

THE CREDIBILITY GAP

Deb Tyler and Patricia Easteal

Sexual harassment in the tribunals.

It has been postulated that there is a 'hierarchy of credibility';¹ that is, there is a social tendency for the views of reality posed by someone in authority to be accepted in preference to those of a person in a subordinate position. For example, an employer's word may be accepted over an employee's, a police officer's statement may be more powerful than that of an accused or a complainant. An example of the operation of this hierarchy in discrimination law is found in *Chief General Manager, Department of Health v Arumugam* (1987), when Fullagar J adverted to the 'very considerable intelligence' and qualifications of the respondent psychiatrists. Accordingly, Thornton concludes that the court may be less likely to find against a respondent of prestige and high social status.²

Unfortunately, it appears that women are generally perceived to be close to the bottom of the hierarchy and, consequently, may face a credibility gap.³ Occupationally, females are indeed more likely to be in the lower echelons (as measured by income) since neither legislation nor society have addressed systemic discrimination — the practices of inequity which have permeated the structures and fabric of a culture and have discriminatory impact. Thus, Mack argues that women are 'consistently treated as less worthy of belief than men, specifically because they are women'.

Given that the majority of sexual harassment cases involve women as victims, and further that they must establish their case in the absence of any additional witnesses, how do independent discrimination tribunals assess women's credibility?

From a brief review of sexual harassment cases heard under the *Sex Discrimination Act 1984* (Cth), it appears that the High Court decision in *Briginshaw v Briginshaw* (1938) has been accepted as the precedent for standard of proof to be applied. The *Briginshaw* test involves the following. First, the more serious the allegation and its consequences, including those for the respondent, the higher the level of proof required for a matter to be substantiated. This does not mean that the standard of proof shifts to 'beyond reasonable doubt'. Rather, the more serious the allegation, the more persuasive the proof must be. Second, credibility of the parties and witnesses can only be assessed by 'seeing' and cross-examining the person; and, third, if there is a more plausible explanation for events, this must be accepted. Proof is to the standard of 'balance of probabilities' and the rules of evidence, according to the *Sex Discrimination Act* need not apply. As a consequence, although there are no evidence rules formally required, *Briginshaw* seems to import some rules, principles and ideas of evidence, especially in the context of credibility.

Do these evidentiary ideas, as embedded in our cultural context disadvantage women? We explore this issue through an overview of some cases and decisions that were randomly selected through the search engine, and examine how language and mythology contribute to



Deb Tyler is Senior Conciliator at the ACT Human Rights Office. Patricia Easteal is a Visiting Fellow, in the Faculty of Law at The Australian National University. The views expressed are those of the authors and not necessarily those of the ACT Human Rights Office.

what may emerge as a crevasse between the voice of the victim and the ears of the tribunal.⁴

Decontextualisation of harms and construction of (in)credibility through language

Just as language affects other aspects of the law, (in)credibility in a harassment report is constructed by words. A comparison of the official report with the complainant's in the following case study⁵ illustrates the pivotal role that language can play both in constructing reality and disaggregating harm.

The police report:

Complainant states that she was working at XX on Monday night in the bar. A group of male YY employees, staying at XX, were drinking in the bar. During the evening they became quite rowdy and suggestive towards the complainant. Complainant contacted the ... manager who came down to assess the situation. He did not think there was a problem and returned to his duties. The males became rowdier during the evening and at one stage a male person followed the complainant behind a partitioned area. He grabbed the complainant by the wrist and placed his arm around her. He then said, 'Come up to room ZZZ and we can make love'. The complainant pushed him away and again rang the manager. She states she was quite distressed by this stage and was relieved by the manager and another female employee.

... It was explained that it was a minor incident ...

The preceding official account varies significantly with K's detailed record of her experience.

