# *Gender Bias and the Law of Evidence: The Link Between Sexuality and Credibility*

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*In sexual assault trials, the credibility of the complainant, or the "primary witness", will often be an issue. Prior to the enactment of section 23A of the Evidence Act 1908, which governs the admissibility of sexual history evidence, the complainant's veracity was often questioned on the basis of her prior sexual experience. Under section 23A, such sexual history evidence must be of "direct relevance" to a fact in issue to be admissible. The concept of relevance and reasonableness also governs the admissibility of "recent complaint" evidence in sexual assault trials, with varying results. This comment examines the concept of relevance in light of two Court of Appeal decisions, and discusses how the link between sexuality and credibility is still being made by New Zealand courts.*

## I INTRODUCTION

The "rape myth" that has found the most support in the law of evidence is that women lie about rape. Ironically, this notion may well have some support, but not for the reasons that have been proffered historically. There is no evidence to support that women fabricate stories about rape, or at least statistics indicate that the rate of false complaints for sexual abuse is no higher than for any other offence.[1] However, there is considerable support for the proposition that rape is the most under-reported crime.[2] It seems that women are indeed "dishonest" about rape, but because they *do not tell* when it does happen, not because they tell when it does not.

The belief that women lie about rape has lead to the development of a number of evidence rules at common law which have had significant impact both on the experience of women during rape trials and on conviction rates. The two legal commentators most responsible for the development and acceptance of the rules relating to the need for corroboration, the grounds for admissibility of character evidence of the complainant, and the scope and rationale of the rule relating to recent complaint, are Sir Matthew Hale and John Henry Wigmore.

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1 M Torrey "When Will We Be Believed? Rape Myths and the Idea of A Fair Trial in Rape Prosecutions" (1991) 24 Uni of Calif Davis LR 1013; N Naffine "Windows on the Legal Mind: The Evocation of Rape in Legal Writings" (1992) 18 Mel U LR 741; E Sheehy "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989) Ottawa LR 741, 758.

2 Above n 1.

In 1680 Hale wrote in *The History of the Pleas of the Crown* that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."[3] This sentiment is the basis of the cautionary warning, or the corroboration requirement, which judges still employ in many common law jurisdictions today.[4] Along with the statements that the charge is easy to make and hard to disprove, these cautionary instructions inform the jury that the testimony of the woman who has allegedly been raped requires more careful scrutiny by the jury than the testimony of other witnesses in the trial, although other witnesses are no less likely to be motivated by inappropriate considerations in giving their evidence.

Wigmore's contribution to the "scholarship" on the rape victim's tendency to lie includes the following statement:[5]

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by their complexes is that of contriving false charges of sexual offenses by men...Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed.

Despite the lack of any evidence to support the assertions of commentators like Hale and Wigmore,[6] the sentiments they expressed still provide the rationale for the application of the rules of evidence[7] and the basis of jury direction, even after law reform measures:[8]

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3 Cited in J Taylor "Rape and Women's Credibility: Problems of Recantations and False Accusations in the Case of Cathleen Crowell Webb and Gary Dotson" (1987) 10 Harvard Women's LJ 59, 75.

4 W Young *Rape Study: A Discussion of Law and Practice, Volume 1* (Institute of Criminology/Department of Justice, Wellington, 1983) 137 ff.

5 Above n 3, 77.

6 See Torrey and Naffine, above n 1; AT Morris "The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call For Legislative Reform" [1988] Duke LJ 154.

7 "The woman is often the sole eyewitness, and false complaints of rape are far from rare." IR Davis "Character Evidence in Rape Cases" [1976] NZLJ 178.

8 Despite many comments at the time of the reform which indicated it was widely accepted that "[t]here is no warrant for the apparent presumption that the evidence of every complainant is unreliable and, while making the allegation of a sexual offence will often be hard to refute, the making and maintaining of such a complaint requires fortitude, rather than being easy to make" (G Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 NZULR 97), this direction is from a 1986 case decided immediately after the new legislation came into force, see *Daniels* [1986] NZLR 106, 112. See also S J Zindel "Section 23A of the Evidence Act 1908 and the Regulation of Sexual History Evidence" [1987] NZLJ 362: "..the view that a 'loose woman' is intrinsically unreliable seems now to be universally discredited."

