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The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence

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The relevance of delayed disclosure to a complainant's credibility in sexual assault cases remains a problematic and confusing area in the law of evidence. Although section 275 of the Criminal Code abrogates the rules regarding recent complaint, courts have been inconsistent in their interpretation and application of the provision since its enactment in 1983. The doctrine of recent complaint evolved from the assumption that a woman who is sexually assaulted will disclose her violation at the first reasonable opportunity. In R. v. D.D., the Supreme Court of Canada ruled that it is impermissible to draw an adverse inference as to a complainant's credibility based solely on delayed disclosure. Despite this decision and section 275, many courts still rely on the assumption that real victims of sexual violence will tell someone promptly.

In examining D.D.'s treatment in subsequent case law, the author finds that in many sexual assault cases the starting presumption is still that victims who fail to complain promptly are less credible. The author explains that the persistence of the "hue and cry" myth results from engrained social assumptions about how sexual assault victims behave. Triers of fact continue to resort to these problematic assumptions to fill gaps in reasoning regarding circumstances where they have no firsthand knowledge or experience. The author argues that it may not be enough to identify a particular social assumption as problematic.

In conclusion, the author makes two recommendations. First, trial judges should circumscribe defence counsel cross-examination on delayed disclosure if the defence has offered no evidence or explanation suggesting that the delay is relevant for some purpose other than the hue and cry assumption. Second, the Supreme Court of Canada ought to revisit the conclusion in D.D. that expert evidence on the irrelevance of delayed disclosure, standing alone, is not necessary.

Introduction

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When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress . . . ¹

Introduction

“So let it be written, so let it be done” may have worked for Cecil B. De Mille’s Pharaoh in ancient Egypt, but there is less to suggest that it works in the relationship between evidence law reform and judicial assumptions, let alone broader social assumptions, regarding issues of sexual violence. One evidence law issue that frequently arises in sexual assault cases—the relevance of a delayed disclosure of sexual violation—exemplifies this point.

The relevance of delayed disclosure in trials involving charges of sexual offence continues to be an area of confusion and inconsistency in the law of evidence. No doubt the vague and minimalistic language of section 275—the 1983 addition to the *Criminal Code* which abrogates the rules on recent complaint—has contributed to the lack of clarity in this area of the law.² However, its lack of guidance is likely not the sole cause of the current inconsistencies in the case law on the relevance of the

1. *R v DD*, [2000] 2 SCR 275 at para 60, 148 CCC (3d) 41 [*DD* cited to SCR]. Justice Binnie quotes Henrici de Bracton, a thirteenth-century scholar, cited in *Wigmore on Evidence*, 2d ed (Boston: Little Brown, 1923) vol 3 at 764.

2. *Criminal Code*, RSC 1985, c C-46, s 275. (“[t]he rules relating to evidence of recent complaint are hereby abrogated . . .”).

timing, content and circumstances of a complainant's disclosure of sexual violation. Part of the difficulty may stem from the fact that law reform on this issue was ahead of social reform. The continued, albeit sometimes unintentional, reliance by some courts on the assumption that victims of sexual violation are likely to report the abusive acts promptly, suggests it may not be sufficient simply to identify a particular social assumption as problematic. To use the discourse commonly adopted in the context of sexual assault law, it may not be enough to debunk a particular myth or stereotype. Social assumptions have currency that is difficult to devalue. They help people (including judges, jurors and lawyers) reason about circumstances, relationships, problems and dynamics of which they have no firsthand knowledge or experience. In this way, social assumptions may sometimes be an unavoidable element of judicial reasoning on issues such as the assessment of credibility. In the sexual assault trial context, where so many of the social assumptions at work (oftentimes unexpressed and perhaps even at an unconscious level) are ill-founded, they can be decidedly tenacious.³

To give substantive effect to a law reform initiative such as "the abrogation of the rules of recent complaint", it may not be enough to challenge, even explicitly, the validity of a particular assumption about sexual violence. Admonishing a judge or jury not to reason based on an engrained social assumption, without providing new information, may create gaps in reasoning. Unsurprisingly, such gaps often get filled back in with the same old problematic assumption. A review of sexual assault cases involving assessments of the complainant's credibility suggests that, in some cases adverse inferences as to complainant credibility continue to be driven at least in part by the assumption that "real victims" of sexual assault will tell someone promptly. Moreover, in many cases in which a complainant *is* found to be credible, the starting position nonetheless remains a (rebuttable) presumption that a delay in disclosure is a discrediting factor.

3. For a well supported account of how this type of reasoning or decision-making pertains to the sexual assault context, see Jennifer Temkin & Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008).

Part I of this paper provides an overview of the doctrine of recent complaint. Part II discusses the abrogation of that doctrine, the continued reliance on delayed disclosure in subsequent case law and the interpretation of the Supreme Court of Canada's landmark ruling in *R. v. D.D.* Problematic applications of the reasoning in *D.D.* are explored in Part III. Part IV considers the challenges of overcoming engrained social assumptions about victims of sexual assault. The paper concludes by arguing that legal commentators, law reformers and judges must recognize and respond to reasoning that continues to rely on these outdated assumptions.

I. The Doctrine of Recent Complaint

Until 1983, in a prosecution for a sexual offence, evidence that the complainant told someone of the violation at the first reasonable opportunity was admissible on direct examination by the Crown in order to bolster the victim's credibility as a witness. Typically, evidence of a witness' out-of-court statement, introduced to bolster credibility by establishing consistency between it and the witness' testimony in court, is inadmissible according to the common law rule against self-serving statements (also referred to as the rule against narrative). The Crown's ability to lead evidence of a "recent complaint" was an exception to this rule.⁴

Under this this exception, both the details of the complaint (including the fact, time and circumstances of it) and the very words spoken were admissible.⁵ This evidence could be relied upon to show consistency between the complainant's out-of-court statement and her testimony in

4. The recent complaint exception was one of a number of exceptions to the rule excluding evidence of prior consistent statements developed under the common law of evidence. The others included: i) evidence of an eyewitness's prior identification of an accused; ii) evidence to rehabilitate the credibility of a witness who is suggested to have had a motive to fabricate the allegation; and iii) out-of-court statements forming part of the *res gestae* (sometimes referred to as the narrative exception to the rule against narrative). See "Second Report of the Federal/Provincial Task Force on Uniform Rules of Evidence" (Toronto: Carswell, 1982) at 289 ["Second Report"].

5. *Thomas v R*, [1952] 2 SCR 344, 15 CR 1.

court, in an effort to rebut the adverse inference a trier of fact would otherwise draw regarding her credibility. To be admissible under this exception, the out-of-court words had to be capable of constituting a complaint, the complaint had to be recent (that is, made at first opportunity) and it must have been made spontaneously rather than elicited or prompted.⁶

There were two interrelated assumptions that underpinned the creation and presumed logic of the rule permitting the Crown to lead evidence of a “recent complaint”.⁷ The first was that women are not particularly credible witnesses and tend to fabricate claims of rape.⁸ The second was that a woman who is sexually violated will, at first opportunity, raise a hue and cry.⁹ It was a “strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact”.¹⁰ While arguably, the social and judicial assumption that women are not credible

6. *Kribs v R*, [1960] SCR 400, 33 CR 57 [*Kribs*]; *Timm v R*, [1981] 2 SCR 315, 28 CR (3d) 133. For the first several centuries of common law jurisprudence, the recent complaint exception to the general rule prohibiting the Crown from leading evidence of prior consistent statements to bolster a witness’s credibility applied only to female complainants. It was only in the mid-twentieth century that the exception was extended to all sexual assault trials and all complainants. See Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis, 2009) citing *R v Lebrun*, [1951] OR 387, 100 CCC 16.

7. *Kribs*, *supra* note 6 at 62:

“The principle is one of necessity. It is founded on factual presumptions which . . . attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon first reasonable opportunity, and the other, consequential thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story”.

8. The assumption that women lie about rape informed the early development of almost all areas of evidence law related to sexual violence. See Christine Boyle, *Sexual Assault*, (Toronto: Carswell Company, 1984) [Boyle].

9. *DD*, *supra* note 1.

10. *Ibid* at para 15 citing *R v Lillyman*, [1896] 2 QB 167 at 170. See D Fletcher Dawson, “The Abrogation of Recent Complaint: Where Do We Stand Now?” (1984) 27 Crim LQ 59 [Dawson]. While a lack of recent complaint was not a legal bar to prosecution, it did reflect adversely on the complainant. Given the assumption that women tend to lie about rape, and the fact that credibility is the determining factor in most sexual assault trials, a lack of recent complaint presumably did serve as a de facto bar to prosecution.

witnesses has arguably been successfully challenged,¹¹ the assumption that real victims of sexual aggression will raise a hue and cry frequently continues to reveal itself.

