VIOLENCE AGAINST WOMEN

CURRICULUM MATERIALS FOR LEGAL STUDIES

Commonwealth Secretariat

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INTRODUCTION

The following materials, which comprise two seminar packages on two topics within the general subject of violence against women - domestic violence and sexual assault - have their genesis in the Expert Group Meeting of Law Teachers to Develop Curriculum Materials on Violence Against Women held by the Women and Development Programme (WDP) of the Commonwealth Secretariat which took place in London from 11 to 15 May 1987. This Meeting was held in reaction to responses to a questionnaire prepared by Mrs Magaret Rogers of the Commonwealth Legal Education Association and circulated to Deans of law schools and professional training institutions pan-Commonwealth. Responses indicated that there was a need for appropriate comparative materials which could be used in the teaching of the law relating to sexual assault and domestic violence in institutions throughout the Commonwealth.

The two packages, which reflect the recommendations and suggestions of the Expert Group which was constituted primarily of law teachers from seven Commonwealth University Law Schools, but also had the benefit of the wisdom of a member of the judiciary, the profession, a magistrate, the police and a police forensic scientist and a victim support co-ordination, purport to provide teachers with materials which would be readily adaptable for use in law or related teaching in any Commonwealth jurisdiction. There is no attempt, however, to lay down a "required" or "defined" syllabus where both topics are concerned as it is well appreciated that violence against women in any of its manifestations takes different forms in different countries and cultures. All that is offered is a compilation of material that a teacher or student might find useful and thought-provoking, particularly in view of the fact that it draws on comparative legislative and case-law material from other Commonwealth jurisdictions. Furthermore, given the huge number of jurisdictions within the Commonwealth, the material cannot hope to be comprehensive. It is to be hoped that teachers in different jurisdictions will supplement the packages with legislation, case law and commentaries pertinent and relevant to the jurisdiction under consideration.

The literature concerning both domestic violence and sexual assault is vast, and while a comprehensive bibliography has been attached, it is clear that in numerous regions of the Commonwealth access to this literature is limited. Thus within the main body of the packages, reference to this literature has been significantly confined, while the Manual Confronting Violence produced by the Women and Development Programme and published in 1987 is relied on to provide background reading to the material. This is added to in the part concerning sexual assault by Jennifer Temkin's excellent Rape and the Legal Process published in 1987 in London by Sweet and Maxwell and forming part of the Modern Legal studies series. Professor Temkin's small book provides a comparative analysis of the law relating to sexual assault which is well up to date. Furthermore, the book is relatively cheap and should be easy to obtain throughout the Commonwealth.

The packages themselves comprise a combination of legislation, case law and other material deemed relevant. The Expert Group Meeting was particularly concerned at the dearth of material available concerning women in customary law, thus Mrs Margaret Rogers of the Commonwealth Legal Education Association compiled appropriate extracts for both packages. Both these extracts reveal the amount of work which is still required concerning both domestic violence and sexual assault in customary law. The packages also incorporate questions which might be relevant and provocative when considering the issues raised by

the two subject areas. Again it must be reiterated and stressed that the packages do not purport to be comprehensive and could be viewed as a mere starting point to be adapted by the individual teacher to be appropriate to his or her particular country and cultural context.

The preparation of these materials was invaluably facilitated by the work of the Expert Group and by the dedicated work of Mrs Margaret Rogers in preparing and compiling the original Law School questionnaire. To her, also, thanks must go for the preparation of the extracts concerning customary law. Further, thanks must be given to Mrs Jane Stackpool-Moore, Lecturer in Law in the Law School of MacQuarie University, N.S.W. a member of the Expert Group whose paper "Teaching the Treatment of rape Complainants in Law Schools" appears as part of the materials. Finally, the Women and Development Programme wish to thank Jane Connors, Lecturer in Law at the School of Oriental and African Studies (S.O.A.S.) who is responsible for the major task of compilation of the packages and Ms Nidhi Tandon and Mrs Sandy Abeyawickrema for the editing and preparation of this work.

PART ONE: DOMESTIC VIOLENCE

1. THE CONTEXT OF THE PROBLEM

Confronting Violence. pp 7 - 15, pp 58 - 60, pp 140 - 143

a Nature and Extent of Domestic Violence

Dobash, R, and Dobash, R, Violence Against Wives: A Case Against the Patriarchy. Open Books, London, 1980

MacLeod, L, Wife Battering in Canada: The Vicious Circle. Canadian Advisory Council on the Status of Women, Ottawa, 1980.

Johnson, N, (ed), Marital Violence, Sociological Review Monograph No 31, Routledge and Kegan Paul, London 1985

Australian Law Reform Commission Report No 30, Domestic Violence, A G P S, Canberra 1986

In examining reports relating to violence in the home, Dobash and Dobash conclude:

> "First ... that violence in the home is a frequent occurrence in contemporary society; second ... that the use of force between adults in the home is systematically and disproportionally directed at women ..."

Is there evidence to support these conclusions? Have surveys been carried out in your country to determine whether there is a problem of domestic violence?

What forms of behaviour do you include in the term "violence"? Do you think the definition of "violence" is the same for all societies or is it a concept which can be measured only against a backdrop of culture, religion and tradition?

b Explanations for domestic violence

Brienes, W, and Gordon, L, "The New Scholarship on Family Violence" (1983) 8, Signs 490

Dobash, R, and Dobash, R, op cit.

Freeman, M D A, Violence in the Home. Gower 1979

A variety of explanations have been offered for domestic violence. Do the various explanations account for violence against children as arising from the same or different reasons as violence against women?

One commentator argues: "wife beating is not just a personal abnormality, but rather it has its roots in the very structuring of society and the family: that is in the cultural norms and in the sexist organisation of society."

(Straus, M, "Sexual Inequality, Cultural Norms and Wife Beating" in Chapman J R and Gates, M (eds), Women into wives, Sage, Beverly Hills: 1976, p.59). What do you think about this view?

c Crime or Social Issue?

Maidment, S, "The Relevance of the Criminal Law to Domestic Violence" (1980) Jnl of Social Welfare Law 26

Sherman, L W, and Berk, R A, "The Specific Deterrent Effects of Arrest for Domestic Assault" (1984) 49 American Sociological Review 261

Do you consider domestic violence to be a criminal matter or an issue of social welfare?

d The Role of the Police

Confronting Violence, pp 17 - 20

Dobash, R E, and Dobash, R, Violence Against Wives: A Case Against the Patriarchy, Open Books, London 1980

Pahl, J, "Police Response to Battered Women" (1982) Jnl of Social Welfare Law 337

Pahl, J, (ed), Private Violence and Public Policy: The Needs of Battered Women and the Response of the Public Services, Routledge and Kegan Paul, London 1985

Wasoff, F, "Legal Protection from Wife Beating: The Processing of Domestic Assaults and Criminal Courts" (1982) 10 International Jnl of the Sociology of Law 187

What factors inhibit the police from acting in situations of domestic violence?

How far do these factors reflect societal attitudes?

What legal reforms could be introduced to alleviate the problems confronted by the police in this context?

Consider the Canadian "charging policy" whereby police must charge in all cases of domestic violence irrespective of the wishes of the victim. Do you see any problems raised by this approach?

Consider the following legislation. Do you think it helps the police in dealing with domestic violence? Do you see any difficulties raised by it?

(3) Section 407AA

After section 407, insert:-

Compellability of spouses to give evidence in domestic violence proceedings

407AA (1) In this section -

(a) a reference to the husband or wife of an accused person includes a reference to a person living with the accused person as the husband or wife of the accused person on a bona fide domestic basis although not married to the accused person ....

(2) Except as provided in subsection (3), the husband or wife of an accused person in a criminal proceeding shall, where the offence charged is a domestic violence offence (other than an offence constituted by a negligent act or omission) committed upon that husband or wife, be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused person.

(3) The husband or wife of an accused person shall not be compellable to give evidence for the prosecution as referred to in subsection (2) if that husband or wife has applied to, and been excused by, the Judge or Justice.

(4) A Judge or Justice may excuse the husband or wife of an accused person from giving evidence for the prosecution as referred to in subsection (2) if satisfied that the application to be excused is made by that husband or wife freely and independently of threat or any other improper influence by any person and that having regard to-

(a) the importance in the case of the facts in relation to which it appears that that husband or wife is to be asked to give evidence and the availability of other evidence to establish those facts; and

(b) the seriousness of the domestic violence offence with which the accused person is charged,

that husband or wife should be excused.

(5) A Judge or Justice shall, when excusing the husband or wife of an accused person from giving evidence under subsection (4), state the reasons for so doing and cause those reasons to be recorded in writing in a form prescribed by regulations made under subsection (9).

(6) An application under this section by the husband or wife of an accused person to be excused from giving evidence shall be made and determined in the absence of the jury (if any) and the accused person but in the presence of the legal representative (if any) of the accused person.

The Guardian 13.3.89

Judge defends 'deterrent' sentencing of alleged victim

Jailed witness case for appeal court

Clare Dyer
Legal Correspondent

A JUDGE who jailed an alleged assault victim on Friday for refusing to give evidence, said yesterday that victims of violent crime must give evidence against their attackers if they are to be protected and criminals deterred.

Judge James Pickles, who faced calls for his resignation after jailing a 24-year-old secretary, Miss Michelle Renshaw, for seven days for contempt of court, said during an interview on TV-am: "It is the only form of dealing with people which bites deep and causes people to be deterred."

His comments came as Miss Renshaw's mother, Mrs Margaret Renshaw, announced that her daughter would be released today as she launches proceedings in the Court of Appeal to clear her name. Her counsel has asked for the appeal to be listed for this week.

Judge Pickles said in the interview: "Every person must understand that if they are called to give evidence by either side, they have an obligation to do so.

"Justice cannot be done if people can decide for themselves whether or not they are going to give evidence. The refusal to do so is contempt of court and the only effective sanction is loss of liberty."

He had heard many cases involving women who had suffered "appalling injuries at the hands of men.

"If I am going to be able to protect them or deal with the men, it is essential that the women concerned give evidence. If Miss Renshaw had taken my advice and done what the law requires, she would be at liberty today.

"It was a deliberate contempt of court which has perverted justice and maybe prevented a man being properly dealt with by a court."

Miss Renshaw's alleged attacker, Mr Michael Williams, aged 24, was freed after she remained silent because she said that she had received threatening telephone calls and been followed.

Mrs Renshaw, of Low Moor, Bradford, said yesterday she would fight to have Judge Pickles sacked for what she regards as a miscarriage of justice.

After visiting her daughter in New Hall Prison, Wakefield, she said: "You can't imagine what it has done to her. She's a girl from a good home who's never been in trouble.

"She is locked up for all but a couple of hours a day and then she is made to scrub floors. She is being kept in a basic cell with just a bucket and a basin in. She doesn't even have a comb or a handbag. The whole thing is like a bad dream.

"I'm not just doing this for Michelle and our family. We're fighting a battle for other people as well. This has not got to happen to anyone else."

Ms Harriet Harman, Labour MP for Peckham, said: "This is outrageous. This woman should be let out on Monday, the judge should be reprimanded and the Lord Chancellor should look to see whether he is fit to remain on the bench."

The Lord Chancellor's department said yesterday that no action was being contemplated.

Judge Pickles' exasperation at the collapse of the case is bound to strike a chord with other judges and magistrates, who are known to be frustrated at the number of cases in which battered women drop accusations against their attackers or refuse to give evidence.

In 1986 Judge Pickles, known for his outspoken opinions, angered Lord Hailsham, then Lord Chancellor, when he took part in radio programmes in which he expressed strong views on sentencing and advocated legalising prostitution.

In January, there were calls for his resignation when he sentenced a child molester to probation. Last week, a custody case over which he presided was described by the Court of Appeal as a "gladiatorial contest" between the judge and counsel for the children's mother.

(7) A Judge or Justice may conduct the hearing of an application under this section in any manner thought fit and is not bound to observe rules of law governing the admission of evidence but may obtain information on any matter in any manner thought fit.

(8) The fact that the husband or wife of an accused person in a criminal proceeding has applied under this section to be excused, or has been excused, from giving evidence in the proceeding shall not be made the subject of any comment by the Judge or by any party in the proceeding.

(9) The Governor may make regulations, not inconsistent with this Act, prescribing the form of a record required to be made as referred to in subsection (5).

AMENDMENTS TO THE CRIMES ACT, 1900, IN RELATION TO POLICE POWERS OF ENTRY IN CASES OF DOMESTIC VIOLENCE

Entry by invitation

357F (1) In this section, "occupier", in relation to a dwelling house, means a person immediately entitled to possession of the dwelling-house.

(2) A member of the police force who believes on reasonable grounds that an offence has recently been or is being committed, or is imminent, or is likely to be committed, in any dwelling-house and that the offence is a domestic violence offence, may, subject to subsection (3)-

(a) enter the dwelling-house; and

(b) remain in the dwelling-house,

for the purpose of investigating whether such an offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission of further commission of such an offence, if invited to do so by a person who apparently resides in the dwelling-house, whether or not the person is an adult.

(3) Except as provided in subsection (4), a member of the police force may not enter or remain in a dwelling-house by reason only of an invitation given as referred to in subsection (2) if authority to so enter or remain is expressly refused by an occupier of the dwelling-house and the member of the police force is not otherwise authorised (whether under this or any other Act or at common law) to so enter or remain.

(4) The power of a member of the police force to enter or remain in a dwelling-house by reason of an invitation given as referred to in subsection (2) by the person whom the member of the police force believes to be the person upon whom a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed in the dwelling-house may be exercised by the member of the police force notwithstanding that an occupier of

the dwelling-house expressly refuses authority to the member of the police force to so enter or remain.

Entry by radio/telephone warrant, etc., where entry denied.

357G (1) In this section, a reference to-

(a) a telephone includes a reference to a radio or any other communication device; and

(b) a stipendiary magistrate includes a reference to a Justice who has been nominated by the Minister as referred to in subsection (2) and whose nomination has not been revoked.

(2) The Minister may, by notification published in the Gazette -

(a) nominate a Justice employed in the Department of the Attorney General and of Justice -

(i) who is admitted by the Supreme Court of New South Wales as a barrister-at-law or a solicitor; or

(ii) who has fulfilled such of the requirements for eligibility to be so admitted as relate to the passing of examinations,

as a person empowered to grant warrants under this section; or

(b) revoke any such nomination.

(3) Upon complainant made by a member of the police force to a stipendiary magistrate that -

(a) the member of the police force has been denied entry to a specified dwelling-house; and

(b) the member of the police force suspects or believes that -

(i) a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed in the dwelling-house; and

(ii) it is necessary for a member of the police force to enter the dwelling-house immediately in order to investigate whether a domestic violence offence has been committed or, as the case may be, to take action to prevent the commission or further commission of a domestic violence offence, the stipendiary magistrate may, if satisfied that there are reasonable grounds for that suspicion or belief, by warrant, authorise and require the member of the police force to enter the dwelling-house and to investigate whether a domestic violence offence has been committed or, as the case may

be, to take action to prevent the commission or further commission or a domestic violence offence.

(4) A complainant under this section may be made by a member of the police force to a stipendiary magistrate in person or by telephone and may be made directly to the stipendiary magistrate or, where, in all the circumstances, it is impracticable to make the complainant directly, by causing the complainant to be transmitted by another member of the police force by either of those means.

(5) The fact that a complainant is made under this section to a stipendiary magistrate by a member of the police force who causes the complaint to be transmitted by another member of the police force to the stipendiary magistrate does not, if the stipendiary magistrate is of the opinion that it is, in all the circumstances, impracticable to communicate directly with the member of the police force making the complaint, prevent the stipendiary magistrate being satisfied as to the matters referred to in subsection (3)

(6) A stipendiary magistrate grants a warrant under subsection (3) by stating the terms of the warrant.

(7) Where a stipendiary magistrate grants a warrant under subsection (3), the stipendiary magistrate shall cause a record to be made in writing in a form prescribed by regulations made under subsection (14) of -

(a) the name of the member of the police force who was the complainant;

(b) where the complaint was transmitted by a member of the police force on behalf of the complainant - the name of the member of the police force who so transmitted the complaint;

(c) the details of the complaint, including the name of any person who is alleged to have informed the police as to the domestic violence the subject of the warrant and the grounds which the stipendiary magistrate was satisfied were reasonable grounds for the suspicion or belief by reason of which the warrant was granted;

(d) the terms of the warrant (which shall include the address of the dwelling-house the subject of the warrant); and

(3) the date and time the warrant was granted.

(8) A warrant granted under subsection (3) shall be executed as soon as practicable after the warrant is granted and may be executed by day or night.

(9) For the purpose of executing a warrant granted under subsection (3), a member of the police force may use force, whether by breaking open doors or otherwise, for the purpose of entering a dwelling-house

(10) A member of the police force may execute a warrant granted under subsection (3) with the aid of such assistants as the member of the police force deems necessary.

(11) A warrant granted under subsection (3) is not invalidated by any defect, other than a defect which affects the substance of the warrant in a material particular.

(12) Where a warrant has been granted under subsection (3) a record in triplicate in a form prescribed by regulations made under subsection (14) shall be made containing the following details:

(a) the address of the dwelling-house the subject of the warrant;

(b) the name of the stipendiary magistrate who granted the warrant;

(c) the name of the member of the police force who was the complainant authorised to enter the dwelling-house pursuant at the warrant;

(d) the time at which the warrant was granted.

(13) The copies of a record relating to a warrant and made as referred to in subsection (2) shall be dealt with as follows:

(a) the first copy shall, upon entry into the dwelling-house the subject of the warrant or as soon as practicable thereafter, if a person who appears to reside in the dwelling-house and to be of or above the age of 18 years is present, be furnished to such a person together with a statement in a form prescribed by regulations made under subsection (14) and containing a summary of the nature of the warrant and the powers given by the warrant;

(b) the second and third copied shall be endorsed with -

(i) the name of the person (if any) who informed the police as to the domestic violence the subject of the warrant; and

(ii) a notation as to whether a dwelling-house was entered pursuant to the warrant and, if so, the time of entry and the action taken in the dwelling-house;

(c) the second copy shall be forwarded to the Director of the Magistrates Courts Administration or such other officer as may be prescribed for the purpose of this subsection by regulations made under subsection (14);

(d) the third copy shall be retained by the member of the police force authorised to enter a dwelling-house pursuant to the warrant to be dealt with in such manner as may be prescribed by regulations made under subsection (14).

(14) The Governor may make regulations, not inconsistent with this Act, prescribing any matter required or permitted to be prescribed under this section.

Provisions relating to powers of entry under sections 357F and 357G

357H (1) Where a member of the police force enters a dwelling-house in pursuance of an invitation (as referred to in section 357F), or in pursuance of a warrant granted under section 357G, for the purpose, in either case, of investigating whether an offence which the member of the police force suspects or believes to be a domestic violence offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission of such an offence, the member of the police force shall-

(a) take only such action in the dwelling-house as is reasonably necessary-

(i) to investigate whether such an offence has been committed;

(ii) to render aid to any person who appears to be injured;

(iii) to exercise any lawful power to arrest a person; and

(iv) to prevent the commission or further commission of such an offence; and

(b) remain in the dwelling-house only as long as is reasonably necessary to take that action.

(2) Nothing in subsection (1) or in section 357F or 357G limits any other power which a member of the police force may have under this or any other Act or at common law to enter or remain in or on premises.

APPREHENDED DOMESTIC VIOLENCE ORDERS

Definitions

562A. In this Part -

"aggrieved person" means the person whose fear of domestic violence offence or other conduct is the subject of a complaint under this Part;

"authorised Justice" means -

(a) a Magistrate; or
(b) a Justice employed in the Attorney General's Department;

"court" means -

(a) a Local Court;
(b) the Children's Court; or
(c) the District Court,

exercising jurisdiction under section 562G;

"defendant" means the person against whom an order is made;

"order" means an apprehended domestic violence order in force under this Part and, if the order is varied under this Part, means the order as so varied;

"relative" means -

(a) father, mother, grandfather, grandmother, step-father, step-mother, father-in-law or mother-in-law;
(b) son, daughter, grandson, granddaughter, step-son, step-daughter, son-in-law or daughter-in-law;
(c) brother, sister, half-brother, half-sister, brother-in-law or sister-in-law;
(d) uncle, aunt, uncle-in-law or aunt-in-law;
(e) nephew or niece; or
(f) cousin,

and includes, in the case of de-facto partners, a person who would be such a relative if the de-facto partners were married.

Apprehended domestic violence orders

562B. (1) A court may, on complaint, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person fears the commission by another person -

(a) who is or has been the spouse or de-facto partner of the person;
(b) who is living or has lived ordinarily in the same household as the person (otherwise than merely as a tenant or boarder);
(c) who is or has been a relative of the person; or
(d) who has or has had an intimate personal relationship with the person,

of a domestic violence offence on the person or of conduct consisting of harassment or molestation of the person (being conduct which falls short of actual or threatened violence but which, in the opinion of the court, is sufficient to warrant the making of the order).

(2) Before the court makes an order it must be satisfied on the balance of probabilities that the person's fear is reasonable.

(3) An order may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court.

Making of complaint

562C. (1) A complaint for an order -

(a) may be made orally or in writing to a Justice; and
(b) shall be substantiated on oath before the Justice.

(2) A complaint for an order may be made by -

(a) the aggrieved person; or
(b) a member of the Police Force.

(3) Notwithstanding subsection (2), a complaint for an order must be made by a member of the Police Force if the aggrieved person is a child under the age of 18 years at the time of the complaint.

(4) A complaint for an order may be made by or on behalf of more than one aggrieved person.

Prohibitions and restrictions imposed by orders

562D. (1) Without limiting the generality of section 562B, an order may do all or any of the following:

(a) prohibit or restrict approached by the defendant to the aggrieved person;
(b) prohibit or restrict access by the defendant to any specified premises occupied by the aggrieved person, any specified place of work of the aggrieved person or any other specified premises or place frequented by the aggrieved person (whether or not the defendant has a legal or equitable interest in the premises or place);
(c) prohibit or restrict the possession of all or any specified firearms by the defendant;
(d) prohibit or restrict specified behaviour by the defendant which might affect the aggrieved person.

(2) Before making an order which prohibits or restricts access to the defendant's residence, the court shall consider the accommodation needs of all relevant parties and the effect of making such an order on any children.

(3) If the court makes an order which prohibits or restricts the possession of firearms by the defendant, the court may by the order require the defendant to dispose of firearms in the defendant's possession and to surrender to the Commissioner of Police any licence, permit or other authority under the Firearms and Dangerous Weapons Act 1973 held by the defendant.

Duration of order

562E. (1) An order remains in force for such period as is specified in the order by the court, and does not have effect unless a period is so specified.

(2) The period so specified shall be as long as is necessary, in the opinion of the court, to ensure the protection of the aggrieved person.

Variation or revocation of orders

562F. (1) If an order is made -

(a) the aggrieved person (whether or not the complainant);
(b) if the complainant was a member of the Police Force; or
(c) the defendant,

may, at any time, apply to a court for the variation of revocation of the order.

(2) Notwithstanding subsection (1), an application must be made by a member of the Police Force if the aggrieved person is a child under the age of 18 years at the time of the application.

(3) The court may, if satisfied that in all the circumstances it is proper to do so, vary or revoke the order.

(4) In particular, an order may be varied under this section -

(a) by extending or reducing the period during which the order is to remain in force;
(b) by amending or deleting any prohibitions or restrictions specified in the order; or
(c) by specifying additional prohibitions or restrictions in the order.

(5) An order shall not be varied or revoked on the application of the defendant unless notice of the application has been served on the aggrieved person.

(6) An order shall not be varied or revoked on the application of the complainant or aggrieved person unless notice of the application has been served on the defendant.

2. DOMESTIC VIOLENCE: THE EXTENT OF THE PROBLEM

An extract from "Teaching the Treatment of Rape Complainants in Law Schools"

Paper presented at the Commonwealth Secretariat Expert Group Meeting of Law Teachers, London 11 - 15 May 1987 by Jane Stackpool-Moore, Lecturer in Law, University of MacQuarie, N.S.W., Australia.

One of the first issues of importance in reaching students in the domestic violence area is to create student awareness of the nature and extent of the problem. The extensive background literature has a fundamental use for educating students in a number of ways in coming to the realisation firstly that domestic violence knows no cultural, social or class-defined bounds, and that it can affect anyone in the family, including children. Secondly, that domestic violence is a result of a complex of interacting features,

"perpetuated by our beliefs, traditions and institutions";[1] that it is a general problem and that understanding of the problem via understanding theories is only one part of the lawyer's responsibility. Theories lead to an understanding of causes, but students need to go further and develop the interconnecting skills in legal resources and community welfare agency awareness. Students need to understand that causes are both "specific" and "generic". Specific causes include victim blame psychology, the cycle of violence wherein family violence breeds family violence, that problems may be exacerbated by alcohol, or individual pathologies.

Equally significant are the generic or institutionalised reasons for domestic violence and student awareness of these is necessary too. Sex-role stereotyping of women and of men is of prominent concern, as is, of course, the financial vulnerability of the woman. These things are so accepted - so endemic - in our social perceptions that their relevance apart from categorisation according to theory tends to be overlooked. In times of high unemployment, a common trend is to criticise women who work as taking jobs from men. But we've seen this before. J S Mill in the C19th was accused of endangering the British economy for advocating increased work opportunities for women.

Another crucial aspect of understanding the problem is why violent relationships continue. The Bacon et al study[2] identifies fear, isolation, intimidation, dependent children and emotional dependence as some of the major factors. There is a very real problem in students actually appreciating that "these things do go on", unless they have experience of part time work at the local Legal Centre or some other welfare agency. All these factors need to be considered before any response that the law can offer can be totally productive and/or implemented usefully. It is no use urging the spouse to prosecute if her only concern is to remove the violent spouse from the home for a limited period.

Many women in their statements to various bodies make it clear that they cannot afford to lose the breadwinner.[3] Students need to be made aware of agencies which can offer advice on loans, housing and child-care just as much as they require knowledge of welfare services to which a woman can go, or legal services, which can be used to eject the violent male.

A police study carried out in New South Wales between June 1977 and May 1978 provided the following information regarding peacekeeping calls from police stations: Mt Druitt and Blacktown representing predominantly working class

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1 NSW Task Force on Domestic Violence, Govt Printer, Sydney, 1982, p. 33.

2 NSW Task Force: "Domestic Violence - A Survey of Attitudes Towards Available Services", Appendix 1.

3 Recognition by the law and training courses of financial vulnerability resulting from social conditions and the structure of the workplace is essential - a key factor in understanding domestic violence. Lack of financial independence is a major factor in why women stay even after they've "mentally" chosen to leave. "Choice" means nothing when she has to look after more than just herself.

areas; Chatswood, a middle-income mixed age group area and Pymble, an affluent North Shore area of Sydney. Of the two working class areas, 25.7% and 32.1% of calls respectively were domestic violence peacekeeping calls, whereas Chatswood recorded 15.3%, and Pymble, 6.4%. The significance of these figures is not to illustrate that domestic violence is a problem of any particular class or income group. Rather, it is submitted that their importance lies in their implications for resource deployment - take the specialist unit to where it is needed most; an indication of the significance of police involvement in some areas rather than others. Affluent North Shore victims apparently tend to divorce rather than prosecute. This is arguably predictable in view of the fact that education may breed access to lawyers and money, therefore there is less likelihood of being trapped in the home and generally more likelihood of knowing "what to do"! They can escape the violent relationship. It may also be a function of avoiding the stigma of a spouse assault trial.

In addition these statistics clearly indicate that students should be equipped with detailed information especially if they intend to work in high risk areas.

To conclude on this aspect, therefore, teaching emphasis needs to be laid in several areas apart from strictly legal resources: the general occurrence of domestic violence, that the law's provisions cannot operate in vacuo, that they must be utilised in accordance with welfare services, and that endemic causes need to be looked at before a victim is simply categorised and processed, if a real understanding of the victim's plight and the most effective resolution for all concerned is to be reached.

a Spouse murder

I have included husband murder as relevant in this discussion for two reasons: firstly, because it is the end product of the domestic violence continuum which runs from harassment (driving up and down the street where the estranged wife lives, confronting her suddenly at the home or shops, roaming up and down outside a refuge) to this end point of desperation and total fear which escalates the domestic incident to a homicide. Technically spouse murder raises different issues from violence which does not amount to murder and certainly from sexual assault.

Nevertheless statistics in New South Wales are available which show the extreme importance of considering this topic in any discussion of legal responses to women in violent relationships[4]. Between 1968 and 1981, 42.5% of homicides occurred within some kind of family relationship. Half of these were spouse homicides, of which 705 of victims were women. In 48% of spouse homicides where the victim was the woman, there was a long history of violence perpetrated by the man on the woman. 70% of males killed or were killed in the context of a violent episode between the man and the woman. 52% of the male killings occurred in response to an immediate threat the male had posed to the woman or family.[5]

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4 The relationship between domestic violence and spouse murder is documented in Rod, T., "Marital Murder" in Scutt, J.A. (ed), Violence in the Family, Australian Institute of Criminology, Canberra, (1980), and Wolfgang, M.E., Patterns in Criminal Homicide, Philadelphia, University of Philadelphia Press, 1958.

5 NSW Bureau of Crimes Statistics and Research, NSW Homicides Cleared Up by the Police Between 1968 and 1981, 1987 (unpublished).

These statistics indicate that some women eventually can take no more and retaliate in the most final of ways to end their torment. If the facts are viewed in isolation, the once-victim has in the eyes of the law become the offender.

The significance for the legal response to treatment of women in violent relationships is the concern that intervention should have occurred at an earlier stage to prevent the killing by monitoring the situation, intervening and dealing effectively with the problem before the irrevocable step is taken. The role of the police and the law is therefore crucial.[6] Looking at the teaching role, if students are made aware of the issues to be explored in law and support agencies and are taught to seek the danger signs (infra), these homicides need never occur.

As a postcript to this short discussion, there is every indication in the New South Wales jurisdiction at least that the courts' attitude to the victim/murderer in these cases is undergoing a subtle change to respond to the realities of the real inter parties situation, in sentence. The first case which attracted the glare of publicity was that of Hill (1980) 3 A Crim R 396 where the Court of Criminal Appeal (NSW) using its supervisory jurisdiction varied the judge's finding of murder to manslaughter in the light of the undisputed history of violence of the deceased towards the appellant.

The law of provocation was subsequently altered and the mandatory life sentence for murder abolished.[7] Without entering into a lengthy dissertation on developments, the most recent example is revealing of judicial trends. In Bogunovich (1985) 16 A Crim R 456, Maxwell, J said (at p. 462):

> "For a period of some thirteen years the deceased indulged in extreme brutality of a phisical and mental kind towards his wife and elder child and as the other children were born they received like treatment. The deceased's conduct can only be described as brutally callous and inhuman ... I find it hard to accept from all the circumstances that she intended to kill the deceased ... I am unable to find any valid reason for the imposition of a custodial sentence. I am quite satisfied that the deceased's persistent ill-treatment and abuse of the prisoner, and his knowledge of his assaults upon her son were such as to render this a special case in which a non-custodial penalty should be imposed."

The real plight of the victim/murderer has at last been judicially recognised as the reason for the killing and has been given a legal significance in the trial process.

As has already been indicated spouse murder is the ultimate end of many domestic violence episodes, and this becomes the more significant when the percentage of assaults where weapons are involved is considered.

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6 e.g. ALRC 30, p.15; NSW Task Force, passim Chapter 4.

7 Crimes Act, NSW, s.23 and Crimes Act, NSW, s.19; both amended by Act No. 24 of 1982.

The decision in Bogunovich has come a long way from Lord Devlin's formulation of the role of the judge:

> Judges are not lawmakers; they are concerned with personal rather than social justice."[8]

Maxwell, J. clearly acknowledges the realities rather than merely the legal dimensions of the facts in issue. The evolution of sentencing attitudes this reflects "legitimises" the "problem", giving it curial acknowledgement. Vindicated in this way, the plight of the victim/murderer of last resort must only improve all the way down the line.[9]

Before passing from this topic, I should just mention that, in preparing this paper, I researched the last eight years of case reports. "Domestic Violence" does not appear as a heading in case indexes, and there are only two cases in that perid where "domestic violence" is mentioned in the case summary. I would suggest that it become an item of significance in law reporting in its own right as soon as possible. Such further recognition could only serve to increase law student and practitioner awareness of the problem as an independent legal issue.

b **Teaching Violence Against Women**

The NSW Task Force on domestic violence recommended many changes to the criminal law in operation in New South Wales which have been implemented.[10]

Obviously the legislative provisions are of the first importance to law students and practitioners who may wish to participate in follow-up courses and conferences, and these provide the starting point of consideration of what should be included in materials used as teaching aids in courses on violence against women.

In examining the relevant legislative provisions, however, it is very relevant that the limitations on those provisions be evaluated. There are two very obvious examples which can be used to illustrate this point in the New South Wales jurisdiction.

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8 Lord Devlin, The Judge, Oxford University Press, Oxford, 1981.

9 cf. Bacon, W and Landsdowne, R, "Women Who Kill Husbands: The Problem of Defence"; 52 ANZAAS Conference, 1982, paper. And, for the police response in domestic killings see Bacon, W and Landsdowne, R, "Women Homicide Offenders and Police Interrogation" in Basten, J et al (eds), The Criminal Injustice System ALWG, NSW, 1982. See also, Lupoi, 15 A Crim R 183, (1984).

10 The Crimes Act amendments are detailed in Confronting Violence p. 74ff. To complete the legislative picture, the following amendments should be noted: Bail Act, 1978, Form 4A; De Facto Relationships Act, 1985; Periodic Detention of Prisoners Act, 1985.

Section 547AA of the Crimes Act, 1900 (NSW) concerns apprehended domestic violence orders. They have been hailed by commentators as providing an excellent half-way house to full criminal prosecution as they are "quasi-criminal": they can bring about removal of the violent spouse from the home and protect against harassment and future violence, while eliminating the trauma and family dislocation of the criminal trial.

These orders can be sought by the aggrieved spouse or by the police (s. 547AA(3)) on the grounds set out in that sub-section. Breach of the order attracts a criminal sanction in its own right (s. 547AA(4)) and provides grounds for arrest without warrant and detention of the person: s. 547AA(8). The order in no way derogates from the availability of ordinary recognizances to keep the peace (s. 547) or other remedies[11] and it is granted upon the satisfaction of the civil standard: s. 547AA(1). Therefore the immediate problems of the victim are catered for without pre-empting traditional tenets of the criminal law such as the presumption of innocence and proof of crime beyond reasonable doubt before individual rights are interfered with by the State.

But there are problems. The 1985 study showed[12] that police seldom act in lieu of the victim (ss. 3). This means that regardless of the legislative framework and intendment, the victim still has the onus of protecting herself and her family in this context by instituting legal proceedings. Very few orders have in fact been sought anyway, and it is unlikely that any breaches of the ADVO will be acted upon, even where there is clear evidence that assaults have occurred after the ADVO has been granted.[13] There is evidence to suggest that women are taking action, when the numbers of 547AA(5) orders are compared with official police reports.[14]

Apart from to date unexplained police reluctance to use these remedies[15] it has been reported[16] that magistrates are falling to comply with s. 407AA

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11 For example, an injunction under the Family Law Act (Cth), s. 114, 1975

12 NSW Domestic Violence Committee, 1985 Report, passim pp. 1-37, especially 31-32

13 op. cit. p. 22-23. In these circumstances the victim then has to approach a magistrate for a warrant for arrest of the offender which takes time and involves technicalities. Note, s. 547AA has been repeated and replaced by Part XVA of the Act. Se p.

14 1985 Report pp. 28-30

15 1985 Report, pp. 1-37, especially 31-32

16 ALRC 30, p. 3; interview with Senior Constable Margaret White, Program Co-ordinator for Family Violence, NSW Police, 1 May, 1987.

which compels spouses to testify subject to discretionary exception on the ground of "reconciliation", which is not one of the criteria spelt out in the section. In 1985, thirty-seven spouses were excused from testifying on this ground of a total of 566 domestic violence charges. This without apparently any inquiry by the magistrate as to the bona fides of the "reconciliation". Nor does the section provide for ouster orders or furniture orders as may be obtained under the Domestic Protection Act, 1982 (NZ).

The second of the examples concerns the telephone warrant available to police in domestic violence cases pursuant to s. 357G, Crimes Act, 1900 (NSW). The anomaly here is that it is easier for police to obtain a telephone search warrant for general matters under the Search Warrants Act, 1985, s. 12 than it is to obtain dial-a-warrant for domestic violence under the Crimes Act, 1900. The safeguards for privacy legislated in s. 357G are along the lines recommended by the ALRC in its Second Report, 1975, but they are absent from s. 12. It is unfortunate that goods may be seen still to be more sacred than persons. If a man's house is not to be his castle[17] for drugs, indictable and firearms offences, it must be queried why the privacy of the family relationship stands across effective police enforcement for domestic offences, especially when it is noted that the amendments were passed specifically to legalise police powers to enter and remain when they have "reasonable grounds to believe" a domestic incident has occurred.

