JAMAICAN BAR ASSOCIATION IN ASSOCIATION WITH THE GENERAL LEGAL COUNCIL CLE SEMINAR

TOPIC: LIMITATIONS ON ADDUCING EVIDENCE OF THE COMPLAINANT'S SEXUAL HISTORY: LAWFUL SHIELD OR CONSTITUTIONAL BREACH – AMENDMENT TO THE SEXUAL OFFENCES LEGISLATION

"It is true that ***Article 6*** does not explicitly require the interest of witnesses in general, and those of victims called upon to testify in particular to be taken into consideration. However, their life, liberty or security of person may be at stake, as many interests coming generally within the ambit of ***Article 8*** of the ***Convention.*** Such interests of witnesses and victims are in principle protected by other substantive provisions of the ***Convention,*** which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. ***Against this background principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify [1]" (My emphasis.)***

The Strasbourg Court in ***Doorson*** put to rest the raging debate as to whether the right to a fair trial, [a human right, expressedly stated in ***Article 6*** of the ***European Convention on Human Rights, (ECHR)]*** was solely and wholeheartedly relevant to the rights of an Accused at trial. All rights are inextricably linked and indivisible and as such individual rights should not be read in a vacuum. The ***ECHR***, though not applicable to our jurisdiction in the Caribbean has influenced the ***International Convention on Civil and Political Rights 1966***, (***ICCPR***) which came into force on the 23rd of March 1976. The ***ICCPR*** was ratified by Jamaica and we have since sought to enact domestic legislation consistent with the ***ICCPR*** and also our ***Charter of Fundamental Rights and Freedom*** (***The Charter.)***

[1] In Doorson V. The Netherlands (Application No. 20524/92 (1996) 22 EHRR 330, para. 67.)

The right to a fair trial is captured in ***Article 14*** of the ***ICCPR***….. "**All persons** shall be equal before the courts and tribunals …." and ***section 16*** of the ***Charter. Article 8*** of the ***ECHR***, the right to respect for private and family life, is mirrored in ***Article 18*** of the ***ICCPR*** [2] and ***Section 13***(***3***)(***j***)(***ii***) of our ***Charter.***

The object and purpose of our ***Charter*** seems to be defined as "…respect for and observance of human rights and freedoms." (***Section 13***(***1***)(***a)***). The ***Charter,*** like the ***ECHR,*** can also be regarded as an evolving document and as stated in **Tyler** v. **UK (1978)** "the ***ECHR*** is an instrument which must be interpreted in the light of present conditions." The principle of proportionality, I would suggest, is central to the interpretation of the ***Charter.*** Inherent in the ***Charter*** is a search for a balance between the demands of society on the one hand and the fundamental rights of the individual on the other. As such, proportionality requires that a measured and justifiable approach be adopted.

Striking The Balance – Section 27 of the Sexual Offences Act, 2009

The approach of our local legislature/parliamentarians is quite instructive in demonstrating the measured and justifiable approach that was applied to the analysis and implementation ***of Section 27 of the Sexual Offences Act***, ***2009***, ***Jamaica*** (***Act 12 of 2009***).

Upon careful perusal of the Report of the Joint Select Committee [3] it was evident that the Sexual Offences Bill (as it then was) was largely adapted from the provision of

[2] *Article 18 of the ICCPR "no one shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

[3] *Joint Select Committee in the Bills shortly entitled "The Offences Against the person (Amendment) Act" and the Incest (Punishment) (Amendment) Act" – June 6, 2007.*

Section 276 of the ***Canadian Criminal Code*** which was an amendment subsequent to a Constitutional challenge. The Canadian Case of **R** v. **Seaboyer [1991] 2 SCR S77** [4] was discussed and the guidelines given in **Seaboyer** were given statutory effect in ***Section 276*** of the ***Canadian Code***. Of critical note is that although the provision of ***Section 27*** is modeled on ***Section 276*** of the ***Canadian Criminal Code***, the two (2) provisions are not identical. The Committee was very careful in ensuring that this provision attracted very little or no constitutional challenges unlike our Canadian and British counterparts. In achieving this feat, there was a fusion of the provisions of ***Section 276*** of the ***Canadian Code*** and ***Section 41*** of the ***Youth Justice and Criminal Evidence Ac***t (***YJCE Act***), UK.