Prior to [their] arrival, I was told, several times, that it was a very important contract ... and I should do nothing to jeopardise it. The workers were expected to [stay] ... for 3 months and they were to be well looked after during that time. Early in the week, during the afternoon, one of the workers ran his hand up my leg under my skirt as I collected glasses from their table. One of them said, 'Why don't you bend right over and pick up that bottle top. I'd like to get an eyeful of that, actually I'd like to get a handful.' This action and the foul language they used were an indication of the type of behaviour I could expect so I resolved to take particular care not to expose myself to their lewd comments and actions for the rest of their stay.

During the evening [about five days later] [two] men ... made obscene proposals to me in most lurid and indecent language. [Mr A] in particular was extremely obnoxious and appeared to be encouraging the other men at the table to join in making me uncomfortable by making lewd remarks in a loud voice. During the evening he suggested I go to [Mr B's] room as [Mr B] fancied me. He said, 'Sweetie my friend here would like to bend you over that bar and fuck you, hard. Why don't you go up to his room. You're guaranteed to have a good time.' Later, I called the duty manager, as I was concerned for my safety as a result of the large amount of alcohol the men had drunk and the increasing unruliness and lewdness of their behaviour. The duty manager came down, examined the restaurant dockets and then left.

A short time later in the evening one of the men followed me, without my consent or knowledge, behind the bar and grabbed me from behind, pinning my left arm to my body and holding my right arm by the wrist and then in most disgusting language asked me to go up to his hotel room for sex. He said, 'Baby, why don't you come up to my room when you finish. I wanna fuck you all night long.' I broke away from his grasp and called the hotel management and asked to be relieved of my shift as I was most upset and too afraid to continue working.

Because the employees were booked in for three months and ... had made it very plain that the accommodation contract was most important, and a manager re-asserted the view the next

morning when she said, 'You're twenty-one years old. You should know how to handle this sort of thing. Its part of the job.' I was afraid to continue to be exposed to the most unpleasant and disgusting treatment suggested by these two men, and could see no other solution than to hand in my resignation.

The official report decontextualises K's experience. It does not record the guests' behaviour on previous nights and, consequently, the harassment appears as though it was an event out of the blue. In comparison, K's statement provides a wider context, describing similar treatment by the same individuals on another occasion. The police also ignore the full gamut of the incident and the fact that other men in the room were being encouraged to behave in a similar way by the respondents. What appears to be the complete puzzle in the police description is, in fact, only one piece of a much larger puzzle. In K's statement, she tells how she was told to 'do nothing to jeopardise' the arrangement with the workers. The official report, on the other hand, denies her experience and the expectations placed on her by others. There is no sense of the implied judgment that was made of her performance or the directive that the guests' needs were paramount over anything else. (Implying that her safety was of less importance?)

Without this context, the reader (and ultimately, a decision maker such as an Inquiry Commissioner) could well be left inferring a context of their own, perhaps making the erroneous assumption that previous to this one incident when the guests became 'rowdy', their behaviour had been otherwise unremarkable and that the complainant's experience of her employment was previously unremarkable. In fact, K had made allegations about a previous group of guests.

Appearing on the surface as a dry recording of 'facts', there is a disturbing bias towards the male manager's perspective and his assessment of the threat. K's opinion is only recorded once, '[s]he states she was quite distressed'. This contrasts with her assessment appearing on four occasions in her story. It is as though, as the object of the harassment, it is not for her to say, through the police voice, what was the intensity or the impact of the harassment.

Additionally, the dry factual report uses language that minimises the actions *and* their effects; for instance, a word such as 'rowdy' which means 'noisy and disorderly' does not give a sense of the behaviour being directed at the complainant. Neither do phrases such as 'make love', and 'placed his arm' that contrast markedly with K's description of 'I wanna fuck you all night long', and 'grabbed me from behind, pinning my left arm to my body and holding my right arm by the wrist'. Further, the police use the word 'suggestive' meaning 'indecent or improper' as opposed to the complainant's description of the behaviour as 'obscene' (meaning offensively or repulsively indecent, especially by offending accepted sexual morality). These words, along with the absence of adjectives, contribute to the official minimising of the men's behaviour which, in turn, casts doubt on the victim's complaint and her believability as a witness.

