

- DeKeseredy, W.S., & Corsianos, M. (2016). *Violence against women in pornography*. London, UK: Routledge.
- DeKeseredy, W.S., & Hall-Sanchez, A. (2016). Adult pornography and violence against women in the heartland: Results from a rural southeast Ohio study. *Violence Against Women*. Advance online publication. doi: 10.1177/1077801216648795.
- DeKeseredy, W.S., & Schwartz, M.D. (1998). *Woman abuse on campus: Results from the Canadian national survey*. Thousand Oaks, CA: Sage.
- DeKeseredy, W.S., & Schwartz, M.D. (2013). *Male peer support and violence against women: The history and verification of a theory*. Boston, MA: Northeastern University Press.
- Dines, G. (2010). *Pornland: How porn has hijacked our sexuality*. Boston, MA: Beacon Press.
- Dines, G., Jensen, R., & Russon, A. (Eds.) (1998). *Pornography: The production and consumption of inequality*. New York, NY: Routledge.
- Funk, R.E. (2004). What does pornography say about me(n)? How I became an anti-pornography activist. In C. Stark & R. Whisnant (Eds.), *Not for sale: Feminists resisting prostitution and pornography* (pp. 331–351). Melbourne, Australia: Spinifex Press.
- Funk, R. E. (2014). *What's wrong with this picture?: Examining the harms of viewing pornography and the links to men's perpetration of gender based violence*. Louisville, KY: MensWork.
- Gillespie, I. (2008, June 11). Nowadays, it's brutal, accessible; pornography. *London Free Press*, A3.
- Hammaren, N., & Johansson, T. (2007). Hegemonic masculinity and pornography: Young people's attitudes toward and relations to pornography. *Journal of Men's Studies*, 15, 57–71.
- Harmon, P.A., & Check, J.V. P. (1989). *The role of pornography in woman abuse*. Toronto, Canada: LaMarsh Research Program on Violence and Conflict Resolution, York University.
- Jensen, R. (2007). *Getting off: Pornography and the end of masculinity*. Cambridge, MA: South End Press.
- Kimmel, M. (2008). *Guyland: The perilous world where boys become men*. New York, NY: Harper.
- Kjellgren, C., Priebe, G., Svedin, C. G., Mossige, S., & Langstrom, N. (2012). Female youth who sexually coerce: Prevalence, risk, and protective factors in two national high school surveys. *Journal of Sex Medicine*, 8, 3354–3362.
- Lehman, P. (2006). Introduction: "A dirty little secret": Why teach and study pornography? In P. Lehman (Ed.), *Pornography: Film and culture* (pp. 1–24). New Brunswick, NJ: Rutgers University Press.
- Mossige, S., Ainsaar, M., & Svedin, C. (Eds.). (2007). *The Baltic Sea regional study on adolescent sexuality* (NOVA Rapport 18/07). Oslo, Norway: Norwegian Social Research.
- Romita, P., & Beltrami, L. (2011). Watching pornography: Gender differences, violence and victimization. An exploratory study in Italy. *Violence Against Women*, 17(10), 1313–1326. doi 10.1177/1077801211424555.
- Russell, D. (1990). *Rape in marriage* (2nd ed.). Bloomington, IN: Indiana University Press.
- Russell, D. (1993). *Against pornography: The evidence of harm*. Berkeley, CA: Russell Publications.
- Shope, J.H. (2004). When words are not enough: The search for the effect of pornography on abused women. *Violence Against Women*, 10(1), 56–72.
- Simmons, C.A., Lehmann, P., & Collier-Tenison, S. (2008). Linking male use of the sex industry to controlling behaviors in violent relationships: An exploratory analysis. *Violence Against Women*, 14(4), 406–417.
- Wolak, J., Mitchell, K.J., & Finkelhor, D. (2007). Unwanted and wanted exposure to online pornography in a national sample of youth Internet users. *Pediatrics*, 119, 247–255.