Problems of perception arise here just as significantly as problems of implementation. The victim may be left with the impression that the law is impliedly legitimising at least some degree of spouse assault,[18] which (a) may deter the woman victim from going to law again and (b) suggests the law itself abdicates its function by appearing to be incapable in a very serious and widespread class of criminal offence. The potential for a court deterrent and/or preventive role is lost. Thus merely teaching the "black letter" of the law without more only provides half the picture.[19]

c Lawyer/Client Relationship

More needs to be canvassed in teaching about violence against women than merely the legislative and legal framework, however. The lawyer/client relationship is one area where instruction is important. The lawyer's role is to come right to the nub of the issues as with any legal matter, but difficulties peculiar to violence against women need to be stressed. For all the reasons enumerated below, sensitive interviewing skills are crucial to facilitate revelation of the whole picture which can only be achieved if the woman can be made to feel at ease and not some sort of social canaille (the rape victim) or housewrecking disloyal beast (the domestic violence victim).

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17 Semayne's Case (1604) 5 Co. Rep. 91a. The 1985 Report (supra) indicates that only 6 telephone warrants were obtained during each of the years under study. It was suggested that the threat of a phone warrant generally resulted in granting of access but problems of availability of magistrates in small areas especially were pinpointed.

18 Cf. reluctance of courts to attach arrest provisions to family Court injunctions: ALRC, 30 p. 37, Lewis v Lewis (1978) 1 All ER 729.

19 In the above consideration the role of the police is vital but is outside the scope of the current concern of the paper.

Part of making her feel at ease is to inform her specifically of what her legal position is and what can be done in law. If a choice of options is available to her, then this should be indicated and suitable advice offered. The offering of advice, however, needs to be treated with caution: it may be that the woman needs time to consider her position (especially the domestic violence victim) and that a series of interviews is required. The lawyer must be sensitive to any reticence and not appear to be overly assertive or dominant.

It may be for example that, if available in the firm, she may prefer to consult with a female lawyer.

A further significant aspect of the lawyer/client relationship which should be included in courses is making students aware of the range of community services available in such cases coupled with advice on which of those the woman should approach. In appropriate circumstances, the lawyer may be of assistance in attending those services with her. This is suggested as lawyers figure prominently as persons from whom advice is first sought.[20] Apart from welfare agencies and other information (loans, child care), the lawyer should suggest medical attention in the appropriate case. If medical attention is required, the lawyer should clearly identify to the doctor the sort of information he perceives should be included in that first consultation. Legal aid should be raised for discussion.[21] In domestic violence cases, counselling may be a option, though here again students should be trained not to assert their view of the situation. Due regard must be had to the wishes of the client. At present in New South Wales counselling would have to be arranged privately as there are no schemes in operation, but studies have attended to the value of counselling the violent male. For example,[22] the TAB (Therapy for Abusive Behaviour) in Baltimore, Merryland. Here, a program for men who batter their wives intervenes at an early stage of litigation and has been said to be analogous to probation. It offers, a "therapeutic rather than a punitive" option as the judge places the offender in the scheme on condition that he attend regularly or he'll be dealt with according to law.

This is a significant example for two reasons:

(i) It is an assertion that the court may not be the appropriate forum for resolution of domestic violence cases except as a last resort, when intractability of the man renders none but the criminal sanction viable;

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20 NSW Task Force 1981, Appendix 1, p. 85: 42% of women studied first approached a local solicitor

21 Legal Aid for such matters in NSW is both means and merit tested but it is available. Very few grants have been made in the past, which has suggested that practitioners may not be even aware that a client may make an application! 1985 Report (supra)

22 The Centre for Women, Policy Studies, Washington, Response, Vol. 2, No. 1, 1-10-78.

(ii) but it also acknowledges the fact shown by several studies that women do not look to the law for relief, so rather than closing the door on them or taking action in such technical ways as to cause the victim to lose faith, through fear or reprisals during delay, or ineffectiveness, the judge can interpose with all the seriousness of a judicial proceeding but with the humanity of a social response to a social problem.

In addition, counselling in an appropriate case provides the court with a positive option before the negative punitive options arise for consideration. It would be folly to suggest that there is any rehabilitative component in the gaol system for the man afflicted by violent tendencies.
Of course, these sorts of agencies depend on the learned behaviour "cycle of violence" theories as an explanation for domestic violence; and the drawback of such programs is the compulsory counselling component. As with for example alcohol and drug dependence, until the individual wants to change, compulsion may only breed hostility. Even this is not clear as some counsellors suggest that once the person is in the system they can "work through" the man's violence and hostility and eventually turn it around into willing participation.

Any disposition which simply increases the tendency to feel hostile is only going to create increased hostility and the "why are they picking on me" syndrome which in turn will only serve to fuel resentment about the perceived cause of that picking - the wife, with obvious consequences of escalation of violence towards her once opportunity again permits.

A parallel to or precedent for this sort of disposition of offenders can be found in New South Wales in the Pre-trial Diversion of Offenders Act, 1986, s. 20.

d **Preparation for court**

Apart from the interviews with clients, lawyers should receive training in how to prepare these cases for trial. In the Bacon/Landsdowne study conduct for the New South Wales Task Force (supra, fn. 7, at p. 35), nearly 33% of victims of the sample laid charges, of which half were withdrawn. Of the remaining 16 1/2%, only 40% (less than half) resulted in conviction. The question to be addressed is, why. There is a clear need for empirical study in these cases to find out more about what actually happened at the trial. The bare statistics would suggest that lawyers need to be trained more carefully in preparation of cases involving violence against women. It would be very defeating and disillusioning for the victim if she goes through all the trauma of the criminal trial only to have the behaviour of the assailant vindicated. There is also the significance of the high rate of aborted prosecutions, notwithstanding legislative attempts to circumvent this is s. 407AA, Crimes Act which renders the spouse compellable. The significance of the high rate of aborted prosecutions lies in the impact on police willingness to take these matters on, and provides further support for the frustration they note in running such matters. In some cases noted in the study there was fairly clear evidence that the woman had been intimidated by the violent spouse to withdraw the charges, or considerations other than personal safety became paramount. Apart from these cases, however, the number of s. 407AA exemptions granted and

the diversity of reasons apart from reconciliation[23] upon which magistrates tend to grant exemptions undermine the legislative intendment of s. 407AA and raise serious questions about the efficacy of a prosecution-or-bust scheme.

e Matters of Evidence

The evidential component was not considered in the NSWLRC/ALRC Reports (supra) nor in the various legislative enactments which have featured in the statutory revision burst of the eighties in New South Wales.

It is not difficult to imagine the difficulties which the victim will face in the witness box at the hands of the skilled cross examiner - certainly if rape complainant experiences are anything to go by. The woman (like many other victims and witnesses) might be disoriented by being in court, owing to such specific factors as:

- the nature of the crime; and
- the nature of her position (e.g. embarrassment, "letting down" the family by going public);
- she may be inarticulate;
- she may be humiliated/suffering "victim to blame" perception;
- she may be confused (especially if the act in question is only one of several assaults which have led to the charge);
- she may speak low and so create a bad impression on the jury;
- she may be unused to court surroundings, formality, adversary techniques;
- the nature of her evidence;
- and the problems faced by inevitable question "why didn't you leave him?". As noted in studies there is a general public absence of sympathy and understanding for the victim, the normal response being, "why put up with it?". Jurors may fail to consider love, children, money, dependence in their response. Evidentially this may mean that all the denigrating details may be dragged out in her case with a corresponding decrease in self esteem, "hanging all the dirty washing in public", which can only exacerbate the above problems.

On top of all this there may be a substantial delay before the hearing, resulting in faded memory of detail and severity, for example.

The question therefore arises as to how to train students in their preparation of such cases.

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23 The 1985 Report at p. 32 identified the following reasons for exemption apart from reconciliation, all of which are outside the grounds envisaged in S. 407AA: the interest of the children, Future of the relationship intention to marry, argument now settled, she "misunderstood the seriousness of complaining" (!!) and wife needs the support of the husband.

Photographs: compare the personal injury case, where photographs are taken as soon as possible so that years later when/if the matter is litigated the full extent of the injury is pictorially clear even if physical signs have cleared up. Therefore, these should be taken:

(i) in all cases where there is some form of physical injury;

(ii) by whom? Whoever deals with the victim after the initial encounter with the police;

(iii) police should be required to make full written note of what they visibly see as her physical state at the first opportunity; and

(iv) submit her to hospital for a full medical, i.e. doctor's report on her injuries in the appropriate case.

It may not be that in all cases actual physical abuse has eventuated - it all still may be in the technical assault - creation of fear - stage.
If this is the case, then this should be one instance where the victim gives a Record of Interview at the earliest possible time - one instance where one can see great advantages in tape recording the interview to capture the third dimensional aspects of the victim's state, the disturbance and so on, resulting in a more accurate and real picture than can be gained from words alone. The victim/witness should be made fully aware of what is going to happen in the hearing, and there may be other steps taken to relieve the problems outlined above to enhance her credibility before the jury. It is hardly going to be an edifying experience but it can be made less traumatic. As has been suggested above, students should be trained to find out as much as possible about the relationship in order to create the true picture. It is unlikely that the defendant will come to court, except looking like the epitome of respectability and the jury (again using stereotypes) will believe what they see, therefore the lawyers should elicit from the victim a very detailed background in evidence in chief, which should be tailored to give her as much confidence as possible.

Reform of evidential rules may be necessary to overcome problems with hearsay and opinion from third parties, for example, neighbours who have overheard disturbances, or ex post facto have been told by the spouse what has caused her injuries (black eyes, etc) or to allow inferences to be drawn from disturbed behaviour of children at school and so on.

Formal procedures should be instituted for hospital reports made with a view to legal follow up of the assault - detailed regarding patient history and the instant case.[24] There is definitely a need by hospitals to identify domestic violence victims as people who will need to more sophisticated medical response, regarding treatments, agency backup and histories.

Finally, the evidence of children. Important legislative reforms were introduced into law in 1985 regarding court reception of the evidence of children[25] with regard specifically to child assault. But just as child

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24 In one of the cases studies by Bacon and Landsdowne a vicious assault actually occurred at the doctor's surgery. In these circumstances the doctor's evidence would be central.

25 Evidence (Children Amendment Act, 1985; Crimes (Child Assault Amendment Act, 1985; Oaths (Children) Amendment Act, 1985.

assault has been selected as a particular concern focus for the criminal law, so should domestic violence assaults with the evidence of children in some cases being important evidence in the case history.

f The Role of the Court

Some products of Law Schools eventually become judges, and change in judicial thinking can be brought about in an evolutionary way.

As to the current role of the court in the context of domestic violence, often women want the relationship to continue; they simply want the violence to stop, and see the court as a medium for achieving this result.

When one considers the strong social components associated with domestic violence assaults, a simply punitive response from the courts may not be the only solution. The trend away from traditional thinking in such cases has already been identified: Bogunovich and the TAB Scheme (supra). Litigation is not an adequate response where it is simply a question of stopping the violence, except as a second stage or last resort. But if the court does become involved, issues concerning case preparation and evidence discussed above are again relevant.

Nevertheless, in NSW, the legislative pattern clearly involves a significant role for the court in resolution of domestic violence issues; criminal sanctions are available regardless of the couple's reconciliation or separation. The legislative and procedural changes in N.S.W. clearly reflect an attempt to increase the effectiveness of the court in these matters, and emphasise that the problem is a criminal one. The significance of this is found in the focus of the law's response, that police are to be encouraged to charge, or arrest, with the ultimate end a criminal conviction: a criminal justice approach. The law is involved through the position of the victim in law as opposed to her wishes in fact.

Early training for lawyers in understanding the issues on all levels is indisputably relevant. Can the court go further than punishment, however, and develop as an educating and preventing mechanism? The ALRC argues no: that the criminal law cannot provide the kind of protection that is needed because of ineffective enforcement procedures and inflexibility. It is suggested that such a view is too narrow. In inserting a role of prevention into training - whether for lawyers, for the Bench or other professions involved in domestic violence actions - we are looking at domestic violence in the cycle of violence explanation and theory and seeking to break that cycle by re-educating people, via elimination of sex role stereotypes and social conditioning, about the unsuitability of the use of violence to resolve interpresonal conflict.

Publicity, such as "You don't have to put up with it" type pamphlets may also have a role, but my feeling on this is rather like wealth and tax: you don't really take any notice until you have to face it personally "It could never happen to me". Could it?

I do not see primarily an educative-preventive role for the courts or police. This is not to say that students should not be trained in law courses to acknowledge the problem and to deal sympathetically and responsively with domestic violence victims as clients. It is only to say that the law is not prima facie a teacher, and the educative function may be introduced more directly by schools and the -ologies.

But the law clearly has a symbolic-educative role, in focussing and reflecting law and society's disapproval of violence in the home. When such cases are tried and the offender convicted, even as it appears not very often, the law is making a clear statement which is significant in terms of public and victim perception. Law Societies can provide ongoing training for practitioners; Chamber Magistrates courses can include courses covering the issues discussed above.

3. DOMESTIC VIOLENCE IN TRADITIONAL SOCIETIES

a Case Study: East New Brittain

Bradley, S C, "Attitudes and Practices Relating to Marital Violence among the Tolai of East New Britain", in Domestic Violence in Papua New Guinea, Law Reform Commission of Papua New Guinea, Monograph No 3, Boroko; p.32 at pp 33-39, 1985.

In order to understand violence in marriage, it is essential to see it in the context of relations between men and women in general, and between husbands and wives in particular. Changes in Tolai gender relations, the marriage relationship and the concept of the family have been enormous over the hundred or so years since the Tolai first came into contact with the Western world. As described by early European observers at the end of the last century, Tolai society was strongly male-dominated. Women were regarded as inferior to men and were controlled by them, the men using physical force whenever they felt it necessary (see page 45). Tribal warfare and cannibalism were rife and male bravery, strength and fighting skills were highly valued. Masculinity was celebrated in the powerful male cult of the tubuan, whose members often terrorised women and children and sexually abused widows without a male protector (Parkinson 1907:473). Women who discovered cult secrets or approached the cult's ceremonial places were killed. There were many cultural expressions of the greater value attached to men and male activities. This might at first sight seem surprising in a matrilineal society. However, it must be remembered that matrilineality is a method for reckoning descent, not a system for giving power or status to women. Motherhood was respected but women were nevertheless second-class citizens.

Men and women mixed very little in daily life. Women were obliged to stay away from all things and places associated with male activities such as fishing, hunting and warfare, on pain of severe penalties, even death. Women were believed to be polluted by their own menstrual blood, hence close contact with women was considered polluting and dangerous to men and was kept to a minimum. Men slept in the men's house and had intercourse with their wives only for procreative purposes. Taboos prohibited men from sleeping with their wives at certain times, especially when men of the clan were undertaking important activities.

All sources of power and influence in the society were in the hands of men. There were no formal positions of leadership, but individual big-men gathered followers by their own initiatives. Possession of shell money **(tambu)** was important for organising ceremonials and attracting followers, but new **tambu** shells could only be obtained by making long and dangerous canoe journeys, which were prohibited to women. Land, the other major valuable, was controlled by male lineage elders. Only men could learn the strong forms of sorcery, such as those associated with the male **iniet cult**, and of course only men could be war leaders.

It was in the marriage relationship that women's subordination was most clearly marked. A woman was bound to obey her husband in everything, by virtue of the bride-price that her husband's relatives had paid to her own relatives. The payment of pride-price entitled a man to the woman's labour, her sexual services, and her full obedience (but not her children, since these always belong to their mother's descent group). Men who could afford it were polygamous. On marriage, a woman went to live with her husband on his land. Once he had cleared the trees from a plot of garden land, it was the wife's

job to support her husband and her children by her labour in the food garden. The husband's responsibilities were to protect the family in times of war and to provide fish and occasional small game whenever possible. Women were not necessarily consulted over the choice of husband, and divorce was difficult if not impossible for a woman to initiate, because her relatives would have to be persuaded to return the bride-price.

If a woman was divorced by her husband, she and her children returned to live with her parents or maternal uncle, and the husband had no further obligation to them. If the husband died, the wife and children inherited nothing from him: his sisters and their children claimed house, land, shell money and property. Boys lived with their parents only until puberty, when they moved to live and work with their mother's brother on the land that they would one day inherit. It was the mother's brother and not the father who sponsored a boy's initiation into the **tubuan** cult and later organised payment of pride-price on his behalf. Bonds of affection certainly developed between men and their children, and often between spouses, but men's main responsibility was to their sisters' children. Consequently, the conjugal relationship and the nuclear family were less important than the sibling bond and the matrilineal descent group.

Nowadays, Tolai society is still male-dominated, but there have been many realignments in the relative positions of the sexes. Beliefs in the pollution of women have almost disappeared and the sexes mix much more freely than in the past, although there are still some restrictions on women's freedom of movement. Since pacification , male fighting skills are not necessary for group survival and, outside the family, violence is no longer a normal part of everyday life. Nevertheless, men are still socialised to become aggressive and dominant, whereas women are trained to be passive and obedient. Also significant nowadays for male prestige is men's greater sophistication or competence in the world outside the home. This competence is attributed by the Tolai to innate male ability; social and cultural factors that restrict women's mobility and their participation in activities which would allow them to acquire the skills, experience, confidence and relative sophistication admired in men are not generally acknowledged.

Men's former control of shell money has been eroded as **tambu** shells have become more easily accessible and the significance of shell money is now symbolic and ritual rather than economic. Nowadays, all Tolai are involved to a greater or lesser degree in the cash economy. Although the cash economy is dominated by men through their greater access to jobs and business opportunities and their control of cash crops and the income from them, female education and the opportunities for paid employment that it has opened up have had a major impact on male-female relations. Methodist missionaries insisted that their schools would close if parents prevented their daughters from attending classes with the boys (Danks 1933-47). Catholic missionaries too encouraged education of girls, with the result that even before the Second World War, the majority of Tolai of both sexes were already literate in their own language. This has meant that many Tolai women have been able to get jobs, mainly in the 'female' fields of teaching, nursing and secretarial work.

In the villages within easy reach of Rabaul or Kokopo, where land is short and the population is heavily dependent on income from wages and salaries to supplement agricultural and business earnings, significant numbers of Tolai women work in town. For example, in Pila Pila, a village of approximately 600

inhabitants 5 km from Rabaul on which much of the research for this study was based, 25% of females aged between 15 and 60 years were in employment in June 1978, either locally or outside the province. In 8% of households the sole wage-earner was female.

Women's earnings are their own, although the traditional duty of a wife to provide the family's basic requirements from her own labour means that married women's earnings usually go on household expenses, freeing their husbands to spend their wages as they choose. Nevertheless, having their own income does give working women more independence and more prestige, a fact which prompts some men to forbid their wives to work for money, fearing that their own authority in the home will be threatened. It is unusual for husbands to allow their wives to work unless they themselves are also working, to avoid being in the humiliating position of having to ask their wives for cash. However, those married women who do not work, and they are in the majority, are finding that increasing needs for cash and the growing shortage of land for food gardens are making them more financially dependent on their husbands, who have more access to cash through wage employment and the control of cash crops.

Women's increasing participation in the cash economy has not been matched by any significant increase in political participation. A seat is reserved for a women's representative in the Provincial Assembly and in each of the community government councils, but this merely perpetuates the view that politics and government are male preserves, since the token female participants are confined mainly to 'women's affairs'. Women have a limited public role through their village women's clubs and church fellowships, which have been valuable in training women's leaders to organise local women's activities, but public power remains a male province. A few exceptional women have stood in open elections against men, with occasional success, but the system of appointed women's representatives and the emergence of the provincial Council of Women as a pressure group for women's interests has effectively quashed any prospect that women will challenge men in the political arena, and the separate and unequal political development of the sexes is virtually assured.

As regards marriage, many diverse influences have been at work to modify traditional expectations of the roles of husband and wife and the concept of the family. Of these, the teachings of Christianity have been the most direct, since much of Tolai life revolves around the church. From earliest childhood most Tolai regularly attend weddings and services where Christian ideals of marriage and conjugal and parental responsibilities are expounded at length. In the United Church, couples are encouraged to think of their marriage as a partnership, with husband and wife as equal partners (Taylor 1970:14-15). Marriage vows made in church weddings are identical for both partners, each promising to love, respect and obey the other. This egalitarian and companionate ideal of marriage sits uneasily with traditional attitudes regarding the proper relationship of husband and wife. It is still commonly said that once a woman is married she comes under her husband's control entirely **(a vavina i ki ta ra varkurai kai ra tutana)**, and she owes him complete obedience. A Tolai woman still often speaks of her husband as her 'boss' or her 'master', using the English or Pidgin words. At home, it is the man who is the head of the family.

As in the past, a husband's authority over his wife continues to be justified by the payment of pride-price. Bride-price is still regarded as essential for legitimating the union in the eyes of the community, whether or not a church

wedding is held later. The bride-price system has survived despite strong opposition from the churches, which has succeeded only in standardising the amounts paid so that bargaining is no longer involved. The churches have tried to portray bride-price as a token of good intentions rather than as a transaction in which rights over women are exchanged for shell money. Consistent with this is the increasing tendency for women themselves to claim the bride-price paid for them, although the shell money is usually received and looked after on their behalf by third parties. In Pila Pila in 1978, 80% of women under 30 years old had successfully claimed their own bride-price, compared to only 44% of over-60 year olds. Nevertheless, many Tolai, especially among the older generation, still feel that the payment of bride-price puts the husband in a superior position in the marriage and entitles him to control his wife, by force if necessary.

Over the last century, the Tolai have gradually moved closer to the model of family relationships introduced to them through contact with Europeans. Again, Christianity has had a profound influence on Tolai concepts of family roles and responsibilities. Christian ideology makes much use in its imagery of patriarchal family relationships, and idealises the father-son relationship. From the point of view of this study, the main relevant features of the Christian model of paternal behaviour are the emphasis on the father's enduring authority over his children and his duty to provide for all their material needs and prepare them for an independent life, since these aspects were not part of the Tolai father's traditional role.

Direct Christian teaching has of course been only one amongst many factors influencing Tolai concepts of marriage and the family. Much of the current legislation of Papua New Guinea embodies Western concepts of family relationships and is based on the assumption that wife and children are materially dependent on the husband/father. An example is the **Deserted Wives and Children Act**, which allows a wife to claim maintenance payments for herself and for the children until they reach 16 years of age. In Tolai custom, a man is responsible for his children's upkeep only while they live with him, and he is bound only to provide land for the wife to garden on while the marriage lasts, all else being the responsibility of the wife's brother, the children's maternal uncle. However, the introduced notion of a man's duty to maintain his wife and children until the children are independent has become so widely accepted among the Tolai that maintenance orders for the support of deserted wives and children can now be made and enforced through the village courts, courts which were set up principally for the application of customary law. Similarly, Papua New Guinea law, based on the Australian, also obliges a man to support his illegitimate children until they reach 16 years of age, completely contrary to custom, and this too can nowadays be dealt with by village courts. Pension schemes, and accident or death insurance for workers and motor vehicle drivers also recognise a man's wife and children as his dependents and heirs in keeping with European priorities but in contradiction to Tolai custom, in which the benefits of a man's work should go after his death to his matrilineal relatives, rather than to his wife and children.

European disapproval of the matrilineal system of inheritance as cutting across the 'natural' bonds between a man and his children and as a drag on development has also put pressure on the Tolai to conform more to the European pattern of nuclear family with partilineal inheritance. For example, under the Australian Administration, grants and loans were given more readily for

land in individual rather than group ownership so as to encourage men to buy land from their matrilineal descent group for passing on to their own children. The education system too has had a lasting effect on Tolai concepts of the family. From the earliest days, mission teachers insisted on enrolling children using their father's name as a family name, although the Tolai had only individual names. The creation of a system of patrilineally inherited family names in a matrilineal society is somewhat incongruous. School text books were of course imbued with European concepts and attitudes, showing the typical family as one in which the husband goes out to work to support the family while the wife stays in the house to look after the children and service the family. Until recently, most teaching materials were written by non-Papua New Guineans and were based primarily on those used in Australia. Imported films, magazines, books, newspaper features and radio programmes also portray Western models of relations between the sexes and of marital and family relationships.

The European-style image of the nuclear family under the headship of the husband/father that is conveyed by the Christian churches, by the legal system, in teaching materials, in bureaucratic procedures and by the media is reinforced by the growing economic dependence of wives and children on the husband/father as provider. Men's assumption of the role of family breadwinner and their greater involvement in the cash economy puts most women in a position of financial dependence, emphasises their primary identification with home-making and strengthens the nuclear family unit and the authority of the husband/father over it. The man is the head of the nuclear unit, which is known by his name. Electoral rolls, census forms and the Village Books list the population by families, each under the name of its male head. Women and children are classified by their relationship to the husband/father, who has legal, financial and moral responsibility for them and who represents them to the outside world.

Thus male-female relationships inside and outside the family have been, and still are being, redefined in response to changing circumstances. Traditional sex-role stereotypes are being challenged daily, and individuals' expectations of acceptable behaviour in a marriage partner can vary enormously. On the one hand, tradition and custom define women as inferior to men and wives as subordinate to husbands; on the other, modern Tolai are aware that the Papua New Guinea Constitution calls for equal rights and duties for males and females as citizens and as marriage partners and that the 7th of Papua New Guinea's 8 National Aims requires the 'equal social and economic participation of women'. It is against this background of rapid change and uncertainly about appropriate behaviour between the sexes, particularly within marriage, that marital violence among the Tolai must be seen.

b The Status of Women in Customary Law
by Margaret Rogers

Introduction

This section of our work is to concentrate on the status of women in African customary law; largely because there are more women whose lives are governed by their traditional system of law than in most Commonwealth jurisdictions and because it is the system with which I have worked most closely. However, the problems raised apply equally although perhaps not always to the same extent to women governed by many other systems of personal laws be they Muslim, Hindu, Maori or Cheyenne Indian. These problems are differences of cultural values applying to different societies.

Commonwealth African countries "received" English common law, certain statute law and the doctrines of equity as the general system under which their countries were administered on colonisation. However, the British colonial government, unlike the French government, preserved the traditional systems of law which governed the majority of the peoples of these colonies until colonisation. The British colonies were therefore governed by pluralistic legal systems: they were subject to the received English common law and those statutes of England, some in the form of Code, which were applied at the date of reception. African citizens were governed in all matters of personal law by their own traditional tribal system of customary law but in areas governed by the Penal Code they could be indicted in the formal courts which were set up by the colonial administration. As these systems sometimes conflicted, and still do, an indigenous member of society could be in double jeopardy. In commercial transactions with non-Africans they would be subject to the received law, be it in statutory form or as the English common law.

There were also groups of citizens whose customary or traditional personal law was other than African customary law. There were large numbers of Muslims in both East and West Africa and Hindus in East Africa. There was therefore a situation in which there might well be internal conflicts of law between an individual's personal law and the received English law. This is illustrated most clearly by the offence of bigamy as set out in the Penal Code which is based on the concept of monogamy and the customary law under which a potentially polygamous marriage is valid and the norm.

The Kenya Government in 1968 set up a Presidential Commission to look at these problems and we see the picture very clearly from the following extracts from the Report which was produced by the Commission on Marriage and Divorce. The Report says on page 15 -

49. There is also what may be termed an internal conflict of laws. The spheres of statute law and personal law are not clearly defined and the extent to which a person can change his personal law on a change of religion is uncertain. There is also doubt how far Africans who marry under religious or civil law retain rights and remain subject to obligations under customary law. There are also problems that arise on the inter-marriage of persons from different tribes, communities or religions.

50. We are told that it is not uncommon for Africans who have contracted marriages under the Marriage Act, or the African Christian Marriage and Divorce Act, and while those marriages subsist, to take other wives under customary law. This is a criminal offence but so far as we are aware, prosecutions are never instituted. This state of affairs is undesirable as it tends to bring the law into disrespect. The position as regards civil rights and obligations under customary law is obscure.

51. Doubts have been expressed as to which of the constituent elements of a customary marriage are essential to the validity of the marriage and at what point the marriage is complete. We think it of the greatest importance that there should, as far as possible, be certainty in all matters of marital status.

52. The traditional African view of marriage was that it was less a union of individuals than a union of families. Moreover, in the past, the unity and numerical strength of the clan were of paramount importance. Today, people

move about far more than formerly, mixed communities are growing and, while tribal loyalties continue, there is now a new allegiance to the State. These changes have made some of the former practices inappropriate or inconvenient.

53. We should briefly mention here the subject of dowry, with which we shall have to deal more fully later. For the present purpose, it will be sufficient to say that there are allegations that the practice of requiring dowry, which has a deep significance in African society, is being commercialised. Also, there are wide differences between tribal laws on the subject and this tends to lead to uncertainty.

54. It would be wrong to generalise on the status of women under customary law as there are considerable differences between the customs of the various tribes and even within the tribes. It is perhaps sufficient for the present purpose to say that there are some features in the customary laws of some tribes which we regard as derogating from the dignity and status to which women are entitled: to give three examples, we are told that in one tribe a girl may be compelled by her parents to marry against her will, in some tribes a widow has no choice but to join the household of a brother or other relation of her late husband, and in some tribes a widow is precluded from remarrying.

55. On the breakdown of a marriage, also, women in some communities are in a position greatly inferior as regards obtaining relief to that of their husbands.

56. We consider it unsatisfactory, also, that the right to maintenance of women who are divorced or separated from their husbands should vary as greatly as it does according to the community or religion of the parties. This is anomalous from the point of view of the individual and so far as destitution has to be relieved out of public funds, unfair on those sections of the community that contribute to those funds but accept also the liability to pay maintenance.

57. We believe also that the fact that customary marriages are not registered leads to difficulty in proving such marriages, particularly when matrimonial proceedings are taken in an area other than that in which the parties were married.

58. Finally, we would remark that we have observed many defects of detail in the drafting of the statutes relating to marriage and divorce. It would not be profitable to detail these, since, as will appear, we think that what is required is not the patching of the present law but a completely fresh approach.

1. Traditional marriages

We look now at the various aspects of marriage under customary law which conflict with the developed systems of law introduced by colonial powers.

(a) Degrees of affinity

African customary law is very strict in regard to the prohibition of marriage within degrees of affinity. The Report of the Kenya Commission referred to above states:

"70. We think it desirable that there be a single, uniform rule, applying to members of all communities, prescribing the degrees of relationship within which marriage is forbidden by law. Obviously, such a rule must only specify those relationships that are prohibited by all communities alike and will, therefore, be more tolerant than the rules of any particular community. We realise that many people will regard such a rule as unduly liberal but we think that the consciences of individuals and the social pressures within communities will generally ensure compliance with religious and traditional rules, without the need for legal sanctions. We think that our proposals would lead to certainty as to the legal position, and flexibility as regards religious and customary rules.

RECOMMENDATION NO 7

We recommend that the prohibited degrees of kindred and affinity within which marriage is not permitted be laid down by statute and be the same for everyone regardless of race, tribe or religion. We suggest that the prohibited degrees should be as follows:

(a) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be;

(b) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse;

(c) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild;

(d) No person shall marry a person whom he or she has adopted or by whom he or she was adopted;

(e) For the purpose of this recommendation, relationship of the half blood is as much an impediment to marriage as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate.

71. We are of the opinion that any ceremony purporting to be a marriage where the parties are within the prohibited degrees should be a nullity. At the same time, we would, as in the case of purported marriages of people under age, provide that any children of such a void union should be deemed to be legitimate.

We recommend that a ceremony purporting to be a marriage should be a nullity if the parties are within the prohibited degrees of kindred or affinity. We further recommend that any children of such a void union should by statute be deemed to be legitimate.

72. We are unanimously of the opinion that it should be an offence knowingly to participate in such a ceremony.

RECOMMENDATION NO 9

We recommend that it be an offence knowingly to take part in a ceremony purporting to be a marriage which is void by reason of the parties being within the prohibited degrees. For the purpose of this recommendation, "to take part" should have the same meaning as in Recommendation No 5.

(b) Monogamy and polygamy

One of the more frequent areas of conflict between the received English law and the customary law was in regard to the validity of polygamous marriages. In the Report of the Kenya Commission this was set out as follows:

73. Traditionally, all the tribes of Kenya were polygamous, without any limit on the number of wives a man might take, other than what he could afford. Those Africans who have adopted Islam are, of course, limited to four wives and those who have adopted Christianity are required to be monogamous. We have said earlier, however, that it is not uncommon for Africans who have contracted a Christian marriage, subsequently, and while that marriage is subsisting, to contract another marriage under customary law, although to do so is not only contrary to the rule of the Church but also constitutes a criminal offence. We understand that polygamy is usual among Muslim Arabs and Somalis but that Muslims from India and Pakistan are usually monogamous in practice, although their personal law allows polygamy. The Ismaili community, however, are monogamous by virtue of their Constitution. Other immigrant peoples are generally monogamous.

74. It was represented to us by the National Council of Women and other women's organisations that the traditional basis of African polygamy has now largely gone. Formerly, additional wives were brought in to help in the work of the **shamba**; they were introduced with the consent of, and indeed often by, the first wife, who enjoyed a special position of respect. Now, it was submitted, the first wife is often neglected, while the husband lavishes his attention on the younger woman, particularly in those cases where the first wife is left to look after the **shamba** while the young wife is kept in a town house.

75. We are satisfied that there is a considerable body of opinion in favour of retaining polygamy. We found opinion on this subject very sharply divided, with the main support for polygamy coming from Muslims and from traditionalists in rural areas and the main opposition from Christians, from the women's organisations and from the more educated members of the younger generation. We found many people, both among those who favour and those who oppose polygamy, who thought that the practice would inevitably die out under the pressure of social and economic change, particularly the cost of educating children and, in some areas, the dwindling reserves of land. Many of those opposed to polygamy expressed the opinion that it is unnecessary, and that it would be unwise, to prohibit the practice.

76. The main argument advanced in favour of polygamy was based on a belief that prostitution is increasing; a belief which we found, wherever we went, to be a major subject of concern. It was argued that

a man who is permitted to take a second wife is less likely to divorce the first and that polygamy absorbs the excess of women over men in the population. In this connection, we found a widespread belief that women greatly outnumber men in Kenya; in fact, such information as is available shows this belief to be unfounded. It was particularly urged that a man should have the right to take a second wife where his first marriage was without issue. As regards the domestic aspect, it was stressed by Muslim speakers that Islam requires a man to accord equal treatment and affection to all his wives.

77. The main argument for monogamy, apart from that based on religious teaching, was that it is only in the union of one man and one woman that it is possible to find the mutual love and trust that are essential to a stable and happy home. It was strongly urged that children suffer under polygamy because, human nature being what it is, the children of one wife will, in practice, be preferred to the children of another and therefore that many children are very likely to grow up in an atmosphere of jealousy and discord. It was also argued that since Kenya's population was expanding rapidly, one way to restrict it would be by abolishing polygamous unions.

78. We think polygamy will die out and that it is in the national interest that it should. Rising standards of living and the cost of bringing up and educating children will, almost certainly, contribute to this end. Diminishing land reserves and increased mechanisation in farming will tend to remove the traditional rural justification for it. Furthermore, the education and emancipation of women, a process well under way, will, we think, mean that women will, in the future, be less willing to form part of a polygamous household.

79. We do not think polygamy should be prohibited by law. We think that any law which attempted to do this at the present time would cause considerable social disruption, without being really effective. It would probably lead to an increased number of unions not constituting lawful marriages and hence to an increase in the number of illegitimate children.

80. Equally, we cannot accept a suggestion put to us that all marriages should be made potentially polygamous. We think this would be a retrograde step and offensive to a large part of the population.

81. We believe that the law should do everything reasonably possible to discourage the practice of polygamy. Our recommendations in this part therefore, while preserving the possibility of a man taking a subsequent wife or wives, are designed to render this difficult in circumstances where it is clear that it is undesirable that he should do so.

RECOMMENDATION NO 10

We accordingly recommend that the law should recognise two distinct types of marriage: the monogamous and the polygamous or potentially polygamous.

82. At the present time, the character of a marriage, ie whether it is monogamous or polygamous, is determined according to the form in which it is contracted. It is monogamous if contracted under the

Marriage Act or the African Christian Marriage and Divorce Act or the Hindu Marriage and Divorce Act, and polygamous if contracted under customary or Islamic law. We consider that in future the character of a marriage should not depend on the form of marriage or the personality of the parties, but upon their express agreement. We accordingly take the view that when two parties embark upon marriage, they should expressly declare, when giving notice of intention to marry, whether their marriage is to be monogamous or potentially polygamous, and that such declaration should be binding. We believe this innovation will remove many of the difficulties that now arise, and is fair to the wife in that it gives her an opportunity to ensure - if she so wishes - that her marriage will be monogamous.

RECOMMENDATION NO 11

We recommend that when giving notice of intention to marry, the parties should declare whether their marriage is to be monogamous or potentially polygamous, and that such declaration, subject to Recommendation No 12 below, should be binding during their lifetime and whilst the marriage subsists

83. This recommendation, if adopted, would lead immediately to the question whether a person who has contracted a monogamous marriage should be able, while that marriage subsists, to convert it into a polygamous one. As the law stands at present, there is express provision in the African Christian Marriage and Divorce Act for the conversion of marriages contracted under customary law into statutory marriages and it seems to be implicit in the Marriage Act that an Islamic marriage may similarly be converted. It would also seem to be implicit in the Mohammedan Marriage, Divorce and Succession Act that a customary marriage may be converted into an Islamic one. There is, however, no provision for the conversion of monogamous marriages into Islamic or customary ones.

