
Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues

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When a woman with a mental disability makes a complaint of sexual assault, she must confront a criminal trial process that was not designed in contemplation of her as a witness. The requirements of repeated testimony under oath and the ability to be cross-examined are not always well-suited to the particular needs and capacities of women with mental disabilities. These problems are magnified by the tendency to infantilize women with mental disabilities, thereby diminishing their credibility and depicting them as hypersexual when they engage in any sexual activity. These stereotypes also manifest themselves in the application of evidentiary rules relating to evidence of sexual history and records in the hands of third parties. In this way, the disabilities of these women are not merely physiological in an "objective" sense, but are also constructed by the trial process itself. This article considers how the experiences of women with mental disabilities demand modifications to evidentiary and procedural rules in sexual assault cases in ways that are consistent with the right of the accused to a fair trial. It also uses these experiences to reflect on the purported tension between sexual freedom and protection from violence that is evident in the feminist literature on sexual assault. The authors argue that substantive equality demands greater efforts to ensure the full participation of women with mental disabilities in the criminal trial process.

Lorsqu'une femme atteinte d'une déficience mentale dépose une plainte d'abus sexuel, elle se retrouve à devoir affronter un processus judiciaire pénal non conçu initialement pour l'entendre en tant que témoin. Les exigences propres aux témoignages répétés sous serment et la capacité de subir un contre-interrogatoire ne sont pas toujours adaptés aux besoins et aux compétences particulières de femmes atteintes de troubles mentaux. Ce problème n'est qu'aggravé par la tendance d'infantiliser ces femmes, ayant pour effet de diminuer leur crédibilité et de les dépeindre en tant qu'hypersexuelles dès lors qu'elles entretiennent des rapports sexuels. On retrouve ces stéréotypes également au niveau de l'admissibilité de la preuve de rapports sexuels antérieurs et de documents appartenant à des tiers. Le handicap de ces femmes n'est donc pas seulement physiologique de façon objective, il est aussi fabriqué par le processus judiciaire. À travers les expériences de ces femmes, les auteures démontrent la nécessité de modifier les règles de preuve et de procédure dans les cas d'abus sexuel, tout en respectant le droit de l'accusé à un procès juste. Ils se servent également de ces expériences pour illustrer la tension entre la liberté sexuelle et la protection contre la violence suggérée par la littérature féministe portant sur l'abus sexuel. Les auteures soutiennent que de plus grands efforts sont nécessaires au niveau de l'égalité substantielle afin d'assurer aux femmes atteintes d'une déficience mentale une participation totale au sein du processus judiciaire pénal.

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Introduction

Most of the sexual assaults that men commit against women are never reported to the police.¹ One of the most common reasons that women give for not reporting such assaults is that they are wary of the treatment they will receive at the hands of the police and the courts.² Women express concerns that their claims will not be believed, that their sexual and mental health history will become public, and that they, rather than the man who committed the sexual assault, will become the focus of the investigation. These concerns are magnified for women with mental disabilities. Women with developmental disabilities, psychiatric disabilities, or brain injuries affecting intellectual ability or communication³ have particular difficulties in accessing the criminal justice system as sexual assault complainants.

In an earlier article, we traced the history of the criminal law as applied to sexual offences against women with mental disabilities and demonstrated that the law has often not reflected the interests of these women.⁴ Our analysis considered this history in the context of both feminist and critical disability theory. We argued that much of this history has been steeped in two conflicting stereotypes about women with mental disabilities: that they are either asexual and childlike, on the one hand, or oversexed and indiscriminate in the choice of their sexual partners on the other. These stereotypes are in some ways reflected in the perceived tension in the feminist literature between the need to protect women with mental disabilities from exploitative men and the importance of promoting their sexual autonomy. Measures designed to offer protection are sometimes criticized as overprotective and too prescriptive of appropriate sexual behaviour. Yet emphasizing sexual autonomy has been viewed as leaving women open to abuse.⁵ Critical disability theory, like feminist theory, has also faced internal tensions, in particular over the meaning of “disability”. Scholars have debated whether disability should be understood not according to a biomedical model, but rather as a social construct that views “disability” as a category created by social norms that fail to incorporate the full diversity of human beings and their ways of living.⁶ This debate

¹ See Federal-Provincial-Territorial Ministers Responsible for the Status of Women, Status of Women Canada, *Assessing Violence Against Women: A Statistical Profile* (2002) at 19, online: Status of Women Canada <http://www.swc-cfc.gc.ca/pubs/0662331664/index_e.html>. See also Ontario Women's Directorate, *Sexual Assault: Reporting Issues* (2002), online: <<http://www.citizenship.gov.on.ca/owd/english/resources/publications/dispelling/reporting/>> [*Reporting Issues*].

² See *Reporting Issues*, *ibid.*

³ We have chosen to refer to these conditions collectively as “mental disabilities”, recognizing that this term is an imprecise shorthand for a range of diverse conditions and experiences.

⁴ Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill L.J. 243.

⁵ See *ibid.* at 250-55.

⁶ See Bill Hughes & Kevin Paterson, “The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment” (1997) 12 *Disability and Society* 327; Liz Crow, “Including All of Our Lives: Renewing the Social Model of Disability” in Jenny Morris, ed., *Encounters with*

has arisen primarily in the context of physical disability, and it is important to consider whether it offers any insights in the context of mental disability.

Our goal has been to use the experiences of women with mental disabilities who complain of sexual assault by men to reconsider these supposed tensions. To that end, we examined approximately one hundred written judgments involving sexual offences against complainants with mental disabilities over the past two decades.⁷ We set out to determine whether changes in the law during that period have benefited women with mental disabilities, and to identify the challenges and concerns raised by applying the elements of sexual assault—specifically consent, capacity, and mistaken belief—to this group of complainants. The cases we reviewed bore out our assertion that sexual autonomy may be a hollow value if there is no safe context in which to exercise it.

We concluded that the situation of women with mental disabilities makes clear that the perceived dichotomy between protection and autonomy is largely a false one, because women with mental disabilities appear to enjoy very little of either. Rather, protection from exploitation is a prerequisite for any meaningful sexual autonomy.

We were struck by the similarities in the challenges facing complainants who have been labelled as having mental disabilities and those who have not: both groups of women are subject to having the quality of their resistance to unwanted sexual advances brought into question, to having their previous sexual experiences used inappropriately to interpret the particular sexual encounter at issue, and to having superficial reference made to sexual autonomy at the expense of the protection of bodily and psychological integrity from exploitation by men in positions of power over them. The fact that the issues are similar does not mean that their resolution is identical. Instead, disability intersects with gender to filter judges' responses to these legal issues in ways that uniquely disadvantage women with mental disabilities.

Nonetheless, while we acknowledged in our earlier work that there are arguments for having a specialized offence targeted at those who sexually assault women with disabilities, we concluded that we should have one law of sexual assault that recognizes the similarities and differences among all women rather than a distinct provision that tries to carve out a group of women as "different" from other women. Arguing that the *definition* of sexual assault should be the same for all women does not mean denying that women with mental disabilities face increased risk of sexual assault, or that they lack equal access to having their stories heard in the criminal justice system. A commitment to substantive sex equality requires not merely

Strangers: Feminism and Disability (London: Women's Press, 1996) 206. See also Benedet & Grant, *supra* note 4 at 253-54.

⁷ Our study considered cases reported on Quicklaw that were decided between 1984 and 2004 in English and between 1994 and 2004 in French. The large majority involved charges of the least serious form of sexual assault. Of the cases where the nature of the disability was clear, eighty per cent had an intellectual disability. The accused had a mental disability in less than twenty per cent of the cases where this information was available.

inclusivity, but also placing these women at the centre of our analysis of sexual assault law as opposed to treating them as exceptions that do not “fit” the regular law.

Our work to date has focused on the substantive elements of the crime of sexual assault. But at the same time that complainants with mental disabilities must confront concepts of consent, capacity, and mistaken belief that were not developed with their experiences or realities in mind, they also face barriers to the receipt of their testimony in court.

In this article, we examine whether existing, well-entrenched evidentiary and procedural rules disadvantage women with mental disabilities in the trial of sexual assault charges in ways that are specific to the intersection of discrimination on the grounds of sex and disability. As in our previous paper, we use the alleged dichotomy between autonomy and protection as a lens through which to assess the case law. Courts need to be made accessible, in the broadest sense of the word, to women with mental disabilities. The rules of evidence and procedure need to be sufficiently flexible in order to hear their stories in a manner that recognizes the individual circumstances of the complainant’s disability while demonstrating respect for her as a human being.

Some of the evidentiary questions that we address in this paper apply to all complainants, while others are of special concern for women with mental disabilities. Issues such as the (mis)use of evidence of sexual history and access to therapeutic records are faced by many sexual assault complainants, though the presence of a mental disability may make the resolution of these issues more complex. Other issues, such as testimonial capacity and the use of hearsay evidence, are unique to the context of mental disability, at least for adult complainants.

Many of these procedural rules are used to undermine the credibility of complainants, sometimes in the name of recognizing their sexual autonomy. Sexual history evidence and evidence from third-party records, for example, can be used to label women as oversexed and hence lacking in credibility. The requirement that a witness understand an oath and the use of hearsay evidence, by contrast, may portray women with mental disabilities as childlike and thus lacking in credibility.

The problems we identify in this paper are consistent with the social science research on the experience of persons with mental disabilities in court, in particular witnesses with developmental disabilities. For example, one Canadian study concluded that individuals with developmental disabilities have far less familiarity with common legal terminology, though they may report a higher level of understanding than they in fact possess.⁸ The authors noted that many individuals with developmental disabilities are inclined to acquiesce to persons perceived as being in authority, and have difficulty saying “I don’t know”. The participants with developmental disabilities were also more likely to have directly participated in the

⁸ Kristine I. Ericson & Nitza B. Perlman, “Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities” (2001) [unpublished, on file with authors].

courts as complainants, witnesses, or accused persons, or in family court proceedings, than those who were not so labelled, a result the authors noted is consistent with other studies. If women with mental disabilities are in fact *more* likely to find themselves participating in court proceedings than other women and more likely to be sexually assaulted than other women, the need for policies and procedures designed with their needs in mind is all the greater. These women should not be seen as “exceptional” cases requiring improvised modifications to the current system.

Our concerns about the processing of sexual assault complainants extend to all players in the criminal justice system. One Australian study reported that police officers had difficulty identifying when a sexual assault complainant had an intellectual disability and were confused about how to respond.⁹ Many of the officers interviewed for the study repeated social stereotypes portraying women with mental disabilities as highly sexed and lacking credibility. Some police officers were reluctant to take complaints from such women seriously and turned to support workers or other professionals for their opinion as to whether anything had actually happened.¹⁰

Although the manner in which police deal with such complaints is beyond the scope of our research, we assume that such attitudes can influence the way that not only police, but also Crown attorneys and judges, handle such cases. Our sample certainly discloses cases in which the Crown does not appear to make much effort to address the needs of complainants with mental disabilities.¹¹ At best, attempts were made to analogize the situation of these women to rules designed for children, a practice that follows the lead of the *Criminal Code*¹² (“Code”) and the *Canada Evidence Act*.¹³

The case law demonstrates the tendency to equate women with mental disabilities with children, particularly where the disability is an intellectual or developmental one. We have labelled this phenomenon the “infantilization” of women with mental disabilities. It is, in our view, inexorably intertwined with the perceived dichotomy between protection and autonomy. We begin our analysis here because it is an important precursor to a critical evaluation of the way that women with mental disabilities are treated by police and the courts. While we expected that this phenomenon would elicit a more protective approach by the courts, the case law did

⁹ Jennifer Keilty & Georgina Connelly, “Making a Statement: An Exploratory Study of Barriers Facing Women with an Intellectual Disability When Making a Statement About Sexual Assault to Police” (2001) 16 *Disability and Society* 273.