> Now I refer you to the question of corroboration. It has already been indicated to you that it has often been said that it is easy to make a complaint of a sexual nature and it is extremely difficult to disprove. By that I don't mean that it is easy for a woman to make a complaint in the social sense, but she can simply make the allegation and then just leave it to the man to explain himself. He can usually do little but deny what takes place. So the law has required in the past that you should look for corroboration. It is usually said that it is dangerous to convict on the uncorroborated testimony of a complainant in a sexual case.

## II RECENT COMPLAINT EVIDENCE

Hale has also had an impact on the law relating to the use of "recent complaints" in sexual abuse cases. In the same treatise in 1680 he opined that if the woman did not take the first opportunity to report her rape, or if during the rape "she made no outcry...where it is probable she might be heard by others; these and other like circumstances carry a strong presumption, that her testimony is false or feigned."[9]

Complaint evidence in cases of a sexual nature, as evidence of a previous consistent statement, is admissible as an exception to the ordinary rule. This exception has arisen due to Hale's pronouncement:[10]

> The rationale...lies in antiquity when it was assumed that a woman who had been raped would naturally raise a hue and cry at the first available opportunity and that a failure to raise such a hue and cry, being inconsistent with violation, must at least throw doubt on the allegation of rape. In circumstances where a society would think that sexual violation could not occur without a hue and cry it would be expected that the jurisprudence of the society would permit evidence of such hue and cry. However, recently in terms of the alleged offence was a necessary condition of admissibility, again because it was assumed that where rape had actually occurred the complaint would immediately follow.

The impact that such a rule would have in a rape trial is immediately apparent. Women who did not complain immediately, or at the first reasonable opportunity, were viewed as being more likely to have fabricated the charge. That defence lawyers and judges did indeed view the matter in this way has been documented, the result of which was legislative reform in 1985.[11] The current position in New Zealand is unchanged in

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9 Above n 3, 75.

10 *R* v *H* Unreported, 31 October 1989, High Court Rotorua Registry T 16/89, 2-3.

11 See *Rape Study*, above n 4, 145. The following exchange from G Chambers and A Millar "Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim?" in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (Open University Press, Milton Keyes, 1987) 58, 69 also demonstrates how defence counsel may use the lack of a recent complaint (to the police) to discredit the complainant.

"Defence: Now you had the telephone in the house obviously because you were able to telephone Miss ... ?

Complainant: Yes.

terms of the time requirements for admissibility and the purpose for which the complaint evidence is used,[12] but section 23AC of the Evidence Act 1908 allows the judge to tell the jury that there may be "good reasons why the victim of such a complaint may refrain from or delay in making a complaint" in cases where the issue of delay has been raised during the trial.

The problems in relation to the rules of admissibility of such complaints that remain are both general and specific. The general concern is that a special case needs to be made for sexual offences.[13] The continued exception gives the message that women are not believed on their word alone, and that often juries will need evidence of a prior

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D: And equally if you had been all that distressed and upset by what happened, you knew I take it from part of your training (the complainant was blind) how to get in touch with the Police?
C: Yes, I did.
D: You would dial 999, wouldn't you?
C: Yes.
D: And that's a very simple operation?
C: It is yes.
D: So if you had just been raped by this man as you are suggesting to the jury, you had at your disposal immediate means of contact with the police who could then apprehended the man, is that right?
C: Yes.
D: And that's a very simple operation?
C: It is yes.
D: So if you had just been raped by this man as you are suggesting to the jury, you had at your disposal immediate means of contact with the police who could then have apprehended the man, is that right?
C: Yes.
D: But you telephoned Miss ... instead?
C: Well, I was distressed really, I didn't know what my next move should be.
D: Well, you would know would you not that for anyone to rape another person is a serious crime?
C: Yes.
D: And the people to whom crimes are reported are normally the police?
C: Oh yes.
D: So if what you say is correct and if you had been raped and if you wanted to report a serious crime you could have lifted the phone there and then to get the police?
C: Yes.
D: But you never did that?
C: No, because I didn't feel composed enough to do so.
D: But you felt composed enough to phone Miss ... ?
C: Well, I wasn't very composed when I phoned Miss ... either.
D: And the truth of the matter is that the reason you didn't telephone the police was that you realised you had nothing to complain about in the criminal sense, isn't that right, you had never been raped that day?"

