

Evaluating the ‘First Report’: The Persistent Problem of Evidence and Distrust of the Complainant in the Adjudication of Sexual Offences

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ABSTRACT

This article looks at the issue of the first report, which exceptionally permits a complainant in a sexual offence case to offer a previously consistent statement into evidence. In the law of evidence a previous consistent statement is a written or oral statement, made by a witness on some prior occasion to testifying, which is substantially similar to her testimony in court. Normally, previous consistent statements are deemed to be inadmissible at trial because such testimony is considered to be self-serving and lacking in probative value. However, throughout jurisdictions following the Anglo-American tradition previous consistent statements in sexual offences are allowed as an exception to the general rule. This article reviews the history of the first report rule, including critical feminist legal critique of the rule's origins. The paper proceeds with a comparative look at divergent approaches to reform that have emerged with the rule in foreign jurisdictions. This analysis includes a review of reform proposals from the South African Law Commission (now the South African Law Reform Commission) before looking at a recent controversial case in the Supreme Court of Appeal that dealt with the first report, namely the case of *S v Hammond*.

I. Introduction

The motivation behind this research originated from a series of workshops I attended with regional court magistrates in early 2005. The workshops, entitled ‘Contextualising Sexual Offences’ focused on the adjudication of sexual offences with particular attention paid to the difficult procedural and evidentiary issues facing judicial officers. During informal discussions and structured interviews with workshop participants various issues emerged that raised some concerns. Notably, there appeared to be a range of viewpoints from those interviewed when it came to providing a correct statement of the law as related to evidentiary issues in the adjudication of sexual offences. Some of the confusion related to the current state of the law of evidence as related to the cautionary rules, the use and function

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of expert testimony, evaluating rape trauma syndrome and lastly the first report. This article will focus on the first report.

The first report, also known in some jurisdictions as 'recent complaint'¹ or the 'de recenti exception,' exceptionally permits a complainant in a sexual offence case to offer a previously consistent statement into evidence.² In the law of evidence a previous consistent statement is a written or oral statement, made by a witness on some occasion prior to testifying, which is substantially similar to her testimony in court.³ Normally, previously consistent statements are deemed to be inadmissible at trial because such testimony is considered to be both 'self-serving' as well as 'superfluous and time-wasting'⁴ and generally lacking in probative value.⁵ However in South African law, as well as most other jurisdictions following the Anglo-American tradition,⁶ previously consistent statements in sexual offences cases are allowed into evidence as an exception to the general rule in certain instances.⁷ Specifically, such statements will be admissible when: the statement is made voluntarily;⁸ the complainant also testifies at trial;⁹ and the complaint is made at the first reasonable opportunity.¹⁰

This article will proceed by reviewing: (1) the origins of the first report rule; (2) application of the rule by South African courts leading up to the 2004 Supreme Court of Appeals case of *State v Hammond*;¹¹ (3) the reform proposals of the South African Law Commission; (4) a comparative perspective on how this rule has been dealt with in other jurisdictions, taking notice of the divergent approaches in Canada (where the rule has been abrogated) and the United Kingdom (where exceptions to the prohibition on previous consistent statements have been expanded); and finally (5) a more detailed discussion of the case of *S v Hammond*¹² and the difficulty posed by the current interpretation of this rule for complainants in sexual offences cases.

¹ See J Sopinka et al *The Law of Evidence in Canada* (1999) 321.

² FE Raitt 'Gender Bias in the Hearsay Rule' in M Childs and L Ellison *Feminist Perspectives on Evidence* (2000) 74.

³ PJ Schwikkard and SE Van der Merwe *Principles of Evidence 2ed* (2002) 100.

⁴ J Temkin *Rape and the Legal Process* (1987) 144.

⁵ Schwikkard op cit (n3) 101.

⁶ The common law rules of evidence were received into South African law from the English law of evidence. In terms of South African law of evidence, the applicable English common law rules and principles as of 30th May 1961 are binding on South African courts in terms of South African law of precedent. See Schwikkard op cit (n 3) 24. See also *S v Desai* 1997 (1) SACR 38 (W).

⁷ Notably, the Canadian Criminal Code s 275 has done away with the exception.

⁸ *S v T* 1963 (1) SA 484 (A).

⁹ *R v Kgaladi* 1943 AD 255.

¹⁰ *S v De Villiers* 1999 (1) SACR 297 (O).

¹¹ *S v Hammond* 2004 (2) SACR 303 (SCA).

¹² *Ibid.*

II. First Report – Origins of the Rule

The rule's origin, as with other evidentiary rules relating to sexual offences, dates back to the Middle Ages. Fundamentally, the rule displays a rather archaic notion of sexuality and an inherent distrust of female complainants in general. Early English law displayed confusion over whether rape was a crime against a woman's body, or against a man's property.¹³ In this earlier era the very definition of rape and whether it was an actionable offence hinged on the complainant's prior status – specifically 'unless she was a virgin beforehand, her complaint of rape had no validity.'¹⁴ For completeness it is also worth noting that during this earlier period a woman could save an offender from prosecution by marrying him, provided that the judicial officer and families were in agreement. Alternatively, in the case of prosecution, the penalty imposed could vary based on the relative social status of the victim and offender.¹⁵ When looking at this historical context it is questioned to what extent these earlier views inform our law today, most notably the focus by courts on the status, conduct and character of the complainant in sexual offences.