¹⁰ See *ibid.* The assumption that jurors will not find women with mental disabilities to be credible witnesses is not supported by the available social science research. In one American study involving mock jurors in a sexual assault trial, researchers found that the jurors were more likely to convict the accused where the victim was described as “mildly mentally retarded” (Bette L. Bottoms *et al.*, “Jurors’ Perceptions of Adolescent Sexual Assault Victims Who Have Intellectual Disabilities” (2003) 27 *Law & Hum. Behav.* 205 at 210).

¹¹ See e.g. *R. v. Wyatt* (1997), 115 C.C.C. (3d) 288, 91 B.C.A.C. 166 [*Wyatt* cited to C.C.C.].

¹² R.S.C. 1985, c. C-46, s. 246.1.

¹³ R.S.C. 1985, c. C-5, s. 16.

not bear out this expectation. To the contrary, we found that the infantilization of women with mental disabilities served more to undermine their credibility than to elicit an ethic of protection.

Thus, as with the substantive cases addressed in our earlier paper, the cases reveal a willingness to consider sexual autonomy at the expense of protection. Evidence purportedly relating to sexual autonomy (such as prior sexual history) and evidence suggesting that women are childlike in nature (such as the inability to be sworn) coalesce in the overall tendency to disbelieve women with mental disabilities when they testify in court.

I. The Infantilization of Women with Mental Disabilities

In the cases that we reviewed, women's cognitive abilities, communication skills, and even their understanding of sexuality were frequently equated with those of a young child, sometimes as young as two or three years of age, more often in the range of five to seven years of age.¹⁴ In some cases, expert evidence was used to attach different age equivalents to different abilities. Taken to the extreme, in *R. v. R.R.*, the Ontario Court of Appeal noted the following expert evidence about a twenty-one-year-old complainant who had been sexually assaulted by her neighbour:

Based on a number of psychological and cognitive assessments undertaken between 1984 and 1996, Dr. Cousins concluded that the complainant was functioning cognitively at a mental age of 5 years, 5 months. His report showed the following:

1. Communication: 0.1 percentile
Age equivalent: 5 yrs., 6 mos.
2. Daily living skills: 0.1 percentile
Age equivalent: 8 yrs., 9 mos.
3. Socialization: 0.1 percentile
Age equivalent: 4 yrs.
4. Expressive language
Age equivalent: 4 yrs., 3 mos.
5. Written language
Age equivalent: 7 yrs., 5 mos.
6. Receptive language
Age equivalent: 3 yrs., 1 mo.
7. Socialization
Age equivalent: 4 yrs., 1 mo.
8. Interpersonal relationship
Age equivalent: 4 yrs., 5 mos.¹⁵

¹⁴ See e.g. *R. v. Parsons* (1999), 170 Nfld. & P.E.I.R. 319 (Nfld. S.C. (T.D.)) [*Parsons*]; *R. v. Jackson*, [1994] O.J. No. 453 at paras. 2, 15 (Gen. Div.) (QL); *R. v. Sam*, [1987] B.C.J. No. 3158 at para. 9 (Co. Ct.) (QL); *R. v. M.(M.K.)*, [1989] B.C.J. No. 1834 (C.A.) (QL); *R. v. Aikoriogie*, [2004] O.J. No. 2717 (Ct. J.) (QL).

¹⁵ (2001), 159 C.C.C. (3d) 11 at para. 45, 151 O.A.C. 1 (C.A.), aff'd 2003 SCC 4, [2003] 1 S.C.R. 37, 171 C.C.C. (3d) 575 [*R.R.* cited to C.C.C.].

While a person's cognitive abilities may develop along a continuum, there are very important differences between a woman with a mental disability and a child. Children, generally speaking, are developing their emotional and intellectual abilities as they pass through childhood and adolescence toward adulthood and independence. Sexual activity is inappropriate for children because they are not yet at the stage of cognitive and physical development necessary to make choices and to understand sexuality, and because they do not have the same sexual desires as adults.¹⁶

This is not true for women with mental disabilities. In the majority of our cases, the complainants are adults whose intellectual abilities are limited and unlikely to progress much further, but who are, physically and emotionally, adult sexual beings. For most of these women, sexual feelings and expressions of those feelings are appropriate, assuming they can find a noncoercive context in which to experience them. All these factors get tangled up when too much weight is put on comparisons with children. Women with mental disabilities are women. They are not children:

[U]nlike mentally retarded adults, eight-year-olds cannot work, marry, procreate, or engage in romantic love. As Leslie Walker-Hirsch, president of the [American Association for the Mentally Retarded's] special interest group on sexual and social concerns has noted, "there is a belief that, when a person is mentally retarded everything else is at the same level of advancement as the intellect, when really the body is very on target with the age." Mentally retarded persons merely demonstrate "a developmental lag" because their social skills and biological development are not commensurate.¹⁷

The analogy to children can set in motion a whole chain of assumptions that can undermine a complainant's credibility.¹⁸ Just as no sexual activity is appropriate for children, it is not uncommon to see women with mental disabilities who do have prior sexual experience have that experience deemed "inappropriate",¹⁹ as it would be if the complainant were in fact a child. Women are described as "too friendly"²⁰ or "hyper-sexual".²¹ Prior expressions of sexuality, whether coerced or consensual, once they are labelled as "inappropriate", can be used to question the complainant's behaviour during the encounter at issue, to question whether she consented to sexual activity, and to question whether the accused knew she was not consenting. In this way, stereotypes about the sexual availability of women with disabilities also play into attacks on credibility, making the complainant less believable.²² Evidence of previous

¹⁶ Cf. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at paras. 199-208, 194 D.L.R. (4th) 1, L'Heureux-Dubé J. (discussing the role of pornography in reinforcing cognitive distortion of pedophiles, and the harm caused to children by child pornography).

¹⁷ Deborah Denno, "Sexuality, Rape, and Mental Retardation" (1997) U. Ill. L. Rev. 315 at 367 [footnotes omitted].

¹⁸ See e.g. *R. v. B.M.*, [1994] O.J. No. 2242 at para. 92 (Ct. J. (Prov. Div.)) (QL) [*B.M.*]; *R. v. Hundle*, 2002 ABQB 1084, 10 C.R. (6th) 37, 56 W.C.B. (2d) 334 [*Hundle*].

¹⁹ *B.M.*, *ibid.* at para. 11; *R.R.*, *supra* note 15 at para. 4.

²⁰ *R. v. Harper*, 2002 YKSC 18, [2002] Y.J. No. 38 at para. 16 (QL) [*Harper*].

²¹ *Hundle*, *supra* note 18 at para. 20.

²² See e.g. *ibid.*

sexual experience may, for example, be admitted on the issue of capacity to give consent²³ or for some other permissible use, thus challenging overall credibility through the back door. As will be discussed below, it appears to be easier to get evidence of sexual history admitted in cases where the woman has a mental disability.²⁴

Less often, equating a woman with a mental disability to a child leads to a conflicting stereotype that can actually serve to bolster her credibility, but in an equally problematic manner. If one assumes that complainants with mental disabilities are not “smart enough” to fabricate evidence of sexual assault—the idea being that children do not lie and neither do women with the mental age of a child—the complainant can be perceived as *more* believable. For example, in *R. v. D.K.R.*, the judge stated, “[M]ost importantly, this witness did not possess the guile or quickness of wit to create an atmosphere of credibility if it did not exist.”²⁵ While this statement expresses belief in the complainant’s testimony, the labelling of the complainant as dim-witted is demeaning nonetheless.

Equating women with mental disabilities to children accomplishes two somewhat contradictory outcomes. On the one hand, it sets women with mental disabilities apart from other adult women, allowing us to distance ourselves from their realities and to deny them the sexual lives to which other women are entitled. On the other hand, the comparison gives us a familiar starting point, allowing us to draw analogies with the sexual assault of children, something with which we are all too familiar. Both these outcomes are problematic in that they undercut the sexuality and agency of women with mental disabilities and obscure the similarities between women with mental disabilities and other women.

The tendency to infantilize women with mental disabilities contributes to sex discrimination against them by perpetuating stereotypes of asexuality and hypersexuality. When these women are analogized to children, sexual relationships are no longer seen as necessary or important for them and they are depicted as asexual. Since no sexual activity is considered appropriate for children, the sexual activity that these women do have is then labelled as inappropriate, and they are also tainted, paradoxically, with a label of hypersexuality.

As the examples discussed below demonstrate, this tendency to infantilize has particular resonance in the procedural and evidentiary context. When women with mental disabilities are treated like children, their credibility is often correspondingly diminished. They are also subject to a host of incorrect assumptions about the kinds

²³ See e.g. *R.R.*, *supra* note 15 at para. 10.

²⁴ *B.M.*, *supra* note 18 is perhaps the most striking example of this tendency. The defence paraded numerous witnesses at trial, all but one of whom were disbelieved by the judge, and who testified that the complainant was likely to have sex with numerous students on her lunch hour. This display occurred despite the fact that there was an independent witness to the complainant’s clear assertions of nonconsent in the case before the court.

²⁵ (1998), 104 B.C.A.C. 296 at para. 3, 38 W.C.B. (2d) 42.

of supports that will facilitate their testimony, by simple analogy to the situation of child witnesses. Moreover, if they fail to fit the threshold criteria for those special accommodations designed for children, they may end up with no accommodations at all.

II. Evidentiary Issues

The criminal trial process was not designed to facilitate the testimony of persons with disabilities. Oral testimony under oath, cross-examination, and the requirement to repeat one's story over and over again to persons in authority with consistency over a long period of time can present serious challenges to women with mental disabilities, yet these requirements are accepted without question as integral to the criminal trial process. An inability to operate within the confines of the traditional trial process may result in the diminished credibility of a woman's testimony or even in the granting of a stay of proceedings.

The nature of the evidence received by courts in sexual assault cases presents other concerns. The routine use of sexual history evidence, cross-examination on therapeutic and other third-party records to undermine credibility, and the requirement of recent complaint raise unique concerns for women with mental disabilities. We suggest that the myths and stereotypes on which these devices rest remain active.

A. Competence to be Sworn and the Use of Hearsay Evidence

Parliament has made a number of legislative amendments in recent years that specifically address the situation of witnesses with disabilities. At the same time that section 153.1 was added to the Code in 1998 to create the offence of sexual exploitation of a person with a disability,²⁶ changes were made to the *Canada Evidence Act*²⁷ and to the Code²⁸ to address the needs of persons with disabilities when they testify as witnesses. These changes included permitting persons with disabilities to testify behind a screen or with assistance from a support person or interpreter. They also affirmed a presumption of testimonial competence for all adult witnesses, while leaving open the possibility that a party might be able to prove that a witness for the other side was not in fact competent to testify.²⁹ The purpose of these

²⁶ *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c. 9, s. 2 [*An Act to amend the Canada Evidence Act*].

²⁷ *Supra* note 13, ss. 6, 6.1, as am. by *An Act to amend the Canada Evidence Act*, *ibid.*, s. 1.

²⁸ *Supra* note 12, s. 715.2, as am. by *An Act to amend the Canada Evidence Act*, *ibid.*, s. 8.