84. We think it would clearly be wrong to allow a change in the character of a marriage to be brought about by the unilateral action of either party. The more difficult question is whether it should be permitted by mutual consent. Such a change might be desired where the parties have changed their religion, or, in the case of persons following no recognised faith, a change of opinion on the subject, possibly inspired by the ill-health of the wife or her incapacity to bear children. The danger, of course, would be that a husband anxious to marry a second wife, might bring pressure on his wife to agree and if she refused to agree, that this would imperil the marriage, as the husband would see the wife as the obstacle to his happiness. We think, therefore, that it would be necessary to ensure that any such consent was freely given.

85. The same problems do not arise where a man with one wife whose marriage was potentially polygamous wishes to convert it into a monogamous one, because it would only be in very exceptional circumstances that a wife would object. Such a situation would probably only arise on a change of religion. We think, however, that, as a matter of principle, the same rule should apply as for the conversion of monogamous into polygamous marriages. There can be nothing to prevent a

man deciding, or even promising, not to take another wife, but if the nature of the marital status is to be changed, we think it should only be by mutual act.

RECOMMENDATION NO 12

We recommend that the unilateral action of one party or a change of faith or religion of one or both parties to a marriage, should not, in itself, change the character of a marriage. We recommend, however, that it be permitted to convert a potentially polygamous marriage into a monogamous one, or a monogamous marriage into a potentially polygamous one, by a joint declaration of husband and wife freely made in the presence of a registrar and recorded in writing at the time of making.

86. It was suggested to us that where a man has more wives than one, the first should enjoy a status higher than the other or others. This was argued from two points of view. On the one hand, it was said that in the traditional African society, the senior wife had some measure of authority over, and was entitled to the respect of, the other wives and it was argued that it was proper that this should continue. On the other hand, opponents of polygamy favoured discrimination as a means of discouraging women from accepting the status of junior wives. We would agree that in a polygamous establishment, the senior wife should enjoy a special position, but we think this should be accorded as a matter of respect and courtesy. So far as legal rights and status are concerned, we think all wives should be equal and, as a corollary, that the children of polygamous wives should rank equally amongst themselves. The National Council of Women and others, suggested that the law should provide for the registration of the first wife only, but as we have said, it is our opinion that all wives should rank equally in law.

RECOMMENDATION NO 13

We recommend that where a man has two or more wives, there should be complete equality of legal status and legal rights between such wives.

87. We considered further whether the law should require a man polygamously married to accord equal treatment to his wives but we felt that this was a domestic matter, where it is neither desirable nor polygamous or monogamous, who is seriously neglected or ill-treated should have a right of recourse to the courts. Social custom and religion may also play a part in regulating these relationships.

RECOMMENDATION NO 14

We recommend that the law should not attempt to regulate polygamous households, as for example by requiring the husband to accord equality of treatment to his wives.

88. It is generally accepted, both under Islamic and under customary law, that a man should not take a second wife unless he has the means adequately to support both wives. We are recommending the setting up of marriage tribunals and we have considered whether every man who proposes to take a second or subsequent wife should first have to satisfy a tribunal that he has the means to justify so doing. Although in

principle we would favour such a requirement, we are not recommending it, because we think it would impose an excessive burden on the tribunals and hence tend to detract from the performance of their main function, the attempt to reconcile matrimonial differences.

89. We considered also whether a man proposing to take a second or subsequent wife should be required to obtain the consent of his existing wife or wives. We think this would be unreasonable, because it would enable a wife to go back on her acceptance, at the time of her marriage, of the principle of polygamy. At the same time, we think such wives should have the right to be heard. What we suggest is that a wife who, having accepted the principle of polygamy, objects to her husband taking another wife either on the ground that it is likely to cause financial hardship in the household or on grounds personal to the proposed new wife, such as notorious immorality, should be entitled to lodge a notice of objection with the local registrar or chief, whose duty it would then be to refer the question to a marriage tribunal. We think there should be no appeal from the decision of the tribunal, although an aggrieved party should have the right to apply to the court for relief similar to the prerogative orders if the tribunal were to misconduct itself.

RECOMMENDATION NO 15

We recommend that a wife by a polygamous marriage who objects to a proposed subsequent marriage by her husband, either on the ground that such marriage is likely to cause financial hardship in the household or because of the personal unsuitability of the proposed wife, be entitled to lodge a notice of objection with the registrar to whom notice of the proposed marriage has been given, whose duty it would then be to stay the proposed marriage and refer the objection to a marriage tribunal. We recommend further that there be no appeal from the decision of the tribunal.

90. We have considered whether there should be a statutory limit to the number of wives a man have. No such limit is known in customary law but Islam imposes a maximum of four. We do not think this question is of great practical importance because, as we have said, we think social and economic factors will lead to the decreasing practice of polygamy. We think also that a statutory maximum might be interpreted as legislative approval of the contracting of marriages up to that number.

RECOMMENDATION NO 16

We recommend that no statutory limit be imposed restricting the number of wives a man may take under the polygamous system.

91. We think that it would be futile to provide by law for a monogamous system of marriage without providing sanctions.

RECOMMENDATION NO 17

We recommend that if a man who has contracted a monogamous marriage goes through a ceremony, purporting to be a marriage, with another woman while his wife is alive and his marriage has not been dissolved and its character has not been converted as suggested in Recommendation No 12,

the later ceremony should be a nullity. Similarly, where a woman who has a husband living and has not obtained a declaration from the court that he is to be presumed dead goes through a ceremony, purporting to be a marriage, with another man, that ceremony should be a nullity. At the same time, we would, as in the case of purported marriaged of people under age, provide that any children of such a void union should by statute be deemed to be legitimate.

92. From the criminal aspect, bigamy is already an offence under the Penal Code, while it is an offence under the Marriage Act for an unmarried person to go through a ceremony of marriage with a person whom he or she knows to be married to a third person. We think these provisions should be consolidated and somewhat widened, and since the offences would spring from prohibitions in the proposed new law, we think the penal provision should be included in that law, rather than in the Penal Code.

93. We think it should be a good defence to a person charged with such an offence, that he or she believed, on reasonable grounds, that his or her spouse was dead, or that the marriage had been dissolved.

RECOMMENDATION NO 18

We recommend that it be made an offence knowingly to take part in a ceremony purporting to be a marriage which is void on account of either party thereto having a living spouse. We recommend further that it should be a good defence if a person charged with such an offence can satisfy the court that he or she believed, on reasonable grounds, that such spouse was dead, or that the marriage had been dissolved. For the purpose of this recommendation, "to take part" should have the same meaning as in Recommendation No 5. We recommend that this offence be included in the proposed new law and that section 171 of the Penal Code be repealed.

(c) Consents to marriage

Under the old customary law the consent of the wife was not essential to a valid marriage. In modern times, however, it has become the practice for a woman's consent to be essential. The Kenya Report says:

94. We are emphatically of the opinion that the consent, freely given, of both parties should be essential to the validity of every marriage. It is at present essential to every Christian and civil marriage and apparently to every Hindu marriage, and to every Islamic marriage where the parties have attained the age of puberty; the consent of the spouses is required by the customary law of all tribes with one or two exceptions. So far as any religious or customary law at present allows parents to force a child into marriage, we think it is wrong and should be abrogated.

95. In this respect, we think that the English law regarding consent is not entirely logical. For example, where there is ignorance or mistake as to the nature of a ceremony which purports to be a marriage, the ceremony is void, but, if the consent of either party is vitiated by intoxication, it would seem that a marriage is merely voidable. We do

not consider this satisfactory and we think every ceremony should be void if the consent of either party was induced by coercion, fraud, or mistake, or was vitiated by insanity or intoxication or was in any other way less than fully and freely given.

RECOMMENDATION NO 19

We recommend that the consent of both parties freely given be essential to the validity of a marriage.

96. It follows, we think, that any ceremony purporting to be a marriage where either party does not give his or her consent or gives consent under coercion should be a nullity. We would, however, as in the case of purported marriages of people under age provide that any children of such a void union should be deemed to be legitimate.

RECOMMENDATION NO 20

We recommend that a ceremony purporting to be a marriage should be a nullity if the consent of both parties thereto is not freely given. We further recommend that any children of such a void union should by statute be deemed to be legitimate.

97. We have considered what other consents, if any, should be required. Under the Marriage Act, parental consent is required to the marriage of any person under 21 years of age and under the Hindu Marriage and Divorce Act to the marriage of females between the ages of 16 and 18. Under Islamic law, where a person is under incapacity, his or her **Wali**, or marriage guardian, is a necessary party to his or her marriage, while according to the Maliki and Shafei schools, even an adult woman must give her consent through her **Wali**. The general rule under customary law is that consent of parents is essential to the first marriage of a person, while other members of the family are consulted; consent is not generally required to the marriage of a person who has previously been married. This is a subject on which we have met a wide divergence of opinion. Most people who expressed opinions favoured parental consent at least up to the age of 21 and many would like to see a higher age fixed or even require such consent regardless of age.

98. While we think parental advice is always desirable, regardless of age, we do not think it would be reasonable to make parental consent a legal requirement where a person is over 21 years of age. We think it is a proper requirement up to that age, even though we are recommending that 18 should be the age of majority. We see nothing illogical in this. A person of 18 may well be old enough to enter into ordinary contracts but marriage is a very special kind of contract which may affect the whole course of a person's life, and one which calls for maturity of judgement more than intelligence.

(d) **Dowry**

Dowry was an important and essential part of a valid marriage under the old customary law. It was normally expressed to be payable in the form of livestock or some other form of property. With the transition of the traditional communities from a subsistence to a money economy changes

have taken place, first of all in regard to whether dowry is essential to a valid marriage under customary law and secondly, as to its expression in monetary terms. Again, we look to the Kenyan Report which says:

107. Under all the customary laws of Kenya marriage is preceded, accompanied or followed by a payment or payments by the bridegroom or his family to the bride's family. The payment was traditionally made in cattle or other livestock, but sometimes partly in produce, honey or beer. Nowadays, money is often given in lieu or in addition. Generally, it is not necessary that it be paid in full before the marriage: indeed more often there is only an initial, possibly a token, payment, followed by payments over the years as and when the husband can afford or the wife's family may need a further instalment. Amongst most tribes, it is open to the wife's father to waive the payment, if he so wishes. With a few exceptions, the amount to be paid is not fixed by custom, but is a matter for negotiation between the families.

108. A question which has occasioned much difficulty amongst judicial and administrative officers and amongst academic writers, is the significance of the payment, and the difficulty of finding a suitable English term to describe the institution. The European view in the past was that the payment was nothing but a price for "buying" a woman, hence the term bride-price. Many of the witnesses we heard around the country were at great pains to explain that the payment implies no such thing and this was a Western misconception. We agree that the term is unfortunate. Other suggestions that have been put to us, and also put forward by various writers, regarding the significance of the payment are: that it is in the nature of a bond uniting the two families; that it is a mark of the man's respect for his wife; that it is merely a symbol or token to seal the marriage contract; that because of the liability to repayment on divorce, it acts as a deterrent to misconduct on the part of the wife; and that it is the price for the children resulting from the marriage.

109. We do not think any useful purpose will be served in ascertaining which of these suggestions is the more appropriate or correct one. It may well be that some of these theories are correct for one tribe or a group of tribes, but it is very difficult to generalise. Suffice it to say that the payment played and continues to play a very significant part in African customary marriages.

110. As regards terminology, we have preferred to use the word "dowry" rather than other expressions such as "bride-price", "bride wealth", "marriage cattle", "marriage payment", "child price", etc, because although the practice in African society is the reverse of that in Europe, ie it is given by the bridegroom or his family to the bride's family and not vice versa, we believe that the expression is the most neutral one. We also note that the Kenya legislation has recently switched from the use of the term bride price to dowry.

111. Under Islamic law, the dowry (mahr) is strictly payable to the bride, although with her consent it may be to her parents. It need be of no commercial value but the giving of at least a token is regarded as essential to the validity of a marriage.

112. The payment of dowry is not required under the Hindu Marriage and Divorce Act, but we understand that it is a social custom among the Hindus in Kenya.

113. We have considered whether the legal validity of marriage should depend on the payment of dowry and we have concluded that it should not. It would clearly be undesirable to make dowry essential in some cases and not in others, and we do not think any useful purpose would be served by making dowry compulsory if it involved no more than a token. Moreover, there are material differences in the customary laws of the various tribes regarding payment and repayment of dowry, while in some areas at least the custom seems to be changing. To embody all the existing customs in the new law would preserve all the present complications and would impede change and we consider the standardisation of those customs to be impracticable.

114. We do not think that the payment of dowry should be abolished, because we believe that it is a factor making for stability in marriage but we think it should be a matter for arrangement between the two families and not a requirement of law.

115. We are not oblivious to the fact that in many customary laws, the payment of dowry is regarded as a legal essential, but in view of the complications to which we referred above, and also to the fact that dowry is often dispensed with altogether, we think that the custom is losing much of its legal significance and is becoming like the European dowry, a social custom.

RECOMMENDATION NO 24

We recommend that the legal validity of marriage should not depend on dowry having been paid or promised.

116. It is sometimes alleged that the dowry system is being commercialised and exploited, and that young men are unable to marry because of their inability to raise the necessary amount. There may be such cases, but we are not convinced that there is any general public evil. Comparatively few complaints of such a nature were made to us in the course of our public meetings. Furthermore, as we have already said, it is usually sufficient to make a small initial payment. Moreover, if our recommendations are accepted, parties of full age would be able to marry even without the consent of their parents, and in the case of a girl under 21 the demanding of a manifestly excessive dowry might be held to be an unreasonable withholding of consent.

117. We have considered whether the law should set limits to the amount of dowry that may be paid, or whether local authorities should be empowered to see limits, and our conclusion is that this would be undesirable. We appreciate that there are tribes where the amount of the dowry is fixed by custom but this appears to be the exception. We think it would be impracticable to enforce rules limiting dowry and we understand that attempts in the past by local authorities to do so have failed. Generally, we think the amount of dowry asked is bound to vary according to the wealth and standing of the bride's family. As on the question whether or not dowry should be paid, so also on the question of

the amount to be paid, our view is that the matter is one to be arranged between the families concerned.

RECOMMENDATION NO 25

We recommend that the law should not regulate or empower the regulating of the amount of dowry but that this should be left to agreement between the families concerned.

118. We have considered whether, as at present, it should be possible to sue for outstanding dowry and we think it should, as a contractual obligation for which the marriage provides the consideration. We think, however, that limitation of such actions is desirable. At present, the rule in most tribes is that on the death of a wife, the husband ceases to be under any obligation to contribute any further dowry, while the wife's family is usually under an obligation to return a proportion of the dowry, the amount depending on the number of children she has borne. Where the husband dies first, his family is usually liable to provide the balance of the dowry, and this obligation may continue as long as the wife lives. We think these obligations are unduly onerous. Whatever system is adopted, there are bound to be cases which excite sympathy, but after weighing the various considerations, we think it would be fairest if the obligation to contribute dowry were to cease on the death of either the husband or the wife and if there were no obligation to return any part of the dowry on the death of the wife. When we speak here of an obligation, we mean an obligation enforceable through the courts: it is, we think, very likely that existing customs will continue to be followed voluntarily by many families. We do not propose to speculate on the possible effects of such a change on family negotiations regarding dowry and would merely remark that we think they may be minimal since, as we have said, we think dowry is increasingly being regarded as a social custom rather than a matter of law.

RECOMMENDATION NO 26

We recommend that outstanding dowry be recoverable as a contractual debt, subject to the limitation that no action should be brought on an agreement to provide dowry after the death of the husband or the wife, whoever shall die first. We recommend further that no action should lie for the return of dowry after and in consequence of the death of a wife.

119. The rule under most customary laws is that dowry is partly or wholly returnable to the husband or his family on divorce, the amount returnable, as in the case of the death of the wife, depending on the number of children and their sex. Under some customary laws, the divorce only becomes legal when the dowry has in fact been returned. As we have said earlier, we think that matters relating to dowry should continue to be regulated by custom and agreement, and we would extend this to the question of return of dowry on divorce. However, just as we think that the payment of dowry should no longer affect the validity of a marriage, so too, its return should not affect the legality of a divorce. Further, we think that there should be a period of limitation for actions for return of dowry after a divorce, and we suggest, for this purpose, a period of three years.

RECOMMENDATION NO 27

We recommend that -

(a) the validity of a divorce should not depend on the return of any dowry to the husband or his family;

(b) the return of any dowry on divorce should be regulated by the custom of the community to which the parties belong and by any agreement between the parties or their families, and that an action for such return be enforceable in the courts:
Provided that no action for the return of dowry after a divorce shall be instituted more than three years after the date of the decree.

120. We also suggest that other matters relating to dowry, such as the replacement of dead animals or those that do not produce, the return of the progeny, the method of payment, should continue to be governed by custom and agreement.

c Domestic violence in customary law

The following is an extract from a summary of a paper presented to the Expert Group Meeting organised by the Women and Development Programme of the Commonwealth Secretariat in London from 11th to 15th May 1987. The author was Mr Philip Iya, formerly Director of the Law Development Institute in Kampala and now a leading law practitioner.

(a) Historical perspective of the status of women under customary law

One judge in Nigeria had once remarked that "All down the roles of recorded history human culture has always lent support to masculine superiority in all spheres of human activity while conceding none to women." In pre-colonial times men engaged in hunting, providing the basic structures for shelter and fighting inter-tribal wars. Anything to do with physical strength and prowess was associated with men. Women tended the young, the aged and the disabled. They also looked after domestic animals, prepared and cooked the food for the family. In non-nomadic and non-pastoral societies women tilled the land but it was owned by the men whether for cultivation or for grazing. If it became necessary for the man to have more labour then he had to have additional wives and children to provide free labour.

Since a man paid dowry to get a wife it followed that women, as persons were regarded as inferior and formed part of a man's assets.

Women who were captured as a result of tribal wars fared no better; their status may even have been lower as they had not been paid for. They became the wives of the persons who captured them or they would be distributed among male relatives of the conquerors.

What is important to note here, says the author, is that these factors inculcated in African societies the concept of the division of labour according to sex and defined the role of women as primarily that of a wife and mother and producer of food. Any such work traditionally

associated with women such as cooking, cleaning, looking after children came to be regarded as inferior.

By the time the colonialists came the status of women in African societies was already well-established - they were inferior to men. The introduction of the cash economy only encouraged men to participate im growing cash crops; women only participated as labourers on their husband's or father's plots. Men had to be employed to get money to pay the poll taxes levied by the colonial administration while the woman's role in the subsistence economy agriculture was given low status. Hence the division of labour on the basis of sex throughout the colonial period. Therefore the status of women was unchanged.

The author concludes that in Africa the status of women was that assigned to them by the norms and customs of the society in which they lived. By African culture women were regarded as inferior to men and women acquiesced in this position.

(b) Violence as conceived by and practised in customary law

The author queries whether we are considering what he calls "real violence" or mere cultural requirements. He considers first:

i) Violence between spouses

Incidence of violence against a wife takes various forms - threatening assaults, homicides but most commonly, wife beating. Under customary law wife-beating is regarded as a justifiable form of chastisement and a tool of discipline. The reason given to justify this form of violence is that it is based on the payment of dowry; men felt that by paying such dowry they owned their wives and therefore could discipline them.

Some women were even said to regard wife-beating as a sign of manliness. If a man does not beat his wife he is considered effimate. Wife-beating was also considered as a sign of love or affection and some wives actually provoke their husbands into beating them before making love.

The incidence of rape of a wife by her husband is unknown in customary law as the wife is the property of the husband and so he is free to have her at his will. The wife is not expected to complain.

(ii) Violence outside the marital sphere

Assaults may take the form of female circumcision, tattooing, the slashing of cheeks and various forms of scarring. These have various cultural significance and are not regarded as in any way violent. The scarring and slashing are forms of making a woman more beautiful.

The incidence of rape of women outside marriage was either unknown or unreported under customary law because of strict societal discipline.

(c) Dealing with violence under customary law

Excessive domestic violence by a husband against his wife was regarded as an offence. It is regarded as ground for a separation with the wife

returning to her parents until the issue is resolved. If no reconciliation is effected or the wife on return to her husband is again excessively beaten the dispute will be placed before the Council of Elders. The procedure followed is very simple as compared with modern criminal proceedings. The aim of the Council is, if possible, to effect a reconciliation.

If the matter is very serious the husband may be punished by the pronouncement of a curse.

(d) The future of customary law

The most difficult problems in administering customary law are firstly that it is unwritten and secondly that it varies in detail from place to place and clan to clan. This means that it is difficult to achieve uniformity even within one country. This makes it difficult to ascertain; there is much legal argument as to how it must be proved.

4 TYPES OF RESPONSES TO DOMESTIC VIOLENCE

a Legal Responses

Confronting Violence, pp 15-50.

(i) The Criminal Law

In most jurisdictions, normal criminal provisions cover physical violence in the home.

Note, however, in many countries rape or sexual assault of a wife is not a crime. See p. .....

Some countries have introduced special criminal provisions to deal with wife abuse.

Indian Penal Code 1860

CHAPTER XXA OF CRUELTY BY HUSBAND OR RELATIVES OF HUSBAND.

s. 498A.

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to a fine.

Explanation: For the purpose of this Section 'cruelty' means -

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property, or valuable security, or is on account of failure by her or any person related to her to meet such a demand.

How useful do you think the criminal law is in dealing with domestic violence? What impedes its usefulness?

(ii) Matrimonial Relief: divorce and judicial separation

What are the limits of matrimonial relief as a strategy for dealing with domestic violence?

Note the comment of Giles-Sims, J (Wife Battering: A Systems Theory Approach, Guildford Press, NY 1983, p.138).

"Of those who never returned to the man . . . . 44% reported at least one violent incident with the man".

Consider the following legislation. What are its implications in situations of domestic violence?

Law Reform (Marriage and Divorce) Act 1982
Malaysia:

103. Injunction against molestation

The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree or divorce, judicial separation or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.

(iii) The Civil Law

(i) Actions in Tort or Delict

Law Reform (Husband and Wife) Act 1962
(England and Wales)

s. 1 Actions in tort between husband and wife.

(1) Subject to the provisions of this section, each of the parties to a marriage shall have the right of action in tort against the other as if they were not married.

(2) Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may stay the action if it appears -

(a) that no substantial benefit would accrue to either party from the continuation of the proceedings; or

(b) that the question or questions in issue could more conveniently be disposed of on an application made under section seventeen of the Married Women's Property Act, 1882 (determination of questions between husband and wife as to the title to or possession of property);

and without prejudice to paragraph (b) of this subsection the court may, in such an action, either exercise any power which could be exercised on an application under the said section seventeen, or give directions as it thinks fit for the disposal under that section of any question arising in the proceedings.

Would any advantage be gained by a wife, pursuing a civil action against her husband where he had abused her?

Can you think of situations where a civil action would be the victim's only legal strategy?

Foakes, J Family Violence: Law and Practice. Hemstal Press, London: 1984 p. 103:

(i) Injunction and an Action for Assault and/or Battery

A victim of family violence may always bring an ordinary claim in the county court for damages for assault and/or battery, coupled with a claim for an injunction restraining future assaults.

It may be that the injunction is the real object of the action but an injunction will only lie to protect a legal right, in this case, a right not to be assaulted[2] and must therefore be coupled with the claim for damages. It used to be thought that the claim for damages had to be the main part of the action and the injunction ancillary to that, so that if the plaintiff's injuries were relatively trivial, there would be little point in requesting an injunction because the defendant would be able to claim that that was the main purpose of the proceedings. But in Hatt and Co v Pearce[3] it was held that it is not necessary for a judge to weigh the value to the plaintiff of the injunction against the amount of damages claimed, and that an award of £1 damages will suffice to give the court jurisdiction to grant the injunction.

These proceedings may therefore be a useful remedy, as indicated by Sir George Baker when he told the Select Committee on Violence in Marriage in 1975, 'it is a very simple procedure but nobody will ever use it. I do not know why'.

There are however many disadvantages with this application as compared with the 1976 Act or, indeed, with the interlocutory relief available in a matrimonial cause.

If the plaintiff cannot establish a battery, he or she must prove an assault. This has been defined as 'an act . . . . which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant'.[4] The concept of 'molestation' under the 1976 Act is far wider and can include pestering.[5] Pestering will not generally constitute an assault.

A power of arrest cannot generally be attached to an injunction granted in these proceedings, but it may be obtainable where an injunction is granted restraining assault or trespass when the parties are husband and wife, or when they come within the meaning of the phrase 'living together in the same household as husband and wife'.[6] It is not clear whether an exclusion order can be obtained.[7]

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2 Egan v Egan [1975] 2 All ER 167

3 [1978] 2 All ER 474

4 Winfield and Jolowicz on Tort (1979) page 51

5 Vaughan v Vaughan [1973] 3 All ER 449

6 Maclean v Nugent [1979] Bar Library Transcript No 490, per Ormrod LJ

7 Freeman, Violence in the Home (1979) p 194, assumes that an exclusion order can be obtained but Parker, Cohabitees (1981) p 125, points out that it may be that an exclusion order will only be granted to protect a right to the enjoyment of property (even if it is only a licence). He adds that if a court can exclude a property owner merely on the basis of assaults then why was there so much argument in the Court of Appeal and House of Lords, over the meaning of s.1(1) of the 1976 Act.

(ii) **Injunction and an Action in Nuisance**

This procedure may provide a remedy for a person being pestered in her own home where it is unlikely that an assault could be established.

In **Davis v Johnson** Viscount Dilhorne said:

> 'Molestation may take place without the threat or use of violence and still be inimical to mental and physical health . . . it is probable that if it is of such a character that the court would be disposed to grant an injunction in respect of it, there would be a right of action as nuisance.'

Private nuisance has been described as 'unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it'.[8]

It is therefore of limited use as the action must be linked to the enjoyment of land.

Section 51A of the County Courts Act 1959 provides that a claim for damages is no longer necessary.

(iii) **Injunction and an Action for Trespass**

There is an alternative remedy, again linked to a right over land. If the defendant pesters the plaintiff, and in doing so trespasses on her land, she may bring an action for damages and for an injunction restraining future trespasses.

The plaintiff need only establish that the defendant has entered on to her land as a trespasser and may do so again, without proving more complicated matters such as an interference with the enjoyment of land. Section 51A of the County Courts Act 1959 again provides that a claim for damages is no longer necessary.

(iv) **Injunction and an Action Related to a Property Right**

As already noted, the 1976 Act provided that an applicant may obtain an injunction requiring the respondent to permit the applicant to enter and remain in the matrimonial home or any specified part of it.

An applicant not falling within the scope of that act, can take proceedings for possession, provided that she is the sole holder of the legal estate in her home, whether freehold or leasehold. This would be appropriate in a case where such an applicant has been forcibly evicted by the defendant.

In addition she may seek an injunction enforcing her right of occupation or, if necessary, an exclusion order.

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8 Read v Lyons [1945] KB 216 at 236

9 CCR Ord 2, r 1(1)

Note, in many jurisdictions a wife may not sue her husband.

Consider the following legislation. Do you see any defects in either?

The Domestic Proceedings and Magistrates' Courts Act 1978
(England and Wales)

Powers of the court to make orders for the protection of a party to a marriage or a child of the family

16. (1) Either party to a marriage may, whether or not an application is made by that party for an order under section 2 of this Act, apply to a magistrates' court for an order under this section.

(2) Where on an application for an order under this section the court is satisfied that the respondent has used, or threatened to use, violence against the person of the applicant or a child of the family and that it is necessary for the protection of the applicant or a child of the family that an order should be made under this subsection, the court may make one or both of the following orders, that is to say -

(a) an order that the respondent shall not use, or threaten to use, violence against the person of the applicant;
(b) an order that the respondent shall not use, or threaten to use, violence against the person of a child of the family.

(3) Where on an application for an order under this section the court is satisfied

(a) that the respondent has used violence against the person of the applicant or a child of the family; or
(b) that the respondent has threatened to use violence against the person of the applicant or a child of the family and has used violence against some other person; or
(c) that the respondent has in contravention of an order made under subsection (2) above threatened to use violence against the person of the applicant or a child of the family,

and that the applicant or a child of the family is in danger of being physically injured by the respondent (or would be in such danger if the applicant or child were to enter the matrimonial home) the court may make one or both of the following orders that is to say

(i) an order requiring the respondent to leave the matrimonial home;
(ii) an order prohibiting the respondent from entering the matrimonial home.

(4) Where the court makes an order under subsection (3) above, the court may, if it thinks fit, make a further order requiring the respondent to permit the applicant to enter and remain in the matrimonial home.

(5) Where on an application for an order under this section the court considers that it is essential that the application should be heard without delay, the court may bear the application notwithstanding

(a) that the court does not include both a man and a woman

(b) that any member of the court is not a member of a domestic court panel, or

(c) that the proceedings on the application are not separated from the hearing and determination of proceedings which are not domestic proceedings.

(6) Where on an application for an order under this section the court is satisfied that there is imminent danger of physical injury to the applicant or a child of the family, the court may make an order under subsection (2) above notwithstanding

(a) that the summons has not been served on the respondent or has not been served on the respondent within a reasonable time before the hearing of the application, or

(b) that the summons requires the respondent to appear at some other time or place,

and any order made by virtue of this subsection is in this section and in section 17 of this Act referred to as an "expedited order".

(7) The power of the court to make, by virtue of subsection (6) above, an expedited order under subsection (2) above may be exercised by a single justice.

(8) An expedited order shall not take effect until the date on which notice of the making of the order is served on the respondent in such manner as may be prescribed or, if the court specifies a later date as the date on which the order is to take effect, that later date, and an expedited order shall cease to have effect on whichever of the following dates occurs first, that is to say

(a) the date of the expiration of the period of 28 days beginning with the date of the making of the order; or

(b) the date of the commencement of the hearing, in accordance with the provisions of Part II of the Magistrates' Courts Act 1952, of the application for an order under this section.

(9) An order under this section may be made subject to such exceptions or conditions as may be specified in the order and, subject in the case of an expedited order to subsection (8) above, may be made for such term as may be so specified.

(10) The court in making an order under subsection (2)(a) or (b) above may include provision that the respondent shall not incite or assist any other person to use, or threaten to use, violence against the person of the applicant or, as the case may be, the child of the family.

17. (1) A magistrates' court shall, on an application made by either party to the marriage in question, have power by order to vary or revoke any order made under section 16 of this Act.

(2) Rules may be made for the purpose of giving effect to the provision of section 16 of this Act and any such rules may in particular, but without prejudice to the generality of this subsection, make provision for the hearing without delay of any application for an order under subsection (3) of that section.

(3) The expiry by virtue of subsection (8) of section 16 of this Act of an expedited order shall not prejudice the making of a further expedited order under that section.

(4) Except so far as the exercise by the respondent of a right to occupy the matrimonial home is suspended or restricted by virtue of an order made under subsection (3) of section 16 of this Act, an order made under that section shall not affect any estate or interest in the matrimonial home of the respondent or any other person.

18. (1) Where a magistrates' court makes an order under section 16 of this Act which provides that the respondent

(a) shall not use violence against the person of the applicant, or
(b) shall not use violence against a child of the family, or
(c) shall not enter the matrimonial home,

the court may, if it is satisfied that the respondent has physically injured the applicant or a child of the family and considers that he is likely to do so again, attach a power of arrest to the order.

(2) Where by virtue of subsection (1) above a power of arrest is attached to an order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of any such provision of the order as is mentioned in paragraph (a), (b) or (c) or subsection (1) above by reason of that person's use of violence or, as the case may be, his entry into the matrimonial home.

(3) Where a power of arrest is attached to an order under subsection (1) above and the respondent is arrested under subsection (2) above

(a) he shall be brought before a justice of the peace within a period of 24 hours beginning at the time of his arrest, and
(b) the justice of the peace before whom he is brought may remand him.

In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken of Christmas Day, Good Friday or any Sunday.

(4) Where a court has made an order under section 16 of this Act but has not attached to the order a power of arrest under subsection (1) above, then, if at any time the applicant for that order considers that the other party to the marriage in question has disobeyed the order, he may apply for the issue of a warrant for the arrest of that other party to a justice of the peace or the commission area in which either party to the marriage ordinarily resides; but a justice of the peace shall not issue a warrant on such an application unless

(a) the application is substantiated on oath and
(b) the justice has reasonable grounds for believing that the other party to the marriage has disobeyed that order.

(5) The magistrates' court before whom any person is brought by virtue of a warrant issued under subsection (4) above may remand him.

SAINT VINCENT AND THE GRENADINES

ACT NO. 5 OF 1984

I ASSENT

[L.S.]

SYDNEY D GUN-MUNRO,
Governor-General

2nd May, 1984

AN ACT to make fresh provisions in the law relating to matrimonial injunctions; to provide the police with powers of arrest for the breach of injunction in case of domestic violence; to make provision for varying rights of occupation where both spouses have the same rights in the matrimonial home; and for purposes connected therewith

[8th May, 1984]

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the House of Assembly of Saint Vincent and the Grenadines, and by the authority of the same as follows

Short title

1. This Act may be cited as the Domestic Violence and Matrimonial Proceedings Act, 1984.

2. In this Act

"Court" means the High Court.

"dwelling house" includes any building or part thereof which is occupied as a dwelling and any yard, garden, garage or outhouse belonging to the dwelling house and occupied therewith.

Arrest for breach

3. (1) Where, on an application by a party to a marriage, a judge grants an injunction containing a provision (in whatever terms)

(a) restraining the other party to the marriage from using violence against the applicant, or
(b) restraining the other party from using violence against a child living with the applicant, or
(c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included,

the judge may, if he is satisfied that the other party has caused actual bodily harm to the applicant or, as the case may be, to the child concerned and considers that he is likely to do so again, attach a power of arrest to the injunction.

(2) References in subsection (1) to the parties to a marriage include references to a man and a woman who are living with each other in the same household as husband and wife and any reference in that subsection to the matrimonial home shall be construed accordingly.

(3) If, by virtue of subsection (1), a power of arrest is attached to an injunction, a police officer may arrest without warrant a person whom

he has reasonable cause for suspecting of being in breach of such a provision of that injunction as falls within subsection (1)(a) to (c) by reason of that person's use of violence or as the case may be, of his entry into any premises of area.

(4) Where a power of arrest is attached to an injunction and a person to whom the injunction is addressed is arrested under subsection (3)

(a) he shall be brought before a judge within the period of 24 hours beginning at the time of his arrest, and

(b) he shall not be released within that period except on the direction of the judge, but nothing in this section shall authorise his detention at any time after the expiry of that period,

(5) Where, by virtue of a power of arrest attached to an injunction, a police officer arrests any person under subsection (3), the police officer shall forthwith seek the directions of the court as to the time and place at which that person is to be brought before a judge.

Order restricting

(4) Where each of two spouses is entitled, by virtue of a legal estate vested in them jointly, to occupy a dwelling house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant.

(2) On an application for an order under this section the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case, and without prejudice to the generality of the foregoing provision:

(a) may except part of the dwelling house from a spouse's right of occupation (and in particular a part wholly or mainly for or in connection with the trade, business or profession of the other spouse);

(b) may order a spouse occupying the dwelling house or any part thereof by virtue of this section to make periodical payments to the other in respect of the occupation;

(c) may impose on either spouse obligations as to the repair and maintenance of the dwelling house or the discharge of any liabilities in respect of the dwelling house.

(3) Orders under this section may, in so far as they have a continuing effect, be limited so as to have effect for a period specified in the order or until further order.

(4) Where each of two spouses is entitled to occupy a dwelling house by virtue of a contract, or by virtue of any enactment giving them the

right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly.

Passed in the House of Assembly this 12th day of April 1984.

J CLEMENT NOEL
Clerk of the House of Assembly

b **Other responses**

Confronting Violence, pp. 50-58, pp 60-71.

How important do you think the provision of shelters, hotlines and support groups have been to victims of domestic violence?

What other effects have the shelter movement had?

c **What can be done?**

Freeman, M D A, "Violence Against Women. Does the Legal System Provide Solutions or Itself Constitute the Problem? (1980) 7 Brit Jnl of Law and Society 215.

Consider options available to deal with abusive men. Are they adequate? What reforms would you like to see here?

Australian Law Reform Commission, Domestic Violence, pp. 54-55.

Should treatment such as that described below be part of the sentencing process for a domestic violence offender?

What further steps are necessary in order to protect women from victimisation in the family?

(i) **Counselling and therapy programmes**

Existing programs

121. No legal or victim support strategy can get to one of the root causes of domestic violence: the offender's attitudes and perceptions. Court orders can help, by ensuring that the offender realises that the law really means that assaults must not recur. But more is needed. At the least, counselling would help offenders to see that their attitudes and perceptions need to be changed and to help them in that process.

ACT *'Challenge' program.* A small project, named 'Challenge' which is run by volunteers, has been started in the Australian Capital Territory. It is privately funded, but its organisers regard the program's informality and lack of professional image and bureaucratic trappings as beneficial (despite the problems it poses) for two reasons: as well as providing a good environment for counselling and therapy, participants' fears of taking part in the program ('Will I be referred to a psychiatrist?') are allayed. As the program only

commenced in 1984, client numbers have not been sufficient to start a group program. Members of Challenge have therefore been counselling clients individually. To date there is no information about the success of this program.

