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Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History



CONSTANCE BACKHOUSE[†]

Female victims of sexual assault have traditionally found their courtroom testimonies assailed by legal rules requiring corroboration. This article examines the historical roots of the doctrine of corroboration, using a case study based on R v Sullivan, a trial for 'carnal knowledge of a girl under 16' that took place in Perth in 1912-1913. Drawing upon archival records and contemporary newspaper reports, the author uses the case to illustrate how Australian lawyers and judges interpreted the corroboration rules in ways that privileged men accused of sexual assault and unfairly disadvantaged female complainants.

NEIGHBOURS and acquaintances all described young Ila Florence Collins, a mere slip of a girl just 13 years old, as 'very innocent'. Herbert Carrington, a labourer employed to clear the scrub near Cannington, Western Australia, told the court she was 'a good girl', 'backward', even 'babyish'. Another labourer stationed at Karragullen near the Canning Mills called her a 'good, quiet, retiring girl'. A

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farm labourer who sometimes rode alongside her when she travelled on horseback to and from the Bedforddale State School swore that she was 'a very quiet girl' who 'made free' with no one. Her mother, Sarah Collins, persisted in referring to her as 'the child', 'my little girl'. William Brodie, the police constable at Kelmscott, swore that he had 'always known her to be a very quiet, reserved girl'. The repeated references to the young girl's reputation as proper, shy and subdued suggest a certain consistency of community opinion. That so many witnesses were called to testify to this perception was no accident. Ila Collins's 'character' was central to the case in *R v Sullivan*.¹ The young woman had reported that she was sexually assaulted by a 50 year-old innkeeper, Louis Sullivan, and the Crown was attempting to convict him in Perth, Western Australia in 1912 of 'carnal knowledge of a girl under 16'.²

How the legal system measures the credibility of courtroom witnesses constitutes one of the most important indicia of equality of any society in any era. For women and girls who have experienced sexual assault, staking a claim to credibility has long presented a battle of epic proportions. Their efforts to be taken as 'truthful' have historically been thwarted by special legal rules based upon the untested and ill-conceived assumption that females tend to lie about such things. The doctrine of corroboration was designed to ensure that the testimony of a victim of sexual assault could not be accepted as independently credible. No matter how compelling or persuasive the female complainant, the law stipulated that it was not possible to convict without some additional evidence to corroborate the victim's story.³

In recent decades, the doctrine of corroboration has become one of the targets of feminist rape law reform, and the requirement for legal corroboration in sexual assault trials has begun to be dismantled throughout the Anglo-American common law system.⁴ Feminist analysts have welcomed the move towards formal equality,

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1. 'A Serious Charge' *Daily News* (Perth, 16 Dec 1912); 'A Serious Charge' *West Australian* (Perth, 13 Dec 1912); State Archives of WA, 'Depositions in *R v Louis Sullivan*', Criminal Indictment Files, Cons 3473, Item 427, Case 4475 (Perth, 1913); *R v Sullivan* (1913) 15 WAR 23. All references to the evidence have been taken from the Depositions and Exhibits, unless other sources are indicated.
 2. See Criminal Code 1902 (WA) s 188. S 6 defined 'carnal knowledge' as 'complete upon penetration.' The current version of this offence is found in the provision labelled 'sexual offences against a child of or over 13 and under 16' in the Criminal Code 1913 (WA) s 321. See also s 321A, outlining the offence of a 'sexual relationship with a child under 16.
 3. Criminal Code 1902 (WA) s 188 stated: 'A person cannot be convicted of any of the offences defined in this section [including carnal knowledge of girls under 16] upon the uncorroborated testimony of one witness.' S 1 added: 'The term "uncorroborated testimony" means testimony which is not corroborated in some material particular by other evidence implicating the accused person.'
 4. P Gillies *Law of Evidence in Australia* 2nd edn (Sydney: Legal Books, 1991) 612 notes that relaxation of the corroboration requirement has occurred 'in most Australian jurisdictions.'

but continue to believe that the change remains primarily rhetorical. Although lawyers and judges no longer regularly caution juries not to convict without corroboration, in practice the law has not altered very much. Judges still caution juries using different terminology, and juries are reluctant to convict on the word of the complainant without further corroborating particulars. The tenacious staying power of the doctrine of corroboration continues to amaze and alarm its critics.⁵

As we begin to move forward, however hesitantly, into a reformed evidentiary regime, it is important to look back at the history of the doctrine of corroboration. How did the concept take root in Australian law? How did the proponents of the doctrine articulate its rationale? How did the legal authorities implement the concept in practice? What sorts of evidence qualified? What practical difference did the doctrine make historically to victims of sexual assault and the men accused of these crimes?

The *Sullivan* case is profiled here because the issues concerned, the types of evidence adduced in the courtroom, and the legal arguments considered by counsel and judges typify the sexual assault trials that focused on the doctrine of corroboration in early 20th century Australia.⁶ The case is also one of the most fully documented in the surviving archival records. Most evidence texts, digests and journals derive their analysis of corroboration from case reports. These are necessarily limited tools, since they consist of the rulings of trial and appeal judges, typically the last step in the complex and lengthy process of criminal litigation. This article attempts to probe beyond the contours of the reported decision,

See also JD Heydon *Cross on Evidence* 5th edn (Sydney: Butterworths, 1996) 357-359 citing the legislative provisions. In WA, see eg the Evidence Act 1906 s 50. In Canada, the statutory requirement for corroboration in cases of sexual assault was removed in 1976: SC 1974-75-76, c 93, s 8. For discussion of the Canadian statutory and judicial positions: see CLM Boyle *Sexual Assault* (Toronto: Carswell, 1984) 15-16, 155-162. For discussion of the move to dismantle corroboration requirements in the United States: see C Spoon & J Horney *Rape Law Reform: A Grassroots Revolution and its Impact* (New York: Plenum Press, 1992).

5. In *R v Longman* (1989) 168 CLR 79, the High Court held that the abolition of the corroboration requirement in WA dispensed only with the requirement to warn of the general danger of acting on the uncorroborated testimony of victims of sexual offences 'as a class,' and did not affect the requirement to give a warning whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the particular circumstances of a case. See RG Kenny *An Introduction to Criminal Law in Queensland and Western Australia* 4th edn (Sydney: Butterworths, 1997) 238-239; Heydon *ibid*, 359. Boyle *ibid*, 15-16 stated that Canadian judges initially interpreted the statutory repeal of the corroboration rule as simply resurrecting the common law rule of practice. This prompted the enactment of s 246.4, as noted above, forbidding judges from instructing juries on corroboration. Despite this legislative provision, it appears that in practice corroboration still retains a substantial impact upon prospects for conviction in Canada. For an analysis of resistance to the dismantling of corroboration rules in the United States: see Spoon & Horney *ibid*, 161-164.
6. The sample from which I have drawn this conclusion includes all reported sexual assault cases from WA and Victoria between 1900 and 1950.

examining all of the surviving records for the Sullivan sexual assault trial. The wider scope of this study makes it possible to go beyond the rulings of judges to consider the testimony of the witnesses, the arguments fashioned by the lawyers, and the newspaper coverage of the case. It permits us to ask what sort of evidence was potentially available to serve as corroboration. It allows us to explore what the lawyers decided to do with such evidence — whether to introduce it, whether to claim it met the test of corroboration, or whether to reject it as failing to fulfil the doctrinal requirements.

R v Sullivan presents a unique opportunity to scrutinise early Australian law at a point in time when the rules of corroboration were somewhat fluid and unsettled. The case of *R v Baskerville*, decided by the English Court of Criminal Appeal in 1916, would eventually articulate a rigid, formulaic set of criteria that came to hold sway across the British Commonwealth for the next half a century.⁷ Prior to the imposition of the *Baskerville* blueprint, however, it was still open to Australian lawyers and judges to shape and mould the doctrine within their own sense of evidentiary jurisprudence. *Sullivan* demonstrates how lawyers and judges utilised the legal construct of corroboration to skewer the testimony of Ila Collins, a witness who was apparently perceived as otherwise credible by all who heard her give evidence. It demonstrates how the legal authorities deliberately whittled down the sorts of evidence deemed to fit within the rules of corroboration. It documents how legislators, lawyers and courts chose to adopt a restrictive and narrow application of the doctrine over a potentially wider, open-ended interpretation. It offers a remarkable glimpse into the history of the legal assessment of female credibility.

THE PRIMARY WITNESS: ILA COLLINS

Historians of sexual assault have noted that women's testimonies of sexual assault clashed repeatedly with the denials of accused men in courtrooms across Australia. Understandably, this forced judges and jurors to wrestle with issues of credibility. But their gaze typically skimmed over the men indicted on criminal charges to fasten mercilessly upon the girls and women who brought their claims to court.⁸ And unquestionably it was to Ila Collins that all eyes turned in Police

7. [1916] 2 KB 658. On the dominance of the *Baskerville* analysis: see AB Clarke 'Corroboration in Sexual Cases' [1980] Crim L Rev 362; AE Branca 'Corroboration' in RE Salhany & RJ Carter (eds) *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) 133, 134.

