RAPE IN MEDICAL TREATMENT: THE PATIENT AS VICTIM

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[*This article analyses the Victorian Court of Criminal Appeal's decision in* Mobilio. *In that case, the court decided that a health worker who, it assumed, was acting purely for a sexual purpose when he inserted an instrument into a woman's vagina, had not committed rape. In its view, the consent of a woman to what she assumed was legitimate medical treatment was consent to an act done for a different purpose. Although the Victorian government subsequently passed legislation to respond to the decision, the case is still of interest for what it reveals of judicial attitudes.*[1]]

In February 1990 a Victorian Supreme Court jury convicted Vincenzo Mobilio of three counts of rape. Mobilio was a radiographer who had undertaken internal examinations of eight women using the transducer of an ultrasound machine. He was acquitted on five similar charges of rape. In July 1990 the Victorian Court of Criminal Appeal overturned the convictions.[2] In December 1990, the High Court refused the D.P.P. special leave to appeal. Why are these decisions of interest?

Mobilio was the first reported case of a prosecution under the expanded definition of rape.[3] Prior to 1980, under the common law in Victoria, rape was committed when a man knowingly or recklessly inserted his penis into a woman's vagina, without her consent. After 1980, the Victorian Crimes Act provided that, in circumstances where the introduction of a man's penis into a woman's vagina[4] would be rape, so is the introduction of a penis into another's anus or mouth or the manipulation of an object into the vagina or anus of another.

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1 The article was completed before the Victorian government passed the Crimes (Rape) Act 1991 which abolished the common law offence of rape. It also abolished the distinction between crimes of rape and crimes of sexual penetration, discussed towards the end of this article. The *actus reus* of rape is now defined as 'sexual penetration' with consent. Sexual penetration is defined as, amongst other things, 'the introduction ... by a person of an object ... into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.' The '*Mobilio* amendment' now appears in s. 36, defining consent as free agreement, and one of the circumstances in which a person does not freely agree is where 'the person mistakenly believes that the act is for medical or hygienic purposes' (para. (g)). Para. (f) may also be of relevance: 'the person is mistaken about the sexual nature of the act.' These amendments are not incorporated into the article. The article does, however, discuss amendments made by the Crimes (Sexual Offences) Act 1991 (Vic.).

2 *R. v. Mobilio* [1991] 1 V.R. 339.

3 Rape was formerly defined by Crimes Act 1958 (Vic.) s. 2A(1). The Crimes (Sexual Offences) Act 1991 (Vic.) has expanded the activities covered: see Crimes Act 1958 (Vic.) s. 36.

4 In fact the legislation refers to 'the penis of a person' and 'the vagina of another person': gender-neutrality with a vengeance? See MacKinnon, C. A., *Feminism Unmodified* (1987) 72 where she refers to women meeting the male standard being served 'equality with a vengeance'. However, under s. 39 of the Crimes (Sexual Offences) Act 1991 a vagina includes a surgically constructed vagina.

The Victorian Act also contained a limited exception (perhaps only applicable in certain circumstances) in relation to medical treatment.[5] The High Court's decision to refuse special leave to appeal is, at the least, a lost opportunity to clarify the meaning of these otherwise untested provisions.[6]

The facts of the case are, in some senses, commonplace. Women frequently undergo internal examinations by male doctors and other health care workers. What makes their consent in the medical context a real consent for the purposes of negating liability for rape?[7] Was the Victorian Court of Criminal Appeal correct in its interpretation of the law? In one sense the answer to these questions has been rendered moot. In March 1991 the Victorian Government introduced legislation to respond to the Court of Criminal Appeal's decision in *Mobilio* so as to provide:

> Consent to conduct which could otherwise constitute rape or indecent assault is of no effect if it was obtained by a false representation that the conduct was for medical or hygienic purposes.[8]

Whilst this should mean that in a situation similar to that in *Mobilio*, the health worker may well be found guilty of rape or indecent assault (depending on the facts), the Court of Criminal Appeal's judgment in *Mobilio* continues to deserve scrutiny. This is because it indicates a failure by the Court (and courts before it) to understand women's experience of unwanted sexual intercourse, a failure which, it appears, is not confined to rape in a medical context.[9]

WHAT DID HAPPEN IN MOBILIO*?*

Mobilio was originally charged with eight counts of rape, relating to eight separate incidents involving transvaginal or internal ultrasound examination. He was convicted by a jury on three counts. Why he was convicted on these three counts and not the other five is unclear from the Court of Criminal Appeal's

[5] *Cf.* the amendments in the Crimes (Sexual Offences) Act 1991 *infra* n. 8 and accompanying text.

[6] Mason C.J. and Toohey J. would have granted special leave. The other five justices refused special leave. Brennan, Deane, Gaudron and McHugh JJ. emphasized that the appeal application occurred after a verdict of acquittal entered by the Court of Criminal Appeal. They were also concerned that the trial judge had indicated that the jury's verdict was unsafe and unsatisfactory because the charges on which he was convicted and those on which he was acquitted were not easily distinguishable, apart from the fact that in the three cases in which Mobilio was found guilty the women had complained to various people about their treatment and in the other cases the complaints came to light only after police investigation. Further, the effect of a successful appeal in the High Court would have meant the case had to be returned to the Court of Criminal Appeal to deal with the other grounds of appeal. (There was then a possibility, according to Mobilio's counsel, that he could be subject to a retrial.) Dawson J. did not think there was sufficient reason to doubt the correctness of the decision of the Court of Criminal Appeal. *R. v. Mobilio*, Application for Special Leave to Appeal, No. M20 of 1990, 6 December 1990, transcript 24-5.

[7] This article does not address the issue of informed consent to medical treatment for the purposes of tort law. For an exploration of these issues see, *e.g.*, *The Report of the Cervical Cancer Inquiry*, July 1988, New Zealand, and Law Reform Commission of Victoria, *Informed Consent*, Symposia 1986, December 1987.

[8] See s. 3 of the Crimes (Sexual Offences) Act 1991 (Vic.) which contains what is now s. 36A of the Crimes Act 1958 (Vic.). In a press release on 12 March 1991, the Deputy Premier and Attorney-General Jim Kennan stated '[t]he law should protect women to ensure that they genuinely consent to medical procedures and their consent was not improperly obtained for procedures that were not medically necessary'.

[9] See Carter, M., 'Judicial Sexism and Law Reform' (1991) 16 *Legal Service Bulletin* 29.

judgment.[10] In each of the three incidents on which he was convicted, the women concerned had 'apparently consented': that is, they did not refuse the internal examination. The prosecution argued that 'the apparent consents were vitiated and not real consents because each woman consented to the introduction of the transducer only for medical diagnostic purposes but the applicant introduced it solely for the purpose of his own gratification'.[11]

In none of these cases had the referring doctor requested a transvaginal ultrasound examination, each doctor expecting their patients to undergo only an external ultrasound examination.[12] Miss P testified that Mobilio did not 'tell her what he proposed to do or ask her permission to insert the transducer in her vagina', though he did say 'he might get a better picture'.[13] After conducting an external ultrasound examination, according to Miss B, Mobilio 'then told her that he needed to do a transvaginal ultrasound examination to get a proper view'. Miss B then asked for a female radiographer but was told there was none available. And Miss H testified that '[t]he only explanation he gave her for the internal examination was that that way he would be able to see more'.[14]

Mobilio's (unsworn) evidence was that he had told each of his patients that an internal examination was needed 'and explained what he was doing'.[15]

At the trial there was apparently much disputed expert evidence as to whether the transducer used was in fact suitable for internal examination or only for external use. However, this evidence was not examined by the Court of Criminal Appeal.[16] There was also apparently medical evidence given at the trial that to insert the transducer only one centimetre was of no use in achieving a clear picture: in Miss P's case the evidence was that the transducer was inserted to this extent only.

All three women said they were asked by Mobilio when they last had sex; Miss H said she was also asked if she had a boyfriend; both Miss H and Miss B were asked to remove all their clothes for the examination, and did so; when Miss H went to leave the room at the end of the examination, she found that the door was locked.

The Court of Criminal Appeal stated:

> We consider that on the evidence it was open to the jury to be satisfied that the women consented to the transducer being inserted solely for a diagnostic purpose but that the applicant inserted it solely for his own sexual gratification.[17]

[10] As indicated in n. 6, *supra*, it appears from the transcript of the application to the High Court for Special Leave that in the cases of the three women where the jury returned a guilty verdict, each of them had complained of their treatment soon after its occurrence, in one case to the police, in one to a doctor and in the other to her boyfriend. The other five cases had only come to light after police investigation.

[11] *Mobilio, supra* n. 2, 343.

[12] *Ibid.* 342.

[13] *Ibid.* 341.

[14] *Ibid.* 342.

[15] *Ibid.* 343.

[16] *Ibid.*

[17] *Ibid.* 346.

This article is written on the assumption that the jury made those findings of fact.[18] As the Court went on to consider, the legal issue then was whether the women's apparent consent to the insertion of the transducer was vitiated by the purpose for which Mobilio acted.[19]

WHY DO MEN RAPE WOMEN?