Myths of the 'reasonable' victim and the 'good woman'

In the legal world, certain characteristics have been ascribed to the sexes. The qualities attributed to men in both formal adjudication and mediation include self-possession, self-knowledge, autonomy, abstraction, self-determining status, public action, rationality, self-interest, and being instrumental and a possessor of rights. On the other hand, traits

attributed to women include connectedness (that women will put others' needs before their own, if they are 'good women') emotion, context and privacy.⁶ The legal world has viewed them as confabulators bent on bringing false accusations against men;⁷ as causing or contributing to the sexual violence against them; as able to have prevented the assault; or if it happened, as requiring obvious signs of distress afterwards.⁸

In reference to the last two points, *Hodson v Nanni & Ors* (1996) reveals both what is the expected response of the victim and the reasonable presentation in court. First the complainant's allegation was described.

... she followed the first respondent into the store-room and that once they were in there he indicated that she should pick up two cans of paint. She states that she bent to pick up two cans and that as she was straightening, the first respondent put his hands on her shoulders and kissed her on the lips. She states that she stepped back, but that he grunted a few times, still holding on to her shoulders, and kissed her again. She asserts that she broke free of his grasp, still carrying the paint, and walked out of the store-room and out of the shop.

She stated that she felt shocked, violated and embarrassed by what had occurred. She went home and made a cup of coffee and, because she realised when she looked in the paint cans that there was not enough paint for the task, she did not work that afternoon.

During that afternoon she told two co-tenants what had taken place ... [at 7]

Inquiry Commissioner Innes in his assessment of the complainant's credibility then made the following comments:

The first is the lack of 'credibility' in her description of the events and their aftermath, and in the delivery of her evidence. During the whole of the time that she was alleged to have been held and kissed twice by Mr Nanni she held onto two cans of paint. She did not drop them in surprise, drop to free her hands to defend herself, or use them to ward off Mr Nanni. She then carried the cans back to 183 Alison Road to continue her work. Further, she made no verbal protest either during or immediately after the alleged incident. Whilst I do not intend to imply that there should be 'acceptable' and 'unacceptable' reactions to inappropriate behaviour such as that alleged by Ms Hodson, I found these reactions lacking in credibility in the particular circumstances of this case.

Further, the detached way in which her evidence was delivered gave me cause for concern ... (at 7)

While the Commissioner may not have been invoking a rule as to acceptable or unacceptable reactions, he was evoking myths about what makes a woman believable. First, 'good' women should defend themselves against harassment — doing nothing appears to be equated with consent. Further, it appears that the complainant's 'detachment' on the stand lessened her credibility. Yet, there are legitimate explanations for such an appearance; for example, it is possible that flat affect could reflect the emotional state frequently associated with depression.

The assessment of coolness as incredible is particularly ironic as open displays of emotion can be counted against women as well!

In contrast, the credibility of the complainant in *Coon v Horne & Ors* (1996) was determined favourably. Ms Coon had alleged that the respondent had held her around the waist and kissed her, regularly requested morning hugs, looked down her cleavage and touched her bottom, making comments such as, 'You look sexy in white', and that he had

spun her around on her stool and separated her legs while trying to kiss her and had talked about the brothel he visited.

Cross-examined in relation to why she had not told her mother about the allegations earlier, why she had not told specified employees about the incidents, and why she disobeyed a direction to work back one evening, Ms Coon was, however, ultimately seen as a believable victim. She had confided in her husband about her problems at work and he had encouraged her to keep the job because they needed the money. Her husband had also observed what was constructed as the necessary emotional response to the harassment; namely, a 'personality change'. In addition, the complainant's mother had noted her daughter's reluctance to go to work and a change in her demeanour:

In about July she would burst into tears at the slightest thing. Anything would set it off it could have been something said at the kitchen table she would fly off the handle and was snappy with everybody. [para. 31]

Unlike the complainant in *Hodson*, Ms Coon had credible witnesses who confirmed her 'appropriate' emotional response to the harassment. Further, she appeared to conform to the middle class notion of what constitutes a 'good' woman, putting her marital responsibilities before her own personal desire to escape a stressful job. Thus, *Coon* reveals the myth of womanly connectedness and context in operation along with an expectation that a woman experiencing sexual harassment will leave and quit her job. These obviously operate in conflict with each other. Females, stereotyped as dependent and passive, are expected to be autonomous and act independently. Nevertheless, Ms Coon is determined to be a good woman because she put her marital responsibilities before her own interests. She, therefore, is constructed as responding in the correct 'emotional' way.