The additional subsection that is absent in the ***Canadian Code*** is ***Subsection*** (***3***) of ***Section 27***, which states:

> "… the judge shall not grant leave … (b) unless the judge is satisfied that the exclusion of the evidence or question in respect of which leave is sought would be unfair to the accused because of the extent to which that evidence:
>
> ***(i) relates to behaviour on the part of the complainant which was similar to the alleged behaviour on the occasion of, or in relation to, events immediately preceding or following the alleged offence; and***
>
> ***(ii) is relevant to issues arising in the proceedings."***

Another recommendation that was made by the Committee and was adapted was the requirement to serve notice where the Accused intends to adduce evidence of the previous sexual history of the Complainant (see ***Section 41*** of the ***YJCE Act***). This

[4] *83 DLR (4th) 193*

requirement is also consistent with that of the ***Sexual Offences Act of Barbados***, 1992.

In the Hansard, [5] a very thorough and informed presentation on the enlightened path that ***Section 27*** of the ***Sexual Offences Act***, 2009 (***SOA***) had taken us as a democratic society was made. Minister Clive Mullings, himself a legal practitioner, indicated that he had seen cases where "the history, the sexual life of the complainant is brought to centre stage to discredit, to say that this individual either, one, by virtue of this checkered sexual history, cannot be relied upon; or two, the issue of consent is not one that should bother a Judge because the Complainant is given to consenting anyway."

Due consideration was given to the sage words of Mrs. Justice Heilbron who was part of an Advisory Group on the law of Rape:

> "***In contemporary society sexual relationships outside marriage, both steady and of a more casual character are fairly widespread , and it seems now to be agreed that a woman's sexual experiences with partners of her own choice are neither indicative of untruthfulness, nor of a general willingness to consent."***

This quote clearly embodies the journey in thought of a democratic society.

Surely, the teleological approach to the interpretation of our ***Charter*** is also the promotion of a democratic society as was expressed in **Kjeldsen and others v. Denmark (1976)** with respect to the ***ECHR***, and that democracy should encompass broadmindedness. As such, the courts need to take an expansive rather than

[5] *The Hansard, The Honourable House of Representatives, 10/02/2009*
Mr. Mullings, Minister of Energy and Mining

restrictive approach, reflective in our domestic legislation and judgements handed down by our Courts.

In **PS** v. **Germany** [6], the Strasbourg Court went on to say:

> ***"In appropriate cases, principles of fair trial require that the interest of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of persons are at stake, or interest coming generally within the ambit of Article 8 of the Convention."***

The rights of the victims are just as important as the rights of the Accused and "Parliament shall pass no law … which abrogates, abridges, or infringes those rights."[7]

Rape Shield Laws in Other Jurisdictions

The esoteric question that surfaces in the minds of the advocate must lead one to contemplate the source of this rape shield and the cultural norms that existed decades ago.

United States of America

Professor David S. Rudstein of Illinois Institute of Technology [8] expressed that the manner in which society in general and the criminal justice system in particular, treat alleged female victims of sexual assaults have been criticized for protecting male interests rather than protecting women from sexual assault, specifically, the rules of evidence that often permit a defence attorney to delve into the private life of the complaining witness.

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[6] *(Application No. 33900/96) (2001) 36 EHRR 1139*

[7] *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011*

[8] *Williams and Mary Law Review, Vol. 18, Issue 1, Article 2*
Rape Shield Laws some Constitutional problems.

As a result of robust objections from Women Rights Groups on the United States of America (USA), the most prevalent reform was the enactment of statutes altering in some manner the traditional rules of evidence in rape cases to limit the defendant's inquiry into past sex life of the alleged victim.