The Court of Criminal Appeal commenced with a discussion of the reality of consent when the act involved is the insertion of a penis into a vagina, that is, the common law of rape. Rape occurs when a man has intercourse with a woman who does not consent and he is aware that she is not consenting, or realizes she might not be.[20] The court continued:

> It makes no difference whether his ultimate or ulterior purpose, motive or reason for intercourse is his own sexual gratification, his self-aggrandisement, the hurting or humiliation of the woman, her psychological or bodily betterment, or some combination of those.[21]

At first glance this may be unobjectionable. The Court is suggesting that the nature of a particular ultimate or ulterior purpose is irrelevant to an accused's guilt or innocence. Canada, in reforming its law of rape in the early 1980's replaced it with the crime of sexual assault, but chose not to define the term 'sexual'. Christine Boyle, in reflecting on how a feminist judge might give content to the term 'sexual', suggests that a definition of what makes an assault sexual that relies on finding that the man had a sexual motive is likely to be circular. What is more, she suggests, the motives of men in rape appear to be very diverse and it would be hard to capture them in a single definition.

> The offence must be wide enough to encompass all sexual interference; it should not matter whether the motive is to achieve sexual gratification, or to experience pleasure in the degradation of another human being or in violence.[22]

A more considered examination of the Court of Criminal Appeal's listing of motivations is more disturbing. The Court accepted that one motivation of a man in raping a woman may be 'her psychological or bodily betterment'. Is this really a plausible motivation? There has been much debate about whether rape is better understood as a crime of violence or a sexual crime,[23] but there is no evidence that men who rape are ever motivated by a desire to help women. Such a suggestion is reminiscent of the male folk saying, 'All she needs is a good lay'

[18] The Court stated that the legal position, in its view, 'would be the same if the jury found that he inserted the transducer partly for a medical diagnostic purpose and partly for his sexual gratification' (*ibid.* 352). However, it should be noted that the trial judge, 'having regard to the apparent inconsistency and the unease that he felt about the verdicts of acquittal on some and convictions on the others, compromised the basis upon which he felt that the jury convicted on some, acquitted on the others, by saying that in the three instances he was going to act on the basis that the then applicant's motives were not in fact sexual gratification but experimentation in the technique' for the purposes of sentencing (*per* Mr Richter, QC, in the Special Leave application, transcript, 15).

[19] I am assuming that the women did 'consent'. In the tort law context, it may well be necessary to question how informed their consent was. Here, the focus is on what precisely they consented to.

[20] *Ibid.* 343.

[21] *Ibid.* 343-4.

[22] Boyle, C., 'Sexual Assault and the Feminist Judge' (1985) 1 *Canadian Journal of Women and the Law* 93, 99.

[23] See, for example, MacKinnon, C. A., 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635.

which can hardly be entertained as even an unconscious motivation of any man.[24] This asserted motivation may well be best understood as a judicial absorption of culturally widespread misogyny. To be charitable, perhaps the Court was foreshadowing the difficulty it would have in dealing with the crime of rape in the context of medical treatment, that is, where there may be a plausible argument that what would otherwise be rape is, in the context of a medical examination, legitimate medical treatment for 'bodily betterment'.

On a third glance, it may well be that the Court is in fact trying to counter cultural misogyny with irony: that is, it was confirming the absurdity of a suggestion that a man who says he raped a woman in order to 'help' could be excused from criminal liability. If this is so, given women's experience with the legal system's handling of rape, and our consequent suspicion as to the legal system's failure to understand the experience from a woman's point of view,[25] the nature of the Court's (possible) disapproval of such an attempted defence should have been indicated more clearly.

THE COURTS AND FRAUDULENT INDUCEMENT OF CONSENT

The Court of Criminal Appeal in *Mobilio* decided that the High Court decision in *Papadimitropoulos*[26] governed and determined their decision in this case. That is:

> [I]f the woman consented to the act knowing it to be an act of sexual intercourse, no mistake as to the man's purpose deprives her consent of reality. The consent is real even though the act of intercourse, having been done for the purpose the man actually had, may wear a different moral complexion from that it would have worn if done for the purpose the woman believed he had.[27]

In that case a newly arrived Greek woman, who spoke no English, was led to believe that she was married to a man who had in fact merely signed along with her papers preparatory to a marriage ceremony taking place. She then had sexual intercourse with him, believing him to be her husband; he deserted her some three days after the 'ceremony'. He was charged with rape. The High Court overturned his conviction, stating:

> To say that in having intercourse with him she supposed that she was concerned in a perfectly moral act is not to say that the intercourse was without her consent. To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.[28]

In the Court of Criminal Appeal's view, this High Court decision determined the matter before it:

> In our opinion it is established in Australia by the High Court that if the woman consented to the act knowing it to be an act of sexual intercourse, no mistake as to the man's purpose deprives her consent of reality.[29]

[24] See Scully, D., *Understanding Sexual Violence: A Study of Convicted Rapists*, Perspectives on Gender, vol. 3, (1990).

[25] See, for example, Smart, C., 'Law's Truth, Women's Experience' in Graycar, R. (ed.), *Dissenting Opinions* (1990).

[26] *Papadimitropoulos v. R.* (1957) 98 C.L.R. 249.

[27] *Mobilio, supra* n. 2, 344.

[28] *Papadimitropoulos, supra* n. 26, 261; cited in *Mobilio, ibid.* 345.

[29] *Mobilio, supra* n. 2, 344.

The 'Old' 'Medical Treatment' Cases

The Court of Criminal Appeal did go on to consider various other 'medical treatment' cases, all of which were decided prior to the amendments currently applying in Victoria, but raising similar issues.[30]

The first of these is *R. v. Harms*.[31] In this case a 20-year-old Canadian Indian woman[32] 'consented' to 'sexual intercourse' (the insertion of his penis into her vagina) with a man who represented himself as a doctor, when he was not, and who told her that the intercourse was necessary in order to effect appropriate treatment of her medical condition. The evidence was that she understood some at least of what was involved in sexual intercourse: she knew that intercourse could lead to pregnancy and she believed that Harms had inserted some contraceptive tablets into her vagina to prevent this; he had, but she in fact became pregnant. His conviction for rape was confirmed by the Saskatchewan Court of Appeal. MacKenzie J.A. stated:

> [T]o my mind the question of the complainant's knowledge of the nature and quality of the prisoner's act is not necessarily to be determined by a mere consideration of her understanding of the intimate incidents preceding it, or by its usually natural consequences but by the purpose which rendered her submissive to it and by the effect she was moved by the prisoner to believe would result therefrom.[33]

It seems, as Jocelynne Scutt suggests, that the Saskatchewan Court was differentiating between consent to the physical act and the moral dimension of that consent.[34] If this was the distinction the Saskatchewan Court was making, it does not seem to be one likely to appeal to the Victorian Court of Criminal Appeal. As noted above, a change in the 'moral complexion' of an act because a woman was misled as to the man's purpose, could not in the Appeal Court's view vitiate consent. In the course of rejecting an approach which explored consent within the context of the moral character of a decision or action, the Appeal Court also indicated that the High court in *Papadimitropoulos* had (politely) suggested that *Harms* was wrongly decided. It quoted from the High Court:

> In *R. v. Harms* . . ., the Court of Appeal in Saskatchewan sustained a convition for rape based on the 'medical treatment' cases. One may perhaps think that the facts went outside the limits of those cases. For, when all the humbug of treatment had been gone through and 'Dr Harms' proceeded to the sexual act, the woman, who understood what he was doing, resisted, but later was persuaded to submit. The editorial note makes the comments:-
> 'In the present case the complainant appreciated the nature of the act but submitted because she thought that it was a necessary part of the medical treatment. Is there not in such circumstances a real consent?'[35]

30 Some of these cases involve indecent assault, sometimes because the behaviour concerned was not then rape as it did not involve insertion of a penis into a vagina (*e.g. R. v. Bolduc and Bird* (1967) 61 D.L.R. (2d) 494, *Bolduc and Bird v. R.* (1967) 63 D.L.R. (2d) 82), and sometimes because, for reasons unknown, that was all that was prosecuted (*e.g. R. v. William Case* (1850) 1 Den. 580; 169 E.R. 381). Like the current Victorian Parliament (whose amendment to the Crimes Act to deal with the problem raised by *Mobilio* applies to both rape and indecent assault), I believe the issues are the same, regardless of the offence charged. That is, I emphasize the sexual nature of both indecent assault and rape, rather than the intercourse or penetration.

31 *R. v. Harms* [1944] 2 D.L.R. 61.

32 She is described as a Canadian Indian in the Supreme Court's decision in *Bolduc and Bird v. R.* (1967) 63 D.L.R. (2d) 82, 84, but her ethnicity does not appear in the *Harms* decision, and is therefore presumably irrelevant to that court.

33 *Harms*, *supra* n. 31, 65.