## Chapter 14

# The court's response to intimate partner sexual violence perpetrators

Anna Carline and Patricia Easteal

### Introduction

Any efforts to change the way IPSV defendants are treated need to recognize that the courts' responses do not take place in a vacuum, but are embedded within the attitudes held by many in the community and by the legacy of legal precedent and past practice. The "license to rape" (the spousal exemption from sexual assault charges), although now abolished in most countries, continues to have a potent impact on the beliefs and actions of the courts and the community (Carline & Easteal, 2014). If you work in the criminal justice system it is useful for you to learn more about why this is so. In this chapter, we will highlight some of the ways that the legacy of the fiction ripples into the courtroom. We provide several examples of how IPSV continues not to be seen as "real rape" and how this affects the legal response to perpetrators. We also include a few recommendations. Some are relevant for those who work in the Courts. Other suggestions are more relevant for readers who are advocates or in positions to work toward law reform and/or policy changes.

### Not quite "real" rape

Since the 1980s, studies of attitudes toward partner rape have found that some people simply do not believe that husbands ever use force to compel their wives to have sex; some believe it's rare; some believe wives have no right to say no; and many do not think this type of sexual assault harms the victim because she is used to having consensual sex with her abuser (Basile, 2002; Ferro, Cermele, & Saltzman, 2008). A mythology persists which constructs marital rape as less damaging or injurious than other types of rape (Easteal, 2001; Edwards, Turchik, Dardis, Reynolds, & Gidycz, 2011). Be aware that within the criminal justice system, the same minimization of the harm of IPSV and reduced culpability of the offender is reflected (Carline & Easteal, 2014). As stated in an Australian appeals matter, IPSV may be seen as "quite different from the characteristics of the more usual cases of non-consensual sexual intercourse which come before the Courts" (*Turnell v The Queen* [2006] NSWCCA 399, [65]).

For example, note that the high rate of prosecutorial discontinuances in all sexual assault cases is slightly higher in partner rape (Heenan, 2004a; Lea, Lanvers, & Shaw, 2003). Evidently, prosecutors are influenced either consciously or unconsciously by the continuum of "real" rape and will "run" with the cases that they believe will result in a conviction. For instance, in Canada, despite the abolition of the marital rape exemption in 1983, "both Crown and defence counsel generally translated wife/partner rape as 'bad sex' or 'unwanted sex' but not *really* as rape" (Lazar, 2010, p. 333).

Further concern regarding prosecutorial decision-making stems from the English case of *R v A* ([2012] EWCA Crim 434). The defendant in this case was an IPSV victim who was convicted for perverting the course of justice after she falsely retracted an allegation of rape against her abusive husband. Despite acknowledging the psychological impact of the domestic abuse suffered, as well as the pressure the perpetrator and his sister placed on her to retract the complaint, the Court of Appeal upheld the conviction. Nevertheless, as Hoyano (2013) argues, the decision to prosecute an IPSV victim for a false retraction fundamentally undermines the legitimacy and integrity of the criminal justice system. It may also negatively impact rates of reporting, as women fear being prosecuted if they retract a complaint (which is not an uncommon feature of IPSV). The Director of Public Prosecutions has since developed a policy to deal with false retractions in rape and domestic violence cases which, if it had been applied in *R v A*, would have resulted in no further action. However, as Hoyano (2013, p. 245) notes, this is "unlikely to completely allay [any] apprehension," as the possibility of being prosecuted remains.

#### **Recommendation: Use expert witnesses**

One way of assisting the court to understand the specific effects and harms of partner rape is to have expert testimony and/or reports by people who work in the area of violence against women as a normative part of the trial process. These experts may provide judges and jurors with the necessary information to better understand how IPSV is "real" rape. As demonstrated by Long (2007), their evidence might combat the myths about domestic violence and sexual assault, and how the mythology may intersect in the perception of IPSV.

#### **How consent is negated in IPSV and may not be understood**

Consent is a complex legal construct. Therefore, it is essential to be aware that establishing the two elements of the offense of sexual assault is challenging, and that these problems seem to be magnified in the context of IPSV (Carline & Easteal, 2014). Unsurprisingly in a partner context, proving that the woman did not consent (a physical element) or an absence of consent that the defendant knew of, but chose to ignore (the fault element) is difficult, because of the

history of consensual intercourse. This can problematically lead to the imposition of informal "presumed consent" or "continuing consent" models, even in jurisdictions such as Canada, which on the surface require affirmative consent (Lazar, 2010).

In a 2009 Australian judgment, for example, the judge indicated that defense Counsel in the final address had focused on the defendant's knowledge of lack of consent and had asked the jury to take into account the fact that the complainant and the appellant were married; that they had been living together for 15 years and "how married couples might relate to each other in a sexual environment" (*TK v R* (2009) 74 NSWLR 299, 328).