Both assumptions driving the recent complaint exception were problematic, but for different reasons. The first assumption, characterizing female complainants as unreliable and dishonest, was problematic for several reasons, not the least of which was its blatant sex inequality. It was only complainants of sexual offences, and not complainants of other crimes, who were presumptively lying. Initially, this meant a formal inequality, as it applied solely to rape victims, who by legal definition could only be women. In the twentieth century, the doctrine of recent complaint was extended to include all victims of sexual offences. However, a substantive inequality persisted because the overwhelming majority of complainants in sexual assault cases (at least in terms of adult complainants) are female.

The second assumption—the hue and cry assumption—was problematic not because of a formal inequality in the treatment of male and female victims of crime, but because it was premised on an erroneous belief about how victims of sexual assault behave. The hue and cry assumption underpinning the recent complaint exception was premised on the erroneous belief that the “natural” time for a woman to speak out about her sexual violation is at the first opportunity.¹²

This belief was consistent with the general assumption that silence on the part of witnesses, when it would be natural for them to speak, can give rise to an adverse inference as to their credibility.¹³ Evidence led by the defence suggesting that a complainant (of any crime) failed to complain when it would have been natural for him or her to have done so, can be taken to raise an allegation of recent fabrication—that is, an allegation that

11. There are certainly compelling arguments that challenge the suggestion that women, or certain “types of women”, are no longer presumed dishonest witnesses in sexual assault trials. See e.g. Lise Gotell, “The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law” (2002) 40:3 *Osgoode Hall LJ* 251.

12. *Kribs*, *supra* note 6.

13. John Sopinka, Sidney N Lederman & Alan W Bryant, *The Law of Evidence in Canada*, 2d ed (Toronto: Butterworths, 1999).

a complainant concocted the story at some point subsequent to the date of the alleged incident to which he or she was testifying.¹⁴ This gives the Crown the opportunity to introduce evidence of a prior consistent statement in order to rebut such an allegation.¹⁵

The assumption that the “natural” time for a woman to speak out about her sexual violation will be at first opportunity is not simply questionable; it may actually be illogical. The social stigma ascribed to sexual assault victims, the general social discouragement to talk about anything to do with sex, the shame experienced by those subjected to non-consensual sexual interactions, and the likelihood of victim self-blame and fear of one’s abuser all serve as disincentives to reporting. These circumstances are aggravated by the process of re-victimization that many complainants experience at the hands of a justice system not equipped to accommodate the incommensurate interests of complainants and accused. Why would anyone assume that the “natural time” for a victim of sexual violation to disclose is at first opportunity? Indeed, a more logical assumption is that these and other disincentives make it more likely that people who are sexually violated will avoid, or at the very least delay, telling anyone.

The Supreme Court of Canada has in recent years stated that it is no longer permissible to rely on the assumption that the natural time for a sexual assault victim to complain is promptly.¹⁶ In fact, the court has said that the timing of disclosure is, alone, of no significance to a complainant’s credibility.¹⁷ Despite this, as will be discussed below, courts (including the Supreme Court) have not consistently reflected the understanding that a failure to complain promptly, taken alone, indicates nothing about a complainant’s credibility.

14. *Ibid.*

15. For sexual assault complainants, then, the issue of fabrication was presumed, regardless of the defence’s conduct in the case. This was unlike other crimes, where the issue arose only if implied directly or indirectly by the defence.

16. *R v WR*, [1992] 2 SCR 122, 13 CR (4th) 257 [*WR* cited to SCR].

17. *DD*, *supra* note 1; *WR*, *ibid.* The Court has only been explicit about this in child complainant cases. That said, they have never suggested that the same reasoning would not apply to adult complainants.

II. The Abrogation of the Doctrine of Recent Complaint

In 1983, the *Criminal Code* was amended to add what is now section 275.¹⁸ This provision stipulates that “the rules relating to evidence of recent complaint are hereby abrogated. . . .”¹⁹ The vague and unusual language of section 275 left courts and commentators with several questions regarding the precise intent of the provision.²⁰ Does it mean that a trial judge is now required to warn the jury not to draw an adverse inference from a lack of recent complaint?²¹ Did the provision eliminate only the requirement that the trial judge warn the jury about the risk of giving weight to testimony not supported by evidence of a recent complaint, or did it also eliminate the Crown’s ability to lead evidence of recent complaint during its examination-in-chief? If it did eliminate the Crown’s ability to introduce this evidence before a complainant’s credibility has been attacked, then under what circumstances can the Crown still introduce evidence of out-of-court complaints made by the victim? To what use can these statements be put? Was the provision intended to limit or preclude the defence’s ability to raise a lack of recent complaint in order to discredit the complainant?

18. *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 19.

19. *Supra* note 2.

20. Prior to the adoption of section 246.5 (now section 275) of the *Criminal Code*, abrogation was not a common term in Canadian law. Commentators expressed a great deal of uncertainty as to what abrogation even meant. See Lorenne MG Clark, *The Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality* (Ottawa: Canadian Advisory Council on the Status of Women, 1993); Boyle, *supra* note 8; Dawson, *supra* note 10. A proposed provision in a preceeding bill was more complex and would have answered some of the questions left by the provision ultimately adopted. See Boyle, *supra* note 8 at 151.

21. In *R v TEM*, 187 AR 273, 110 CCC (3d) 179 (CA) at para 9 [*TEM* cited to AR], the Alberta Court of Appeal stated that a judge should warn a jury, in a case where there is little or no evidence of prompt complaint and the Crown so requests, that as a matter of law, one cannot say that a woman who is wronged will always complain at the first opportunity. In *DD*, *supra* note 1, Justice Major concluded that expert evidence on delayed disclosure was unnecessary, because an instruction to the jury not to draw an adverse inference would suffice.

Was the provision intended to preclude the trier of fact from drawing an adverse inference when there is no evidence of a recent complaint?

Some post-amendment feminist commentary argued that the abrogation of the doctrine of recent complaint made the presumptive adverse inference against the complainant impermissible, but left in place the exception to the rule against narrative (permitting the Crown to lead evidence in chief of a recent complaint).²² However, courts have generally assumed that the amendment not only removed the requirement that a judge warn the jury about the danger of believing the complainant in those cases where there was no evidence of recent complaint, but also eliminated the recent complaint exception to the rule against prior consistent statements.²³ This has created uncertainty as to when the Crown may use evidence of a complainant's prior consistent statements.²⁴ The inconsistent manner in which courts have approached this issue—in particular their use of the oddly named narrative exception to the rule against narrative, as well as the rules regarding rebuttal of recent fabrication—is a topic unto itself.²⁵ It is the latter two related questions expressed in the preceding paragraph that lie at the heart of this discussion. Can the defence raise delayed disclosure to discredit the complainant? Can the trier of fact draw an adverse inference from delayed disclosure? While the issues certainly overlap, the focus of this paper is solely on this one aspect of what is generally a complex and muddled area of evidence law: the assessment of complainant credibility in those cases where the complainant delayed disclosure.

22. See Clark, *supra* note 20.

23. *Ibid.*

24. See Lisa Dufraimont, “*R c Dinardo*: Troubling Issues Regarding Prior Consistent Statements” (2008) 57 CR (6th) 76.

25. There is also a concern that the Crown's reliance on admissible evidence of recent complaint to support the complainant's credibility will paradoxically reinforce the very social assumption it is intended to rebut—that victims who complain promptly are more credible. For a discussion, see Kathryn M Stanchi, “The Paradox of the Fresh Complaint Rule” (1996) 37:3 BCL Rev 441.

A. Judicial Approaches to the Relevance of Delayed Disclosure

As a matter of law, can the trier of fact draw an adverse inference based on lack of recent complaint?

In 1992, the Supreme Court of Canada in *R. v. W.R.* found that it was a reversible error to draw an adverse inference as to the victim's credibility where that adverse inference was based on the stereotypical view that victims of sexual aggression are likely to report the violation in a timely manner.²⁶ In *W.R.*, the accused was charged with sexual assault, gross indecency and indecent assault against three young girls. Justice McLachlin (as she then was) overturned the provincial Court of Appeal in part because of its "reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint".²⁷

Despite this Supreme Court decision, in 1995 the Ontario Court of Appeal, in *R. v. O'Connor*, affirmed a line of cases which determined that "it is erroneous to state that a trier of fact is no longer entitled to draw an adverse inference based on an absence of recent complaint".²⁸

Five years later in *R. v. D.D.*, the Supreme Court of Canada, citing *R. v. W.R.* as authority, again determined that it is a reversible error to rely upon "outdated assumptions" about how rape victims act in order to discredit a complainant.²⁹ The issue in *D.D.* was whether to admit expert evidence attesting to the fact that "in diagnosing cases of child sexual abuse, the timing of disclosure, standing alone, signifies nothing. . . . [Disclosure] depends upon the circumstances of the particular victim".³⁰ Justice Major, for the majority, considered this evidence to be so obvious that he "found surprising the suggestion that a Canadian jury or judge alone would be incapable of understanding this simple fact".³¹ He held:

26. *WR*, *supra* note 16 at para 30.