8. See generally J Allen *Sex and Secrets: Crimes Involving Australian Women Since 1880* (Melbourne: OUP, 1990); J Bavin-Mizzi *Ravished: Sexual Violence in Victorian Australia* (Sydney: UNSW Press, 1995); J Bavin-Mizzi 'Understandings of Justice: Australian Rape and Carnal Knowledge Cases, 1867-1924' in D Kirkby (ed) *Sex, Power and Justice:*

Magistrate Augustus Roe's courtroom on the sweltering hot day of 12 December 1912 in Perth. The young girl took the witness stand, was duly sworn in and began to explain how Louis Sullivan had sexually assaulted her repeatedly between January and November of that year. For one as shy and reserved as Ila seems to have been, giving evidence on any matter, let alone one so embarrassingly sexual, must have been a torturous ordeal. Even the hardened and cynical police court reporters were struck by her reticence and timidity. Ila Collins could barely manage to enunciate her answers to the lawyers' questions, prompting the Perth *Daily News* to recount that 'the girl[']s story was extracted with some little difficulty'. That Louis Sullivan was sitting directly in front of the 13 year-old witness must have exacerbated the situation. As numerous witnesses attested, it was clear that Sullivan terrified Ila Collins.⁹

Ila told the court that she and her mother had been living in Cannington for six years, at the Travellers' Arms Hotel on the Albany Road. Ila's mother held the licence for the hotel, but it was Louis Sullivan who ran the operation. The accused

Historical Perspectives of Law in Australia (Melbourne: OUP, 1995) 19; J Bavin-Mizzi 'Aboriginal Women and Rape: The Case of Lucy Morgan in 19th Century Australia' in P Hetherington & P Maddern *Sexuality and Gender in History: Selected Essays* (Perth: Centre for WA History, 1993) 182; J Bavin-Mizzi 'Writing about incest in Victoria 1880-1890' in P Hetherington (ed) *Incest and the Community: Australian Perspectives* (Perth: Centre for WA History, 1991) 49; A Summers *Damned Whores and God's Police: The Colonisation of Women in Australia* (Melbourne: Penguin, 1975); M Carmody 'A Historical Look at Attitudes to Rape' in J Breckenridge & M Carmody (eds) *Crimes of Violence: Australian Responses to Rape and Child Sexual Assault* (Sydney: Allen & Unwin, 1992) 7; AM Collins 'Testimonies of Sex: Rape in Queensland, 1880-1919' (1991) 29 *Journal of Australian Studies* 50; L Finch 'Seduction and Punishment' (1990) 16 *Hecate* 8; G Reekie 'Writing About Rape in 1888' (1983) 12 *Australia 1888*, 31-9; J Greenwood 'Women at Risk: Rape in Western Australia in the 19th Century' in R Frances & B Scates (eds) *The Murdoch Ethos* (Perth: Murdoch UP, 1989) 172; D Philips 'Sex, Race, Violence and the Criminal Law in Victoria: Anatomy of a Rape Case in 1888' (1987) 52 *Labour History* 30; M Sturma 'Seduction and Punishment in Late 19th Century New South Wales' (1985) 2 *Aust Journ Law and Society* 76; D Tyler 'The Case of Irene Tuckerman: Understanding Sexual Violence and the Protection of Women and Girls, Victoria 1890-1925' (1986) 15 *History of Education Review* 52; D Walker 'Youth on Trial: The Mount Rennie Case' (1986) 50 *Labour History* 28; J Peers 'The Trial of Mary Jane Hicks: Imaging Women Through the Mount Rennie Rape Case 1886' (1993) 12 *Australian Cultural History* 127; RN Barber 'Rape and Other Sexual Offences in Queensland: An Historical and Behavioural Analysis' (unpublished thesis, University of Queensland, 1970).

9. 'A Serious Charge' *Daily News* (Perth, 13 Mar 1913), recounting evidence given by Ila Collins earlier in the lower court; 'A Heat Wave' *West Australian* (Perth, 12 Dec 1912); 'A Serious Charge' *West Australian* (Perth, 13 Dec 1912). The rules of evidence did not permit children 'of tender years' to give sworn evidence, but there was no explicit age cut-off and the trial judge would assess each child witness's individual understanding of the nature and obligation of the oath: see P Garrick 'Children of the Poor and Industrious Classes in Western Australia, 1829-1880' in P Hetherington (ed) *Childhood and Society in Western Australia* (Perth: UWA Press, 1988) 13, 17-18. In this case the trial judge must have concluded that Ila Collins was mature enough to appreciate the nature of an oath.

man had moved into the hotel shortly after Sarah Collins purchased the licence, relegating Ila's mother to the position of housekeeper and clerk. 'We have been in Mr Sullivan's employ as long as I can remember', explained Ila. Although Ila was not apparently aware of it, Sullivan and her mother were also co-habiting as lovers, and so few suspicions were aroused when he began to take a personal interest in the young girl's upbringing. Sullivan taught Ila to horseback ride and took her riding with him every Sunday, occasionally camping out overnight.

Most of those who observed Sullivan and Ila together noticed that she was visibly apprehensive of the older man. One of the labourers who worked for Sullivan stated that Ila 'appeared to be rather afraid' of Sullivan, and that Sullivan would sometimes 'storm' at Ila so violently that she would 'run away and hide'. When Ila reached puberty, her fear of physical punishment from Sullivan was augmented by the realisation that he now wanted sexual access. In court that day, Ila testified in a wavering, barely audible voice as to how Louis Sullivan attempted to assault her for the first time in January:¹⁰

We were beside the Canning River and we halted and gave our horses a drink and we dismounted.... Accused forced me down.... He undid his trousers. He then took my drawers down. He tried to have connection with me but he did not succeed because I was struggling.... [Accused] said he would tear the clothes off me if I didn't keep still. My drawers were wet when he let me up. The wet came from accused. He said, 'If it hurts you it will only hurt you once in your life'. I was really afraid of accused. I cried.

Ila explained that Sullivan persistently attempted to 'have connection' with her for the next nine months. He accosted her while they were out riding, and regularly when the two of them went down to Ratke's paddock, about 1½ miles from the hotel, to feed the pigs that Sullivan kept there. She revealed that Sullivan would 'force' her down and try to rape her every three or four days at the paddock. 'He had or attempted to have connection with me a great many times, only sometimes he would wet me inside — I mean the inside of my private parts'. One day, in particular, stood out clearly in her memory as she told the court: 'I remember 25 November.... He forced me down on some empty chaff bags he had placed on the table [in the house at Ratke's paddock.] He fully succeeded this time. He went fully into me. It hurt me more than the other times. He said nothing. Nor did I'. Ila Collins had not had a menstrual period since November and believed she was pregnant as a result of the forcible sexual acts. She swore that no one else was ever 'rude' in such a manner towards her, and that Louis Sullivan was the only man with whom she had ever had sexual connection.

At the age of 13, Ila Collins was not required to prove that she had been raped by means of force, fear or fraud. Nor did the Crown have to prove that the act

10. Evidence from Depositions and Exhibits: supra n 1.

took place without her consent. Criminal legislation placed these potentially onerous burdens only upon adult women who complained of rape. The evidence suggests that force and intimidation were indeed part of the sexual assault here. This was not a case in which Ila Collins was enticed or cajoled into consenting to sexual relations with Louis Sullivan. However, the Crown prosecutor had decided to charge Sullivan with the offence of ‘carnal knowledge of a girl under 16’. His preference for this offence was probably due to the fact that there were fewer elements to prove. Convictions for ‘carnal knowledge’ were supposed to be procurable upon simple proof that the accused had had sexual connection with the young girl.¹¹

Ila Collins’s testimony was apparently very compelling that day. Magistrate Roe committed Louis Sullivan for trial on the strength of her statements, her demeanour and the mode in which she answered the questions.¹² She stood up

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11. Had the case been tried prior to 1892, 13 year-old Ila Collins would have been considered an adult woman who had reached the statutory age of consent. The governing legislation in WA at that time was the Offences against the Person Act 1861 (Eng), 24 & 25 Vict, c 100, ss 50, 51 which defined ‘carnally knowing a girl under ten years of age’ as an offence subject to life imprisonment, and created the new offence of ‘carnally knowing a girl between the ages of 10 and 12’ with a penalty of three years’ imprisonment. The English statute was expressly adopted by the Criminal Law Consolidation Ordinance 1865 (WA). The decades that spanned the turn of the century witnessed a tumultuous and protracted debate concerning the appropriate cut-off date for the age of consent both in England and Australia. The Offences against the Person Amendment Act 1875 (Eng), 38 & 39 Vict, c 94, ss 3 and 4 raised the ages to 12 and 13 respectively, and reduced the penalty for the latter offence to two years’ imprisonment. The Criminal Law Amendment Act 1885 (Eng), 48 & 49 Vict, c 69, ss 2-13, created a host of new offences: procuring defilement of women by threats, fraud or administering drugs; carnal knowledge of girls under 13; carnal knowledge of girls between 13 and 16; abduction of girls under 18; unlawful detention; and outrages on decency. WA passed its own Criminal Law Amendment Act 1892 which was substantially modelled upon the English legislation. However, the age cut-off was held at 12 for the offence of ‘carnal knowledge of girls under 12 years of age,’ and 14 for the offence of ‘carnal knowledge of girls between 12 and 14 years of age.’ Several novel provisions also appeared in the WA statute: ‘defilement by a guardian’ which prohibited guardians, teachers and schoolmasters from having carnal knowledge of girls under the age of 17, and ‘incest’ which prohibited sexual relations between fathers and daughters, and sisters and brothers. Householders who permitted boys under the age of 16 to resort to brothels were also subjected to a maximum of two years’ imprisonment. The Criminal Law Amendment Act 1900 (WA) increased the age limits to 13 and 16, as seen in the English statute. See also Criminal Code 1902 (WA) ss 1, 6, 24, 28, 29, 181-198, 202, 205, 312, 313, 323-328; Criminal Code Amendment Act 1911 (WA) ss 2-4.
 12. ‘A Criminal Appeal’ *West Australian* (Perth, 27 Jun 1913); *Daily News* (Perth, 26 Jun 1913); *Sullivan* supra n 2, 24-25. *Halsbury’s Laws of England* vol 9 (London: Butterworths, 1909) 320 indicates that the burden of proof upon the prosecutor at this stage was as follows: ‘If [the justices] are of the opinion that the evidence is sufficient, or if the evidence raises a strong or probable presumption of his guilt, they must commit him to prison to stand his trial.’ Two of Sullivan’s business acquaintances put up £100 as bail, and Sullivan was released on 16 December 1912, on his own recognisance, to appear at the next criminal sittings of the Supreme Court.

equally well at trial before McMillan J and a jury at the criminal sittings of the Supreme Court in Perth in March 1913. Although she was ‘cross-examined at length’ by Mr G Lavan, defence counsel for Louis Sullivan, Ila Collins seems to have impressed those in the courtroom as unshakeable.¹³ But the legal rules were not simply designed to determine whether the individual sexual assault complainant was truthful. Sexual offences aroused profound suspicions on the part of those who professed to create and implement the law. Much more than mere ‘believability’ was demanded.