34 Scutt, J. A., 'Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and its Moral Implications' (1975-6) 18 *Criminal Law Quarterly* 312, 317-18; *cf.* Roberts, G., 'Dr Bolduc's Speculum and the Victorian Rape Provisions' (1984) 8 *Criminal Law Journal* 296 discussed further below.

35 *Papadimitropoulos*, *supra*. n. 26, 260.

The Victorian Court agreed with the suggestion by Brent Fisse in *Howard's Criminal Law* that the High Court thought *Harms* was wrong.[36] Fisse clearly believed that *Harms* was wrongly decided.[37]

The Court of Criminal Appeal went on to consider another Canadian 'medical treatment' case, *Bolduc and Bird v. R.* In that case a qualified doctor, Dr Bolduc, who was about to perform a vaginal examination and treatment of a woman patient, invited his friend Bird to be present. Prior to seeing his patient, he asked his nurse/receptionist to find a white coat for Bird and to give him her stethoscope. She expressed disapproval and threw her stethoscope on Bolduc's desk. Bird dressed in a white coat and carrying a stethoscope was introduced to Bolduc's patient as an intern who would like to observe her treatment. Bolduc's patient have her 'consent'. Bird observed the treatment but did not touch Bolduc's patient. Bolduc and Bird were both charged with indecent assault, and their convictions were affirmed by the New Brunswick Court of Appeal, but overturned by the Canadian Supreme Court. Although the Victorian Court of Criminal Appeal did not discuss this case in detail, it noted that Canadian Supreme Court in *Bolduc and Bird* discussed both *Harms* and *Papadimitropoulos*, concluding without expressly disapproving *Harms*, that *Papadimitropoulos* correctly expressed the relevant law.

The Victorian Court considered one other medical treatment case, *Rosinski*'s case.[38] It appears that a person, who set himself up as a doctor, induced the victim to undress and then had sexual intercourse with her. He was found guilty of assault. The Court of Criminal Appeal concluded that, although there was a lack of information about the facts of this case, it 'does not seem to have any feature which distinguishes it from many similar medical cases in which the test for reality of consent is whether the woman was mistaken as to the nature and character of the act'; although as the Court noted, this test was not mentioned in the report. It is unclear what the court was suggesting in this analysis of *Rosinski*: perhaps, that it is different to *Harms* because in *Rosinski* the woman did not understand what sexual intercourse involved; or perhaps, that it could be interpreted to support the position of either the Crown or the defendant? The Court of Criminal Appeal concluded its discussion of the 'medical treatment' cases with this statement:

> There are statements in some of the early cases which would give support to the prosecution's argument here. However, in view of the High Court's examination and interpretation of those cases and statement of the law in *Papadimitropoulos* we regard it as unnesecessary to go to the earlier cases.[39]

[36] *Mobilio supra*, n. 2, 347. See Fisse, B., *Howard's Criminal Law* (5th ed. 1990) 181, n. 82.

[37] See also the suggestion in Roberts, G., 'Dr Bolduc's Speculum and the Victorian Rape Provisions' (1984) 8 *Criminal Law Journal* 296, 300 that the High Court's disapproval of *Harms* did not imply a rejection of a purpose approach (one that takes account of the fraud as to the purpose for which an act is done, not just whether consent to the mechanical act had occurred), but had more to do with its disapproval of the 'finding that V in that case was deceived as to the purpose of the act for the facts suggest quite strongly that V appreciated not only its physical nature but also its purpose and that she was coerced rather than deceived into compliance'.

[38] *Peter Rosinski's Case* (1824) 1 Lewin 11; 168 E.R. 941.

[39] *Mobilio, supra*, n. 2, 348.

However, the Court of Criminal Appeal briefly mentioned these cases — *R. v. William Case*;[40] *R. v. Flattery*[41] and *R. v. Williams*[42] later in its decision.[43] In *Case*, a 14 year old girl 'consented' to her doctor having sexual intercourse with her in the belief that it was medical treatment. He was charged with and convicted of assault.[44] Wilde C.J. stated:

> She acquiesced under a misrepresentation that what he was doing was with a view to a cure and that only; whereas it was done solely to gratify the passion of the prisoner. How does this differ from a case of total deception?[45]

It is unclear from *Case* exactly what the young woman understood she was undergoing: Roberts suggested that it is plausible that she may well have understood the mechanical aspects of sexual intercourse but did not understand the purpose or moral quality of the act.[46] That is, Roberts argued that Wilde C.J.'s statement as to there being no difference between 'total deception' and a belief that the act of sexual intercourse was directed solely to medical treatment, should be understood as meaning that, legally, there is no difference between a situation where a woman does not understand that sexual intercourse involves the insertion of a penis into her vagina and one where, although she understands this, she believes the act occurred solely for her medical treatment. In both cases, there is no valid or real consent. With a somewhat different emphasis, Scutt implies that *Case* can be understood as a case where 'the girl involved had no comprehension of the act as being "sexual" but saw it as only being "medical"'.[47]

In *Flattery*, the accused purported to 'give medical and surgical advice'. A 19-year-old woman consulted him, with her mother, as to treatment for fitting. After examining her, Flattery told the mother and daughter that 'it was nature's string wanted breaking and asked if he might break it'. The mother replied she did not know what he meant but she did not mind if he thought 'it would do her any good'. He then took the young woman into another room and had sexual intercourse. His conviction for rape was affirmed. Kelly C.B. stated:

> [I]t is plain that the girl only submitted to the plaintiff's touching her person in consequence of the fraud and false pretences of the prisoner, and that the only thing she consented to was the performance of a surgical operation. . . . [T]he only thing contemplated either by the girl or her mother was the operation which had been advised; sexual connection was never thought of by either of them. . . . In other words, she submitted to a surgical operation and nothing else. It is said, however, that having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know of no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument.[48]

Once again, it is difficult to know what level of knowledge the young woman was presumed by the court to have had. However, Koh[49] pointed out that the alternative report of the case in Cox's Criminal Cases contains the following statement from Kelly C.B.:

40 *R. v. Case* (1850) 1 Den. 580; 169 E.R. 381.
41 *R. v. Flattery* [1877] 2 Q.B.D. 410.
42 *R. v. Williams* [1923] 1 K.B. 340.
43 *Mobilio*, *supra* n. 2, 349.
44 The reporter of this case questions why the appropriate charge was not rape.
45 *Case*, *supra*, n. 40, 382.
46 Roberts, *op. cit.* n. 37, 300.
47 Scutt, *op. cit.* n. 34, 315.
48 *R. v. Flattery supra* n. 41, 413.
49 Koh, K. L., 'Consent and Responsibility in Sexual Offences' [1968] *Criminal Law Review* 81, 93.

> . . . I am not prepared to say that, if she did know the nature of sexual intercourse it would have been evidence of consent.[50]

Williams involved a choir master who told a 16 year old girl that there was something wrong with her breathing after 'testing' it with a broken aneroid barometer and noting the 'results'. Williams told her he was going to make an air passage and on two occasions he had sexual intercourse with the young woman.[51] Williams' conviction for rape was affirmed, the court quoting with approval from the trial judge's summing up:

> The law has laid it down that where a girl's consent is procured by the means which the girls says this prisoner adopted, that is to say, where she is persuaded that what is being done to her is not the ordinary act of sexual intercourse but is some medical or surgical operation in order to give her relief from some disability from which she is suffering, then that is rape although the actual thing that was done was done with her consent, because she never consented to the act of sexual intercourse. She was persuaded to consent to what he did because she thought it was a surgical operation.[52]

In this case the court seemed to be operating on the assumption that the young woman did not know that what was occurring was 'the ordinary act of sexual intercourse'; however, it is unclear whether what made it not 'ordinary' was her failure to understand sexual intercourse in either or both its mechanical and moral aspects. That is, did she understand that what was occurring was sexual intercourse, but purportedly designed to treat or did she see it as 'merely' medical treatment?

It would appear then that these cases could be read narrowly or broadly. It would also appear that they may not be consistent,[53] though consistency in part depends on the way the nature of the understanding by the women of what took place is described. The Victorian Court of Criminal Appeal renders them consistent by, as described above, suggesting that the High Court in *Papadimitropoulos* decided that *Harms* was wrongly decided (*Harms* being clearly a case where the woman concerned understood at least the physical nature of sexual intercourse) and by concluding, in relation to *Case*, *Williams* and *Flattery*, that if they are to be understood as consistent with the law stated in *Papadimitropoulos*, they must be understood as cases where

> the woman did not know that the insertion of the man's penis into her vagina was a sexual act, but believed it to be an act of medical treatment or bodily improvement.[54]

The Court of Criminal Appeal briefly discussed two American cases *Boro v. Superior Court*[55] and *People v. Ogunmola*.[56] Both cases utilized a provision of the Californian Penal Code which provides that a person is guilty of rape if he has sexual intercourse with a person who is 'at the time unconscious of the nature of the act, and this is known to the accused'.[57] In *Ogunmola*, where the doctor had

50 *R. v. Flattery* (1877) 13 Cox C. C. 388, 391.

51 Williams was also charged with two counts of indecent assault involving a 19 year old woman. Using the same story, he had inserted his fingers into her vagina. [1923] 1 K.B. 340, 341.