Responding to harassment: myth of experience vs youth

The decision in at least one case, *Allridge v Booth and Ors* (1986) appears to reflect an understanding of the inherent power game in harassment and that a woman may be in 'an extremely vulnerable position' and only endures the situation because of her fear.⁹ This understanding, unfortunately, appears to equate vulnerability with youth.

It may seem surprising today that any young woman would endure the conduct of which she complained without taking some steps to bring it to an end. But ... I believe that this young woman was unsophisticated, was very keen to remain in employment, and apparently thought that this was the tariff which she had to pay. It was not, and she should be recompensed. She is entitled to damages for the humiliation and injury she suffered at the hands of one who knew that she had been unemployed and that she was eager to have employment.

The age of the applicant was similarly mentioned in *Patterson v HooKey & Healesville Piquant Palate Pty Ltd 1996* (discussed below). In these and other cases, the myth that age or experience arms a woman with the knowledge to deal with sexual harassment in an 'appropriate' way, operates so that a younger woman's inability to leave or report is excused by her inexperience.

Responding to harassment: myth of immediacy

From the legal perspective, credibility is in part measured by whether there is a delay in initiating a claim.¹⁰ This is the regimen that a person who has suffered a harm will make a complaint quickly since lengthy delays in making a complaint could work against a respondent who may not have the

opportunity to have collected evidence while it was fresh. Consequently, in s.52(2)(c) of the *Sex Discrimination Act 1984* (Cth), the Commissioner has the discretion to decline a matter when it raises allegations more than a year old.¹¹

There are, however, a number of problems in equating prompt complaint with credibility as a victim. Immediacy assumes a point in time, immediate to the events, where the complainant will be able to 'observe and describe their experience accurately and without fear or shame'.¹² This expectation denies the emotion inherent in a victim's experience and response to sexual harassment. Further, it discounts both the nature of the power game and the lack of a discrete event or harm that are central to harassment. The masculocentric view also denies that a complaint, if made at all, will likely be made with considerable fear and/or shame.

Indeed, there are a variety of reasons why a victim of harassment may not report or not immediately. For example, victims might not know their rights, particularly some under-represented groups such as 'Aboriginal and non-English speaking women, women working in male-dominated industries and blue collar occupations'.¹³ Further, sexual harassment may be so rife in some industries, such as hotels and bars, that many do not complain because it has become an entrenched part of the job with workers expected to accept it and effectively interact with it, without support from their employers. This appeared to be true in K's case when she was told by a female manager that '... it's part of the job'.

Given their self-blame, some victims will attempt to manage the sexual harassment in their own way. K, for instance, spent a considerable amount of time in front of the wardrobe, selecting clothes that would not betray in any way her femininity or sexuality, as though the ideal selection would prevent or stop the harassment. This may in fact be a typical response to the harassment: the women finds herself objectified and her only power is to adjust her behaviour in the vain hope that the harassment will cease. Others will wait to act until they change employment and are no longer in the disempowered relationship.

Commissioner Rayner in *Patterson v Hookey & Healesville Piquant Palate Pty Ltd* (1996) recognised these dynamics. She had been invited by counsel for the respondent to see the complainant as a liar with a motive to fabricate, or at best, as inconsistent. Reference was made to the delay in reporting the matter to the police and Ms Patterson's failure to confront the respondent with the allegations. However, in determining the credibility of the complainant, Rayner took the following into account: the fact that Ms Patterson 'immediately and consistently complained that she had been indecently assaulted', her 'visibly distressed emotional state' and that her failure to confront Mr Hookey