THE ORIGIN OF THE DOCTRINE OF CORROBORATION

Most authorities credit one man, the English jurist and misogynist, Sir Matthew Hale, with the origination of the doctrine of corroboration. Early 20th century criminal law texts all routinely cite as founding authority the venerable English judge, who was wont to make reference to the evidence of rape complainants as ‘the confident testimony, sometimes, of malicious and false witnesses’.¹⁴ Indeed, it was Hale who penned the memorable phrase, routinely trotted out at ‘almost every trial’:¹⁵ ‘[Rape] is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent’.¹⁶ Most of this was nonsense. Rape never was, nor is, an easy accusation to make. There have always been overwhelming social pressures placed upon rape victims to protect their reputations and conceal their experiences of sexual violation.¹⁷ Australian rape trials historically have garnered the lowest conviction rates of any other criminal proceedings, giving credence to Hale’s opinion that the charge was

13. ‘A Serious Charge’ *Daily News* (Perth, 13 Mar 1913) indicates that Ila Collins’s testimony at trial was ‘similar to that given in the lower court.’

14. M Hale *Historia Placitorum Coronae* vol 1 (London: Nutt & Gosling, 1734) 635-636.

15. *Harris’s Principles of the Criminal Law* 7th edn (London: Stevens & Haynes, 1896) 164.

16. Hale supra n 14, 635-636, quoted in *Roscoe’s Digest of the Law of Evidence in Criminal Cases* 12th edn (London: Stevens & Sons, 1898) 775; *Harris* ibid, 164; *Russell on Crimes* vol 3, 6th edn (London: Stevens & Sons, 1896) 235. Russell lays out Lord Hale’s puzzlingly insubstantial rationale for the need for caution in rape trials: ‘[Lord Hale] mentions two remarkable cases of malicious prosecution for this crime, that had come within his own knowledge....’ Although he describes Hale as ‘a great and experienced judge,’ Russell fails to mention his reputation as a misogynist and his notorious role in convicting women accused of witchcraft: see G Geiss ‘Lord Hale, Witches and Rape’ (1978) 5 *British Journal of Law and Society* 26; J Scutt ‘Law Reform and Child Sexual Abuse in Australia’ in Hetherington supra n 9, 125-126, 134. For further discussion of the absence of any empirical foundation to substantiate the claims that women often lie about rape: see J Scutt ‘Sexism and Psychology: An Analysis of the “Scientific” Basis of the Corroboration Rule in Rape’ (1979) 5 *Hecate* 35-48.

17. This was evidenced clearly in the Sullivan case, being the urgent advice of neighbouring publican, Margaret Reed, to Ila and Sarah Collins that the matter would be ‘better hushed up.’

'hard to prove', but making mincemeat of his conjecture that it was 'harder to be defended'.¹⁸

It was Lord Hale's dictum that governed the English common law, however, and in deference to him, special evidentiary rules had been constructed for sexual assault trials. At the close of every trial, judges were supposed to caution juries that it was dangerous to convict upon the uncorroborated testimony of female rape complainants. As the 1909 edition of *Halsbury's Laws of England* pointed out: 'The evidence of the complainant in charges of rape and similar offences is of little weight, if not corroborated'.¹⁹

Australian legislators expanded upon the common law rules, fortifying many of their criminal law statutes with additional requirements for corroboration in cases of sexual assault. For some offences, the statute law went well beyond the common law preference for corroboration, making it *mandatory* and stipulating that no one could ever be convicted 'upon the uncorroborated testimony of one witness'. The offence with which Louis Sullivan was charged, carnal knowledge of girls under the age of consent, was one such offence.²⁰ When the offence was being discussed in the all-male Western Australian Legislative Assembly in 1900, the legislators had expressed alarm that 'designing and libidinous' women would use the law 'for blackmailing purposes'. Men might give in to 'natural passions', but women were understood to utilise sex as an economic transaction. They were frequently thought to bargain mercenarily for marriage and to fraudulently extort financial windfalls. Describing the female species as potentially 'hysterical', 'wanton' and 'wicked', the politicians determined that corroboration must be the *sine qua non* of the offence. 'We cannot close our eyes to the fact that there are many females who are so lost to all sense of what is right and just that they will not hesitate to beguile youths, and then issue an information, or perhaps threaten an information, with the object of levying blackmail', claimed Mr Wilson, the representative from Canning.²¹

Legal authorities conceded that insisting upon corroboration was an unusual requirement. It was a marked deviation from the general rule of English law that the testimony of a single witness was sufficient to prove a legal case. The peculiar

18. J Bavin-Mizzi's detailed study of criminal records from WA, Victoria and Queensland between 1880 and 1900 reveals that rape charges resulted in the lowest conviction rate of any of the crimes tried before the Supreme Courts: see J Bavin-Mizzi 'Understandings of Justice: Australian Rape and Carnal Knowledge Cases, 1867-1924' in Kirkby supra n 8, 21-22. For similar findings regarding New South Wales: see Allen supra n 8.

19. Halsbury supra n 12, 388. See also EH East *Pleas of the Crown* vol 1 (Abingdon, Oxon: Professional Books, 1987 (reprint)) 445.

20. Criminal Law Amendment Act 1892 (WA) ss 4, 6; Criminal Law Amendment Act 1900 (WA); Criminal Code 1902 (WA) ss 1, 185, 188.

21. *Hansard* (LA) 25 Oct 1900, vol 18, 1296-1300; 28 Nov 1900, vol 18, 1990; 31 Jan 1911, vol 40 3505.

decision to ask for corroboration was a rarity, attached primarily to allegations involving sexual violence, exploitation or immorality made by women and children.²² It was an evidentiary hurdle that made it substantially more difficult to secure convictions against individuals like Louis Sullivan. Thus, despite the overwhelming ring of truth that seems to have suffused Ila Collins's testimony in the Perth courthouse that summer, it all came down to a question of 'corroboration'.

THE 'BACK-UP EVIDENCE'

What exactly did the term 'corroboration' mean? What sorts of additional proof did the prosecution have to muster to satisfy the perverse proclivities of 17th century scions such as Sir Matthew Hale? Turn-of-the-century English dictionaries defined the word with a list of equivalent phrases: 'strengthening, fortifying, invigorating', 'the confirmation (of a statement, etc) by additional evidence', 'to strengthen (a statement, etc) by concurrent or agreeing statements or evidence', 'to make more sure or certain'.²³ As will become evident, the legal definition did not entirely accord with contemporary parlance. However, if the common understanding of the word had been taken as indicative, it would seem that judges and juries could have accepted a great many things as 'corroborative' in sexual assault trials. The *Sullivan* trial provides a useful illustration.

Crown prosecutor Frank Parker called a series of witnesses who testified to a plentiful assortment of details that helped to shore up, strengthen, fortify and confirm Ila Collins's evidence at trial. The first was Dr David Francis Blanchard, who testified that he had conducted a medical examination on Ila Collins, and found 'a considerable dilatation of the whole vaginal tract'. He was unable to say for certain whether she was pregnant, since it was too early in the gestation period to know. However, it was the doctor's opinion that she had had 'repeated sexual connection' dating back several months. Here was uncontested medical evidence that confirmed that Ila Collins had been subjected to sexual relations, just as she had testified.

22. The requirement for corroboration was attached to criminal proceedings for a wide range of sexual offences and civil proceedings for affiliation, breach of promise to marry and divorce. The unsworn testimony of children 'of tender years' also attracted the need for corroboration, as did the evidence of accomplices, and criminal prosecutions for perjury, treason, blasphemy and personation. Highlighting the peculiarities of such rules, *The Dictionary of English Law* vol 1 (London: Sweet & Maxwell, 1959) 504 stated: 'The general rule of English law, unlike that of other systems, is that the evidence of a single witness is sufficient to prove any case, civil or criminal. In certain cases, however, the court will not act on the evidence of a single witness unless that evidence is corroborated. This, in some cases, is a matter of practice, but in a few cases the court is precluded by statute from acting on the evidence of a single witness unless there is corroboration.'

23. *A New English Dictionary* vol 2 (Oxford: OUP, 1893) 1020.

Kelmscott police constable William Brodie told the court that he had journeyed over to Ratke's paddock, where he found three sheds and a disused outhouse. Inside was an old table — 4'9" by 3'0" — and a bundle of empty chaff bags. Numerous witnesses swore to having seen Louis Sullivan and Ila Collins out riding together in the bush and towards Ratke's paddock, often late into the night. Here was both physical evidence that accorded with Ila Collins's description of the scene of the last sexual attack, and eye-witness identification placing Louis Sullivan at or near the location where the alleged offences had taken place.

There was also evidence from several witnesses about rather unusual statements made by Louis Sullivan. William Otway, a labourer who had worked for Sullivan the previous spring, recounted under oath how he had been chatting with Sullivan 'about a man at Beverley' who had 'got into trouble with a girl'. When Sullivan had asked how old the girl was, Otway told him she was 14 or 15. Otway's testimony continued: 'I said they said he had made a horrible mess of the girl. [Sullivan] said a little bit of vaseline would have prevented all that. He [Sullivan] always carried vaseline in case of scars on his horses'. This evidence may have been a bit attenuated to qualify as corroboration of Ila Collins's sexual assault. But certainly it intimated that Louis Sullivan was not above offering advice to his countrymen about how best to accomplish sexual relations with young girls.

Mrs Margaret Jane Reed, the proprietor of the nearby Armadale Wine Saloon and a 'trained nurse', testified that Louis Sullivan had come by her place early in December. She recounted for the court the conversation that ensued, during which Louis Sullivan made what sounded suspiciously akin to an admission:

Louis Sullivan: I know you have been a nurse for many years and you are an elderly woman. May I ask you one or two questions?

Margaret Reed: Yes, if you wish.

Louis Sullivan: Could you tell if a medical man could tell positively [that] a girl had been interfered with or not?

Margaret Reed: Undoubtedly.

Louis Sullivan: Could you tell me whether a medical man could tell whether a 'girl' or 'the child' was pregnant or not?

Margaret Reed: After about a month or six weeks, there was an indication which would aid him in forming an opinion.

Louis Sullivan: Mrs Collins was here the other night. Did she tell you I wouldn't marry the girl?

Margaret Reed: Yes, she told me you'd do nothing whatever for her but call her a blackmailer and the child a whore. [It is] a foolish and dreadful matter...and would be better hushed up and it would have been better if the man had met her in some way — and to have married the girl even if she was put away for a few years.

Louis Sullivan: Yes, that's all very well, but suppose the man is not the only one?

This, Mrs Reed testified, prompted her to end the conversation. There was much to ponder in this exchange, but it would seem that an astute jury might have adduced from this conversation that Louis Sullivan had admitted to being sexually familiar with Ila Collins.

Sarah Collins, the mother of the complainant, also testified at length. She told the court that Sullivan and Ila often went out riding together, over to Ratke's paddock to attend to the pigs. Although Ila used to enjoy riding, her mother had noticed a marked disinclination to go with Sullivan during the last six months. Sarah Collins first became suspicious when her daughter missed a menstrual period in November. When she questioned her on 28 November, Ila broke down and confessed all. In a rage, Sarah Collins tore over to Sullivan's room and confronted him directly. Ila's mother told the court that, while her daughter looked on, the two adults argued as follows:

Sarah Collins: What have you been doing to the child?

Louis Sullivan: I've been doing nothing to the child.

Sarah Collins: Yes, you have. The child is now in the family way.

Louis Sullivan: You must be mad, raving mad.... Even if you thought so, you ought to have sense enough to hold your tongue as you're only injuring her.

Sarah Collins: It's impossible to injure her more than you've already done.

Louis Sullivan: It's all nonsense.

Sarah Collins: There is no nonsense about it. You've ruined the child for life and she's only a baby. Bear in mind she's not 14 years of age yet.

Louis Sullivan: I'm not afraid of anything. She cannot be in that condition, because I never properly got into her.

Sarah Collins: Oh that will do! I know you better than that, you did it all right once you had started.

A guest resident in the hotel overheard the first part of this emotional exchange. He testified that Sarah Collins was 'crying hysterically', and that Sullivan began to chase her around the back of the house. Sullivan then called Ila a 'whore' and fired a series of questions at her: 'Didn't old Otway have something to do with you?' 'What about young Chandler? Didn't he?' 'Did Tom Edquist touch you? Did John?' Ila indignantly replied 'no' to all of these accusations, turned heel and fled. When Sarah Collins told Sullivan that she intended to report the matter to the police, he accused her of trying to blackmail him. 'I never blackmailed him', insisted Sarah Collins. As the woman who kept the accounts for the hotel, she was incensed that Sullivan should have alleged such a thing. 'I knew

he had nothing. He was in debt. He has never paid wages. I left his home with nothing', she declared.

Sarah Collins related that she and Sullivan had further words after a brief cooling-off period. She testified that Sullivan had told her that if Ila were 'in a family way', he would be 'very sorry if she miscarried'. Apparently he was quite concerned that Ila's mother might try to find someone to procure an abortion for the young girl. He chastised Sarah, adding, 'You know I've always wanted children'. Sarah retorted: 'Yes, and I've told you to get a wife'. She then demanded of Sullivan whether he had any 'proposal to make', and if he had 'any intention' of marrying Ila. Sullivan replied: 'No, I won't marry her. She's a fucking little whore'. This, Sarah told the court, was when she resolved to leave the hotel, taking Ila with her. On 5 December, she filed a formal complaint with the police.

Sarah Collins's evidence would seem to have been potentially very damaging to the accused. Although she never tried to cover up the fact that Louis Sullivan had denied having sexual intercourse with her daughter, Sarah's testimony unveiled a number of incriminating statements. Sullivan's piqued insistence that Ila could not be pregnant because he had 'never properly got into her' was quite a slip. Understood within the context of the conversation, most hearers would have taken this as an unwitting admission that Sullivan had indeed 'got into' the young girl after some fashion. And the precise offence charged did not require the Crown to prove full sexual intercourse. The crime of 'carnal knowledge of girls under 16' was defined as 'having' or 'attempting [to have] unlawful carnal knowledge of a girl under the age of 16'.²⁴ The crime specifically encompassed the 'attempt' as well as the completed offence. Furthermore, 'carnal knowledge' was understood to involve 'penetration in the least degree', whether or not the hymen was ruptured, and whether or not the accused had ejaculated.²⁵ Crown prosecutor Frank Parker seems to have been satisfied with the supporting witnesses he had mustered. Confident of securing a conviction, he closed his case.

Defence counsel Lavan seems to have felt equally assured of success. He opened by reminding the court that his client could not be convicted on a charge of this nature unless there was corroboration. He advised that his client would make a 'flat denial' of the charge against him, and called Louis Sullivan as the sole witness for the defence. Sullivan appears to have been eager for the chance to

24. Criminal Code 1902 (WA) s 188.

25. *Russell* supra n 16, 229; *Roscoe* supra n 16, 767, 775 noting that 'if any part of the membrum virile was within the labia of the pudendum, no matter how little,' this was sufficient to constitute penetration. East supra n 19, 437, quoting Lord Coke, noted that for carnal knowledge, 'there must be penetration, that is, res in re; but the least penetration maketh it carnal knowledge.' Criminal Code 1902 (WA) s 6 provided: 'When the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration'.

protest against accusations he described as part of a 'deliberate' concoction designed 'to ruin him'. In fact, he was still smarting from the fact that his counsel had insisted he not give evidence at the earlier hearing before the police magistrate. 'Personally I am more than anxious to go into my defence straightaway', he had declared to Magistrate Roe in December.²⁶ It was only with the greatest of difficulty that Lavan had managed to forcefully restrain his client from testifying until trial. When his turn finally arrived, Sullivan testified with confidence, describing his occupation as that of a 'farmer' and 'innkeeper', and emphasising his status as a respectable businessman in the community. Calling him to account on such heinous accusations was a fiasco, he complained, a wild fantasy dreamed up by Sarah Collins as part of an elaborate blackmail scheme. 'I expected this', he told the court. 'I have no fear. I ordered that woman off the premises on several occasions and told her to carry out her threats as she was only injuring her case by delay'. Flamboyant to the end, he concluded: 'There is no fury like a woman scorned'. It was as if Louis Sullivan had taken the words right out of the legislators' mouths.

THE CHARGE AND THE VERDICT: ROUND ONE

Counsel put forward their final arguments and the judge then gave his charge to the jury. No written records of this survive, but McMillan J would undoubtedly have summarised the evidence and outlined the elements that needed to be proved. He would have advised the jurors of the position under English common law, that in cases of sexual accusation it was dangerous to convict upon the uncorroborated evidence of the complainant. Certainly he would also have pointed out to them that the requirements were even more stringent in trials for the offence of 'carnal knowledge', where corroboration was mandatory and no accused could be convicted of the crime upon the uncorroborated testimony of the complainant.

It was the responsibility of the trial judge to rule on questions of law, and McMillan J would have had to decide at first instance whether there was evidence that was legally capable of constituting corroboration. Without this, he would have had to direct the jury to acquit. Although we are now unable to know with certainty what testimony he relied upon, McMillan J did decide that there was evidence from which the jury could conclude that corroboration had been offered. The case then passed to the jurors, as the triers of fact, to determine whether they believed the complainant and the corroborating witnesses. Advising the jurors

26. Sullivan's outburst was unusual. It was customary for defendants represented by counsel at the hearing before the police magistrate to state simply: 'I do not wish to say anything. I reserve my defence.' See eg State Archives of WA 'Depositions in *R v John Walsh*' Criminal Indictment Files, Cons 3473, Items 3692 and 3701 (Perth, 1905).

that questions of credibility were properly left to their collective judgment, McMillan J would also have reminded them that the burden of proof rested with the Crown.²⁷ At the close of the judge's direction, the jurors retired to consider their verdict.

Given the structural imbalance that the rules of evidence foisted upon the prosecution, one might have anticipated that the result would have been an acquittal. However, when the jury returned, the foreman announced a verdict of 'guilty of attempted carnal knowledge of a girl under the age of 16'. Despite the considerable evidentiary impediments placed in their path, the jurors were unanimous. They had believed the complainant. They had believed some or all of the witnesses who backed up her testimony. They had believed Louis Sullivan to be guilty beyond reasonable doubt. The result suggests that at least some judges and juries were prepared to accept the complaints of young female sexual assault victims as truthful, and that at least some cases ultimately found their way through the evidentiary maze. It also suggests that Ila Collins's testimony at trial must have been extraordinarily convincing. And yet the jurors were not prepared to convict Louis Sullivan of the full act of sexual intercourse. They had been cautious about the precise acts they believed the accused man to have committed. They voted to classify it as an attempt rather than full penetration.