52 *Ibid.* 347.

53 On consistency, or lack thereof, see Stuart, D., *Canadian Criminal Law: A Treatise* (1987) 479.

54 *Mobilio*, *supra* n. 2, 349.

55 163 Cal. App. 3d 1224; 210 Cal. Rptr. 122 (1985).

56 193 Cal. App. 3d 274; 238 Cal. Rptr. 300 (1987).

57 California Penal Code s. 261, subdivision (4).

inserted his penis into a patient's vagina after examining her with a speculum, the doctor was found guilty of rape. In *Boro*, a man posing as a doctor had told a woman that she had a fatal disease and the cure was to engage in sexual intercourse with a man who had been injected with a serum; the man was acquitted of rape, on the view that she was not unconscious of the nature of the act, understanding that it involved sexual intercourse.

At the very end of its discussion of the medical treatment cases, the Court of Criminal Appeal cursorily stated:

> A view along similar lines to the view advanced for the prosecution is expressed by G. Roberts, 'Dr Bolduc's Speculum and the Victorian Rape Provisions', *Criminal Law Journal* vol. 8, 1984, p. 296.[58]

I draw attention to the Court's failure to discuss this article, for it is a prescient (and detailed) examination, in the light of contemporary amendments to the Victorian Crimes Act which extended rape to the insertion of objects into a woman's vagina, of how a Victorian Court might deal with a case like *Bolduc*. I describe it as prescient as it also envisaged cases quite similar to *Mobilio*, suggesting that liability for rape in such circumstances could well be found. For the Court to dismiss it in such a cursory fashion, suggests at least a lack of fortitude. (Roberts' ideas are discussed further below.)

The 'Nature and Character of an Act' and 'Diminished Mental Capacity'

The Court of Criminal Appeal considered a different line of judicial authority to explore the meaning of consent to 'the nature and character' of an act of 'intercourse', cases involving women with diminished mental capacity. According to the Court, for a woman's consent to a man's 'proposed act of inserting his penis into her vagina' to be real where she does not have full mental capacity:

> [S]he must understand more than that what is proposed is the physical act of penetration by the penis. She must have some further perception of what is about to take place including the immediate conditions affecting the nature of the act and the character of what he proposes to do. . . . She needs to understand that the act is one of sexual connection as distinct from an act of a totally different character . . .[59]

The Court cited *Papadimitropoulos*, *Lambert*[60] and *Morgan*.[61] In *Morgan*, where two brothers were appealing against their conviction on charges of rape of a 19-year-old woman who was described as 'mentally retarded to a marked degree', the Full Court of the Victorian Supreme Court considered what a young woman had to understand in order to give a valid consent to sexual intercourse. It concluded that in order to establish that she lacked the capacity to consent:

> [I]t must be proved that she has not sufficient knowledge or understanding to comprehend (a) that what is proposed to be done is the physical fact of penetration of her body by the male organ or, if that is not proved, (b) that the act of penetration proposed is one of sexual connexion as distinct from an act of a totally different character. . . . That knowledge or understanding need not, of course, be a complete or sophisticated one. It is enough that she has sufficient 'rudimentary knowledge' of what the act comprises and of its character to enable her to decide whether to give or withhold consent.[62]

58 *Mobilio*, *supra* n. 2, 348.
59 *Ibid.* 350.
60 *R. v. Lambert* [1919] V.L.R. 205.
61 *R. v. Morgan* [1970] V.R. 337.
62 *Ibid.* 341-2.

In reaching this conclusion, the Full Court in *Morgan* rejected the direction given by the trial judge that the woman needed to understand a series of 'rudimentary concepts' in order to give a real consent. According to the trial judge, she had to understand the concept of virginity — 'that in our community some distinction is drawn between girls who are virgin and those who are not'; she needed to have some understanding of the 'social significance' of the act, that is that most people in the community perceive a difference between sexual intercourse and other acts of intimacy and that the decision to consent involved a moral judgment, that sexual intercourse might be regarded as 'naughty'.[63]

If these sorts of matters do not have to be understood, as a matter of law, to render a 'real' consent, it is difficult to know what a woman does need to be aware of in her understanding of the proposed act as one of 'sexual connection'. Perhaps this difficulty is reflected in the Victorian Court of Criminal Appeal's statement on the *Morgan* decision in *Mobilio*:

> Persons know what a proposed act is if they have an understanding which would in ordinary language be described as knowing what it is.[64]

The court expanded on this circular statement:

> Thus a person has sufficient knowledge to give effective consent to a complex surgical operation without a complete knowledge of all that is involved. No doubt the knowledge of the nature and character of an act requires some knowledge of its possible or probable immediate effects or future consequences.[65]

What are the possible or probable effects of engaging in an act of sexual intercourse in the Court's view? We are not told. But we are told that knowledge of a man's purpose is *not* part of a woman's understanding of the nature and character of a proposed act of sexual intercourse:

> The disagreement of the High Court [in *Papadimitropoulos*] with the decision in *Harms* indicates that if a woman understands that a proposed act is an act of sexual intercourse she knows its nature and character. This knowledge is not affected by a mistake as to the purpose for which the man proposes to perform that act of known nature and character.[66]

It is worth noting here the emphasis on mistake. This is consistent with the High Court decision in *Papadimitropoulos*, where it was stated:

> It must be noted that in considering whether an apparent consent is unreal it is the mistake or misapprehension which makes it so. It is not the fraud producing the mistake so much as the mistake itself.[67]

That is, a man's nefarious purpose is irrelevant. By emphasizing the mistake (made by the woman) rather than the fraud (perpetrated by the man), we have surely lowered the perceived seriousness of the offence. A mistake is a human error, something minor: fraud is a deliberate decision. There are specific statutory offences of inducing sexual intercourse by fraud or false pretences; these are not rape but some lesser offence. Interestingly, the *Mobilio* amendment, described above, will focus the court's attention on the perpetrator's behaviour. It states:

63 Quoted, *ibid.* 339-40. However, the Full Court in *Morgan* did suggest that the jury might consider these matters in making its decision on the woman's understanding as they described it (342).
64 *Mobilio*, *supra* n. 2, 350.
65 *Ibid.*
66 *Ibid.*
67 *Papadimitropoulos*, *supra* n. 26, 260.

> Consent to conduct which could otherwise constitute rape or indecent assault is of no effect if it was obtained by a false representation that the conduct was for medical or hygienic purposes.[68]

The (Ir)relevance of Motive Reconsidered: Consistency in the Criminal Law?

The Court of Criminal Appeal then proceeded to compare consent in relation to sexual intercourse with consent as understood in other legal areas. It stated:

> The actual act to which she consents, the act of sexual intercourse, is not different and has no different effect on her body if the man has one ulterior purpose rather than another.[69]

At one level this statement is perhaps (trivially) true: we are asked to compare one ulterior purpose with another. Let us compare the situation where a man has sexual intercourse with a woman on the basis that he is performing a bona fide medical treatment when he is not, but has the ulterior purpose of humiliating the woman by tricking her into consent, and a situation where a man has sexual intercourse with a woman on the basis that he is performing a bona fide medical treatment when he is not, but has the ulterior purpose of gaining sexual pleasure. For the women concerned, the men's different ulterior purpose would not make a great deal of difference to their sense of invasion. However, perhaps what the Court had in mind here was a comparison between a legitimate ulterior purpose — say, a vaginal examination for the purposes of diagnosis or treatment — and a vaginal examination with no legitimate medical justification, but done in order to humiliate the woman concerned and/or to obtain sexual pleasure. If that was the assertion, we really have come to the nub of the issue: most women, I suggest, will perceive these two acts, once they are aware of the man's secret purpose, as having quite different effects on her body. I will return to this issue later; here I wish to concentrate on the court's legal analysis. For in order to amplify the assertion that the presence of one ulterior purpose rather than another has no different effect on a woman's body in the context of sexual intercourse, the Court asserted that it is different in other areas of law:

> where one person having consented to another performing an act for a limited purpose is held not to have consented to the person performing the act for a different purpose. In those cases if the other person performed the act for the different purpose, its effect on the person who gave the limited consent would be harmful, or more harmful, than if it were performed for the limited purpose.[70]

The court cited in support of this statement the cases of *Barker*[71] and *Pallante v. Stadiums Pty Ltd.*[72] In *Barker*, Barker's neighbour had asked him to look after his house while he was on holiday, telling Barker where he kept the key if Barker needed it. Barker entered the house and stole a number of items of furniture. A person is guilty of burglary if 'he enters any building or part of a building as a trespasser with intent to steal anything in the building or part in question'.[73] The High Court decided (Murphy J. dissenting) that Barker was guilty of trespass as

68 S. 36A, as inserted by the Crimes (Sexual Offences) Act 1991 (Vic.) s. 3.
69 *Mobilio, supra* n. 2, 350.
70 *Ibid.*
71 *Barker v. R.* (1983) 153 C.L.R. 339.
72 *Pailante v. Stadiums Pty Ltd (No. 1)* [1976] V.R. 331.
73 See Crimes Act 1958 (Vic.) s. 76.

he knowingly entered the house with a purpose beyond the consent of the homeowner, that is, with an intent to steal, and he had thus 'entered as a trespasser'. There seemed to be no dispute that Barker had some authority to enter the house, but when he entered with an intention to steal, knowing that it was beyond the authority given to him, this created, in the High Court's view (or, more accurately, in the Victorian Court of Criminal Appeal's view in *Mobilio*) a 'harmful effect' on the homeowner, justifying a verdict of guilty of burglary.

