

Bills Committee on Evidence (Amendment) Bill 1999

Further Submission from the Equal Opportunities Commission

Background

This paper is submitted by the Equal Opportunities Commission (“EOC”) in furtherance of the discussion before the Bills Committee on 19 May 2000.

2. It was submitted on behalf of the Bar Association that the existing corroboration rules in relation to sexual offences (“the existing rules”) are not sex discriminatory and that there is no gender bias applicable to the existing rules.

3. The EOC disputes this and submits that the very foundation of the existing rules is the now outdated and stereotypical assumption that the evidence of women is inherently unreliable and, unless corroborated, false accusations will be made against men.

Gender Bias

4. Corroboration rules developed, as a matter of practice, in respect of certain categories of cases where the evidence of the victims was “suspect” in some way. In *DPP v Kilbourne*¹, Lord Hailsham of St. Marylebone L.C. referred to the “recognized categories” of accomplices, complainants in cases of sexual assault, children giving sworn testimony and persons of “admittedly bad character”.

5. Although one can argue that the existing rules apply equally where there are male and female victims, statements made by legal scholars and judges alike reveal a gender bias against women.

¹ [1973] A.C. 729

6. Wigmore stated:

*“The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect, and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.”*²

7. The statement refers not only to “imaginary sex incidents” that women are prove to narrate, but to the “innocent man” whom must be protected from the alleged fabrication of women. In fact, Wigmore was so concerned by the danger of fabrication by the “unchaste mentality” that he went so far as to suggest that female complainants, particularly young ones, should be subjected to medical or psychiatric examination in order to assess their credibility.³ He made no reference to male complainants, as his concern seemed to be completely focused on the *“problem of estimating the veracity of feminine testimony in complaints against masculine offenders [which] is battling enough to the experienced psychologist.”*⁴

8. Professor Glanville Williams in his writings also expressly refers to the dangers of convicting on the uncorroborated evidence of women in sexual cases. He states that:-

“There is sound reason for this, because sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl’s refusal to admit that she consented to

² Evidence (3rd. ed., 1940) para. 924A

³ This suggestion appeared for the first time in the 1934 supplement to the 1920 edition of Wigmore’s treatise.

⁴ Wigmore, supra 924a

*an act of which she is now ashamed.”*⁵

9. He also goes on to say that *“The distinctive reason for the warning in sexual cases is that experience shows that the complainant’s evidence may be warped by psychological processes which are not evident to the eye of common sense Moreover, there is a tendency in sexual cases for the proceedings to start with a prejudice against the defendant, if the complainant is a girl of tender years, whose appearance makes a strong appeal to the sympathy and protective feelings of the jury.”*⁶

10. It is thus apparent that the corroboration warning in sexual cases owes its justification to the twin notions that a) women tell lies and b) men must be protected from such lies.

11. Interestingly enough, in Canada, the corroboration warning in sexual cases applied only to cases involving female victims. Corroboration was not required where the victim was a male. Again, this reinforces the fact that the practice of corroboration warnings developed as a response to female complainants. And, although the existing rules in Hong Kong apply in cases of both male and female complainants, this does not alter the fact that the existing rules were developed out of gender bias against women.

12. Gender bias against women in respect of corroboration warnings in sexual cases may also be found in the comments of judges: Sutcliffe, J at the Old Bailey in April 1976 told the jury: *“It is well known that women in particular and small boys are liable to be untruthful and invent stories.”*

13. In *R v Henry & Manning*, Salmon LJ stated that judges in sexual cases must convey to juries that *“it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of*

⁵ “Corroboration – Sexual Cases” [1962] Crim. L.R. 662

⁶ Ibid, at p. 663

*reasons and sometimes for no reason at all.”*⁸

14. In Taylor, which involved a charge of rape brought against a man by a woman, the trial judge warned the jury:

*“..... it is very difficult often to shake such an allegation when made by a woman, young or old, in the witness box making complaints of a sexual nature. Of course, as experience shows, there are many reasons why ladies may make an allegation of rape when there was, in fact, no rape. I should have thought one of the obvious ones is where there has been intercourse with consent, for instance, and a girl gets home late at night and is asked ‘Why were you out?’ and she does not want to tell her parents what she was actually doing and so she makes the complaint that it was without her consent. Accordingly, it is customary for judges to warn juries about this and to say that the jury should look for some corroboration of her evidence.”*⁹