Adelaide program. A pilot project in Adelaide conducted by Mr D Wehner has been in operation for approximately 18 months. It is specifically directed at men who have been violent to their partners. The number of men who have participated is small (only 78 to date), with each group containing approximately 12 people. The program is voluntary, that is, it does not depend upon court-ordered participation, and is reported to be a qualified success. Mr Wehrner reported to the Commission that the best result achieved has been that 75% of a given group reported that they had stopped beating their partners while the worse result was that only 50% reported that they had stopped[1], but the subjective nature of these responses should be borne in mind when assessing the success of the program.

Clearly, if a fully-fledged group program for violent people were to be developed in the Australian Capital Territory, it would have to be established on a more formal basis. The present program, Challenge, could not cope with the numbers which would be generated by court-ordered counselling and therapy.

Court-ordered programs

122. Both Mr Wehner and 'Challenge' administrators agree that compulsory participation in a suitable counselling program should at least be an option available to the court in cases of domestic violence offences. At present, both programs are voluntary. One argument against compulsory participation in such a program is that it would tend to be counter-productive. An essential element, the desire for change on the part of the offender, would not be present. In any event, it is clear that not all offenders would need, or could benefit from, such a program. Only those who could benefit would be considered for a program of this kind, on the analogy of programs already developed in the Australian Capital Territory and elsewhere for drink-driving offenders. Programs for domestic violence offenders are an essential measure for treating the causes, rather than just the symptoms, of domestic violence. The Australian Capital territory Health Authority should establish counselling and therapy programs for people who are violent to their partners, which should be an option for magistrates dealing with offenders. This option may be used in conjunction with condictions imposed either without proceeding to conviction[2] or, more usually, when a suspended sentence is imposed.[3] This recommendation is made tentatively because there is no available information to indicate whether a court ordered, as opposed to a voluntary, program will be beneficial. The Commission is aware that such a program may be used by offenders cynically, in order to escape a heavy punishment. Court-ordered counselling should therefore be attempted on a trial basis and the program should be carefully monitored by a committee consisting of workers in the program and a magistrate.

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1 D Wehner, *Spouse Abuse Intervention Project, Final Report,* South Australian Health Commission, 1985.

2 Crimes Act 1900 (NSW:ACT) s556A.

3 id. s556B.

PART TWO: SEXUAL ASSAULT

1. THE SOCIAL CONTEXT

a Causes and Incidence

Brownmiller, S Against our Will, Bantam Books, N Y, 1975

P.15: "... rape ... is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear."

Edwards, S Female Sexuality and the Law, Martin Robertson, Oxford, 1981.

Walker, N "Feminist Extravaganzas" (1981) Crim L R 379.

b Attitudes towards the Complainant

Edward, S op.cit.

Brownmiller's op.cit.

c Police Proceedings, Training, and New Approaches in Rape and Sexual Assault Investigation:

Extract from Women's National Commission, Violence Against Women: Report of an Ad-Hoc Working Group. Cabinet Office, London, H.M.S.O. 1986, pp.24-36.

In March 1983 the Home Office issued a Circular to all police forces (HO 25/83) offering guidelines for rape and sexual assault investigations. This followed bad publicity from reported instances where some police were judged to have used bullying tactics with women complainants and challenged their veracity unjustifiable (one interview was seen in a television programme). Such reports still occur in the press from time to time and the London Rape Crisis Centre representatives told the Working Group that they thought police still frequently disbelieved women reporting rape and made unjust assumptions about the women's role in "asking for it" or "leading on" the man. Any assumption by the police that she was at fault could combine with the guilt and self-distrust which are part of Rape Trauma Syndrome to induce the victim to withdraw her allegation, especially if she has been insensitively cross-examined. It would add to fears of the later stages of investigation and court procedure, particularly the latter, as the adversarial system of cross-examination inevitably includes attacks on her veracity and reliability.

The Working Group made contact with a number of Forces, and distributed a questionnaire to all Chief Constables in June 1985. A high total of 44 substantive replies were received; they are summarised and tabulated form in Annex III. Most Forces appear to accept that police attitudes may have been at fault and need to be reviewed, though answers varied widely in their evidence of far-reaching, practical action. A majority of Forces saw HO 25/83 as a basis for their current policies (though some had held prior reviews) and have incorporated its contents in Force Instructions and instructions used in

training. One Chief Constable told us: "I think it has drawn the attention of all to the need for the sensitive approach to the victims of rape and sexual assault."

HO 25/83 covers most aspects which the Working Group consider important in the police treatment of women victims, such as sensitivity in questioning and avoiding offensive lines of questioning, medical examination in suitable surroundings, supplying helpful information to the victim, not using a succession of officers in the investigation, maintaining contact with the victim. Policy guidelines are at best the starting point of and at worst no guarantee of effective action. Police experience suggests that to begin a real process of change profound re-examination of policy and changes in practice, new resources and new approaches are required. Increased training, new approaches in training, extending specialised training to more young male officers and more senior officers, liaison with outside agencies, examining the possibility of specialist teams should be considered if the spirit of HO 25/83 is to be implemented.

There are a number of difficult issues which the Home Office Circular did not discuss, such as the precise nature of Rape Trauma Syndrome, decisions about which police officers should be intensively trained (and suitable resources for training), the selection and training of police surgeons, the most appropriate support agencies to which to refer complainants (and the best ways of maintaining liaison with agencies), the problems of classification and recording of all reported cases.

There is also the underlying problem of attitudes to women rape victims in society at large, which can be sceptical and condemnatory, and doubtless affects the approach of many police officers, unless given greater insight into the offence and victims' reactions. There are widely different views about the incidence of false reporting in relation to this crime. It was clear from comments in answer to the WNC questionnaire that many police officers believe that a significant proportion of women who report rape are untruthful, vindictive or want to avoid the consequences of their own actions. Police officers with whom the Working Group had discussion carefully substantiated cases of false reporting in all these categories and the very experienced specialist officers of the Thames Valley Indecency Units thought these were 30 per cent of reported cases. The women's movement therefore goes too far in minimising the incidence of such cases, but police may err in the opposite direction by disbelieving individual women too readily. In some cases police officers have expressed a generally derogatory view of women's truthfulness. It is therefore necessary for the police to demonstrate that they are tackling any prejudice in their ranks by

- training, and sound example from trained senior officers
- maintaining good records of all reported cases, which could lead to eventual corroboration of women's claims when criminals are caught.

The Working Group place great importance on the measures (described below) instituted by many Forces. If some police still have blind spots in relation to the truth of allegations, the result is loss of evidence, and great difficulty in establishing the pattern of crime, which may include a significant number of repeated crimes. Those Forces who have set out most vigorously to eliminate any remaining prejudices tell us they have the dual aims of lessening suffering to women victims, and achieving higher professional standards and rates of crime detection.

(i) Training and Awareness

Replies to WNC from police forces showed that it is standard in training to include instruction on the law relevant to rape and sexual assault, and on forensic and medical matters. Typically, basic training in these matters is given in all initial and refresher courses for the uniformed branch up to Sergeant. The same ground is covered in greater detail in training CID officers. New developments in response to HO 25/83 include new modules specifically aimed at teaching sensitivity to victim's needs. These include the involvement of outside speakers, for example, from Rape Crisis Centres, the extension of training to Tutor Constables and Senior Detective officers, the use of tailor-made resources in training, for example, videos, and practice interviewing on video and longer specialist courses for women police officers. Where in their replies Forces comment on the purpose of the new developments in training, this is seen chiefly as promoting greater understanding of the victims' needs and teaching officers greater sensitivity and tact. However, studies of past police attitudes and procedure have underlined that better training has an important role to play in increasing professional performance. Officers who fail to understand Rape Trauma Syndrome are likely to draw wrong conclusions from the apparently irrational actions of victims immediately after an attack (for example, not reporting the attack immediately, not giving details to the first person they meet) and also from their demeanor. The variations in response to fear and horrifying experience are ill-understood by many. This may mislead officers in their judgement about the seriousness of the crime and may even to apprehend the accused and to obtain important forensic evidence, and possibly, to a decision to take no action. If it is fully appreciated that initial judgements, which must often be made by junior uniformed officers (mainly males), can be critical in the process of detection, the conclusion must be drawn that appropriate training has to be very widespread, and not solely focused on officers who will be involved in formal interviews.

Much of current training effort in this area, and especially that focussed on the needs of the victim, is concentrating on women police constables. Special courses for women officers range in length from a single session, lecture or seminar, up to two weeks training. Concentrating training on women officers indicates the intention that WPCs should take the original statement from a woman or child victim of a sexual attack. This does not always happen in practice: incidents may be handled at small stations with no WPCs or at times when WPCs are not available. We discussed with Detective Chief Superintendent Thelma Wagstaff (who is Chairman of the Metropolitan Police Working Party on Rape and Kindred Offences) whether, in her view, it was desirable to make taking of statements in these investigations a specifically female task. She said that in her experience it was much more acceptable to the majority of women victims to make the first detailed statement to a woman officer; groups who would find it difficult to give the same details to a man included children, elderly women and women under 30. The need for the option of a woman officer is borne out by some of the comments of rape victims interviewed in the Scottish Office Study "Investigating Sexual Assault".[1] Some of those complainants who had not seen a woman officer specifically referred to this as "the most stressful aspect of all the investigations:" "for example, one of these women said she had been upset because 'it was men, men, men all the time'".

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1 "Investigating Sexual Assault", a Scottish Office Social Research Study, Gerry Chambers and Ann Millar, HMSO (Edinburgh) 1983

Some complainants mentioned "an immediate rapport with sympathetic women officers which made it easier to talk about personal details" some of which might be of crucial importance.

Concentrating special training on women officers means that male officers would not normally fully study this subject early in their careers. There is thus a strong case for giving Senior Detective Officers special insight into the problems of the Rape Trauma Syndrome. Those directing the work of the WPCs taking the initial statements should be as well trained as the women officers. The Metropolitan Police have met this specific point by including Officers of Detective Inspector and Detective Chief Inspector rank on part of the curse held for WPCs. Recently introduced joint training, which has proved successful, is continuing and so far 83 investigating officers have been trained together with 300 WPCs. A small number of other Forces have also taken measures to introduce training of this kind for senior detectives, and in one Force, though formal training does not take place, these officers are encouraged to read about Rape Trauma Syndrome. On the other hand some Chief Constables appear to have made a firm decision that training on this subject for Senior Detective Officers is unnecessary. The Working Group find that the cause for the gravest concern. A relatively small number of rapes are investigated, which means that even an experienced CID officer may have insufficient relevant experience. It is both unwise and unjust to both victim and accused for an officer to play an important role in an investigation (which he might do from Detective Constable level upwards) without training which deliberately sets out to give an insight into Rape Trauma Syndrome and the need to collect forensic and medical evidence with the minimum of delay.

By concentrating training on women officers a body of expertise will be built up. However, if the present pattern is maintained, few of these officers will progress into CID work (in the Metropolitan Police Area, for example, only about 5% of CID Officers are women). Special attention should perhaps therefore be given to creating a core of expertise which involves both male and female officers as well as making plans for a career structure for WPCs. Another paradoxical aspect of concentrating training on women officers is that they would seem to have some natural and instinctive appreciation of the effects of a sexual assault on a woman, whereas male officers would seem to have a greater need for formal learning about the psychology of women and child victims.

Several Forces use relevant video material in training. The Working Group saw excellent films used by the Metropolitan Police at Hendon. Bedfordshire Police specifically mentioned a video "Rape is a Four Letter Word". Others record using video to enable trainees to assess their own performance in practice interview sessions. In their replies some other Forces said they would now consider adopting this technique.

Six Forces expressed satisfaction with their decision to involve outside speakers in training, eg from Rape Crisis Centres and Victim Support Schemes.

(ii) Specialisation

The final paragraph of HO 25/83 says:

> "This circular does not prescribe, and its contents do not indicate the need for the general introduction of specially trained squads, to deal

with allegations of rape. It remains open, however, to individual chief officers to consider establishing such squads if the local circumstances justify it."

Amongst the Forces who replied to WNC, two (Thames Valley and Strathclyde) specifically state that they have set up specialist task forces of police women, to cover rape and other offences. (There may be other similar schemes in existence which are not described in replies.) In addition, West Yorkshire Force are setting up similar teams of police women to be based within the two major cities in the area, Leeds and Bradford. Devon and Cornwall Force are considering setting up a Sexual Abuse Team concentrating initially on cases involving abuse of children, but they do not rule out an extension of its work to cover adults.

Thames Valley Police, who have had specialist teams in existence for over 4 years agreed to discuss their work with the Working Group. On 6 September 1985 at Reading Police Station, 5 representatives met with 2 WPCs from the specialist teams respectively working at Reading and Slough Police Stations, and a senior CID officer. The units of women police have the sole function of being involved in all aspects of inquiries relating to sexual and violent attacks on women and children. A total of 30 WPCs (5 for each of 6 areas) are selected for their personality and aptitude for the work. Members of the teams together with all other WPCs and some male officers attend a two-week specialist course. The aim was to have a member of the specialist team available at all times to interview victims, and a team member was always "on call". Officers remained attached to teams for varying lengths of time, but some now had substantial continuous experience of the work, and this facilitated liaison with eg social services and hospitals who would sometimes respond better to dealing with known officers. The longest serving team member had not been able to establish a working relationship with the Rape Crisis centre in her town, who appeared unwilling to respond to her approaches. Women officers, however, found it easier than males to obtain entry to and assistance from Women's Aid Refuges.

The WPCs showed a high degree of concern with the needs of victims and described how long-serving officers were able to maintain contact with some of those victims who still needed support after the outcome of the case. The WPC based at Reading said she could recall no case where a woman had decided to withdraw her allegation because she feared to face the investigation/court case: women did panic about their ordeal but could be persuaded that it was in the interest of other potential victims to go through with it. Officers accompanied victims to court. Thames Valley had introduced a range of measures in relation to medical examination and other aspects which were a practical expression of sympathy for victims.

In the Strathclyde Force, Female and Child Units were inaugurated in July 1984. Sixty women officers now provide a 24-hour service throughout the Force area specialising in dealing with crime against women and children. Women officers attached to the units attend a special 5-day training course, co-ordinated by a woman Chief Inspector:

> "The programme includes a component on medical examinations by the Chief Medical Officer, who also elaborates on the physical and psychological impact on victims. This is complemented by a psychiatrist describing the long-term effects of sexual attacks and a doctor from the Family Planning Service covering sexually transmitted diseases and unwanted pregnancies.

> Training is essentially task orientated and video equipment is employed in exercise situations to illustrate and emphasise the need for sensitivity during enquiries into sexual crimes. The well-being of the victim is accorded priority both at the enquiry stage and afterwards. Unit officers are introduced to available after-care facilities so that victims can be offered such services where appropriate. On a more practical level, officers are encouraged to liaise with the local agencies, establish personal contacts and ensure that victims requesting assistance obtain help."

The units also have an additional resource in the Glasgow area in two social workers (attached to the Family Planning Service) who have received training from the police in counselling victims. Their experience now makes a useful in-put to police training sessions. One benefit arising from specialised Units in Strathclyde is that they have become a catalyst for change:

> "Review of procedure is a feature of Force strategy and Unit members are encouraged to exchange views and ideas with the object of enhancing, where possible, the efficiency and professionalism of the service provided. For example, at a recent meeting between Female and Child Unit representatives and senior officers, presided over by my Deputy, the problem of younger victims being inhibited by the presence of uniformed officers was highlighted and the decision taken to have Unit officers perform duties in plain clothes."

Staffing of specialised units appears from WNCs survey to have so far involved women staff only. This is a development which should be subject to further consideration: the Edmund-Davies Inquiry on the Police for example called for "specialist departments staffed by suitable women and men."[2] The Working Group have learned of a number if individual officers, male and female, who have a special study of rape and sexual assault. Some of these officers are at a senior level, and therefore in a position to initiate measures, and to give the kind of lead which is needed to instil the right attitudes in junior officers who normally make initial contact with rape victims. In addition a senior police surgeon experienced in this work considers that contact with kindly and objective men is an essential ingredient in reassuring and rehabilitating victims.

(iii) Conduct of Investigation and Support for Victims

Substantially more than half those Forces replying to the Working Group; have a standing instruction that all rape investigations are conducted by a Detective Inspector or more senior officer. About a quarter of the Forces replying to us referred to the interview being normally conducted by a Detective Sergeant (in one case "even Detective Constable"). In "Investigating Sexual Assault" Scottish Office researchers report that well over half the cases of rape and sexual assault with intent to ravish with which they were concerned were investigated by a Detective Constable and 87.5% by either a Detective Constable or Detective Sergeant. The rank of available officers could be linked with problems of geography, and most Forces where more junior Detective Officers are used emphasised that the only officers involved were experienced. The Working Group consider it very important key interviews in these investigations should be conducted by highly experienced

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2 Committee of Inquiry on the Police, Report III, 1979, pp 87-88

officers, capable of appreciating the complex problems of women's reaction to rape and the need for great sensitivity. It seems undesirable to place this heavy responsibility on junior officers, who may be more used to dealing with routine matters, though it would be desirable to involve younger officers in support roles in order to give experience, provided this was done with the consent of the victim.

In their replies many Forces made it clear that they were implementing the advice in HO 25/83 for the conduct of investigations, and follow-up support for victims. One additional initiative was the compilation of a comprehensive leaflet of useful advice and addresses to be given to the rape victim (the West Midlands Force leaflet covers both "procedures at the Police Station and giving advice on pregnancy screening, sexually transmitted diseases, 'morning after' birth control and the agencies which can offer help and counselling"). One existing handout which we were sent was a rather impersonal document, and the presentation could have probably been improved by the adoption of a less neutral and more humane tone. If resources allow, it would be desirable to produce well-designed leaflets for ease or reading by deeply distressed victims, already intimidated by officialdom.

It appears that at senior officer level, most Forces have now accepted the need to look to the victim's physical comfort and to try to avoid an offensive line of questioning. It is widely recognised by police that the victim may be helped by support from a member of her family, a friend, or a representative of a supportive organisation. Some Forces say that they require a woman officer to be present with the victim throughout the whole process of investigation at the police station, medical examination, and afterwards to keep in touch to report progress of the investigation, and the outcome. The desirability of making contact with a support group, or a person in a position to give the victim practical assistance and counselling, is also widely accepted as a principle, though police may have had difficulties in establishing contact with some agencies, or may be unhappy with the type of support offered.

HO 25/83 draws attention to the provisions of the Sexual Offences (Amendment) Act 1976 about preserving rape victims' anonymity and keeping their sexual history with other than the accused out of the cross-examination in court. The Circular made it clear that the state of the law placed a duty on the police, also, not to make offensive enquiries about the woman's sexual history (though any immediate past history of sexual intercourse before the assault would have to be established tactfully for evidential purposes). Police in some Forces are instructed to reassure the victim about the protection offered by the Sexual Offences (Amendment) Act. Unfortunately, this may not be wholly realistic (see the Working Group's comments in Chapter III).

The Working Group has no certain means of knowing how far the instructions based on HO 25/83 are carried into practice at the working level in all Forces. Complaints in the press and by women's groups suggest that there are still problems in ensuring that Force policy filters down to station level. Representatives of Birmingham Rape Crisis Centre, for example, gave evidence to the Working Group that they have a good working relationship with West Midlands Police and spoke highly of the work of some officers but thought that proper investigation of the crime and support for victims still depended on the attitudes of officers at particular police stations: some did not inform victims of the existence of the RCC. Inclusion of modules in training courses on the psychology of victims and the need for sensitivity is relatively new,

while only a very few Forces have taken serious steps to develop teams of officers with expertise.

(iv) Medical Examination

In their replies several senior officers said that they thought police stations unsuitable for the medical examination of victims, and there has been a move towards the more frequent use of the police surgeon's own GP surgery and selected hospitals. Chief Superintendent Thelma Wagstaff of the Metropolitan Police explained to us that one of the chief disadvantages of conducting a medical examination at a police station was the frequent location of this room directly off the Charge Room, which meant that entry and exit were observed by a floating population and added to the ordeal for the woman. We discussed the Metropolitan Police decision to set up eight Victim Examination Suites to cover the MPD. Many other Forces have indicated that they have not the resources to provide purpose-built units. However, the policy of the Metropolitan Police is to seek to adapt a variety of existing premises (some in police stations, and some elsewhere). The cost of one such conversion was estimated in the region of £3,000 only, and it is possible that where there has previously been living accommodation, highly desirable shower facilities, for example, will already been available.

Some Forces have told us that they are either fortunate to have purpose-built premises (the Sheffield Medico-Legal Centre, for example) or are considering including these when new police stations are built. The West Midlands Force told us their aim was to have at least one Examination Suite to serve three areas. Some Forces say that they have adequate facilities in police stations which include facilities for showering, but it is not always clear whether all facilities can be used in privacy. Some consideration has been given to the victim's conform by providing disposable underwear and a gown if her clothes have to be removed for forensic examination, but this is not a uniform practice. The Working Group would like to see attention paid to the decor and facilities of purpose built suites with the aim of making these as comfortable and reassuring as is compatible with clinical requirements.

If Forces aim to set up a caring team for these investigations, the police surgeon is obviously a key member. He or she has to undertake the task which may be one of the most offensive to the victim, and this must be done without delay. Some Forces, at least, seem to be concerned to review their deployment of police surgeons in relation to this highly sensitive function, and measures which have either been taken or are under consideration are:

- offering the complainant a real choice of man or woman doctor

- using selected police surgeons only for this work, thus building up a specialised group

- introducing seminars for police surgeons to discuss both technical matters and the needs of the victim with, for example, the Chief Medical Officer of the Force, forensic scientists, and senior police officers with specialist knowledge. Already the Association of Police Surgeons provides courses, seminars, a useful Journal and Meetings, but these are not known to many and some are not members.

A significant challenge is involved if Forces determine to make a real choice of men and women doctors available. In the MPD, for example, there are only 11 women out of 87 police surgeons and there will be further recruitment of women to achieve adequate geographical spread. Three Forces have told us that they have attempted to recruit women police surgeons without success, and this is perhaps an area wherein women doctors and their Associations could promote the idea of more of their number undertaking this valuable social service. West Midland Police, who have not been able recently to recruit women police surgeons (though they have used them in the past), maintain a list of female doctors who have received a partial training in forensic work willing to assist fully trained police surgeons and similar measures have been taken in Northumberland.

One or two Forces have instituted special provision for the complainant's GP to be present at her examination if she wishes. One Forces also says that the examination could be by the GP if this were very important to the complainant, though clearly there is a considerable disadvantage because of lack of experience in forensic work.

There have been complaints in the past about lack of advice for women on:

- possible pregnancy
- contracting sexually transmitted diseases
- other physical difficulties - for example, inability to have intercourse comfortably for a period following the attack.

It seems that police surgeons, have, in the past, rarely seen it as their role to give complainants clear and useful advice about dealing with these problems via hospitals, their own GP or services such as the British Pregnancy Advisory Service. There now seems to be some change in this area: it has become standard practice in some Forces for police officers to hold useful addresses which they make available to victims (in some cases they may make follow-up hospital appointments for victims, and there may be arrangements to avoid public sessions of clinics in favour of private appointments); leaflets covering this information may be provided; the police surgeon or doctors involved in forensic work may liaise with GPs and/or with hospitals. The Working Group cannot be sure how far these arrangements prevail, and there is no doubt considerable local variation. There seems at least to be fairly widespread acceptance that complainants should not now simply be allowed to 'fend for themselves' in these respects - especially as many women could be completely ignorant of the possible physical consequences of rape.

It will be wrong to conclude this section without alluding to the impression which has been given to us by women's support agencies, by some senior police officers, and others that a proportion of police surgeons are not suited to this aspect of their work. It may be that some doctors have a distaste for dealing with the consequences of sexual attacks, or that this particular task is at a considerable remove from the other duties of police surgeons, or the fact that it requires a special humane approach has not always been taken on board. More evidence is likely to emerge from a study of Rape being undertaken by the Medical Women's Federation.

Another medical aspect of importance in the detection of crime is that evidence such as bruising not visible on first examination may appear later

possibly days after the attack. Thus further medical examination monitored by the police can be helpful to the prosecution (and is standard practice in France). West Midlands Police, for example, told representatives of WNC that where the nature of the attack was such as to indicate that evidence of bruising may be revealed later then the victim would be seen again and if necessary arrangements made for a further medical examination or photograph. It is important that this should become standard practice laid down in procedure and included in any training for police surgeons: as a first step victims should be urged to report to the police any new evidence of bruising noted by them.

(v) Liaison with Outside Organisations

In their replies to WNC a number of Forces note the value of a multi-agency approach to community policing problems which can involve:

- use of representatives of outside organisations to take sessions on police training courses
- the police taking part in training of volunteers, so that these can give victims more informed and effective help
- referring victims to Personal Social Services or voluntary agencies, and maintaining the kind of close liaison which facilitates successful referral
- enabling rape victims to be accompanied by representatives of women's support organisations throughout all procedures including medical examination and interviews.

The main support agencies (apart from medical services) used by police in the context of sexual assault are:

- Social Services
- Victim Support Schemes
- Rape Crisis Centres and similar bodies such as the Sexually Abused Victims' Emergency Service - SAVES
- Women's Aid

Rape Crisis Centres are the voluntary agencies specific to the care of rape and sexually assaulted victims. Several Forces have told us that they have an excellent working relationship with their local Rape Crisis Centre (and one Force maintains contact with the Centre in a neighbouring country). THere were seven references in the replies to WNC to the use of Rape Crisis Centre speakers on training courses for police. Differences of standpoint and approach can, however, make co-operation difficult. For example, some women who work in Rape Crisis Centres make the prior assumption that there is a total absence of a proper understanding by courts and police in particular, as well as society in general, of the victims' trauma and needs. Past grave shortcomings have meant that they may see police investigations and any court case as additional ordeals forth victims which they should not be obliged to undergo unless they wish. Representatives of the London Rape Crisis Centre

told us that they advised women who came to them that they must exercise an absolutely free choice about reporting the crime, and they also seek to give women a realistic assessment of the experience they may face in police stations and courts. If the victim decides to report the crime, Rape Crisis Centre staff will then seek to accompany her and support her throughout the investigations in police stations and, where possible, through the court case. Clearly it is in the best interest of society for all women attacked to report crimes, and one way to achieve this is for police to liaise closely with Rape Crisis Centres, to convince staff that they are in accord with their aim of minimising the victim's ordeal and to use the staff's insight and experience as widely as possible in their own training. Staffs of Rape Crisis Centres also need to appreciate that the police have a technical task to perform which is necessary in order to protect other women from criminals, who, if undetected, will most probably commit multiple crimes. In her evidence to the Working Group, Dr Susan Edwards (Polytechnic of Central London) referred to her experience of hostile attitudes leading to lack of co-operation with the police sometimes adopted by statutory and revoluntary agencies in London. During her extensive research in this area she noted:

> "I am gravely concerned about lack of laision in certain areas in London between the police and other groups ... Indeed, it is the policy of certain groups to refuse to co-operate with others, the police in particular ... If liaison is the important policy for the police, if there is a need to refer as clearly there is, then other agencies must recognise that there first role is one of co-operation and reciprocity."

Dr Edwards also refer to the needs for police to establish precisely who are the individuals most appropriate to contact within agencies. The Working Group consider that it is very important that Rape Crisis Centres and police forces who have not yet achieved a good mutual understanding should set out to do so. Building such bridges could be one of the most valuable results of setting up specialised police units with the remit to make contacts of this kind.

Victim Support Schemes as distinct from Rape Crisis Centres have been set up chiefly to deal with victims of violent crime other than those of rape and sexual assault. The aim appears to have been an essentially 'neighbourly' service and victims' need for more informed and specialised counselling in rape and sexual assault cases might seem to rule out the use of these volunteers. However, some Forces have set out to give groups of VSS volunteers training in dealing with this special category of victims, and then to use them in counselling. For example the Metropolitan Police recently provided facilities at Hendon Police College for about 40 volunteers to have a weekend training course, which was partly organised by VSS with outside speakers and lectures from the police. A further weekend course will take place in November 1985. Other Forces refer to the training of selected volunteers. Strathclyde Force has given training to, and used for counselling, two social workers attached to their local Family Planning Association.

(vi) Raising Standards of Effectiveness

A number of Forces have made reference to the need for "increased professionalism" in the investigation of rape and sexual assault cases. The use of this term is heartening as it implies that procedures will be improved,

training intensified, and the purely human prejudices which can interfere with the proper investigation of this crime will be replaced by greater objectivity. Some Forces have clearly undertaken a thorough re-examination of the likely attitudes of their officers and how these could be an obstacle to successful detection and prosecution of perpetrators. However, there is some evidence that this more profound approach is still more the exception than the rule. In their replies to WNC, it is clear that senior officers appreciate the need for tact, sensitivity, more caring attitudes towards the victim, giving more information and being more closely concerned with follow-up.

However, it is perhaps significant that neither HO 25/83 itself, nor our police respondents discussed the nature of the crime of rape and the deeply rooted prejudices and myths which create difficulties in handling complaints. A popular view of this crime is that it is sexual - that is, likely to be committed by a 'loner' or inadequate person who is sex-starved and attacks a stranger because of violent physical desire. This type of interpretation leads to concentration on the justification for the attack - did the woman herself take advantage of the sex-starved man; did her actions or her style of dress "lead him on"? Another interpretation of the crime is that it is essentially a crime of violence, the aim not being sexual pleasure but a sadistic attack of which rape itself may be only one feature. In the latter interpretation the woman's conduct is hardly material: she can be old or young; 'attraction' in the normal sense plays no part in inducing the attack. Women's support organisations have often set out to destroy what they see as myths about rape, emphasising that all women are at risk. Possibly, these claims may go too far. The majority of reported rapes in the UK are on younger women (13 - 29),[3] and include cases where sexual attraction and an incipient relationship to which the woman consents ends in a sexual act being forced upon her. "Investigating Sexual Assault" reaches the conclusion that in such cases some police take too casual an attitude to the importance of the woman's consent during an impassioned episode, and show too much sympathy for the male agressor, neglecting the woman's right to decide whether or not she wanted intercourse. The police of course often claim that in their line of questioning they must be concerned with the testing of the witness which may take place in court, and to her ability to stand up to the easiest line of defence: that is, she was sexually attracted to the rapist and consented. Whilst there is some validity for this argument police would be seen to show more concern for victims if they more often postponed their main investigatory interview until after the victim was rested. All these issues need a thorough discussion in police training, together with assessment by police officers of their own values and opportunity for hearing the actual experiences and views of victims (or those who have special knowledge of these). The results of this process might not change an individual police officer's basic standpoint but it could be to create a new respect for the complexity of these crimes, and eliminate some stock responses which are offensive to the complainant and hinder the process of obtaining useful evidence from her.

A number of senior police officers drew out attention to the proportion of allegations which had subsequently been withdrawn: in one Force there were 51 cases of rape reported, 17 of which were subsequently withdrawn.

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3 But under-reporting of rape means that all statistics of reported offences including those of age-group, are unreliable: research would need to be taken to assess if older women are less likely to report rape.

This led to the comment:

> "It seems to me that not all our critics or the public at large understand the balance between being sensitive to the trauma of rape and sexual assault but at the same time being a little sceptical. It is not an easy balance to obtain."

Another Force reported 20 cases of alleged rape in 1984, 10 of which were subsequently withdrawn. However, in considering figures such as this the Working Group is bound to ask how careful are the police to try to understand the nature of a withdrawn allegation; do they too readily accept that withdrawal is evidence of falsity rather than of fears about proceeding?

Thames Valley Police told members of the Working Groups that so far in 1985 of 64 reported cases of rape, about one third had been false. The police officers described the different types of police accusation concerned: some designed to protect pregnant women from censure, other vindictive in nature. The Metropolitan Police are engaged in a review of every "no crimed" allegation of rape to try to ensure that this only happens if complainants are mistaken, frivolous or vindictive. The Working Group would hope and urge that careful reviews by senior officers would become more widespread.

Detective Chief Inspector Ian Blair (Metropolitan Police) has written a valuable account of his studies in the UK and the US, "Investigating Rape: A New Approach for Police",[4] which discusses at length the police response to the recording and prosecution of allegations of rape. He argues that the police are aware of the high standard required at court and tend to apply that standard to the initial recording of crime. He suggests that the widely discussed theory of a high rate of false reports springs from the:

> "Confusion of those allegations which are inherently false with those allegations which do not contain sufficient evidence to warrant prosecution." (Chapter 5, page 54)

He suggests that clearer guidelines (such as those which now exist in the Metropolitan Police) would reduce the proportion of allegations which were "no-crimed", leading to an enhanced standard of treatment for victims and increased criminal intelligence for the police. Both of these would ultimately result in a higher reporting and detection rate with a consequent reduction in these socially abhorrent crimes.

2. THE LEGAL DEFINITION AND CONCEPT OF RAPE

a Scope of the Offence

(i) Physical Circumstances

Confronting Violence: A Manual for Commonwealth Action. Commonwealth Secretariat, 1987, pp. 74-78.

Crimes Act (Victoria) 1958

S. 2A (1)

'Rape' includes the introduction (to any extent) in circumstances where the introduction of the penis of a person into a vagina of another person would be rape, of

(a) the penis of a person into the anus or mouth of another person (whether male or female); or

(b) an object (not being part of the body) manipulated by a person (whether male or female) into the vagina or anus of another person (whether male or female)

and in no case where rape is charged is it necessary to prove emission of semen.

Crimes Act (N.S.W.) 1900

Sexual intercourse

61A. (1) For the purposes of this section and sections 61B, 61C and 61D, "sexual intercourse" means -

(a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by -

(i) any part of the body of another person; or
(ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes;

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;

(c) cunnilingus; or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

What conduct should be included in the concept of rape?

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4 Published by Croom Helm Ltd, in conjunction with The Police Foundation, 1985

The English Criminal Law Revision Committee (15th Report, **Sexual Offences**, CMND. London 9213, London, H.M.S.O., 1984) argues that:

(i) the concept of rape as a distinct form of criminal misconduct is well established in popular thought and corresponds to a distinct form of wrongdoing, and

(ii) the risk of pregnancy is an important distinguishing characteristic of rape and thus the traditional concept of rape should be retained.

Do you agree?

McNiff (McNiff, F V, 'Reform of Sexual Offences in Victoria: The Time to Abandon the Victorian Perspective' (1980) 4 Criminal Law Journal 328 at p.332) suggests:

> "By adjusting the definitions and the penalties to allow for harm, both psychological and physical, the law can attach liability to all who deny others the right of control over their own bodies, irrespective of gender".

Do you agree?

(ii) Should there be a scheme of graded sexual assault?

Confronting Violence, pp 75-7.

Temkin, J, Rape and the Legal Process pp 95-109.

A number of jurisdictions in the Commonwealth have produced new graded sexual offence laws with the idea of giving greater prominence to the element of violence.

These are modelled, to some extent, on the **Michigan Criminal Conduct Act 1974.**

> "520b. (1)A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists"
>
> (a) That other person is under 13 years of age.
>
> (b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by one or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(i) to (v).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, 'to retaliate' includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognised as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

520c. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(b) That other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, or is related by blood or affinity to the fourth degree to the victim, or is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by one or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in sections 520b(1)(f)(i) to (v).

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520(b)(1)(f)(i) to (v).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520(b)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

(a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (iv).

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the fourth degree is a misdemeanour punishable by imprisonment for not more than 2 years, or by a fine of not more than $500.00, or both."

Canadian Criminal Code R.S.C. 1970.

Sexual Assaults

(1) (Simple) Sexual Assault

246.1 (1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for ten years; or

(b) an offence punishable on summary conviction.

(2) Sexual Assaults Involving Bodily Harm, Weapons or Third Parties

246.2 (1) Every one who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation thereof,

(b) threatens to cause bodily harm to a person other than the complainant,

(c) causes bodily harm to the complainant, or

(d) is a party to the offence with any other person, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(3) Aggravated Sexual Assault

246.3 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

Crimes Act (N.S.W.) 1900

Sexual assault category 1 - inflicting grievous bodily harm with intent to have sexual intercourse.

61B. (1) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with the other person shall be liable to penal servitude for 20 years.

(2) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 20 years.

Sexual assault category 2 - inflicting actual bodily harm, &c., with intent to have sexual intercourse.

61C. (1) Any person who -

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument,

with intent to have sexual intercourse with the other person shall be liable to penal servitude for 12 years.

(2) Any person who -

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person,

with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 14 years.

(3) Any person who, in the company of others -

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument,

with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 14 years.

(4) Any person who, in the company of others -

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person,

with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 14 years.

Sexual assault category 3 - sexual intercourse without consent

61D. (1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be liable to penal servitude for 8 years or, if the other person is under the age of 16 years, to penal servitude for 10 years.

(1A) Any person who has sexual intercourse with another person who -

(a) is under the age of 16 years; and

(b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person,

without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse.

(1B) Any person who, in the company of others, has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be liable to penal servitude for 10 years or, if the other person is under the age of 16 years, to penal servitude for 12 years.

(1C) Any person who, in the company of others, has sexual intercourse with another person who -

(a) is under the age of 16 years; and

(b) is (whether generally or at the time of sexual intercourse only) under the authority of the person,

without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be liable to penal servitude for 14 years.