²⁹ These provisions were strengthened and expanded by *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 15. The use of a screen and support person is now presumptively appropriate rather than

changes was to ensure the full and equal participation of persons with disabilities in the justice system, and in particular in the criminal trial process.³⁰

Yet in the cases we have reviewed, there are repeated examples of complainants whose evidence is given diminished weight because of their mental disability. While these witnesses are not considered incompetent to testify, they are found to be incapable of understanding the nature of an oath, and therefore permitted to testify only on a promise to tell the truth. This, in turn, gives their evidence less weight than that of other witnesses. The court in *Parsons*³¹ reached just such a result. The judge found that while the twenty-six-year-old complainant had a “mental age”³² of a seven-year-old child, the Crown was correct to have conceded her capacity to consent to sex with the accused, a stranger, in his truck by the side of the road. However, that same mental age rendered her incapable of being sworn and her testimony was thus given less weight.

In some cases, judges assume that evidence given by a complainant with a mental disability must be scrutinized especially carefully and given less weight, without even hearing expert evidence on how the particular mental disability and life experience of the complainant might affect, if at all, her testimonial capacity.³³ On a more fundamental level, there is an unwillingness by many judges to reconsider the assumption that the ability to understand the precise meaning of an oath or affirmation is predictive of truthfulness or reliability as a witness.

The assigning of diminished weight to the testimony of complainants with mental disabilities is especially troubling when compared to the relatively low threshold set by Canadian courts for capacity to consent to sexual intercourse.³⁴ In a number of cases, the judge finds (or the Crown concedes) that the complainant has the mental capacity to consent to sexual contact with the accused, but lacks the capacity to understand the nature of an oath.³⁵ The finding on capacity to consent means that consent is in issue, and the finding on oath-taking capacity means that the accused’s testimony that the complainant consented is given more weight because he does not have a disability.

Conversely, in cases where it is agreed that the complainant does not have the capacity to consent to sexual contact, her capacity to testify may also be in issue. In

discretionary, and the accused is prohibited from personally cross-examining a witness with a mental disability.

³⁰ See Department of Justice, News Release, “Federal Government Proposes Changes to Meet the Needs of Persons With Disabilities” (23 April 1997), online: Department of Justice <<http://www.canada.justice.gc.ca/en/news/nr/1997/disabi.html>>; *House of Commons Debates*, No. 057 (11 February 1998) at 3742 (Paul Forseth).

³¹ *Supra* note 14.

³² *Ibid.* at para. 24.

³³ See e.g. *R. v. Sam*, *supra* note 14 at para. 4; *Parsons*, *supra* note 14; *R. v. M.(M.K.)*, *supra* note 14.

³⁴ See Benedet & Grant, *supra* note 4 at 269-74.

³⁵ See e.g. *R. v. M.(M.K.)*, *supra* note 14; *B.M.*, *supra* note 18 at para. 87; *R. v. White*, [2001] O.J. No. 3367 at paras. 6-7 (Sup. Ct.) (QL).

some cases where the complainant has profound mental disabilities, the Crown has attempted to lead hearsay evidence according to the rule in *R. v. Khan*.³⁶ In that case, the Supreme Court of Canada held that a preschool child's statements to her mother about the actions of a doctor who had sexually assaulted her were admissible as hearsay evidence because they met the requirements of necessity and reliability. In the case of adult complainants with intellectual or developmental disabilities, support persons to whom the complainant disclosed the assault, for example a doctor, social worker, or mother, might also give evidence of the assault. It appears that such applications have met with mixed success; from our review of the cases, it was not easy to predict which factors would lead to the application being granted. Such applications have generally been unsuccessful where the complainant is judged competent to give at least some evidence in court.

The Supreme Court took a restrictive view of *Khan* in *R. v. Parrott*,³⁷ while invoking the language of autonomy and respect for persons with disabilities. In that case, the complainant was a resident of a psychiatric hospital in Newfoundland, where she had lived for many years. The complainant had Down syndrome and was described as having the mental development of a three- or four-year-old child.³⁸ A staff member observed another patient bringing her to a man's car; the man gave that patient twenty dollars and drove off with the complainant. Seven hours later, at 2 a.m., the complainant was found with the accused in his car in a remote coastal area. The complainant was bruised and scratched and her shorts were on backwards. The accused was charged with kidnapping, assault causing bodily harm, and sexual assault.

The Crown called expert evidence about the complainant's intellectual limitations and poor memory of events. On the basis of this evidence, the trial judge admitted out-of-court statements that the complainant had made to the police and to a doctor after the event. The complainant was not called as a witness on the *Khan* voir dire or at the trial. The accused was convicted of kidnapping and assault causing bodily harm. On appeal, the Newfoundland Court of Appeal overturned the assault-causing-bodily-harm conviction and ordered a new trial. A majority of the Supreme Court, in a 4 to 3 decision, affirmed this result.

The appeal, strictly speaking, was not a sexual assault case, because the complainant was not able to articulate any allegation of sexual misconduct to anyone, and there was no physical evidence of intercourse or other sexual activity. The accused was acquitted of the sexual assault charge at trial and it appears that the Crown did not appeal this acquittal. It is clear, however, that there were strong suspicions of sexual assault based on the complainant's dishevelled clothing, her injuries, and the simple fact that there was no other explanation for why the accused,

³⁶ 2001 SCC 86, [2001] 3 S.C.R. 823, 207 D.L.R. (4th) 289 [*Khan*].

³⁷ 2001 SCC 3, [2001] 1 S.C.R. 178, 194 D.L.R. (4th) 427, aff'g (1999) 175 Nfld. & P.E.I.R. 89 (Nfld. C.A.) [*Parrott*].

³⁸ *Ibid.* at para. 29.

a stranger, took her from her residence and confined her to his vehicle for seven hours in an isolated location. In any event, the comments of the Supreme Court would be equally applicable to a case where sexual assault is at issue more directly.

Writing for the majority, Justice Binnie held that the trial judge erred in admitting the hearsay evidence without hearing *viva voce* evidence from the complainant on the *voir dire*.³⁹ Justice Binnie noted that there was no suggestion that the complainant might be harmed by being called to testify, beyond the usual trauma of the criminal process.⁴⁰ It was for the judge, and not the medical experts, to make the assessment of testimonial competence based on direct observation. Responding to a Crown argument that bringing the complainant to court in an attempt to testify would be akin to “marking her as an exhibit simply for the purpose of ... showing her to all sides,”⁴¹ Justice Binnie invoked the language of autonomy and rebuttal of stereotypes:

[T]he Court should not be quick to leap to the assumption that a person with mental disabilities is not competent to give useful testimony. Trauma should not be presumed, not only because such a presumption would deprive the accused of the ability to observe and cross-examine the witness, but also because stereotypical assumptions about persons with disabilities should be avoided. ... Persons with disabilities should not be underestimated.⁴²

Justice LeBel, dissenting, would have found that the hearsay evidence was properly admitted. He pointed out that the trial judge had viewed the complainant on the videotape of her interview with police in which her responses to simple questions in a supportive environment immediately after the event were repetitive and largely incoherent.⁴³ He rejected the majority’s claim that calling her as a witness would not be traumatic:

My reservations are stronger still with respect to her ability to handle cross-examination, which is a more sophisticated intellectual exercise than examination-in-chief. To require the Crown to call the complainant before the court in these circumstances, only to confirm her limited ability to convey evidence, would have been demeaning and traumatic to her. As the trial judge pointed out, ... [s]he was ... afraid to leave the hospital grounds. The trial judge even wrote that she had “to be coaxed ... with treats by staff to persuade her to go out for a drive or an outing with other patients” ... Dr. Morley had said that it was not feasible for the victim to leave the hospital ...⁴⁴

Justice LeBel noted that calling the complainant as a witness would have “deprived her of that degree of respect that every disabled person is entitled to ...”⁴⁵ Both

³⁹ *Ibid.* at para. 52.

⁴⁰ *Ibid.* at para. 79.

⁴¹ *Ibid.* at para. 78.

⁴² *Ibid.* at para. 80.

⁴³ *Ibid.* at para. 12.

⁴⁴ *Ibid.* at para. 17 [references omitted].

⁴⁵ *Ibid.*

judges, then, invoke the notion of respect for persons with disabilities to support quite different results.

We prefer the approach of the dissent in this case, if only because it realistically recognizes the trauma inherent in testifying as a sexual assault complainant in a courtroom proceeding (potentially three times: at the voir dire, the preliminary inquiry, and the trial) and how that trauma is magnified for a woman who not only finds changes in her established routines upsetting even when they take the form of a pleasant outing, but has already been subjected to a terrifying forcible confinement for many hours. We are troubled by the majority's invocation of the language of autonomy in a vacuum without any consideration of what that term might mean for this woman. Perhaps for her, respecting her autonomy means respecting her fearfulness and desire to remain in familiar surroundings. Or maybe it means acknowledging that any expression of autonomy engaged by disclosing acts of male violence to a person in authority were fully realized immediately after the assault. A more nuanced application of *Khan*, and a more contextualized analysis of autonomy, would have recognized that the costs to this complainant of forcing her to testify far outweighed any possible probative value of so doing.⁴⁶

B. Capacity to be Cross-Examined

Even if the complainant is considered competent to testify, whether under oath or on a promise to tell the truth, problems may still arise if the complainant is not able to withstand the rigours of the standard trial process. Despite some modifications to assist complainants with disabilities in testifying, such as the use of a screen device to block their view of the accused, complainants are still expected to give evidence in the standard form of examination-in-chief and cross-examination. If the Crown elects to proceed by indictment, this may happen twice, once at the preliminary inquiry and once at trial. If the Crown proceeds summarily in order to spare the complainant the ordeal of testifying twice, then the maximum sentence can be no more than eighteen months, regardless of the seriousness of the sexual assault (as opposed to ten years where the Crown proceeds by indictment).⁴⁷ Since charges of aggravated sexual assault or sexual assault with a weapon are solely indictable offences, this makes it more likely that, even where additional physical violence is present, such cases will be downgraded to simple sexual assault to prevent the complainant from having to testify twice.⁴⁸ In this way, the full measure of the harm suffered by the complainant is not even formally recognized.

⁴⁶ For an alternative view, see Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 267 at 272-77.

⁴⁷ *Criminal Code*, *supra* note 12, ss. 271(1)(a), (b).

⁴⁸ See generally Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15 C.J.W.L. 305.

Some complainants with disabilities in the cases we reviewed were able to give evidence-in-chief but not able to give responsive answers on cross-examination. One of the most striking examples is *Wyatt*.⁴⁹ In that case, the twenty-eight-year-old complainant met the accused, whom she had known for a number of years, at a bar. The next day he came to her apartment where he had sexual intercourse with her. The complainant later called the police and reported that she had been sexually assaulted.

The complainant lived independently with some support in her small northern British Columbia town. Her disabilities arose from a serious brain injury sustained as an infant when she was dropped headfirst onto a concrete floor. The injuries left her with cognitive and memory deficits as well as impairment in her motion and coordination. The complainant had completed a modified grade ten education and had never been employed.

The complainant testified at the preliminary inquiry that she did not consent to sexual contact with the accused. However, she became very emotional and agitated when cross-examined. The cross-examination was not pursued further and the accused was committed for trial.

At the trial, the complainant repeated in her evidence-in-chief that the sex was without her consent. Defence counsel began to cross-examine the complainant, apparently to suggest that the complainant was angry at the accused because the condom had come off during intercourse. The complainant became distraught and was unable to answer further questions about the alleged assault.

The Crown sought an order permitting the transcript of the complainant's evidence at the preliminary inquiry to be read into evidence, and a *Khan* voir dire to admit hearsay statements made shortly after the event. Defence counsel opposed the motion, arguing instead that a stay of proceedings should be granted because the complainant could not be effectively cross-examined.