12 *R* v *Nazif* [1987] 2 NZLR 122.

13 Rosemary Barrington "The Rape Law Reform Process in New Zealand" (1984) 8 Crim LJ 307, 322.

complaint to confirm that the basis for the charge was the event itself, rather than some other factor.[14] However, if Hale's legacy remains operative in this situation also, then it is better that the exception allows evidence of recent complaint to be adduced to counter the effect of the myth.

The specific problems relate to the discretion that remains to both rule the complaint admissible, and to decide whether or not to inform the jury of any "good reasons" that may exist.

For feminists there are two problematic concepts at work in the application of the recent complaint rule. The first requirement that needs comment is that the complaint must have been made "at the first reasonable opportunity"[15] after the commission of the offence. The word "reasonable" indicates the operation of an objective standard which is held out as gender-neutral and value-free, but which invariably is not.[16] Judges, in determining what is a reasonable opportunity in the circumstances of the case, will be drawing on their own experiences, their own familial relationships and their own ideas of how they would respond in a similar situation.[17]

Judges, however, do recognise that notions of what is reasonable for this purpose are not set in stone. Changing perceptions and greater understanding of child abuse cases, for example, has lead to statements about what constitutes "a reasonable opportunity" that would not have been made 10 years ago.[18] Judges also recognise that in some situations different views might be reached on the same facts.[19] The cases that deal with

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14 *R* v *Crime Appeal* Unreported, 20 December 1991, Court of Appeal CA 273/91, 12. There is much writing on the motivations women have for bringing a false rape charge. A 1970 example: "Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse, especially when pregnancy results, and delusion." Above n 3, 80. See also "False Accusations of Rape", Chapter 11 in JM Macdonald *Rape: Offenders and Their Victims* (Charles Thomas, Illinois, 1971) 209-231.

15 DL Mathieson *Cross on Evidence* (4 ed, Butterworths, Wellington, 1989) 206.

16 See for example Wendy Parker "The Reasonable Person: A Gendered Concept?" (1993) 23 VUWLR 105.

17 For an example of how courts may not fully understand the situation of women see the literature on battered woman's syndrome cited in EA Sheehy, J Stubbs and J Tolmie "Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations" (1992) 16 Crim LJ 369 and the New Zealand case *R* v *Wang* [1990] 2 NZLR 529.

18 "I think it obvious that social perceptions have changed in recent years and it must now be accepted that in cases of sexual molestation within a family there will not necessarily be an immediate complaint. The complexities and dynamics of a family situation are obviously such that offending may occur for years before some catalyst in the life of an alleged victim raises a complaint." *R* v *H* Unreported, 31 October 1989, High Court Rotorua Registry T 16/89, 3. See also *R* v *Duncan* [1992] 1 NZLR 528, 533.

19 *Duncan*, above n 18, 534.

recent complaint certainly give support for such a view.[20] Given the subjective and personal nature of the decision on admissibility of recent complaint evidence, I believe that it is open for judges to accept more in the way of explanation for the delay than they seem willing to do at present.

There is certainly a move to be more accepting of long time delays in the case of child abuse, when the complaint is made while the child is still young, but from the cases there appears to have been no real attempt to deal with the special issues that arise for women who may not talk to anyone for some years about their childhood experiences. *R* v *P*[21] provides a recent example of the differences that are normally drawn between the position of adults and children in making complaints:

> An older person can be expected to complain of sexual offending on the first occasion they have access to some suitable person to whom such a complaint can be made. In the case of a child, it may be the child's mother, or some person in whom the child could be expected to have some confidence. If the person has been threatened, this may provide an acceptable explanation for the delay in making the complaint. In the case of a child of 3 1/2 years who has been subjected to the particular acts over the previous year and a half, *the child cannot be expected to even appreciate that the acts are such to call for a complaint until the matter is raised with the child by its mother or some similar person.*

The final point made by the Court of Appeal in this statement (as emphasised) is one that has particular relevance to the situation of a woman who has been sexually abused by a male authority figure, yet the significance and impact of the event may not occur to her or apparently to affect her life until sometime later. She may view the attempted goodnight kisses and fondling by her teacher on a weekend school trip as flattering but unpleasant and unwanted. She says nothing about the incident to anyone, because she likes the teacher and does not want to cause a fuss. It is only some years later, when she comes to view the event as a breach of trust and as an improper use of power, that she confides in a close friend. Later she goes to the police. Although courts have recognised that "there may well be understandable human reasons why it took an occasion of particular emotional stress to explain even to a friend matters which if true would be of an acutely embarrassing and upsetting nature,"[22] it is highly unlikely that the evidence of the report to her friend would be admissible.

This is probably of little concern if the views of Hale are not shared by juries today. However, if juries and judges still believe that a woman will lie about sexual assault, and that time delays in reporting make it less likely that she is telling the truth, then the admissibility of this evidence may be significant, as it goes to consistency and therefore credibility.[23] Although the law does not expressly equate a late complaint with

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20 Compare *R* v *S* (1988) 5 CRNZ 668 with *R* v *B* Unreported, 22 September 1987, High Court Invercargill Registry T 1/87.

21 Unreported, 23 March 1993, Court of Appeal CA 342/92, 6.

22 *R* v *H*, above n 18, 5.

23 See *Cross on Evidence*, above n 15, 205. Another issue which is worthy of some consideration is the rigidity of the rule relating to the admissibility of the *first*

a false complaint, case law indicates that the time delay may indicate, among other things, a change of heart about consent,[24] and it is certainly true that defence counsel would argue this line at trial.[25] Given the survival of the "hue and cry" myth[26] and in light of the inconsistency in case law[27] due to individual interpretations of "reasonable opportunity", I believe that evidence of both early and late complaints should be admitted as an exception to the normal rules of evidence.[28]

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complaint, which may mean that the evidence of a taxi driver rather than a woman doctor is heard. See S Edwards "Evidential Matters in Rape Prosecutions from 'First Opportunity to Complain' to Corroboration" (1986) New Law Journal 291, 292. Courts in New Zealand seem a little more flexible in this regard (see *R* v *Mathers* Unreported, 4 March 1992, Court of Appeal CA 335/91 and *R* v *O* Unreported, 29 April 1992, High Court Christchurch Registry T 64/91).

24 See *Crime Appeal*, above n 14, 12. The United States Model Penal Code (section 213.6 comment, proposed Official Draft 1962) justifies the requirement that a complaint must be filed within three months in this way: "The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant." As Susan Estrich notes, this commentary "is startlingly attentive to the problem of the vindictive, spurned woman, but silent about the woman who legitimately worries about the receptiveness of police, prosecutors, juries and even friends or employers to a report that she was raped." See "Rape" (1986) 95 Yale LJ 1087, 1140.

25 *Rape Study*, above n 4, 147.

26 J Temkin "Regulating Sexual History Evidence-The Limits of Discretionary Legislation" (1984) 33 International and Comparative LQ 942, 971. In the United States a national survey of prosecutors revealed that promptness of complaint was the third most important factor in the decision to lay a criminal charge, following only proof of penetration and physical force. Torrey, above n 1, 1043.

27 *Duncan*, above n 18, provides an example of a situation in which the Court of Appeal did not consider relevant the kinds of observations made in *R* v *P* and upheld the trial judge's decision not to admit the evidence of the complaint to her mother. The complainant, a girl of 12, may arguably not have complained immediately because she may simply have thought there was nothing abnormal about her mother's partner's behaviour. On the night he attempted to have intercourse with her, he had first put on a pornographic video showing heterosexual intercourse. It arguable that this kind of tactic would have encouraged her participation in sexual acts, in that the video depictions reassured her that it was normal behaviour. In *Duncan* the complaint was made only four days later (as a result of a question by her mother) which was probably also explicable because the complainant may also have felt diffident about saying anything given the accused's relationship with her mother. Counsel for the Crown did, however, make this argument and invited the Court of Appeal "to take into account the girl's fear of breaking [up] her mother's relationship, and desire not to disturb a 'parental' relationship she had with the accused" (at 531).

28 *Rape Study*, above n 4, 148. For a contrary view see Rosemary Barrington, above n 13.

## III RELEVANCE AND SEXUAL HISTORY EVIDENCE

The second concern for feminists in the exercise of judicial discretion in recent complaint cases is the found in the wording of the guidelines laid down by the New Zealand Court of Appeal in *R* v *Nazif*:[29]

> There are no hard and fast rules as to the time within which a complaint must be made in order to be admissible. Matters to be taken into account will include the age, nature, and personality of the prosecutrix, her relations with those to whom she might be expected to complain, the reasons for delay in complaint and *all other circumstances the Judge regards as relevant.*

The concept of "relevance" has recently been examined by feminists, who suggest the term operates to obscure the fact that decisions on admissibility are based on personal bias or prejudice.[30] Decisions based on what is viewed as "relevant" are no more objective and value-free than those based on what is seen to be "reasonable". Relevant to whom? Reasonable according to whose world view?

Relevance, as in all decisions on admissibility, plays a significant role in the admissibility of both recent complaint evidence and sexual history evidence. I now wish to examine two recent New Zealand Court of Appeal decisions, one concerning recent complaint evidence,[31] and one dealing with the admissibility of sexual history evidence,[32] which, I will argue, operate to reinforce notions about female sexuality and credibility.

There is a widely held belief that the application of section 23A of the Evidence Act 1908 (New Zealand's "rape shield" provision) is successfully preventing inappropriate questioning about sexual abuse complainant's sexual history. Recently the Law Commission has also indicated there will be no change to this section as a result of their current review of the law of evidence. Unfortunately, the latest word from the Court of Appeal indicates that the section enables the use of rape myths as part of the inquiry into direct relevance. In *R* v *M* the rape myth that was supported is the belief that women, or girls, are prone to lie about rape.

In *R* v *M* the Court of Appeal ruled admissible evidence that the 9 year old complainant had been sexually abused two years previously by another man. In two

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29 Above n 12, 125 (emphasis added).

30 T B Dawson "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987-1988) 2 Canadian J of Women and the Law 310; S Bond "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 Dalhousie LJ 416; EA Sheehy "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989) 21 Ottawa Law Review 741; contra David Paciocco "The Charter and the Rape Shield Provisions of the Criminal Code: More About Relevance and the Constitutional Exemptions Doctrine" (1989) 21 Ottawa Law Review 119, 130ff.

31 *R* v *R* Unreported, 15 December 1993, Court of Appeal CA 240/93.

32 *R* v *M* Unreported, 9 July 1993, Court of Appeal CA 268/93.

separate High Court rulings (the first trial was aborted) by two different judges, leave had been declined. The Court of Appeal, however, in a decision delivered by Eichelbaum CJ, found the "strong test"[33] under section 23A was met. The reasons given for finding that evidence of prior sexual abuse was of "such direct relevance to facts in issue...that to exclude it would be contrary to the interests of justice" (section 23A(3)) was that the defendant's claim (her grandfather) that the abuse did not occur would be more readily believed if the jury could satisfy itself there were other reasons why the girl had complained (other than the fact of abuse). The Court stated:[34]

> In that situation a jury inevitably would ask itself twin questions: how the complainant came to be familiar with the concepts and language of sexual abuse, and what motivation she might have to raise a false complaint against a member of her family.

In other words, a jury who hears a child describe sexual acts which would not normally be known by a child, is more likely to find the defendant guilty because the explanation for the familiarity is likely to be sexual abuse. This rationale for allowing evidence of prior sexual experience has found favour in some overseas jurisdictions,[35] but there is no local research which indicates that juries are more likely to convict in this kind of situation. One question about introducing evidence for this purpose is whether in fact it meets the strict test in section 23A(3) for admissibility. The issue that this kind of evidence (prior sexual abuse) seems to be related to is the identification of the defendant as the person responsible for the complainant's most recent "sex education". If this rationale for admissibility is used, there is seemingly no debate that some abuse has occurred. The issue is one instead of identification and credibility.

Credibility will almost invariably be at issue in a sexual abuse case, that is, whenever the complainant and the defendant tell different stories. The focus in *R* v *M* on the desire for the jury to explain the complainant's story, if they choose to believe the defendant, is troublesome because the search for motivation is the basis for the admissibility of sexual history evidence. In this case, the Court of Appeal relied on the mother's sympathy and attention in handling the first incident of sexual abuse as the motivation for a false complaint two years later. In other words, because the child's mother had believed her daughter and had been supportive, this arguably provided enough motivation for the child to falsely complain about her grandfather, in order to receive more sympathy and attention. It is submitted that significantly more evidence is needed to support this kind of rationale for the introduction of sexual history evidence, given the strong threshold imposed by the legislation. Is it a tenable argument that this child would complain, just to get attention? It surely cannot be the case that every tenuous explanation for the making of the complaint, other than it actually happened, can provide the basis for cross-examination of the complainant about matters which are

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33 *R* v *McClintock* [1986] 2 NZLR 99, 104.

34 Above n 32, 3.

35 See CB Reid "The Sexual Innocence Inference Theory as the Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct" (1993) 91 Uni Mich LR 827.

almost invariably painful memories. A similar criticism can be made in relation to the decision *R* v *Phillips*[36] to allow sexual history evidence, on the basis, inter alia, that the complainant had consensual sex with other men to make her ex-boyfriend jealous.

Another argument put forward by the defence, which the Court of Appeal seems to have accepted, is that given the previous incident of abuse, the complainant would have known such incidents should be reported immediately and unsolicited, not a year later after an enquiry from a third person. This overlooks the difference between the two defendants. The first was an employer of her mother. In this case, the alleged abuser was the child's grandfather. Most juries would understand how hesitant a child might be to complain about a family member, *especially* one who knows the result of such a complaint. The time delay is not proof of fabrication, it is merely arguable, and certainly does not amount to meeting the "direct relevance" test under section 23A(3).

It is the final words of the decision which are of most concern:[37]

> Absent knowledge of the previous events, the jury would be proceeding on a misapprehension. It is contrary to the interests of justice to keep such knowledge from the jury in a case where *to succeed the defence must raise at least a reasonable possibility that the child fabricated her complaint.* (Emphasis added).

The unfortunate outcome of a case decided on this rationale is that in a situation of denial by the defendant, in a case where credibility is the issue, the defence may justifiably argue that because the complainant may have fabricated her story, sexual history evidence which supports this argument is of direct relevance. In other words, where sexual history supports an argument about credibility, it is admissible. It is of concern that this link made between credit and sexual experience is exactly the one that section 23A sought to remove, or at least severely restrict. An argument which supports a "reasonable possibility", it is submitted, does not amount to a fact of "direct relevance." There is simply no empirical evidence that women, or girls, with a sexual past are more likely to lie about rape or sexual abuse. The assumption, or the argument, that they may do so, merely reinforces the outdated and insupportable view that women should not be believed merely because they claim something happened. Most unbelievable are women or girls "with a past." This judgment of the Court of Appeal reaffirms these beliefs for the 1990s.[38]

*R* v *M* is similar to the decision of the Court of Appeal in *R* v *Accused (CA 92/92)*,[39] a judgment also delivered by Eichelbaum CJ. In that case the Court stated:[40]

> The existence of the second complaint is on the record; and although one can point to differences, there is a remarkable similarity to the complaints in that again the

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36 (1989) 5 CRNZ 405.
37 Above n 32, 3.
38 The decision in *R* v *M* is also supported by R Mahoney, see "Evidence" [1994] NZ Recent LR 82, 99.
39 [1993] 1 NZLR 553.
40 Above n 38, 556.

> incident is said to have happened while the complainant was sitting on a couch watching television with a male outside the family circle...[The defence's] assertion of inherent unlikelihood was perhaps pitched a little high, but it can be seen as an odd coincidence that two such incidents, the one not the subject of any immediate complaint, should have happened to the same complainant within the space of a few months.
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> As stated earlier, plainly this is one of those cases, common enough at present, where the outcome will depend heavily on the jury's impression of the complainant's credibility. *Any matter bearing on her credit in a significant way, at any rate where closely connected with the complaint against the accused, is of assistance to the defence and difficult to dismiss as remote or trivial.* (Emphasis added).

The message from both these decisions is that where women, or young girls, are unfortunately assaulted more than once, in similar ways, this becomes evidence of direct relevance because it supports the argument that on one of the occasions they made it up. In other words, prior sexual abuse makes them less credible as witnesses. There is no enquiry into why a women, having gone through the arduous process of making a complaint in the past, should want to repeat it, in the absence of any malice or other motivation. In *R* v *M* it is hard to believe that the motivation is attention seeking by a nine year old girl.

## IV THE RELEVANCE OF SEXUALITY

Attention seeking by a nine year old girl was also proffered as a judicial explanation for a complaint of indecent assault in *R* v *R*. In this case the defendant was the step-grandfather of the complainant and he had been convicted at first instance. He appealed on two separate grounds. First, that the evidence of the girl's complaint to her teacher, two months after the offence, should not have been admitted as recent complaint evidence. The second ground of appeal was that evidence of the complainant's mother's sexuality (a lesbian) should have been admitted. The trial judge had ruled that any reference to the mother's sexuality was inadmissible.

On the first ground, the Court of Appeal held that the complaint to the teacher was not admissible as it was not made at the first reasonable opportunity. The Court traversed the arguments for more flexibility in the requirement when a young child makes a complaint, for instance, when a young child does not understand until a later date that the conduct should be complained about.[41] The Court stated:[42]

> The present case is not one of a girl so young as to not appreciate that the conduct is such as should be complained about. She had within one year before the offending attended a school programme including a video and she understood about "naughty touching". It is apparent from the videotape in this case that what she said to N and A [school friends] within a few days of the offending amounted to a complaint. None of

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41 *R* v *Duncan* [1992] 1 NZLR 528.

42 Above n 31, 5.

> the young girls or the boy to whom the complainant had complained were called to give evidence.

The Court found that as the complaint to the teacher was made two months after the first incident, and one month after the second, it was not made at the first reasonable opportunity, and no acceptable explanation was given for the delay. The prosecution's argument that an exception should be made when the first person hearing the complaint is a young child was rejected. Although the Court accepted that "the decision as to what is the first reasonable opportunity is a matter of degree",[43] the concern not to put child witnesses on the stand and the effort it may have taken for a 9 year old to approach a school teacher did not allow an interpretation of the rule which would have allowed the teacher's evidence to be heard. The result was that the Court quashed the conviction, giving the Crown the right to a new trial if desired. In the context of discussing the possibility of a new trial, the Court dealt with the second ground of the appeal, the reference to the complainant's mother's sexuality which had been disallowed by the trial judge. The Court's discussion of this point follows:[44]