The rule emerges from the belief that there is some essential difference between a complainant alleging rape and those alleging other criminal offences.¹⁶ The assumption behind this view is that rape is an offence susceptible to false accusations and therefore allegations of rape require differential treatment.¹⁷ As Adler has argued, 'the genuineness of the complaint appears to be judged primarily with reference to the character and behaviour' of the complainant rather than that of the accused.¹⁸ It is worth noting that many of the principles informing the common law of rape in England, which have been received into the South African law of evidence, were set forth by Lord Hale during the seventeenth century. In fact, the logic informing the first report rule as it stands today can be found in the following statement by Lord Hale made in 1736:

'... the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offence and made pursuit after the offender, showed circumstances and signs of injury... if the place wherein the fact was done was remote from people, inhabitants or passengers, if the offender fled from it; these and the like are concurring evidences to give great probability to her testimony when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had the opportunity

¹³ Z Adler *Rape on Trial* (1987) 20.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Adler op cit (n13)23.

¹⁷ Adler op cit (n13).

¹⁸ Ibid.

to complain, if the place where the fact was supposed to be committed were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned.¹⁹

The idea that a complainant must make an immediate report, also known as the requirement that a complainant should raise a ‘hue and cry’ at the time of the offence, has its origin in the Middle Ages.²⁰ As Schwikkard has noted,

‘the law of hue and cry not only applied to rape cases but to all offences of a violent nature [h]owever by the end of the nineteenth century it would appear that the “hue and cry” requirement was no longer applicable in offences not of a sexual nature.’²¹

Tapper, a leading English writer on the law of evidence, has argued that over time the rule has become extremely technical and widely regarded as ‘anomalous and unsatisfactory’.²² What is perhaps most troubling about this rule, as with the cautionary rule, is that the law of evidence seems to focus on conduct of a female complainant, attributing a delay in reporting with inherent distrust. Further, the assumption underlying the view that a victim should report a sexual offence at the earliest possible opportunity is at best unfounded and misplaced.²³ It is notable that in South Africa this exceptional rule has survived numerous law reform initiatives. It continues to feature controversially as a critical element in the evaluation of evidence in sexual offences cases, most notably the recent decision of the Supreme Court of Appeal in *S v Hammond*.²⁴

In *Hammond* the ‘technical’ and controversial aspect of this rule became apparent by the court’s ruling on what inferences can be drawn from the first report. Notably, the court held that evidence of a complainant in a sexual offence case, if made at the earliest reasonable opportunity, is exceptionally admitted into evidence as matter going *only* to the complainant’s consistency, therefore to support credibility.²⁵ Evidence of the prior complaint does not amount to truth of the matter asserted, which in most cases would be evidence as to lack of consent.²⁶

¹⁹ M Hale *Historia Placitorum Coronae* vol 1 (1736) 633 quoted in Adler op cit (n 13) 24.

²⁰ C Tapper *Cross & Tapper on Evidence 10ed* (2004) 319. See also Schwikkard op cit (n 3) 103.

²¹ PJ Schwikkard ‘A Critical Overview of Evidence Relevant to Rape Trials in South African Law’ in S Jagwanth et al *Women and the Law* (1994) 200.

²² Tapper op cit (n20).

²³ *R v Valentine* [1996] 2 Cr App R 213. See also Satchwell J’s discussion of this problem in *Holtzbaugen v Roodt* 1997 (4) SA 766 (W).

²⁴ *S v Hammond* supra (n11).

²⁵ *S v Hammond* supra (n11) at paras 15, 16.

²⁶ *Ibid.*

III. First Report in South African Law of Evidence

A. Previous Consistent Statements – Basis for the Rule

In a criminal trial, therefore, there is a general rule that a previous consistent statement of a testifying witness is inadmissible as evidence of the facts stated.²⁷ Also known as the common law rule against 'narrative' or 'self-corroboration', the rule prohibits a witness from being asked as evidence in chief whether she made a previous statement 'which tends to confirm her testimony.'²⁸ Further, as Hoffmann and Zeffertt explain, the previous statement may not be confirmed by calling another witness to prove that the statement was made. This prohibition applies regardless of whether the earlier statement was oral or in writing.²⁹

The main motivation behind the rule is that such a witness's previous consistent statements are considered to be insufficiently relevant and lacking in probative value.³⁰ It has further been argued that evidence of previously consistent statements 'can easily be manufactured' as a witness 'would be able to create any amount of evidence by repeating her story to a number of people.'³¹ Further, there is a practical consideration that proof of previous consistent statements in 'each and every case would be extremely time-consuming and may pave the way for numerous collateral inquiries'.³²

The exceptions to the previous consistent statement rule form a numerus clausus.³³ Briefly, these major exceptions include the following: (1) statements to rebut suggestions of recent fabrication; (2) prior out of court identification; (3) where the previous consistent statement forms part of the *res gestae*;³⁴ (4) refreshing memory; (5) statements made at arrest or on discovery of incriminating articles; and (6) recent statement by complainants in sexual offences.³⁵

²⁷ Temkin op cit (n4) 144.

²⁸ DT Zeffertt et al *The South African Law of Evidence* (2003) 403.

²⁹ Ibid.

³⁰ Ibid. *S v Mkoble* 1990 (1) SACR 95 (A) 99d.

³¹ Zeffertt op cit (n28) 405.

³² Schwikkard op cit (n3) 101.

³³ Schwikkard op cit (n3) 102. Zeffertt op cit (n28). For a contrary view, see Satchwell J in *Holtzhausen v Roodt* supra (n23) at 774A who takes the view there is *no numerus clauses* of instances where evidence of previous consistent statements may be admitted on the basis of relevance as an exception to the general rule.