Critics of the traditional rules of evidence have pointed out that evidence of a rape Complainant's bad reputation for chastity, opinion evidence of her bad character for chastity or evidence of previous acts of sexual intercourse with the Accused or with other men can be highly embarrassing to the Complainant and can have a deep psychological effect on her when introduced at a public trial along with the barbs and insinuations often made by the defence Attorney.[9]

In fact it has been observed, even in the USA, that the ordeal faced by the complaining witness often was so harrowing that it seemed as if the alleged victim were on trial.

Many critics of the traditional rules of evidence have suggested that this traumatic experience is one of the reasons rape is such an under-reported crime. [10]

Critics also have maintained that the traditional rules of evidence are obstacles of convictions of rapists because juries presented with evidence concerning complainants past sexual history make use of such information to form a moral judgement of her character and then are likely to be sympathetic to the assailant.[11] This is an all too familiar sentiment seen in the courts in Jamaica.

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[9] *Hibey, The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character, 11 AM Crim. L. REV. 309, 323 n. 48 (1973).*

[10] *A Feminist view, 11 AM. CRIM. L. REV. 335, 350-351 (1973)*

[11] *Brownmiller, Against our will: men, women and Rape (1975)*

The Rape Shield Statutes in some states within the USA, preclude many defendants charged with forcible rape from introducing certain evidence in their defence and curtail their cross-examination of the complaining witnesses. It was indicated by the United States Supreme Court in **Chambers** v. **Mississippi** [12] and in **Davis** v. **Alaska**[13] that the Rape Shield laws as enacted would raise serious constitutional problems.

Professor Rudstein opines that there is merit in the rather, what I would term as archaic and "dinosauric" views expressed in the case of **People** v. **Abbot**[14] in which the court stated:

"Are we to be told that... tiers should be advised to make no distinction in their minds between the virgin and a tenant of the stew? between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And will you not more readily infer assent in the practised Messalina in loose attire, than in the reserved and virtuous Lucretia? There is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity."

Professor Rudstein further states that though the courts may not place a heavy reliance on moral concepts the views of **People** v. **Abbot** influence the rule that such evidence is admissible.

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[12] *410 US 284 (1973)*

[13] *415 US 308 (1974)*

[14] 19 Wend. 192 CNY (1838)

The overarching principle that should govern the admissibility of sexual history evidence however, while attaining that balance of rights certainly must be whether the probative value outweighs the prejudicial effect. The probative value depends upon the degree of similarity between the circumstances of the previous acts of sexual intercourse and the circumstances of the case in question. [15]

The linchpin of Professor Rudstein's arguments which he concludes with and which I find favour with is that Rape shield Statutes should provide for a pre-trial hearing to determine the admissibility of evidence pertaining to the prior sex life of the complainant. In order to protect the privacy of the complaining witness, such a statute should require that the hearing be conducted in camera. To protect the defendant's right to a fair trial and his right of confrontation, the Statute, at a minimum, should allow the defendant to introduce evidence of the Complainant's bad reputation for chastity and of prior acts of sexual intercourse if such evidence is relevant to the case and critical to his defence or necessary for an adequate cross examination of a crucial adverse witness. Such a Statute would afford some protection from embarrassment for a Complainant in a rape case and would eliminate any possible jury bias against her caused by the disclosure in court of evidence of her previous sexual conduct by preventing inadmissible evidence from reaching the jury before its relevancy has been determined and by excluding such evidence when not critical to the defense if the accused or necessary for an adequate cross examination of a crucial adverse witness.