The second case the Court referred to, *Pallante*, concerned an attempt to dismiss a negligence action brought by a boxer who had been injured in a boxing match. The defendants (the organization who conducted the fight, the referee, the trainer and the promoter) argued that the fight was illegal and therefore no damages were recoverable for any injuries sustained during it. The Victorian Supreme Court rejected the request to dismiss and, in the course of its judgment, differentiated between a boxing match that would be illegal (an assault) from one that was legal (a mere 'manly pastime'):[74]

> So far as I can see, the question must be determined by reference to the intention of the parties and the mode and conditions of the particular encounter. If the encounter is conducted either from its inception or if not from some point in its course by either, or both of, the contestants, in a spirit of anger or a hostile spirit and with the predominant intention of inflicting substantial bodily harm so as to disable or otherwise physically subdue the opponent it may be an assault on the part of the contestant or contestants so animated, even though each contestant may have consented to the infliction of blows on himself and whether or not the encounter is for reward, in public or private, bare-fisted or in gloves.[75]

Once again, for the Court of Criminal Appeal in *Mobilio*, this change in secret motive — boxing in a hostile spirit or in anger — makes the effect on the person harmful, or more harmful, than if it were performed for the stated purpose of engaging in a 'manly pastime'. It is difficult to see this difference, unless the court wishes to argue that once this change of animating spirit occurs the 'victim' is more likely to be seriously injured. This, however, does not seem to be the concern. The concern seems to be that the change in intent transforms the nature of the interference with bodily integrity, an interference which the earlier Victorian Court in *Pallante* assumed was the essence of a boxing match.

In my view, the boxing case and the burglary case should have been helpful to the prosecution (though I cannot imagine thinking of the analogies myself) and may well have been raised by them. That is, in traditional analytical fashion, it was surely legitimate to argue that both *Barker* and *Pallante* indicate that a secret motive can transform an apparently legal act into an illegal one.[76] If such an analysis can be accepted in the law of assault and the law of burglary, then surely it can also be accepted in the law of sexual assault. Feminist critics of rape law, particularly those critical of the decision in *D.P.P. v. Morgan*[77] (that a man's

74 [1976] V.R. 331, 343.

75 *Ibid.*

76 I do not think it affects the argument that burglary is traditionally perceived as a crime of ulterior or specific intent, that is one has to enter as a trespasser *with the intention to steal*. Legally, *Barker* was directed to the question of whether Barker had entered as a trespasser: that is, whether his intention to steal could transform his entry from authorized to unauthorized (as well as providing the ulterior intent required for the offence).

77 *D.P.P. v. Morgan* [1976] A.C. 182.

belief in the consent of a woman to sexual intercourse does not need to be reasonable, merely honest), are often enjoined to remember consistency: consistency in the criminal law is, it seems, required above all.[78] To change the *mens rea* requirement in rape, is, we are told, to attack fundamental notions of liability in the criminal law. Yet in burglary and assault, a secret unexpressed intention can transform an assailant's action from innocence to guilt, but not in rape. The Court of Criminal Appeal's attempt to distinguish these cases — that harm is done to the victim by the changed or secret purpose in the burglary and boxing cases but not in the case of rape or sexual intercourse — reveals more than judicial sleight of hand or distinguishing a relevant precedent. If a neighbour with a key and an invitation to enter to 'look after the property' who enters with an intention to steal can transform the nature of the harm done, not by his theft but by the nature of the entry, then where is the Court's ability to empathize with the situation of a woman internally examined by a medical professional with an illegitimate ulterior motive?[79] If a man's opponent in a boxing match suddenly decides that what he is doing is 'repaying a debt' (that is, he is angry) rather than 'playing a game' and in this situation the law can perceive a harm arising from an unlawful act, what of the situation of a woman who believes she is visiting a medical practitioner for a necessary vaginal examination, but finds out that he is merely experimenting with the equipment or is aiming to achieve sexual gratification? For the Court of Criminal Appeal, there is harm done in the burglary and assault cases but not in the hidden motive medical treatment context.

WHAT IS 'SEXUAL' IN THE MEDICAL TREATMENT CONTEXT?

In my view, the Court of Criminal Appeal not only failed to place itself in the position of a woman attending a gynaecologist or a radiographer — vulnerable because undressed or partly undressed, concerned about the results of tests or the diagnosis of illness, lying with the most intimate part of our bodies exposed to the gaze, the prodding and poking of cold clinical instruments — but also failed to come to terms with what is or could be 'sexual' about such an encounter.[80] More generally, its understanding of what makes an act, any act, sexual is underdeveloped. Towards the end of its judgment the Court made this revealing statement:

[78] See Pickard, T., 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 30 *University of Toronto Law Journal* 75; Pickard, T., 'Culpable Mistakes and Rape: Harsh Words on *Pappajohn*' (1980) 30 *University of Toronto Law Journal* 415.

[79] Interestingly, in a discussion of the sorts of fraud that should vitiate consent in rape, Jennifer Temkin also raises the burglary analogy. She suggests (though ultimately rejects the suggestion) that perhaps rape law should follow the law of burglary where 'fraud of any kind' is 'regarded as vitiating consent' and continues '[i]ndeed it could well be argued that since entering a woman's body without her true consent is at least as grave a matter as entering property without the true consent of the occupier, such an approach would be amply justified'. Temkin, J., 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 405.

[80] For a description of that vulnerability in the medical treatment context, see *The Report of the Cervical Cancer Inquiry*, New Zealand, 1988, particularly at 137.

> In applying the law with regard to rape by the penis to the statutory concept of rape by a manipulated object it is important to free the mind of incorrect assumptions which can arise from a feature almost invariably present in cases where the reality of a woman's consent to the introduction of a penis was the issue. In cases of rape by the penis it would be extraordinary for the man's conduct not to be driven, at least to some extent, by his sexual impulse and urge. In the case of vaginal rape by manipulated object, the man or woman might not be driven by any sexual impulse, but insert the object into the vagina of a woman without her consent in order to hurt, injure, degrade or humiliate her.[81]

This paragraph does not appear to be obviously connected to the succeeding or preceding paragraphs. What is its relevance? It must be irrelevant to the legal analysis developed, for very early on the Court laid the groundwork for the view it reached, that a man's motive was irrelevant to the consent given by a woman. As noted above, it matters not whether a man is motivated by 'his own sexual gratification, his self-aggrandisement, the hurting or humiliation of the women, her psychological or bodily betterment, or some combination of these'[82] at least where the sexual intercourse concerned involves the insertion of a penis into a vagina. Why does the motivation appear to matter where the Court was avowedly discussing rape by a manipulated object? I think it matters to the Court because the Court did not see that, where a man is manipulating an object in a woman's vagina, the action must be sexual, unless justified by a treatment objective (and even in some cases then).

It appears to me that the Court was taking a very male perspective on what is sexual. If an action involves a man and his penis (and a vagina) it is sexual or, more accurately, driven by a 'sexual impulse'; if it involves a woman's vagina but a man manipulating an object rather than his penis, in the Court's view it may well not be sexual. That is, sexual content only assuredly arises if a man's sexual organs are involved — what men can clearly know and understand as sexual; if it is only a woman's vagina that is being invaded, it appears men cannot be sure. Catharine MacKinnon describes this cultural definition of sexuality:

> To be clear: what is sexual is what gives a man an erection. Whatever it takes to make a penis shudder and stiffen with the experience of its potency is what sexuality means culturally.[83]

I agree with writers like Christine Boyle who argue against trying to understand the meaning of 'sexual' in the legal phrase 'sexual assault' (where, as in the Canadian Criminal Code, 'sexual' is undefined) by building up a 'shopping list' of parts of the body. She suggests that this approach divides our bodies into bits, classifying some as sexual and some parts as nonsexual, which 'may also invite consideration of parts of our bodies in isolation, that is, out of their social and political context'.[84] Boyle here is cautioning against a strict equal treatment approach to a fundamentally gendered situation. In this article she is criticizing a New Brunswick Court of Appeal decision[85] which refused to classify the touching of a woman's breasts as sexual lest they be saddled with the uncomfortable task of consequently classifying the touching of a man's beard as similarly sexual. She points out that the touching of men's beards is not a known social

[81] *Mobilio*, *supra* n. 2, 352.
[82] *Ibid.* 343-4.
[83] MacKinnon, C., *Toward a Feminist Theory of the State* (1989) 137.
[84] Boyle, C., *op. cit.* n. 22, 101.
[85] *R. v. Chase* (1984) 40 C.R. (3d) 282; 13 C.C.C. (3d) 187.