³⁴ Literally meaning 'the facts' or 'the transaction' *res gestae* as described by Zeffertt et al is an all embracing description of different kinds of evidence associated with the time and circumstances of the transaction under investigation that are allowed into evidence, often exceptionally, because of their general relevance and probative value. See Zeffertt op cit (n28) 411-27.

³⁵ See generally Schwikkard op cit (n3) 102-111.

B. The First Report – Requirements

The doctrine of first report or *de recenti* exception is based on the assumption that a victim of a sexual offence will make a verbal report of the incident at the earliest possible opportunity.³⁶ In order for the statement to be received into evidence the statement must be made voluntarily³⁷ and the complainant must testify at trial.³⁸ The only inferences to be drawn from allowing evidence of the prior report is that of consistency in the complainant's testimony and therefore to support the complainant's credibility.³⁹ South African courts have also felt comfortable drawing a negative inference from the lack of a first report – namely, a negative inference as to credibility that the offence actually occurred or in most cases that the offence in question was consensual.⁴⁰

C. Voluntary Complaint

Evidence by a complainant of a first report will be admitted into evidence if the statement is found to be made voluntarily, if the complainant further testifies in court, and if the statement is made at the first reasonable opportunity.⁴¹ The rule has been applied in the prosecution of cases involving rape, indecent assault and similar offences.⁴² Further, the rule now applies to male as well as female complainants⁴³ and is no longer limited to sexual offences 'where the absence of consent is an essential element'.⁴⁴ In the case of *R v Camelleri*⁴⁵ in 1922, the Court of Criminal Appeal extended the rule to male complainants in cases of sexual assault, although cautioning that 'the complaint of an adult male would carry little weight'.⁴⁶

In the case of *S v T* the court evaluated the requirement of a voluntary statement where the complainant's mother 'had threatened to hit her if she refused to disclose what the accused (the stepfather) had done to her'.⁴⁷ In this case the complainant, who at the time of the trial was 11 years old, alleged that her stepfather had sexually assaulted her on three separate occasions. The difficult issue for the court concerned the fact that the first report of these instances of sexual assault was only elicited from the child

³⁶ Raitt op cit (n2) 74.

³⁷ *S v T* 1963 (1) SA 484 (A).

³⁸ *R v Kgaladi* 1943 AD 255.

³⁹ *S v Hammond* supra (n11).

⁴⁰ *S v Van der Ross* 2002 (2) SACR 362 (C).

⁴¹ Schwikkard op cit (n3) 103-6.

⁴² Zeffertt op cit (n28) 405.

⁴³ Schwikkard op cit (n3) 104. See also *R v Camelleri* [1922] 2 KB 122.

⁴⁴ Schwikkard op cit (n3) 104. See also *R v Osborne* [1905] 1 KB 551.

⁴⁵ *R v Camelleri* supra (n43).

⁴⁶ Zeffertt op cit (n28) 405.

⁴⁷ Schwikkard op cit (n3) 104. *S v T* supra (n37).

following a threat of physical chastisement from her mother.

Applying the law of England, the court looked at the case of *R v Osborne* where it was held that 'a complaint in a sexual case is not inadmissible merely because it is made in reply to a question, but that it cannot be admitted if elicited by questions of a leading or intimidating character.'⁴⁸ Incredibly in this case, despite the existence of medical evidence of bruising showing sexual interference with the child, and evidence as to threats of intimidation by the appellant against the child, the court allowed the appeal setting aside the conviction and the sentence.⁴⁹ Thus, despite other evidence pointing to the likelihood of a sexual assault, the court used a deficiency in the first report evidence to uphold the appeal. In many ways the reasoning used by the court in *S v T*⁵⁰ foreshadows the type of reasoning still used by courts today, that is, to acquit in sexual offences cases based on doctrine as opposed to the totality of evidence.⁵¹

D. The Complainant Must Testify

Besides the voluntary nature of the complaint, another requirement for the first report exception to apply is that the complainant must also testify in court. The fact that a victim complained, along with the contents of the complaint, will not be received into evidence by the court if the victim is unable to testify.⁵² The reasoning behind this rule is that admitting the terms of the complaint without testimony to back up the complaint would infringe the hearsay rule.⁵³ An unusual application of this rule was seen in the case of *S v R*, where a complaint of rape was made immediately after the incident and was overheard by a nurse on at least two occasions.⁵⁴ The problem emerged at trial that the complainant, who was found by the court to be an alcoholic and inebriated at the time of the alleged rape, suffered from amnesia.⁵⁵ During her testimony at trial the complainant denied that she could have consented to the sexual intercourse as the accused alleged. However, due to her amnesia she could not remember what happened to her or what she said after the alleged offence. Though the accused objected to the prior statements being admitted into evidence, the court held that 'the statements and their contents were relevant and therefore admissible to prove, not the truth of their contents, but the complainant's state of mind at and just before they were made.'⁵⁶

⁴⁸ *S v T* supra (n37) quoting *R v Osborne* supra (n44).

⁴⁹ See Schwikkard op cit (n3) 104. *S v T* (n37).

⁵⁰ *S v T* supra (n37).

⁵¹ See the analysis to follow in this regard of *S v Hammond* supra (n11).

⁵² Schwikkard op cit (n3) 104-5.

⁵³ Zeffertt op cit (n28) 407.

⁵⁴ *S v R* 1965 (2) SA 463 (W).

⁵⁵ Ibid.

⁵⁶ Ibid.