Although this procedure does not provide complete protection to a rape Complainant and does not eliminate completely the possibility of jury bias against her, such a procedure provides the maximum possible protection for the victim

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[15] *Supra note 8*
Rudstein

consistent with a criminal defendant's constitutional rights to a fair trial and to confront the witnesses against him.[16]

Several States in the USA have enacted Statutes with certain safeguards in place which would require the trial Judge in a rape case to conduct a hearing, either in camera or merely outside the presence of the jury, on the admissibility of evidence of the complaining witness bad character for chastity offered by the defendant in the issue of consent.[17]

Each Statute requires that the Judge determine whether the evidence offered by the defendant is relevant to the issue of consent. Most States also require that the Judge balance the probative value of the evidence against its prejudicial or inflammatory nature. [18] A few also expressly require the Judge to consider other factors such as the damage that the evidence will lead to a confusion of the issues, the privacy interest of the complainant and the interests of the defendant in introducing the evidence. [19]

Rudstein submits that each of these Statutes can be interpreted to achieve the state's goal of eliminating possible jury bias against the Complainant in many cases and they also safeguard the defendant's due process and confrontation rights in all cases.

It is noteworthy that the Michigan Statute contains **just** two (2) narrow exceptions to the rule of exclusion and even where the evidence falls within either exception; it

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[16] Rudstein, Supra note 8 (generally)

[17] *Alaska Stat. S. 12: 48.045 (Supp. 1975); Colo. Rv. Stat. Ann. S. 18-3-407; Nev. Rev. Stat. 48.069.*

[18] *Alaska supra n. 17; Minn. Stat. Ann. 609, 347 (Supp 1976).*

[19] *N.Y. Crim. Pro. S. 60.42 (McKinney Supp. 1975).*

will not be admitted where the evidence is more prejudicial than probative. It is this approach which is most favoured in the USA and twenty-five (25) States have adopted it where they have set out a rule of exclusion with fixed, narrow exception to it. [20]

The United Kingdom (UK)

In the UK, the first appearance of the Rape Shield Law was embodied in the ***Sexual Offences Act*** of 1976. Even after the introduction of provisions in this legislation, the perception was that the judiciary was not applying the provisions in the spirit in which they were intended. The response was therefore to adopt a "categories" approach by the creation of the ***Youth Justice and Criminal Evidence Act*** of 1999. ***Section 41*** of the ***YJCE Act*** establishes a rule of exclusion coupled with exceptions to it set out in several fixed categories.

Similar to our ***Section 27***, the provisions of the 1999 UK Legislation applied to a wide range of sexual offences as well as tightened the restrictions which were contained in the 1976 Act.

For example, the 1976 Act restrictions had no application to any previous sexual experience with the Accused. This exception has been removed. Under the 1976 Act, the Judge could disapply the restrictions if satisfied that it would be unfair to the Accused to refuse to allow the evidence to be adduced or the question to be asked. Under the 1999 Act, the Judge may only give leave, if satisfied, that it is relevant to an issue in the case and that a refusal of leave might render the jury's conclusion

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[20] Section 520 of the Michigan Criminal Sexual Conduct Act provides "(1) Evidence of Specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct ***shall not be admitted*** *Section 520b and 520g unless and only to the extent that the Judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value: (a) Evidence of the victim's past sexual conduct with the actor. (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."*

"unsafe." As to relevance, the Judge may not give leave at all if the issue to which the evidence is relevant is consent, unless the case can be brought within closely defined exceptions. ***Sections 41*** to ***43*** of the 1999 Act, together with other provisions came into force on December 4, 2000: ***Youth Justice and Criminal Evidence Act 1999 (Commencement No. 5) Order 2000 (S.I. 2000 No. 3075)***.

The common law, however, will continue to govern issues of admissibility where the 1999 Act does not apply. Furthermore, it may still be possible to derive some guidance from the common law as to what material may be regarded as relevant to consent as opposed merely to credit.