> The issue is one of relevance. In the event of the mother's credibility not being in issue, it is irrelevant whether the mother was gay or not.[45]
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> However, counsel for the appellant wished to submit to the jury that the nine year old complainant was being teased by her friends about her mother being gay and having a weird friend and that this teasing might have caused the complainant, in order to draw attention to herself, to make a false complaint of indecent assault by her step-grandfather and might have explained the complainant's upset condition at the time of making the complaint. It was also desired to submit to the jury that the complaint to the teacher was not a genuine complaint but that she had been "forced" to do so because of the teasing of her friends.
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> The relevance of the circumstances leading to the making of the complaint ceases to exist now that we have ruled that the complaint is not one permitted to be led as a recent complaint. Nevertheless we do not feel able to rule that the possibility of this child, because of the teasing, making a false complaint in order to draw attention to herself or to seek sympathy, can be said to be so fanciful as to justify refusing the appellant the right to put the possibility to the jury. In order to do so counsel must be permitted to lay the foundation notwithstanding the right to privacy which the complainant's mother might otherwise expect.

The finding of the Court of Appeal was that the complainant's alleged concern about her mother's sexuality may have lead her to falsely complain about sexual abuse by her

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43 Above n 31, 8.

44 Above n 31, 9-10.

45 The question that must be asked is whether her sexuality would be relevant to her credibility at all, unless, of course, as support for her claim that she did not consent to sexual activity with a man. To take the argument about the link between sexuality and credibility to its logical extreme, a lesbian complainant in a rape case, once the physical evidence is established, must be the most believable witness on the issue of her consent.

grandfather, in order to receive sympathy and attention. The Court therefore ruled that the mother's lesbianism was relevant.

In the absence of other evidence to support such a claim, it is of considerable concern that the Court was prepared to rule admissible this evidence, which both reinforces a belief that children can be this upset by their parents' homosexuality or lesbianism, *and* that such children may reflect this distress by fabricating a charge of sexual assault.

Children, or indeed this girl, may well feel concerned or confused by their parents' sexual behaviour, but a child's concern about her parents would not be limited to issues of homosexuality, or even sexuality per se. The reinforcement of a view that "abnormal" sexual behaviour may produce this kind of reaction in a child is, in the absence of other supporting evidence, unnecessary and uniformed. It is even more concerning when linked with the belief that women and girls have a tendency to lie about rape. It may well be, as the Court stated, that the possibility was not "so fanciful as to justify refusing the appellant the right to put [it] to the jury", but the test for admissibility should not be satisfied by how fanciful an argument is, but how relevant the evidence is. Can it really be said that a mother's lesbianism is relevant to the credibility of her daughter? Without significantly more evidence to support arguments about both the daughter's concern *and* the manifestation of it in a sexual assault complaint, the link between the sexuality of a third party and the credibility of the primary witness should not be made, just as it should not be made in the case of heterosexuality.

The suggestion about the complainant's concern in this case was in fact contradicted by the appellant in another argument, although the Court of Appeal accepted both points.[46]

> Counsel also wished to challenge the evidence of the complainant as to the date on which the first offence was alleged to have occurred. He submitted that he should have been allowed to put to the jury that the complainant had deliberately been persuaded to give the wrong date *so as to protect her mother from enquiries into possible lesbian activities* by the mother on the night that the appellant admitted babysitting. We were not persuaded that this rather far fetched submission would alone have affected the jury's verdict but we are not a jury and it would have been preferable to have allowed defence counsel to put the issue. (Emphasis added.)

The complainant is presented here as a child worried about protecting her mother from questions about her sexuality, which seems inconsistent with the image of a child so upset by her mother's "weird friend" that she would make up an allegation of sexual abuse.

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46 Above n 31, 10.

## V CONCLUSION

These two Court of Appeal decisions on the relevance of sexuality to a complainant's credibility, reinforce notions of inherent female mendacity. Although the contested evidence in both cases may be considered relevant on the grounds suggested, without supporting material the decisions instead operate as powerful messages about the untrustworthiness of sexual assault complainants. The link between sexuality and credibility that section 23A of the Evidence Act 1908 sought to question, if not remove, is still being drawn at Court of Appeal level. In making this link, New Zealand courts are continuing to question the veracity of all female witnesses. This questioning keeps popular the mythology of rape.