27. *Ibid.*

28. (1995), 25 OR (3d) 19 at para 20, 100 CCC (3d) 285 (CA) [*O'Connor*].

29. *DD*, *supra* note 1 at para 63.

30. *Ibid* at para 59.

31. *Ibid.*

[t]he significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons. . . react to acts of sexual abuse. . . . In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.³²

Two years after *D.D.*, the Ontario Court of Appeal, in *R. v. Talbot*, upheld the admission of expert evidence stating that delayed disclosure, inconsistent disclosure and recants signified nothing about the veracity of a sexual assault complaint.³³ It interpreted *D.D.* to have established that “the reason that delayed disclosure means nothing in and of itself is that, as a matter of law, no adverse inference can be drawn from a complainant's delay in disclosing the allegations”.³⁴ The Court in *Talbot* stated that it is an error of law to draw an adverse inference as to credibility based on stereotypical assumptions about how sexual assault victims behave, and that

because this principle forms a recognized part of Canadian law, one can easily understand why the Supreme Court found that the information offered by the expert in *D.(D.)* should have gone to the jury in the form of an instruction from the trial judge. . . .The jury was not permitted to draw an adverse inference from this delay as a matter of law and the trial judge should have instructed them accordingly.³⁵

Recall, the majority in *D.D.* determined that it is impermissible to draw an adverse inference based on delayed disclosure, that delayed disclosure *standing alone* can never give rise to an adverse inference and that it is an

32. *Ibid* at paras 63, 65.

33. (2002), 1 CR (6th) 396, 161 CCC (3d) 256 (Ont CA) [*Talbot*].

34. *Ibid* at para 39. *Talbot* is an interesting case. The Ontario Court of Appeal, in response to Justice Major's rejection of the need for expert testimony in child sexual abuse cases involving delayed disclosure, may have distorted the analytical structure of the *D.D.* finding. The court in *Talbot* concluded that the reason why expert evidence was not necessary in *D.D.* was because of a legal principle, rather than the behaviour of child sexual abuse victims as a matter of common sense. This allowed the court to admit expert evidence on the related matter of recanted allegations, which, unlike delayed disclosure, was not the subject matter of a legal principle. See *infra* note 38 for further discussion.

35. *Talbot*, *supra* note 33 at para 40.

error of law to rely upon the stereotype that sexual assault victims will raise a hue and cry. The majority also noted that timing is one circumstance to consider in the factual mosaic of a particular case. Is it possible to reconcile the reasoning in *D.D.* with cases such as *O'Connor*, where the Ontario Court of Appeal determined that it is erroneous to conclude that a trier of fact is not permitted to draw an adverse inference as to credibility based on delayed disclosure? Can *O'Connor* be reconciled with *Talbot* (in which the same court stated that, as a matter of law, no adverse inference can be drawn from a complainant's delay in disclosing the allegations)?

B. Interpreting R. v. D.D.: Permissible and Impermissible Reasoning

Certainly it is difficult to reconcile the reasoning in *O'Connor* with that in *Talbot*, at least on the face of the decisions. However, depending upon the interpretation of *D.D.* that is adopted, it may be possible to reconcile *O'Connor* and *Talbot* with *D.D.* Regardless, given that *D.D.* is the leading precedent on the issue of delayed disclosure, it is necessary to understand Justice Major's assertion that it is an error of law to draw an adverse inference as to credibility based solely on the outdated stereotype that victims of sexual assault will raise a hue and cry. The key to an interpretation of *D.D.* that does not render it meaningless on the issue of delayed disclosure, and the key to reconciling these seemingly inconsistent lower court decisions, turns on what Justice Major meant by the term "standing alone".³⁶

In *R. v. D.D.*, the Court established that an adverse inference as to a complainant's credibility in a sexual assault case cannot be drawn based solely on delayed disclosure. This should mean that it is never permissible to rely on the assumption that real victims of sexual violation are likely to report in a timely fashion to create an inferential link between the delay and the assessment of credibility. Justice Major's decision should be understood to have established that delay will only be a relevant discrediting factor where "the factual mosaic"³⁷ of the particular case gives

36. *DD*, *supra* note 1 at para 63.

37. *Ibid.*

rise to an adverse inference which is not underpinned by the assumption that the natural time to report a sexual violation is promptly. In the absence of some other factor to suggest that the delay reveals something about the complainant's credibility, it is not logically possible to draw an adverse inference as to credibility that is not premised on the impermissible assumption that victims of sexual violence are likely to report promptly. In other words, a lack of recent complaint should not negatively affect the credibility of the complainant where the inference is based on the social assumption that it is "natural" not to delay disclosure. This means it will only be acceptable to draw an adverse inference based on delay in disclosure in those cases where there is some other reason why the delay would reflect on the complainant's credibility.³⁸

Think of it this way: inadequate evidence, or lack of evidence, to answer the question "Why didn't you tell sooner?" should only give rise to an adverse inference as to credibility where there is some reason, some aspect of the factual mosaic, which would lead one to assume that *this* complainant, in *these* circumstances, would have told someone sooner.

38. This interpretation would allow one to reconcile the reasoning in both *O'Connor* and *Talbot* with *D.D.* by suggesting neither is wrong. Instead, neither are sufficiently specific or nuanced in their language. *O'Connor* correctly stated that it is erroneous to conclude that an adverse inference can never be based on delayed disclosure. According to *D.D.*, an adverse inference can be drawn where some other aspect of the factual mosaic makes the delay relevant. *Talbot* stated that as a matter of law, an adverse inference cannot be drawn based on delayed disclosure. This is also true. According to *D.D.*, an adverse inference based on delay cannot be drawn. Based on the timing of the disclosure there must be something more, something other than delay alone to make an adverse inference as to credibility. That said, there is another reading of *Talbot* that should be noted. At issue in *Talbot* was the admission of expert evidence not just on delay, but also on other factors regarding disclosure. The Court of Appeal relied on the assertion that it is an error of law to draw an adverse inference based on delay and that this was why the expert evidence was considered unnecessary in *D.D.* From this, it concluded that expert evidence regarding recants and inconsistent disclosure was necessary because, unlike with delay, there was no legal bar against drawing an adverse inference based on these behaviours. In *D.D.*, the Supreme Court determined that the expert opinion was not necessary because it was common sense not to read anything into the timing of a disclosure alone, even though, as a matter of law, it was no longer permissible to do this. The way the Court of Appeal framed the issue in *Talbot* allowed them to admit the expert evidence regarding recants and incomplete disclosures without contradicting the expert evidence element of the reasoning in *D.D.*

Where the factual circumstances in the particular case suggest that this particular complainant would have been likely to complain promptly, not because it is the natural thing to do but because of the circumstances at hand, it is proper to draw an adverse inference based on lack of timely disclosure. Examples might include a circumstance where the complainant had been sexually assaulted several times in the past and had always reported promptly. In such a case, it is possible for an adverse inference to be driven by her prior conduct, which may suggest she would have been inclined to report as she had done in the past. Perhaps another example would involve a circumstance where the complainant was given repeated opportunities to disclose in a safe and supportive environment, and knew that other individuals had accused the same person and the response was supportive. A delay in disclosure can also properly discredit a complainant of sexual assault where the delay is relied on to give rise to an adverse inference because of factors such as memory loss.³⁹ However, even with the examples just described, courts must be cautious in ensuring that it is the particular circumstances of the particular complainant that drives the adverse inference, and not an underlying assumption or paradigm about how women do, or should, respond to sexual violation.

The timing, in other words, must be tied to some other factual circumstance. It must not rely upon an intermediate assumption that it is natural for sexual assault victims to tell someone promptly. This must be what Justice Major meant by the assertion that delayed disclosure “standing alone” cannot give rise to an adverse inference against the complainant’s credibility. If this interpretation is not correct, then *D.D.* establishes that a trier of fact *can* resort to stereotypical assumptions about how sexual assault victims behave in order to discredit a complainant if that trier of fact also has other reasons to disbelieve the complainant. This cannot be what the Court in *D.D.* intended. If it is wrong to discredit a complainant based on the stereotypical assumption that real victims of sexual assault tell someone promptly, other factors, such as intoxication or

39. See e.g. *R v A(A)*, 2009 NUCJ 1. Drawing an adverse inference as to credibility on the basis that the lapse in time between the alleged incident and the disclosure has caused actual memory loss does not resort to the hue and cry myth. Indeed, in such a case the inference is actually driven by the loss of memory, not the timing itself.

inconsistent testimony, do not make it acceptable to also consider her to be discreditable based on the assumption that victims of sexual assault tell someone promptly and this complainant did not.