... was entirely consistent with a desire to avoid Mr Hookey and a difficult situation. I consider that Ms Patterson thought her story would probably not be believed, given Mr Hookey's relative status and the lack of any independent witness to his unexpected behaviour. [at 7]

There is a tension in the decision between the application of evidentiary rules and the reality of a woman's experience of sexual harassment. On the one hand, Ms Patterson was able to satisfy the rules of credibility because she made immediate and consistent complaint to some members of her immediate family, and her emotional reactions fit the expected reaction of one who is sexually harassed. Despite the 'unlikely' nature of the allegations, she was constructed

as credible. She had met at least some of the evidentiary hurdles placed in front of her and was forgiven for not making prompt and assertive complaint to the relevant agency because she was 'young [and] not particularly well-educated'.

Without such hurdling successes, delay in reporting, just as in sexual assault, continues to work against the complainant in the decision making process, as shown in *Hodson v Nanni & Ors*:

Thirdly, I am concerned by the amount of time which elapsed before Ms Hodson spoke to Mr Frank Nanni about the incident. If she had wanted to 'clear the air' so that she could have got on with her work and continued to live in peace, as she claimed, it seems to me more likely that she would have done so quickly.

Crawling out of the credibility crevasse

Myths are tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change and the law is full of mythology. Women are particularly at its mercy, although men do not escape its force, especially when issues of class and race emerge ... Mythology is a triumph of belief over reality, depending for its survival not on evidence but on constant reiteration.¹⁴

When considering the credibility of the female witness, the primary myth can be traced back to Greek mythology and labelled as 'The Cassandra Curse'. No-one believed her prophecies because of the presumption that women lie.

The myth of the female liar is not just an impasse for the archetypal Cassandra, but it has been and continues to be a real impediment for female plaintiffs in sexual harassment suits.¹⁵

As Naffine states, women were seen as the deviation from the male standard of normalcy and were 'therefore obliged to represent the irrational, the passionate ... the mother of voluptuousness ... [the] fickle'.¹⁶ Irrationality and being fickle are not traits that evoke credibility — in fact quite the opposite.

Given that credibility is such an intangible quality, an individual Inquiry Commissioner's reaction to a complainant and the Commissioner's reliance on 'universal cognitive competence'¹⁷ may be easily influenced by stereotypes and myths about women. What might appear to be 'universal cognitive competence', or common sense, may be the masculocentric view of the world, a view that distorts the victims' experience of sexual harassment. Through the operation of myths in the application of the *Briginshaw* precedent and evidentiary regimes, women's credibility is limited, and inevitably, their access to justice in a system established to protect their rights is also curtailed.

One way of enhancing or legitimising their voices is through using an interpreter — the expert.¹⁸ This was apparent in the *R v L* (1992) decision.

R worked in L's factory. Her mother instigated her resignation after R's friend, Lisa, made a number of allegations to her own mother about L. R, when asked, revealed a number of incidents including L: asking whether she had a boyfriend; touching her breasts; looking down her clothing at her breasts; requesting that R touch him; and L talking about sex with other employees in front of R.

Inquiry Commissioner Kiefel invoked the evidential rule of consistency:

... in reconciling the particulars of the original complaint with that of the following statements and, in some respects, her evidence. I have also been concerned about the manner in which the matter was raised and as to whether there was some prompting

by the complainant's mother and the complainant's friend, Lisa. [para. 7]

Yet, he was prepared to find in favour of the complainant. Why?

The evidence of a clinical neuropsychologist, may well have addressed Commissioner Kiefel's concerns as '[t]hat evidence was of assistance in understanding the difficulties the complainant has with her communication skills' (para. 5). The expert also played a pivotal role in another area. R's mother stated that she had not noticed anything unusual in her daughter's behaviour and this may have been because she (the mother) was going through a marital breakdown at the time. Thus unlike in *Coon*, there appeared to be little in the way of contemporaneous observations about the impact of the harassment at the time it occurred. But again, what seemed to turn the Commissioner's mind was the evidence of the neuropsychologist:

In arriving at my conclusion I was particularly struck by the description of how these events affected the complainant — which she related to the neuropsychologist. I have difficulty in comprehending that someone of the complainant's age and sheltered background could invent, in a reasonably detailed way, the effects that the conduct had upon her. [para. 25]

The myth being tested out in *R* appears to be that women are easily lead and manipulated by others. R would not have been perceived as credible unless she had an expert to reconfirm the allegations and explain away any inconsistencies, removing the Commissioner's doubt that R had been lead to make her complaint. R's case purportedly succeeded because she had an expert witness to support her being a 'good' woman who had lead a sheltered life.