In essence, ***Section 41*** imposes a prima facie prohibition on the introduction of evidence of the complainant's sexual behaviour: "in a sexual offence trial as evidence may be adduced and no question may be asked in cross-examination about the complainant's sexual behaviour without the leave of the Court." [21] Leave may be granted only if its refusal might result in rendering unsafe a conclusion of the jury or the Court on any relevant issue in the case. [22]

There are only four (4) specific situations in which leave may be granted:

1. *The evidence or question relates to a relevant issue in the case and that issue is not an issue of consent:* **S. 41(3)(a)**. *Clearly contemplated here is relevance to belief in consent.*

   Section 41(3) *potentially allows the introduction of a great deal of sexual history evidence on the basis of its relevance in establishing such a belief.*

[21] *Youth Justice and Criminal Evidence Act 1999, S. 41 (1)*

[22] *Ibid, S. 41(2)(b)*

2. *The evidence or question relates to an issue of consent and the relevant sexual behaviour is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the Accused.* **S 41(3)(b)**.

3. *The evidence or question relates to an issue of consent and the relevant sexual behaviour is alleged to have been in any respect so similar…. to any sexual behaviour of the complainant which…. Took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.*

4. *The evidence or question….relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant: and …. In the opinion of the Court would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the Accused:* **S. 41(5)**.

In **R** v. **A (NO. 2)** [23], before the trial Judge made a preliminary ruling that the defendant could not lead evidence of any previous sexual relationship between them because of ***Section 41***. It was held that he could, but only for the purpose of showing that he believed that she consented and not to show that she actually did.

In a very lengthy, closely reasoned and erudite argument, Lords Steyn, Clyde and Hutton all agreed that "the effect of the decision today is that under ***Section 41 (3)(b)*** of the 1999 Act, construed where necessary by applying the interpretative obligation under ***Section 3*** of the ***Human Rights Act 1998*** and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to

[23] [2001] 2 WLR 1546

exclude it would endanger the fairness of the trial under ***Article 6*** of the ***Convention***. If this test is satisfied the evidence should not be excluded."[24]

As Professors Choo and Nash [25]have stated with respect to the UK perspective, given the failure of its predecessor to protect complainants adequately from inappropriate questioning in Court, it is pleasing that the new Rape Shield Legislation has, for all its difficulties, been found to be Convention – compliant.

Professor Jennifer Temkin [26] in her detailed and well researched article severely criticizes Professor J. R. Spencer's views [27] that what is wrong is not that their sex lives are examined but that this happens publicly. The problem, Professor Spencer opines "should be tackled not by restricting the questions, but by limiting the evidence." Complainants should routinely give their evidence with the public and the press excluded; something the fair trial requirement in ***Article 6*** undoubtedly permits…."

Professor Temkin quite rightly and emphatically refutes this argument, supra, with the logical ritual that if embarrassment and humiliation were the only problem, then proceedings in camera would not answer it. The complainant would still have her sexual past paraded in front of the jury, Counsel, the judge and the rest of the "cast" in the courtroom.

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[24] Ibid at para 46, per Lord Steyn.

[25] *Evidence Law in England and Wales: The impact of the Human Rights Act 1998, International Journal of Evidence and Proof (2003) 7 E & P 31 -61, p. 56*

[26] *Sexual History Evidence – Beware The Backlash, [2003] Crim. L. Rev. 217*

[27] J.R. Spencer, "Rape Shields and the Right to A Fair Trial [2001] CLJ 452.

The primary purpose of Rape Shield Legislation is **not** to save the blushes of the complainant, it is to exclude evidence that is of little or no relevance and which serves only to distract the jury from the issues in trial and excite its prejudice. Even at common law, the admission of sexual history evidence was subject to constraints.

Professor Spencer's proposal would ensure that the previous sexual behaviour of adult and child complainants, including evidence of previous sexual abuse could be freely admitted as never before.

There was however a rather radical argument put forward by Professor Spencer:

> ***"…. And what is also wrong…. Is that the Complainant can be asked if she regularly consents to sex without the defendant having to admit, if such be so – that he has previously forced others to have sex with him without it…"***

By extension could it not be argued that perhaps the law should include this as part of evidentiary procedure and allow the Crown to invoke ***Section 9 f(ii)*** of the ***Evidence Act (Jamaica)***[28], once there is admission of sexual history evidence.