Having dealt with the issue of voluntary complaint and the requirement that the victim must testify, the most controversial aspect to the rule is the requirement that the complaint be made at 'the first reasonable opportunity'.

E. Complaint Must Be Made At First Reasonable Opportunity

Recognising the historical origins of the rule as laid out above, the requirement that the complaint be made at the first reasonable opportunity remains a foundational principle before allowing a complainant's first report into evidence.⁵⁷ While the principle is clear, courts have interpreted first reasonable opportunity with some latitude, allowing complaints by young children from after five days up to a period of six weeks to be received into evidence.⁵⁸ The first reasonable opportunity is clearly a factual inquiry that can depend on numerous factors. These include whether anyone was available to whom a complainant could reasonably be expected to complain and, in the case of young children, the recognition on the part of the complainant as to the criminal nature of the act.⁵⁹

The inherent problem with this requirement, namely the antiquated assumptions upon which it is based, has been critiqued by legal scholars and has gained recognition by courts. As Schwikkard noted, the rule fails to take into account 'the many psychological and social factors which may inhibit a rape survivor from making a complaint.'⁶⁰ This view finds support in the English case of *R v Valentine* where the court notes that:

'victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family.'⁶¹

Doubts about this requirement have also crept into South African case law, most notably in the case of *Holtzbauzen v Roodt*. Here Satchwell J evaluates whether expert testimony should be allowed on the issue of a delay in reporting an allegation of rape. She writes:

'In the normal course this court would certainly be entitled to draw an inference that there was nothing for the defendant to report to her mother or to her sisters. Certainly, if a witness' purse containing cash and credit cards and a cheque book had been stolen outside a bank, and the victim failed immediately to go inside and cancel the cheque book or credit cards and to make a report to the policeman standing on the street corner while the thieves made a getaway, then I would consider myself entirely justified in drawing an adverse inference

⁵⁷ *S v Hammond* supra (n11).

⁵⁸ Schwikkard op cit (n3) 105.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ *R v Valentine* supra (n23) quoted in Schwikkard op cit (n3) 105.

from such facts. If indeed there are particular reasons, known only or known particularly to those who work with rape survivors and who have experience in the field, why rape survivors frequently do not take the first opportunity to make known such an assault and to seek help, then it would ill behove me as a judge of the High Court to turn my ear against the opportunity to gain a better understanding from an available expert.⁶²

Beyond the requirements of the voluntariness of the complaint, the requirement that the complainant testify and that the complaint be made at the first reasonable opportunity, the critical issue in application of the rule relates to the allowable inference which can be drawn from the statement. As iterated most recently in the case of *S v Hammond*, the only inference that can be drawn from the statement is that of consistency going to the credibility of the complainant.⁶³ Furthermore, as stated by the court in *S v Van der Ross*, despite the criticism raised above a court may draw a negative inference as to consistency, and in turn credibility, in circumstances where a first report is not made at the first reasonable opportunity.⁶⁴ In reviewing the possible law reform options available to overcome the problems with this rule, the South African Law Commission has focused specifically on the negative inference issue as the main basis for reform. As the remainder of this article will seek to argue, while removing the ability of the adjudicator to draw a negative inference from a late complaint may be a welcome reform, it still falls some ways short of addressing the fundamental problems with the rule.

IV. South African Law Commission (SALC) Proposed Reforms

Prior to 2002 the South African Law Commission concluded that the rules governing admission of a prior complaint in a sexual offence case did not require legal reform.⁶⁵ In their 1985 report, as Schwikkard explains, the South African Law Commission took the position that the proper application of the rule did not prejudice the complainant. In fact it was submitted that it enhanced the prosecution's case and 'in absence of an admissible earlier complaint the finder of fact could – depending on the reasons why no complaint was made at the first reasonable opportunity – draw correct inferences from all the circumstances.'⁶⁶ By 2002 however, the South African Law Commission came to the realisation that the rule creates problems.⁶⁷ Of particular concern to them is the issue that adjudicators can draw a negative inference when a 'first reasonable

⁶² *Holtzhausen v Roodt* supra (n23) 778-9.

⁶³ *S v Hammond* supra (n11).

⁶⁴ *S v Van der Ross* supra (n40).

⁶⁵ Schwikkard op cit (n3) 107.

⁶⁶ Ibid.

⁶⁷ Ibid.

opportunity' complaint is lacking. The South African Law Commission acknowledged that this is a common practice by courts and 'reflects an assumption about the psychological effects of rape and other sexual offences and the conduct expected of a "reasonable" complainant which are not borne out by recent empirical studies in this area'.⁶⁸ As the 2002 case of *S v Van der Ross* highlights, with the slow pace of reform courts continue to draw a negative inference in the absence of a report made at the first reasonable opportunity.⁶⁹

In their 2002 report on sexual offences (in preparation for the drafting of the pending *Criminal Law (Sexual Offences) Amendment Bill*), the South African Law Commission revised its position and put forth various options for reform of the previous consistent statement exception in sexual offences. The first option the South African Law Commission looked at involved totally abolishing the rule in line with the approach taken by Canadian lawmakers, with their abrogation of the rule in s 275 of the *Canadian Criminal Code*.⁷⁰ The approach adopted by the Canadians (discussed in more detail below) is to treat the prior complaint in a sexual offences case like all other prior, out of court statements in criminal cases: exclude all such statements - unless admissibility can be gained on another ground, such as to rebut an allegation of recent fabrication.⁷¹