The trial judge, after hearing evidence on the complainant's mental state, granted the motion for a stay, and the British Columbia Court of Appeal unanimously affirmed this order. The trial judge found that the preliminary inquiry evidence added nothing to the record, since the complainant could not be effectively cross-examined at that time either. Similarly, the use of some limited hearsay statements did not address the problem that the accused could not effectively exercise his right to confront his accuser through cross-examination. Noting that cross-examination is of paramount importance where the defence is one of consent, the trial judge also recognized that this result was unsatisfactory:

What I find enormously disturbing about the present circumstance is that we have a young woman who has a complaint, rightly or wrongly, who by her condition and disabilities and because of the nature of the process of this court will be denied an opportunity to have a full and fair hearing on that complaint.

⁴⁹ *Supra* note 11.

Effectively she will be denied access to the courts because of her inability to participate in the process.⁵⁰

In this passage, the trial judge comes close to locating the problem for this lack of access in “the nature of the process of this court,” but is unable to disentangle this from the complainant’s own “inability” to participate in that process. Crown counsel also placed the focus on the complainant, referring to her as a “difficult witness”,⁵¹ and noting that “the problem here is ... that we have a witness ... essentially what we’re dealing with is ... a thin skull rule almost. ... [I]t isn’t the Crown, it isn’t the state that created this witness. This witness was there.”⁵²

Yet, the expert evidence about the complainant’s mental state confirmed how disability can be the product of both biomedical and socially constructed views of disability. The complainant was described as prone to emotional outbursts, frustration, as well as tearful and depressive episodes.⁵³ The expert report indicated how her physical limitations had been aggravated by her social experiences:

Ms. [T.] was extraordinarily sensitive to any form of challenge. She would get agitated, tearful, flustered and loud even after I would carefully explain to her that I was only clarifying rather than questioning a statement. Her mother explained that Ms. [T.] has felt unwanted, disbelieved and rejected ever since she was a child. Other children would not play with her or include her in their activities. Moreover, her explanations of her feelings or past events were frequently disbelieved and were attributed to her intellectual deficits. Thus, she grew up extremely sensitive to anyone questioning a statement that she has made ...

I found this characteristic to be extremely entrenched in Ms. [T].⁵⁴

Thus the expert evidence very clearly situated at least part of the complainant’s “inability” to be cross-examined as rooted in pervasive societal discrimination against a young woman with disabilities. Her oppositional responses were in part a protective mechanism that allowed the complainant to cope with years of rejection. To then exclude her from participation in the criminal trial process only compounds that discrimination both by denying her the equal protection of the law and by reinforcing her experiences of marginalization and exclusion. In a very real sense, the state did “create this witness” by combining social tolerance for discrimination against persons with disabilities with a process based on blind faith in the importance of repeatedly accusing women of lying about sexual assault as a means of getting at the “truth”.

The stay of proceedings makes this complainant rapable with impunity so long as there are no witnesses or other corroborating evidence, such as physical injuries. The accused in this case had known the complainant for many years and her disabilities

⁵⁰ Cited in *ibid.* at para. 32 [emphasis omitted].

⁵¹ Cited in *ibid.* at para. 16.

⁵² Cited in *ibid.* at para. 21.

⁵³ *Ibid.* at para. 26.

⁵⁴ Cited in *ibid.* at para. 26.

must have been apparent to him. Yet we never get to consider what steps he took to ensure that this woman was in fact consenting, or what thought he gave to her wishes, because we cannot get past her “inability” to be cross-examined. This is not to say that the accused should have to testify, but rather that there would have been a tactical burden on the accused to respond if the complainant had been able to give evidence that she had been assaulted.

Surely, at a minimum, there is an obligation on the Crown and on the police to ensure that a thorough effort is made to obtain useful and potentially credible evidence from the complainant. While it is not reasonable to expect Canadian courts simply to accept untested evidence-in-chief as sufficient for conviction, there may have been other ways that the complainant’s direct evidence could have been tested. Might the defence have formulated a list of questions to be explored with the complainant by someone she trusted and knew well? Could the disputed areas have been explored in a manner that was not perceived as confrontational by the complainant? At a minimum, these questions should have been fully considered well in advance of trial. The complainant has the right to the accommodation of her disabilities within the limits of a fair trial.

C. Corroboration

It may be that the effect of the British Columbia Court of Appeal decision in *Wyatt* is to require corroborating evidence to offset the complainant’s inability to be cross-examined. Presumably, some sort of independent witness or perhaps physical injury might have been enough to allow the trial to proceed, though the court never acknowledges this explicitly, and such evidence was not always helpful in other cases that we reviewed.⁵⁵ If so, this harkens back to the rule that the jury should be cautioned against convicting the accused of rape solely on the basis of the complainant’s testimony. This common law rule was abolished by statute in the 1982 amendments to the Code.⁵⁶ Of course, the abolition of the corroboration requirement does not mean that corroborating evidence is no longer useful or important. For example, in the Supreme Court’s decision in *Khan*, the presence of corroborating physical evidence (a semen stain on the child’s shirt) was important (though not required) to the assessment of reliability in terms of the admissibility of hearsay evidence.⁵⁷

Yet we have found that even where complainants with mental disabilities are able to give direct evidence-in-chief and to be cross-examined, some judges appear keen to find corroborating evidence, especially where it is “objective” or is supplied by a

⁵⁵ See e.g. *Harper*, *supra* note 20.

⁵⁶ *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s.19, amending R.S.C. 1970, c. C-34 [1982 amendments].

⁵⁷ *Supra* note 36.

witness who does not have a disability. There is no doubt, for example, that the teenage complainant in *B.M.* was assisted considerably by the presence of a disinterested adult bystander who, walking by the complainant's school at lunchtime, heard her cries for help while she was being sexually assaulted by three young men.⁵⁸ While this tendency does not revive the common law rule that the jury should be cautioned against conviction in the absence of confirmatory evidence, it does indicate that the credibility of women's claims of sexual assault are still suspect, even where those claims are unshaken by the supposedly crucial practice of cross-examination.

In those cases where it is found or assumed that the complainant does not have the capacity to consent, the inability of the complainant to give evidence-in-chief and to be cross-examined by conventional means seemed less important. For example, in *R.R.*, the twenty-one-year-old complainant experienced severe emotional distress after the sexual assault and was institutionalized. After a *Khan* voir dire, the court admitted into evidence a videotape of her statements to the police and to her mother. The accused, the complainant's fifty-seven-year-old neighbour, was convicted despite the absence of corroborating physical or other evidence.⁵⁹

Taken together, these cases leave us with the impression that the complainant may be in a better position if she is unable to testify at all than if she can give some evidence. In the latter instance, the hearsay evidence may be excluded and the direct evidence rejected because of their perceived deficiencies. It may be that a woman's inability to testify renders her childlike and asexual in the eyes of the court, and thus "innocent", actually enhancing her credibility.

D. Sexual History Evidence

The first Code provisions restricting the use of sexual history evidence were enacted in 1976.⁶⁰ Prior to that time, evidence of the complainant's general reputation for promiscuity or a lack of chastity could be introduced to undermine her credibility and to support the accused's claim that the complainant consented.⁶¹ Promiscuity was broadly defined, and questions about whether the complainant was using birth control, had ever had an abortion, or was a prostitute were routinely asked, without any evidentiary foundation or direct relevance to the issues at trial. Such evidence was permitted based on the belief that an immoral woman was more likely to lie on the stand. In this way, sexual history was used to attack general credibility. Although evidence of sexual history could also be used to support a claim of consent, this

⁵⁸ *Supra* note 18 at para. 5. That said, despite the bystander's evidence of her clear expressions of nonconsent, the sexual history of the complainant was nevertheless put under a microscope at trial. See Benedet & Grant, *supra* note 4 at 267-68.

⁵⁹ *Supra* note 15 at para. 7.

⁶⁰ *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8, amending R.S.C. 1970, c. C-34, s. 142.

⁶¹ See e.g. *R. v. Moulton* (1979), 19 A.R. 286, 51 C.C.C. (2d) 154 (C.A.).

tended to be a subsidiary use since nonconsent was typically measured in terms of observable resistance.⁶²

The first sexual history provisions in the Code were not especially useful for protecting women's equality in the criminal trial process, since they made the complainant a compellable witness at the voir dire and relied on a general test of relevance to determine admissibility. Judges tended simply to repeat the sexist assumption that past sexual experience was relevant to credibility and would admit the evidence. The fact that the evidence was typically of a general reputation for unchastity, rather than for specific sexual acts, made it even harder for the Crown to rebut.⁶³

Subsequent amendments made all sexual history evidence with persons other than the accused inadmissible, with four exceptions.⁶⁴ As a result of these amendments, the complainant was no longer compellable on the voir dire. The Supreme Court declared these provisions unconstitutional in *R. v. Seaboyer*,⁶⁵ finding that the use of fixed exceptions violated the section 7 right of the accused to make full answer and defence by excluding relevant evidence. In an influential dissent, Justice L'Heureux-Dubé exposed the sexist stereotypes that continue to fuel the myth that sexual history evidence is relevant to consent and credibility.

Parliament responded by enacting new provisions that closely follow the *Seaboyer* guidelines. The current law makes no categorical exclusions, but instead provides a list of factors for the trial judge to consider in balancing probative value against prejudicial effect.⁶⁶ The complainant remains noncompellable on the voir dire. Significantly, the current provisions also extend to evidence of past sexual activity with the accused, thus making them broader in their potential application than their predecessor.

In the cases of sexual assault against women with mental disabilities that we reviewed, evidence of sexual history sometimes appeared to have been admitted as part of an inquiry into the complainant's knowledge of sexual matters without a formal section 276 application. Presumably, the Crown may do this if it seeks to place in issue the capacity of the complainant to consent to sexual intercourse, since the Crown is not required to submit sexual history evidence to a voir dire.⁶⁷ It is disturbing, however, that this evidence was also present in cases in which capacity was not in issue, again without a formal section 276 application. This evidence is

⁶² See e.g. *R. v. P.* (1976), 32 C.C.C. (2d) 400 at paras. 18-21 (Ont. H.C.J.). See also Alan W. Bryant, "The Issue of Consent in the Crime of Sexual Assault" (1989) 68 Can. Bar Rev. 94 at 107.

⁶³ See e.g. *R. v. Moulton*, *supra* note 61. Evidence of specific sexual acts was inadmissible as it would have violated the collateral fact rule. See *ibid.*

⁶⁴ *Criminal Code*, *supra* note 12, s. 246.1, as am. by 1982 amendments, *supra* note 56.

⁶⁵ [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193 [*Seaboyer*].

⁶⁶ *Criminal Code*, *supra* note 12, s. 276(3), as am. by *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 2.

⁶⁷ See *ibid.*, s. 276(2) (referring specifically to evidence "adduced by or on behalf of the accused").

often used in highly suspect ways that reinforce the stereotype of hypersexuality identified earlier. This was sometimes done in an offhanded way, for example by describing the complainant as "overly friendly", a label that was used in a number of the cases we considered.⁶⁸ The cases do not really explain how it is that a person can be too friendly, or what that might have to do with her claims of nonconsensual sexual touching. Does the use of such a label suggest that the accused's responsibility is mitigated because the complainant "led him on" or that he might have had a belief in consent as a result?

Sexual history evidence was used in other cases that we reviewed in situations where its utility seems nonexistent. In *R. v. McPherson*,⁶⁹ where it seems to have been assumed that the complainant was incapable of consent and the only issue was whether any sexual touching took place, the court heard evidence that the complainant had received some education in sexual matters from her mother and that she "loved"⁷⁰ to watch a film that depicted people having sex (apparently because she had watched the film at least once in the three-month period prior to the alleged assault). The complainant's understanding of sexual matters and the vocabulary she might use to communicate about them were at issue in the case, but reference to the complainant's "love[]" of sexually explicit films (on scant evidence) is prejudicial and also plays into the stereotype that women with disabilities are oversexed.⁷¹ The evidence had no real connection to the specifics of the alleged assault; the accused was a bare acquaintance of the family who had stopped by to pick up mail belonging to a mutual friend.