Unhappily, this reliance on experts to validate the sexually harassed woman's experience reinforces the notion that the woman's own voice is not reliable for giving evidence. It is further illustration of the witness credibility hierarchy that subtly influences decision-making. More fundamental changes are needed to shrink the victims' credibility gap. One answer is a review of evidentiary protocols.¹⁹ Concurrently, a way must be found to use an 'ordinary' sexual harassment victim or survivor (free of myths and stereotypes) as the standard by which to measure credibility. Or the culture's paradigm of femininity and the masculocentric ideal of white middle class womanhood that haunt the construction of credibility need to be reconstructed. Unless such changes take place, women remain in a double bind. Their credibility will remain a function of whether or not they conform to conflicting myths and stereotypes. And worse, women will be damned if they do not report sexual harassment and damned if they do.

References

1. Hunter, R., *Indirect Discrimination in the Workplace*, The Federation Press, 1992, p.228.
2. Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, 1990, p.181.
3. Mack, K., 'Alternative Dispute Resolution and Access to Justice for Women,' (1995) 17 *Adelaide Law Review*, pp.123-46.
4. The Inquiry Commissioner cases were heard under the *Sex Discrimination Act 1984* (Cth); K's complaint was lodged under the *Discrimination Act 1991* (ACT).
5. We are using material submitted by a complainant (K) during the investigation of her complaint. As required by section 122 of the *Discrimination Act 1991* (ACT), her written permission was obtained for the inclusion of the material in this paper.

6. Naffine, N., 'Sexing the Subject of Law,' in M. Thornton (ed.), *Public and Private: Feminist Legal Debates*, Oxford University Press, 1995, pp.23-5.
7. Mack, K., "'You Should Scrutinise her Evidence with Great Care': Corroboration of Women's Testimony about Sexual Assault', in P. Eastal (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture*, The Federation Press, 1998, pp.59-75.
8. Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary*, Commonwealth of Australia, May 1994, p.23.
9. Osborne, M., *Sexual Harassment: A Code of Practice*, Human Rights and Equal Opportunity Commission, Sydney, 1996, p.25.
10. An excellent historical and case overview of the evidentiary issue can be found in Bronitt, S., 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the 'Reasonable' Rape Victim,' in P. Eastal (ed.), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Federation Press, 1998, 41-58.
11. However, under amendments to the *Discrimination Act 1991* (ACT), such discretion has been removed entirely and the Commissioner must decline a complaint if the last allegation complained of occurred more than 12 months before lodgement of the complaint. See s.81(2)(c).
12. Hunter, R. and Mack, K., 'Procedure and Evidence' in N. Naffine and R. Owens (eds), *Sexing the Subject of the Law*, LBC Information Services, 1997, p.179.
13. Hunter, R. and Leonard, A., *The Outcomes of Conciliation in Sex Discrimination Cases*, Centre for Employment and Labour Relations Law, Working Paper No. 8, University of Melbourne, August 1995, p.29.
14. Kennedy, H., *Eve Was Framed*, Chatto and Windus Ltd, London, 1992, p.32.
15. Banner, A., 'The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in *Jones v Clinton*,' 31 *UC Davis Law Review*, p.130.
16. Naffine, above, ref. 6, quoting G. Lloyd's, *The Man of Reason: 'Male' and 'Female' in Western Philosophy*, Methuen, 1984.
17. Hunter and Mack, above.
18. This has certainly been shown to be the situation with other female victims of violence such as women who kill violent partners.
19. (1988) EOC ¶92-244, para 36.