(2) For the purposes of this section a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse.

(3) For the purposes of this section and without limiting the grounds upon which it may be established that consent to sexual intercourse is vitiated -

(a) a person who consents to sexual intercourse with another person -

(i) under a mistaken belief as to the identity of the other person; or

(ii) under a mistaken belief that the other person is married to the person, shall be deemed not to consent to the sexual intercourse;

(b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) shall be deemed to know that the other person does not consent to the sexual intercourse;

(c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, shall be regarded as not consenting to the sexual intercourse; and

(d) a person who does not offer actual physical resistance to sexual intercourse whall not, by reason only of that fact be regarded as consenting to the sexual intercourse.

Sexual assault category 4 - indecent assault and act of indecency

61E. (1) Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to imprisonment for 4 years or, if the other person is under the age of 16 years, to penal servitude for 6 years.

(1A) Any person who assaults another person who -

(a) is under the age of 16 years; and

(b) is (whether generally or at the time of the assault only) under the authority of the person,

and at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to penal servitude for 6 years.

(1B) Any person who, in the company of others, assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to penal servitude for 6 years.

(1C) Any person who, in the company of others, assaults another person who -

(a) is under the age of 16 years; and

(b) is (whether generally or at the time of the assault only) under the authority of the person,

and at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to penal servitude for 8 years.

(2) Any person who commis an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with that or another person, shall be liable to imprisonment for 2 years.

(2A) Any person who commits an act of indecency with or towards a person who -

(a) is under the age of 16 years; and

(b) is (whether generally or at the time the act is committed only) under the authority of the first mentioned person, or who incites any such person to an act of indecency with that of another person shall be liable to imprisonment for 4 years.

(3) For the purposes of this Act, a person who incites a person under the age of 16 years to an act of indecency, as referred to in subsection (2), shall be deemed to commit an offence on the person under the age of 16 years.

Legislation which introduces gradations of sexual assault usually bases the gradations on escalating degrees of violence rather than the sexual attack itself. Rape which is committed where the victim submits out of fear of her attacker not arising out of actual or threatened violence comes low in the gradation. Do you think that this might lead to the misconception that sexual aggression per se is trivial in comparison with sexual aggression accompanied by violence?

NOTE:

Department of Justice and the Institute of Criminology, New Zealand, Rape Study, Volume 1, A Discussion of Law and Practice, 1983, p.109:

> "The stress upon the violent rather than the sexual component of the offence in determining its seriousness, especially in the New South Wales and Canadian models, is not in keeping with the way in which most victims described their rape experience in this study. They saw it as an act of extreme humiliation and degradation which was qualitatively different from other types of assaults. Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. Some felt that the beating and bruising they received assisted them in the criminal justice process, while the rape itself was not accorded the centrality it deserved. Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved, would therefore seem to be at odds with the perception of many victims. As the Auckland Rape Crisis Centre pointed out, it would punish the associated physical violence and still ignore the violence of rape."

Do you see any advantages in the redefinition of an sexual assault which incorporates a gradation of offences?

b Labelling the Crime

Should the word "rape" be retained?

Confronting Violence, pp 77-78.

It has been argued that the term 'rape' is synonymous in our culture with a particular form of wrongdoing. It is claimed, accordingly, that removal of

the label would detract from that image of the behaviour in the public mind and result in trivialisation of the offence. Alternatively, it is suggested that the term 'rape' is an emotional term which adds to the trauma and stigmatisation of complainants.

With which view are you more sympathetic?

Giacopassi, D J and Wilkinson, K R, 'Rape and the Devalued Victim' (1985) Law and Human Behaviour 367.

Schwartz, M D and Clear, T R 'Toward a New Law on Rape' (1980) 26 Crime and Delinquency 129.

c Sexual Assault within Marriage

Confronting Violence, p. 78-80.

Hale, Sir M, History of the Pleas of the Crown (1736) p.636:

> 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract.'

Clarence [(1888)] 22 Q.B.D. 23

Freeman, M D A, 'But If you Can't Rape your Wife, Whom can you Rape?' (1981) Family Law Quarterly 1.

New Law Journal, August 21, 1987. p.777:

Marital Rape Criteria Extended

In a landmark decision last Thursday, an undivorced and not judicially - separated husband was sentenced to five years' imprisonment for raping his wife. The decision .... is a logical extension of the accepted principle: the couple concerned were living their separate lives under the same roof, in separate rooms. They had agreed to leave each other alone, and the first steps towards a divorce had been instigated. Theirs was not a harmonious relationship. Things would have come to a pretty pass if a "husband" could have sexual intercourse with his wife at knifepoint and be exempt from a rape charge on a technicality.'

Crimes (Amendment) Act (Vic.) 1985

> "The existence of a marriage does not constitute, or raise any presumption of consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person".

The English Criminal Law Revision Committee Working Paper, Sexual Offences, London; H.M.S.O., 1980, para 33 argues:

> "Spouses have responsibilities towards one another and to any children there may be as well as having rights against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for any children could be grave, and for the wife too."

Do you agree?

d The Age of the Offender

At common law males under 14 are conclusively presumed to be impotent.

Crimes Act (N.S.W.) 1900

S61A. (2) For the purposes of sections 61B, 61C and 61D, a person shall not, by reason only of age, be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

(3) Subsection (2) shall not be construed so as to affect the operation of any law relating to he age at which a child can be convicted of an offence.

THE INDEPENDENT Saturday 7 May 1988

Boy, 16, given three years for rape

A boy who raped a councillor in her housing surgery was yesterday ordered by a judge to be detained for three years.

The boy 16, admitted rape. It was said in court that from the age of 12 he had been the victim of a man who abused him and introduced him to transvestite behaviour and the occult. Judge John Evans QC, at Dudley Crown Court, directed neither the boy nor the councillor be identified.

Geoffrey Clough, for the defence, said the boy, aged 15 at the time of the offence, had never intended rape and was contrite about the effect on the woman. He handed in a report indicating that the boy had been the victim of abuse, transvestism and the occult. The judge said: "You were only 15 at the time and I am perfectly satisfied that the evil and unpleasant man mentioned in the report put into your mind things which ought not to be there."

e Consent

In most Commonwealth countries, consent is the crux of the definition of the crime. Consent is material in two contexts:

i) rape is defined as sexual intercourse without the consent of the victim, and

ii) consent determines the guilt of the accused as not only must he perform the act of penetration, but he must have the required mens rea or mental element. In most jurisdictions he must be aware that his victim is not consenting or, at least, he must be recklessly indifferent as to whether she is or not.

The Victim's Consent

Confronting Violence. pp 80 - 83.

Temkin, Rape and the Legal Process. pp 60 - 76, pp 109 - 118.

Law Reform Commission of Victoria

Discussion Paper No 2 Rape and Allied Offences: Substantive Aspects. August 1986: Para 2.15: This is it.

> "The concept of consent in the context of rape is a difficult one. It may be tempting to suggest that one either consents to an act of sexual penetration or one does not. Because of the complexities of human relationships and sexual behaviour, however, there are often situations when the question of consent is far from clear. Consent is an attitude of mind and a phenomenon of the will. This means that it is often difficult in the detached, forensic atmosphere of a courtroom, sometimes many months or even years after the event, for a court to determine whether there was consent to a sexual act. Where a stranger leaped out from behind a bush in the middle of the night armed with a knife and sexually attacked another person it is easy to conclude that there was no consent. It is much more difficult to do where the incident in question occurred in the context of a relationship of long standing sexual intimacy and where there was no violence of overt threat of violence.
> While consent may have been absent in both, the latter case is likely to create more difficulty for outsiders, in general, and for the legal system in particular."

Olugboja (1981) 73 Cr app. R 344

In the case of the question of law for the English Court of Criminal appeal was 'whether to constitute the offence of rape it is necessary for the consent of the victim of sexual intercourse to be vitated by force, the fear of force, or fraud, or whether it is sufficient to prove in fact the victim did not consent;

The Court stated at p. 350:

> "They (the jury) should be directed that consent, or absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission ... In the majority of cases, where the allegation is that the intercourse was had by force or the fear of force, such a direction coupled with specific references to, and comments on the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it ...

we think an appropriate direction to the jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw ... where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case."

Consider how stereotypical attitudes towards sexual behaviour, particularly female sexual behaviour, colour the attitudes of the police, the jury, the judge to a complainant of sexual assault.

See Naffin, N, An Inquiry into the substantive Law of Rape, Women's Adviser's Office, Department of Premier and Cabinet, S.A., 1984, p.24

> "... once consent is brought into issue, which seems to be often, the defence is likely to argue that the victim consented, and that even if she did not, she gave every indication to the accused that she did, and therefore he, the accused, lacked the requisite guilty intent. With the defence thus presented to the jury - as two conflicting and alternative versions of the incident - the aspect of the accused's story which either convinces or fails to convince the jury becomes a private matter for the jury room. Thus, the best one can do in trying to determine the proportion of rape cases which turns on the issue of the victim's lack of consent is to say that, to a greater or lesser extent, most probably do."

Do you think that the prosecution should be obliged to disapprove the complainant's consent?

Consider here the Michigan Sexual Conduct Statute 1974 (p infra) which omits all references to consent, framing the crime in terms of the prohibited action, so that it is committed either where sexual intercourse is achieved by the use of force or by the incapacity of the victim to resist.

Naffin, N, An inquiry into the substantive Law of Rape, p 26

> "A number of respondents to the present author's questionnaire argued that amendments of his nature (ie the Michigan Statute) could and should shift the focus of the crime from the victim to the accused. It was suggested that the law should talk in terms of coercion, that the crime should be defined exclusively in terms of the actions of the accused, and not in terms of the spirit in which the accused's attitudes were received - that is, whether or not the victim was consenting.

However, all lawyers interviewed - prosecutors, defence counsel and academics - maintained that it is impossible to avoid the issue of consent by amendment of this kind. Moreover, the Michigan experience since the passage of the Criminal Conduct Act suggests that the lawyers are correct. The reason seems to be as follows.

Except where rape is brutal, its only distinguishing feature - that which makes it different from lawful sexual intercourse - is the lack of willingness of the victim. This can be described in a number of ways, but whatever it is called, the facts of the crime, the key issues in the courtroom and therefore the experience of the victim, remain the same. Both the prosecution and defence remain interested in determining whether the victim wanted to engage in sexual intercourse. The sort of evidence which will tend to prove that the accused "forced" (or "coerced") the victim to engage in intercourse, essentially will be the same as the evidence indicating whether or not the victim consented. Courtroom tactics, and therefore the experience of the victim, are unlikely to vary with semantic changes to the law."

Do you agree?

New South Wales has attempted to shift the focus to the conduct of the accused in cases of what would have been, prior to the legislation, brutal rapes or rapes with weapons.

Crimes Act (N S W) 1900

Sexual assault category 1 - inflicting grievous bodily harm with intent to have sexual intercourse.

61B (1) Any person who maliciously inflicts grievous bodily upon another person harm with intent to have sexual intercourse with the other person shall be liable to penal servitude for 20 years.

(2) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 20 years.

Sexual assault category 2 - inflicting actual bodily harm and (c), with intent to have sexual intercourse.

61C (1) Any person who:

(a) Maliciously inflicts actual bodily harm upon another person, or

(b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument,

with intent to have sexual intercourse with the other person shall be liable to penal servitude for 12 years.

(2) Any person who:

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person,

with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 12 years.

(3) Any person who, in the company of others -

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument,

with intent to have sexual intercourse with the other person shall be liable to penal servitude for 14 years.

(4) Any person who, in the company of others -

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person,

with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 14 years.

Do you think a woman should be regarded as consenting to sexual activity if her submission is gained by:

* ***force, explicit or implicit, against her;***

* ***force, explicit or implicit, against her child;***

* ***force, explicit or implicit, against her companion;***

* ***fraud or deception, either as to the nature of the act or as to the identity of the actor;***

* ***blackmail of herself or someone she cares about;***

* ***threats of termination of employment?***

(b) Statutory Definition of Consent
(Crimes Act (N S W) 1900 s 61D(3))

"For the purposes of subsection (1) and (1A) and without limiting the grounds upon which it may be established that consent to sexual intercourse is vitiated:

a) a person who consents to sexual intercourse with another person:

i) under a mistaken belief as to the identity of the other person; or

ii) under a mistaken belief that the other person is married to the person,

shall be deemed not to consent to the sexual intercourse;

b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) shall be deemed to know that the other person does not consent to the sexual intercourse;

c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror instilled in, the person who submits to the sexual intercourse or any other person, shall be regarded as not consenting to the sexual intercourse; and

d) a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse."

Indian Penal Code, 1860
s 375 (Substituted by the Criminal Law (Amendment) Act, 1963

Rape - A man is said to commit "rape" who, except in the case hereinafter expected, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

First - against her will

Secondly - without her consent

Thirdly - with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - with her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - with or without her consent when she is under sixteen years.

Explanation - penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape.

Criminal Code (Canada) R S C 1979, c C-34
s 244(3)

"For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:

a) the application of force to the complainant or to a person other than the complainant;

b) threats or fear of application of force to the complainant or to a person other than the complainant;

c) fraud;

d) the exercise of authority."

Crimes Act (NZ) 1961
128A.

Matters that do not constitute consent to sexual connection:

(1) The fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the purposes of s 128 of this Act.

(2) the following matters do not constitute consent to sexual connection for the purposes of section 128 of this Act.

a) the fact that a person submits to or acquiesces in sexual connection by reason of:

i) the actual or threatened application of force to that person or some other person;

b) the fact that a person consents to sexual connection by reason of:

i) a mistake as to the identity of the other person; or

ii) a mistake as to the nature and quality of the act.

New South Wales Women's Electoral Lobby
Draft Sexual Offences Bill, 1977

Deems consent to any sexual act to be vitiated:

i) when the accused overcomes the victim through the actual application of physical force or violence, or by sudden attack.

ii) when the accused coerces the victim by threatening to use force, violence, or physical strength on the victim.

iii) when the accused coerces the victim to submit by threatening to use violence on a companion of the victim.

iv) when the accused coerces the victim to submit by threatening future punishment to the victim, or any other person. Future punishment as used in the sub-section included threats of future physical or mental punishment, kidnapping, false imprisonment or forcible confinement, extortion, or public humiliation or disgrace.

v) when the accused, without prior knowledge or consent of the victim administers to or has knowledge or someone else administering to the victim any intoxicating substance, drug or anaesthetic, which mentally incapacitates the victim.

vi) when the accused by words or acts induces the victim to submit in the belief that the person undertaking the act of sexual intercourse or the sexual act is some other person.

vii) when the accused by words or acts induces the victim to submit in the belief that the act of sexual intercourse or the sexual act is some other act.

viii) when the accused is in a position of authority, or professional or other trust over the victim, and exploits this position to induce the victim to submit.

xi) when the victim is physically helpless to resist, or is mentally incapacitated or emotionally incapable of understanding the nature and character of the act or its implications.

x) when the victim submits under circumstances involving kidnapping, false imprisonment or forcible confinement or extortion.

Statutory sections such as the above seek to spell out the sort of behaviours which the law will regard as consenting and non-consenting. Do you think they ameliorate the law relating to rape?

In some jurisdictions "submission" to sexual activity in certain circumstances has been rendered a criminal offence:

Indian Penal Code, 1860

s 376B Intercourse by public servant with woman in his custody - whosoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment ... for the term which may extend to five years and shall also be liable to a fine.

s 376C Intercourse by superintendent of jail, remand home etc - whoever being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment ... for a term which may extend to five years and shall also be liable to a fine.

s 376D Intercourse by any member of the management or staff of a hospital with any woman in that hospital - whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment ... for a term which may extend to five years and shall also be liable to a fine.

Crimes Act (NZ) 1961

129A Inducing sexual connection by coercion -

(1) Everyone is liable to imprisonment for a term not exceeding 14 years who has sexual connection with another person knowing that the other person has been induced to consent to sexual connection by -

(a) an express or implied threat that the person having sexual connection or some other person will commit an offence which is punishable by imprisonment but which does not involve the actual or threatened application of force to any person; or

(b) an express or implied threat that the person having sexual connection or some other person will make an accusation or disclosure (whether true or false) about misconduct by any person (whether living or dead) that it likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made; or

(c) an express or implied threat by the person having sexual connection to make improper use, to the detriment of the other person, of any power or authority arising out of any occupational or vocational position held by the person having sexual connection or any commercial relationship existing between that person and the other.

Do you think "submission in these circumstances should be deemed a lesser offence?

Crimes Act (NSW) 1900

65A. (1) In this Section

"non-violent threat" means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.

(2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, be liable to penal servitude for 6 years.

(3) A person does nto cimmit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

f **The Accused's Mental State**

Confronting Violence, pp 83-85

Temkin, J, Rape and the Legal Process pp 76 - 91.

DPP v Morgan [1975] 2 All E R 347.

House of Lords:

Morgan, one of the appellants, invited three strangers to have sexual intercourse with his wife. They alleged that Morgan told them she was "kinky" and was likely to struggle to get "turned on". Morgan denied having said this. All four had intercourse with Mrs Morgan, using violence to overcome her resistance. The three strangers claimed that they believed Mrs Morgan was consenting.

At trial, the judge directed the jury that unless their belief was based on reasonable grounds, it could not constitute a defence to rape. They were convicted of rape, whilst Morgan was convicted of aiding and abetting. They appealed to the Court of Appeal and finally to the House of Lords.

Lord Edmund Davies dismissed the appeal on the grounds that there had been no misdirection as any mistake as to the complainant's consent had to be based on reasonable grounds, while Lord Fraser of Tullybelton, although dismissing the appeal on the grounds that there had been no miscarriage of justice, held that if an accused believed in fact that the woman had consented, whether that belief be reasonable or unreasonable, he must be acquitted. He said "... the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was truly held by the defendant, but that is all" (p. 382).

Consider the case of Morgan. Why do you think some people called it "a rapist's charter"?

The decision was followed by the establishment of the Heilbron Committee (See Report of the Advisory Groups on the Law of Rape, Cmnd 6352 (1975)), the view of which can be summarised: (p.9).

The law recognises that man is susceptible to error and does not demand that he may never be mistaken in his mental appreciation or perception of the actual circumstances surrounding his actions. In the case of rape the man who makes a mistake fails to appreciate the

woman's lack of consent or misinterprets her actions but he does not intend deliberately nor recklessly to commit the crime, a mistaken, though erroneous, belief is inconsistent with and negatives the requisite mental element ie either an intent to have sexual intercourse with the complainant knowing she does not consent, or recklessly, not caring whether she was a consenting party or not. Conversely, if the jury were to find that the accused did have sexual intercourse either with such intent or recklessly, this should have the effect of negativing the existence of any mistake, for if he intended to have non-consensual sexual intercourse, there could be no question of mistake, and if he did not care whether she was consenting or not, he could hardly be said to have held any genuine belief, one way or the other."

Sexual Offences (Amendment) Act (England and Wales) 1976
S 1 (1):

A man commits rape if

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and

(b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

Crimes Act (NSW) 1900

S 61D(2) for the purposes of sub-section (1), a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse.

* ***How far do you believe that a subjective element should be part of the law of sexual offences?***

* ***Some commentators argue that the rentention of a subjective element allows defendants to exploit stereotypical views of women and sexual encounters. For example, some commentators argue that its retention allows for the exploitation of the myth that women wish to be raped. What do you think?***

Consider the following statements:

"The definition of rape requires that the woman was not consenting. If there is sufficient evidence to satisfy a jury that consent was absent, can it not be argued that this is sufficient to distinguish in terms of culpability, the mistaken defendent from those men who have never had sexual intercourse with a woman who was not consenting? If the defendant is so out of touch with the reality of the situation, is there not a suggestion that he should take more care to ensure that his sexual partner is willing? Social protection might be better served by the punishment of a defendant who failed to acquaint himself with this (seemingly) elementary fact. (Wells, C., "Swatting the Subjectivist Bug" [1982] The Criminal Law Review p. 209 at p. 213)

"There can be no doubt that it is a major harm for a woman to be subjected to non-consensual intercourse notwithstanding that the man may believe he has her consent. There can be little doubt that the cost of taking reasonable care is insignificant compared with the harm which can be avoided through its exercise. Indeed, the only cost I can identify is the general one of creating some pressure towards greater explicitness in sexual contexts. To accept an honest but unreasonable belief in consent as a sufficient answer in these circumstances is to countenance the doing of a major harm that could have been avoided at no appreciable cost." (Pickard, T "Culpable Mistakes and Rape Relating Mens Rea to the Crime: (1980) 30 University of Toronto Law Journal p.75 at p.77).

"... sexual relationships are far more complex than driving a car, and it is silly to pretend otherwise. This society is more open about sexual relationships that it used to be, but, even so, it is indisputable that sex is surrounded by a good deal of humbug, misinformation, prejudice and fear. The kind of mistake under discussion is just as likely to have occurred through ignorance and prejudice as through callousness or viciousness. Sexual interaction can be extraordinarily complex and confused, and the mistake can arise as a consequence of the incorrect perceptions of both parties." (Goode, M "The Mental Element of Rape, The Naffin Report and other Questions: A Defence of the Common Law" (1985) a Criminal Law Journal p.17 at p.31).

With which view are you most sympathetic? Why?

Crimes Act (NZ) 1961

S 128(2) A male rapes a female if he has sexual connection with that female occasioned by the penetration of her vagina by his penis -

(a) without her consent; and
(b) without believing on reasonable grounds that she consents to that sexual connection.

(3) a person has unlawful sexual connection with another person if that person has sexual connection with the other person -

(a) without the consent of the other person; and
(b) without believing on reasonable grounds that the other person consents to that sexual connection.

Indian Evidence Act 1872

S114A Presumption as to absence of consent in certain prosecutions for rape - In a prosecution for rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of sub-section (2) of S. 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

S 376(2) Whoever -

(a) being a police officer commits rape -

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant, or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place of institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(g) commits gang rape.

Do you believe that the test introduced into the New Zealand legislation should be introduced in other jurisdictions?

Should certain classes of offenders, for example, police officers or jail superintendents accused of sexually assaulting those in their custody, be required to give an account of themselves as in the Indian Statute?

3. PROCEDURES

a Police Procedures on Complaint and Investigation

Confronting Violence pp 110 - 139

Temkin, J Rape and the Legal Process, pp. 155 - 157; pp 158 - 162.

Kelly, D P "Victims' Reactions to the Criminal Justice Response", Paper delivered at the 1982 Annual Meeting of the Law and Society Association, June 6 1982, Toronto, Canada.

Blair, I Investigating Rape - A New Approach for Police (1985)

Women's National Commission: An Advisory Committee to Her Majesty's Government, Violence Against Women: Report of an Ad-hoc Working Group, London, 1984.

See, Investigative Techniques in Sexual Offences, Metropolitan Police Detective Training School, D9/JR/10/86.

What sort of training do you think police officers should receive with regard to sexual assault?

Do you think special "teams" should be trained to deal with cases of sexual assault?

As with most other crimes, prosecutions for rape need not be brought by the police or state prosecutors. Should private prosecutions or civil suits be encouraged?

Do you think prosecutors should prosecute in sexual offences where there is more than a 50% chance of conviction only? If so, why?

b Evidence

(i) Fresh Complaint

Temkin, J Rape and the Legal Process, pp 144 - 149.

Woods, C D Sexual Assault Law Reforms in New South Wales, A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981, and Cognate Act, NSW Government Publisher, June, 1981, pp 25 - 27

"There is considerable evidence that sexual assaults - particularly rape - are seriously under-reported. The first type of evidence is anecdotal. Most legal practitioners (indeed most adult members of the community at large) will be aware of instances where, on good and reliable authority, it seems that an offence has been committeed but that the victim will not report the matter to police. Many lawyers will have counselled the victims of sexual assault that to report would inevitably involve a serious ordeal. Indeed in private conversation, some experienced lawyers and police will say that they woulu advise any close relative sexually assaulted not to report. Powerful anectdotal evidence also comes from women who work in rape crisis centres, and who

say that many of their clients are unwilling to report their victimisation officially.

Statistical evidence comes from victim survey studies, in the USA and Australia, confirming the phenomenon of under-reporting of rape. The major study in this country is a careful "self-report" study conducted by the Australian Bureau of Census and Statistics and the Australian Institute of Criminology in 1975. This revealed that only 28 per cent of Australian victims included in the study reported the offence.[1]

Quite clearly, hundreds (if not thousands) of offences of sexual assault go unreported each year in Australia. A considerable factor in this is the perception by victims of sexual assault that if they officially complain and prosecute the offence, they will be unfairly and unsatisfactorily treated by the legal system. This is a very widely held view.

The structure of the new Act is aimed, partly, at minimising both the reality of and the perception of unfairness in the legal system. Genuine victims should not be deterred from coming forward and reporting offences.

The relevance of this to Section 405B is that, for a variety of complex social and psychological reasons, many women victims of sexual assault are afflicted by a peculiar and quite unjustified sense of personal guilt about the experience.

Fox and Scherl, in a study of patterns of response among victims of rape[2], refer to the response of relatives and friends of the victim, who may be initially supportive, but who may:

> "feel that the woman has been ruined and they may convey this to her so strongly that it becomes part of her self-image."

Depression and guilt, sometimes but not always alternating with anger, are common psychological after-effects of rape. The victim will probably, unless guided by careful counselling, feel self-doubt and uncertainty concerning the experience.

Did she somehow provoke it, even unconsciously? Was the violence directed against her personally, or was it merely random? Will people regard her as unclean or damaged

For this reason, cross-examination in a rape trial as to the reason for late complaint or absence of complaint after the event is often met by a non-response of anguished silence or by the unhelpful answer: "I don't know." the victim usually cannot articulate the subtle psychological processes which may cause a delay in complaint. "I wanted time to think about it", is a response occasionally made: but rarely will the victim

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1 "General Social Survey of Crime Victims" Australian Bureau of statistics, Canberra, May, 1975.

2 Fox, S S and Scherl, D J Patterns of Response Among Victims of Rape (1970) 40am. J Orthopsych, p.503 Quoted by Barbara Toner in The Facts of Rape H utchinson, London 1979, p.676.

clearly say something like: "I felt unclean because twenty years of social conditioning led me to think that if I made a complaint I might not be believed. I was so shocked that at first, I wasn't even sure what my own behaviour had been. I felt unclean and wanted to cleanse myself, to escape from the whole experience."

In your opinion does the law of "fresh" or "recent" complaint help or hinder the rape complainant?

See Adler, Z Rape on Trial, Routledge and Kegan Paul, London, 1987, p. 119:

> "Defence counsel invariably refers to any delay in reporting in cross-examination and comments on it in the closing speech: not making an immediate formal complaint is sometimes referred to as 'an extraordinary thing to do', going against 'what you'd expect a girl who has been raped to do'.
>
> Is there any systematic link between the time of reporting a rape and the verdict? The findings of this study suggest that there is about 40 per cent of the victims reported the offence following some delay after the departure of their assailant, ranging from one day to around three months. The conviction rate for those accused of the rape of late reporters was 38 per cent, as compared to 73 per cent for those whose victims made an immediate complaint."

Canadian Criminal Code

S 246.5: The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

Does this provision preclude the prosecution as well as the defence from raising evidence of recent complaint? If so, does the provision aid the complainant?

Crimes Act 1900 (NSW)

S 405B (2) Where on the trial of a person for a prescribed sexual offence evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission of the alleged offence by the person upon whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the judge shall -

(a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and

(b) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

See Woods, G D, Sexual Assault Law Reforms in New South Wales, a Commentary on the Crimes (Sexual Assault) Amendment Act 1981, and Cognate Act. N S W Government Publisher, June, 1981, pp.26 - 27.

> "Section 405B is designed as a compulsory warning to the jury (as well as to the judge and counsel) that even though a rape victim may have difficulty in articulating in the witness the painful self-reflections he or she felt after the offence occurred, such difficulty should not be necessarily taken as indicating fabrication. The section thus serves to alert the court to a point of considerable importance. The pressure to dismiss rape allegations where the "hue and cry" has not been immediately raised has certainly been a factor in deterring legitimate reports and prosecutions of sexual assault. The section will be "a signpost", it is hoped, not only for courts but also for investigating police and prosecutors.
>
> It is to be noted that the section does not prevent the trial judge from making to the jury any other appropriate observation on the facts relevant to a late complaint. He may actually, subject to the usual limitations, say that the facts appear to lend themselves to an interpretation of fabrication. Perhaps in some cases the facts may warrant that being precisely spelled out by the trial judge. But in any event the direction required by Section 405B must be given.
>
> Otherwise of course, the law as to recent or fresh complaint remains as it has been, and the standard direction will be given in terms of the complaint being regarded as evidence as to the consistency of the complaint's conduct, not as evidence indicating consent or failure to consent to sexual intercourse."

(ii) The Complainant's Sexual History

Confronting Violence, pp 86 - 88

Edwards, S, Female Sexuality and the Law, Oxford: Martin Robertson, 1981, p.62ff

Temkin, J, Rape and the Legal Process, pp.119 - 133.

The previous sexual experience of the complainant is very often addressed by defence counsel in cross-examination. Evidence adduced in cross-examination must be, like all evidence, relevant and admissible. Evidence adduced in cross-examination may be relevant either because they are germane to the fact in issue or because they reflect on the credit of the witness and thus tend to show that she is not a trustworthy witness.

Previous voluntary sexual intercourse with the defendant is regarded, at common law, as relevant to the fact of consent, while evidence of sexual activity with men other than the defendant was regarded generally as irrelevant to the issue of whether she consented to intercourse with the defendant, but did bear on her credibility, or whether she should be believed as a witness.

There were some exceptions, however:

R v Bashir and Manzur [1969] 3 All E.R 692

Trial on Indictment

Mohammed Bashir and Mohammed Manzur were each charged on indictment, inter alia, with rape, in tht they had sexual intercourse with Maria Zahra, the complainant, without her consent. Their respective defences were substantially that they admitted sexual intercourse with the complainant but claimed that it was with her consent. During the cross-examination of the complainant it was put to her by the counsel for the accused Bashir that she had been behaving as a prostitute, had had sexual intercourse with another named man, has accosted other men inviting them to have sexual intercourse for money and had made various statements to two other men from which the inference could be drawn that she was a common prostitute, and in particular that she had said to one Mohammed Aqubar that "Lamb Lane, Bradford, is a good place for business." The complainant denied all these allegations. During the evidence for the accused Bashir, Mohammed Aqubar was called and counsel for Bashir sought to lead from him that the complainant had used the words alleged. The court was thereupon invited to rule on the admissibility of evidence to be called in rebuttal of the denials of the matters put to the complainant during cross-examination. The case is reported on this ruling.

VEALE, J.: The complainant in this case was cross-examined by counsel for the accused Bashir with a view to establishing, inter alia, the following facts; (i) that she was a common prostitute; (ii) that she had sexual intercourse with a person not the accused; (iii) that she had accosted another man inviting sexual intercourse for money; and (iv) that she had made various statements to two other men which might tend to show that she was a common prostitute. When one of these other men came to give evidence the prosecution objected to a question by the defence and I was invited to rule.

It is quite clear that evidence is not admissible to contradict answers given on cross-examination to credit. The borderline of cross-examination to credit is often very hard to draw, but as applied to cases of rape there is no doubt that whilst the girl can be contradicted if she has denied having previous sexual intercourse with the accused, she cannot be contradicted if she has denied sexual intercourse with another man. Previous intercourse with the accused is, one would think, relevant to the question of consent although sexual intercourse with another man is not. I therefore hold in the first place that specific acts of sexual intercourse with other men is inadmissible in chief. I further rule that this includes acts of familiarity leading to sexual intercourse. But that is not the whole picture. There is a difference between the woman who has had acts of sexual intercourse with men and a prostitute who regularly sells her body. It has been held that evidence may be given that a woman complainant is of notoriously bad character for chastity. I have not had the opportunity of looking at any authority other than R v. Clay[1] which was heard before Patterson, J., at the Shrewsbury Assizes in March 1851. In that case a police constable was permitted to give evidence that 20 years previously he had seen the prosecutrix on the streets of Shrewsbury as a reputed prostitute.

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1 R v. Clay (1851), 5 Cox, C.C. 146; 14 Digest (Repl.) 413, 4031

2 R v. Greatbanks, (1959) Crim. L. R. 450

I have also been referred to R v. Greatbanks[2] which was heard before Elwes, J., at the Central Criminal Court in April 1959. The headnote of the case is as follows:

> "(The defendant) was indicted with rape. The defence was that the prosecutrix had consented to the act of sexual intercourse. The prosecutrix denied consent and the question arose whether witnesses could be called by the defence to show that the prosecutrix was a woman of notoriously bad character for want of chastity or common decency. Counsel for the defendant admitted that such evidence was admissible ... Counsel for the prosecution, submitting that the evidence was inadmissible, cited (two cases). Held, that the evidence was admissible. In a case other than rape such evidence could clearly not be admissible. In rape cases, however, special rules applied. It was certain that evidence of intercourse with named men would not be admissible in a rape case but evidence showing that the woman was a prostitute or as in this case, that she was a woman of loose character and notorious want of chastity or indecency was, on the authorities, admissible. The defence would, therefore, be allowed to call such evidence."

I noticed that, in the commentary by the editors on Greatbanks[2], reference is made to the judgement of Kelly, C.B., in R v. Holmes[3], in which the Chief Baron expressly pointed out that "evidence showing the prosecutrix to be a common prostitute ... has long been held material." The effect of a complainant being a prostitute was in his view relevant to the issue of consent and was therefore relevant to the subject matter of the indictment or proceeding.

What then is the permissible evidence-in-chief directed to the issue of prostitution? Is it merely "I know her to be a prostitute" or can a witness add "because of such and such incident"? I have been referred to no authority on this point, although one is aware of the limitations on the evidence of a witness, who says he is not prepared to believe a man on his oath. I think that to apply this rule to the present situation is to add an artificial 14g which any jury, at any rate, would find most difficult to follow. In the absence of any authority which compels me to hold that the witness's reason for saying that the complainant is a prostitute cannot be given, I decline to introduce this artificiality. I hold, therefore, that a defence witness may say - of course, after a proper foundation in cross-examination of the complainant has been laid, as it has in this case: "I say she is a prostitute because of so and so", provided that the evidence is directed to prostitution as opposed to mere sexual intercourse. I emphasise that this does not mean that a witness can say "I say she is a prostitute because I had sexual intercourse with her" and no more. If the witness says "She offered herself to me for money", I think he is entitled to do so.

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2 R v. Greatbanks, (1959) Crim. L. R. 450

3 R v. Holmes (1871), L. R. I C.C.R. 334; 41 L.J.M.C. 12; 25 L.T. 669; 14 Digest (Repl.) 414, 4037.

R v Zorad [1979] 2 NSW L R 764
Reynolds, J (p 773-4)

... in charges of rape in this country, it is the practice to allow cross-examination of a prosecutrix as to whether she has had connection with any other men or any particular man named to her. This practice is of course, based upon statements in a number of texts, and has the support of some judicial decisions, but it may be questioned whether this principle is soundly based. It is, of course, based on the proposition that it affects her credibility. It may be that human experience in the late twentieth century does not suggest a relationship between sexual activity, pejoratively referred to as lack of chastity, and truthfulness."

Sexual Offences (Amendment) Act 1976 (England and Wales)

2 (1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceeding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

(3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.

(4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

The Heilbron Committee (Report on the Advisory Group on the Law of Rape Cmnd 6352, 1975) in paras 134 - 138 recommended the introduction of a provision which would exclude evidence of the complainant's past sexual history with men other than the defendant except in two situations where the judge would have a discretion to admit such evidence. These two situation were (a) where he or she was satisfied that such evidence concerned previous incidents of a strikingly similar nature to the incident in question and that it would be unfair because of its relevant to exclude it and (b) if the defence sought to adduce it in order to counter evidence by the prosecution as to the complainant's sexual history.

Do you think the Committee's proposals are preferable to Section 2?

Studies suggest that section 2 and legislation similar to it allowing the judge to decide whether to admit evidence of the complainant's past sexual history have little effect.

See Adler, Z Rape on Trial. Routledge and Kegan Paul, London, 1987, Chapter 5.

Crimes Act 1900 (NSW)

409 (3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except -

(a) where it is evidence -

(i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and

(ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;

(b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;

(c) where-

(i) the accused person is alleged to have had sexual intercourse, as defined in section 61A(1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

(d) where it is evidence relevant to whether-

(i) at the time of the commission of the alleged prescribed sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or

(ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;

(e) where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was

first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence); or

(f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to subsection (5), be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

Canadian Criminal Code

Section 246.6(1) In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, no evidence shall be adduced by 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 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.

(iii) Corroboration

Confronting Violence, pp 85-86

Temkin, J Rape and the Legal Process, pp.133 - 143

Edwards, S Female Sexuality and the Law, Chapters 3, 4 and 5

Williams, G "Corroboration - Sexual Cases", [1962] Crim L R 662.

Adler, Z Rape on Trial, pp.161 - 163.

Consider how the corroboration warning serves to reinforce stereotypical views of women in the mind of the jury.

Consider how the corroboration warning affects the attitude of the police to a complainant of sexual assault.

Crimes Act (NSW) 1900

405C (2) On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed.

(3) Nothing in subsection (2) affects the operation (if any) of any rule of law or practice which requires-

(a) a Judge on the trial of a person for a sexual offence alleged to have been committed before the commencement of this section to give the jury a warning as referred to in sub-section (2);

(b) a Judge on the trial of a person for a sexual offence alleged to have been committed after the commencement of this section, being a sexual offence other than a prescribed sexual offence, to give the jury a warning as referred to in subsection (2); or

(c) a Judge on the trial of any person to give the jury a warning to the effect that it unsafe to convict the person on the uncorroborated sworn evidence of a child.

Canadian Criminal Code

Section 264.4: Where an accused is charged with an offense [of a sexual nature] no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Which reform do you find preferable?

(d) **Identification**

R v E J Smith, (1984) 1 N.S.W.L R 462

This case concerns a voire dire on the admissibility of evidence of voice identification. The judgement of O'Brien J, however, canvasses evidence of identification in general.

See R v E J Smith, pp. 467 - 482

(Reprinted as pp. 105 - 113 of this manual.)

In a more general context the High Court in the leading case of *Davies and Cody v The King* (1937) 57 CLR 170 seems in its single judgment to have confirmed this proposition. That judgment was directed generally to evidence of identification but more specifically to evidence of identification by appearance which I will call visual identification. With some essential qualifications which it was not then necessary for the court to consider, what was then said is, I think, apposite to identification by voice. The appellants in that case were seen by a number of witnesses who associated them with the crime, some at the time of the commission of the crime and others a few days beforehand in a car used in the commission of the crime. None of these witnesses who identified them, or either of them, claimed any previous knowledge of them. After the appellants were taken into custody, it was desired to ascertain whether the witnesses could identify either of them. Each was shown singly to the witness who was asked to say whether he was one of the men in question. In some cases this was done at the detective office, in other cases it was done when the appellants were in the dock at the police court charged with the crime for which the identification was sought. In one case, although the prisoners were in custody, the witness was shown some photographs from which he picked out one of the appellants and some days afterwards, when that appellant was brought up to the police station, he was shown him singly for the purpose of identifying him.

The trial judge left the matters of identification to the jury without any definite warning of the dangers which such a method of identification is considered to involve. Of course, it would, as the court in its judgment said, be ridiculous to deny the value or reliability of an identification because a prisoner has been shown alone to a potential witness if the knowledge of the prisoner arose from a long and close association or from everyday intercourse in business affairs. The concern arose because the witnesses had no acquaintance with the prisoners before the occasion of the crime or, as it is sometimes described, their identification was by a stranger of a stranger. But

the following long passage from the judgment (at 181, 182) serves to state all the matters to which I need refer from this decision of the High Court:

> "... They treat it as indisputable that a witness, if shown the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection.
>
> If, on the other hand, he were called upon to say whether anyone of a number of persons were the man, his entire mental attitude would be different. A witness who is taken by the police for the purpose of seeing whether he can identify a person who is in custody in relation to a particular crime *has in his mind a recollection or impression of the person whom* he saw, or, it may be, *heard, at the scene* of the crime or in relation to some matter which is connected with the crime. The recollection probably relates to the appearance of the person, and possibly to his mode of standing, moving, *or speaking or some other characteristic*. It is important that this recollection should not be overlaid or in any way affected by suggestions that a particular person in custody is either the person previously seen by the witness or is the person suspected of or charged with the crime. Moreover, inspection of a photograph of the person in custody before viewing him naturally tends to impress on the mind the characteristics shown in the photograph so that the witness, however honest he may be, tends to identify the person in custody with the person shown in the photograph rather than with the person whom he himself saw previously.
>
> Similarly, if a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question.
>
> We think the view accepted in England and, as far as we know, elsewhere in the Dominions where the provisions of the *Criminal Appeal Act* have been adopted, should be applied in Victoria. That view, as we understand it, is that, if a witness whose previous knowledge of the accused man has not made him familiar with his appearance has been shown the accused alone as a suspect and has on that occasion first identified him, the liability to mistake is so increased as to make it unsafe to convict the accused unless his identity is further proved by other evidence direct or circumstantial. Where that further evidence consists in or includes other witnesses whose identification has been of the same kind, *the number of witnesses, their opportunities of obtaining an impression or knowledge of the prisoner and other circumstances in the case* must be taken into account by the court of criminal appeal for the purpose of deciding whether on the whole case the possibility of error is so substantial as to make the conviction unsafe.
>
> As the responsibility of convicting must rest with the jury their appreciation of the question is an important consideration, and in a case where the method of identification is open to the objections we have

discussed, they should be clearly warned of the dangers, which according to the accepted view, do exist." (Emphasis added.)

The reference to the witness who "has in his mind a recollection or impression of the person whom . . . he heard at the scene of the crime", a recollection which "relates . . . possibly to his mode of . . . speaking or some other characteristic" seems to me to be an explicit acknowledgment of the admissibility of evidence of recognition by voice. At the same time I should note that the judgment emphasises the natural inclination of a witness identifying an accused in the circumstances of that case to think that there is possibly some reason for an arrest which in turn means that there is a tendency to prevent an independent reliance upon his own recollection, a tendency which the court held was "greatly increased if he is shown the person actually in the dock charged with the very crime in question". Nevertheless, the court was of opinion that, notwithstanding the mode of identification adopted the evidence of the witnesses to visual identification was enough to support a conviction if there had been a proper warning to the jury. The court further said (at 183):

> "If the only ground were the manner in which the learned trial judge dealt with the question we have discussed, we might have hesitated in intervening and granting special leave. But, as we have attempted to show, the whole question of identification is necessarily bound up with the nature of the other evidence in the case."

The only other evidence was that of a man who repaired a pistol, dropped at the time of the crime, for a stranger whom he identified with one of the appellants and that of a man of very bad character who had subsequently resiled from his testimony, who said that he was an associate of the appellants and that they had admitted to him that they were concerned in the crime. This was evidence which if given any weight would have worked strongly against the appellants. The court took the view that, though the jury were warned by the trial judge of the danger of acting on the evidence of this witness and the alleged admissions made to him, it was not at all improbable that the jury might add his evidence to the rest of the testimony in the case as fitting in with it and making, as a whole, a case establishing the identity of the appellants with the culprits. This was considered in the other circumstances of this witness which I need not further develop, sufficient to warrant a new trial.

The problems which arise with evidence of visual identification by a stranger, in particular where police photographs have been used for the purpose, were further considered by the High Court in *Alexander v The Queen* (1981) 145 CLR 395. No attention was there given to identification by voice and what I regard as problems quite special to such a means of identification. However, much was said, to which it is necessary here to refer, as to "in court" identification and "out of court" identification of a suspect seen by a witness in circumstances associating him with the crime. As to "in court" identification Gibbs CJ said (at 399):

> "Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime, or in circumstances connected with the crime, will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason

> of previous knowledge or association, become familiar with the appearance of the accused. The reasons for this were explained in *Davies and Cody v The King* (1937) 57 C.L.R. 170 (at 181-182)."

Accordingly he said it had become the established practice for a witness to be asked to identify the accused by an "out of court" identification as soon as practical after the event and for evidence to be given of that act of identification. His Honour continued:

> "In theory the manner in which an accused was identified out of court goes to the weight rather than to the admissibility of the evidence. However, the objections to the evidence of an identification made of an accused person, when he is in the dock are almost equally open to evidence of the identification of an accused person which is given by a witness who has been shown the accused alone and as a suspect, and in *Davies and Cody v. The King* it was held that a conviction based on evidence of such a witness should be quashed as unsafe unless the identity of the accused was further proved by other evidence. The Court went on to say, at 182:
>
> 'Where that further evidence consists in or includes other witnesses whose identification has been of the same kind, the number of witnesses, their opportunities of obtaining an impression or knowledge of the prisoner and other circumstances in the case must be taken into account by the court of criminal appeal for the purpose of deciding whether on the whole case the possibility of error is so substantial as to make the conviction unsafe'."

His Honour then went on to consider the use of identification parades and the superior quality of such a process of "out of court" identification especially where it is a physical examination of a group of persons from which the witness is asked if he can identify a culprit rather than an examination of a group of photographs for that purpose. I do not need here to set out the defects considered to be inherent in the evidence of photo-identification parades, but his Honour held (at 401):

> "For these reasons, it is most undesirable that police officers who have arrested a person on a charge of having committed a crime should arrange for potential witnesses to identify that person except at a properly conducted identification parade. Similarly, speaking generally, an identification parade should, wherever possible, be held when it is desired that a witness should identify a person who is firmly suspected to be the offender. However, there is little support to be found in the authorities for the view that a conviction must necessarily be quashed if it is based on evidence that the accused was identified other than at an identification parade at a time when he had been charged or was definitely suspected, even though there was no valid reason why an identification parade could not have been arranged. The judgment of this Court in *Davies and Cody v. The King* suggests that the proper approach is to consider whether the conviction can safely be sustained on the whole of the evidence."

Later his Honour said (at 402, 403):

> ". . . However, a trial judge has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge

> was of opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused. . . . If the trial judge admits the evidence, and the accused is convicted, the true question for the Court of Criminal Appeal is whether having regard to the whole of the evidence it would be so unsafe or unsatisfactory to allow the conviction to stand that to do so would amount to a miscarriage of justice. In considering that matter the Court of Criminal Appeal also will keep in mind the importance of ensuring that the most reliable evidence of identification is obtained in every case."

His Honour concluded that the evidence of the identifying witnesses in the circumstances of the case with which the court was then concerned was not inadmissible and that the trial judge was entitled to admit it in the exercise of his discretion. Mason J, with whose reasons for judgment Aickin J agreed, expressed himself in much the same fashion as did the Chief Justice.

In the course of the judgments consideration was given to the question of what was the principle firstly upon which evidence of a witness was admissible that he had previously made "out of court" identification of an accused especially where he could not identify the accused when giving his evidence and secondly the principle upon which evidence of an observer could be given that he had witnessed such an act of identification.

As to the evidence of the witness who makes the identification, Gibbs CJ held (at 403, 404) that upon high authority "it is relevant that the witness identified the accused on the earlier occasion", and "such evidence is constantly admitted in practice". For this he cited *R v Christie* [1914] AC 545. He considered it to be original evidence and not hearsay. It was not, he thought, tendered as an exception to the hearsay rule and seemed to be admitted "by analogy with the rule that allows evidence of complaints to be given in sexual cases or with the rule allowing proof of previous consistent statements to answer a suggestion of late invention", although he conceded that the evidence does not come within the latter principle as it is ordinarily stated (*Nominal Defendant v Clements* (1960) 104 CLR 476) and if admitted on that basis must come within an extension of the principle (at 404, 405).

Mason and Aickin JJ saw no violation of the hearsay rule, nor did they think it necessary to resort to the doctrine of recent contrivance for the admissibility of evidence of out of court identification from the person who made it. They considered an identification made out of court by a person qualified to make it is admissible in evidence because it is more likely to be reliable than an identification made in court since it is earlier in point of time and since it is not subject to the same compulsive suggestion as an identification of an accused when in court charged with the very crime to which his identification relates. The principle upon which the evidence of the witness as to his previous identification is admissible does not appear to have been considered by Stephen J, whose judgment was directed to the propriety of methods of "out of court" identification. Murphy J, confining himself it would seem to the facts of the case under consideration, held (at 434) that:

> ". . . Evidence of previous identification or recognition of the accused is admissible as evidence of facts tending to prove what had become an issue, that is the reliability of the in-court identifications of the accused, or else as tending to complete what is an incomplete in-court identification (which refers to and depends for its completion on evidence of the previous identification)."

It seems to me that the admissibility of evidence of a prior identification, however one might seek to justify it by reference to other established principles or an extension of them, must be an independent rule peculiar to evidence of identification. There seems to be no support for a rule which would, for example, enable a victim of an alleged assault with intent to murder to give evidence that the accused had stated he would kill him and to give further evidence as original evidence supporting that claim that, for example, at an identification of the accused he again stated that the accused said he would kill him, even if there was an issue as to the reliability of that claim apart from the identity of the assailant.

As to the principle which would permit a third person giving evidence of the identification, Gibbs CJ referred to passages in the judgments in *R v Christie* [1914] AC 545. There the boy who had been assaulted gave evidence identifying the accused but did not say in evidence that soon after the event he had identified the accused as the man who assaulted him. However, the boy's mother gave evidence of that act of identification. Viscount Haldane LC said (at 551) that if the boy had given evidence that he had identified the accused, the mother's evidence would have been admissible; it would have been relevant "to shew that the boy was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or mistake". This seems to support the proposition that the evidence is admissible because earlier in point of time and because more reliable since it was not subject to the compulsive suggestion of an in court identification. However, Lord Moulton said (at 558):

> ". . . Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to shew by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable, and this is contrary to the spirit of the English rules of evidence."

Lord Reading spoke much to the same effect (at 563), but Lords Atkinson and Parker took a contrary view. They were of opinion that the evidence was admissible as primary evidence of the boy's act of identification.

The view of the majority, said Gibbs CJ, was accepted by the Judicial Committee as correct in *Teper v The Queen* [1952] AC 480 where a witness gave evidence that an unknown passer-by had identified the accused. This was held inadmissible and the above passage from the judgment of Lord Moulton was cited (at 488). The same passage was again cited in *Sparks v The Queen* [1964] AC 964 at 981. In that case the girl who had been assaulted was not herself called to give evidence in the trial but evidence was given of her having said that "it was a coloured boy" and this was held to be inadmissible, Lord Morris saying (at 981): ". . . There is no rule which permits the giving of hearsay evidence merely because it relates to identity."

Gibbs CJ considered that these cases establish that evidence by a witness

ho observed an act of identification made out of court cannot be admitted hearsay. He held (at 406):

> "... If the witness who made the identification gives evidence identifying the accused, the evidence of the person who observed the prior act of identification will be admissible to show that the identification made by the witness in court was not an afterthought or a mistake. If the witness who made the identification does not give evidence, obviously the evidence of the person who observed the prior identification will not be admissible for that reason."

The Chief Justice, however, referred to *R v Osbourne* [1973] 1 QB 678 here the Court of Criminal Appeal held that it was admissible for a police ficer to give evidence that a woman had selected the accused at an entification parade notwithstanding that the woman said in her evidence at she could not remember picking anyone out at a parade. His Honour nsidered that this evidence must have been admitted as hearsay evidence of e earlier act of identification, since he felt there could be no other ground. he court had not spelt out the ground on which the evidence was admitted it said (at 690-691) that it would be artificial to exclude it. In *Cross on vidence*, 4th ed (1974) at 51 and 2nd Aust ed (1979) par 2.23 at 54, it is said at as a result of this decision the views of Lords Atkinson and Parker in *hristie's* case may now be taken to represent the law. In *R v Collings* [1976] NZLR 104 at 114, the Court of Appeal of New Zealand said that the court ould, if necessary follow *R v Osbourne*. Gibbs CJ felt himself unable to gard the law as being settled by *R v Osbourne* and considered the evidence as hearsay and inadmissible. He added that in *R v McGuire* [1975] 4 WWR 24, the Court of Appeal of British Columbia rejected evidence of earlier lentification made by witnesses who, in the witness box, swore that the erson previously identified was not the person who had committed the rime.

The position, however, was different, the Chief Justice considered, when he identifying witness says in evidence that he did, on a previous occasion, lentify somebody as the person connected with the crime, but cannot now emember who it was that he identified. In such a case evidence is admissible o prove who was the person identified. Such evidence is not hearsay; it is not endered to prove the truth of what the identifying witness asserted on a revious occasion. It is admissible to prove what was indicated, not that it vas correctly indicated. The evidence of the observer is, therefore, admitted s original and not hearsay evidence. It explains and gives meaning to the vidence of identification given by the identifying witness.

Mason and Aickin JJ did not accept the approach taken by the Chief ustice to the evidence of an observer of an out of court identification. They ited (at 432) from *R v Christie* the following passage from the judgment of ord Atkinson (at 554) with which Lord Parker concurred:

> "... The boy had in his evidence at the trial distinctly identified the accused. If on another occasion he had in the presence of others identified him, then the evidence of these eye witnesses is quite as truly primary evidence of what acts took place in their presence as would be the boy's evidence of what he did, and what expressions accompanied his act. It would, I think, have been more regular and proper to have examined the boy himself as to what he did on the first occasion, but the omission to do so, while the bystanders were examined on the point, does not, I think, violate the rule that the best evidence must be given. His evidence of what he did was no better in that sense than was their evidence as to what they saw him do."

They referred to the decision in *R v Osbourne*. In his judgment Mason J referred to the evidence there admitted from a police officer to establish that two witnesses had identified the accused at an identification parade when each witness at the trial was unable to recollect having made such an identification and one of the two witnesses was unable to identify one of the accused at the trial. The court held that there was no reason in principle why the evidence should not have been admitted. His Honour said (at 432, 433):

> "... The Court proceeded according to the view, which in my opinion is correct, that the reception of such evidence does not violate the hearsay rule or the best evidence rule. It is the act of identification that is relevantly in issue. An observer of the act may give evidence of it. Obviously the weight to be given to this evidence varies with the circumstances; its worth partly depends upon what is said by the witness who makes the identification. If he denies having made the 'out of court' identification, and gives reasons for departing from that 'out of court' identification, evidence from a third party that he did so seems to have little value, and should be rejected, as it was in *R. v. McGuire* [1975] 4 WWR 124, not perhaps on the ground that it is not evidence at all, but on the ground that its probative value is so slight as to make it valueless. If, however, as here, the recollection of the identifying witness is hazy through lapse of time, the evidence of the third party may have value."

It seems to me that *Alexander v The Queen* establishes the proposition that evidence is admissible of an identification made out of court by a person qualified to make it, even though that person is unable, when in court, to make such an identification. Further, it establishes that evidence of observers of that out of court identification is also admissible. The principle in each case is that the act of out of court identification is of itself proof of identification and is original evidence for the reason that it is more likely to be reliable than any identification made in court, being earlier in point of time and not so subject to the tendency to prevent an independent reliance upon the witness' own recollection when aware that the person identified may be suspected of the crime, a tendency which, as the judgment in *Davies and Cody v The King* states (at 182) "will be greatly increased if he is shown the person actually in the dock charged with the very crime in question".

These propositions are I think particularly relevant when identification is by voice. Ordinarily the witness will not be able to make an in court identification since, when the witness gives his evidence in chief, the voice of the accused, unlike his then appearance, will not be presented to the witness and, of course, the accused cannot be obliged (nor would it be proper) to demonstrate his voice in court. The witness will give evidence of having heard a voice of a man associated with the crime but he will not, when called in evidence, be in a position to say that in court he hears the voice as in visual identification he would say he sees that person. It seems virtually inevitable, therefore, that to be able to give evidence of identification by voice a witness will have made an out of court identification. Evidence by him of that prior identification will be the only evidence he can effectively give. It will be

iginal evidence in proof of identity as also will the evidence of any observers the act of identification of the voice with the voice heard at the crime and the identity of the accused with the person whose voice is thus again heard. ll this, I think, follows from the decision in *Alexander's* case even though it as concerned only with visual identification.

Furthermore, and importantly, *Alexander's* case makes it clear that lentification is an act of the mind" by whatever sense the mind is informed. ; the Chief Justice said (at 403):

"... It is relevant that the witness identified the accused on the earlier occasion, and, since identification is an act of the mind, the evidence of the witness as to his own state of mind on the earlier occasion is original evidence, ..."

It is also necessary to consider the question of an identification parade iere voice is virtually the only means of identification, that is to say, where e sense of hearing and not of sight is the sense which activates the mind to identification of a voice with that heard on another occasion. Before doing I should refer to other judicial authorities relating to identification by ice.

Other than references in *Davies and Cody* there seems little to be found lating specifically to identification by voice alone in this country or in the nited Kingdom: see eg *R v Keating* (1909) 2 Cr App R 61. There is, wever, Canadian authority directly in point in the judgment of the ppellate Division of the Supreme Court of Alberta in *R v Murray and 'ahoney* (1916) 33 DLR 702. Beck J, with whose judgment the other three embers of the court concurred, had this to say (at 705, 706):

"... Grant was the person who was robbed. So far as he is concerned his evidence of the identity of Mahoney consisted solely in his asserting that he recognized at the Police Court the voice of Mahoney as that of one of the men who had assaulted him, he having heard the voice before only on the occasion of the robbery.

There can be no doubt that evidence of identity by means of identification of the voice alone is sufficient evidence. We identify people many times a day in this way in conversations over the telephone. It is scarcely necessary to support this proposition by authority but a number of cases, some of which were before the days of telephones, will be found collected in Wigmore on Evidence, pars. 660 and 669.

If there was nothing more than this involved in the question I should say that, examining the Judge's charge, it appears to me that he gave a quite sufficient warning to the jury of the weakness of the evidence and the danger of convicting upon it.

But some assertions are made by counsel for the prisoners that the circumstances under which Grant heard Mahoney's voice at the police station were such as to render his evidence of identification valueless. What those circumstances were can be made to appear to us only by the evidence bearing on them being reported to us by the trial Judge. Whatever they were, however, it seems to me that they could not possibly result in our finding that the evidence was *inadmissible* and that is all that is open under the form of this question. They might, I think shew that the identification was made under such circumstances that it was fallacious or so weak that if it stood alone there would be no

evidence on which, the case being a criminal case and the jury being therefore bound to acquit unless they were convinced of the prisoner's guilt beyond a reasonable doubt, the Court could properly say as a matter of law that there was no evidence justifying the conviction."

The judgment then went on to refer to matters relating to identification by single confrontation with which the High Court dealt in *Davies and Cody*.

Identification by voice has, however, received considerable attention in the judgments of courts in the United States of America. In the course of discussion in *Wigmore on Evidence* (Chadbourn rev 1979) vol II, ch 26 of the general principles of knowledge as involving rational inferences from adequate data it is said (at par 660(c)) that "it has been properly held, for example, that a witness may testify to a person's identity from voice alone". The footnotes to this observation make reference to numerous American decisions. Annotations of many of the decisions are to be found in, for example (70 ALR 2d (1960) at 995) under "Identification of accused by voice". As stated in *American Jurisprudence* (cited 16 ALR 2d (1951) at 1322):

"Since an early period, witnesses' testimony of identification of a person by having heard his voice has been regarded as legitimate and competent to establish identity in both criminal and civil cases. Such evidence is not the statement of mere matter of opinion, but is the statement of a conclusion reached directly and primarily from an operation of the sense of hearing.

It is direct and positive proof. The infrequency with which the witness heard the voice before the time in question is not a reason for the exclusion of his testimony, although it may affect the probative value thereof."

The annotation proceeds:

"Voice identification testimony has been received in a good many criminal cases as going to identify the defendant as the person who committed the crime for which he is on trial. Particularly where the crime was committed in darkness, or out of sight of witnesses, or by a person masked or otherwise disguised, or where the witness is blind, testimony based upon a witness's recognition of the voice of the defendant as being that of the offender may be important in making out a case."

The general rule has been held to be that testimony by a witness that he recognized the accused by his voice is admissible in evidence, provided that the witness has some basis for comparison of the accused's voice with the voice which he identifies as the accused's and this is satisfied if the witness acquires his knowledge of the accused's voice after the event to which the witness testifies as well as before that time. One authority which is regularly cited in the recent judgments is the decision of the United States Court of Appeals (6th Circuit) in *Neil v Biggers* 409 US 188 (1972) where the accused was convicted of rape on evidence that consisted in part of testimony concerning the visual and especially voice identification of the accused at a "station-house show-up" as distinct from a line-up. It was, for example, followed in the *State of New Jersey v Johnson* 351A 2d 787 (1976).

In *United States v Rizzo* the Court of Appeals (2nd Circuit) (492 F 2d 443 (1974) at 448) held that: "The standard for the admissibility of an opinion as

to the identity of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time." For this the court cited *United States v Bonanno* 487 F 2d 654 (1973) at 659 where the court referred to:

> "the well-settled rule that 'Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording' may be made 'by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker'. Proposed Federal Rules of Evidence 901(b)(5). See McCormick, Evidence (Cleary ed 1972) par 226, at 554 and n 81 and cases there cited."

Another authority which is regularly cited is the decision of the United States Court of Appeals (5th Circuit) in *United States v Ladd* 527 F 2d 1341 (1976) where the defendant was convicted of gambling offences. Telephone conversations of the accused were taped under the authority of the Attorney-General and an FBI agent was allowed to testify that one of the means he used to identify the taped voice of the defendant was by comparing the voice on the tapes with the voice of the defendant in face-to-face conversations. The court said (at 1343):

> "Ladd also contends that the court erred in allowing the FBI agent to testify that one of the means he used to identify the taped voice was by comparing the voice on the tapes with the voice of Ladd in face-to-face conversations. According to Ladd, this testimony was inadmissible opinion evidence, the effect of which was to invade the province of the jury and to deny him a fair trial. However, voice identification testimony is not inadmissible opinion evidence when the witness has demonstrated a basis for the identification, such as familiarity with the accused's voice.
>
> 'Testimony by a witness that he recognized the accused by his voice is admissible, provided that the witness has some basis for comparison of the accused's voice with the voice which he has identified as that of the accused . . . .
>
> Ordinarily, testimony identifying the accused by recognition of his voice is regarded as direct evidence. However, there is authority to the effect that such testimony constitutes opinion evidence which is not admissible *unless the witness has a basis for his opinion, either by having acquired a familiarity with the accused's voice, or by virtue of the accused's voice having some peculiarity or characteristic making it easily recognizable.*' 1 Wharton's Criminal Evidence, 13th Ed. 373-376." (Emphasis added.)

In the *Devlin Report on Evidence of Identification in Criminal Cases* (1976) three categories of identification were distinguished. They were described as follows (par 4.1):

> "The first is by recognition; its weight depends upon the human ability to memorise a face, even when it cannot be described with any accuracy. If the memory is clear enough, it will enable a positive identification to be made. If it is not so clear, it will permit a witness to do no more than give evidence of resemblance; this we put into a second category. The third category is identification by means of some distinctive feature such as a tattoo mark or a scar or a limp or exceptional height. We stress the word 'distinctive' because evidence about usual features often forms part of evidence of recognition — colour of eyes, shape of nose, baldness, a beard and so forth. A witness who has observed a distinctive feature in another man can give evidence which will help to identify him even though he has never seen his face and does not claim to recognise him. Or a witness who has seen the face and does claim to recognise it, may say that in addition to facial recognition he observed a particular mark on the arm. What we mean by 'evidence of feature identification' is evidence that is presented independently of evidence of facial recognition.
>
> There are, of course, other means of identification, for example, by fingerprints, by handwriting or by voice, by habits or by propensities, as they are called."

It was said (par 4.2) that "the voice is certainly a means of identification and in one or two unreported cases studied by the committee the voice was the principal factor". In one of the cases there was an armed attack on the cash register of a petrol filling station and one of the raiders, who had worn a mask at the time, was identified by his voice by one of the station employees eleven days later. And as to identification the following observations were made (par 4.4):

> "It seems likely that positive identification could, in fact be made only by someone very familiar with the voice heard, or by an expert. It is perhaps significant that in the second example quoted above the witness who had identified the robber by voice at an identification parade held 11 days after the offence (when only a few words had been spoken) said at the trial several months later, after hearing the defendant give evidence for some time, 'I cannot say I recognise the voice now as it is so many months ago when I heard it'. It has also to be remembered that a voice can greatly alter under stress. It is doubtful, therefore, whether the recognition of the voice by a stranger (*unless the voice was distinctive in which case it would rank as feature identification*) could ever amount to more than evidence of resemblance; to make it worth anything much more there would have to be a separate voice identification parade, with voices chosen for their resemblance. We understand that in Sweden a procedure of this kind is employed with the aid of recorded tapes." (Emphasis added.)

It is to be noted therefore that according to both the United States authorities and to the observations in the Devlin Report, evidence of the voice of a person present at a crime as being the same as the voice of the accused can only amount to positive identification where the witness is very familiar with the voice before hearing it at the crime, or that the voice heard at the crime was very distinctive, which means that the witness need not have heard the voice before the crime but heard it as the voice of the accused for the first time after the crime and then noted it to have the same very distinctive features as had the voice at the crime.

The evidence sought to be led by the Crown in the present case falls into this latter category, that is to say into the category described in the Devlin Report as "feature identification". As I have already said, such a witness when called in evidence will not normally be able to make in court identification since the voice of the accused will not normally be presented to him as in the case of visual identification when the witness is, in the nature of things, able to observe the accused. Normally then the evidence of identification of a voice by feature identification will be of hearing the voice

at the crime and of hearing the voice of the accused in a subsequent out of court identification.

In all of this it is necessary to realise, it seems to me, that whilst many features of a person which are visually noticeable, such as age, height, size, colour of hair and eyes and the numerous other physical characteristics of a particular human being are fairly readily capable of description so as to give a reasonable reproduction in everyday vocabulary, the features of a voice are not by any means as readily capable of verbal description. It may be fairly said that the features of a voice beyond some very general characteristics do not at all lend themselves to a verbal description any more than the features of a musical cadence lend themselves to a verbal description. A person will readily recognize the voice of a political figure heard regularly on the electronic media but he will be quite unable to convey by words the impression of that voice to one who has not heard it, in the same way as he would be unable to convey by words the impression of a melody to one who has not heard that melody.

Beyond broad generalization, such as that the voice was male, Australian, not juvenile, quite coarse, uneducated because the language used was ungrammatical, rather high pitched and so on, a witness would have in effect to resort to mimicry, if he happened to be a competent mimic, in order to give any realistic impression of a voice. It cannot, therefore, be expected of a witness who speaks of recognizing a voice that he will normally be able to give any useful description of the voice.

In matters of visual identification records of some permanency and giving a ready impression of appearance are available, as in photographic reproductions of a person taken within reasonable photographic range and light, and as in reproduction by identikit techniques of the visual impression of a person mentally retained by a witness. No corresponding equivalents are, however, available in matters of voice identification. An audio tape may record the voice of a person with some reality if taken in carefully arranged circumstances with appropriately adjusted microphones and the exclusion of extraneous noise but no technique exists for the reproduction of an aural impression of a voice mentally retained by a witness. Audio tapes may be played to a witness of various voices but for practical purposes they will be useful only if they are not only made in circumstances designed to enable a reproduction of representative quality but also when the voice is used in circumstances corresponding with the use of the voice when heard by the witness at the crime. The voices of suspects of crime are not likely ever to be available for such purposes. Certainly, as the evidence on the voir dire demonstrated, tapes of line-ups of persons in custody and charged with an offence (such as are taken by the police video unit) do not at all qualify as useful for such a purpose.

It was submitted to me, therefore, that in an out of court identification of a voice the only acceptable procedure is by a properly conducted identification parade of the accused and other people with voices chosen for their general resemblance to that of the accused, a submission which, it seems to me, is more appropriate to a situation other than where recognition is by distinctive features since ex hypothesi the voice in question is so different from others that no set of voices could effectively be chosen for their general resemblance to the voice of the accused. There is, however, as I see it, a further significant

problem to be encountered in voice recognition as it applies in particular to the present case.

Voices vary considerably according to the circumstances in which they are used and the purposes for which they are used. The voice of a man speaking affectionately to a child necessarily varies markedly from his voice if abusing a fellow motorist in an argument between drivers on the road. Similarly, the voice of a man speaking in conversational tones necessarily varies from his voice when used loudly and heatedly. So also there must be a difference in the voice of a man as used in the course of a crime, especially a violent crime, from his voice when normally used in a natural manner. This would be especially so if he be a suspect asked to repeat words used in a violent crime and repeats them in a constrained or even simulated manner.

The use of identification parades when voice is the means of identification must, therefore, often be of less value than when the means of identification is by appearance. A voice intrinsically reflects the emotional and mental attitude of the person to a far greater extent than does the appearance, which is far less susceptible to modification than is the voice. If the voice at the scene of the crime was used other than in a more or less normal and unemotional manner, effective recognition may well require that the voice submitted for identification should be used after the same abnormal or emotionally charged fashion as at the scene of the crime. To achieve such a use of a voice by the person whose voice is submitted for identification, by a request that he use his voice in the postulated manner may be well nigh wholly unattainable both because it is realistically an impractical and virtually futile exercise in itself and also because the suspect, in the use of his own voice, is not prepared to reproduce what would obviously be intended as a basis for recognition. The submissions put to me by the accused in the presentation of his objections amply supported this observation.

The foregoing would especially be the case if, as is suggested in the present case, some highly distinctive features of a voice are manifest only when it is used in a loud, aggressive or imperious fashion; that when used normally the voice displays a characteristic pattern without markedly distinguishing features, but when used in an abnormal and emotional affect of mood the voice reveals features highly distinctive of the voice and of the personality of the man who uses it.

Accordingly, identification parades for voice recognition often have limited utility. Indeed, according to the circumstances they may be used by a suspect not only to destroy any worth they may have, but to have a contrary effect by actively suggesting that the suspect is not the man heard at the crime. In such a set of circumstances the only reliable comparison of a voice heard at the scene of the crime and the voice of a suspect, when it is suggested that the voice at the scene was used in an abnormal manner — and when it is in that use that highly distinctive features are markedly registered — is to have the voice of the suspect, unbeknown to him, heard by the witness when the suspect is using his voice in the relevantly abnormal manner. This was the procedure adopted in the United States case of *Neil v Biggers*.

Of course, ordinarily such a situation could not be easily, if at all, attainable, but if it could be attained its value would certainly exceed that of a parade for the identification of such a voice. In such a situation there might be inherent a suggestion to a witness that the voice submitted to him for

identification is that of a suspect for the crime, but notwithstanding that suggestion such a mode of recognition may have the only really substantial evidentiary potential.

It was submitted that to arrange such an identification without the suspect being aware of the process is impermissible, that he has a legal right which must be respected to refuse to take part in an identification parade, and to attempt the same procedure behind his back is to subvert his right not to incriminate himself and evidence so gained is not, therefore, admissible.

If the suspect were deceived by those investigating the crime into a situation where he would have occasion to use his voice angrily and aggressively or were deliberately induced into an argument so that, unbeknown to him, a witness could hear him use his voice in a fashion corresponding with the fashion in which a voice was used at the violent crime, questions of unfairness or impropriety might arise. But if the suspect was, without any manoeuvre by the investigating officers, expected to be found of his own initiative or in the ordinary course of activities about a court or police premises, in a situation where his voice could be heard being used in an aggressive and imperious fashion, such questions do not, in my opinion, arise.

A similar situation was considered by the Full Court of the Supreme Court of Victoria (Starke ACJ, Crockett and McGarvie JJ) in *R v Clune* [1982] VR 1. The appellant had appealed against his conviction of the armed robbery of a jeweller's shop. Apart from other evidence led for the prosecution (which it is not necessary here to consider) the flat of the appellant was searched two and a half months after the robbery and he was found to be wearing a watch later established to be one of those taken from the shop, and there was found in the flat a gold chain, also established to be part of the proceeds of the robbery. He was arrested and an attempt was made to identify him by a female assistant in the shop who had had a good, although short, look at the face of the man with the firearm who first entered the shop. The appellant was taken to Russell Street Police Station where the police proposed to conduct an identification parade. The appellant, after speaking to his solicitor, declined to go into a line-up voluntarily. Thereupon he was taken to an office and the police brought in eighteen men from the street and dispersed them, seated in various positions, in an office where the appellant was similarly seated. The appellant objected to this manoeuvre and turned to face a wall. The shop assistant then entered the office. The appellant called out his disapproval of what was being done and made clear his view that the "parade" was being "unlawful" was without his consent and was being conducted contrary to his express wish. To prevent the shop assistant seeing his face he placed his hands over his face and crouched over the floor. In fact she did not see his face, but said his voice was "very similar" to that of the man with the firearm.

The following day the appellant appeared upon remand proceedings in the dock in the city court. The shop assistant then had only a side view of him, but said he was "very very similar" to the robber. So as to be certain, she wished to see his face full on. At the conclusion of the court proceedings the appellant was escorted from the court across Russell Street. The shop assistant was standing on the opposite side of the street. When he was about halfway across the road he and the lady looked at each other. She positively

identified him with the advantage of the view she then had of him. When their eyes met the appellant quickly covered his face and made an offensively critical remark to, and of, the police. By these actions and words, it was said that it was shown that the appellant had recognized the lady, a recognition as inculpatory as any identification by her of him. She later identified him in the dock at his trial.

Accepting that the appellant was lawfully entitled to refuse to enter an identification parade, that he had refused to enter a parade and that the manoeuvre of taking him to an office and bringing a parade to him was unauthorized, the court held that whilst the evidence of what occurred when the shop assistant was brought into the office was legally admissible it was necessary for the trial judge to exercise a discretion, which he had not done, whether or not to exclude that evidence. That discretion was to be exercised in accordance with the principles in *R v Ireland* (1970) 126 CLR 321 and *Bunning v Cross* (1978) 141 CLR 54 by considering and weighing against each other the competing public requirements, being on the one hand the public need to bring to conviction those who commit criminal offences and, on the other hand, the public interest in the protection of the individual from unlawful and unfair practices since conviction obtained by the aid of unlawful or unfair acts may be obtained at too high a price (per Barwick CJ at 334-335).