problem (whereas the touching of women's breasts is); ignoring this leads to a discussion of breasts and breast touching out of its social and political context. Boyle's view was confirmed by the Canadian Supreme Court on appeal.[86] That is, touching a woman's breasts did amount to sexual assault. However, in the context of the *Mobilio* decision, it may not be inappropriate to call for strict equal treatment. That is if a (probably) tumescent penis is sexual, so is a vagina. Whilst I do not accept that biology alone determines cultural definitions of what is sexual,[87] in a predominantly heterosexual culture, if a penis is sexual, surely so is a vagina. I am suggesting that there is a common sense in our culture that a vagina is sexual, a common sense that the Court of Criminal Appeal clearly failed to discern. It is, I suggest, a common sense shared by both men and women.[88] This is a common sense that Graham Roberts describes as objective — he suggests that an 'objective social judgment', that is 'according to our culturally defined perceptions', can be made that the 'improper exposure' of a vagina is a 'sexual act'.[89]

It is also worth noting that this is a common sense that the Victorian Parliament enacted into legislation in 1980 — the insertion of a penis into the vagina or anus of another or the insertion of an object into the vagina or anus of another (in circumstances where the insertion of a penis into a vagina would be rape at common law) amounts to rape. According to our legislation then, the anus, the penis and the vagina are sexual parts. The definition may well be underinclusive,[90] but does at least include vaginas. If a man's motive is irrelevant for 'traditional' rape, on the Court's analysis, it must be irrelevant in this context, for the Parliament has already determined that invasion of these body parts is the equivalent of traditional rape or sexual assault.

The court also appears to have ignored the connection between 'hurt', 'degradation' and 'humiliation' of women and sexuality, or in the Court's words 'sexual impulse'. Catharine MacKinnon has pointed to the close connections between the degradation of women and their sexuality as defined by men:

> Male dominance is sexual. Meaning: men in particular, if not men alone, sexualise hierarchy; gender is one. ... The male sexual role ... centers on aggressive intrusion on those with less power. Such acts of dominance are experienced as sexually arousing, as sex itself.[91]

In other words, our culture associates the hurting, humiliation and degradation of women with women's sexuality, indeed, according to MacKinnon, defining women and their sexuality through such degradation and its representation in, for example, pornography. So even without the involvement of a woman's vagina,

86 *R. v. Dalton Chase* [1987] 2 S.C.R. 293.

87 See Gatens, M., 'Towards a Feminist Philosophy of the Body' in Caine, B., Grosz, E. A. and de Lepervanche, M., *Crossing Boundaries: Feminism and the Critique of Knowledges* (1988).

88 Christine Boyle makes a similar observation in her analysis of the *Chase* decision: *op. cit.* n. 22, 101.

89 Roberts, G. B., *op. cit.* n. 37, 303.

90 The Law Reform Commission of Victoria recommended that the sorts of acts covered should extend to penetration of a vagina or anus by parts of the body other than a penis: *Rape and Allied Offences: Substantive Aspects*, Report No. 7, June 1987, at 16-18; this is now the law in Victoria as a result of the Crimes (Sexual Offences) Act 1991. See also, for example, Crimes Act 1900 (NSW) s. 61A.

91 MacKinnon, C. A., *op. cit.* n. 83, 137.

and certainly without the involvement of a penis, this degradation should be seen as sexual. Thus, not only does the court fail to see that an act is necessarily sexual when a woman's vagina is involved, but also that where a man inserts an object into a woman and is 'merely' motivated by a desire to hurt or humiliate her, he is involved in a sexual act.

It is interesting to speculate on why the Court failed to see this 'common sense'. Boyle, faced with a similar conundrum when analysing the new Brunswick Court of Appeal decision in *Chase*, suggests that the court there may have been following the rigid gender neutrality of sexual assault laws, which suggest that men and women are both equally subject to rape: in order to respond to equality claims made by women, we treat them equally with men.[92] We too have such gender neutral laws,[93] yet gender neutrality was rejected here. My speculation must begin (and end) with the suggestion that there may have been a hesitation both to equate a penis with a vagina for these purposes, as suggested above, but also a hesitation to equate a penis with an instrument.

Sexual Motive: the Example of Indecent Assault

In the recent case of *R. v. Court*,[94] the House of Lords confirmed that, at least in some circumstances, evidence as to a man's motive for an assault is admissible to establish the indecency of that assault. The House of Lords confirmed that where the circumstances of an assault were incapable of being regarded as indecent, then the undisclosed intention of the accused to gain sexual satisfaction cannot turn the assault into an indecent one.[95] Further, where the assault involves actions which are 'inherently indecent' (and here the example given is of a man removing a woman's clothes without her consent), a man's motive is irrelevant. In words similar to those used by the Victorian Court of Criminal Appeal, the House of Lords stated:

> Whether he did so for his own personal sexual gratification or because, being a misogynist or for some other reason, he wished to embarrass or humiliate his victim, seems to me to be irrelevant.[96]

However, evidence of motive is relevant where, as in the *Court* case, the circumstances are equivocal. In this case, Court had slapped a young girl of 12 across the buttocks. When challenged on his behaviour by the police, he stated he had a buttock fetish. The House of Lords (Lord Goff dissenting) concluded this evidence was admissible in order to establish the necessary intention: that is, that he intended to commit an assault that was indecent.

> It tended to confirm . . . that what he did was to satisfy his peculiar sexual appetite. . . . It tended to establish the sexual undertones which gave the assault its true cachet.[97]

92 Boyle, C., *supra* n. 22. She suggests a judge may in fact be motivated by this 'well-meaning' (but inadequate) approach to equality as well as perhaps a more deliberate choice reflecting an attitude of 'ask for equality and see where it gets you'.

93 Though it is interesting to note that the Attorney-General's Press Release foreshadowing the amendments to the Crimes Act to respond to *Mobilio* does refer to the need to protect women, though of course the law itself is gender-neutral.

94 *R. v. Court* [1989] 1 A.C. 28.

95 *Ibid.* 42.

96 *Ibid. per* Lord Ackner, 43.

97 *Ibid. per* Lord Ackner, 45.

Now, where does the insertion of an object into a woman's vagina fit into the House of Lords tripartite analysis? It will be clear from my earlier comments that in my view it is 'inherently indecent' or, more accurately, inherently sexual. However, given that it may well occur legitimately in the context of medical treatment, the action could, in the House of Lords' terms, be described as equivocal. So surely motive or intention becomes relevant. Interestingly, the House of Lords in *Court* did address the medical treatment context.[98] The passage is worth quoting in full:

> The jury in their question to the judge were concerned with the position of a doctor who carried out an intimate examination on a young girl. Mars-Jones J. dealt with their point succinctly saying:
>
> > In that situation what is vital is whether the examination was necessary or not. If it was not necessary, but indulged in by the medical practitioner it would be an indecent assault. But if it was necessary, even though he got sexual satisfaction out of it, that would not make it an indecent assault.
>
> I entirely agree. If it could be proved by the doctor's admission that the consent of the parent, or if over 16 the patient, was sought and obtained by the doctor falsely representing that the examination was necessary, then, of course, no true consent to the examination had ever been given. The examination would be an assault and an assault which right-minded persons could well consider was an indecent one. I would not expect that it would make any difference to the jury's decision whether the doctor's false representations were motivated by his desire for the sexual gratification which he might achieve from such an examination, or because he had some other reason, entirely of his own, unconnected with the medical needs or care of the patient, such as private research, which had caused him to act fraudulently. In either case, the assault could be, and I expect would be, considered as so offensive to contemporary standards of modesty or privacy as to be indecent. A jury would therefore be entitled to conclude that he, in both cases, intended to assault the patient and to do so indecently. I can see nothing illogical in such a result. On the contrary, it would indeed be surprising if in such circumstances the only offence that could be properly charged would be that of common assault. No doubt the judge would treat the offence which had been motivated by the indecent motive as the more serious.[99]

This *obiter* statement is interesting at a number of different levels, not least because it appears to be directly contrary to the Court of Criminal Appeal's decision in *Mobilio*. In the *Mobilio* appeal judgment there is next to no consideration of the legitimacy, the necessity, of the internal examinations undertaken. As noted above, the Court in its summary of the evidence noted that none of the women's treating doctors had ordered internal examinations, nor did they expect them to be carried out. That is, the Court ignored what in the House of Lords' view is an essential factor in the determination of the indecency (and I would argue the sexuality) of the assault. This issue is explored more fully below.

What is also of interest is the House of Lords' suggestion that, where an unnecessary internal examination was undertaken, it is indecent (that is, sexual)[100] whether the doctor was motivated by a motive of private research or sexual gratification. That is, the House of Lords seems to accept that there is something inherently indecent, or for me, sexual, in treating a woman's vagina

98 It is worth noting here that in England the issue of internal examination with an ulterior purpose will be addressed as an issue of indecent assault not rape for the common law definition of rape is still relied on.

99 *Court supra* n. 94, *per* Lord Ackner, 43-4.