In a second option, the South African Law Commission considered the provisions of Namibian legislation on this issue - notably s 6 of the Combating Rape Act.⁷² This section provides that evidence relating to *all* previous consistent statements by a complainant in a sexual offence case be admissible provided that '*no inference shall be drawn only from the fact that no such previous statements have been made.*'⁷³ The effect of this provision is to do away with the first reasonable opportunity requirement and allow prior complaints into evidence, regardless of their delay, provided the other requirements are met.⁷⁴ Critically however, the South African Law Commission felt that while this option improves the current law, the provision does not eliminate the possibility 'that a presiding judicial officer may draw an adverse inference where the complainant did delay in making her report'.⁷⁵

The third option considered by the South African Law Commission involved looking at s 7 of the Namibian legislation along with certain

⁶⁸ South African Law Commission Discussion Paper 102 (Project 107) 'Sexual Offences: Process and Procedure' (2002).

⁶⁹ *S v Van der Ross* supra (n40).

⁷⁰ Schwikkard op cit (n3) 107. See South African Law Commission Discussion Paper 102 op cit (n68).

⁷¹ Schwikkard op cit (n3) 107-8.

⁷² Combating Rape Act 8 of 2000.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

Australian state legislation.⁷⁶ Section 7 of the Namibian legislation closes the gap with regard to drawing a negative inference from a delayed report. It provides that 'the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint.'⁷⁷

In conclusion, the South African Law Commission decided to adopt a modified version of option two combined with option three, in the form of clauses 17 and 19 of the proposed *Criminal Law (Sexual Offences) Bill* released in 2002.⁷⁸

Clause 17 states:

'Evidence relating to relevant previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with a sexual offence: Provided that no inference may be drawn only from the fact that no such previous statements have been made.'⁷⁹

Clause 19 states:

In criminal proceedings at which an accused is charged with a sexual offence, the court shall not draw any inference solely from the length of any delay between the alleged commission of a sexual offence and the laying of the complaint in connection with such offence.⁸⁰

As noted, these proposals are meant to find expression in the *Criminal Matters (Sexual Offences) Amendment Bill*, which was drafted in 2002 and has been widely distributed. The continued delay with this piece of legislation is a matter of some frustration for those working in this area. Further, it seems that significant changes continue to be incorporated into the draft Bill, leaving the current state of the reform process undetermined at best. Regardless, it is contended that the reforms as currently proposed by the South African Law Commission do not go far enough. This is particularly so if they are judged against the radical departure from conventional doctrine enacted by the United Kingdom's Criminal Justice Act 2003 discussed below.

V. Comparative Law Perspective

A. Canadian position

In 1983 the Canadian legislature, recognizing the difficulties experienced in terms of the so-called 'recent complaint' exception, amended the *Canadian Criminal Code* purportedly abolishing the use of such

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ *Criminal Law (Sexual Offences) Amendment Bill* 2003.

⁷⁹ South African Law Commission Discussion Paper 102 op cit (n68) at para 5. 4.2.

⁸⁰ Ibid.

evidence and ending the differential treatment of complainants in sexual offences.⁸¹ Section 275 of the Code provides that the rules relating to recent complaint evidence in a sexual offence case are abrogated.⁸² The effect of this rule is to 'disallow the prosecution from adducing evidence of recent complaint as well as disallowing the judge from directing the jury as to any adverse inference to be drawn from the failure to produce such evidence.'⁸³ Jennifer Temkin, a leading writer on the law of sexual offences, has disparagingly described the Canadian approach as 'throwing the baby out with the bathwater.'⁸⁴ While the motivation behind the abrogation of the rule is a desire to move away from the 'prejudicial' treatment of complainants in sexual offence cases (notably the drawing of a negative inference), the effect of removing the prohibition, argues Temkin, deprives the complainant 'of the opportunity to adduce evidence which might tend to support her credibility in a situation in which she continues to be viewed with disbelief and suspicion'.⁸⁵

In the judgment *R v Page* the Ontario Supreme Court noted that, in effect, the repeal of the recent complaint doctrine amounted to placing 'a complaint of sexual assault on the same footing as the evidence of any other offence, e.g. robbery or fraud'.⁸⁶ Ironically, in this case the court approached the abrogation of the rule with care by permitting the complainant to testify that she 'caused the police to be called'.⁸⁷ The complainant was not permitted to testify as to what she told the recipient of the complaint nor later what she told the police. However, the complainant and the police were both permitted to testify that she had made a statement. Further, the court allowed testimony from other witnesses as to the complainant's emotional condition and her state of dress.⁸⁸

While reform efforts in Canada may have the perverse effect of making the truth gathering inquiry in sexual offences even more difficult, they must be commended for attempting to move away from a differential or specialised treatment of sexual offences within this area of criminal law. However, as Temkin argues, if decisions such as *Page* are to be followed, 'Canadian law will have slipped back to where it was in the nineteenth century when evidence of recent complaint but not details thereof was allowed in as evidence'.⁸⁹

⁸¹ Sopinka op cit (n1) 322.

⁸² Ibid.

⁸³ Temkin op cit (n4) 146.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ *R v Page* (1984) 40 C.R. (3d) 85.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Temkin op cit (n4) 147.