Understanding that no consent was given is made more problematic by survivors' experience of the different types of coercion: social, interpersonal, threat of physical force, and physical force (Finkelhor and Yllo, 1985). Many IPSV survivors experience multiple types of coercion both concurrently and over time, in the context of changing abuse patterns (Mahoney & Williams, 1998). Yet, we must emphasize that the legal interpretation of consent and its negation focuses far more upon physical force and injury, as illustrated in the sentencing remarks in a 2013 Australian Capital Territory case (*R v TN* [2013] ACT SC 64 (10 September 2013)). Justice Penfold noted bruising, four loose teeth, swollen lips, and abrasions as a result of the attack. In sentencing the offender to almost five years of incarceration for raping his estranged wife of 22 years, she stated: "This was a particularly nasty sexual assault in the sense that it appears to have involved [the man] using a sexual violation to assert his power over his wife."

#### **Recommendation: Work to amend consent provisions or their interpretation**

Expert witnesses and/or expert reports could be employed to explain what types of behavior are coercive and what could constitute negation of consent from the victim's perspective. Further law reform might help too. Pertinent provisions could be amended to state that consent is not relevant when actual bodily harm is involved. In cases of assault, and even indecent assault, the courts have affirmed that view. There is also precedent within rape common law. In the Canadian case of *R v Welsh* (1995) 86 OAC 200, it was held that a person cannot consent to a sexual act causing bodily harm.

Vitiation of consent could be defined more broadly to include the type of intimidation that can be generated in a marital type of relationship. As the Australian Law Reform Commission (2010, p. 1158) recommended, all jurisdictions should include that consent is negated if there is "abuse of a position 'of authority or trust'; and to threats against the 'complainant or any other person.'"

As an alternative to defining, or redefining, consent, attention has been given to the development of offenses in which the notion of consent is not so pivotal (Tadros, 2006). Such an approach, for example, has been adopted by some of

those jurisdictions such as Michigan that operate a gradation scheme in which the law stipulates that in certain circumstances sexual activity is an offense, such as if the defendant is armed with a weapon, causes personal injury, or uses force or coercion (Mich Comp Laws § 750-520b(1) (1974). By focusing more on the violence used, as opposed to the sexual activity, the law recognizes that rape/sexual assault is fundamentally a crime of violence. Further, the prosecution does not have to prove the absence of consent. The focus is on the conduct of the defendant, as opposed to the complainant.

### Evidentiary barriers with IPSV

Be aware that a higher evidential threshold may be set in IPSV cases and, as Sack (2009, p. 937) notes, such differential treatment “demonstrates ongoing toleration for the view that married women are not entitled to legal autonomy.” Additional evidentiary issues could include the disappearance of evidence, which can be used against the woman in court to further discredit her as a witness. Prompt disclosure and reporting are not the norm with this type of rape (Easteal & McOrmond-Plummer, 2006).

The admissibility or inadmissibility of prior violence evidence is extremely important too. From the perspective of the IPSV victim, *fear* of physical force may be the source of coercion. If testimony concerning family violence antecedents is not admitted and the incident is looked at in isolation from prior abuse, then the threat of force that vitiates or negates the victim’s consent may not be understood.

Another problem concerns defense barristers’ questioning of the victim witness about specific sexual activities between her and the accused. The aim is to suggest that “consensual sex was more likely to have occurred on the occasion in question, just as it had in the past” (Heenan, 2004a, p. 8). Although laws have been enacted to restrict the admission of previous sexual activity between the accused and the complainant in most Western countries, such provisions continue to be susceptible to problematic judicial interpretation in IPSV cases (Carline and Easteal, 2014). In the English House of Lords in *R v A (No 2)* [2002] 1 AC 45 for instance, the Court maintained that previous sexual activity between the accused and the complainant was relevant to the issue of consent and therefore should be more readily admissible. And, across the world in Australia, the conviction in *Taylor v The Queen* [2009] NSWCCA 180 was quashed and “a miscarriage of justice” declared since “this is a case where the jury’s view of ABC’s credibility in her account of how the assault took place is of great importance.” The crux of the appeal was that evidence about a continuing sexual relationship had not been admitted.