Interpreting *D.D.* otherwise leads to formalistic reasoning such as that of the Newfoundland Supreme Court and the Newfoundland Court of Appeal in *R. v. H.T.*⁴⁰ In *H.T.*, the trial judge acquitted the accused of sexually assaulting his two nieces. Although the judge stated that he thought the complainants were telling the truth, he determined that their evidence still left him with a reasonable doubt. The very first factor he identified as contributing to his doubt was their delay in disclosure:

Michelle B. and Deena B. each explained why they did not report the sexual assaults before 2006. Their reasons ranged from personal embarrassment through concern for how it would affect their mother to the more altruistic motive of preventing it from happening to other young girls. Deena B. also said that it was time that Mr. Harvey T. paid for what he did to her. Their reasons may be relevant to them, but they are not substantial enough to justify withholding such serious abuse for so long. Moreover, they do not answer the equally obvious question of why they decided to disclose the assaults now, as opposed to five, ten, fifteen or even twenty years ago.⁴¹

The need to justify a delayed disclosure in order to find a complainant credible only arises when one is trying to overcome the impermissible presumption that real victims report promptly. Essentially, the trial judge in *H.T.* determined that the evidence offered to explain the delay (requiring evidence to explain the delay is itself problematic) was not substantial enough to rebut the presumption that real victims report in a timely manner. Similarly, the question as to why a complainant did not report the sexual violation sooner is *obvious* only to those who assume that the natural behaviour of a sexual assault victim is to report the abuse promptly.⁴²

40. [2008] NLTD 106 (available on QL) [*HT*]; 2009 NLCA 69, 292 Nfld & PEIR 147.

41. *HT*, *supra* note 40 para 67.

42. The question as to why a complainant chooses to disclose at a particular time (as opposed to five, ten or twenty years ago) may be an acceptable line of reasoning if it is not underpinned by the impermissible assumption that it is natural not to delay disclosure. Indeed, in such a circumstance the adverse inference may be driven by the opposite assumption that, given the disincentives for disclosing, it would be natural for a sexual

The trial judge went on to identify six other problems with the complainants' evidence. Ultimately, he found that the cumulative effect of what he described as "these unanswered questions regarding their evidence" gave rise to a reasonable doubt.⁴³ The other problems included that the complainants went willingly to the accused's house despite years of abuse, that they agreed to see him after the abuse had ended, and that their parents testified that they were not aware of the alleged fourteen years of abuse by the complainants' uncle. These first two factors rely on reasoning based on another problematic (and ill-founded) social assumption about how sexual assault victims behave--the assumption that a real victim of sexual assault would avoid further contact with the accused. Courts in some cases have recognized that it is problematic to assume that continued association between a complainant and her alleged abuser suggests that the sexual assault did not occur.⁴⁴ Identifying the fact

assault complainant not to tell anyone. However, this was obviously not the trial judge's reasoning in *HT*, *supra* note 40. Note that I am not suggesting that courts should adopt the opposite assumption—that is, the assumption that the natural time to speak out is after great delay or never. To do so would create another rebuttable presumption, in which complainants could be discredited simply because they were unable to explain why they disclosed now as opposed to ever. Such a presumption would unfairly impact the credibility of complainants in cases where their motives for making the complaint were otherwise fairly questioned. The safer assumption, and the one that expert witnesses in several cases have tended to advocate in favour of, is that the timing of disclosure itself indicates *nothing*, one way or the other, about the veracity of the allegation.

43. *HT*, *supra* note 40 at para 65.

44. See *R v Nitsiza*, 2007 NWTSC 53, 74 WCB (2d) 495, where the Court applied *D.D.* to reject the defence argument that the complainant's allegations were suspect because had she actually been sexually assaulted by the accused she would have acted in a hostile way toward him afterwards and there was evidence that she maintained cordial contact. The Appellant argued, at para 61, that "people who are sexually assaulted usually behave with hostility to their assaulters—*not* in a friendly way!" The Court responded, at para 62, that "[t]his submission assumes most or all people who have been sexually assaulted will react the same way. That submission, with respect, is grounded neither in reality nor in law. The Supreme Court of Canada expressed concern about this type of reasoning in the context of assessing the significance of delay in reporting a sexual assault. What the Court said in that context, in my view, is equally relevant to the assessment of other aspects of a person's conduct following an alleged sexual assault".

See also *R v R (JW)*, 2007 BCCA 452, [2007] BCWLD 6820.

that the parents testified that they were unaware of the abuse as a factor giving rise to an adverse inference as to the complainants' credibility may also be problematic. It is problematic if it is underpinned by the assumption that parents always know when their children are being abused, or even worse, by the assumption that parents would never ignore the fact that their children are being sexually abused by another family member.⁴⁵

Regardless of the legitimacy of the trial judge's reasoning with respect to these other potentially discrediting factors, the problem with his reasoning regarding delayed disclosure remains. It is possible that the trial judge in *H.T.* would have had reasonable doubt even without his findings regarding the complainants' delayed disclosure. It is impossible to know whether their failure to "justify" the delay pushed him over the threshold into the realm of reasonable doubt. Whether it did or not, whether the outcome in this particular case would have been different or not, the reasoning was wrong.

On appeal, the Crown argued that the trial judge had erroneously drawn an adverse inference as to credibility based on delayed disclosure. The Newfoundland Court of Appeal rejected this argument on the basis that the trial judge had considered the issue of delayed disclosure as part of a list that included other problematic aspects of the complainants' evidence. The Court of Appeal upheld this application of *D.D.*, stating:

[W]e were also satisfied that he did not draw the adverse inference as to credibility from delay in disclosure *standing alone*. Read as a whole his decision leads to the conclusion that the delay was simply one of the circumstances he was entitled to consider.⁴⁶

Reliance on a particular line of reasoning or inference about a complainant's credibility is not transformed into something else by adding it to a laundry list of other factors (such as financial motive, malice or level of intoxication) that may discredit a witness based on inferences of one's own. Any other interpretation renders the substance of the Supreme

45. Indeed, in the *H.T.* case, one of the complainants testified that when she was quite young she told her mother that "Uncle Harvey T. was honeyin' with me" but that her complaint was just "passed off". *HT*, *supra* note 40 at para 20.

46. *HT*, *supra* note 40 at para 7 [emphasis added].

Court's decision in *D.D.* on the issue of delayed disclosure very difficult to comprehend. If it is not permissible to rely on a particular stereotype or assumption about how victims of sexual abuse behave, then reasoning which resorts to that assumption is wrong. In *H.T.*, the trial judge drew an adverse inference as to credibility based on the presumption that sexual assault victims will tell someone. That this adverse inference did not "stand alone", but rather was among a list of other adverse inferences, does not change the nature of his reasoning on the issue of delayed disclosure. A wolf hanging out in a herd of sheep is still a wolf.

III. Case Law Applying *D.D.*

Unfortunately, there is a continuing tendency on the part of some courts in sexual assault cases, particularly those involving adult complainants,⁴⁷ to rely on the assumption that it is natural for victims of sexual violence to tell someone. One of the more explicit examples of this is the trial court's decision in *R. v. Sandfly*.⁴⁸ The judge, in acquitting the accused, identified the difficulties with the complainant's testimony as follows:

After the alleged sexual assault occurred, the complainant says that she made some effort to wake up her sister. When she was not able to rouse her sister, she fell back to sleep and slept for several more hours. *This behaviour is typically inconsistent with somebody who has just been violated* . . . After she did wake up that morning, *her subsequent actions were not consistent with what she said had happened to her*. She continued to drink alcohol. *It was only after she encountered her boyfriend and disclosed to him what she said happened to her, that she decided to go to the hospital*. That focus was to check to make sure she had not got anything, presumably referring to a sexually transmitted disease, and not to complain about

47. See for example *R v G(G)*, 99 OAC 44, 115 CCC (3d) 1 at para 43:

"The allegations cannot be assessed in the same way as those of an average adult victim because the implications of a child's disclosure, given his or her complete social and economic dependency, may be more cataclysmic than those of an adult, especially if the target of the disclosure is a family member".