Similarly, in *R.R.*, the accused, a neighbour of the complainant and her family, led evidence in support of his defence of mistaken belief in consent that the complainant had behaved in a sexually forward way with his teenaged sons.⁷² He testified that the complainant, a young woman with developmental disabilities, once tried to climb into bed with his son and would frequently talk about wanting to have a baby. As in *McPherson*, it appears that no voir dire was held to test the admissibility of this evidence.

⁶⁸ *R. v. Chin*, [1989] B.C.J. No. 539 (C.A.) (QL) [*Chin*]. See also *Harper*, *supra* note 20 at para. 16, where the expression "too friendly" is used.

⁶⁹ [1999] B.C.J. No. 518 (S.C.) (QL) [*McPherson*].

⁷⁰ *Ibid.* at para. 39.

⁷¹ For a similar situation, see *R. v. G.A.M.*, [1993] O.J. No. 476 (Ct. J. (Gen. Div.)) (QL), where the fourteen-year-old complainant alleged that her uncle had intercourse with her on a number of occasions. The complainant, who was described as having a significant learning disability, testified that she had never had sex before and did not know what was happening. Presumably in response to this testimony, the accused was permitted to cross-examine the complainant on her use of birth control pills to regulate her period, in an apparent attempt to show that she was sexually active or knowledgeable. The relevance of this evidence was not apparent, since the accused was arguing that the sex never took place.

⁷² *Supra* note 15 at para. 8.

In *R.R.*, this evidence was held to be admissible on the basis that it formed the evidentiary foundation for the expert testimony about the complainant's capacity to consent, not to support an inference that she actually did consent.⁷³ Yet its admissibility does not eliminate its prejudice. This is just the kind of evidence that was used in damaging and discriminatory ways prior to the enactment of the sexual history provisions, and whose use is now strictly limited by section 277.⁷⁴ The latter section provides that evidence of sexual reputation is not admissible to show that the complainant is generally less credible or more likely to have consented.

In *R.R.*, the court correctly recognized that this evidence actually proved that the accused was well aware of the complainant's disability and saw her behaviour as an opportunity for exploitation.⁷⁵ However, there is a danger that the judge or jury may equally rely on such evidence to conclude that the complainant was eager to participate in any sexual activity proposed to her. In most cases, it should be possible to settle the issue of capacity without a review of the complainant's sexual history. This is particularly true if, as we have argued elsewhere, capacity is judged situationally by reference to the specifics of the alleged assault and the characteristics of the accused.⁷⁶

In other cases, evidence that the complainant may have engaged in sexual activity in the past in the hope of gaining social acceptance or male interest is admitted for the purpose of undermining her assertions of nonconsent. This is precisely what happened in *B.M.*,⁷⁷ where the trial judge permitted wide-ranging evidence about the complainant's reputation for casual oral sex with groups of boys at her high school. Even though almost none of this so-called reputation evidence could actually be substantiated, it was introduced at tremendous cost to the complainant, who was portrayed as oversexed.⁷⁸ The reputation evidence almost overshadowed the clear evidence of nonconsent to the acts at issue. The court never squarely confronted whether any previous encounters, if they in fact took place, might also have been coerced, or whether taking advantage of a young woman's desire for approval and

⁷³ It is also possible that such evidence could be admitted on the basis that it is not evidence of "specific instances of sexual activity" (*Criminal Code*, *supra* note 12, s. 276(2)(a)) but is instead evidence merely of conversations about sexual matters or expressions of interest in sexual activity.

⁷⁴ *Criminal Code*, *supra* note 12, as am. by *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19, s. 13.

⁷⁵ *Supra* note 15 at paras. 58-59.

⁷⁶ In an earlier article, we argued that the capacity to consent to sexual activity may depend not only on the complainant's intellectual abilities, but on the nature of the sexual activity involved and the relationship (or lack thereof) between her and the accused. See Benedet & Grant, *supra* note 4 at 286-87.

⁷⁷ *Supra* note 18.

⁷⁸ *Ibid.* at para. 105. A similar result was obtained in *R. v. D.*, [2000] O.J. No. 3645 (Sup. Ct.) (QL), where the court held that s. 276 had no application on a bail hearing, and received evidence that the teenage complainant was known to have had sex with groups of boys at her high school some five years prior to her alleged abduction and group rape.

social acceptance is exploitative. It is certainly not a phenomenon that is unique to those young women who are considered to have mental disabilities.⁷⁹

The apparent willingness of courts to consider the sexual history of women with mental disabilities can have a devastating effect where that "history" includes one or more recanted prior allegations of sexual assault, as in the *Parsons* case described above.⁸⁰ In that case, the judge admitted (through a section 276 voir dire) evidence that the complainant had, on four prior occasions, made allegations to her mother or to police that she had been sexually assaulted by men other than the accused. In each of these instances, the complainant later retracted the allegation. This evidence was relied on by the trial judge to completely undermine the credibility of the complainant. As a result of this history, it would have been almost impossible for this complainant to be believed in the absence of strong corroborating evidence.

Yet the trial judge in *Parsons* ignored important considerations that differentiated the prior allegations from the charge before him. First, after the sexual activity at issue in the trial, a police officer noted a large quantity of blood on the outside of the complainant's pants.⁸¹ Apparently, no record was retained of the "rape kit" examination conducted on the complainant. Second, the complainant called the police numerous times after the incident to report that she had seen the accused driving in his truck and another vehicle. Based on this information, the police were able to pick up the accused, who later admitted to sexual intercourse with the complainant.⁸² Finally, unlike in the other cases, the complainant did not recant or even substantially modify her testimony throughout the proceedings.

In addition, the Crown did not lead any evidence about the possibility that the complainant may previously have been pressured to recant falsely because of fear, shame, or embarrassment. Or, if some of the allegations were indeed false, it may be that they were made in response to leading questions that played to the complainant's tendency to give the answers that she thought her mother wanted to hear. If those factors were not present in this case, which seemed to involve a spontaneous allegation by the complainant when she first sought help in a convenience store, her allegations could still be believable notwithstanding the prior recantations. It might have been wise for the Crown to try and lead expert evidence to help the trial judge make sense of this history.

The admission of sexual history evidence is generally problematic for sexual assault complainants, but it is women with mental disabilities who are at particular risk of seeing this evidence brought in "informally", even by the Crown, as a way of determining the complainant's capacity. There is a real danger that this evidence will

⁷⁹ See Michelle Oberman, "Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law" (1994) 85 J. Crim. L. & Criminology 15.

⁸⁰ *Supra* note 14 at paras. 34-39.

⁸¹ *Ibid.* at para. 3.

⁸² *Ibid.* at para. 5.

invoke stereotypes about the sexuality of women with mental disabilities that will diminish their credibility as witnesses.

E. Third-Party Records

Another source of stereotyping about the sexuality of women with mental disabilities is the introduction into evidence of records in the hands of third parties. Women with mental disabilities often live heavily documented lives, with records kept by health care workers, support services, group homes, schools, adapted work placements, and counsellors. These women usually have no opportunity to read what is written about them in these files, nor do they have an opportunity to correct or supplement their own records. When they complain of sexual assault, a whole new set of records may be generated by doctors, counsellors, and other individuals and institutions involved in their care.

The evidentiary status of these records is connected to the issue of sexual history evidence because as restrictions on the use of sexual history evidence increased in the 1990s, some defence lawyers turned to cross-examination on therapeutic and other records (often maintained by third parties) as a way of impeaching the complainant's credibility. "Records" include psychiatric and medical records, counselling records, diaries and journals, and school and employment records, among others.⁸³ The purposes for which the records were introduced often relied on the same myths and stereotypes about women that had supposedly been discredited through tightening the use of sexual history evidence and abolishing the discriminatory evidentiary rules of corroboration and recent complaint.⁸⁴

In cases where the alleged assault took place many years prior to the complaint being made, defence lawyers might try to show that the assault was a recent fabrication or "false memory"⁸⁵ induced by the therapist. In other cases, they would look for prior inconsistent statements by the complainant that she felt guilty or responsible for what had happened.⁸⁶ In a more general sense, evidence that the complainant had received therapy or psychiatric treatment could be used to suggest that she was an unreliable witness, prone to exaggeration, fabrication, or delusion,

⁸³ The *Criminal Code* includes these in the definition of record, which also extends to any other document that records personal information for which a person has a reasonable expectation of privacy (*supra* note 12, s. 278.1, as am. by *An Act to amend the Criminal Code*, S.C. 1997, c. 30, s. 1).

⁸⁴ See Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 40 *Osgoode Hall L.J.* 251 at 283-90.

⁸⁵ *R. v. E.F.H.*, [1994] O.J. No. 452 at para. 44 (Ct. J. (Gen. Div.)) (QL), aff'd 105 C.C.C. (3d) 233 (Ont. C.A.); *R. v. J.W.M.*, [1995] O.J. No. 3589 at para. 9 (Ct. J. (Gen. Div.)) (QL); *R. v. G.D.D.*, [1995] N.S.J. No. 529 (S.C.) (QL).

⁸⁶ See e.g. *R. v. Osolin*, [1993] 4 S.C.R. 595, 109 D.L.R. (4th) 478, 162 N.R. 1 [*Osolin* cited to S.C.R.].

and so not worthy of belief.⁸⁷ Sometimes school or work records were also sought to show that the complainant was a delinquent or a problem student who could not be trusted to tell the truth.⁸⁸

As the number of sexual assault cases using records began to increase, some rape crisis centres, counsellors, and others began to resist or deny requests to produce such records, citing confidentiality and the need to protect the interests of their women clients.⁸⁹ Since the Code was silent on the availability or use of such records, there was confusion about when, if ever, they might be producible to the defence and who might have standing to oppose the application.

The Supreme Court attempted to resolve this uncertainty in 1995 in *R. v. O'Connor*.⁹⁰ The Court developed a three-stage common law procedure for defence applications for such records in the hands of third parties. First, where the judge considered the records to be "likely relevant" to an issue at trial, he or she would order their production to the court for review.⁹¹ Second, after weighing the right of the accused to make full answer and defence with the right of the complainant to privacy, the judge would analyze the record and make a decision as to whether it should be disclosed to the accused. Finally, and if they are disclosed, their admissibility at trial would then be determined during the course of the trial according to the standard rules of probative value and prejudicial effect.⁹² Third parties, including the complainant and the record holder, were given standing to oppose the application. Records already in the possession of the Crown were to follow the rule in *R. v. Stinchcombe*⁹³ and be disclosed to the defence if they were likely relevant.⁹⁴ Sexual assault complainants' therapeutic records did not attract a class privilege and were not to be treated differently than other records, a point made in *A.(L.L.) v. B.(A.)*.⁹⁵

The *O'Connor* test was criticized for being too expansive and for failing to take into account the equality rights of sexual assault complainants. The initial threshold for production was low, on the assumption that the complainant's privacy was not compromised by mere production to the trial judge. In addition, the analysis adopted by the majority of the Supreme Court failed to recognize that the complainant's equality rights were also at stake, forcing consideration of competing constitutional values, not merely adjudicating a lopsided "contest" between the complainant's

⁸⁷ See e.g. *R. v. Nickerson* (1993), 121 N.S.R. (2d) 314, 21 C.R. (4th) 262, 81 C.C.C. (3d) 398 (C.A.); *R. v. Manios* (1999), 67 C.R.R. (2d) 138 at 140, 103 O.T.C. 73 (Sup. Ct.).

