife and that the abuse did not begin until after their marriage, at a time when their relationship "demonstrated many complexities that have no parallel with the situation in which the complainant found herself".⁵² These differences led Binnie J. to question not only whether Handy's treatment of his ex-wife could be extrapolated to his treatment of other women, but also the epistemological basis on which it would be possible to draw that conclusion. Justice Binnie put these questions in the following way:

⁵¹ *Supra*, note 43, at para. 17. According to the trial judge, the similar fact evidence showed "a pattern of using an initially consensual situation to escalate into violent, painful sexual connection, with both vaginal and anal penetration".

⁵² *Id.*, at para. 130.

To what extent was [Handy's] behaviour with his ex-wife an incident of a particular conjugal relationship and to what extent did it reflect a propensity to deal in a certain way with casual sex partners, including the complainant? To what extent can "common sense" be safely relied upon to answer this question? With what confidence can the necessary inferences be drawn? There is no satisfactory answer to these basic questions in this record.⁵³

Again, the judges of the Supreme Court clearly had a very different view from the trial judge about what common sense tells us in these types of situations. For the trial judge, common sense tells us that how a man treats a woman to whom he is married may be probative of how he treats other women, including those with whom he has casual sexual encounters. According to the judges of the Supreme Court we cannot rely on common sense to tell us this. For the judges of the Supreme Court, the inference that a man who refused to respect his wife's right to consent to sexual activity might also refuse to respect the consent of other women is not one that can be drawn in the absence of other evidence. This inference was not part of the stock of shared understandings of how people behave or how the world works.

In different ways, these cases illustrate the profound impact that background, "common sense" assumptions can have in a sexual assault trial. In *D.D.* the trial judge held that common sense views based on stereotypes of how a real victim of childhood sexual abuse would behave might distort the fact-finding process. The majority of the Supreme Court of Canada took a different view of common sense, suggesting instead that reliance on common sense would not lead the jury to engage in biased reasoning.⁵⁴ In *Handy*, the belief that a man who repeatedly failed to respect his wife's right to refuse consent to sexual contact might also fail to respect another woman's right to refuse consent was part of the trial judge's background, common sense assumptions. It was not part of the background assumptions of the judges at the Supreme Court of Canada. In both cases, different background or common sense assumptions made the difference between whether evidence that would have assisted the prosecution of sexual offences was admitted or not.

⁵³ *Id.*

⁵⁴ The majority's view that juries were unlikely to engage in stereotyped reasoning based on the timing of disclosure was based primarily on the fact that Parliament had abrogated the rules on recent complaint. According to the majority, the expert evidence did nothing more than restate the law, and this could be appropriately done in a jury instruction.

What do the decisions in *D.D.* and *Handy* tell us about the Charter's impact on the law of sexual assault? They tell us that even though the Charter has been instrumental in producing a law of sexual assault that takes women's Charter rights seriously, obstacles remain. They exist any time that myth and stereotype can enter into legal reasoning. This potential exists any time judges and juries have resort to "common sense", their stock of deeply held beliefs and assumptions about human behaviour.

IV. EPILOGUE: THE TALE OF D.S.K. AND THE CHAMBERMAID: WHAT THE D.S.K. CASE TEACHES US ABOUT THE CHARTER AND THE LAW OF SEXUAL ASSAULT

When head of the International Monetary Fund and French presidential hopeful Dominique Strauss-Kahn was charged with sexually assaulting a member of the housekeeping staff at an exclusive New York City hotel in May 2011, the case garnered international attention. Like countless others, I was riveted by the case. The case was fascinating not merely because of the people involved — a rich and powerful, white French man and a poor, illiterate black refugee from West Africa — or the nature of the allegations, or the prosecution's ultimate decision to drop the charges. It was fascinating because of the very strong reactions the case evoked, in media reports in Canada and internationally, and in the many conversations I had with colleagues, friends and acquaintances.

Most striking were the many reasons people voiced for disbelieving or discrediting the complainant. These reasons included:

- The complainant was a large woman compared to DSK who is relatively short in stature, and if she truly was not consenting, she would have been able to fight him off.
- The complainant must have been a prostitute or she must have agreed to the sexual act with the purpose of extorting money from DSK.
- If she had really been attacked, the complainant would have screamed and other housekeepers in neighbouring rooms would have heard.
- If she had really been assaulted, the complainant would not have gone on to clean another hotel room, which is what hotel records showed that she did.

- It is impossible for a man to force a woman to perform oral sex.
- It would not have been possible for DSK to commit this assault in the nine or so minutes that DSK and the complainant were in the hotel room together.
- The complainant's boyfriend was serving time for criminal offences, suggesting that she might also be involved in criminal activity.

These “common sense” reactions drowned out a competing set of common sense reactions that saw the complainant's account as plausible — that she had been taken by surprise and that she was afraid to scream or to fight back because she did not want to lose her job, which was the highest paying job she had obtained since arriving in the United States.

Why is the case, and the strong reactions to it, so instructive? What does an event that took place in the United States have to tell us about the effect of the Charter on the law of sexual assault? Because it was played out in the court of public opinion, the DSK case provides a window into thinking processes that undoubtedly also take place in deliberations occurring behind courtroom doors. In other words, the DSK case provides a sobering glimpse into the background assumptions and common sense understandings that people bring with them into the courtroom in sexual assault cases, not merely in the United States but in Canada and other countries as well.

The DSK case is also instructive in evaluating the effect of the Charter on the law of sexual assault. It reminds us that changing formal legal rules is only part of the process of effecting real change and perhaps the easier part. The other part is changing the underlying beliefs and attitudes that gave rise to the problematic legal rules in the first place. Changing belief structures is a much more difficult task and takes a much longer time, particularly when these belief structures are deeply entrenched.

DSK is a good reminder that we cannot expect the Charter to fix all the problems with the law of sexual assault. It reminds us that even though sexual assault law has come a long way under the Charter, the Charter can only take us so far and there is still a long way to go. Plus ça change, plus c'est la même chose.