The underlying reasoning in these and other such cases appears to not recognize that consent is given anew each time and is a “decision,” as opposed to “an emotion or a mind-set” (Ellison, 2010, p. 208). By implying that due to her previous sexual activity a woman is more likely to consent to sexual

intercourse, there is an “inference that women are less likely to be raped by their sexual partners rather than others” (Boyle & MacCrimmon, 1998, p. 229). This may restrict these women’s right to legal protection (Firth, 2006).

### Recommendation: Work for reform and judicial education that changes (interpretation of) the rules of evidence

Under most legislation, evidence is considered as relevant and therefore admitted if it “could rationally affect (directly or indirectly) the assessment of the probability of the existence of a *fact in issue* in the proceeding” (*Evidence Act 1995* (Cth) section 55). Judicial education about IPSV is required. To understand how consent is vitiated or negated, which is the *fact in issue*, judges must learn that IPSV should be seen within the dynamics and context of the other manifestations of family violence.

As far as evidence concerning previous sexual activities between the accused and the victim, McGlynn (2010, p. 225), in her feminist rewriting of *R v A (No 2)*, suggests that the more discretionary Canadian *Criminal Code* s 276 could be adopted in other countries. In Canada, when sexual history evidence is admitted because it is deemed relevant to some other issue in the trial, the judge must warn the jury not to draw inappropriate inferences regarding consent and credibility (*R v Seaboyer* [1991] 2 SCR 577, 636). Although such judicial warnings regarding inappropriate inferences may have little effect (Schuller & Hastings, 2002; Schuller & Klippenstine, 2004), we believe their use is of value as they involve judicial officers challenging problematic assumptions regarding rape and consent.

Further to this, a significant online resource for judicial education regarding the nature and impact of IPSV has been developed in the U.S. by the National Judicial Education Program of Legal Momentum, *Intimate Partner Sexual Abuse: Adjudicating this Hidden Dimension of Domestic Violence Cases*, [www.njep-ipsacourse.org](http://www.njep-ipsacourse.org). This free online course may be of use not only in relation to the development of appropriate judicial warnings, but also for professionals in all disciplines to extend their learning about IPSV.

### Legacies in sentencing

Instead of considering the violation of the trust in an intimate relationship as an aggravating factor, the judicial tendency may be the opposite: seeing the (previous) relationship as mitigating the sentence. For example, Easteal and Gani (2005) identified IPSV cases with histories of domestic violence in which judges considered offenders’ emotional upset at a relationship breakup to be a mitigating variable at sentencing. If the woman has willingly had sex with the rapist at some point in the recent past, this may affect the judge’s construction of the offense, perhaps viewing the defendant as having a genuine but unreasonable belief in consent. This is exemplified in the lenient sentences and

language used by some Australian judges (Easteal & Gani, 2005). The harm of rape by a stranger often seems to be considered as relatively greater:

The case was not one where a victim walking through a lonely street or park at night is seized by a complete stranger about whom she knows nothing and who, for all the victim knows, may well kill her when the intercourse is . . .

(*Boney v R* [2008] NSWCCA 165)

an extremely serious example of the offence of rape . . . She was unknown to you, taken from the street *where she had the right to feel safe*. She was attacked without explanation and suffered extremely serious injuries.

(*R v Gill* [2008] VCC 0027, 46–47)

In Scotland, too, at least some judges still accept that a domestic relationship operates in mitigation:

Whilst the element of breach of trust involved in any domestic assault is an important factor in determining penalty, the significance of an ongoing sexual relationship in determining the penalty in a case such as this where the gravest feature is that there was penile penetration and the conviction is for rape, is a much more complex issue. The fact of the relationship is one of a complex host of facts and circumstances that have to be taken into account in determining appropriate sentence. In this case we consider that the trial judge gave insufficient weight to the fact that the couple had regularly engaged in sexual intercourse over a period of two years up to the night of the offence.

(*HM Advocate v Petrie* [2011] HCJAC 1, [7])

In England and Wales, the sentencing of IPSV has evolved over the years. Guidance was initially produced by the Court of Appeal in *R v Millberry* ([2003] 2 All ER 939), which was incorporated into the Sentencing Council's 2007 Definitive Guideline, and remained in force until April 2014. The court agreed with a proposition from Sentencing Advisory Panel, regarding the equal seriousness of relationship, acquaintance, and stranger rape. This was an auspicious development, given previous judicial pronouncements to the effect that the "violation of the person" and "the defilement," which were "inevitable features" of stranger rape, were "not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship" (*R vs Berry* [1988] 10 Cr App R (S) 13). Unfortunately, however, the court still elevated the fear caused by stranger rape, due to the "unknown quantity" of the attacker, which may lead the victim to wonder: "[i]s he a murderer as well as a rapist?" (*R v Millberry* [2003] 2 All ER 939, 944).