Louis Sullivan made the best of his brief opportunity to address the court on the question of sentence. 'I ask your Honour to consider the terrible torture to which I have been subjected while this sword of Damocles has been hanging over my head for the past two months. I have suffered punishment far worse than your Honour can give me today'. The offence carried a maximum penalty of imprisonment with hard labour for two years, with or without whipping. McMillan J dispensed a sentence of 18 months' hard labour, adding: 'I never have and never did order a flogging for this kind of offence, and will not do it if I can help it'. Louis Sullivan was carted off to gaol, insisting upon an immediate appeal and proclaiming his innocence to the end.²⁸

Juries are not asked to give reasons for their verdicts, and so it is difficult to know precisely what testimony the 12 jurors relied upon as corroborative. By the

27. *Halsbury* supra n 12, 378: 'The general rule of evidence is that he who affirms must prove; therefore, a defendant who pleads not guilty throws upon the prosecution the burden of proving that the facts alleged in the indictment are true.' The definitive statement that the criminal prosecution has to prove its case beyond a reasonable doubt would be articulated in the English case of *Woolmington v DPP* [1935] AC 462, 481-482, although R Cross *Evidence* (Sydney: Butterworths, 1970) 109-110 indicates (without citing authority) that 'the rule that the prisoner must have the benefit of reasonable doubt has been traced back to the end of the 18th century.'

28. 'At a Glance: A Brief Summary of Today's Happenings' *Daily News* (Perth, 17 Mar 1913); 'The Full Court' *West Australian* (Perth, 20 May 1913).

time the case got to appeal, however, all parties had come to the rather surprising agreement that the only evidence capable of constituting legal corroboration was the testimony of Sarah Collins.²⁹ There are no surviving records that would indicate exactly why this conclusion was reached. However, it may be possible to extrapolate from some of the arguments made at trial and some of the precedents that had been handed down in earlier Australian cases.

At trial, defence counsel Lavan had referred the court to the Criminal Code 1901 (WA). The Code had introduced a statutory definition of corroboration for the first time, defining the phrase ‘uncorroborated testimony’ as ‘testimony which is not corroborated in some material particular by other evidence implicating the accused person’.³⁰ This definition went well beyond the simple concept of ‘strengthening’ or ‘confirming’ evidence. In the hands of the lawyers and judges, the statutory definition would be pulled apart, probed and pinched further, until the legal doctrine resembled but a fraction of the original meaning of the concept.

Dr Blanchard’s evidence was possibly the easiest to dismiss. Australian law was still quite unsettled regarding the corroborative potential of medical evidence in sexual assault trials.³¹ However, defence counsel Lavan had fastened upon the fact that the physician was unable to say which man had caused the ‘considerable vaginal dilation’ he observed in Ila Collins. There were a host of possible suspects,

29. ‘The Sullivan Case’ *Daily News* (Perth, 14 Mar 1913); ‘Court of Criminal Appeal’ *Daily News* (Perth, 26 Jun 1913).

30. Criminal Code 1902 (WA) s 1.

31. The reported jurisprudence was limited to two conflicting cases. *R v Abbott* (1898) 9 QJL 92 involved a charge of carnal knowledge of a girl under the age of 12. The prosecution argued that the corroboration consisted of medical evidence that the girl had experienced sexual intercourse based on a physician’s diagnosis that her hymen had been ruptured, that the accused had admitted suffering from venereal disease and his subsequent medical examination revealed an infection ‘which might have been caused by gonorrhoea as well as by some other disorders,’ and that five weeks after the attack the girl was diagnosed with gonorrhoea. There was also evidence of opportunity, since the accused was frequently in the company of the girl. The court found that the combination of this evidence constituted legal corroboration. However, Real J’s ruling suggests that the medical evidence of the torn hymen might also have been corroborative on its own: ‘There is this in corroboration of the girl, that she had recently been carnally known by some man. There is no doubt about that. The hymen had been recently ruptured.’ In *R v Roys* (1898) 9 QJL 47, the Crown furnished evidence that the child assaulted was found shortly afterwards to be suffering from a disease which might be either of a venereal or of an innocent character. The court held that this did not constitute legal corroboration. J Bavin-Mizzi ‘Writing About Incest in Victoria 1880-1890’ in Hetherington *supra* n 9, 49, 58-65, describes an unreported trial of Thomas Palmer in the Geelong Court of Assize in 1885 on the charge of raping his daughter. One physician testified that six year-old Martha’s hymen was ‘partially, though not entirely, absent’ as it had been ‘torn to half its size’ by the introduction of ‘some foreign substance, such as a penis.’ A second medical witness testified that the hymen had been torn, but that he ‘could not say penetration by a penis took place.’ In his charge to the jury, Williams J advised that Martha’s testimony has been ‘corroborated by the medical witnesses’ and that ‘further corroboration was scarcely possible.’

and it could have been any of them, or potentially even more than one, postulated Lavan. Lavan had latched on to the last phrase of the definition — ‘implicating the accused’. With the introduction of this phrase, the legislators had dramatically scaled down the evidence capable of constituting corroboration. The complainant could not be believed on her own, but when she went to the trouble of producing other witnesses to support her testimony, the law dictatorially rejected entire categories of evidence as insufficient. According to the statutory definition, nothing could serve as corroboration unless it directly related to the individual man accused of the crime and no one else. Dr Blanchard’s testimony might have proven that the young girl had been sexually assaulted, but it did not solely ‘implicate the accused’. With one stroke of the pen, the new statutory definition rendered legally meaningless a swath of otherwise confirmatory testimony. What was theoretically a remarkably affirming piece of evidence, a medical finding that the complainant had been sexually violated, was now nugatory. This rule would largely eviscerate the utility of any medical evidence in sexual assault trials, at least until the advent of DNA-testing three-quarters of a century later.

The corroborative value of the statements of the multiple witnesses who had testified to seeing Ila Collins out riding with Louis Sullivan late at night and in the vicinity of the paddock was also rejected. This seems slightly more difficult to understand, since the evidence placed Louis Sullivan at the scene of the crime. Unlike Dr Blanchard’s evidence, this presumably ‘implicated the accused’. However, there were Australian decisions that had rejected evidence of ‘mere opportunity’ as insufficiently corroborative. *R v Walsh*, a Western Australian case decided in 1905, involved a charge of carnal knowledge of a nine year-old girl. The girl’s parents had sent her to the accused’s residence with messages on three occasions, and each time she had come home complaining of injury. The sexual assault was medically ascertained some weeks later. The Supreme Court ruled that the fact that the girl had been at the accused’s house, or in his company, was insufficient corroboration without further incriminating particulars. It was up to the Crown to prove something more to obtain an inference of impropriety — that they had been seen in an ‘indelicate position’, that he was enticing her into his house, or shutting the door or pulling down the blinds.³² Presumably merely going horse-back riding in the vicinity of the assaults was taken to be lacking an ‘inference of impropriety’.

32. *R v Walsh* (1905) 7 WAR 263; State Archives of WA supra n 26. An earlier case, *R v McGee* (1894) 6 QLJ 151, also ruled that the fact that the accused man and the child were alone together in the house in which the offence was alleged to have been committed did not constitute corroboration. See also *R v O'Brien* [1912] VLR 133, holding that ‘evidence that the accused had an opportunity to commit the act charged, the commission of which was clearly proved, was not sufficient.’

Constable Brodie's evidence of finding the table and chaff bags in Ratke's paddock, as Ila Collins had described it, and William Otway's story of the conversation about vaseline were possibly dismissed as too tangential to the crime — not 'a material particular' as required under statute. It is more difficult to understand why the lawyers dismissed Mrs Reed's testimony. Sullivan's pouting retort to her that he was 'not the only one' certainly implicated him in some degree, and might have been construed as an incriminating admission. It is true that Australian courts had been very cautious about drawing implications from statements of the accused, giving them every benefit of the doubt before accepting such evidence as corroborative.³³ However, it is hard to see how Sullivan's statement, made in the context of a discussion about responsibility for Ila's pregnancy, was not a full-fledged admission of sexual intercourse. How often was similar evidence disqualified, without any records left to offer analysis or rationale? Inexplicably, Mrs Reed's evidence was jettisoned, leaving the testimony of Sarah Collins as the sole remaining option for corroboration.

What was there about Sarah Collins's evidence that singled it out as potentially corroborative while the other testimony was dismissed as legally irrelevant? One feature of Sarah Collins's evidence that distinguished it from the rest was her testimony that Ila Collins had made a 'complaint' about Louis Sullivan's aggressive behaviour. Ila Collins had confided to her mother the details of Louis Sullivan's sexual assaults well before any formal charges were laid with the police. Australian law was still somewhat unclear as to whether the complainant could corroborate her own story by revealing the sexual assault to a third party. None of the reported decisions had ruled categorically whether this type of evidence was sufficient. The main case on this point had caused considerable disagreement between two judges. *R v Gregg*,³⁴ an 1892 decision of the Victorian Supreme Court, had involved a charge of indecent assault on an eight year-old girl. The court heard evidence that the child had returned to her mother 'in a state of distress' and described the assault, the place where it was committed, the appearance of the place and the appearance and garb of her assailant. Higinbotham CJ held that the conversation was 'forcible evidence' of corroboration, stating:³⁵

33. See eg *R v Rima* (1892) 14 ALT 138, where the accused gave statements to the arresting officer in which he admitted having 'tampered with the child.' The court held that this was insufficient to justify the conclusion that he had committed an indecent assault. In *R v Walsh* *ibid*, the accused, who was charged with carnal knowledge of a girl under the age of 13, told the police that the complainant was a 'young hussy.' He also admitted she had been in his place when he was undressing. Upon arrest, he added: 'It would not do me any good to say anything.' The court held that these statements were insufficient to implicate the accused.

34. (1892) 18 VLR 218.

35. *Ibid*, Higinbotham CJ 222-223.