15. In a study conducted some time ago, research findings revealed that in three Old Bailey trials conducted between 1978 and 1979, the judge warned the jury in sexual cases as follows:

- (i) *“The experience in these courts is that sometimes women make up such charges – I ask you to accept that. It is dangerous to convict in a sexual case on the word of a woman.”*
- (ii) *“The jury should be warned that it’s dangerous to convict on the evidence of the girl alone. There may be underlying reasons why imagination, vindictiveness, remorse, etc. may actuate a girl in making a false accusation, particularly concerning the question of consent.”*

⁸ (1968) 53 App. R. 150 at p. 153

⁹ (1985) 80 Crim. App. R. 327 at p. 332

- (iii) “Women in some cases, for motives sometimes known, sometimes unknown, exaggerate or lie in such cases. It doesn’t always happen, but it can do. That’s why judges warn juries.”¹⁰

Adverse Impact on Women

16. Apart from the gender bias against women, the existing rules impact adversely on women (who form the largest group of victims in sexual cases).

17. In Hong Kong, “rape” cannot be committed against men (since rape involves penetration) and buggery does not require corroboration under the existing rules. Although that still leaves some sexual offences where males are victims, the reality is that it is essentially females that are the victims of sexual offences.

18. Furthermore, even where males are the victims, they are not subject to the same derogatory remarks. In *R v Gammon*, a case involving charges of gross indecency by a male against seven boys aged 14 to 17 years, the Court of Appeal referred to the trial judge’s warning to the jury. The trial judge had warned:

*“I will now tell you something which is in his favour it is the danger always present where youths of this age group are giving evidence of alleged sexual offences against a grown man that they may be affected consciously or unconsciously by the period of life when they are coming to puberty and imagine all sorts of things which never happen and give evidence which sometimes (though they do not realize it) is in fact completely untrue. **It applies much more to girls than boys**, but we who have had long experience of these cases know that the evidence of a girl giving evidence of indecency by a man is notoriously unreliable**It does not apply nearly as much in the case***

¹⁰ Study referred to in Rape and the Legal Process, Modern Legal Studies, 1987, at p. 136

of boys. It applies to some extent. It does not apply so much where the boys are 16 and 17.....”¹¹

[Emphasis added]

19. It is particularly noteworthy that the trial judge in that case expressed the common held belief at that time that females told lies more than males, and boy children generally stop telling lies when they become adults. As far as women were concerned, it did not matter whether they were 7 years of age, 17 years of age, or 27 years of age; their evidence would always be “suspect”.

20. This has a double impact on women. Not only is their evidence “suspect” and “tainted”, they must go into court facing a barrage of questions about their credibility, about their sexual histories, their sexual proclivities and their moral characters as the case may be. These factors, alone, work against a woman coming forth to bring a claim of rape, etc.

21. Were there a prescribed field in the Sex Discrimination Ordinance, Cap. 480 (“SDO”) to cover the existing rules, it could easily be argued that the existing rules impose a condition or requirement on people, which has an adverse proportional impact on women, and thus constitutes indirect sex discrimination under the SDO.

Conclusion

22. Much has changed today in the perceptions of the roles and functions of women. Men – and sex – have undergone a tremendous shift which makes it necessary to reconsider both the purpose and the content of outmoded laws such as the existing rules. Wigmore’s belief that women fantasized about rape has long now been discredited, and girls are not likely to cry rape because they are pregnant or come home late.

23. The existing rules are gender biased, sex discriminatory and not in keeping with the spirit of the SDO or international conventions

¹¹ (1959) 43 Crim. App. R. 153 at p. 159

such as the Convention on the Elimination of All Forms of Discrimination against Women. The EOC submits that it is time for the existing rules to be removed.

Equal Opportunities Commission

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