B. United Kingdom position

While the South African Law Commission's proposed reforms can be criticised for not going far enough and the Canadian position has been regarded as regressive, a more promising development can be found in the United Kingdom's Criminal Justice Act 2003. The reforms to the law of evidence enacted by this piece of legislation have been described by one commentator as 'the most far reaching since the 1898 Criminal Evidence Act.'⁹⁰ While the major areas of reform relate to the reception of hearsay evidence and the adducing of bad character evidence, the Act also alters the way in which the law treats witnesses' previous consistent statements.⁹¹ The main two effects of the reforms in this regard are: to extend the circumstances under which previous consistent statements can be adduced and; to allow all such admitted statements into evidence in their own right, for truth of the matter asserted, abolishing the notion of previous statements being admitted purely for the purposes of consistency or credibility.⁹²

With the passing of this Act, under s120(7):

'a statement in the form of a complaint by a witness who claims to have been a victim of an offence, which the crime forms the subject-matter of the proceedings, which was made "as soon as could reasonably be expected" after the conduct it relates to, and in which the witness has first given evidence, is admissible.'⁹³

In this one provision the law of first report in the United Kingdom has been drastically altered in two ways. First, the first report exception is extended beyond sexual offences to cover all offences. Secondly, the statement itself, once admitted into evidence, is admitted as evidence of truth of its contents rather than for credit or consistency.⁹⁴

On both these accounts, the extension of the exception to all offences and expanding the basis upon which reception of the statement is allowed, the United Kingdom reform overturns centuries of discriminatory doctrine. Guiding these reforms were findings by the Law Commission of England and Wales that 'the preconditions for adducing recent complaints that had been established in sexual cases were too strict and should be relaxed.'⁹⁵

In terms of allowing previous consistent testimony as evidence in its own right, rather than merely for purposes of credit or consistency, the Law Commission of England and Wales concluded that the main justification for the prior limitation related to the hearsay rule and the probative value of

⁹⁰ G Durston 'Previous (In)Consistent Statements After the Criminal Justice Act 2003' (2005) *Crim LR* 206.

⁹¹ *Ibid.*

⁹² Durston *op cit* (n90) 206-7.

⁹³ Durston *op cit* (n90) 211.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

out of court statements.⁹⁶ As such concerns should not apply to a witness's own earlier statement it was logical, so the Law Commission reasoned, that the hearsay rules should no longer apply to previous consistent statements.⁹⁷ As regards expanding the exception of first report evidence beyond sexual complaints, the Law Commission has sought to move away from a differential treatment of sexual offences and other criminal offences. Critically, the Law Commission's reforms take the view that early post-crime statements in general, across a range of the possible offences, are more likely to be accurate in their accounting of events and 'that they also ran a smaller risk of being "corrupted" by subsequent events'.⁹⁸

Compared with Canada, or for that matter the proposals of the South African Law Commission as expressed in the *Criminal Law (Sexual Offences) Amendment Bill*, the expansion of the use of previous consistent statements to cover all offences is a radical departure. Its worth remembering that the justification for the limit of this exception to sexual offences has always hinged on the perception that sexual offences are somehow different from other types of crimes - as one judge stated 'because sexual activity tends to take place in private and is usually kept secret'.⁹⁹ However this sort of reasoning can be applied to any number of criminal offences, such as domestic violence, where evidence of a prior recent complaint under current South African law would be subject to the exclusionary rule.¹⁰⁰ Further, by allowing the prior statement into evidence as a matter going to the truth of its contents the English reforms enact a major shift in the balance to be struck in sexual offences cases. This type of reform will allow magistrates and judges to move beyond the often difficult and 'illogical' exercise, evidenced in cases such as *Page* and *Hammond*, where statements are grudgingly admitted into evidence only to be circumscribed by doctrine (as opposed to logic) as to their limited probative value.¹⁰¹

What remains less certain in the United Kingdom reforms is what is meant in s 120(7) by the phrase 'as soon as could reasonably be expected'. Specifically, it appears that this language retains the 'first reasonable opportunity' requirement.¹⁰² However, following the case law, perhaps this is not too great a concern. As Durston has argued, courts in the United Kingdom following the case of *R v Valentine*¹⁰³ 'have taken an increasingly understanding approach to delays in complaining about sexual assaults, having regard to the nature of the complainant and her relationship

⁹⁶ Durston op cit (n90) 206.

⁹⁷ Ibid.

⁹⁸ Durston op cit (n90) 213.

⁹⁹ Durston op cit (n90) quoting Tudor Evans J in *Jarvis* 1991 *Crim LR* 374.

¹⁰⁰ Ibid.

¹⁰¹ Durston op cit (n90) 206.

¹⁰² Ibid.

¹⁰³ *R v Valentine* supra (n61).

to potential confidantes.' The view put forth by Durston suggests that regardless of whether the drafters sought to retain the first reasonable opportunity requirement, courts have recognised the problems associated with the requirement and sought to soften the rule's potentially harsh application.¹⁰⁴

VI. *S v Hammond*

In the *Hammond* case, the Supreme Court of Appeal confirmed the rule in South African law that evidence of a complaint in a sexual misconduct case, given at the earliest reasonable opportunity, is exceptionally admitted only as evidence of consistency in the account given by the complainant. The judgment in the case was handed down in September 2004 by Cloete JA with Brand JA and Comrie AJA concurring. The case reached the Supreme Court of Appeal following a conviction for rape of the appellant Angelo Hammond by a regional court magistrate in Mitchell's Plain. Hammond was sentenced to ten years' imprisonment. An appeal to the Cape High Court was dismissed 'on the basis that there was no misdirection by the magistrate'.¹⁰⁵ On further appeal, Cloete JA found that the magistrate had in fact 'misdirected himself in several fundamental respects'¹⁰⁶ and the Supreme Court of Appeal granted the appeal, ordering that the appellant's conviction and sentence be set aside.¹⁰⁷

To summarise the facts of the case, on the day in question at around noon the appellant and his friends came across the complainant and her friends at the beach. Apparently the individuals in each group had not previously met. Both parties were consuming alcohol and they continued to drink together. At around 16h00, the appellant and his friends offered the complainant a lift to Mitchell's Plain, where she had to collect her child who was staying with other family members.¹⁰⁸ However, instead of going to Mitchell's Plain the appellant drove with the complainant and his friends to purchase more alcohol, which they consumed. The disputed facts in the case relate to what occurred next.¹⁰⁹

According to the complainant's evidence, she testified that the appellant stopped by the side of the road, stepped outside of the vehicle and walked over to the passenger side where she was seated. Next the appellant pulled the complainant out of the vehicle and grabbed her by her hair pulling her across a stony pathway approximately 14 metres away from the vehicle.

¹⁰⁴ Durston op cit (n90).

¹⁰⁵ *S v Hammond* supra (n11) at para 2.

¹⁰⁶ Ibid.

¹⁰⁷ *S v Hammond* supra (n11) at para 26.

¹⁰⁸ Described in Cloete JA's judgment as the complainant's 'parents-in-law' at para 3.

¹⁰⁹ Ibid. I should note that the summary of the facts vary in minor details from the reported judgment of the Supreme Court of Appeal and that of the High Court judgment of Ismail AJ *Angelo Hammond v the State* case no. A634/02.

During the course of being dragged, the complainant gashed her leg. The appellant then proceeded to rape her. The complainant testified that she screamed to the appellant '*moet dit nie doen nie*'.¹¹⁰ Further, while the appellant was raping her, a witness (one of the appellant's friends) Neil Mitchell, asked the appellant how much longer he would be.

The appellant's version of the story, as described by Cloete JA, is that the appellant 'made amorous advances towards the complainant whilst they were in the motor car, she reciprocated and they had consensual intercourse'.¹¹¹ The appellant further alleged that the complainant had gashed her leg earlier, when she stumbled and fell. The appellant's evidence that the complainant was a willing party was corroborated by his friend Neil Mitchell.

The issue of the first report emerges shortly after the alleged rape. After the alleged rape, the appellant's vehicle got stuck in the sand. A landrover arrived with four fishermen in it – two of whom, Messrs Steyn and English, received the first report from the complainant. Both Steyn and English gave evidence in the case on behalf of the State. Steyn testified that as soon as they stopped their car the complainant approached them saying '*help my meneer die man het my ge-rape*'.¹¹² The testimony of English was reported in the Supreme Court of Appeal judgment as follows:

'She was upset and her hair was all wild and things... she was upset, she – I think she was crying, ja. And anyway we proceeded to help these guys to get their car out of the sand. And in that time she wanted to get into the van and she was mumbling on about, you know, that she had been raped and things... She was upset. To my mind she was upset, but I know – I am not a person with a breathalyser or anything but to my mind she looked like she had been drinking, she had (had) alcohol of some sort.'¹¹³

There are a few other issues of fact which require comment before proceeding with an analysis of Cloete JA's judgment. The first fact, which finds no mention in Cloete JA's judgment but which can be found in the record of the case, is that the complainant was a member of the South African Police Services. While the complainant's status should have no effect on a legal finding of guilt or innocence on the part of the appellant, the fact that the Supreme Court of Appeal found it to be immaterial and not worthy of mention is surprising. What Cloete JA did find material relating to the complainant's conduct, and this is repeated on numerous occasions in his judgment, is the fact that the complainant consumed a

¹¹⁰ '[d]on't do it.' These facts come from the ruling of the High Court, case no A634/02. Details relating to the complainant's screaming were omitted from the Supreme Court of Appeal judgment.

¹¹¹ *S v Hammond* supra (n11) at para 3.

¹¹² '[h]elp me sir, this man raped me.' *Angelo Hammond v The State* supra (n109).

¹¹³ *S v Hammond* supra (n11) at para 5.

large amount of alcohol and was intoxicated.¹¹⁴ Cloete JA describes at length the amount of alcohol consumed by the complainant, a fact which receives mere mention in the High Court judgment. The Magistrate's Court ruling in this regard found that despite the consumption of alcohol on the day, based on the testimony of the complainant and the district surgeon who examined the complaint, she was not drunk.¹¹⁵

Turning to the basis of the Supreme Court of Appeal's decision to accept the appeal and reverse the conviction and sentence in the case, the judgment of Cloete JA turns on his interpretation of the first report exception and his own findings of credibility as regards the complainant, the appellant and the witnesses in the case (findings in contradiction with those of the magistrate and the Cape High Court). Over the course of five paragraphs, in what is a relatively short judgment (26 paragraphs in all), Cloete JA muses over the old English and Australian case law on the issue. At issue for Cloete JA is what he describes as the 'fundamental misdirection' by the magistrate in the case 'as to the purpose for which evidence of a complaint in a case of sexual misconduct such as present may be received'.¹¹⁶ Critical for Cloete JA in this regard is to dispute that a first report complaint is admissible for two purposes, 'namely to show the consistency of the complainant's evidence, and to negative consent'.¹¹⁷ Beginning with what he unfortunately describes as 'the seminal' English case of *R v Lillyman*¹¹⁸ and continuing with a line of cases up through the 1970s, Cloete JA disputes the view that the complaint can be used for anything other than consistency and can never be used to negative consent.

Returning to the magistrate's finding in the case, Cloete JA finds that the magistrate impermissibly 'in weighing up the totality of the evidence had regard to the complaint and its terms as constituting a probability in favour of the State's case which tended to disprove consent, which was at issue – indeed, the only issue – in the case'.¹¹⁹

Furthermore, Cloete JA disagrees with the magistrate's reasoning in the case on another point. Astonishingly, this relates to the condition of the complainant's hair. The complainant gave evidence that the appellant pulled her by the hair and dragged her on the ground to the place where she was raped. This was the only explanation placed before the court for the condition of the complainant's hair. The magistrate further relied on the testimony of the fishermen, Steyn and English, that the complainant's hair was 'wild' as corroboration for the complainant's testimony. Further,

¹¹⁴ *S v Hammond* supra (n11) at para 23.

¹¹⁵ *Angelo Hammond v The State* supra (n109).

¹¹⁶ *S v Hammond* supra (n11) at para 11.

¹¹⁷ *S v Hammond* supra (n11) at para 12.

¹¹⁸ *R v Lillyman* [1896] 2 QB 167.

¹¹⁹ *S v Hammond* supra (n11) at para 17.

the magistrate found that the appellant's evidence that he did not notice the complainant's hair was an attempt by him to conceal the truth from the court.¹²⁰

In response to these findings, Cloete JA writes that he finds the magistrate's reasoning 'entirely unconvincing.'¹²¹ Then in an extraordinary passage in the judgment Cloete JA states, '[a] woman who has been drinking steadily since noon, who is inebriated and had just had sexual intercourse on the beach, is likely to look more than a little unkempt.'¹²² In this passage, Cloete JA dispels the credibility of the complainant, the value of the first report and reasserts the age-old logic of the inherently distrustful, and in this case, wanton female complainant. The rest of his judgment focuses on casting doubt on the credibility of the complainant's version of events, including evidence of her emotional state as relayed by the fishermen. In each instance, Cloete JA returns continuously to the finding, contrary to the finding of the magistrate and the Cape High Court, that the complainant was drunk. As to her emotional state, Cloete JA casts doubt on whether this could be attributed to the alleged rape, reasoning as follows:

'She was intoxicated. She would have some explaining to do to her "parents-in-law" as to why she failed to collect her children during the afternoon so that they could attend school the next day. And her fiancé, whom she said she would have seen that night, would no doubt have asked questions as to her whereabouts - particularly if he had seen her in the condition testified to by the two fishermen, Steyn and English. Or she may have been overcome by remorse, perhaps induced by the quantity of alcohol she had consumed.'¹²³

In summary, Cloete JA states that despite the allegation and acceptance of the first report given to the fisherman as a matter going only to credibility, the complainant's evidence was unsatisfactory.¹²⁴ She was a single witness - 'she was drunk and had behaved irrationally earlier in the afternoon'.¹²⁵ Furthermore, he found that she had lied as to her state of sobriety and therefore the case required application of the cautionary rule. By contrast, Cloete JA found the appellant's evidence to be 'beyond reproach' and that this evidence was corroborated by the friend, Mitchell. Lastly, Cloete JA held that the magistrate's finding of the complainant's hair and the interpretation of the first report supporting the allegation of rape could not be sustained.¹²⁶

¹²⁰ *S v Hammond* supra (n11) at para 18.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *S v Hammond* supra (n11) at para 23.

¹²⁴ *S v Hammond* supra (n11) at para 25.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

VII. Conclusions

The decision of Cloete JA in *Hammond* definitively states the current position in South African law as to the admissibility of a complainant's first report, at the earliest reasonable opportunity, in a sexual offence case as evidence going only to the complainant's consistency. This position must be contrasted with the recent reforms to the law of evidence in the United Kingdom (overturning centuries of case law relied upon by Cloete JA in his judgment) that such evidence can be admitted as to the truth of the matter asserted, which in the case of *Hammond* means evidence as to lack of consent.

One of the main arguments put forward in this article is that the reform proposals put forth by the South African Law Commission in this area do not go far enough, as they keep the basic logic for the first report exception in place. If we were to apply the South African Law Commission recommendations to the facts of *Hammond* there is no reason to believe that Cloete JA's reasoning in this case would be disrupted. In the judgment there is no drawing of a negative inference because the first report was made immediately. What is critical in Cloete JA's judgment, which the South African Law Commission recommendations do not address, is the permissible inference to be drawn from a recent first report once admitted – namely the issue of credibility. Thus in *Hammond*, despite the fact that the first report evidence is deemed admissible, its reception into evidence is entirely circumscribed. Cloete JA even finds the magistrate's reasoning – that the first report creates a *probability that the complainant's allegation is true* – to be a 'fundamental misdirection'. Rather, if the first report evidence is admitted for the truth of the matter asserted, together with the totality of the evidence in *Hammond*, the adjudicator would be required to come to a different conclusion.

In summary, while the law reform process as regards sexual offences continues to take place in South Africa, with due respect, it is critical that the South African Law Commission and the relevant legal drafters revisit this issue and interrogate whether the reforms as currently proposed adequately address the problems. Fundamentally, lawmakers must ask why we continue to treat sexual offences differently from other criminal offences and what assumptions underlie this differential treatment. While the South African law of evidence owes its foundational principles to the law of England, historically this has been to the disadvantage of female complainants who have been viewed with skepticism and inherent distrust. Perhaps the current reforms, as proposed by the Criminal Justice Act of 2003 in the United Kingdom, provide a way forward to overcoming centuries of unfair and discriminatory doctrine.