⁸⁸ See e.g. *R. v. R.D.*, [2002] S.J. No. 427 (Q.B.) (QL); *R. v. N.P.*, [2001] O.J. No. 1828 (Sup. Ct.); John DeMont, "Not Guilty: A jury acquits Gerald Regan of eight sex-related charges" *Maclean's* (28 December 1998) 56.

⁸⁹ See e.g. *R. v. Carosella*, [1997] 1 S.C.R. 80 at 81, 142 D.L.R. (4th) 595, 207 N.R. 321.

⁹⁰ [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235, 191 N.R. 1 [*O'Connor* cited to S.C.R.].

⁹¹ *Ibid.* at para. 137.

⁹² *Ibid.* at paras. 15-34.

⁹³ [1995] 1 S.C.R. 754, 162 A.R. 269, 178 N.R. 157.

⁹⁴ *O'Connor*, *supra* note 90 at paras. 13-14.

⁹⁵ [1995] 4 S.C.R. 536 at 579, 130 D.L.R. (4th) 422, 190 N.R. 329.

feelings of embarrassment and the accused's right to a fair trial. In dissent once again, Justice L'Heureux-Dubé argued that the majority's approach was too broad and that the interests of the complainant needed to be considered before the records were produced for review.

Parliament responded to the decision in *O'Connor* with a statutory regime for the production and disclosure of third-party records that more closely followed the dissent. While the three stages of production, disclosure, and admissibility were retained, the complainant's right to privacy and equality was to be considered at the first stage of production (as well as at subsequent stages). In addition, the Code specified a long list of reasons that were not, in and of themselves, sufficient to support an order for production or disclosure.⁹⁶ The statutory regime was upheld against constitutional challenge in *R. v. Mills*.⁹⁷

A review of cases on third-party records decided since *Mills* shows a number of things. First, the kinds of records sought by the defence are not limited to counselling and other therapeutic records. Defence counsel have in various cases sought access to school records, records kept at addiction treatment centres, pharmacy records, records of youth centres and child protection agencies, group-home disciplinary records, poetry, and personal diaries.⁹⁸ Second, there is still a tendency on the part of some judges to fail to account for the adverse impact on the complainant of mere production to the judge.⁹⁹ Finally, judges also seem to have difficulty articulating the nature of the equality interest of the complainant in the nondisclosure of such records, or identifying the potential for stereotypical and discriminatory use of such evidence inherent in many records applications. Few cases do more than refer in passing to these rights in general terms.¹⁰⁰

Not surprisingly, applications for access to records have a differential adverse impact on groups of women whose lives are more likely to be heavily documented, including women with mental disabilities. Such women are likely to have had multiple encounters with medical practitioners, counsellors, therapists and support workers, and residential or drop-in programs, all of which produce documents. In most cases in which records are sought, the complainant will never have seen the records and will have had no opportunity to contribute to, correct, or dispute their contents before they are produced to the judge or disclosed to the defence.

Women with mental disabilities are vulnerable to particular discriminatory stereotypes that may prompt third-party-records applications. Women with

⁹⁶ *Supra* note 12, s. 278.3(4).

⁹⁷ [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1, 248 N.R. 101 [*Mills*].

⁹⁸ See e.g. *R. v. W.A.O.*, [2002] S.J. No. 783 (Q.B.) (QL) (medical, therapy, and pharmaceutical records); *R. v. R.D.*, *supra* note 88 (alcohol treatment centre records, school disciplinary records, and Child and Family Services records); *R. v. M.H.*, 2005 BCCA 419, 201 C.C.C. (3d) 47, 216 B.C.A.C. 74 (medical and therapy records, as well as poetry written by the complainant).

⁹⁹ See e.g. Gotell, *supra* note 84 at 278-81.

¹⁰⁰ See e.g. *ibid.* at 279.

developmental disabilities or brain injuries are treated as childlike and therefore unreliable. Women with psychiatric illness are seen as prone to lying or fantasizing and are also considered unreliable.

This does not mean that records are invariably ordered, produced, or disclosed. There are numerous cases involving complainants with mental disabilities where applications for records are denied on the basis that the accused has made no more than a bare assertion of relevance and is effectively engaging in a fishing expedition.¹⁰¹ What is troubling, however, is that it is hard to discern any predictable pattern in judicial decision making with respect to such applications. The judges who do order production at times seem unmoved by the clear equality interests engaged.

For example, in *Hundle*,¹⁰² the accused was a bus driver for a transportation service for adults with disabilities. The complainant was a twenty-four-year-old woman who used the service to travel from a college art course to her group home. She had autism and bipolar disorder. She alleged that Hundle did not drive her directly home, and instead took her to two different parking lots and sexually assaulted her by touching her breasts. Hundle admitted to the activity, but said that it was initiated by the complainant, that it was consensual, and that he terminated it when he realized that it was inappropriate.

Hundle sought access to the records of the complainant's psychiatrist (who testified as a witness at the preliminary inquiry), records of a former treating psychologist, records of the complainant's family physician, and records of the complainant's group home showing any discipline for inappropriate sexual activity. He also sought access to any other records of the transportation service concerning the complainant, based on information he received from another driver that the complainant had, nine months earlier, touched the other driver's leg and tried to kiss him without his consent and that he had reported this incident to his supervisors.

The trial judge held that there was no reasonable expectation of privacy in the transit service records; as such, they were not subject to the Code regime and should be produced.¹⁰³ The group home records were also relevant as potentially disclosing discipline meted out for the earlier complaint by the other bus driver.¹⁰⁴ Finally, the trial judge ordered that the records of the psychiatrist be produced because he was called as a witness and the defence was entitled to see the documents on which his opinion was based.¹⁰⁵

The conclusion that these records were likely relevant seems to have little connection to the nature of the allegation or the accused's asserted defence. If the complainant did attempt to have consensual contact (a kiss) with another bus driver

¹⁰¹ See e.g. *R. v. Sutherland*, [2001] 156 C.C.C. (3d) 264, 146 O.A.C. 53 (C.A.).

¹⁰² *Supra* note 18.

¹⁰³ *Ibid.* at para. 42.

¹⁰⁴ *Ibid.* at para. 9.

¹⁰⁵ *Ibid.* at para. 63.

nine months earlier outside her residence, this is hardly probative of whether the complainant in fact “initiated”¹⁰⁶ the touching of her own breasts by the accused in a parking lot on the latter occasion. It is in fact evidence of past sexual history, tendered to show the likelihood of consent, that should have been subject to scrutiny under section 276.

In addition, the psychiatrist’s testimony that four years earlier, when the complainant experienced her one severe manic episode, she had delusions that she had once been married and had miscarriages, was not really supportive of his conclusion that she had “delusions ... [of a] sexual nature ...”¹⁰⁷ It certainly had nothing to do with her encounter with the accused, which he admitted had taken place. Instead, the decision to produce the records appears to have had much more to do with generalized concerns that the complainant’s psychiatric disorder made her delusional and not credible and that her history of discipline for “inappropriate”¹⁰⁸ sexual activity gave her a motive to lie. The actions of the group home, if indeed they included punishment for the earlier incident, are further evidence of how the sexuality of women with mental disabilities is often judged and tightly controlled by others.

Overall, we did not have a large number of decisions on records applications in our sample. We did, however, find a number of cases in which the content of facility records were discussed and relied on by the judge without any reference to a formal section 278.1 application having been made. For example, in *Harper*, the trial judge referred to a letter in the nursing home’s file on the complainant about her interactions with men.¹⁰⁹ In *R. v. G.H.S.*, the complainant was cross-examined on a nurse’s note in her medical file that stated she was “very manipulative”.¹¹⁰ The file was created when she went to the hospital after a suicide attempt.¹¹¹ In none of these cases does it appear that the records were the subject of an application, even though the Code regime applies to records in the hands of both the Crown and third parties.

In the same way that sexual history evidence is admitted almost automatically in some cases where the complainant has a mental disability, it appears that sometimes evidence from private records is simply admitted without any consideration of its prejudicial effect. It may be that some judges and lawyers fail to recognize that even heavily documented complainants, or complainants whose disabilities are profound, have a right to privacy and are harmed when private information, speculation, and conclusions are used to distort their abilities and experiences.

¹⁰⁶ *Ibid.* at para. 1.

¹⁰⁷ *Ibid.* at para. 20.

¹⁰⁸ *Ibid.* at para. 9.

¹⁰⁹ *Supra* note 20 at para. 16.

¹¹⁰ 2001 BCSC 766, [2001] B.C.J. No. 1425 at para. 53 (QL).

¹¹¹ *Ibid.* at paras. 51-53.

F. Credibility

The credibility of the complainant is closely intertwined with the evidentiary issues discussed above. The accused introduces sexual history evidence, for example, to undermine the complainant's credibility. Credibility also operates at a more general level, however, setting the tone for a consideration of consent and mistake of fact and playing into the reasonable doubt calculation. Sexual assault prosecutions often pit the accused against the complainant in a contest of credibility because there are rarely other witnesses. Any claim by the accused that the sexual contact did not happen, or that it was consensual, is inherently an attack on the credibility of the complainant: if the accused is correct, the complainant is lying, absent a finding of mistake of fact.

There is a long history of trying to impeach the credibility of sexual assault complainants by invoking misogynist stereotypes about women.¹¹² In the context of our adversarial system, and of the requirement of proof beyond a reasonable doubt, the accused need not be believed to be successful. If the trier of fact has a reasonable doubt that the accused is telling the truth, the accused is entitled to an acquittal. What is especially disconcerting, however, is how the fact of disability itself can be used in a discriminatory manner to cast doubt on the complainant's credibility. As we have seen above, if she cannot be sworn, her testimony carries less weight. In other cases, memory or communication problems may raise a reasonable doubt about the believability of the complainant.

It is not unusual in cases involving complainants with mental disabilities to see inconsistencies in, or a certain amount of confusion regarding, some details of their testimony. Such inconsistencies might raise issues of credibility if the complainant did not have a disability. But in cases involving complainants with mental disabilities, trial judges should carefully examine the real significance of those inconsistencies to the legal issues at stake, with a view to understanding the essence of the complainant's testimony. In some cases, for example, the complainant may be easily influenced by the nature of the questions or may not fully understand them. Trial judges must be cautious not to dismiss too easily all of the complainant's testimony because some of the details may be unreliable.

In *R. v. Gadway*,¹¹³ for example, though the judge did have a reasonable doubt based on some of the complainant's testimony about the day on which the assault was alleged to have taken place, he nonetheless recognized that issues of credibility need to be seen in the context of the complainant's disability:

While the answers [of the complainant] would normally place the credibility of any witness beyond repair, in dealing with mentally handicapped witnesses or children, the Court['s] assessment of credibility must be attuned to the experience, and intellectual development of the witness.¹¹⁴

¹¹² See generally *Seaboyer*, *supra* note 65, L'Heureux-Dubé J., dissenting.

¹¹³ [1993] Y.J. No. 69 (Terr. Ct.) (QL) [*Gadway*].

¹¹⁴ *Ibid.* at para. 31.

In *Gadway*, the complainant maintained throughout her testimony that the accused, an activity coordinator for persons with disabilities, had raped her in her apartment on a Saturday. The trial judge found that this was impossible based on the undisputed timing of other events. It was, however, possible that the assault took place on Sunday, when the accused also visited the complainant's apartment. *Gadway* demonstrates that, even when the courts treat complainants with disabilities with respect, limitations in their evidence may prevent a conviction. Where timing is a crucial factor, the inability of the witness to remember dates or the sequence of events may pose a very real barrier to justice.