48. (2008), 64 CR (6th) 53 [*Sandfly*].

the alleged sexual assault. *It was only after* her version of events were provided to the medical personnel that the police were called in.⁴⁹

One should be wary of trial judgments that make statements about what is and is not typical behaviour for a woman who has passed out after a party and then has awakened to find herself being penetrated by a friend, an acquaintance or a stranger with whom she had no intention of, or interest in, having sex.⁵⁰ In considering the issue of delayed disclosure, one should be wary of judicial assessments of complainant credibility that use the phrase “it was only after” in describing the timing of events that concluded in a complaint of sexual offence.

The mistakes made in *R. v. Sandfly* are obvious; fortunately, they are also unusual. Two less obvious and more frequent types of reasoning that resort to the hue and cry myth (both of which occurred in *H.T.*) include the following: (i) bootstrapping adverse inferences about delayed disclosure onto unrelated adverse inferences regarding other discrediting factors;⁵¹ and (ii) presuming an adverse inference as to credibility unless the complainant’s evidence explains away the delay.⁵²

49. *Ibid* at paras 17-18 [emphasis added]. There were other problems with the trial judge’s reasoning. He also relied, at paragraph 17, on the assumption that a real victim of rape would fight back to discredit the victim: “[o]ne might have expected her, in those circumstances, to be more vocal and animated in her protestation”.

50. For a discussion regarding the frequency with which this factual circumstance comes before the courts, see Janine Benedet, “The Sexual Assault of Intoxicated Women”, (2010) CJWL, (forthcoming); see also Elaine Craig, “Ten Years After *Ewanchuk* The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence” (2009) 13:3 Can Crim L Rev 247.

51. See e.g. *R v Handy*, 2002 SCC 56 at para 23, [2002] 2 SCR 908 [*Handy*]; *R v Williams*, (2004), 183 CCC (3d) 510, 2004 BCCA 207 [*Williams*]; *HT*, *supra* note 40.

52 For cases where the court found that the complainant did not “explain away the delay”, see *HT*, *supra* note 40; *R v JM*, 2004 CarswellOnt 6693 (WL Can) [*JM*]; *R v M(B)*, 2007 NSPC 56 (available on WL Can); *R v L(HA)*, 2002 CarswellMan 370 (WL Can) at para 46 (Man Prov Ct)[*L(HA)*]; *R v Palardy*, 2007 CarswellOnt 9687 (WL Can) at para 108 (Ont Ct J) [*Palardy*]; *R v CR*, 2008 CarswellOnt 812 (WL Can) at para 86 (Ont Sup Ct) [*CR*]. For an example of this reasoning in a civil proceeding, see *S(D) v Mascoll*, 2001 CarswellOnt 2123 (WL Can) (Ont Sup Ct). For cases where the court found that the delay had been sufficiently justified, see *R v Pikayuk*, 2009 NUCJ 14 [*Pikayuk*]; *R v BJW*, 2006 ONCJ 455, 72 WCB (2d) 29 [*BJW*]; *R v CDR*, 53 WCB (2d) 127 (NL Prov Ct) [*CDR*]; *R v B(FF)*, [1993] 1 SCR

A. Bootstrapping Delay onto Other Discrediting Factors

In *R. v. Handy*, the Supreme Court of Canada considered the credibility of a similar fact witness alleging sexual assault by her then husband. It found that “[t]he credibility of the ex-wife was problematic. She had considerably delayed reporting any of the incidents. The eventual timing of her complaints raised issues with respect to her motives”.⁵³ She first reported the allegations of her abuse to a victim’s compensation fund while her ex-husband was in prison. There was evidence that the ex-wife had told the complainant in *Handy* that if she alleged rape she too could get money from this fund. Such evidence is probative of the ex-wife’s motives and thus of her credibility.⁵⁴ There is a permissible inference capable of making her statement to the complainant about compensation probative of her motives regarding her own allegations: if she suggested to the complainant that the complainant fabricate allegations in order to receive money, perhaps she had the same idea for herself. But that is not the reasoning Justice Binnie relied upon in the above statement about her delay in reporting the incidents. He said that she had considerably delayed reporting

697, 18 CR (4th) 261 [B(FF)]; *R v OA*, 63 WCB (2d) 303 (Ont Sup Ct) [OA]; *R v PC*, 2004 ONCJ 160, 72 WCB (2d) 288 [PC]; *R v Hoosein*, 2010 ONSC 4452 (available on QL) [Hoosein]; *R v H(H)*, 2009 ONCJ 730 (available on QL) [H(H)]; *R v L(F)*, 2002 CarswellOnt 178 (WL Can) (Ont Sup Ct) [L(F)]; *R v Skunk*, 2010 ONCJ 209 (available on WL Can) [Skunk]; *R v C(DA)*, 2010 SKQB 194 (available on WL Can) [C(DA)]; *R v Oickle*, 2010 NSSC 182 (available on WL Can) [Oickle]; *R v Hoang*, 2005 CarswellOnt 5929 (WL Can) (Ont Sup Ct) [Hoang]; *R v Nayanookeesic*, 2010 ONCJ 47 (available on WL Can) [Nayanookeesic]; *R v K(M)*, 2006 CarswellOnt 7933 (WL Can) (Ont Sup Ct) [K(M)]; *R v S(TH)*, 2002 CarswellOnt 5313 (WL Can) (Ont Ct J) [S(TH)]; *R v C(P)*, 2004 ONCJ 160 (available on WL Can) [C(P)]. See also *R v B(R)*, 2006 CarswellOnt 5151 (WL Can) (Ont Sup Ct) [B(R)].

53. *Handy*, *supra* note 51. *Handy* was not actually a case about recent complaint; Justice Binnie’s comment regarding delayed disclosure was made in the context of an analysis about similar fact evidence. Nevertheless, it reveals the continued vitality of the hue and cry assumption. He did discredit the similar fact witness, in part, based on her delayed disclosure. This was unnecessary to his decision and is, in principle, inconsistent with the reasoning in *DD*.

54. The potential for collusion that such evidence suggests also destroys the probative value (and thus the admissibility) of her similar fact evidence in support of the allegations of the complainant in *Handy*, *ibid*.

and that “the eventual timing of her complaints raised issues with respect to her motives”.⁵⁵ How does a delay in disclosure give rise to an inference that she had financial motives to fabricate the allegations? How does the fact that she had not complained *until* she was before the victim’s compensation board give rise to an inference that she had a financial motive to lie? But for the assumption that victims of sexual assault are likely to report their violation promptly, what other logical connection between these two considerations makes the delay in reporting relevant to the possible financial motives? The answer is that there is no other logical connection. Embedded within Justice Binnie’s reasoning is the very inference that the Court in *W.R.* and *D.D.* ruled was impermissible: the assumption that real victims of sexual violence are likely to report promptly.

Evidence that the ex-wife suggested to someone else that they fabricate a complaint in order to receive compensation would discredit her as a witness, without any need to resort to the impermissible hue and cry assumption. The following is permissible reasoning: “I find that you suggested to X that she make up a story about rape in order to receive money. This leads me to conclude that you are not a credible witness based on the inference that you may have had the same idea for yourself”.

Similarly, evidence that an individual sought compensation from a victim’s compensation board at all may discredit her without resorting to the hue and cry assumption: “The possibility that you fabricated this allegation in order to receive money makes it less believable to me”. This, too, is permissible reasoning. In most cases, given the disincentives for reporting sexual violence, this reasoning will likely not be very probative.

Conversely, the following is not permissible reasoning: “The fact that you did not tell anyone until you went to the victim’s compensation board suggests to me that the only reason you are alleging sexual assault is to obtain money”. It is impermissible because it relies on the assumption that had this woman actually been raped by her ex-husband, she would have told someone sooner. It relies on that assumption without tying it to some other factual circumstance. In *Handy*, not only was no other factual circumstance offered to connect the adverse inference with her failure to

55. *Handy*, *supra* note 51.

complain in a timely manner, but Justice Binnie explicitly used the delay to infer suspect financial motives.

Again, relying on evidence of a possible financial motive to lie in order to question credibility is proper. But bootstrapping evidence of delayed disclosure onto inferential reasoning regarding other issues of credibility, with which it has no logical connection, does not avoid relying on the assumption that real victims of sexual aggression are likely to report promptly. The Supreme Court of Canada's reasoning in *Handy*, released only two years after *D.D.*, reflects the persistence (and perhaps the insidiousness) of this assumption about how sexual assault victims behave.