Corroboration may be easily supplied in most cases by our law, though not by the English law. Our law admits that a statement by a child to its mother, made after the commission of such an offence, is admissible, not as part of the *res gestae*, but as evidence confirming and corroborating the testimony which the child gives in the box; and in a very large number of cases I am not aware of any kind of corroboratory evidence more satisfactory than that of a female child suffering under a shock of this kind, and indicating by appearance, manner, words, and acts the distress caused by the assault.

In the peculiar circumstances of the case, however, the Chief Justice went on to hold that the evidence did not meet the qualifications of legal corroboration. In *Gregg*, the conversation between mother and child took place before the child identified her assailant pursuant to a police investigation. The Chief Justice held that the statement thus failed to 'implicate the accused':³⁶

Under the present law such corroboration can only be given so as to implicate the accused person, if the child knows at the time of the assault the person who has assaulted her, or if some other testimony exists independent of that of the child by which the assailant can be identified.

While agreeing with the outcome of the case, Hood J was in marked disagreement with his Chief Justice over the utility of complainants' statements to third parties. Dismissing this type of evidence as generally insufficient, Hood J noted:³⁷

There was evidence to support the girl's story and to confirm her credibility and to show that she was telling what she believed to be the truth. But I think that the

36. *Ibid*, 223.

37. *Ibid*, Hood J 224. See also *R v Smith* (1901) 26 VLR 683, a charge of indecent assault on a girl of five years, where the court heard evidence that the girl had described portions of the assault to her mother. Ruling that the conversation between the girl and her mother had not revealed sufficient 'circumstances of indecency,' the court disqualified it as corroborative. Although nothing in the court's judgment suggests that such evidence could never be corroborative, the holding did note that corroboration constituted 'extrinsic sworn evidence' that would 'implicate the accused': *ibid* 686. A more definitive statement of the law was set forth in *R v Peacock* (1911) 13 CLR 619, 656 a case which considered the necessity of corroboration with respect to the testimony of an accomplice. There Barton J held that corroboration would be deemed sufficient if it was 'substantial and is upon a material part of the case,' emphasising that 'it need not amount to independent evidence implicating the accused'. O'Connor J continued: '[Corroboration] does not mean that all the material facts have to be proved by independent evidence': *ibid* 671. What it does mean is well expounded in the following passages from the last edition of *Russell on Crimes* 7th edn, 2287: 'The confirmation need not extend to every part of the accomplice's evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts as to which there is no confirmation.'

Legislature has in these cases required something more. There must be some other material evidence implicating the accused; that is, something proved altogether apart from the child's story tending to establish the guilt of the prisoner. It seems to me that the intention was that no man should be convicted upon the unsworn testimony of a child of tender years unless other facts were established which would raise a suspicion of the accused's guilt, even if the evidence of the girl had been absent.

Hood J's interpretation was draconian in import. Essentially, he was demanding that 'corroboration' be restricted to evidence that originated entirely separate and apart from the complainant's words and actions. The statutory wording did not mandate this. What was required was testimony that was corroborated 'in some material particular by other evidence implicating the accused person'. Hood J had taken the phrase 'other evidence' and equated it with evidence that was completely 'extrinsic' or 'independent' of the complainant.

In Louis Sullivan's case, the legal authorities seem to have preferred Higinbotham CJ's sense of the issues over Hood J's. There was no legal argument over whether Sarah Collins's testimony about her daughter's description of the sexual assaults could potentially qualify as corroboration. Nor was there any disagreement over the other main feature of Sarah Collins's evidence, her narration of the conversation she had with Louis Sullivan, in which he had stated that Ila could not be pregnant because he never 'properly got into her'. Counsel on both sides of the case seem to have taken this incriminating admission to fit within the legal criteria for potential corroboration.

Cognisant of the importance of Sarah Collins's corroborating testimony, Louis Sullivan's lawyer had done his best to diminish the force of her evidence at trial. The defence strategy was to attempt to eviscerate her credibility and Lavan took to the task with obvious gusto. He began by turning to the question of Sarah Collins's marital status. Here was a woman who was blatantly living in sin, a 'mistress' to Louis Sullivan. Lavan seems to have been indifferent to the obvious conclusion that if this sullied Sarah Collins's credibility, it ought also to have sullied her accused partner, Louis Sullivan. Instead, Lavan forged onward, expressing grave suspicion regarding the circumstances of Ila's birth. Sarah Collins professed to have married in Tasmania in 1897, and been widowed in 1898, six months after Ila's birth in Melbourne. Yet the birth certificate tendered as 'Exhibit A' to prove Ila's age had a blank space where the father's name should have appeared.

The unfortunate marital history created additional problems, since Sarah Collins had sworn to be a widow when she made application for her hotel licence in Cannington in 1906. This, proclaimed Lavan, amounted to perjury. That it was none other than Louis Sullivan who ultimately became the main beneficiary of Sarah Collins's hotel licence perturbed him not a whit. The final coup de grace was Lavan's charge that Sarah Collins was a 'drunkard'. Louis Sullivan had clearly planned to rely upon alcohol to discredit his de facto partner. Right after Sarah

Collins confronted him at the hotel with accusations of sexual assault, Sullivan had tried to convince Ila's mother to 'have some whisky'. When she refused, he tried to ply her with champagne. When he went down to see Mrs Reed at Armadale, he tried to convince the older woman that Sarah Collins had been drinking when she first complained to Mrs Reed about the sexual attack. He also tried to badger his employee, Herbert Carrington, into testifying that Mrs Collins was 'the worse for drink' when she lodged her complaint. He repeatedly asked Constable Brodie whether Mrs Collins 'was sober' when she arrived at the police station, insisting that she had been 'drunk as a fool' when she left the hotel. Defence counsel Lavan drew all of this to the attention of the court during the trial. That neither Reed, Carrington, nor Brodie would attest at trial that Sarah Collins was drunk was immaterial to Lavan. He wanted to make the accusation, conscious that it would stick easily to an unmarried woman who was licensed to operate a public house. The fact that the trial also heard evidence that Louis Sullivan was in the habit of partaking of alcoholic beverages went unremarked. During the course of his testimony, Louis Sullivan was apparently not questioned about his marital status, hotel licence or drinking habits. The double standard seems, in retrospect, to be obvious.³⁸ The inquiry was designed to focus differently upon Sarah Collins and Louis Sullivan. The identical evidence that implicated both in non-marital sex, false declarations to obtain hotel licences, and a reputation for the consumption of alcohol was designed to destroy the woman's credibility, not the man's.

THE APPEAL: ROUND TWO

Louis Sullivan's vow to commence appellate proceedings came to fruition before the full bench of the Supreme Court of Western Australia on 18 June 1913. The presiding judges, Parker CJ, Burnside J and Rooth J, were both startled and chagrined to discover at the opening of argument that Louis Sullivan had discharged his legal counsel. Whether the decision was taken as a matter of cost,

38. J Bavin-Mizzi *supra* n 8, 63-64 has found similar evidence of a double standard regarding alcohol in her analysis of cases from Western Australia and Victoria between 1880 and 1900: 'When defendants had been drinking, their counsel sought and were sometimes granted mercy because they were drunk. When a sexual assault complainant had been drinking, on the other hand, she was held to be more, rather than less, culpable for whatever then transpired.' For a thorough analysis of the status of women working in licensed hotel and bar premises: see D Kirkby *Barmaids: A History of Women's Work in Pubs* (Cambridge: CUP, 1997) 39. Kirkby notes that the operation of hotels was becoming a 'fairly respectable profession for mainly middle-class women' by the turn of the 20th century, but she cites S Hunt *Spinifex and Hessian: Women in North Western Australia 1860-1900* (Perth: UWA Press, 1988) 56 as noting that it was a 'constant battle' to keep licensed hotels distinguished in reputation from bawdy gambling houses and brothels.

or as a result of some falling out with his lawyer, was never explained.³⁹ The *West Australian* registered some amusement over the scene:⁴⁰

The somewhat unusual spectacle of a layman conducting his own case was afforded yesterday...when a middle-aged, well-dressed man named Louis Sullivan appealed for a rehearing of [his trial and conviction]. The appellant, who was attended by a warder from the gaol, was equipped with a sheaf of notes and legal documents, and upon the bar table ready to hand was a line of law reports, which in number were quite double those with which Crown Prosecutor Frank Parker had supplied himself.

Flush with precedents, Sullivan outlined multiple grounds of appeal.⁴¹ He argued that certain evidence had been 'wrongly admitted', while other evidence was 'wrongly rejected'. He argued that the trial judge had misdirected the jury during his summing up of the evidence. In particular, he stated that the judge should have advised the jurors that they must regard Sarah Collins's evidence 'with caution'. He argued that the verdict was against the weight of the evidence. He argued that the sentence was excessive. Most emphatically, he argued that there was no corroboration in law. While Sarah Collins' testimony might meet the test of legal corroboration in theory, in fact it was simply useless. First, she could not corroborate her daughter's story because she was simply not a credible witness. Secondly, her story was factually at odds with Ila Collins's testimony in certain critical particulars. Ila had testified that the sexual connection on 25 November occurred during the morning. Her mother had claimed that Ila told her it took place in the afternoon. Then Sarah Collins had testified that her daughter was present when Sullivan made his incriminating admission that he had 'not properly got into' the girl. In contrast, Ila Collins had advised the court that Sullivan persistently denied any sexual contact with her. The inconsistencies between mother's and daughter's stories, argued Sullivan, meant that any potential corroborative value simply vaporised into oblivion.

Lastly, Sullivan launched into a lengthy diatribe against the jury system. 'Juries were not', he insisted, 'infallible'. Jurors were untrained in law, incapable of sifting or weighing evidence, and often wont to return inexplicable verdicts. His argument was long-winded and repetitious, prompting the Chief Justice to remind him that there was no need to give the court a lengthy history of juries.