1. Disability Undermining Credibility

There are several ways in which disability itself is used to undermine credibility: the complainant might have difficulty forming long-term memories,¹¹⁵ communicating information to people in authority, or communicating effectively on the witness stand.¹¹⁶ She might be overly suggestive to ideas put to her in questions¹¹⁷ or unduly influenced by caregivers or parents.¹¹⁸ The pressures of cross-examination may result in apparently conflicting testimony by a complainant with a mental disability.¹¹⁹ Sometimes these limitations are real, and police and courts must accommodate their processes accordingly. However, there is a fine line between actual cognitive and communicative limitations on the one hand, and assumptions about such limitations on the other:

There is no straightforward relationship between intellectual impairment and memory. Individuals process, remember and communicate information more or less well, depending on numerous variables involved in the situation and the individual. It is possible to assess these on an individual basis.¹²⁰

In *Harper*,¹²¹ the complainant, who was living in a nursing home, notified nurses using her emergency bell and described a sexual assault against her by a relative of another resident who was subsequently found in the hall, severely intoxicated. She was found with her clothes in disarray and a strong smell of alcohol in the room. Physical injuries supported her claim of sexual assault. The complainant had well-established problems forming long-term memories but, instead of looking to her statements immediately following the alleged assault, the court applied more

¹¹⁵ See e.g. *Parrott*, *supra* note 37; *Harper*, *supra* note 20.

¹¹⁶ See e.g. *R. v. Young* (1994), 113 Nfld. & P.E.I.R. 219 (Nfld. S.C. (T.D.)).

¹¹⁷ See e.g. *Gadway*, *supra* note 113 at para. 27 (complainant and roommate both highly prone to suggestion in questioning).

¹¹⁸ See e.g. *Chin*, *supra* note 68 (caregivers); *McPherson*, *supra* note 69 (mother).

¹¹⁹ See e.g. *R. v. K.R.*, [1998] O.J. No. 181 at paras. 20-37 (Ct. J. (Prov. Div.)) (QL).

¹²⁰ Charlene Senn, *Vulnerable: Sexual Abuse and People with an Intellectual Handicap* (Downsview, Ont.: The G. Allan Rocker Institute, 1988) at 70, cited in *Gadway*, *supra* note 113 at para. 42. This report was prepared under contract to the Family Violence Prevention Division, Health and Welfare Canada.

¹²¹ *Supra* note 20.

traditional indicators of credibility. For example, in assessing the complainant's credibility as a witness, the judge commented on the fact that the complainant did not know the floor or room number in which she lived on the date of the sexual assault. She also had difficulty saying whether the assault took place in fall, winter, or spring. The fact that someone cannot retain such information (that was of limited significance in her life) does not mean that she would make false allegations of sexual assault immediately after an alleged assault. The trial judge in *Harper* recognized that the focus on more typical indicators of credibility was problematic in this case:

Cases such as this are probably the most difficult that courts have to face. They are stressful for the complainant, her family and the staff at [the residence]. The criminal law is of necessity an after the fact process and confronts the frailty of the human memory and our ability to determine what really happened in any given case. There is no doubt that the vulnerable members of our society have a diminished ability to make their case even when their hearsay evidence is admitted.¹²²

While there was clear evidence in *Harper* that the complainant's ability to form new long-term memories was almost nonexistent, there was no evidence that her immediate recall of events was not reliable or that she was likely to lie. Given this knowledge base, the focus should have been on her statements made to the institution's staff immediately following the alleged sexual assault and on whether evidence of her statements to her caregivers could have been admitted under *Khan* as both reliable and necessary, without the need to subject her to a futile cross-examination.

The inability to form long-term memories is made all the more problematic by the long delays between an alleged assault and trial. Often, the complainant will have gone through several interrogations and, by the time of trial, it may be very difficult to sort out what her explanation of events really was.¹²³ Sometimes, the police will have thought to make a videotaped statement while the information was still fresh enough in the mind of the complainant.¹²⁴ In *Gadway*, the court noted that

[w]hile all memories fade in time, some mental handicaps may so severely restrict long term memory that a delayed trial may effectively preclude their testimony. Precluding such testimony may allow the guilty to elude justice, and for the innocent to avoid unjust convictions.¹²⁵

In cases like *Harper*, however, where the complainant's memory was particularly limited, even the delay involved in setting up a videotaped interview may preclude the opportunity of getting the complainant's story documented. In *Harper*, the only basis for the trial judge's reasonable doubt about nonconsent was the complainant's

¹²² *Ibid.* at para. 72.

¹²³ See *Gadway*, *supra* note 113 at para. 17ff. for a thoughtful discussion of some of the difficulties in obtaining evidence from complainants or witnesses with serious memory impairments.

¹²⁴ See e.g. *R. v. B. (K.G.)*, [1993] S.C.R. 740, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1.

¹²⁵ *Supra* note 113 at para. 42.

memory deficit. It was her disability that made a conviction impossible, notwithstanding the corroborating evidence of nonconsent present in this case.

2. Credibility of Caregivers and Parents

The fact that complainants with mental disabilities may have to rely on the evidence of support persons or parents may also be destructive of credibility, particularly where those persons are seen as advocates for their children or as harbouring some hostility to the accused (or indeed to any potential sexual partner of the complainant). For example, in *Chin*,¹²⁶ a nurse testified that she saw the accused doctor touching the breasts of the fifteen-year-old complainant who was confined to hospital for treatment for epilepsy. The British Columbia Court of Appeal ruled that her evidence should not have been relied upon because the nurse had discussed her evidence with her husband, a counsellor at the complainant's school who was aware of earlier allegations of sexual assault against Dr. Chin by another student. The nurse's evidence was important because the Court of Appeal found that the complainant's evidence was highly suspect given her limited memory, confusion due to her epilepsy, and highly suggestible nature.

In *McPherson*,¹²⁷ the trial judge rejected the Crown's application to introduce statements made by the twenty-nine-year-old complainant to her mother and aunt alleging that she had been sexually assaulted by a family acquaintance who had stopped by to pick up some mail. The trial judge noted that there was no physical evidence to support the allegation of sexual assault and that the evidence given by the complainant's aunt and mother was suspect because they believed that the accused had assaulted the complainant when they saw him leave her room in a crouching fashion.

The complainant in that case was described as having the intellectual ability of a preschool child due to complications from childhood meningitis. She was described as "cheerful", "eager to please", and as often giving inappropriate answers to questions.¹²⁸ Her evidence was further complicated by the fact that she did not speak English and testified in Tagalog through an interpreter. As a result, the complainant's statements were seen as being elicited by the mother's and aunt's questioning and were neither spontaneous nor reliable. Her interview with the police was also ruled inadmissible because of her suggestibility.

On a practical level, it is unlikely that witnesses who are deemed confused and suggestible by the court are going to be able to give credible evidence on their own. Without physical corroboration, there is little choice but to supplement their evidence with statements made to parents (usually mothers) and caregivers. These persons are usually not disinterested observers, and it is hardly surprising that if they thought they

¹²⁶ *Supra* note 68.

¹²⁷ *Supra* note 69.

¹²⁸ *Ibid.* at para. 5.

had just witnessed an assault, they would ask “leading” questions of their daughter or client rather than waiting around for a spontaneous outburst. The trial judge’s repeated reference to the complainant’s mother in that case as “hysterical”¹²⁹ is itself a stereotypical label with a long history of use to dismiss wrongs done to women.¹³⁰

Certainly, the accused’s explanation—that he had let himself into the house to get the mail at 8 a.m., without waking either the complainant or her brother, and then was in the complainant’s room watching television—strains credulity. This is especially so given that the accused did not have a close relationship with the family (he was an employee of the mother’s friend), and that two witnesses saw him leave the bedroom in a crouching position.

The role of the mother as destructive of credibility is also evident in *Parsons*.¹³¹ In that case, the complainant’s mother was influential in encouraging her both to make and later recant several prior allegations of sexual assault against men other than the accused. This evidence was extremely destructive of the complainant’s credibility, leading the court to find that she was a person who was prone to fabricating complaints of sexual assault. This led the judge to discount several notable differences between the past case and the case before him. Unfortunately, the Crown failed to lead any evidence about false recantation by women with disabilities who have been sexually assaulted,¹³² and the trial judge failed to consider the possibility that some or all of the previous allegations could be true. Certainly, it is not at all inconceivable that a woman with physical and mental disabilities could be sexually assaulted multiple times by different men.

III. Discussion

In this paper, we have argued that the failure of courts to guarantee substantive equality to women with mental disabilities manifests itself not only in the way courts interpret and apply the substantive offence of sexual assault, but also in the form of evidentiary and procedural barriers to full participation as witnesses in the criminal justice system. Thus far, we have identified some of the specific areas of law that create barriers for complainants with mental disabilities in sexual assault trials. The cumulative impact of these barriers has a potentially devastating impact on the likelihood of a successful prosecution. Although beyond the scope of this study, it would not be surprising if Crown counsel decided in many such cases not to pursue prosecution because of these obstacles.

¹²⁹ *Ibid.* at paras. 36, 41.

¹³⁰ See Jonette Watson Hamilton, “The Use of Metaphor and Narrative to Construct Gendered Hysteria In the Courts” (2002) 1 J.L. & Equality 155; P. Chodoff, “Hysteria and Women” (1982) 139 *American Journal of Psychiatry* 545.

¹³¹ *Supra* note 14.

¹³² See e.g. *R. v. S.G.R.*, [1993] O.J. No. 610 (Ct. J. (Prov. Div.)) (QL).

In this section, we attempt to integrate our legal analysis with our understanding of (and assumptions about) disability both to clarify the barriers for women with mental disabilities and to suggest potential accommodations. The legal analysis demands an understanding of disability that takes into account both the biomedical diagnosis and the social construction of disability. While women with mental disabilities have real conditions, such as memory loss, that necessitate accommodation in the criminal justice system, our social construction of disability also creates barriers. For example, delays in the criminal justice system may “disable” a complainant from participating as a witness who might otherwise have been able to give evidence. Yet the greatest impediment to accommodating complainants with mental disabilities lies in our assumptions about what is necessary to ensure a fair trial for an accused. We suggest that a more nuanced understanding of what a fair trial requires would facilitate a more effective utilization of existing accommodations as well as the development of new ones.

Many of the evidentiary rules and procedures that have evolved in the sexual assault context exist to provide a mechanism for the accused to demonstrate that the complainant is lying, either in her assertion of nonconsent or in her claim that sexual activity took place at all. While these rules can reflect stereotyped assumptions about women and make successful prosecution of sexual assault difficult in any context, they are particularly damaging in the context of complainants with mental disabilities. It is simply unrealistic to expect many women with developmental disabilities to be able to live up to the demands of the perfect witness who gives a detailed, consistent account of a highly traumatic event in increasingly public and hostile forums, possibly years after the alleged assault. And while these demands are onerous for many other sexual assault complainants as well, the issues of the ability to be sworn and to be cross-examined may be unique for this group of women.

These problems demonstrate the tension between a model of disability that sees it as a biomedical condition that creates real barriers to participation and a social model of disability that characterizes those barriers as being created by norms of behaviour and ability that are socially constructed.¹³³ There is little doubt from our study that both of these models have explanatory value in addressing problems in the criminal justice system facing sexual assault complainants with mental disabilities.