The British Columbia Court of Appeal's decision in *R. v. Williams* offers another example of this same type of problematic reasoning.⁵⁶ In *Williams*, the Court of Appeal overturned a sexual assault conviction on the basis that the trial judge had misdirected himself on the evidence. As recognized by both the trial judge and the Court of Appeal, the Crown's case depended upon the testimony of the complainant. The Court of Appeal found that the evidence was too weak to sustain a conviction, in part because "the circumstances under which the complaint was made are extremely suspicious. The complainant admitted that she reported the incident only after eight years of physical and verbal abuse from her husband".⁵⁷ The Court held that "in light of those circumstances, the defence argument that the complainant had 'a motive to lie' ought to have been more fully addressed".⁵⁸ There were difficulties with the complainant's testimony in *Williams* that *could* properly be relied upon to draw an adverse inference as to her credibility. These included inconsistencies in her testimony regarding what year the rape occurred and concerns about her possible motives for making the allegation. The problem is that the delay in reporting should not have been among the factors considered by the Court. As in *Handy*, the timing of disclosure itself does not logically give rise to suspicion about motives without an intermediate reliance on the impermissible assumption that real victims do not delay disclosure.

56. *Williams*, *supra* note 51.

57. *Ibid* at para 22.

58. *Ibid*.

B. Assuming a Rebuttable Presumption

The fact that the hue and cry assumption continues to inform judicial reasoning is evidenced by the many cases in which courts feel compelled to provide reasons as to why a complainant is credible *despite* the delayed disclosure.⁵⁹ For example, in *R. v. Pikayuk*, the judge noted that “despite the inconsistencies in her evidence and failure to cry out I believe the complainant was a truthful witness”.⁶⁰ Consider also Judge Nightingale’s comment in *R. v. P. (J.L.C.)* that he was “aware that . . . delay in disclosure ought not inevitably lead to a conclusion that the disclosure is untrue”.⁶¹ *D.D.* rejected the rebuttable presumption regarding delayed disclosure. Not only is an adverse inference as to credibility based on delayed disclosure not inevitable, it is not permissible, without some other factual circumstance.

Unlike the problematic reasoning in cases like *Handy* and *Sandfly*, in which the hue and cry assumption continues to discredit the complainant, the reasoning in cases where the court finds a complainant credible despite the delay do not constitute an error of law. This is because they do not draw an adverse inference of credibility based on delayed disclosure alone. In these cases, the courts find reasons to overcome the presumption. This is obviously not the same as rejecting it. If a delay in disclosure standing alone signifies nothing, it should not be necessary to justify the delay in order to find that it does not discredit the complainant. In these cases the starting position is still an assumption that a failure to complain promptly discredits a sexual assault complainant. While the outcome of the credibility assessment is not problematic in these cases, such reasoning continues to reinforce the hue and cry assumption. Starting from the assumption that delay is a discrediting factor (and then articulating reasons

59. See e.g. the following cases at *supra* note 52: *Pikayuk*; *BJW*; *CDR*; *B (FF)*; *OA*; *PC*; *Hoosain*; *H(H)*; *L(F)*; *Skunk*; *C(DA)*; *Oickle*; *Hoang*; *Nayanookeesic*; *K(M)*; *S(TH)*; *C(P)*. See also *B(R)*, *supra* note 52, in which the trial judge rejects certain allegations based on an adverse inference as to the complainant’s credibility because of a failure to report when given the opportunity, but found the complainant credible with respect to other allegations.

60. *Pikayuk*, *supra* note 52.

61. 2007 SKPC 131 at para 21, 53 CR (6th) 199.

for finding the complainant credible regardless) not only fails to challenge the presumption, but actually gives credence to it.

Even more problematically, in some recent cases trial judges *have* drawn an adverse inference as to credibility where the complainant's testimony has failed to rebut the presumption that a truthful victim of sexual assault will complain promptly.⁶² Reminiscent of *H.T.*, in which the trial judge found that the complainants' evidence did not sufficiently justify their delayed disclosures, the Ontario Superior Court in *R. v. J.M.* acquitted the accused because "the complainant had no reasonable justification for not telling the police about the sexual assault until after she was taken to the police station".⁶³ In *J.M.*, the Court determined that the case turned on the complainant's credibility. Justice Brown found that there was reasonable doubt as to whether the accused, her ex-boyfriend, had sexually assaulted her. Despite significant reference to *D.D.*, Justice Brown was not satisfied with her explanation as to why it took four days to report the incident to the police.⁶⁴ Her explanation was that she had had previous dealings with the police that were "[not] the best" and so she had decided to try to deal with it herself.⁶⁵ The trial judge also found the lack of evidence to explain why she waited until she was at the police station to disclose the sexual assault to be a discrediting factor: "[w]hen asked why she didn't mention the sexual assault at her apartment earlier, before going to the police station, the complainant replied she did not know".⁶⁶ This is only a discrediting factor if one assumes that the natural time to raise a complaint is at first opportunity.

Justice Russell, of the New Brunswick Court of Queen's Bench, made the same type of mistake in *R. v. Sark*.⁶⁷ Justice Russell found that the

62. See e.g. *R v B(M)*, 2007 NLTD (available on WL Can) at para 44; *R v JM*, [2004] OJ No 5976 (QL) (Ont Sup Ct); *HT*, *supra* note 40; *L(HA)*, *supra* note 52; *Palardy*, *supra* note at 52 para 108; *CR*, *supra* note 52.

63. *JM*, *supra* note 52. The court was clear in *J.M.* that the failure to justify the delay in disclosure was, on its own, sufficient to raise a reasonable doubt.

64. *Ibid* at para 39.

65. *Ibid* at para 37.

66. *Ibid*.

67. 2004 NBQB 425 (available on WL).

complainant's explanation as to why she did not report the rape to health care providers was insufficient:

The complainant's position that she did not report the rape during the admission to the Dr. Everett Chalmers Hospital in 1979 or to other mental health advisors is important. She says she was depressed in 1979 because of the rape and the death of her father. The rape, however, was not mentioned because, according to the complainant, of communication problems with her treating psychiatrist. Her father's death was, however, reported. As far as the later advisors were concerned she said, 'I didn't want to say it'. Neither reason is credible. If one accepts she had already reported the matter to the RCMP in 1978 then shame or guilt should not have been a significant factor.⁶⁸

It is clear from Justice Russell's reasoning that he started from the assumption that a complainant's failure to speak out about her violation must be explained if her allegations are to be believed. These cases demonstrate how this persistent social assumption continues to inform credibility assessments. Given the imperviousness of the hue and cry myth, what legal strategies might encourage triers of fact not to resort to it?

IV. Law Re-forming Reality: Challenging Engrained Social Assumptions

Feminists who lobbied for an amendment to the criminal law eliminating the special treatment of prior consistent statements under the recent complaint doctrine hoped that it would "rid the law of any idea that 'real' rapes would be complained about at the earliest 'reasonable' opportunity and that failing to do so casts doubt on the truthfulness of the complainant".⁶⁹ Situated within a broader law reform project aimed at dismantling several stereotypical assumptions about rape, the feminist impetus for law reform on this issue was to change the underpinning social assumption that victims of sexual violence will complain at first opportunity, by changing the legal presumptions regarding evidence (or lack of evidence) of recent complaint. Feminist involvement at the time was hardly premised on the belief that legal presumptions simply had to be

68. *Ibid* at para 30.

69. Clark, *supra* note 20 at 22.

aligned with reformed social attitudes about sexual violence.⁷⁰ Amidst significant apprehension on the part of feminist activists who expressed concern regarding the use of law as a tool for social change, feminist intervention on the issue of sexual assault law at the time was aimed at using law reform to challenge legal and *social* misperceptions about rape—assumptions that these scholars and activists identified as alive and well in both judicial and social contexts.⁷¹

The impetus of legislative reformers, on the other hand, may have been different. From their perspective, the reform seems to have been motivated by a recognition that the social assumption *had* changed and that it was thus necessary to amend the law so that it no longer reflected “outdated assumptions” about how rape victims act. For example, the 1981 report by the Federal/Provincial Task Force on Uniform Rules of Evidence suggested that the doctrine of recent complaint was anomalous and arbitrary and should be reformed on the basis that “the expectations of medieval England as to the innocent victim of a sexual attack are no longer relevant” and that “[i]n contemporary society, there is no longer a logical connection between the genuineness of a complaint and the promptness with which it is made”.⁷² Were that it were so. Labeling a social assumption or stereotype “outdated” does not make it so, regardless of whether it is courts or legislators doing the labeling. A social assumption is only outdated when it is no longer relied upon.

70. *Ibid* at 1.

71. For a feminist critique of the power of law to effect social change, see Carol Smart, *Feminism And The Power of Law* (New York: Routledge, 1989). In the Canadian context, see Sheila McIntyre, “The Charter: Driving Women to Abstraction” *Broadside* 6:5 (1985) 8; Brettel Dawson, “Legal Structures: A Feminist Critique of Sexual Assault Reform” (1985) 14:3 *Resources for Feminist Research* 40; Sheila McIntyre, “Redefining Reformism: The Consultations that Shaped Bill C-49” in Julian Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 293. This is likely why some feminist commentators at the time argued that while the 1983 amendment to the *Criminal Code* should remove the trial judge’s ability to instruct the jury about the complainant’s lack of credibility, the amendment should not be understood to have removed the exception permitting the Crown to lead evidence in chief of a recent complaint where such evidence existed. See Dawson, *supra* note 10.

72. “Second Report”, *supra* note 4.

To be sure, there are many examples where courts have properly applied *D.D.* In these cases, courts have not inferred anything from a delayed disclosure absent additional circumstances making it relevant, nor have they premised their findings of credibility on the complainant's ability to explain away the delay.⁷³ In *R. v. S.(W.)* for example, the Court stated that the complainant's "delay in disclosing the sexual assaults to her parents must be viewed in the context of the principles set out in *R. v. D.(D.)*".⁷⁴ Justice Mossip then resolved the issue of the timing of the complaint by stating: "in the particular circumstances of this case, I am unprepared to draw an adverse inference against A. because she delayed in reporting the sexual abuse to her parents".⁷⁵ Justice Mossip offered no justification for refusing to draw an adverse inference based on delay. Presumably his decision was based on the fact that in the particular circumstances of that case there was no intermediate factor that would give rise to an adverse inference for reasons other than the assumption that "real victims" report promptly.

Similarly, in *R. v. B. (J.A.)*, the Court found that the complainant was not credible for a number of reasons, but delay was not among them. The only reference it made to the timing of the disclosure was the statement that "the fact that a child delays disclosure of a sexual assault should also not reflect adversely on the child's credibility. Without more, delayed disclosure is meaningless".⁷⁶

Despite the fact that many courts do get it right, many do not. As discussed in the previous section, in many cases courts still do start from the presumption that a failure to disclose reflects adversely on the complainant's credibility. While in many of these cases, courts find that sufficient justification for the delay has been provided, in some they do not. If judges are continuing to do this, juries may be as well.

If it is correct, then, that despite law reform, the hue and cry assumption continues to inform judicial assessments of complainant

73. See e.g. *R v A(A)*, 2004 CarswellOnt 647 (WL Can)(Ct J) [*A(A)*]; *R v S(C)*, 2007 ONCJ 502 (available on QL); *R v Sacrey*, 2009 CarswellNB 332 (WL Can); *R v R(CD)* 2002 CarswellNfld 49 (WL Can).

74. 2002 CarswellOnt 530 (WL Can) at para 87.

75. *Ibid.*

76. *R v JAB*, 55 WCB (2d) 456 at para 49, [2002] OTC 723.

credibility in many sexual assault cases, be it at an unarticulated or even unconscious level, the question becomes this: how can baseless or even illogical assumptions be prevented from discrediting complainants? This question is particularly salient, and particularly difficult, in the context of sexual assault law. Social assumptions will always inform inferential reasoning as to credibility, especially on issues on which an assessor lacks firsthand knowledge or experience.⁷⁷ In a context where credibility is so central to the outcome, and where so many of the assumptions that underpin social and judicial understandings of sexual violence are not well founded, it becomes particularly important to identify legal reasoning where these assumptions continue to operate despite law reforms. Among these assumptions are the following: women who are actually raped will scream out; women who fail to defend themselves are more likely to have consented; promiscuous women are more likely to consent; and sexual assault victims will always be hostile toward their abusers. It is critical to unpack the specific inferences that drive adverse findings with respect to complainant credibility in sexual assault cases. It is also important to recognize that labeling an assumption, stereotype or myth as outdated does not make it so. With this in mind, it is necessary to consider other avenues through which to challenge engrained, but baseless, social assumptions about sexual violence.

The final part of this paper makes two suggestions for responding to this issue. The first is that it is the responsibility of trial judges to circumscribe defence counsel's cross-examination on delayed disclosure in cases where the defence has not offered any evidence or explanation suggesting that the delay is relevant to some inference not reliant on the hue and cry assumption. The second is that the Supreme Court of Canada ought to re-visit the conclusion in *D.D.* that expert evidence regarding the irrelevance of delayed disclosure, standing alone, is unnecessary.

A. The Limits on Cross-Examination

Some commentators and courts have suggested that section 275 establishes that the defence cannot cross-examine a complainant about a

77. Temkin & Krahe, *supra* note 3 at 33.

lack of recent complaint.⁷⁸ However, courts have for the most part concluded that defence counsel is still permitted to raise the issue of delayed disclosure (either implicitly or explicitly) in order to discredit the complainant.⁷⁹

On one hand, this is consistent with the rules in non-sexual offence cases, where the defence is allowed to suggest that a complainant's silence, when it would be natural to speak, discredits the complainant's testimony. Where the defence does raise "failure to speak when it would be natural to have done so", it is considered to have made an allegation of recent fabrication. This entitles the Crown to introduce evidence of a complaint made either at the time it would purportedly have been "natural to speak", or prior to that time, in order to respond to the allegation of recent fabrication.⁸⁰

On the other hand, allowing the defence to seek an adverse inference based solely on delayed disclosure is problematic. If it is an error of law to draw an adverse inference based on this outdated stereotype, then evidence of a lack of recent complaint (adduced through cross-examination of the complainant) should be irrelevant in those cases where the defence seeks to introduce it to discredit the complainant solely on the basis that she or he did not raise a hue and cry in a timely fashion.⁸¹

78. *R v Temple*, (1984) 12 WCB 71 (Ont Co Ct), where the court held that the defence was precluded from any cross-examination on this issue. See *R v Ward*, (2008) 234 CCC (3d) 159 (CA), 856 APR 183 [*Ward*] aff'g 2007 CarswellNfld 418 (WL Can) on this point. For a general discussion on this point see Clark, *supra* note 20. For a case which amply demonstrates why defence counsel should not be permitted to cross-examine on what an irrelevant fact is, without some intervening consideration, see *A(A)*, *supra* note 73. The trial judge in this case strongly rejected defence counsel's urging that the complainant be discredited because she failed to raise a hue and cry at first opportunity.

79. See e.g. *R v F (JE)* (1994), 16 OR (3d) 1, 85 CCC (3d) 457 (CA); *TEM*, *supra* note 21; *O'Connor*, *supra* note 28.

80. *O'Connor*, *ibid*.

81. See e.g. *Ward*, *supra* note 78 at para 22F:

"Case law such as *R v D.D.* . . . and section 275 of the *Criminal Code* no longer permit the defence to seek a negative inference about a complainant's testimony in a sexual assault case solely on the basis of a lack of timeliness of a complaint. . . However, the defence is entitled, as it did in this case, to explore in cross-examination the delay in reporting the sexual assault provided that the inquiry is not based solely on stereotypic or erroneous assumptions".

Protecting an accused's opportunity to cross-examine Crown witnesses is, of course, of fundamental importance to the legitimacy of our criminal justice system. Nevertheless, rights are never absolute. The defence is not entitled to cross-examine a complainant to elicit evidence regarding credibility if the probative value of that evidence is substantially outweighed by the unfair prejudice that might flow from it.⁸² In *R. v. Osolin*, Justice Cory stated that "[c]ross-examination for the purposes of showing consent or impugning credibility which relies upon 'rape myths' will always be more prejudicial than probative".⁸³ In fact, cross-examination on the timing of a complaint, standing alone, elicits evidence with no probative value. It elicits evidence in order to raise an inference that triers of fact are not entitled to draw. Defence counsel should be required to demonstrate that the evidence could potentially fulfill a legitimate purpose.⁸⁴ Where defence counsel fails to do so, the trial judge should not allow this line of questioning to proceed.

If defence counsel were not permitted to cross-examine complainants on the timing of disclosure, that is, without offering some explanation making it relevant for a reason other than the hue and cry assumption, complainants would not be put in the position of having to justify their timing. Trial judges would not then find it necessary to point to evidence to justify their refusal to draw an adverse inference based on delay alone. This is a self-perpetuating issue that could cycle in either direction. As it currently stands, the unclear wording in *D.D.* often compels trial judges to highlight evidence justifying delayed disclosure in cases where they find the complainant credible.

At this point, the reasoning in cases such as *R. v. M. (T.J.)* may be the most advisable approach for trial judges who do not want to be erroneously overturned for failing to justify a finding of credibility despite the delayed disclosure. In *R. v. M. (T.J.)* the trial judge highlighted the reasons why he "accept[ed] S.M.'s explanation of why she did not disclose the abuse any earlier" but then rejected the defence submission that S.M.'s late disclosure should impugn her credibility, because it "reflects a reliance on a

82. *R v Seaboyer*, [1991] 2 SCR 577 at 580.

83. [1993] 4 SCR 595 at para 37, 109 DLR (4th) 478.

84. See *R v Shearing*, 2002 SCC 58 at para 119, 3 SCR 33.

stereotypical, but suspect view, that the victims of sexual aggression are likely to report the acts immediately”.⁸⁵

B. It is easier to teach a dog to fish than to teach a dog not to fish

Another possible response to the continued role that the hue and cry assumption plays in assessments of complainant credibility pertains to the use of expert evidence. In *D.D.*, Justice Major concluded that expert evidence on the (in)significance of delayed disclosure was inadmissible. According to Justice Major, the evidence did not meet the necessity criteria under the *Mohan* test for the admissibility of expert opinion. Under *Mohan*, expert evidence will only be admitted if it provides information likely to be outside the experience and knowledge of a judge or jury.⁸⁶ In *D.D.*, Justice Major deemed the evidence unnecessary because it was, in his estimation, a matter of common sense not to discredit a complainant based on the outdated assumption that victims of sexual assault are likely to complain without delay; the matter could be addressed by a warning to the jury or the taking of judicial notice. Given the continued reliance on this social assumption, both by the Supreme Court of Canada and by lower courts, it seems that Justice McLachlin’s dissent was correct to conclude that the issue of delayed disclosure does involve matters beyond the ordinary knowledge and expertise of the judge or jury.

For two decades prior to *D.D.*, courts admitted expert evidence on delayed disclosure to assist triers of fact in child sexual abuse cases.⁸⁷ Experts in these cases included social workers and psychologists, with years of experience observing children who had been sexually abused and children who falsely alleged that they had been sexually abused.⁸⁸ Expert opinion was admitted to explain that it is not uncommon for children to fail to take an opportunity to disclose when given one, or to fail to support a

85. 2009 BCSC 1212, [2009] BCWLD 7332, at paras 139-140.

86. *R v Mohan*, [1994] 2 SCR 9, 29 CR (4th) 243.

87. See e.g. *R v C(G)* (1996), 144 Nfld & PEIR 204, 110 CCC (3d) 233 (CA) [*C(G)*]; *R v M(RM)* (1998), 106 OAC 191, 122 CCC (3d) 563 (CA) [*RM*]; *R v T(DB)* (1994), 71 OAC 233, 89 CCC (3d) 466 (CA); *R v C(RA)* (1990), 78 CR (3d) 390, 57 CCC (3d) 522 (BCCA).

88. *C(G)*, *supra* note 87.

sibling when he or she has disclosed similar abuse.⁸⁹ Experts testified that there is no normal response to sexual abuse, that timing of disclosure will vary and that there are many reasons why victims fail to report promptly.⁹⁰

The nuance and complexity of sexual (mis)behaviour and responses to sexual (mis)behaviour are not readily accommodated by law and legal process. Inevitably, some triers of fact will rely on social assumptions to fill gaps in reasoning, particularly when it comes to sexual circumstances of which they have no firsthand knowledge or experience. The development of the doctrine of recent complaint, its “abrogation” in 1983 and the continued reliance by courts, almost thirty years later, on the assumption thought to be outdated in 1983, is a fascinating example of the complex interaction between law and social reform. The tenacity with which this engrained social assumption about sexual violence continues to prevail suggests that labelling it outdated and admonishing triers of fact not to rely on it is insufficient. It may be necessary to provide triers of fact with more than a warning that it is an error of law to rely on an assumption that they may not even realize is informing their inferential reasoning. That it *should* be common sense not to make baseless assumptions about how sexual assault victims behave does not mean that it currently *is* common sense not to do this. The social assumption that victims of sexual assault report promptly forms part of a common and longstanding narrative about how sexual assault victims (and actually, women more broadly) behave. It may be that substantive change in the criminal law’s response to sexual violence requires new narratives, not just new laws.

Law is inextricably anchored in narrative. Narrative gives meaning to law. To use Robert Cover’s language, a *nomos*, or normative universe, is made up of prescriptions (that is, laws, rules and norms) and the narratives that give them meaning.⁹¹ In addition, narrative is integral to social movements. New accounts of experience and observation are essential to the processes of disruption, iconoclasm and re-articulation that ensure the

89. *RM*, *supra* note 87.

90. *DD*, *supra* note 1.

91. Robert Cover, “*Nomos* and Narrative” (1983) 97:1 Harv L Rev 4.

law stays open to new possibilities. Stories, as Kenneth Plummer suggests, are social acts.⁹²

Many of the reforms in Canadian sexual assault law have been influenced by feminist theory. They have been oriented toward dispelling what feminists and jurists have come to describe as sexual myths and stereotypes about rape. Unsurprisingly, as a result, the reforms both by courts and Parliament in the last twenty-five years have been deeply and explicitly informed by feminist thought. But despite these reforms, many of the assumptions regarding “how a rape victim behaves” or “how women respond to sexual violence” continue to inform the reasoning in sexual assault cases.⁹³ Perhaps, in part, this is a function of a failure to adequately replace these so-called myths and stereotypes with new or different accounts about sexuality in the context of sexual assault cases. It is not enough simply to dispel one narrative or story about sex, sexual interactions and sexual violence. To create effective change at the level of inferential reasoning requires more than simply identifying stereotypical thinking about sexual assault and proscribing reasoning based upon it. Substantive change requires: i) law reform; ii) the identification of a problematic social assumption and the narrative that underpins it; *and* iii) a new narrative.

Expert witnesses with experience in observing and dealing with sexual assault complainants can provide a contextual backdrop against which new narratives might be formed. They can do more than a jury warning could ever achieve. Think, for example, of the role that expert opinion played in *R. v. Lavallee*,⁹⁴ where expert testimony facilitated the legal recognition of battered wife syndrome. This is an advance that would not likely have been achieved through judicial notice alone.⁹⁵ That said, the admission of expert

92. Ken Plummer, *Telling Sexual Stories: Power, Change and Social Worlds*, (London: Routledge, 1995) at 16.

93. Temkin and Krahé demonstrate this “justice gap” as they label it in *Sexual Assault and the Justice Gap: A Question of Attitude*, *supra* note 3.

94. [1990] 1 SCR 852 [*Lavallee*].

95. In *Lavallee*, *ibid*, an expert witness testified at length regarding the accused’s “ongoing terror, her inability to escape the relationship despite the violence and the continuing pattern of abuse which put her life in danger. He testified that in his opinion the appellant’s shooting

evidence is a complicated issue involving consideration of many factors, such as preserving the role of the jury and avoiding the admission of unproven science. In addition, providing triers of fact with expert social science evidence does not guarantee that their assessments of credibility will be free of the hue and cry assumption in cases involving delayed disclosure. The suggestion made in the preceding paragraphs is a preliminary one. Further consideration would be required before determining whether it is a strong and advisable response to ill-founded social assumptions in legal contexts where *some* assumption will inevitably be relied upon to drive an inference as to credibility. Perhaps there are other ways to respond to this specific problem, such as a more comprehensible statement of the law clarifying the implications of the reasoning in *D.D.* Nonetheless, some response is necessary.

Conclusion

The issue of delayed disclosure and its relevance to a complainant's credibility continues to be an area of confusion in evidence law. In part, this can be attributed to the vague and unusual language of section 275 of the *Criminal Code*. In part it can be attributed (at least in the last ten years) to the interpretive ambiguities resulting from Justice Major's reasoning in *D.D.* But at least in part, it is likely that the inconsistencies stem from the persistence of the social assumption that the natural time for sexual assault victims to raise a hue and cry is at first opportunity. In *R. v. L.F.*, the Ontario Superior Court commented that:

A trier of fact should place *little or no reliance* on stereotypical reasoning, such as the historical attitude that the evidence of women and children should be viewed with suspicion, particularly in sexual assault cases.

Racial stereotyping, that is, the assumption that certain racial or ethnic groups are less worthy of belief, *must of course play no part* in the credibility assessment.⁹⁶

of the deceased was the final desperate act of a woman who sincerely believed that she would be killed that night".

96. *R v LF*, 71 WCB (2d) 307 (Ont Sup Ct) [emphasis added].

If it is obvious that racial stereotyping must *of course* play no part in assessing the credibility of racial minorities, is it not equally obvious that sexist stereotypes should play no part in assessing the credibility of women? It seems difficult for some courts to fully reject the engrained assumptions underpinning social understandings of sexual violence. Given this, it is incumbent upon legal commentators, law reformers and judges to do more to recognize and respond to circumstances in which inferential reasoning continues to be informed by ill-founded assumptions stemming from a history of problematic and discriminatory attitudes towards sexual violence.