Cases which Have Examined Sexual History in the UK relevant to S. 27 of the Sexual Offences Act (Jamaica)

1. In **R. v. R.T.; R. v. M.H. [2002] 1 W.L.R. 632, CA,** it was held that for the purpose of ***Section 41***, a distinction is to be drawn between questions about sexual behaviour itself and questions concerning statements about such

[28] *"… A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –*

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

behaviour by the complainant; even if the questions concerned the credibility of the Complainant they were not automatically barred by ***Section 41***; accordingly, the first case, the defence should have been permitted to cross-examine the complainant about a failure to mention the allegation during an earlier investigation; and, in the second case, the defence should have been allowed to cross-examine the complainant about previous alleged lies about sexual behaviour; a failure to mention the allegation on an occasion when it might reasonably have been expected to be mentioned and established lies about previous sexual behaviour would be relevant to the credibility of the complainant; and it would be for the judge to prevent abuse where there was no evidential basis for the assertion that a previous statement was made and that it was untrue, and it would be professionally improper to elicit details of previous sexual behaviour under the guise of previous false complaints.

2. **In R. v. Singh (Gulab), unreported, February 27, 2003, CA ([2003] EWCA Crim. 485)**, the appellant was convicted of rape at a retrial following the quashing of his conviction in the previous trial on account of fresh evidence to the effect that the complainant had not been a virgin at the time of the alleged rape whereas she had said in evidence that she had been. It was held that the judge at the retrial had been correct to refuse an application under ***Section 41*** for leave to cross-examine her as to the fact that at the first trial she had given evidence to the effect that she was a virgin at the time, that such evidence had been false, and, if necessary, to call the man with whom she had previously had intercourse. Since it had not been the intention of the prosecution to elicit from the witness evidence that she was a virgin, the only purpose of such cross-examination and evidence would have been to impugn her credibility as a witness, and ***Section 41 (4)*** provided that questioning for such purpose was not to be regarded as "relating to a relevant issue in the case", which was a condition precedent to the giving of leave.

3. **In R.v. Mokrecovas [2002]1 Cr.App.R.20, CA,** the defence, to a charge of rape of a 17-year –old girl that was alleged to have occurred during a night when both parties were at the flat of the defendant's brother, was that no intercourse took place and that the complainant lied when she first complained of rape to her father and was persisting in that lie. It was held that questioning of her as to a suggestion that she had had consensual intercourse with the defendant's brother twice (approximately two hours and approximately 12 hours before the time of the alleged rape respectively) was not permissible as being relevant to an issue in the case (motive for lying) that was not an issue of consent, where there was other material to found a basis for saying that the complainant had a motive for lying to her father (excessive drinking and that she had gone to the flat to see the brother with whom she was friendly) and where the allowing of such questioning (even assuming that the complainant admitted the truth of the suggestions) could not improve the defence; such questioning would invade her privacy and subject her to humiliating accusations and drive a coach and horses through ***Section 41***.

4. **In R v. White (2004) 148 S.J. 300, CA,** where the complainant alleged that she had met the defendant in a public house, and that they had gone back to her flat where he raped her, and where the defendant's case was that consensual sexual intercourse had occurred, but that the complainant had asked for money, which he had refused, and that after intercourse had taken place he had awoken to find her with his wallet, whereupon there was a struggle, following which he had left, the judge had been correct to refuse to allow evidence of, cross-examination as to the fact that the complainant had worked for 19 years as a prostitute; the judge had been correct to rule that the issue in the case was "an issue of consent" within ***Section 41(3)***; there could be no contention that the bare fact that the victim was a prostitute was relevant to the issue of consent.