100 Note that the House of Lords indicates that whilst it considers Glanville Williams' definition of indecent as 'overtly sexual' as a 'convenient shorthand', it prefers a definition that asks whether 'right-minded persons would consider the conduct indecent or not', *ibid.* 42.

in this way. For the House of Lords the assault is highly likely to be 'considered as so offensive to contemporary standards of modesty or privacy as to be indecent'. Now, a feminist judge may not have resorted to the language of modesty or privacy, and indeed for me that is not the issue, but the House of Lords was expressing that common sense, a sense common I suggest to both men and women, that inserting objects into a vagina is inherently sexual, a sense that, despite amendments to the Victorian Crimes Act, the Court of Criminal Appeal seems to ignore.

Finally, it is worth pointing out that the House of Lords argued that while both would be acting indecently, a doctor who engaged in unnecessary vaginal examinations with an explicitly indecent (sexual) motive would be treated more harshly by a judge than the one who was undertaking such examinations for his own research. I think this may well accord with a woman's reaction on finding out that she had been exposed to an unnecessary vaginal examination in each of these circumstances: while, in my view (and that of the House of Lords) they are both sexual assaults, they both set women's autonomy at nought, I suspect that I would feel an even greater sense of violation if I were to find out that an explicitly sexual motive had driven the doctor's actions.[101]

The Relevance of the Legitimacy of the Medical Treatment

Why was the legitimacy of the medical treatment irrelevant to the Court of Criminal Appeal? There are several reasons. The first I have already canvassed: the refusal of the Court to see the insertion of an object into a vagina as inherently sexual; its interpretation of what is sexual from a male perspective. If the Court had perceived this treatment as necessarily sexual, it would have been necessary to examine in detail the medical justification for it, for only if it was medically justified could it be taken out of the realm of the sexual.

A second answer lies, I suggest, in the Victorian legislation. In N.S.W. the relevant expansion of the sorts of activities covered by the phrase 'sexual intercourse' in the new sexual assault laws — the insertion of objects or body parts into a person's anus or vagina — is subject to the following proviso: 'except where the penetration is carried out for proper medical purposes' (Crimes Act 1900 (NSW) s. 61A(1)). And the N.S.W. offence structure continually describes the offences using the phrase 'sexual intercourse'. No such proviso is contained in the 1980 Victorian amendments to the definition of rape (s. 2A(1) at the time of the *Mobilio* decision; see now s. 36). However, in the definition of 'sexual penetration' (s. 2A(2); see now s. 37), the Victorian Act states:

> For the purposes of the Act, an act of sexual penetration is . . .
> (b) the introduction (to any extent) of an object (not being part of the body) manipulated by a person of either sex, otherwise than as part of some generally accepted medical treatment.

[101] Interestingly, this also seems to have been the view of the sentencing judge in *Mobilio*. It is suggested in the special leave application that the sentencing judge sentenced Mobilio, and sentenced him more leniently than he would otherwise have done, on the basis that he was motivated by a desire to experiment with the equipment rather than because of a sexual motive. See *supra* n. 18.

The phrase sexual penetration, then, only appears in the 'carnal knowledge' sections, various other specific provisions (*e.g.* s. 55 administering drugs to a person with the intention of rendering her (or him) insensible and enabling himself (or a third person) to take part in an act of sexual penetration; see now s. 53) and in s. 54 (now s. 57) of the Crimes Act. Section 54 provides that it is an offence to procure another to take part in an act of sexual penetration by threats, intimidation, false pretence, representation or other fraudulent means. It may then seem as if the medical treatment exception is only relevant where an offence of 'sexual penetration' is involved, and the rape offences do not use this phrase. Normal principles of statutory interpretation may well support this conclusion. However, Graham Roberts has pointed out that to restrict this medical claim of right to the s. 54 context, and other contexts where the term sexual penetration is used, may well have unintended side-effects.

Roberts argues that what he describes as a formalistic approach, the conceptualization of the proviso in s. 2A(2)(b) as totally separate from the expanded definition of rape in s. 2A(1), leads to a removal of the sexual character of rape, a character which he suggests is fundamental to the crime:

> The penetration that constitutes a rape must surely always be a sexual penetration and this must preclude any penetration effected bona fide for a legitimate medical purpose even though consent is lacking.[102]

Without the extension of this 'defence' to the ordinary rape provisions, a doctor who performed lets say a medically justified vaginal examination on an adult woman but did not get her consent (*e.g.* because she was unconscious) could be guilty not only of an assault, but a *sexual* assault. He suggests this is an absurd result. Whilst I do not find it quite as absurd as Roberts suggests, he is making an important point — the need to keep in mind the sexual nature of the offence of rape, however defined.

I have explored the implications of the proviso particularly in the context of s. 54 because at the end of its decision the Court of Criminal Appeal hinted that this would have been a more appropriate offence with which to charge Mobilio. This approach has some difficulties which the court notes — corroboration is required and it says 'much could turn on whether . . . what the applicant did was part of some generally accepted medical treatment'.[103] It noted that the meaning of the phrase 'generally accepted medical treatment' was not argued before the Court. Why wasn't Mobilio charged with this alternative offence? Perhaps the prosecutors were convinced that a rape prosecution would be successful and there was no need to charge in the alternative. It is also important to note that there is a large difference between a conviction for rape, and one for a s. 54 offence. And, of course, I want to suggest that the sort of fraud assumed to be engaged in here is serious enough to vitiate consent rather than a more minor fraud that would appropriately lead to prosecution under s. 54.

The amendments contained in the Crimes (Sexual Offences) Act 1991, as well as inserting s. 36A into the Crimes Act, also make a minor amendment to what is

[102] Roberts, G. B., *op. cit.* n. 37, 305.
[103] *Mobilio*, *supra* n. 2, 354.

currently s. 2A(2)(b): the new s. 37, defining sexual penetration, includes the introduction by a person of an object into the vagina or anus of another person, *otherwise than in the course of an appropriate and generally accepted medical procedure*'.[104]

The addition of the word 'appropriate' should mean that any argument that might have been made in a situation like *Mobilio* that the treatment was generally accepted medically, will not succeed unless the 'treatment' was also appropriate in the context.

SEXUAL INTERCOURSE VERSUS MEDICAL INTERCOURSE

Surely what is in issue in *Mobilio* is whether something that appears to have a medical character, has in fact a sexual character. The Court of Criminal Appeal argued that in order to make the old medical treatment cases consistent with *Papadimitropoulos*, these old cases must be read as cases where

> the woman did not know that the insertion of the man's penis into her vagina was a sexual act, but believed it to be an act of medical treatment or bodily improvement.

Or, in this context, the women did not know that the insertion by a man of a transducer or speculum into her vagina was a sexual act, but believed it to be an act of medical treatment. Contrary to the conclusion of the Court of Criminal Appeal, the analysis then logically continues: the women in *Mobilio* did not know that the actions engaged in by Mobilio had any sexual content, presumed they were only done for a medical reason (in this case diagnostic rather than treatment related) and therefore their consent is vitiated.

The Court rejected this analysis for two major reasons:

(1) the Court's narrow understanding of what it means to perceive an act as sexual
(2) the Court's belief that the only thing that made Mobilio's action a sexual act was the presumed motive of Mobilio.

By finding that *Harms* had been wrongly decided, and in its reading down of the other old medical treatment cases to be consistent with *Papadimitropoulos*, the Court of Criminal Appeal was arguing that once a person understands that the insertion of a penis into a vagina is an act of sexual intercourse, her consent is valid. Whilst, as argued above, it is still unclear precisely what has to be understood to 'know' the act as one of sexual intercourse, the discussion of other cases by the Court of Criminal Appeal suggested it to be a fairly mechanical appreciation that is required.

Roberts suggests that this sort of analysis is not dictated by *Papadimitropoulos*: the constant reference in the High Court decision to the nature *and* character of the act means that something more than mere mechanical understanding is required.[105] Roberts may well be correct in his reading of precedent, that is, that

[104] This is from s. 37(1)(c); s. 37(1)(b) which covers the insertion of parts of the body other than the penis into a vagina or anus has a similar proviso. The new legislation maintains the distinction between rape offences and offences of sexual penetration, so if the interpretation in *Mobilio* on this point is accepted, the proviso still does not apply to rape offences.

[105] Roberts, G. B., *op. cit.* n. 37, 300.

Papadimitropoulos should be given a broader reading than the Court of Criminal Appeal has in fact done, but I do not wish to concentrate on that line of argument. Examining the corpus of precedent relied on by the Court in its decision, there has been a disturbing tendency to narrow the sort of understanding required of a woman to give a real consent to sexual intercourse. Perhaps the low-point was the decision in *Morgan*:[106] 'rudimentary knowledge' of something more than the physical act of penetration is all that is required to give a real consent, whilst understanding of any of the social context appears legally irrelevant. *Morgan* may have been a helpful precedent for the Court's analysis, but it could have been distinguished and is surely open to criticism in the 1990's.