The court, however, failed to recognize the heightened fear suffered by an IPSV victim. Fear may well permeate her life, and repeat victimization is highly probable. In addition, in many cases partner rape is linked to the onset of pregnancy, thus causing additional apprehension, and a woman is also likely to suffer physical, and potentially fatal, violence (Rumney, 2003). The court also speculated that partner rape may be subject to unique forms of mitigation, due to "the ongoing nature of the relationship between the offender and the victim" (*R v Millberry* [2003] 2 All ER 939, 947) and in a case of relationship breakdown "an offender may be subject to an unusual degree of provocation or stress" (Rumney, 2003, p. 874). As discussed further below, the new 2014 Guideline may go some way to ameliorate these issues.

Not all judges regard relationship or prior relationship as a mitigating variable. Indeed, some decisions in England and Wales and in Australia have stressed both the specific trauma of a woman being raped by an estranged partner and that the parameters of aggravation should be defined the same in marital rape as in other types of sexual assault (Carline & Easteal, 2014). In quite an early Australian case, Slicer held that prior sexual relationship was not a mitigating factor, nor was the fact that marital rape had only recently been made a crime (*R v S (No 2)* [1991] Tas R 273, 280). More recently, in an Australian case of partner rape in which a man inserted a wine bottle into his partner's vagina, the appellate court stated that "[t]he fact that the complainant and the appellant were in an existing sexual relationship cannot mitigate the offence in this case" (*Gillies v DPP (NSW)* [2008] NSWCCA 339).

#### **Recommendation: Establish specific (or improved) sentencing legislation or guidelines**

In addition to legislative amendment, establishing rape-specific sentencing guidelines in jurisdictions currently without them or improving existing ones could reduce the potential for biases or ignorance in the construction of relative harm, and of victim and perpetrator blameworthiness. In Australia, for instance, while legislative provisions such as s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) may guide the exercise of judicial discretion, there are no specific guidelines in relation to IPSV or indications as to the relative importance of the multiple factors to be considered. This sits in contrast with the approach adopted in England and Wales which, after a consultation process, has recently instituted a new Definitive Guideline (Sentencing Council, 2013a).

Significantly, from the inception of the consultation process (Sentencing Council, 2012), the rarity of stranger rape was acknowledged. Thus, the resulting guidance aims to encompass factors that pertain to situations where the victim knows their attacker. The Guideline further states that there is an "inherently serious" baseline of both harm and culpability in rape cases, which can only be increased (and never decreased) by the presence of other factors.

Subsequently, three categories of harm are developed, delineated according to the presence of additional factors, including severe psychological harm and threats of violence (among others). Upon determining the appropriate sentencing category, the judge will then consider the aggravating and mitigating factors. With respect to the former, this encompasses factors drawn from the domestic violence sentencing guideline, for example, compelling a victim to leave their home and the exploitation of child contact arrangements to commit an offense (Sentencing Council, 2013b: 11).

Thus, the 2014 Guideline is based upon a broader conceptualization of rape, and could be a useful template for other jurisdictions. Improvements, however, could be made. Concerns have been expressed regarding: (a) the identification of three categories of harm, as this suggests a hierarchy of rape; (b) the reduction of the minimum starting point from five to four years; and (c) the continued inclusion of remorse and good character as mitigating factors (Sentencing Council, 2013a). Furthermore, breach of trust in a partner rape should operate as an exacerbating factor. Trust should be held to encompass the reality that relationship rape can have a further-reaching and longer-lasting trauma than rape by other perpetrators.

In addition to sentencing guidelines, judges do need to be better equipped to understand the reality of rape. This can be achieved in a number of ways. Further training of court personnel is needed. Targeted training may work the best. One way of such targeting could be via "specialisation in court lists and for the creation of specialist sexual offences courts" (Heenan 2004b, para 34). Additionally, expert reports by people working in the area of violence against women and/or victim impact statements should be used routinely to facilitate an understanding of the reality of domestic violence and the particular traumas of IPSV.