Canada

In Canada, Parliament reacted to the demands for change by amending their criminal code to forbid testimony of prior sexual activity except under very specific circumstances. This change to the criminal code is what is referred to as the Rape Shield Law. In 1991, the Supreme Court of Canada in **R** .v. **Seaboyer *and* Gayme** [29] ruled by a majority that ***S. 276*** was unconstitutional, expressing a preference for a discretionary provision. The principal objection was that the exceptions to the rule of exclusion were drawn too narrowly and prevented relevant evidence being adduced. There was concern that the exceptions to the rule of exclusion did not permit evidence that supported a mistaken belief in consent, similar fact evidence even if this was only occasionally relevant, evidence to explain knowledge of sexual matters in the case of young complainants, and evidence that went to bias or motive to fabricate.

The current scheme is one of structured discretion which is intended to guide the judge by setting out those factors which must and must not be taken into consideration in arriving at a decision.

The Actual provision of the Criminal Code Reads:

276. (1) In proceedings in respect of an offence under Section 151, 152, 153.1, 155 or 159, subsection 160(2) or (3) or Section 170, 171, 172, 173, 271 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant:

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief

[29] *See note 4 supra*

The Code also contains an exception to this rule, which is quite narrow in scope. Evidence of prior sexual behaviour may be admitted if it meets three key criteria:

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Some may argue that the Rape Shield law does not go far enough in that no prior behaviour should ever be allowed into evidence.

The Rape Shield law does provide significant protection for victims of sexual assault. It must be remembered that before any exception to the Rape Shield law can be entered into evidence, the party looking for the exception must apply to and receive permission from the Judge.

Section 27 Unveiled

Jamaica's Rape Shield law, ***Section 27*** of the ***Sexual Offences Act***, 2009 is applicable to Rape and other sexual offences, which keeps us in step with the global trend of implementing gender neutral laws, in other words, the SOA being a gender-neutral piece of legislation provides a Rape Shield to **all** victims whether male or female, child or adult and is no longer restricted to the offence of Rape (as defined under our laws).

Section 27 also:-

- Restricts evidence that is adduced and questions asked in cross-examination of the Complainant's sexual history to the accused (excluding persons other than the Accused.)

- Prescribes exceptions to this restriction
- Requires that to invoke the exceptions to this restriction, an application for leave must be made to a Judge.

This application can be made by the Accused or on behalf of the Accused (by his Attorney) and is to be made in the absence of the jury. A copy must be served on the Complainant.[30]

Section 27(***3***)(***a***) looks at the kinds of questions that may be asked or evidence which can be adduced if they relate to evidence of:

(1) Specific instances of the Complainant's sexual behaviour, which tend to establish the identity of the person who had sexual contact with the Complainant on the occasion set out in the charge.

(2) Sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge and relates to the consent which the Accused alleges that the Accused believed was given by the Complainant.

(3) Which rebuts evidence of the Complainant's sexual behaviour or absence thereof that was previously adduced by the prosecution.

Section 27 (***3***)(***b***) creates a balance within the Section by ensuring that the Accused is treated fairly in this process by including certain criteria, which the Judge ought to contemplate when deciding which evidence or question to exclude.

[30] *Section 27 (2) of the Sexual Offences Act, 2009*

Conclusion

The scope of Jamaica's positive obligation to secure the rights of the Accused is also extended to vulnerable victims and potential victims of serious crime who are entitled to special protection, in particular, children.

In **Stubbing's** v. **UK** [31], the Court expressed "Sexual abuse is unquestionably an abhorrent type of wrongdoing with debilitating effects on its victim. Children and other vulnerable individuals are entitled to State protection in the form of effective deterrents from such grave types of interference with essential aspects of their private lives."