However, no exercise of discretion, it was held, became relevant as to the admission of the other evidence of identification of the appellant. Thus (at 10, 11) Crockett J (with whom Starke ACJ agreed) said:

> "On the other hand, as was pointed out by counsel for the Crown, it is important to distinguish between a right not to take part in a parade and a right not to be identified. The applicant possessed the former right but not the latter.
>
> . . .
>
> (But) clearly public exposure at or in the precincts of a court of a suspect to a potential witness who may use the occasion to make an identification is a proper and necessary incident of the detention. Identification in such circumstances may properly be proved. Of course, if no consent is given to participation in a line-up, that fact may be proved by the Crown in order to meet any adverse comment based on the failure to conduct a parade: *Marcoux and Solomon v. R.* (1975) 60 D.L.R. (3d) 119."

And (at 23) McGarvie J (with whom Starke ACJ in substance agreed) said:

> "The fact that a person is in custody does not provide him with immunity from being identified. The distinction relevant to this case is between his being identified while he is engaged in the ordinary activities of his detention, which is lawful, and his being compelled while detained, to do something outside the ordinary activities of his detention for the purpose of submitting himself to an attempted identification by a witness, which is unlawful. By 'the ordinary activities of his detention' I mean those activities or states of inactivity which are inherent in or incidental to the person's detention. If, for example, while engaged in his ordinary activities, in a cell, exercise yard or elsewhere, or while being moved between his cell and court, he is identified by a witness who has gone to a suitable position to view him, there is no misuse of power. The

position would be no different if other persons had been placed near him to improve the reliability of the identification. The position is otherwise, if, for the purpose of an attempted identification, he is compelled to go to a place he would not have gone to or to do something he would not have done as part of the ordinary activities of his detention."

It is my opinion, therefore, that where an accused has specifically refused to engage in an identification parade to be conducted by the police, or by his general protestation has made it clear that he will in no circumstances entertain any kind of approach by the police towards investigating the possibility of his involvement in a crime, the police may properly, in pursuit of the duty which is cast upon them to investigate crime, adopt any alternate approach to his identification and if there is some element of suggested unfairness in the form of identification adopted which does not infringe his right to refuse to be obliged to enter an identification parade, he brings this on himself by obliging the police to adopt some other means to secure identification, since he has no right to immunity from identification.

Of course, evidence of identification of a suspect, while publicly exposed in a court proceeding, by a witness in attendance for the purpose of determining whether the witness is able to recognize the suspect by appearance or voice, may introduce matters, as they do in the present case, which require an exercise of the more usual discretion concerning the weighing of the prejudice of extraneous matters against the probative value of the identification.

GENETIC FINGERPRINTING

DNA puts criminals behind bars

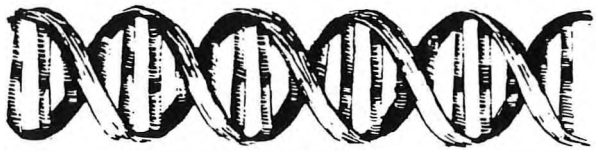
By **Marshall Ingwerson**
Staff writer of The Christian Science Monitor

Miami

Tommy Lee Andrews has twice been convicted of rape in Orlando, Florida, this year even though neither of his victims got a good look at him.

The key evidence: his genes.

Now under appeal, the Andrews case is likely to provide the highest court ruling yet in the United States on the legal validity of a new test for identifying human evidence: DNA fingerprinting. From a hair, a drop of blood, or any other bit of biological evidence, a DNA pattern in the chromosomes can be compared to that of a suspect much as the whorls of fingerprints are matched.



In another rape case approaching trial in Palm Beach County, Florida, a judge ruled in April to admit DNA fingerprint evidence indicating that the baby of a rape victim was fathered by the defendant. On the other hand, rape charges were dropped against Tony Harris recently because, although the victim identified him, his DNA did not match that of the semen sample.

"The DNA really tipped the scales," says his attorney, Jack Nants, "because the rest of the case was balanced." Otherwise, a jury would have been left to choose between Mr. Harris's alibi and the victim's identification.

DNA fingerprints are not definitive.

Sometimes the tests produce no results. British scientists found last month that the old evidence was too degraded to shed new light on the rape conviction of Gary Dotson, who was identified by a victim who recanted years later.

The certainty of a DNA match depends on how rare a DNA type is and how well-preserved the sample. A test produced by a California company, Cetus Corporation, can work on very old samples with degraded, broken DNA fragments. But the results may only narrow gene types to those held by one in five people.

On better samples, the test by Lifecodes of New York can narrow the DNA type to 1 to 10 million – for even the most common gene types – according to Michael Baird, manager of forensic and paternity testing.

The scientific credibility of the tests make it tough to fight in court. "We could not find a single scientist who thought it didn't work," says Hal Urhig, Tommy Lee Andrews' attorney. But Mr. Urhig questions the theory behind the high certainties offered by scientists. While geneticists treat each band of DNA like a random variable, Urhig notes that genetic traits often go together – such as blond hair and blue eyes – and their DNA codes may not be as random or independent from each other as they are made out to be. He also notes that Lifecodes projects extremely high certainties mathematically but their sample base is only about 1,000 DNA tests.

Ed Imwinkelried, law professor at the University of California at Davis, also questions some of the high certainties DNA testers offer, such as a 1 in 3 billion chance that a match is mistaken. "I have not seen any clear, detailed explanation of these numbers," he says.

Russell Higuchi, associate scientist at Cetus, also cautions that experts should be humble in their claims for DNA matching. "It's done by people," he says, "and people make mistakes." The best an expert can really say, he suggests, is that "this has to be the person, unless we made a mistake." Attorneys can then attack or defend the quality control of the test.

DNA matching has been used in investigations throughout the US. Vast numbers of paternity disputes are being diverted from the courts altogether as DNA matches determine who did or did not father a child. But it will take years before DNA fingerprinting becomes as valuable as traditional fingerprinting as an investigative tool, Dr. Imwinkelried notes. Without a national library of individuals' DNA patterns, he says, DNA testing is limited to cases where suspects are known.

Few attorneys expect to be able to keep DNA evidence out of court. But in far greater numbers, DNA tests are keeping cases out of court. Either suspects plead guilty when faced with a test linking them to a crime, or, as in the Tony Harris case in Orlando, charges are dropped when the tests clear the suspect.

Traditional sleuth work is still required. In an Oklahoma missing persons case, a DNA test identified a drop of the victim's dried blood on the suspect's vacuum cleaner. But a jury acquitted the defendant because investigators never produced a body. ■

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Rapist trapped by 'genetic fingerprint'

By Steve Smith

A rapist became the first person to be convicted as a result of revolutionary genetic "profiling" tests yesterday.

Robert Melias, who admitted raping a 43-year-old polio victim at her home last January, was gaoled for eight years after the jury at Bristol Crown Court was told that the odds of his innocence were four million to one against.

Forensic scientists matched blood samples from Melias, a 32-year-old labourer from Avonmouth, with semen on the clothes of his victim using tests involving DNA, the so-called building blocks of life.

The tests, which were devised at Leicester University four years ago, can compare DNA in samples of blood, hair, skin or semen with the genetic characteristics of a suspect.

The conviction was interpreted by the Home Office last night as confirmation that DNA profiling was a significant advance in solving crime.

Forensic scientists, who have been co-operating with police on DNA tests in more than 50 cases, believe that the Melias case could make it difficult for suspected offenders to refuse blood tests because of the way this will now be seen by juries.

Mr Charles Barton, prosecuting, said that Melias raped his victim, a spinster who lived alone at Avonmouth ignoring her pleas that she was disabled.

After the hearing, Det Con Clive Tippetts, the investigating officer, said: "I think if it had not been for DNA fingerprinting this case would have remained unsolved."

Genetic key has its day in court

A new forensic test has revolutionized the fight against crime

GENETIC fingerprinting, which led to a man's conviction for rape yesterday, is being seen as the biggest advance in crime detection since the discovery of fingerprinting in 1901.

The revolutionary forensic test, invented at Leicester University in 1983, was allowed as biological identification at Bristol Crown Court — the first time anywhere in the world.

The case is expected to clear the way for genetic fingerprinting in other criminal trials. The technique allows scientists to make an infallible identification of anyone who leaves a drop of blood, a hair root, body tissue, or semen at the scene of a crime.

It makes paternity battles a thing of the past. It is available as an over-the-counter service, costing £120.75. The secret is in DNA, the basic "building bricks" of life. Fragments of DNA can be printed out as a unique bar code on an X-ray film. With the sole exception of identical twins, every individual can be distinguished.

A pinprick on a baby's heel is all that is needed to trace the fragments of DNA back from a child to either parent, and in turn to the grandparents.

The breakthrough, accidentally discovered by Dr Alec Jeffries, aged 36, will be crucial to rape cases because the DNA fingerprint is also carried by the sperm in semen.

Dr Jeffries, who was honoured last year as a Fellow of the Royal Society, said: "The thing worked beyond our wildest dreams. It caught us by surprise, not just the remarkable degree of public interest but the range of applications.

"Like all good scientific discoveries, it was made while searching for something else, and shows how important university science is for Britain."

Earlier this autumn he was in the US to watch the British ambassador open ICI's first nationwide laboratory for genetic fingerprinting. A similar lab at Abingdon, Oxfordshire, owned by ICI-subsidiary Cellmarks Diagnostics, has been carrying out 250 tests a week since July, including samples for cases yet to go to court.

Leicestershire police began the first large-scale use of genetic fingerprinting in January, when a test proved that a 17-year-old hospital porter charged with two murders could not have been involved.

The Home Secretary, Mr Douglas Hurd, has announced that all forensic science laboratories will soon be using the biological method of identification.

Conventional blood tests often make it possible to say with certainty that one person is not the child of another, but cannot conclusively confirm a family relationship. Dr Jeffries has already helped an immigrant woman whose son was going to be deported because the authorities did not believe she was his real mother.

c Conduct of the Trial

(i) Anonymity

Confronting Violence, pp 89-90

Temkin, J Rape and the Legal Process, pp.190 - 198

Sexual Offences (Amendment) Act (England and Wales) 1976

(1) Subject to subsection (7)(a) of this section, after person is accused of a rape offence no matter likely to lead members of the public to identify a woman as the complainant in relation to that accusation shall either be published in England and Wales in a written publication available to the public or be broadcast in England and Wales except as authorised by a direction given in pursuance of this section.

(2) If, before the commencement of a trial at which a person is charged with a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge -

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and

(b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that the preceding subsection shall not, by virtue of the accusation alleging the offence aforesaid, apply in relation to the complainant.

(3) If at a trial before the Crown Court at which a person is charged with a rape offence the judge is satisfied that the effect of subsection (1) of this section is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction, he shall direct that that subsection shall not apply to such matter relating to the complainant as is specified in the direction; but a direction shall not be given in pursuance of this subsection by reason only of an acquittal of a defendant at the trial.

(4) If a person who has been convicted of an offence and given notice of appeal to the Court of Appeal against the conviction, or notice of an application for leave so to appeal, applies to the Court of appeal for a direction in pursuance of this subsection and satisfied the Court -

(a) that the direction is required for the purpose of obtaining evidence in support of the appeal; and

(b) that the applicant is likely to suffer substantial injustice if the direction is not given, the Court shall direct that subsection (1) of this section shall not, by virtue of an accusation which alleges a rape offence and is specified in the direction, apply in relation to a complainant so specified.

6-(1) After a person is accused of a rape offence no matter likely to lead members of the public to identify him as the person against whom the accusation is made shall either be published in England and Wales in a written publication available to the public or be broadcast in England and Wales except -

(a) as authorised by a direction given in pursuance of this section or by section 4(7)(a) of this Act as applied by subsection (6) of this section; or

(b) after he has been convicted of the offence at a trial before the Crown Court.

(2) If a person accused of a rape offence applies to a magistrates' court, before the commencement of his trial for that offence, for a direction in pursuance of this subsection, the court shall direct that the preceding subsection shall not apply to him in consequence of the accusation; and if at a trial before the Crown Court at which a person is charged with a rape offence in respect of which he has not obtained such a direction -

(a) the judge is satisfied that the effect of the preceding subsection is to impose a substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to remove the restriction in respect of that person; or

(b) that person applies to the judge for a direction in pursuance of this subsection,

the judge shall direct that the preceding subsection shall not apply to that person in consequence of the accusation alleging that offence.

(3) If, before the commencement of a trial at which a person is charged with a rape offence, another person who is to be charged with a rape offence at the trial applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge -

(a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and

(b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that subsection (1) of this section shall not, by virtue of the accusation alleging the offence with which the first-mentioned person is charged, apply to him.

**Do you think the accused should be given the benefit of anonymity?*

**What defects do you see in the above legislation*

**In some jurisdictions, for example, New South Wales proceedings may be held in camera consider the advantages or disadvantages of such process*

Consider the following extract from the Women's National Commission Report (p 44)

WNC recently obtained evidence from a woman barrister, Ms Spry-Leverton, who, following her own experience as they key witness in a case of an assault on her, has aroused considerable media interest in the position of the victim and is proposing a number of changes in the practice of the law, and procedure of the courts, which would alleviate what was for her (and she believed many others) a horrowing experience. Amongst other proposals, she has suggested that:

- a more carefully worded and explanatory Witness Summons be sent to the victim/witness

- access to an hour of a solicitor's time on the legal aid scheme to explain the likely procedure to be faced and the kinds of questions likely to be asked

- a relative or friend to be allowed to attend the court with the victim/witness, as a matter of normal procedure

- courtesy and some degree of privilege conferred on any victim who chose to sit through the whole of the trial: such as automatic entry to the courtroom and provision made for her to sit quietly and undisturbed at the back of the court.

Ms Spry-Leverton told us that one of the main causes of trauma for the victim/witness is having to mix with the defendant's relatives in the court building, and also to be subject to harassment from members of the press. She thought that now there was some degree of protection for members of the jury from approaches by the press and others in court that this should also apply to victims. She also described the trauma of close proximity to the defendant in the courtroom. The Working Group consider that there is no good reason why courts should not be so arranged to avoid confrontation between victim/witness and defendants; it is probably necessary for each to hear the other, but probably not for each to see the other. A covered witness box, or one so placed as to be invisible to the defendant should be considered.

(ii) Juries

**Do you think a jury should be part of a trial for sexual assault?*

**If not, why not?*

**If so, do you think it should be especially selected?*

Consider the following extract:

South Australia - Criminal Law and Penal Methods Reform Committee - Special Report - Rape and Other Sexual Offences (March 1976)

17 The Jury. It is sometimes contended that the all male jury or the jury on which there is a preponderance of men is more likely to return a verdict of not guilty in a rape case than would be a jury on which more women served. This has not been the experience in South Australia. Women have been entitled to serve and have served on juries in South Australia since the beginning of 1966. Schedule 4 contains a list of persons indicted for rape in the Supreme Court from the beginning of 1965 to the end of 1975. Of 122 cases heard there were 32 pleas of guilty and 90 pleas of not guilty; of the latter cases the jury were unable to reach a verdict in 2, found the accused guilty in 44 and found him not guilty in 44. In one case in October 1968 when four persons were tried jointly counsel so challenged as to exclude all men from the jury and obtain a jury of 12 women. In the case of those persons all were found guilty. From the beginning of 1966 when women sat upon juries verdicts were given by juries in 87 rape cases. There were 44 verdicts of guilty and 43 verdicts of not guilty. In 28 of such cases the jury consisted of a majority of women, in 36 a majority of men, 23 were tried by juries consisting of equal numbers of men and women: as appears from the following table:-

Majority Female Juries:	
Total of prisoners	28
Verdicts:	
Not guilty	14
Guilty	14
Majority Male Juries:	
Total of prisoners	36
Verdicts:	
Not guilty	17
Guilty	19
Juries of equal numbers:	
Total of prisoners	23
Verdicts:	
Not guilty	12
Guilty	11
Total number of matters in which verdicts	87
Total not guilty	43
Total guilty	44

All trials in which there has been a majority of women on the jury after the trial shown as trial No. 15, November 1973, in schedule 4 up to and including trial No. 7, November 1975, have resulted in a verdict of not guilty, although in the period from May 1966 to November 1973, when there was a majority of women on the jury in 16 cases, 14 verdicts of

guilty were returned and only 2 verdicts of not guilty. These data clearly indicate thAt there is no statistically significant difference between the verdicts of male and female dominated juries, and it is safe to conclude that woman are at least no more likely to convict of the offence of rape than are men. In our Third Report we discussed trial by jury and recommended that there should be no provision for trial by jurors selected from the occupational or ethnic group of the accused. It is apparent that in this State the inclusion of equal numbers of men and women on juries is not likely to result in either more or less convictions in rape cases; but in any event similar reasons to those which impelled us to make the above-mentioned recommendation in our Third Report satisfy us that it would be undesirable to vary the method of selection of jurors merely because the charge was one of rape. In our view there is no justification for requiring a charge of rape to be tried by a jury containing a specific proportion of women to men. We therefore recommend that charges of rape should continue to be tried as at present by juries selected in the ordinary manner under the provision of the Juries Act, 1927 - 1974.

17.1 Recommendations with respect to the Composition of Juries

We recommend that charges of rape continue to be tried by juries selected in the ordinary manner under the provision of the Juries Act, 1927 - 1974.

What is your view?.

Should judges or assessors be male or female or have any particular qualifications?

Consider the following extracts. With which are you more sympathetic? Why?

INDEPENDENT, 14 February 1987

MPs Praise for 16- year rape sentence

The 16 year rape sentence passed yesterday on Cecil Gilbert, the bogus evangelist preacher, was welcomed by MPs from both sides of the Commons.

Geoffrey Dickens, the Conservative MP for Littleborough and Saddleworth, praised Judge Nina Lowry - regarded by many as a harsh sentencer. "It has taken a woman judge to do at last what the nation has been crying out for for years," he said. "You could almost hear a sigh of relief throughout the nation at news of this exemplary sentence.

"Until today many judges, in my opinion, have failed in their duty by passing hideously lenient sentences on convicted rapists, a sorry story which culminated in the laughable penalties handed out in the Ealing vicarage case."

Mr Dickens said he was writing to Lord Hailsham, the Lord Chancellor, to persuade him to urge that rape cases be heard by women judges. He was joined by Tony Banks, Labour MP for Newham NW, who said: "There should be a woman judge in rape cases. As a rule men do not take rape charges

as seriously as they should. The sentence is far more in line with the gravity of the offence. I hope it will set an example for future sentencing policy."

Prebendary Michael Saward the vicar in the Ealing case who joined the protest at the five-and-three year terms imposed on the vicarage rapists last week, said "surprise, surprise" when told of yesterday's 16-year term.

Realistically, rape sentencing is in the hands of society and Parliament. I don't think I am in a position to lead the charge."

Judge Lowry, 61, is the only woman judge at the Old Bailey. Her husband Richard, whom she married in 1963, is also an Old Bailey judge and sits in a neighbouring court. He took up his post in 1977, a year after his wife. She was called to the Bar in 1948 and became one of London's first women magistrates. She is generally regarded at the Old Bailey as a fairly hard-line judge, with a tendency to sentence severely.

Judge Lowry, who has a son and a daughter, lists her hobbies in Who's Who as theatre and travel. She was previously married to Sir Edward Gardner, an MP and barrister.

The judge at the centre of the row over the vicarage rape sentences jailed a hit-and-run death driver for a month yesterday.

Mr Justice Leonard was told at the Old Bailey that David Mulligan, 28, a recruitment officer, of Waverley Crescent, New Malden, Surrey, sped through a red light, lost control and hit Mrs Peta Gea, 78, as she crossed a road near her home in Canterbury Road, Morden, South-west London. He drove off so fast that three other motorists failed to catch him.

Mulligan was convicted of causing Mrs Gee's death by reckless driving. He was sentenced to six months in prison, five of them suspended and was disqualified from driving from one year.

The judge said he accepted that Mulligan had a previously good record and had been kept in suspense for so long after the incident, in November 1984.

In another Old Bailey court, Shane Bojang, 25, was jailed for 14 years for raping a teenager as she was walking home. Bojang, of West Gardens, Stepney, East London, who has previous convictions for indecent assaults on girls, was said by Judge Robert Lymbery to be a "grave danger to women". This judge said that his sentence was not influenced "by the wave of emotive public opinion currently being expressed with regard to rape cases."

The Spectator, 21 February 1987
Why rapists, at least, should be spared from female justice

Auberon Waugh

At long last, as I predicted it would, rape seems set to emerge as one of those things which Londoners actually do, as opposed to being one of the things they just talk about. If, as we have been told, the incidence of rape increased by 50 per cent last year in the Greater London area, then this is indeed a significant development, whatever allowances are made for greater readiness to report the crime. It begins to look as if all the agitation by such organisations as Women Against Rape is bearing fruit at last.

Where, two years ago, the average woman in the Greater London area would have had to live for 15,000 years before holding an even chance of having been raped in that time, she now has to wait only 10,000 years. If the alleged rate of increase is maintained, it will be slightly less than 23 years before she has an even chance of being raped every year.

'Judge Nina Shows the Way,' screamed the front page of the Daily Mail on Saturday. Like nearly all newspapers in Britain, it had been 'campaigning' for heavier sentences for rapists. On Saturday we learned that Mr Cecil Gilbert, the bogus bishop, had been sent down for 16 years by the Old Biley's only female judge, Mrs Noreen Margaret ('Nina') Lowry, for the rape of some virgins whom he previously drugged.

The usual group of backbench MPs hastened to give us the benefit of their opinions on the subject. Mr Geoffrey Dickens said: 'You could almost hear the sigh of relief through the country.' Mr Terry Dicks (Hayes and Harlington) agreed. Mr Harry Greenway, whose constituency embraces the Ealing vicarage where a young woman was raped last year, and who has been agitating for a 20-year minimum sentence, said: 'I think this makes much better sense." A Labour MP, Mr Tony Banks, joined the chorus: 'It suggests there should be a woman judge in rape cases. As a rule, men do not take rape charges as seriously as they should.'

Let us examine some of these propositions before exploring my own theory that rape is on the increase precisely because of all the hysteria being generated on the subject. Nobody can suppose that the purpose of greatly increased sentences is deterrent. The male sex drive is not such that a man about to rape a woman will be deterred by the difference between a 5-year and a 15-year sentence if he is brought to book. Its purpose must be punitive - to express society's abhorrence of the crime - and in part preventive - to keep the rapist out of circulation and prevent further rapes for as long as possible. But the prospect of a life sentence, or a 20-year minimum sentence for rape, can have only one logical effect on the rapist, which is to give him a powerful incentive to murder his victims, too. Is this what these backbenchers want, or are they planning to re-introduce the death penalty for murder at the same time as imposing a 20-year minimum sentence for rape? Or are they just making silly noises and hoping to get themselves into the newspapers? I feel we should be told.

But it is the suggestion that rape cases should he heard only by women judges which seems to me to go to the root of the problem. The motive of Mr 'Tony' Banks in making this ludicrous suggestion would appear to be his belief that women judges would give stiffer sentences, on the assumption that stiff sentences are good things in themselves. He cannot, of course, suppose that stiff sentence will deter rape, or make any significant contribution to reducing its incidence. Rape has existed since time began. The Roman republic was founded on an act of mass rape, according to the legend which was fostered and propagated throughout Rome's long history. Only two things have altered since ancient times. In the first place, women started complaining about it rather more loudly; their complaints created a general fear of rape among women which was out of all proportion to the actual danger. In the second place, rapes and sexual assaults on women, having remained more or less constant and showing an overall decrease since 1971 (see HMSO Social Trends), have now shown a significant increase for the first time.

It might well be that fear of rape encourages rape, but fear of rape is something which is beyond the authorities' power to control. My own contention, that the sight of women judges handing out stiff sentences for rape will have exactly the opposite effect to deterrence, needs rather more explaining.

Anybody who wishes to discourage rape must first try to understand the mind of the rapist - something our shrill tribunes of the people seem extraordinarily reluctant to do. It is all very well to shout 'evil monster', 'fiend' and the rest of it, but this scarcely does anything to solve the problem. The important thing is to discover why these monsters, fiends etc choose to express their evil natures in this way. Sex is not particularly hard to find in our society, as it might have been in previous times, for any male who is prepared to make the effort to ingratiate himself to womankind. Rape involves much more effort. Its motive, I would suggest is seldom merely sexual gratification. More often than not, I suspect, the motive is a deep and burning hatred of women, a sadistic urge to make them suffer and humiliate them.

This would also explain why so many cases of rape also involve sodomy - as, I believe, the Ealing vicarage rape did. The question we should ask ourselves is what has happened to bring about such a large increase in the hatred of women, the desire to hurt and humiliate them.

The most obvious answer is that women have become more assertive, they make more noise. From the bitter young feminist at his place of work who complains of sexual harassment if he smiles at her to the squawking harridans of Women Against Rape, modern man may find himself under more or less constant attack from the opposite sex. From Esther Rantzen and Mrs Currie to the Prime Minister herself on television, he may find himself forever being told what to do and being bossed into attitudes he does not hold.

In New York, faced by the new generation of go-getting, liberated career women many modern men gave up on the fairer sex altogether and embraced the homosexual parallel culture in their droves. In London, the men seem happy to cringe, for the most part, only occasionally taking their revenge in bestial acts of cruelty.

But if people are genuinely concerned to discourage rape, as opposed to making Robin Day-style noises of outrage about it and congratulating each other on their superior moral attitudes, they would do well to ponder in causes. I may, of course be wrong. It would certainly be a waste of time to urge women to make less noise. They are not as much worried by rape as that. But if I am right, then nothing could be better calculated to exacerbate the would-be rapist's hatred of women that the appointment of special female judge to try cases of rape.

4. SENTENCING AND REHABILITATION

Temkin, J Rape and the Legal Process. pp 16 - 23

R v Billam [1986] 1 All E R 985

Do you believe there should be minimum sentences prescribed for cases of sexual assault?

Do you think sentences have any effect on the incidence or severity of sexual assault?

Consider the following section from the Indian Penal Code 1860

376 Punishment for rape - (1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with improsonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may exceed ten years and shall also be liable to a fine unless the woman raped is his own wife (and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with a fine or with both).

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever, -

(a) being a police officer commits rape -

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a policy officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant, or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

Appeals and applications for leave to appeal against sentence

The appellant, Keith Billam, and 16 other appellants and applicants were convicted in the Crown Court at various places of rape, attempted rape and associated offences and were sentenced to varying terms of imprisonment, youth custody or detention under s 53(2) of the Children and Young Persons Act 1933. The various appeals and applications for leave to appeal against sentence were specially listed together for hearing. The case is reported solely on the principles of sentencing to be followed in sentencing defendants for rape and attempted rape.

J D Hall (assigned by the Registrar of Criminal Appeals) for the appellant Billam.
Geoffrey Locke (assigned by the Registrar of Criminal Appeals) for the appellant Revill.
Peter Corrigan (assigned by the Registrar of Criminal Appeals) for the appellant Craig.
Peter Geoghegan Smith for the appellant Strong.
Mark Harris for the appellant Bannister.
Peter Swaniker (assigned by the Registrar of Criminal Appeals) for the appellant Temple.
John Collins for the applicant Donaghey.
Stephen Ashurst (assigned by the Registrar of Criminal Appeals) for the applicants Gurmohan Singh and Jaswant Singh.
Alastair G McCallum (assigned by the Registrar of Criminal Appeals) for the applicant Rafiq.
Lionel Scott for the applicant Y.
Six other defendants made non-counsel applications.

LORD LANE CJ delivered the following judgment of the court. We have had listed before us today a number of cases where there has been a conviction for rape or attempted rape, in order to give us an opportunity to restate principles which in our judgment should guide judges on sentencing in this difficult and sensitive area of the criminal law.

In the unhappy experience of this court, whether or not the number of convictions for rape has increased over the years, the nastiness of the cases has certainly increased, and what would ten years ago have been considered incredible perversions have now become commonplace. This is no occasion to explore the reasons for that phenomenon, however obvious they may be.

We would like, if we may, to cite a passage from the Criminal Law Revision Committee's 15th Report on Sexual Offences (Cmnd 9213 (1984)), which reflects accurately the views of this court. It is as follows:

> 'Rape is generally regarded as the most grave of all the sexual offences. In a paper put before us for our consideration by the Policy Advisory Committee on Sexual Offences the reason for this are set out as follows—"Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value."'

This court emphasised in *R v Roberts* [1982] 1 All ER 609, [1982] 1 WLR 133, that rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances. The sort of exceptional circumstances in which a non-custodial sentence may be appropriate are illustrated by the decision in *R v Taylor* (1983) 5 Cr App R (S) 241. Although on the facts that offence amounted to rape in the legal sense, the court observed that it did not do so in ordinary understanding.

Judges of the Crown Court need no reminder of the necessity for custodial sentences in cases of rape. The criminal statistics for 1984 show that 95% of all defendants who were sentenced in the Crown Court for offences of rape received immediate custodial sentences in one form or another. But the same statistics also suggest that judges may need reminding about what length of sentence is appropriate.

Of the 95% who received custodial sentences in 1984, 28% received sentences of two years or less; 23% over two and up to three years; 18% over three and up to four years; 18% over four and up to five years and 8% over five years (including 2% receiving life). These included partly suspended sentences and sentences to a detention centre or detention under s 53(2) of the Children and Young Persons Act 1933, as well as imprisonment or youth custody. Although it is important to preserve a sense of proportion in relation to other grave offences such as some forms of manslaughter, these statistics show an approach to sentences for rape which in the judgment of this court are too low.

The variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years. That aspect of the problem was not considered in *R v Roberts*. There are, however, many reported decisions of the court which give an indication of what current practice ought to be and it may be useful to summarise their general effect.

For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

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b Section 53(2), so far as material, provides: 'Where a child or young person is convicted on indictment of any offence punishable in the case of an adult with imprisonment for fourteen years or more, not being an offence the sentence of which is fixed by law and the court is of the opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period ... as may be specified in the sentence, and where such a sentence has been passed the child or young person shall, during that period be liable to be detained in such place and on such conditions as the Secretary of State may direct ...

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect on the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.

The starting point for attempted rape should normally be less than for the completed offence, especially if it is desisted at a comparatively early stage. But, as is illustrated by one of the cases now before the court, attempted rape may be made by aggravating features into an offence even more serious than some examples of the full offence.

About one-third of those convicted of rape are under the age of 21 and thus fall within the scope of the Criminal Justice Act 1982, s 1. Although the criteria to which the court is required to have regard by s 1(4) of that Act must be interpreted in relation to the facts of the individual case rather than simply by reference to the legal category of the offence, most offences of rape are 'so serious that a non-custodial sentence cannot be justified' for the purposes of that provision. In the ordinary case the appropriate sentence would be one of youth custody, following the term suggested as terms of imprisonment for adults, but making some reduction to reflect the youth of the offender. A man of 20 will accordingly not receive much less than a man of 22, but a youth of 17 or 18 may well receive less.

In the case of a juvenile, the court will in most cases exercise the power to order detention under the Children and Young Persons Act 1933, s 53(2). In view of the procedural limitations to which the power is subject, it is important that a magistrates' court dealing with a juvenile charged with rape should *never* accept jurisdiction to deal with the case itself, but should invariably commit the case to the Crown Court for trial to ensure that the power is available.

[The court then considered the facts of the appeals and applications in respect of which 15 were dismissed (including one withdrawn), in two cases sentences totalling 6 years and 12 years were reduced to 4½ years and 10 years, respectively, and in one case an order was made that a period of 28 days spent in custody pending the hearing of the application was not to count towards sentence.]

Orders accordingly.

Solicitors: *Harrison Grainger & Reed*, Penrith (for the appellant Strong); *Pictons*, Watford (for the appellant Bannister); *E M Collins & Co*, Pinner (for the applicant Donaghey); *David Garsed & Sons*, Elland (for the applicant Y).

N P Metcalfe Esq Barrister.

Paedophile's consent to drug implant

Queen's Bench Divisional Court
Regina v Mental Health Act Commission ex parte W
Before Lord Justice Stuart-Smith and Mr Justice Farquharson
26 May 1988

UNDER Section 57 of the Mental Health Act 1983 a certificate of the Mental Health Act Commissioners is required for (among other things) "the surgical implantation of hormones for reducing male sexual drive". However, this does not apply to a drug which is not a synthetic equivalent of a naturally occurring hormone and which is administered to a mental patient by the subcutaneous injection of a small cylindrical implant.

The legislation

Section 57(2) of the 1983 Act provides that a patient shall not be given any form of treatment to which Section 57 applies unless he has consented to it and a registered medical practitioner and two others all appointed by the Secretary of State for the purposes of the Act certify that the patient is capable of understanding the nature, purpose and likely effects of the treatment and has consented to it.

By Regulation 16(1)(a) of the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983 "the surgical implantation of hormones for the purpose of reducing male sexual drive" is a form of treatment to which Section 57 applies.

The facts

W, a man aged 27, was a compulsive paedophile who had several convictions for indecency and indecent assaults on young boys. While in prison he decided to try and change his ways, but realised that he needed medical help in doing so. In September 1986 on his release he consulted Dr S, a consultant psychiatrist specialising in dealing with sexual deviation and sex offenders.

After trying several drugs which were unsuccessful or unsatisfactory Dr S decided that Goserelin, a drug manufactured for cancer of the prostate, might be suitable and safe for W.

Dr S explained to W how the drug worked and W was enthusiastic to receive it. The treatment consisted of a monthly subcutaneous injection of a small cylindrical implant into the abdomen. Over the ensuing month the drug in the cylinder was gradually released.

Within a short time of receiving the first injection in July 1987, W found that he was no longer having sexual urges and was very pleased with the result.

Dr S informed the Mental Health Act Commission that W suffered from mental disorder and was being treated with Goserelin. Three commissioners visited W in August 1987 and concluded that the treatment was governed by Section 57, W was capable of understanding the nature, purpose and likely effects of the treatment, and had consented to it. In November 1987, however, after a further interview with W, the commissioners declined to issue the certificate.

W applied for judicial review to quash that refusal.

The decision

Lord Justice Stuart-Smith said that the issues were whether treatment with Goserelin was "the surgical implantation of hormones" for "reducing male sexual drive" and if so, if it was treatment for mental disorder.

Synthetic equivalents of a naturally occurring hormone were intended to be included within the term "hormones". But Goserelin is not such a sythetic equivalent. It was a synthetic analogue of lutenising hormone releasing hormone (LHRH). Although initially the effect of Goserelin and LHRH was similar, very soon it was the opposite and it was correctly described as a hormone antagonist.

There was no warrant for including in the term "hormones" hormone analogues which were separate substances well-known at the time the 1983 regulations were made.

Moreover, in ordinary common parlance an injection by conventional hypodermic needle could not be described as surgical means. The use of the syringe to inject Goserelin was almost indistinguishable from a conventional injection. There was no justification for extending the regulations into something Parliament did not intend, merely on the basis that if they had considered it they might have included it. The simple method of achieving that was to omit the word "surgical".

If the regulation should be extended to cover Goserelin, then it was a matter for Parliament and not for the courts. The treatment with Goserelin did not fall within the ambit of section 57. Was W being treated for mental disorder, or was he being treated for sexual deviancy which was expressly excluded from the definition of mental disorder?

In practice it was likely that the sexual problem would be inextricably linked with the mental disorder so that treatment for the one was treatment for the other, as in W's case.

However, if the commission did have jurisdiction, was its decision to refuse to issue the certificate wrong in law?

Before they could certify, all three commissioners had to be satisfied as to the patient's capacity and consent. The words used were "capable of understanding" so that the question was capacity and not actual understanding. The issue was the patient's capacity to understand the likely effects of the treatment and not possible side effects however remote.

The patient's consent had to be an informed consent in that he knew the nature and likely effect of the treatment. There was no doubt that W knew that, and that he realised that the use on him was a novel one and that the full implications with use on a young man had not been studied. It was not a necessary prerequisite that the patient should understand the precise physiological process involved.

If Section 57 had applied, the decision to refuse a certificate would have to be quashed on the grounds that upon the facts of the present case the commissioners took into account wrong matters, applied the wrong test and reached a decision that was unreasonable.

Therefore the decision to refuse to issue the certificate was quashed.

Appearances: Edward Fitzgerald instructed by Pannone Napier for W; Nigel Pleming instructed by Treasury Solicitor for the commission.

Shiranikha Herbert, barrister

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape in a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to a fine.

Provided that the court may for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation I - Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2 - "Women's or children's institution" means an institution whether called an orphanage or a home for neglected women or children or a widow's home or any other name which is established and maintained for the reception and care of women or children.

Explanation 3 - 'Hospital' means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

Do you think statutory guidelines such as the above are useful? Do you believe people in position such as the police, hospital superintendents should receive more stringent sentences?

Do you believe corporal punishment should be used as part of the punishment of sexual offenders?

Consider the following case. What is your view of medical options such as described? Do you believe that such should be available as a sentencing option?

Paedophile's consent to drug implant.

*Consider further the extract from the Howard League Working Part, Unlawful Sex, Waterlow, 1985, pp 104 - 106. What is your view of such strategies?

SOME AMERICAN PROJECTS

7.34 The value of treatment programmes for sex offenders is more readily accepted in America than in Britain (Delin, 1978). A survey published by the U S Department of Justice reviewed 23 different schemes operating in various places (Brecher, 1978). Problems of evaluation were analysed in some detail. It cannot be said that any programme had produced irrefutable evidence of effectiveness, but at least they demonstrated feasibility and promise. A few examples must suffice.

One well-established programme is the treatment unit set up by Dr Geraldine Boozer in South Florida State Hospital, which aims to rehabilitate incarcerated rapists and other serious sex offenders, largely by means of group discussions and self-help enterprises. Wives and girlfriends are drawn into the system and special attention is given to after-care following a gradual transition to the free community. For instance, ex-offenders are given pocket telephones which they can use to dial another ex-offender volunteer for support whenever he feels the urge to re-offend creeping up on him. There is also a private group of sex offenders and sex-offenders meeting voluntarily, independent of the institution. Men who have passed through the programme but still feel the need for help can enrol in this. A prominent feature of the system is the proselytising role of members of the group still under treatment who are prepared to talk to visiting dignitaries, representatives of womens' groups and so forth, arguing for more enlightened approaches to sex problems and putting their members forward as examples of what can be done. Group loyalty and fear of betraying the 'cause' is a powerful factor in keeping misconduct under control.

7.35 Another well known American programme operates in Washington State under the powers conferred by a Sexual Psychopath statue which enables the courts to commit sex offenders to hospital for a thorough assessment, which can last up to 90 days. If the therapists find them suitable for the regime, the court can then commit them for treatment. Initially they are confined to the hospital wards, but usually for somewhat less time than they are allowed gradually increasing periods at liberty under supervision until they are finally released into the community with a requirement to report back at stated intervals. The phased release begins only after the sentencing court has received favourable reports from the therapists and given its consent. If reassuring reports are not forthcoming, the court can substitute a punitive sentence for the treatment order. This formal and public procedure helps to motivate co-operation and is a safeguard against abuse by either the offender or the authorities.

7.36 The Washington regime runs on a 'guided self-help' principle. The chief therapeutic activity is participation in intensive discussion groups at which the offender is required to present before his peer and the therapist a very frank and truthful autobiography, including a full account of his socio-sexual relationships, fantasies and offending behaviour. He must also take part in the work assignments and social

and recreational activities of the therapeutic community and learn to live in intimate proximity with others who know about his problems and oversee his reactions with a sympathetic but critical eye. The aim is to promote in the offender recognition of the hurtfulness of his behaviour, an understanding of how his offences come about and an acceptance of responsibility for changing his ways. Practices in breaking down social isolation and developing more constructive relationships is considered essential. The offender has to demonstrate before a sophisticated audience real progress in all these respects before he is eligible to begin the first steps towards release.

The regime is meant primarily for men whose sexual misconduct stems from poor socialisation or inability to sustain fulfilling adult relationships, rather than for whose prime problem is a deviant fixation. Nevertheless, exercises in orgasmic reconditioning by manipulation or masturbation fantasies are encouraged in selected cases. Most of the clients are adults in their 20s or 30s with a history of repeated sex offences and consequently a high risk of recidivism. The great majority of their victims are young females or children. A recidivism rate of 22 per cent in a follow-up period of from 1 to 12 years has been reported (Saylor, 1980), which is considered significantly less than expected. Unfortunately, as with so many other promising treatment programmes, there is no adequate control group with which to compare this statistic. Moreover, when as must happen sooner or later if large numbers of offenders pass through, one of the subsequent offences in sufficiently serious to attract notoriety and unfavourable comment in the media, there is a great risk of the sacrifice of the whole scheme from loss of public confidence and of judicial support. This nearly happened on more than one occasion in Washington State. When such an event occurs commentators rarely stop to consider whether, without the treatment efforts, incidents of a similar kind following release from ordinary imprisonment might not be still more frequent.

7.37 The best known of American treatment enterprises operate with imprisoned or hospitalised offences, but some specialise in providing alternatives to incarceration. A scheme of this kind was begun in Albuquerque, New Mexico, in 1972 in response to the concern of some local judges who found they had no suitable way of dealing with the more pathetic and non-violent exhibitionists and child seducers. These men seemed to need help rather than a possibly counter-productive sentence of imprisonment. S o a community service was set up which aimed to help its offender clients to improve defective social skills, to develop concern for the interests and feelings of potential victims, to achieve self-esteem and to build up strong conditioning against committing further offences. Clients were required to enter into a contract specifying the services to be received, the length of time during which these would be provided and the conditions they would have to agree to fulfil. The system tends to cater for youngish and mostly single men, many of them lonely drifters in the city. It includes a walk-in counselling service for moments of crisis. The reconviction rate of co-operative clients is surprisingly low. The Albuquerque system has gained a considerable reputation, done much to change local community attitudes and even influenced the state laws on sex offending.

7.38 Another community based effort, the Santa Clara Child Sexual Abuse Treatment Program, organised by the Juvenile Probation Department in San Jose, California, has already been mentioned (see para 4.20). This is a counselling programme begun in 1971 to help families who might otherwise be broken up following the disclosure of an incest offence and the subsequent 'explosive reaction' of the traditional criminal justice system, which often deals 'a knock out blow to a family already weakened by internal stresses' (Brecher, 1978, p.26). The initial contact is made by a volunteer from 'Parents United', a group made up of families who have been through similar experiences. Wife, husband and child are each provided with counselling and also with practical help with the allied problems of housing, finance, and legal aid. At a later stage of treatment the whole family meet for counselling as a group. Giarrettor, the Director of the project, is content that the effort is coupled with a criminal justice system that is humane and flexible enough to encourage participation in treatment. Offenders are often given relatively short sentences in open conditions so that they can attend counselling sessions and continue work to support their families while residing away from home. The shock effect of legal intervention helps to motivate men to change. It also reinforces the idea of personal responsibility for transgressions. The goal of the treatment is to re-unite the family where possible, and this is accomplished in some 90 per cent of cases.

One consequences of the availability of treatment programmes such as this, with the attendant publicity and increased talk about 'sex abuse', is a rapid escalation of referrals. This does not mean that sex abuse is necessarily increasing, but rather that the problem is being more openly recognised and tackled.

7.39 Complete 'cure' is not always a realistic aim in the treatment of sexual problems. At Atascadero State Hospital in California, where many sex offenders used to be committed under the recently repealed "mentally disordered sex offender' statute, and where some hundreds still reside pending decisions as to their release, attempts are made to modify the behaviour of homosexual paedophiles without necessarily changing their sexual orientation. The retraining programme aims at encouraging sexual contacts with adult males. Student volunteers from local gay groups help in role-playing sessions to instruct the patients in techniques of socialising in gay bars and securing appropriate sex partners without causing offence to society (Serber and Keith, 1974).

The Repeal of the sexual psychopath laws in the United States has not been an unmixed blessing in relation to the securing of treatment for sex offenders within the penal system. In California, for example, there is now legal provision for prisoners wanting treatment to request transfer to hospital in the last two years of their sentence. Atascadero, although well equipped to deal with such cases, has received none and expects none under the new system, for the reason that prison authorities prefer to take up the limited number of places allocated for inmates who are more troublesome in prison than the sex offenders (Kiersch, 1983).

7.40 A particularly interesting American development is the proliferation of treatment centres specialising in teenage sex offenders. A recent publication describes 9 such schemes and lists 26 others (Knopp 1983). Some are residential programmes, others community based. They are

inspired by the belief that it is better to tackle deviant sex behaviour before habits have become too ingrained. The techniques include counselling, social skills training, sex education, group discussion, family therapy and emotional re-orientation through experience of a kind and caring therapeutic approach. Therapists identify family conflict and disruption, and physical and sexual abuse of children as important causes of the feelings of bitterness and impotent rage that seem to motivate many aggressive young sex offenders.

There is little in the United Kingdom to compare with all these impressive American projects, but there are avenues by which a favoured few of our sex offenders manage to secure treatment.

5. AN ALTERNATIVE APPROACH

*Consider the advantages and disadvantages of suing in tort for sexual assault. Here, for examine, consider the evidentiary burden and different procedural rules.

The Independent 26.11.88

Woman wins civil action in rape case

By Sandra Barwick

LORRAINE MILES made legal history yesterday when her civil action, the first unsupported by a criminal conviction for rape, was upheld and she was awarded £25,108 in damages.

Miss Miles, 25, a teacher, was sexually assaulted by a therapist on his couch after he had been massaging her back for an old injury, the judge found. She was so shocked that she did not report the assault until many days later, when all physical evidence had been destroyed, and as a result no criminal prosecution was brought.

Mr Justice Caulfield, sitting at Chelmsford, said that he believed her story that Kenneth Cain, 47, of Benfleet in Essex, had sexually assaulted her on one occasion and raped her on another at his clinic. He awarded her damages for trespass to the person, but ordered that the award be stayed pending a possible appeal.

Miss Miles's success is likely to encourage other women to take action in the civil courts, when a criminal conviction seems unlikely, and was warmly welcomed by women's groups yesterday.

On 23 December 1985, when his surgery was empty, Mr Cain had committed a trespass against her person, the judge said, "in furtive carnal gratification while the plaintiff was prostrate and passive". Mr Cain, married with three children, listened with head in clasped hands as Mr Justice Caulfield totally rejected his claim that Miss Miles had fantasised or dreamed the rape.

The judge said he had never seen a woman subjected to such a thorough and ferocious cross-examination, though it had been perfectly proper. "The plaintiff broke down often, but I am satisfied that they were genuine breakdowns and not histrionics," Mr Justice Caulfield said. "Under the greatest stress in the witness-box she impressed as basically a truthful woman." This was the reason for his finding, he said, and she must be compensated for the pain and suffering she had endured."

Miss Miles was intelligent, the judge said, and he was positive, not merely satisfied, that after December 1985 she had changed from being a perfectly happy, uninhibited, normal, out-going young woman into an introspective, dull, at times fearful woman. She had developed genuine symptoms of hysterical illness.

The major issue for him to decide was whether she had been "raped, buggered and desecrated" by Mr Cain.

She had gone to him for treatment to a shoulder, which she had hurt while weight-lifting. Mr Cain was a man of "previously excellent character" who worked mainly as a therapist for sports injuries. The teacher attended as many as 28 treatment sessions. Nothing untoward happened until 18 December 1985, when Miss Miles said Mr Cain touched her inner thigh.

Two days later she had returned to the centre, when treatment included use of a heat lamp and massage with oil. It was then, said the judge, that the first serious sexual assault took place, leaving her in a state of shock. She could not speak, although there were people all round her curtained-off cubicle.

She was too frightened to tell her father and decided to keep her next appointment, when Mr Cain raped her and committed other indecent sexual acts. The judge said Mr Cain had denied committing any of the alleged attacks, but he believed utterly that the teacher was telling the truth.

He said Mr Cain had called his best evidence to show that he had never been alone with her, and that the rape could not have occurred without other patients hearing. But, the judge said, the evidence lacked the necessary precision for him to find that the teacher had lied, or that her evidence was "dishonest or fanciful".

Miss Miles's solicitor said that her chief objective had been to get a public acknowledgement that she was telling the truth.

A representative for Women Against Rape said: "It's an important breakthrough. It's a big victory and we certainly hope this will set a precedent."

Patricia Miles, Miss Miles's mother, said: "This is the happiest day of my life. I am elated."

A spokesman for the Crown Prosecution Service said that it was unlikely that the CPS would now bring criminal proceedings. "The burden of proof in a civil case is very different to a criminal case. A civil case can succeed simply because a certain story sounds more likely. A criminal case must be proved beyond reasonable doubt," he said.

6. SEXUAL ASSAULT ON WOMEN IN CUSTOMARY LAW

We have set out at some length the customary law of marriage because it indicates very clearly the social attitudes to women under the traditional law. It is against that background that we have to reflect on the law governing violence against women. Writing on customary criminal offences, Dr Eugene Cotran in a short excerpt from his work, "Report on Customary Criminal Offences in Kenya" 1963 and reprinted in "Readings in African Law", Vol.I by Rubin and Cotran, 1971 lists the following customary criminal offences against women:

(i) **Adultery with a married woman.** All tribal groups in Kenya, without exception, recognise that it is a criminal offence for a man to have sexual intercourse with the wife of another man. The ingredients of the offence are:

(i) That the accused had sexual intercourse with a married woman.

(ii) That he knew or had reason to know that the woman was married to another man.

(iii) That the husband of the married woman did not consent or connive to the intercourse.

(iv) That the consent of the woman is immaterial.

It must be noted that the offence is only committed by the male adulterer. The adulterous woman commits no criminal offence. Likewise, a wife may not prosecute her husband for committing adultery with another woman.

The following statement, which has been accepted by all the Provincial Meetings and which incorporates all the ingredients of the offence, is suggested:

'Any person who has sexual intercourse with a woman who is and whom he knows or has reason to believe to be the wife of another man, without the consent of connivance of that man, is guilty of an offence. In such a case the woman shall not be punishable as an abettor.'[9]

Apart from being a criminal offence, adultery also has various civil aspects, viz"

(a) In most customary laws, the adulterer has to pay a fixed customary compensation to the husband, e.g. one bull and one goat by Kamba law; and five rams and one ewe by Kikuyu law.

(b) In some cases, the parents or family of the adulterous wife pay some compensation, e.g. one heifer, to the husband.

(c) Most customary laws hold that habitual adultery by a wife is a ground of divorce for the husband, though a husband's adultery is rarely considered to be a ground of divorce for the wife.

(ii) **Taking away or enticing a married woman.** As with adultery, all tribes in Kenya, without exception, hold that it is a criminal offence for a

person to take away or entice a married woman from her husband or other person having the lawful care or charge of her.

This offence differs from adultery in two respects:

(a) Sexual intercourse need not be proved; the mere unlawful taking is sufficient.

(b) Usually (but not necessarily), this offence has a more permanent character, e.g. taking away a married woman from the country to Nairobi.

(i) That the accused took, enticed, removed, concealed or detained a married woman.

(ii) That the taking, removal, etc., was unlawful.

Examples of a 'lawful' taking are:

(a) a father taking away his daughter because her husband refuses to complete bride-price payments for her;

(b) a taking with no intention to have illicit intercourse with the married woman. In the Provincial Restatements, the offence contained as an ingredient an intent to have illicit intercourse with the woman. The attitude of the delegates was that if a man removes a married woman, he must be presumed to have done so with intent to commit sexual intercourse with her. I would therefore suggest the omission of this intention as an ingredient, i.e. it should not be a matter for the prosecution to prove. Any 'unlawful' taking would constitute the offence; and the meaning of 'unlawful' would be left to the court.

(iii) That the accused knew or had reason to believe that the woman was the wife of another man.

(iv) That the woman was at the time of the offence living under the care of her husband or someone else on his behalf.

(v) That such husband or other person on his behalf did not consent to the removal of the woman.

(vi) That the consent of the woman is immaterial.

As with adultery, this offence is only committed by the person who removes the woman (and any accessories), but the woman may not be charged as an abettor.

The following statement, incorporating the ingredients of the offence, is suggested:

> 'Any person who unlawfully takes or entices away or conceals or details any woman, who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any other person having the lawful care or charge of her on

behalf of that man, and without the consent of connivance of that man or other person, is guilty of an offence. In such case the woman shall not be punishable as an abettor.'

There is no customary compensation payable for mere removal of a married woman, though if adultery is also proved, the adultery compensation will be awarded to the husband. In addition, the court may award the husband (or other guardian) the expenses incurred, e.g. travelling expenses, in bringing back his wife.

(iii) **Taking an unmarried girl out of custody of her parent or guardian.** All districts in Kenya recognise that it is a criminal offence for a person to take away or remove an unmarried girl out of the custody of her parent or other person having the lawful care or charge of her, and against the will of such parent or other person.

The ingredients of the offence are:

(i) That the accused has taken away or removed an unmarried girl.

(ii) That the taking or removal was unwalful.

Examples of a 'lawful' taking are:

(a) a taking after payment of bride-price to the girl's father.

(b) a taking with no intent to have illicit intercourse with the girl, e.g. going for a walk; a taking (e.g. by a missionary), to prevent the girl from being forcibly married to a man. As with 'taking away a married woman', in some Provincial Restatements, this offence contained as a necessary element an intent to have illicit intercourse with the girl. But here again, the delegates took the view that such intent was presumed. I would therefore again suggest that this element should be omitted from the definition, i.e. it should not be matter for proof by the prosecution. Any 'unlawful' taking would constitute the offence.

(iii) That the removal was against the will of the parent or other person having the lawful charge of the girl.

(iv) That the girl was at the time of the removal living under the custody of her parent or other person having the lawful care or charge of her.

(v) That the age of the girl is immaterial.

The following statement for the offence is suggested:

'Any person who unlawfully takes an unmarried girl out of the custody of protection of her father or mother, or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of an offence.'

Mere removal of an unmarried girl does not subject the remover to any customary compensation (although the court may award to the father his expenses in bringing back the girl home). If, however, the man has sexual intercourse with the girl, he does have to pay customary compensation under most customary laws, e.g. one heifer by Luo and Luhya law for loss of virginity. Additional compensation is also usually payable if the girl becomes pregnant.

(iv) **Sexual intercourse with a person within the 'prohibited degrees'.** It is true to say that all tribes in Kenya regard it as a very serious matter for a man to marry or have sexual intercourse with a girl to whom he is related within the customary prohibited degrees of marriage. The matter was first raised in Central and South Nyanza (Luo Districts) who insisted that a man who commits this offence should be punished criminally. In the Nyanza Provincial Meeting, the other Nyanza Districts agreed with the Luo contention and the matter was thus recorded as a criminal offence for the whole of Nyanza Province.

The difficulty, of course, is that the customary law marriage prohibitions are extremely wide, e.g. under Luo law, persons belonging to the same Dhoot (a group tracing descent from a common ancestor going back sometimes to 12 generations), may not inter-marry; and by Abaluhya law, a man whose four grandparents' clans[4] are A, B, C and D, may not marry a girl whose any four grandparents' clan are A, B, C and D - the girl's grandparents' clan must be E, F, G and H.

As it would be extremely difficult to incroporate this offence in any of the written laws of Kenya, an attempt was made to dissuade the Nyanza meeting from having this as a criminal offence, but they were quite adamant in rejecting any such suggestion. The tribal groups in the other Provinces were quite happy with the suggestion that this matter should not form part of the criminal law, but that the marriage would be held totally invalid under customary law.

The ingredients of the offence are:

(i) That the accused had sexual intercourse with a female person.

(ii) That such female person was related to him within the prohibited degrees of marriage under his customary law.

(iii) That he had knowledge of the relationship.

The following statement for the offence (applicable in Nyanza Province only) was agreed by the Provincial Meeting:

'1. Any male person who has sexual intercourse with a female person who is to his knowledge related to him within the prohibited degrees is guilty of an offence.'

'2. "Prohibited degrees" means the prohibited degrees of marriage according to the customary law of the male person.'

(v) **Receiving a second bride-price during the subsistence of a marriage.** All tribes in Kenya take the view that it is an offence for a father (or guardian) to receive a second bride-price in respect of his daughter (or

other person whose guardian he is), whilst such daughter is still lawfully married to her first husband.

In the past, this offence was referred to as 'receiving a second bride-price before returning the first bride-price'. This is actually incorrect for two reasons:

(a) Under many customary laws, the first bride-price is in certain cases not returnable at all upon divorce, e.g. by Luo law and Abaluhya law, if the woman had many children, nothing is in fact returnable.

(b) In effect, the first bride-price in some cases cannot be returned before the second has been received, i.e. the father may not have the cattle and must wait until his daughter remarries. under some laws, e.g. Kamba law, the first husband is not entitled to the return of his bride-price unitl his ex-wife remarries.

The following are the ingredients of the offence:

(i) that the accused received, upon the marriage of his daughter (or other person whose guardian he is), a bride-price.

(ii) that during the subsistence of such marriage, the accused unlawfully received a second bride-price in respect of the same daughter.

The Provincial Meeting of Coast Province raised the point that if the first husband in fact refused to complete his bride-price commitments, the father is entitled to remove his daughter and receive a second bride-price from another person. He will commit an offence, however, if he refuses to return the first bride-price to the first husband. It is submitted, that the phrase 'unlawfully receives' covers this eventuality, i.e. if the father receives a second bride-price as a result of the refusal of the first husband to complete his dowry payments, such receipt would not be unlawful.

The following statement for the offence is suggested:

> 'Any person who, having received one bride-price in respect of his daughter (or other person whose guardian he is) from one person, unlawfully receives a second bride-price in respect of the same daughter from another person, whilst such daughter is still lawfully married and not legally divorced, is guilty of an offence.'

The Second suitor is naturally entitled to the return of his bride-price. He (the second suitor) may not be prosecuted. The offence is *receiving* not paying the second bride-price.

(vi) **Circumcising a person without consent.** Circumcision of males and females is practised by many of the Kenya tribes. The subject of female circumcision has caused much controversy in the past, as a certain body of opinion (especially missionaries) strongly objected to the practice and advocated its prohibition by legislation. The position today is that no tribe (with no exception)[5] is prepared to accept the abolition

of the practice. However, it is true to say that with the growth of education, the influence of Christianity and the general advancement of the people, many individuals nowadays refuse to undergo circumcision. In order to cater for such people, all the Provincial Meetings suggested offences connected with the circumcision of persons without their consent or the consent of the parents.

It will be seen that little mention is made of sexual attacks without the consent of the women. Penwill, writing in "Kamba Customary Law", published in 1971 says:

Adultery

If a man commits adultery with a married woman, the customary penalty is the payment of a bull and a goat. The elders - of the aggrieved clan, and of the 'utui' or Tribunal, if these latter have been called in to give judgement in the matter - slaughter them both at the house of the injured husband, who shares in the feast but gets no specific compensation. (In Kikumbulyu it is two goats and a bull). In addition, in the past, the act might well have caused fighting between families and perhaps a death; nowadays, it is made a crime against native law and custom under Section 13(a) of the Native Tribunal Ordinance, 1930, and in addition to the customary compensation the guilty accused will be fined - normally to pay forty shillings, or to undergo two months in the Detention Camp in default.

There is no difference if the woman is made pregnant; the penalty and the compensation are the same, and the child belongs to her husband. If she dies as a result of her pregnancy, say in childbirth, the adulterer must pay the blood price for her - four cows, a bull and a goat, normally; but in Kilungu, Nzaui, Mbitini and Mukaa, the number of cows is increased to five, and in Kikumbulyu to six. If the child is born dead, or there is a miscarriage, there is no further penalty, for it is regarded as the child of the legal husband. There was a case at Nzaui in 1947 of a man accusing another not only of adultery but of infecting his wife with gonorrhoea; however, the "utui" elders considered that there was no proof that it was the fault of the accused and the case was not registered at the Tribunal. There is no customary penalty or compensation for such injury resulting from intercourse, and it would have been interesting to see the outcome of the case had the charge been proven.

Taking a married woman away from her husband is treated similarly; it is a crime against native law and custom for which either fine or imprisonment may be awarded, and the customary compensation is the same.

Fornication

If a young man has intercourse with a girl who is unmarried but past the age of puberty - as frequently happens after a dance - there is no penalty, even if part of the bride price has been paid for the girl and the man is not her prospective husband. If, however, the girl is made pregnant, the customary penalty is a goat, which is slaughtered and eaten by the elders. (If she dies as a result of her pregnancy, the blood price is payable). Normally, under the circumstances, the girl returns to her father's house until she bears the child; only then does she name the father, and one of the elders of the family

goes to call on him, telling him to bring a goat for slaughter since it is understood that the child is his. If he agrees, the man will give this goat; if not, he goes with an elder of his own family to confront the girl and argue the matter to a decision, which the elders of the two families may be called in to make. When the girl is married, the husband takes her child as his.

If the child is born dead, or there is a miscarriage, a goat and a bull must be paid over and not just a goat. In Kikumbulyu, if the child is recognisable as male, seven goats must be paid; if female, five goats.

If a man had intercourse with a child, not yet past puberty, the customary penalty was a goat. Such offences have now been removed from the sphere of customary law by Sections 137 and 138 of the Penal Code, and are outside the jurisdiction of the Native Tribunals.

The taking of an unmarried girl away from her father is punishable, if the girl is under sixteen, by Section 136 of the Penal Code. It is also regarded as an offence against native law and custom, whatever the girl's age, and is treated and punished as such, if the girl is older, by a fine or imprisonment. No customary compensation is payable, save the goat for the elders if the girl is made pregnant.

There has been widespread dissatisfaction with the customary law and penalty for impregnating an unmarried girl. In earlier times, a child was an asset, and a girl could easily be married after bearing one. Now this is changing. Her value on the bridal market is depreciated - her father's loss - and she may never get married and have to stay with her father all her life, or go out to become a prostitute. Furthermore, a goat (whose legal value is tewlve shillings but can often be bought for less) is nothing to young clerks and schoolmasters who earn eighty or one hundred shillings upwards each month. The result has been that there have been cases before the Native Tribunals when the girl has sued the man for the maintenance of the child and its clothing. The usual claim has been for a lump sum of one hundred shillings, or thereabouts. In 1949 one of the pupils at the African Girls' School sued one of the African schoolmasters in this way. Such claims were due to the influence of Europeans, and the elders, though puzzled by the departure from custom, usually awarded a cash sum in compensation. It was decided that it was necessary to clarify this matter and to modify Kamba custom to meet modern needs. A directive was therefore issued that in such casaes the claim must be brought by the appropriate male relative - usually the girl's father - and Local Native Council Resolution 2/1950 reads:

> "That this Council approves the recommendation of the Law Panel, namely that an alteration in Kamba Law and Custom be accepted and the customary penalty of one goat for causing pregnancy in an unmarried girl shall be increased to whatever sum the Native Tribunal hearing the case may consider as suitable compensation."

Rape

Kamba custom does not differentiate in the scales of compensation between rape and consent. Whether the woman consents or whether she is compelled by force, the payments are the same. But in the past such an act as rape would have certainly led to fighting between the clans concerned, and probably to several

deaths before the elders of other clans in the neighbourhood could mediate. Now the distinction is clear, since charges of rape are not heard by the Native Tribunals but by the Supreme Court.

If the act had roused the indignation of the community, they might have executed the culprit by the "king'ole" (this procedure is described under the heading of "theft"). This happened to a man called Nzau wa Uthuko, from Mwala, who raped both a mother and her daughter.

Unnatural Behaviour

If a man commits an unnatural offence with a young boy, he must pay over a goat and a bull. If two men commit the offence together, each must pay a goat. Such cases are rare among the Kamba. Even rarer are cases of men having connection with animals, which the elders regard with such horror and which are unusual, that there is considerable uncertainty as to what penalties should be exacted. One man in Nzaui, Nyange, who had connection with somebody else's cow, was told to take the animal himself and to give one of his own in exchange and to slaughter a goat. In other cases, a fine of a cow and a goat has been paid which seems to be the most usual penalty - the goat is for slaughter for purification in all these cases.

Such cases should now be charged under Section 155 of the Penal Code, but they are normally settled quietly in the locations without even coming to the Courts.

The Kamba regard it as unnatural to have colition with a woman from behind. If a man does this, even with his wife, he must slaughter a goat for purification. By this act he has levelled himself with the animals.

Forbidden Relationships

If a man had intercourse with his sister of daughter or mother, he would in former times have been beaten and tortured by his clan. This is now replaced by the punishment awarded following a charge under Section 160 of the Penal Code. He would also be required - and still is - to pay a goat and a bull for the purification ceremonies. In the past he would probably also have been fined several more bulls or cows by his clan elders, according to the circumstances and the seriousness of the offence - there is nothing fixed save the one bull and one goat. If the man has had intercourse with his sister, she cannot be married until after purification; and if with his daughter, he must leave his wife until this has taken place.

In all these cases, the question of criminal wrong is now decided in the Magistrates' Courts, but the slaughter of beasts are still required for the necessary ceremonies. A case occurred at Ngelani in Iveti in 1932; the man was feeble-minded and went to his mother's bed at night, she welcoming him not knowing who he was. He was imprisoned for ten months, and paid a bull and a goat in addition. There is no legal penalty for the woman in these cases, save the reproach of the clan and social stigma.

Loaning Wives

The rights of half-brothers over each other's wives have been described. The "loaning" of wives to guests or friends, as described by Lindblom on pages 81 and 82, is no longer practised. It is possible that after a day of special celebration, if a man were entertaining a particular friend, they might sleep with each other's wives, but it is exceptional.

Rape is a statutory offence under the Penal Code of most African countries and if the matter is reported to the police a prosecution may be brought. However, many families are still unwilling to have such an offence dealt with in a formal court and will try and deal with the offender within the family. An example of a rape case tried by the Eastern Africa Court of Appeal in Chila and Another v. Republic, (1967 (E.A.) 722. Law, J.A. delivered the judgement and said:

> "C.A.V.
> September 6, 1967. LAW, J.A. delivered the following judgement of the court: The appellants were convicted in the High Court of Kenya at Kisumu (Miller, J.) on an information charging them jointly with the offence of rape. On August 29, 1967, we allowed the appeals of both appellants, quashed the convictions and set aside the sentences of four years' imprisonment and eighteen stokes passed on each of them; and we now give our reasons. The charge was worded as follows:
>
> > " STATEMENT OF OFFENCE
> >
> > Rape, contrary to s. 140 of the Penal Code.
> >
> > PARTICULARS OF OFFENCE
> >
> > Chila Akama and Owiyo Jacob Nyabula, on the 30th day of October, 1966, at Nyang'oma Sub-Location, Sakwa Location in the Central Nyanza District in the Nyanza Province, Kenya had unlawful carnal knowledge of Jael Odipo Eliakim Obondo."
>
> This charge was defective in that it failed to specify the essential ingredient in a charge of rape, that the carnal knowledge was had without the complainant's consent, see form four in Sched. 2 to the Criminal Procedure Code. As the information stands, the particulars of offence are defective in that they disclose
>
> > no offence in law. On a parity of reasoning with the decision in *Terrah Mukindia v. Republic,* had we not decided to allow the appeals on another ground, we would have had to consider whether the defect in the charge in the present case would not likewise have been fatal to the convictions.
> >
> > Another serious defect in the proceedings was that at no stage in his summing up to the assessors, nor anywhere in his lengthy judgement, did the learned judge mention the desirability in a trial on a charge of rape for corroboration of the complainant's evidence in a material particular implicating the accused. The law of East Africa on corroboration in sexual cases is as follows:

> The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.
>
> In this case the learned judge convicted the appellants because he believed the complainant to be a truthful witness. So obviously did the assessors, who advised that both appellants had carnal knowledge of the complainant without her consent. But it is by no means certain that they would have given this advice, or that the judge would have convicted either appellant, had there been a proper direction as to the desirability for corroboration. Learned state counsel conceded that there was no corroboration whatsoever of the allegations against the second appellant. As regard the first appellant, it would seem from the evidence that the complainant went freely with him, knowing what he wanted, and that he escorted her back to the school where she was staying, after the intercourse had taken place. Had corroboration been sought as to the lack of consent on her part, it would not have been easy to find. Her subsequent complaint to the headmaster, which does not in itself constitute corroboration, may have been due to remorse, or fear of the consequences of her conduct, or to some other reason.
>
> We were not satisfied that, upon an adequate direction as to desirability for corroboration of the complainant's evidence implicating both appellants, either would have been convicted.
>
> Appeals allowed."

The following judgement of Muchechetere J. in the High Court of Zimbabwe (Judgement No. HC-B-48-87, 13 March 1987) indicates factors that will be taken into account in sentencing an offender:

The State vs. Adum Bwanusi

MUCHECHETERE, J.: The accused was charged with two counts of rape and was properly convicted. He was sentenced to four years' imprisonment with labour one year of which was suspended conditionally for five years. I was concerned with one of the factors which the Magistrate took into account as a mitigating factor in sentencing resulting in the reduction of the ultimate sentence. He took into account that:

> "The Complainant may be of some questionable morals. Although the Accused's moral blameworthiness is not very high because of this fact ....."

I was of the view that in the circumstances of this case the complainant's "questionable morals" were not relevant and should therefore not have been taken as a factor reducing the accused's moral blameworthiness.

The fact in this matter as found by the trial Magistrate were that the complainant got to a Hotel at about 8.00 p.m. and left it at approximately 1.00 a.m. She was alone. At the gate of the Hotel the accused grabbed her and dragged her all the way to his place or residence calling her a prostitute in the process. There was a struggle as she was trying to pull away. When they reached the accused's place of residence he took her into the house and threw her onto the ground. During the struggle a window pane of the house was broken. The accused thereafter forcibly removed the complainant's shoes, jersey and pants and then raped her once. Soon after he had completed his purpose he took a sjambok and assaulted her with it while calling her a prostitute. He also slapped her on the left cheek. Not being satisfied with all this the accused raped her again for the second time. Thereafter he switched off the lights and went to sleep.

While the accused was sleeping the complainant managed to escape through another door and went to the Ziscosteel security guard's duty room nearby where she made a report. Thereafter the police were called. With the policy she recovered her jersey, shoes and pants from the accused's house. It was noted that her dress was bloodstained and had a tear in it. A doctor's report, produced by consent, confirmed that the complainant had bruises behind left ear, that the area in front of the left ear was bleeding. The doctor noticed a small lesion on the mucus membrane of the upper lip. In connection with the vaginal smears he also noticed what he stated as:

> "Taken piece of man's private with dark muti in vagina".

From the above it is clear that this was a brutal and sadistic rape. On this the trial Magistrate said in his reasons for sentence:

> The assault on the complainant appears to have been perpetuated in a brutal manner and I have just been asking myself why the accused found it necessary, having raped the Complainant, to further assault her."

To my inquiry as to why the complainant's "questionable morals" were a mitigating factor in this case the trial Magistrate replied as follows:

> "The Court found that the Complainant was a woman of some questionable morals. In particular the Court found that she was frequently in beer halls. On occasions, she would leave the beer hall at 2 a.m. It is common cause the Accused had also been drinking in the same beer hall on the day in question. The Court found, on the evidence, that the Accused followed the Complainant, made advances, and thereafter raped her. It was clear to the Court, that despite the Complainant's questionable morals, she did not consent. This however was taken into account in assessing an appropriate sentence, and in my opinion rightly so. A rape committed on a woman of loose morals as she leaves the bar by a man with whom she has been drinking is less traumatic than a rape committed on a decent young woman in her own house.
>
> A more deterrent sentence would be called for in respect of the latter case. The moral blameworthiness of a man who rapes a drunken prostitute with whom he has been drinking must surely be less than that of a man who breaks into a decent woman's residence and rapes her. In short, in the particular circumstances of this case, the fact that the Complainant was a woman of loose morals and was probably soliciting would have affected the quantum of sentence."

In the first place there appears no basis for a finding that the woman was of questionable morals. On this point the trial Magistrate said in his judgement:

> "She says she left the hotel at 1 a.m. intending to walk back to her place of residence. Again she was alone. I did ask if she intended to get male company and she replied in the negative. On her admission she has been to this hotel on quite a few occasions. The possibility, therefore, that she is a woman of loose morals cannot be disputed."

This is the only ground given by the trial Magistrate for his finding that the complainant was of "questionable morals."

In my view the fact that a woman goes alone into a beer hall, bar or hotel and drinks until 1 a.m. or 2 a.m. does not of itself make her of questionable morals especially in this day and age where equality between sexes is the norm. The trial Magistrate found as a fact that the complainant in this case went into the hotel alone and left alone. It was only at the gate of the hotel that the accused grabbed her and started dragging her to his place of residence. There is no evidence that while in the hotel she either misbehaved or exhibited herself as a prostitute.

After having believed the whole account of the Complainant and rejected that of the accused there is no basis for a finding that the complainant was of loose morals merely because she admitted that she has been to this hotel on quite a few occasions. There is no reason why she should have kept away from the hotel. In my view it is discriminatory and therefore wrong to conclude that a woman who frequents and drinks in bars, beer halls and hotels whether alone or in the company of others has questionable morals without necessarily drawing the same conclusion in connection with a man. There is no indication in the trial Magistrate's judgement that he considered the accused a person of questionable morals because he frequented the hotel also. In order to conclude that a person, woman or man, is of questionable morals there must be factors or a factor other than the mere fact that she or he frequents beer halls, bars or hotels tending to indicate her or his lack of morals. No such factors are existing in this case.

The second matter is that even if it could be accepted that the complainant is of questionable morals there is no reason why in this case this factor should be taken into account because it was held as a fact that she never solicited the accused or even showed any interest in him. It was the accused who suddenly grabbed and dragged her as she was going out of the hotel gate. The complainant resisted the accused from the beginning to the end. The fact that the accused might have thought her a prostitute just because she was leaving the hotel at 1 a.m. is in my view irrelevant. What is relevant is the manner and attitude in which she exhibited herself towards him. In this case she was just minding her own business and intended to go home. There is in my view no reason why persons who rape prostitutes should be treated lightly when the prostitutes have neither made overtures to nor shown any interest in them. A prostitute in circumstances of this nature should be treated like any other complainant. A difference of treatment would be sending the wrong message to would-be rapists, which is that, if they rape prostitutes they would receive lighter sentences in courts. This is not only discriminatory against prostitutes but is likely to make rape attacks on them comparatively more frequent.

In view of the above I consider that the trial Magistrate erred firstly in holding that the complainant was of questionable morals and secondly in treating the complainant's alleged "questionable morals" as a mitigating factor in the circumstance of this case. This resulted in the sentence he imposed for this brutal and sadistic rape being too lenient. I cannot therefore certify the proceedings as being in accordance with real and substantial justice.

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