However, even on the Court's own narrow, mechanical understanding of sexual intercourse, it may be arguable that the Court has been internally inconsistent. On the Court's analysis, in order to consent to sexual intercourse a woman need only have a mechanical understanding of the act, but a mechanical understanding that the act involves sexual intercourse. In a medical treatment context, like that in *Mobilio*, surely the Court would agree that in order to give an adequate consent a woman also has to understand the insertion of an instrument as sexual in some sense. On my analysis, it is sexual because it involves a woman's vagina; but on the court's analysis the insertion of an object into a woman's vagina may not be sexual because it does not involve a penis. Consequently, is there not a need for a court to inquire into a woman's understanding of the incident in order to ascertain the state of her knowledge? In other words, could it not be argued that on the Court's own analysis, consent to *sexual* intercourse is required before consent is found, the health worker's action is not necessarily sexual because it involved an instrument not a penis, and therefore there has been no valid consent?

However, this is not a sufficient analysis of the decision. Leaving aside the (possible) inconsistencies within the Court's own analysis, how is it possible for me to avoid similar inconsistencies? For I am arguing that the Court was also motivated by a belief that the only thing that made Mobilio's actions sexual was his presumed hidden motive, and that such a focus reveals an inadequate understanding of sexuality. Considered from a woman's perspective, the fact that her vagina was invaded is enough to make the action 'sexual'. But is that understanding not then enough, as the Court argues, but on a different analysis, to maintain that the women gave a real consent to Mobilio's actions? On my analysis, they have indeed consented to a sexual act, but a sexual act they believed to be transformed by its context, that of a medical setting, into a medical act. The difference between my analysis and that of the Court's is that on my analysis we need to examine motives, situation and context in order to exculpate, but on the Court's analysis that would only be necessary to inculpate, and such an examination is, according to them, inconsistent with prior cases. In other words, I believe that to suggest that we must examine a man's motives to discern sexuality in this context is misguided. We may well need to examine motives in

[106] And here I am referring to the Victorian decision of *R. v. Morgan* [1970] V.R. 337.

order to exculpate, in order to determine whether the action was medically justified, but not in order to pass the threshold test.

I believe that my approach is consistent with the House of Lords' decision in *Court*. That is, we have a situation which can be described as equivocal: it may either be described as 'medical' where the treatment was medically justified or 'sexual' where there is no medical justification. I also agree that in assessing liability, here for rape rather than indecent assault, it does not matter whether the motive of the health worker is avowedly sexual or reflects (say) an interest in experimenting with new technology. Both involve setting women's interests in bodily autonomy at nought and both are sexual because they involve the insertion of an object into a woman's vagina.

In the end then, whether you call what we are grappling with ultimate purpose, motive or context, it must be relevant in the medical treatment situation, if not in 'traditional' rape, because a legitimate ulterior purpose exculpates a medical practitioner and an illegitimate ulterior purpose transforms the experience of an internal examination for a woman. However, to a large extent this exploration of hidden motives will in fact involve an examination of observable context, that of the legitimacy or otherwise of the medical treatment.[107] This is, of course, what will be achieved by the recent amendments to the Crimes Act.

CONCLUSION

Christine Boyle, in her discussion of the New Brunswick Court of Appeal's decision in *Chase*, argues that *Chase* was in some senses an 'easy case'. That is, (most) men as well as women would agree that touching a woman's breasts was sexual. She correctly predicted that the Canadian Supreme Court would discern this common sense and decide that touching a woman's breasts was a sexual assault. Perhaps we have the same situation here: the Victorian Government (largely made up of men) has decided that the Court of Criminal Appeal's decision in *Mobilio* was based on confusion, and has moved to prevent a similar decision occurring in the future. In other words, it has made it clear that, where a woman's consent is induced by a fraud as to the medical nature of a particular action, that consent has no effect.

Whilst the Government's decision and the proposed legislation are to be commended, I am not sure that this can be characterized as such an easy case. Boyle draws attention to the not-so-easy cases, where men's and women's perception of whether an act is sexual may differ:

> What if women think that being kissed against their will is really bad and men think it is just a little fun?[108]

[107] Graham Roberts is, I think, making the same point when he says: 'From an informed medical point of view the lack of medical justification ... for the procedure itself ... is an external or objective fact' (*op. cit.* n. 37, 304). While I would not want to concede so much to 'objectivity', if part of the Court's hesitation is a reluctance to examine motive because of the evidentiary difficulty of doing so, the emphasis on externally observable context is important.

[108] Boyle, C., *op. cit.* n. 22, 103.

She is speculating in her article on how a feminist judge might respond to the situations she is describing: Boyle suggests she might rely on interdisciplinary research about women's understanding of and response to sexuality, might wish to talk to women about their experiences of sexuality and would actively try and incorporate such a world view in her decision making, and would refuse to abstract the facts from their context, a context of sexual and social inequality. What seems obvious, and disturbing, in the *Mobilio* case is that the Court of Criminal Appeal made no attempt to incorporate the world view of women, and almost totally ignored the context in which the actions occurred. Whilst in the future a Court will be required to examine closely the medical treatment context of alleged acts of sexual intercourse, and the proposed legislation appears to embody women's experience of fake medical treatment, the Court's failure in *Mobilio* to view the facts as harmful, together with their failure to view them as sexual in the context of the changes in rape law made in the 1980s, suggests a not particularly hopeful prospect for changes in the understanding of rape law.

I am not here dooming the proposed amendments to failure before they have been tried and tested. What I do want to emphasize are the precedents the Court relied on and its misunderstanding of sexual assault. It seems obvious that not all participants in the *Mobilio* prosecution viewed the law in the same way as the Court of Appeal. The fact that the women concerned pursued their complaints, presumably initially with their doctors and later with the police, and then gave evidence before judge and jury, indicates that they felt they had been harmed and that the law might offer some redress. The fact that the D.P.P. chose not to pursue a prosecution under s. 54 (now s. 57) of the Crimes Act, but to pursue a rape charge, indicates that the D.P.P. presumably thought the facts could amount to rape. Yet, the Court in *Mobilio* did rely on previously decided cases in forming its conclusion.

In the previous discussion, I have outlined the precedent relied on by the Court of Criminal Appeal. Roberts suggests, in his prescient discussion prior to the *Mobilio* decision, that *Papadimitropoulos* should not be understood in a restrictive fashion: given that the case was perceived by that Court to be one which went to 'fraud in the inducement' rather than 'fraud as to the nature and character of the act', the High Court did not need to analyse what was required for a proper understanding of the nature *and* character of an act of sexual intercourse. That is, the High Court's understanding of what is required for consent may not be as narrowly drawn as the Court in *Mobilio* suggested. If we need to play around with precedent, as we may need to do in other States, this may well be a fruitful field of argument. But let us not forget the facts in *Papadimitropoulos*. Surely, on its own facts, the High Court decision may be criticized: can the consent of a Greek woman who had just arrived in Australia, to sexual intercourse within marriage (in the late 1950's) really be construed as consent to sexual intercourse outside marriage? In order to justify such a decision, the act of sexual intercourse has to be so abstracted from its context that it is scarcely recognizable as an action that a woman as well as a man participated in. Papadimitropoulos wished to engage in sexual intercourse with his victim; that she wished to engage in sexual intercourse with her husband, and only her husband, appears irrelevant.

It might be that the Court of Criminal Appeal can be critized for turning to precedent on sexual intercourse with women with severe intellectual disabilities in order to bolster its argument as to what level of understanding is required in women with no such disability, but the major problem is surely the inadequacy of the *Morgan* decision itself on its own facts. Women, with or without an intellectual disability, need and are entitled to understand more than the mere mechanical act of penetration before their consent can be seen as real. The trial judge in *Morgan* attempted to delineate what might be relevant to such an understanding, but the Full Court saw only the mechanics. Context, once again, is irrelevant.

The Canadian Supreme Court in *Bolduc and Bird* found that it was not an indecent assault for a doctor to invite his non-medically qualified friend to 'have a good look' whilst he waas examining and treating a woman's vagina, in apparent reliance on *Papadimitropoulos*. Context, once again, is irrelevant.

However, context is relevant when a man's entry into your house is done with a secret dishonest intent. And again, perhaps it is not a recommended option to participate in a boxing match when your opponent has a grudge against you, rather than wishing to merely test his mettle, but how is the harm increased from that of the 'ordinary manly pastime', presuming no change in the injuries inflicted? The fact that context is relevant to the legal decision in these two cases, but not in rape, suggests a failure to understand the vulnerability of a woman visiting a health worker and having a vaginal examination, yet an ability to emphathize with the (gender-neutral) homeowner or the male participant in a boxing match.

Judges must begin to see rape, or at least penetration, as not just involving the object or part of the body that penetrates but the part of the body which is penetrated; that rape, even by an object, raises issues of sexuality and that rape does not just involve a man, but also involves a woman. Perhaps, after all, the most challenging aspect of the Law Reform Commission's earlier report on the reform of sexual offences was in fact that part which referred to the need for judicial education.[109]

[109] *Rape and Allied Offences: Procedure and Evidence*, Report No. 13, March 1986, Victoria Law Reform Commission, Recommendation One.