In the case of evidentiary and procedural norms, many of the barriers are socially constructed by the assumptions about the necessary procedure for a criminal trial. How do we know that someone who takes an oath or affirmation is more likely to tell the truth than someone who does not? Similarly, we assume that a vigorous, confrontational cross-examination of a sexual assault complainant is the best way to get at the truth, whatever the cost to the complainant and no matter what her disabilities. Likewise, in line with widespread socially accepted stereotypes about

¹³³ See Benedet & Grant, *supra* note 4 at 253-55 for a more detailed discussion of these models.

women's sexuality, sexual history evidence is wrongly assumed to be relevant to issues such as consent and credibility.

At the same time, we need to acknowledge that, in the case of procedural rules, there are many ways in which the barriers for women with mental disabilities flow directly from biomedical conditions. Deficits in memory, problems with communication, and inability to estimate time or to place events in sequence may all be very real challenges for many women with mental disabilities. These difficulties require particular accommodations in the criminal trial process in order for these women's stories to be heard. We cannot simply conclude that all women with mental disabilities have their autonomy enhanced by being allowed to sink or swim in the current system. Nor can we assume that they are somehow insurmountable if the accused is to be guaranteed a fair trial.

Real reform in this area will require examining the rules we take for granted in the criminal justice process in order to identify which are useful and necessary, and which act as unfair barriers to sexual assault complainants with mental disabilities. We are not suggesting that we jettison the fundamental tenets of a fair trial whenever the complainant has a mental disability, but rather that we question unchallenged assumptions about the centrality of certain tenets if those tenets render some women rapable with impunity because their disability prevents them from being "typical" witnesses. We also need to challenge the assumption that the routine portrayal of women as lying or promiscuous facilitates the pursuit of truth.

Women with mental disabilities are guaranteed the equal protection of the law under section 15 of the *Canadian Charter of Rights and Freedoms*.¹³⁴ All players in the criminal justice system have a duty to maximize the extent to which women with mental disabilities can have their claims heard effectively in criminal courts. A substantive equality approach would require all best efforts that are not inconsistent with the right of the accused to a fair trial to accommodate the complainant's participation in the system. Identifying these accommodations is complicated by the fact that different complainants need different types of accommodations. We must resist the temptation to treat all women in this group as if they are the same. Thus, to a great extent, accommodations will need to be assessed on a case-by-case basis. Efforts must be made at the earliest possible stage of the criminal justice process to identify the types of supports necessary to maximize the degree to which complainants with mental disabilities can participate in the process. This may require involving persons familiar with the complainant, her abilities, and her limitations in formulating a strategy. In some of the cases in our study, it was not until well into the

¹³⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

trial itself that such limitations were addressed, even though the disability was clearly evident at the investigatory stage and preliminary inquiry.¹³⁵

There are some limited accommodations for complainants with disabilities already in the Code, mostly derived from provisions that apply to children. Section 715.2, for example, provides for the admission of a videotaped interview made within a reasonable time after the alleged offence where a complainant is unable to testify because of a disability. The videotape does have to be adopted by the complainant, though in cases dealing with the analogous provision for children, the Supreme Court has acknowledged that the complainant need not remember the contents of the videotape.¹³⁶ Subsection 486(1.2) allows a child under fourteen or a person with a disability to have a support person close by when testifying. And subsection 486(2.1) allows for a complainant under eighteen or with a disability to testify outside the courtroom or from behind a screen, blocking her view of the accused yet allowing the accused and other participants in the trial to see her.¹³⁷ While we would urge caution in comparing women with mental disabilities to children, we recognize that some of these procedures are useful for particularly vulnerable complainants. We were surprised, therefore, to see how rarely these options were utilized or discussed in our sample of cases.

We have already suggested that some women may require accommodations including limits on cross-examination, a flexible interpretation of the hearsay rule, and rigorous application of the rules prohibiting inappropriate use of sexual history evidence. In the latter two examples, the problems lie not in the law itself but in its application. There are, for example, already limits in section 276 of the Code on the allowable uses of sexual history evidence, which accused persons are sometimes able to circumvent where the complainant has a mental disability.¹³⁸ Courts must be rigorous about preventing evidence of sexual history from slipping in the back door as part of an inquiry into capacity to consent or testimonial competence, where it is ultimately used to taint all of the complainant's evidence. Trial judges need to be especially careful that the jury is warned about such misuse of evidence even when it is introduced by the Crown without a formal application.

Perhaps more controversially, it may also be necessary to rethink the focus of cross-examination with a view to making it less confrontational for some complainants. This could be done, for example, through a list of questions read by someone familiar to the complainant or by some other mechanism. We recognize that the right of the accused person to confront his accuser by way of cross-examination is part of the right to full answer and defence and has been constitutionalized by section

¹³⁵ See e.g. *Wyatt*, *supra* note 11; *R. v. N.J.D.* (1990), 112 N.B.R. (2d) 271 (C.A.); *R. v. S.G.(I)*, [1998] O.J. No. 2584 (Ct. J. (Gen. Div.)) (QL).

¹³⁶ See *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183, 154 D.L.R. (4th) 13, 220 N.R. 362.

¹³⁷ This safeguard has been upheld as constitutional in the context of child complainants. See *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 85 C.C.C. (3d) 327, 18 C.R.R. (2d) 242.

¹³⁸ See Part II.D, above.

7 and subsection 11(d) of the *Charter*.¹³⁹ We also recognize that a majority of the Supreme Court has tipped the balance toward prioritizing an unencumbered right of full answer and defence over the equality rights and rights to security of the person for sexual assault complainants.¹⁴⁰ Radical reform of the criminal justice system to enhance the participation of complainants with mental disabilities appears unlikely within our current constitutional framework. As John McInnes and Christine Boyle have noted:

This reality may lead us to an uncomfortable recognition that whatever the purpose of criminal law is in our present stage of social evolution, it is irretrievably inimical to equality and that trying to use it as an equality-promoting tool may be much like trying to douse a fire with gasoline. A truly egalitarian society may require a regime of criminal law that to us would be virtually unrecognizable, and we question whether it is possible within the limited range of our present armament of constitutional arguments and procedures to even begin the necessary transformations.¹⁴¹

However, even in privileging the accused's right to full answer and defence over equality, the Supreme Court has cautioned against resort to stereotypes and assumptions about sexual assault complainants. As noted in *Osolin*:

Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility.¹⁴²

More recently in *Shearing*, the majority stated:

The courts have recognized, no doubt belatedly, that certain techniques of cross-examination traditionally employed in sexual assault cases have distorted rather than advanced the search for truth. ...¹⁴³

While in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness, sexual assault cases pose particular dangers. *Seaboyer*, *Osolin* and *Mills* all make the point that these cases should be decided without resort to folk tales about how abuse victims are expected by people who have never suffered abuse to react to the trauma ...¹⁴⁴

¹³⁹ See *Osolin*, *supra* note 86 at 665.

¹⁴⁰ See e.g. *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33 at paras. 107-52, 214 D.L.R. (4th) 215 [*Shearing*].

¹⁴¹ John McInnes & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 U.B.C. L. Rev. 341 at 349.

¹⁴² *Supra* note 86 at 671, Cory J. This passage is cited with approval by Binnie J. in *Shearing*, *supra* note 140 at para. 108.

¹⁴³ *Shearing*, *ibid.* at para. 119. See also *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 at para. 44, 235 D.L.R. (4th) 244 (trial judge has a responsibility to ensure that cross-examination is not used inappropriately to taint the reputation of the witness).

¹⁴⁴ *Shearing*, *ibid.* at para. 121.

We would suggest that, even in our existing constitutional framework, the content given to full answer and defence must be examined in context. Particularly when dealing with complainants with mental disabilities, there will be cases where the opportunity to cross-examine in the traditional way does not further the truth-seeking process and serves only to taint the overall credibility of the complainant because of her disability. Where, for example, the complainant's mental disability renders her suggestible or highly traumatized by confrontation, the traditional style of cross-examination may actually be counterproductive in seeking the truth. Just as we must avoid rape myths about sexual assault complainants generally, so too must we avoid myths about the sexual availability and the veracity of women with mental disabilities. It may be inevitable that limits on cross-examination will affect the weight given to the complainant's evidence. We would argue, however, that this is for the trier of fact to assess and that a judicial stay of proceedings usurps that role.

One danger in providing accommodations to facilitate hearing the stories of complainants with mental disabilities is that the accommodation could further perpetuate stereotypes and undermine the very credibility that the accommodation is designed to protect. The allegations of a woman who does not testify may well be less likely to be believed. A more flexible use of the *Khan* hearsay exception could help the stories of women with mental disabilities be heard in court, but would it undermine their credibility at the same time? Trial judges will need to be vigilant in cautioning jurors about drawing unwarranted assumptions from the fact of accommodation itself.

We acknowledge that there may be a small group of sexual assault complainants whose disabilities are so severe that, in the absence of other witnesses, a fair trial cannot be held. It will be difficult, for example, to prosecute an accused where the complainant has no means of communicating with others about what may have happened, unless the Crown has persuasive corroborating evidence of sexual assault.¹⁴⁵ However, this group of complainants is small and this conclusion should never be reached with respect to a particular woman without first exhausting all possible accommodations to enable her meaningful participation in the process.

Conclusion

Existing evidentiary rules and trial procedures disadvantage women with mental disabilities who complain of sexual assault. Much of the discrimination faced by complainants with mental disabilities is common to all women who complain of sexual assault, but women with mental disabilities often experience it in distinct and particularly devastating ways. While we see more real differences between these groups of women on the evidentiary or procedural side, and more commonality on the substantive application of the sexual assault offence,¹⁴⁶ we must try to transcend the

¹⁴⁵ See e.g. *Chin*, *supra* note 68.

¹⁴⁶ See Benedet & Grant, *supra* note 4 at 271, 289.

sameness/difference debate in pursuit of a more substantive equality that is alive to discrimination at the intersection of the grounds of sex and disability.

The solutions, where they exist, are varied. Some of the problems we have identified could be addressed simply with a greater understanding of this group of complainants. Cultivating such understanding might require more targeted training for police, prosecutors, and judges, including perhaps the designation of special prosecution teams or dedicated courts that do not simply lump these complainants in with children or leave them to sink or swim on their own.

At the same time, there is a need to recognize the heterogeneity of this group of women, not to mention the imprecise boundaries of the group itself. It is a real challenge to tailor individual proceedings to different kinds and levels of disability. Moreover, there is no easy way to define which women should bear this label. This may call for a self-identification threshold or at least caution in labelling women in this way. At a minimum, we argue that it does not meet the sex equality rights of women with mental disabilities to burden them with the stigma, stereotypes, and failure of accommodation that we have seen in so many of the cases, and to make so few efforts to recognize their particular needs, aptitudes, and challenges.

This is especially important because the cost of participating in the criminal justice system can be very high for women with mental disabilities. We have stressed that freedom from sexual violence is a necessary precondition for sexual autonomy. Women with mental disabilities who have been sexually assaulted may find, however, that they are subjected to increased segregation and control after the assault, and that any autonomy they might have been permitted prior to the assault is jettisoned in favour of protection. Adult women still living with their parents may find they are discouraged or prevented from having male friends and may have their independence limited even further; women living in group homes may be subject to increased surveillance and fewer "privileges". Women who have been participating independently in the community may, like other victims of sexual assault, self-segregate.

We conclude by asking a deceptively simple question: in a legal sense, what do we want for women with mental disabilities who complain of sexual assault? In many respects, the answer is common to all women. We want them to be believed and respected. Many women with disabilities have been taught to trust those in authority; that trust is betrayed when they are sexually assaulted by their caregivers or others in relationships of trust. It is further debased when the criminal justice system rejects these women as inadequate to participate in its processes. We want the criminal justice system to recognize and reject, rather than replicate, the stereotypes and pervasive social disadvantage experienced by this group of women.