Recognition has been given to the special features involved in sexual offences. "In the assessment of the question" whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life.[32]

Francesca Klug in her article Human Rights and Victims expressed the view that it is not necessarily unfair in such cases, according to a determination by the former European Commission on Human Rights, to prevent the accused cross-examining vulnerable witnesses (including the complainant) provided there are other safeguards in place such as directions from the judge. Using similar reasoning, a rape trial was held to be not unfair even though the accused was not allowed to cross-examine a mentally unfit teenage victim. [33]

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[31] *[1996] 23 EHRR 213 para. 62.*

[32] See Baegen v. Netherlands [1995] A/327-B para. 77

[33] See HM Advocate v. Nulty [17 February 2000]

The right to a fair trial in the ***ECHR***, the ***ICCPR*** and our ***Charter*** should be determined by examining whether the proceedings as a whole are fair, rather than whether each individual sub-clause of that right is technically observed in isolation, regardless of the consequences for competing values like public safety and right to privacy. This can include a consideration of the effects of the right to a fair trial on other fundamentals rights as expressed in the **Doorson** case.

Klug further states that a range of additional rights have effectively been read into the right to a fair trial by the ***European Court on Human Rights*** including protection of witnesses or victims but also other defendant's rights which are not directly referred to.

Victims are supposed to be at the heart of human rights thinking, so why it is commonly assumed that human rights law is focused largely on the protection of defendants and prisoners? Our ***Charter*** is a human rights document. However, it can be argued that it ought not to be suggested that the victim is viewed the same way in human rights law as in domestic criminal law. Whilst the origins of human rights law began with a focus on state violations, the focus on defendant's and prisoner's rights by human rights defenders – as crucial as these obviously are – can give the impression that the only victims human rights law is really concerned to protect are offenders and that the true abusers are the offenders' real-life victims who wish to limit their rights. [34] To this end, we need a consistent appreciation of both the founding values and evolutionary nature of International Human Rights law and by extension our ***Charter***.

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[34] Francesca Klug, Centre for the Study of Human Rights, LSE, June 2003, "Human Rights and Victims" pp. 12-13.

This appreciation, I would humbly submit, has been intricately woven into our ***Sexual Offences Act***, ***Section 27***. The balance of rights has been achieved.

Shakespeare's long narrative entitled *Rape of Lucrece (1594)* depicts the rape of Lucretia by Tarquinius. It illustrates that Tarquinius was drawn to her chastity and beauty.

Yet spurred on by his desire and lust, he was determined to quench the burning coals of his lust by taking Lucretia's body by force. At paragraph 18 and 19 of his work Shakespeare declares:

> ***"For then is Tarquin brought unto his bed,***
> ***Intending weariness with heavy spright;***
> ***For, after supper, long he questioned***
> ***With modest Lucrece, and wore out the night:***
> ***Now leaden slumber with life's strength doth fight;***
> ***And every one to rest themselves betake,***
> ***Save thieves, and cares, and troubled minds, that wake.***
>
> ***As one of which doth Tarquin lie revolving***
> ***The sundry dangers of his will's obtaining;***
> ***Yet ever to obtain his will resolving,***
> ***Though weak-built hopes persuade him to abstaining:***
> ***Despair to gain doth traffic oft for gaining;***
> ***And when great treasure is the meed propos'd,***
> ***Though death be adjunct, there's no death suppos'd."***

Tarquinius bears much similarity to many sexual offenders, often times drawn to the chastity and beauty of their victims. They are fully aware of the damage they would do to their victims, however, when juxtaposed to their prize that is the satisfaction of their primeval lust, they pay scant regard to the damaging effects that their actions can have on the lives of their victims. They also forget the consequences of their unlawful acts. In light of this state of affairs it is quite spurious that the human rights of these offenders are often given priority to the human rights of the victims.

In Shakespeare's work, Lucretia takes little solace in the vows to bring Tarquinius to Justice; she later takes her own life unable to live with herself. Many victims find themselves in this unenviable position and either kills themselves physically or emotionally. Their pleas for mercy often disregarded by their rapists, it is critical that as a society we don't disregard their feeble cries for Justice and upholding of their Rights.

Prepared by: Lisa M. Palmer Hamilton, LLM
Senior Deputy Director of Public Prosecutions
Head – Human Rights, Intellectual Property and Sexual Offences Unit

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