39. 'Appeal for Liberty' *West Australian* (Perth, 19 Jun 1913) revealed that Sullivan had switched lawyers, having discharged Messrs G Lavan and CR Penny, who had appeared for him during the hearing before the police magistrate. Mr Hearden, who was apparently retained to act in the appeal, was still on the case one week prior to the hearing, but was no longer on the record at the commencement of argument.

40. *West Australian* (Perth, 19 Jun 1913).

41. 'Full Court' *Daily News* (Perth, 18 Jun 1913); 'A Criminal Appeal' *West Australian* (Perth, 27 Jun 1913).

Pressing Sullivan to get to the point was of little effect. According to the *Daily News*, the layman expressed a desire to be allowed to conduct his case 'in his own humble way'. Perhaps hoping to ingratiate himself with the bench, Sullivan asserted that 'juries had outdone their usefulness', and that 'the time was not far distant when a judge, or a bench of justices trained to sift facts, weigh evidence and judge character, would be substituted for the 12 good men and true who had not special qualification for the work'. The story against him was 'pure concoction', he maintained, 'a fairy tale designed to effect his downfall', and upon the examination to which he was prepared to subject it, it would 'crumble to pieces'.

With this, Sullivan began to outline the history of his case 'at considerable length', reiterating again what he characterised as 'serious discrepancies' in the respective testimonies of each witness. At points, Sullivan's lack of legal training caused him to stumble in his argument. The press recounted that the judges 'frequently' had to advise him of his errors. Feisty in his new-found role as advocate, Sullivan often objected to the judges' comments. Eventually angered that the judges were making no written notes of his objections, Sullivan demanded that they put pen to paper and write down his arguments. 'No, certainly not', retorted the Chief Justice. 'We will take no note of your objection. We only take note of anything of substance!'⁴² By late afternoon, the dwindling patience of the judges finally wore thin. Parker CJ advised Sullivan that only his arguments on corroboration were of any assistance to the court, that the rest was 'a waste of time'. The Chief Justice announced rather sharply that the court did not expect to sit there all day listening to dissertations upon the law from the appellant. He supposed that Sullivan's object was 'to get in all the papers', but the court did not usually have its time taken up with 'rubbish of that sort'. The judge and the prisoner had a rather pointed exchange over how much longer the defence arguments were intended to take, and then adjourned for the day.⁴³

The appeal was held over for a week, since Rooth J was scheduled to travel on circuit to the goldfields. When the hearing resumed on 26 July, the Chief Justice seemed intent on avoiding a second day like the first. He announced that there was only one issue the court desired to discuss, and that was the matter of corroboration. Directing his questions to Crown Prosecutor Parker alone, he asked what corroboration the Crown relied upon, and whether it was 'reasonable for the jury to believe the evidence of corroboration'. Reminding the court that the Crown relied entirely on the evidence of Sarah Collins, Parker conceded that the evidence was 'conflicting', even 'contradictory on several important points'. However, he stuck by his view that, on the whole, Sarah Collins had backed up her daughter's story in

42. 'Full Court' *Daily News* (Perth, 18 Jun 1913); 'Appeal for Liberty' *West Australian* (Perth, 19 Jun 1913).

43. *Ibid.*

two critical ways. Sarah Collins was able to tell the court that Ila had described the sexual assault to her mother, and that she was able to recount a self-incriminating admission by the accused. This constituted corroboration at law, and it was within the province of the jury to give it credence. 'If evidence was properly placed before the jury', Parker continued, 'there could be no appeal on facts. The court was not justified in interfering even if they thought the verdict was unsatisfactory, so long as the evidence was rightly given'.⁴⁴

Appellate courts typically did not overrule factual decisions rendered by juries. Traditionally, there was only limited jurisdiction in a court of criminal appeal to strike down jury verdicts if they were 'erroneous in point of law'. However, as Burnside J reminded prosecutor Parker, the jurisdiction of the Full Court in Western Australia was somewhat larger, authorising the appellate judges to intervene whenever they believed that the verdict of the jury was 'unreasonable'.⁴⁵ In order to ascertain what was reasonable, Burnside J advised, 'the judges should exercise their view as reasonable men'.

The essential point came down to corroboration. Burnside J was at pains to articulate the long-standing rationale behind the evidentiary barrier to conviction: 'The policy of the law from time immemorial has been to require that in cases of offences against women and female children the evidence of the prosecutrix should receive some corroboration'. Paraphrasing the indomitable Sir Matthew Hale, he went on: 'It was commonly put before juries in criminal cases that it was a charge very easily made and most difficult to disprove, and the wisdom of the legislators has in the statute under review enunciated that policy, namely, that the prisoner cannot be convicted merely upon the testimony of one witness'.⁴⁶

Parker CJ was equally quick to emphasise the importance of corroboration, taking care to support the statutory underpinning of the doctrine.⁴⁷

44. 'Court of Criminal Appeal' *Daily News* (Perth, 26 Jun 1913).

45. The jurisdiction for criminal appeals was set out in the Criminal Code Amendment Act 1911 (WA) s 669: 'The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the applicant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice.' The Criminal Code (WA) 1913 s 689 retains the same standard today.

46. *Sullivan* supra n 1, Burnside J 29. For press coverage of the appellate ruling: see 'A Criminal Appeal' *West Australian* (Perth, 27 Jun 1913); 'Court of Criminal Appeal' *Daily News* (Perth, 26 Jun 1913).

47. *Sullivan* supra n 1, Parker CJ 24-25. Parker CJ's perspectives on women appear to have been somewhat inconsistent. Although he accepted the mythology that female victims of sexual assault lacked credibility, in 1881 as a member of the WA Legislative Council, he also sponsored a married women's property Bill. The Bill became law in 1892, and was often described as 'Parker's Act.' See 'Parker, Sir Stephen Henry (1846-1927)' *Australian Dictionary of Biography* (Melbourne: MUP, 1991) vol 11, 138.

Her [Ila Collins's] story may be quite true, and in all probability the jury, having seen her in the box and observed the mode in which she answered the questions and her demeanour when cross-examined, may have rightly come to the conclusion that they entirely believed her story, but it is necessary that there should be corroboration as defined by the statute.... Now I venture to think that the jury did believe the girl — it may be that they rightly believed her — and that they entirely overlooked the question that they must find corroboration in the manner defined in the Code, before they could convict the accused.

Here was a blatant recognition that the legal rules requiring corroboration ought properly to override the conviction of guilty men. Even where the complainant was 'entirely believable', even when a jury 'rightly' decided that she was telling the truth, even where the complainant gave evidence in a completely honest and compelling manner throughout her testimony-in-chief and cross-examination, the verdict must go to the accused unless legal corroboration was available. In the tug-of-war between the need to protect young girls from sexual abuse and the need to protect men from female blackmail, it was incontestably the men who came out on top. Was the outcome inevitable, something which accorded only too well with the jurists' perspective as 'reasonable men'?

Certainly the appellate judges seemed very eager to categorise Sarah Collins's testimony as entirely lacking in corroborative import. First, they pulled apart the testimony regarding Ila Collins's complaint to her mother. Honing in on the discrepancies between mother and daughter's evidence, Burnside J tackled the inconsistencies regarding the timing of the assault:⁴⁸

The child, the prosecutrix, alleges that the attempt[ed sexual assault] was committed in the morning. There is no corroboration of that. On the contrary, the corroborating testimony denies it, and says it was committed in the afternoon.... For my part I cannot see how that can be considered corroboration, which does not corroborate, but denies.

Next he drew attention to Louis Sullivan's incriminating admission to Sarah Collins. He admitted that this was quite damning, as well as potentially capable of meeting the test for corroboration. Yet the admission was not consistent with Ila Collins's testimony that Louis Sullivan had consistently denied any responsibility for the sexual assaults:⁴⁹

Now, if he made such a statement, and if such a statement were corroborated anywhere, it would be material for the jury to consider, and obviously if they believed it there would be no objection to their finding a verdict. But ... [s]uch a

48. *Sullivan* supra n 1, Burnside J 30-31.

49. *Ibid*, 30, 31. Burnside J also took pains to point out another inconsistency in Ila Collins's testimony. 'She says in one place that the prisoner pulled down the front of her combinations,' he emphasised, 'and in another place that the combinations were fastened up the back'.

statement ... is not consistent with a denial of the offence. The prosecutrix says he denied the offence from start to finish, and never admitted it. The woman [Sarah Collins] says he admitted it in her presence.... Again, I have some difficulty in knowing where is the corroboration. Neither witness states that which the other states. On the contrary they contradict each other.... The jury may believe either, but in the condition of the law as it stands at present it is not sufficient that they should believe either; they must believe both.

None of the appellate judges gave any thought to the fact that these were minor inconsistencies. They were well aware that evidence of multiple sexual assaults stretching back many months had been adduced in this case. The jurors had presumably concluded that the particulars of one assault might have been slightly mixed up with another in Ila Collins's and Sarah Collins's testimony. This had not dissuaded them from convicting.⁵⁰ Yet the appellate court seemed incapable of recognising how intensely difficult it was to reduce the details of multiple, repetitive sexual assaults to the succinct narrative required in the courtroom. Nor had they really thought about Ila Collins's claim that Sullivan persistently denied his responsibility. From her vantage point, he had.