### Last thoughts

The legal gatekeepers and legal provisions function within a larger social context. At the societal level, there appears to be an unconscious gendered filtering of "reality," which can militate against successful implementation of legal remedies. The existence of unwritten social subtexts is evident when we look at how IPSV is treated by the courts. Legal gatekeepers' educational and occupational subcultures often act to reinforce gender-biased beliefs and misunderstandings about violence. As a consequence, in civil and criminal remedies, police, prosecutors, magistrates, and judges may invoke stereotypes in applying the law.

The State's legal response to violence against women does need more work. However, reforms to the law should aim to empower survivors/victims and be supported by wider public messages about the reality of violence against women. We must all recognize – and that includes lawmakers and people in the community – that laws do not exist and operate in a vacuum.

### References

- Australian Law Reform Commission. (2010). *Family violence – a national legal response*, report No. 114. Sydney, Australia: Author.
- Basile, K. (2002). Attitudes toward wife rape: Effects of social background and victim status. *Violence and Victims*, 17(3), 341–354.
- Boyle C., & MacCrimmon, M. (1998). The constitutionality of Bill C-49: Analyzing sexual assault law as if equality really mattered. *Criminal Law Quarterly*, 41(2), 198–237.
- Carline, A., & Easteal P. (2014). *Shades of grey: Domestic and sexual violence against women, law reform and society*. London, UK: Routledge.
- Easteal, P. (2001). *Less than equal: Women and the Australian legal system*. Sydney, Australia: Butterworths.
- Easteal, P., & Gani, M. (2005). Sexual assault by male partners: A study of sentencing factors. *Southern Cross University Law Review*, 9, 39–72.
- Easteal P., & McOrmond-Plummer, L. (2006). *Real rape, real pain*. Melbourne, Australia: Hybrid Press.
- Edwards, K., Turchik, J., Dardis, C., Reynolds, N., & Gidycz, C. (2011). Rape myths: History, individual and institutional-level presence, and implications for change. *Sex Roles*, 65(11–12), 761–773.
- Ellison, L. (2010). Commentary on R v A (No 2). In R. Hunter, C. McGlynn, & E. Rackley (Eds.), *Feminist judgments: From theory to practice* (pp. 206–210). Oxford, UK: Hart Publishing.
- Ferro, C., Cermele, J., & Saltzman, A. (2008). Current perceptions of marital rape: Some good and some not-so-good news. *Journal of Interpersonal Violence*, 23(6), 764–779.
- Finkelhor, D., & Yllo, K. (1985). *License to rape: Sexual abuse of wives*. New York, NY: Holt, Rinehart & Winston.
- Firth, G. (2006). The rape trial and sexual history evidence – R v A and the (un)worthy complainant. *Northern Ireland Legal Quarterly*, 53(3), 442–464.
- Heenan, M. (2004a). Just "keeping the peace": A reluctance to respond to male partner sexual violence. *Australian Centre for the Study of Sexual Assault Issues*, 1.
- Heenan, M. (2004b) Sexual offences law and procedure, *Aware: Australian Centre for the Study of Sexual Assault Newsletter*, 5, 8.
- Hoyano, L. (2013). Case comment. R v A: Perverting the course of justice. *Criminal Law Review*, 3, 240–246.
- Lazar, R. (2010). Negotiating sex: The legal construct of consent in cases of wife rape in Ontario, Canada. *Canadian Journal of Women and Law*, 22, 329–363.
- Lea, S., Lanvers, U., & Shaw, S. (2003). Attrition in rape cases: Developing a profile and identifying relevant factors. *British Journal of Criminology*, 43(3), 583–599.
- Long, J. (2007). Introducing expert testimony to explain victim behavior in sexual and domestic violence prosecutions. Alexandria, VA: National District Attorneys Association. Retrieved from: [www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).
- McGlynn, C. (2010). R v A (No 2) judgment. In R. Hunter, C. McGlynn, & E. Rackley (Eds.), *Feminist judgments: From theory to practice* (pp. 211–227). Oxford, UK: Hart Publishing.
- Mahoney, P., & Williams, L. (1998). Sexual assault in marriage: Prevalence, consequences, and treatment of wife rape. In J.L. Jasinski and L.M. Williams (Eds.), *Partner violence: A comprehensive review of 20 years of research* (113–163). Thousand Oaks, CA: Sage.
- Rumney, P. (2003). