New Canadian rape law battles old masculine myths

by Rebecca Murdock

Statistics indicate 60 to 90 per cent of sexual assault victims do not report the crime to the police. There are many reasons why women fail to report sexual assaults.

The prospect of recounting one's sexual history in the public forum of a courtroom does not do much to encourage reporting. What adult is without some kind of sexual past? Who could possibly feel comfortable disclosing information of such a personal nature under sworn testimony?

On August 15, 1992 a new rape-shield law was incorporated into the Criminal Code of Canada. During its draft stages, this new legislation was known as Bill C-49. "Rape-shield" basically means a sexual assault victim cannot be questioned on matters related to her past sexual history.

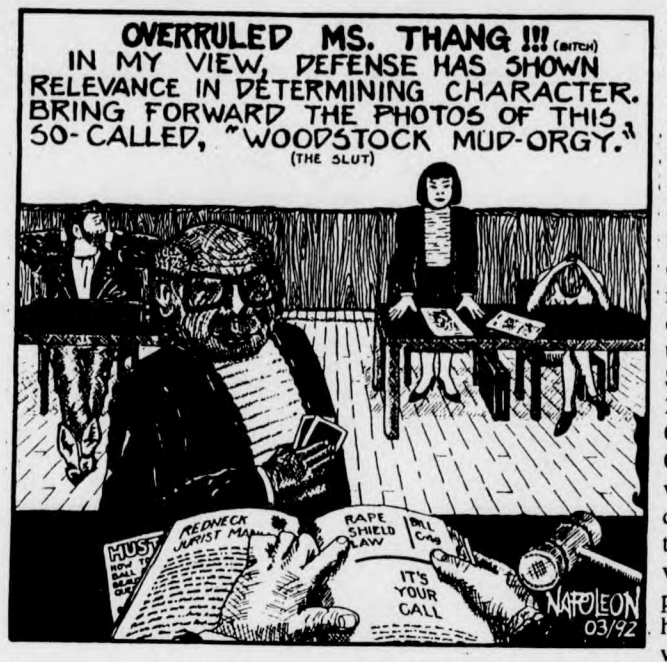
The 1992 rape-shield law is an improved version of a law first introduced in 1983. Before that time, victims of sexual assault were forced to answer questions concerning how often they had sex, with whom and whether they enjoyed sexual activity. A common tactic for defense lawyers was to undermine the credibility of a victim by showing she was promiscuous — a "loose" woman or a "slut" — and therefore capable of seducing, teasing or misleading the accused in some way.

The defense of "mistaken belief" was commonly used to show that while rape may have occurred in the mind of the woman, the accused "honestly" believed he had the woman's consent. Under this defense, many accused rapists were acquitted at trial because the crown could not prove the accused had the *intention* to rape. Trials under the Criminal Code must establish that an accused committed the alleged offense with a conscious and deliberate mind. Where this is not established, the accused is set free.

A rape-shield law is crucial to the fair administration of justice because it protects women from stereotypes that prejudge their "rapeability" according to past sexual activity. Instead of looking at the facts of the case, judges and juries have easily been sidelined in the past by erroneous assumptions that many women falsely or maliciously report rape, or that many rape victims invite sexual assault by their appearance or conduct.

Out-dated myths which focus attention on the behaviour of the victim rather than the accused produce a context in which the woman's morality ("Just look at the way she was dressed!") becomes more of an issue than the criminal actions of the accused. The assailant's trial is eclipsed by questions which always lead back to the woman and whether she falls into that category of women deemed uncredible — and therefore unrapeable.

The first rape-shield law appeared in Canada's Criminal Code in 1983.



For the first time, our courts were forced to acknowledge that sexual assault victims are revictimized by cross-examination that allow for unrestrained questioning of past sexual history.

In 1983 an absolute ban was placed on prior history if its aim was to discredit the integrity of the witness. In very special circumstances, however, a judge could allow the information if it was required as direct evidence. The law tried to distinguish between proper and improper use of past sexual history as character assassination, and the proper use of past sexual history as evidence necessary to the accused's defense.

In August, 1991, the Supreme Court of Canada ruled that the rape-shield law — as it existed since 1983 — violated the rights of an accused to a fair trial. The court decided in the case against Steven Seaboyer that important evidence existed which could not be brought forward through the narrow door already encoded in the law. Section 276 of the Criminal Code which dealt with the victim's past sexual history was declared unconstitutional and tossed out.

A new and much improved version of those repealed sections of the criminal code was formulated in Bill C-49. In August 1992, this Bill was passed by the House of Commons.

In some respects, the new law is not much different from the old. There is again an absolute prohibition on using past sexual history as evidence — except in three very narrow circumstances. What is new are the guidelines which set out considerations a judge must weigh before making a decision to allow or disallow prior sexual activity evidence. Also for the first time, a guiding preamble has been added, a definition of consent and wide restrictions on the defense of mistaken belief.

Women's groups like Bill C-49; criminal defense lawyers don't. Admitting a woman's sexual history as evidence is a balancing act which put a defendant's right to a fair trial at odds with a victim's right to privacy, retribution and protection from institutional sexism.

Even when framed as "evidence", a victim's sexual history can never be disclosed without dredging up stereotypes which automatically condemn a woman for having sexual capacity. Character assassination inherently exists when she acknowledges her sexual history.

We live in a world where judges and juries are every bit as captivated as the rest of society by concepts of female chastity and what may be called a fetish with virginity. If it were not so, women would not be so afraid to come forward with their stories of sexual assault. In 1988, police received 29,111 reports of sexual assault. That means anywhere from 43,668 women (60 per cent) to 261,999 (90 per cent) failed to report. For victims of sexual assault, the criminal justice system has been a colossal failure.

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Women's legal rights and date rape

Of the 800 rapes reported in Toronto in 1987, 500 of the victims knew their assailants. Twenty per cent of women surveyed in an undergraduate study at the University of South Dakota said they had been forced by their dates to have sex against their wishes.

A similar study at Wilfrid Laurier University found 52 per cent of first year female students had been forced into a range of sexual activity from "unwanted necking to unwanted sexual intercourse."

In the wake of the date-rape trials against William Kennedy Smith and Mike Tyson, attention is finally being focused on the fact that most sexual assaults do not occur between strangers. Surveys and police reports overwhelmingly indicate the majority of rape and other sexual assault victims knew their assailants.

In August 1992 a new rape-shield law was passed by Canada's parliament. Not only does that law disallow information at trial pertaining to a victim's past sexual history, but for the first time ever the law (also known as Bill C-49, or Section 273ff of the Criminal Code) offers a definition of consent as "the voluntary agreement of the complainant to engage in the sexual activity in question."

The new law outlines five categories where consent is *not* given:

1) consent was given through a third party (ie: "Mary told me she would have sex with you.")

2) the victim was incapacitated and unable to offer consent (ie: a frat party where the victim has had too much alcohol and doesn't understand what she's getting herself into)

3) the accused used his position of authority or trust to gain consent (ie: sex was offered by a boss or teacher, and the victim felt she must comply or lose her job or a passing grade)

4) the victim said "no" (ie: "Get away from me.")

5) the victim changed her mind about having sex as indicated in either her words or conduct (ie: "I've changed my mind. Get off of me.").

The new legislation further imposes great restrictions on the defense of mistaken belief. An accused will no longer be able to say "I thought she meant yes." Drunkenness, recklessness or willful blindness are no longer allowed as a defense. Rather, the accused must show that he took "reasonable steps" to gain the woman's consent.

Criminal defense lawyers do not like Bill C-49 because it seems to undermine the age old concept that a person is "innocent until proven guilty." In the past, the onus was entirely on the Crown to prove an accused was guilty of a crime "beyond a reasonable doubt."

With the new law, however, an accused has an added responsibility to show he took reasonable steps to gain consent. The accused can no longer sit in silence and wait for the case to be proven against him. Rather, he must at the outset show he made attempts to gain the woman's consent to engage in sex.

Is this fair? In the overall balance of power it certainly is. Change must be made to address the fact that only 10 to 40 per cent of sexual assaults ever result in a formal complaint to the police. Of that percentage, an even smaller fraction — nine per cent — ever result in sexual assault convictions.

Study after study shows that women are reluctant to come forward with accusations of sexual assault, especially in cases of date-rape. Women have internalized stereotypes about acceptable female behaviour, which has led to self-blame and a willingness to point the finger at themselves instead of an assailant whom they know from work or school.

Many women describe scenarios which clearly fall into the category of sexual assault, yet they themselves are unable to describe it in those terms. Some women engage in sexual activity unwillingly because they thought it was inappropriate to refuse (ie: "...after all, he bought me dinner."). Some studies show that men are less likely to believe their dating partners who said they did not want to have sex (ie: "She just needed some persuasion.").

The impact of Bill C-49 in relation to date-rape remains to be seen. What is clear is that there is a new onus on men to check with their partners to ensure that sex is something they both want. Where alcohol is involved, caution is of the utmost importance. If that means sex has to be put off until another day, so be it. Smart people know how to wait and avoid ambiguous situations which may later come back to haunt them.

- Rebecca Murdock