Parker CJ did not stop with the inconsistencies. He was prepared to hold that the jury had been patently unreasonable in believing any of Sarah Collins's evidence. It was apparent that defence counsel Lavan's efforts in cross-examination resonated deeply with the appeal judges in ways that had ultimately failed to sway the jury. The Chief Justice rattled off the many reasons why no jury should ever have found Ila's mother credible at all. She had falsely sworn to be a widow in order to obtain a hotel licence. She was a woman 'who had been living with the accused for years as his mistress'. She was 'a drunkard'. She had talked of trying to procure a miscarriage for her daughter. What more could one possibly imagine to totally destroy the reputation and credibility of a woman?⁵¹ In one fell swoop, the last remaining hope for corroborative evidence was shattered. Unlike the rest

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50. The 'carnal knowledge' offence carried a statutory limitation period of a mere three months. Western Australian legislators had deliberately hedged the offence with this unusual protection, designed to protect men from the 'stale' complaints of scheming women. This meant that although Ila Collins had testified concerning forcible sexual advances by Louis Sullivan for a full 11 months, much of this was beyond the reach of criminal sanction. The specific indictment was drafted to allege one incident of sexual assault, the 25 November episode that Ila recalled so distinctly.
51. *Sullivan* supra n 1, Parker CJ 25. J Bavin-Mizzi 'Understandings of Justice: Australian Rape and Carnal Knowledge Cases, 1867-1924' in Kirkby supra n 8, 19 has found that this tactic was commonplace during Australian rape trials. She notes that character denigration — attacks on marital status and allegations of alcohol consumption — was often used to demolish the credibility of rape victims. In cases involving young complainants, defence counsel often resorted to attacking the reputation of their mothers, intimating that 'poor maternal guidance, if not heredity itself, explained how young girls could become sexually precocious': *ibid* 25.

of the affirming evidence adduced at the trial, the judges did not dispute that Sarah Collins's testimony potentially fell within the legal parameters of the doctrine of corroboration. Instead they chucked it out as incredible.

In conclusion, the appellate court confidently applauded the 'wisdom of the policy of the Legislature in requiring corroboration' in trials such as these. 'It is not sufficient that she should be believed', the court ruled, 'although the jury may have believed her'. In this case, the jurors had apparently satisfied themselves 'of the truth of the girl's story' and 'determined to convict' the accused. But in their haste to see justice done, they had ignored the requirement for corroboration. Without the necessary corroboration, it was 'impossible to say' that the verdict was one which the jury could have reached 'properly'. The judges unanimously quashed Louis Sullivan's conviction, and entered a verdict of acquittal.⁵²

STRANGLING THE DOCTRINE OF CORROBORATION

The Sullivan case provides a useful vehicle with which to scrutinise the evolution of the legal doctrine of corroboration in Australia. The witnesses provided a plethora of evidence that confirmed and strengthened the testimony of the complainant. Then the lawyers winnowed through the richness of their testimony. Opposing counsel both agreed to throw out the medical evidence, the evidence of mere opportunity, evidence considered too tangential, and evidence of the accused's implied admission to a neighbouring publican, as unfit to qualify as corroboration. The appellate judges dismissed the evidence of Ila Collins's complaint to her mother, and the evidence of the accused's implied admission to his de facto spouse, because these differed in minute detail from particulars given in the testimony of the complainant. The judges also rejected the latter two pieces of evidence because they came out of the mouth of a woman deemed to be an 'incredible' witness. The saga of this litigation represents a striking illustration of the way in which the theoretically broad notion of corroboration was seized and strangled into virtual nothingness.

Three years later, the *Baskerville* decision of the English Court of Appeal would tighten the formula still further. The court equated the definition of corroboration at common law and under statute. In both situations, corroboration would now require 'independent testimony which affects the accused by connecting or tending to connect him with the crime'. The *Baskerville* decision would come to stand for the rule that corroboration must always emanate from a source other than the complainant.⁵³ This would place off-limits the details of any complaints made by sexual assault victims to third parties. In addition, the courts would

52. *Sullivan* supra n 1, Parker CJ 25-26, Burnside J 30.

53. *Supra* n 7; JA Gobbo (Aust ed) *Cross on Evidence* (Sydney: Butterworths, 1970) 221.

continue to confirm the rule that evidence of ‘mere opportunity, without more’ could never constitute corroboration.⁵⁴ As the 1970 Australian edition of Rupert Cross’s text on *Evidence* would sanctimoniously counsel, these rules were entirely understandable because of the ‘hysterical or vindictive motives’ that drove women to ‘concoct’ charges of sexual assault.⁵⁵ The evolving rules would pull the noose around the idea of corroboration more tightly than it was tied in the *Sullivan* case. But the process was well underway in 1913 when Louis Sullivan was discharged and returned to his community, while Ila and Sarah Collins were branded legally incredible.

Recent legislative initiatives have started to dismantle formal corroboration requirements. Amendments to the *Evidence Act* of Western Australia passed in 1985 stipulated that judges were no longer required ‘by any rule of law or practice’ to give a corroboration warning to the jury in sexual assault trials. However, judges were entitled to issue such cautions if they were ‘satisfied’ that such a warning was ‘justified in the circumstances’.⁵⁶ The 1989 High Court ruling in *R v*

54. *R v Abernethy* (1916) 18 WAR 108; *Brown v Courtney* (1917) 19 WAR 22; *R v Young* [1923] SASR 35; *R v Eade* (1924) 34 CLR 154; Gobbo *ibid*, 221-222. The case of *R v Jimmie Lee* (1916) 10 QJPR 137 seems anomalous, as the court found corroboration in the fact that a witness had seen the accused and the girl go into the upper storey of a house, that the door closed, and that the two later came out of the house. The slight insinuation of ‘indecentry’ would seem insufficient to take the evidence beyond ‘mere opportunity,’ but the ruling may be explained by racialism. The accused was Chinese and the testimony indicated that he also used to send other Chinese men to have sex with the (white) girl for a fee. Without giving reasons, the court upheld the conviction of Lee for carnal knowledge of a girl under the age of 17.
55. Gobbo *supra* n 53, 217. But see also A Ligertwood ‘Failure to Warn in Criminal Cases where Corroboration May be Required’ (1976) 50 ALJ 158-66, who notes that Australian courts have not universally endorsed the English rulings that a failure to warn constitutes an error of law, preferring to characterise it as a ‘matter of prudence.’
56. The first provision, enacted as s 36BE of the Evidence Act 1906 (WA) by Act No 74 of 1985 s 15, applied solely to sexual assault offences. Evidence Act 1906 (WA) s 50, enacted by Act No 70 of 1988 s 42, was expanded to apply to all indictable offences, and provided:
- (1) In this section ‘corroboration warning’ in relation to a trial means a warning to the effect that it is unsafe to convict the person who is being tried on the uncorroborated evidence of one witness.
 - (2) On the trial of a person on indictment for an offence —
 - (a) the judge is not required by any rule of law or practice to give a corroboration warning to the jury in relation to any offence of which the person is liable to be convicted on the indictment; and
 - (b) the judge shall not give a corroboration warning to the jury unless the judge is satisfied that such a warning is justified in the circumstances.
- See also s 106D, forbidding judges from warning juries that it would be ‘unsafe to convict on the uncorroborated evidence of [a child under the age of 12] because children are classified by the law as unreliable witnesses.’ For discussion of the situation in other Code jurisdictions, see Heydon *supra* n 4 359; Kenny *supra* n 5, 238-239; EJ Edwards, RW Harding & IG Campbell *The Criminal Codes: Commentary and Materials* 4th edn (Sydney: Law Book Co, 1992) 553.

*Longman*⁵⁷ determined that the statutory amendment dispensed only with the obligation to warn juries of the 'general danger' of acting on the uncorroborated testimony of the victims of sexual offences 'as a class'. It did not affect the need to warn juries 'whenever necessary' to avoid 'a perceptible risk of miscarriage of justice arising from the particular circumstances of the case'.⁵⁸ Australian judges continue to refer to 'aspects of human nature and behaviour' such as 'sexual appetite, certain motives for making false complaints, and proneness to certain types of fantasies, which have a peculiar bearing on sexual cases, and which may be important in certain factual situations'.⁵⁹ Contemporary texts continue to cite *Baskerville* as authoritative.⁶⁰ Current cases continue to insist that corroborative evidence be 'independent', that it demonstrate that the accused was 'incriminated' or 'implicated in the commission of the offence', that evidence of 'mere opportunity' without more cannot amount to corroboration.⁶¹

Deeply suspicious of the testimony of girls and women, the Australian legal authorities have traditionally been loath to receive their evidence at face value, or to leave it subject to the ordinary tests for veracity. Without any perception of embarrassment, hesitation or remorse, early 20th century legislators and judges wielded the doctrine of corroboration as a club to assail women and girls who dared to seek criminal sanction against men accused of sexual offences. As the legal authorities must have known, sexual assaults were crimes that were almost entirely perpetrated in private, under circumstances of concealment and away from the prying eyes of witnesses. Fashioning corroboration as the sine qua non for conviction was calculated to ensure that the testimony of guilty men would receive more credence on the scales of justice than the testimony of the female victims of sexual assault. The promulgation of a restrictive and stilted definition of corroboration tilted the balance still further. Beyond debate, it made a mockery of the principles of even-handed justice and gender parity. We allow the remnants of such legal doctrines to continue to infect modern-day legal analysis at our peril.

57. *Supra* n 7.

58. *Ibid.* Heydon *supra* n 4, 359 indicates that two statutory models have been adopted in Australia. The first provides that judges are not *required* to give a warning on corroboration; the second *forbids* judges from doing so. Heydon then concludes that 'the practical differences between the two models may not be great' since 'neither model prevents the court giving other types of warning.'

59. *Puhuja* (1987) 49 SASR 191, 199.

60. P Gillies *supra* n 4, 604; Heydon *supra* n 4, 366.

61. See eg *M* [1995] 1 Qd R 213; *Roissetter* [1984] 1 Qd R 477; *Sailor* [1994] 2 Qd R 342; *Wilson* [1985] WAR 279; *Kau Wong* [1983] WAR 80; *Berrill* [1982] Qd R 508; *Nanette* (1981) 3 A Crim R 268; *Freeman* [1980] VR 1; *Beaver* (1979) 1 A Crim R 50; *Duke* (1979) 1 A Crim R 39; *Yates* [1970] SASR 302; *Flannery* [1969] VR 586. See also Gillies *supra* n 4, 611-619; Heydon *supra* n 4, 366; Kenny *supra* n 5, 238-239.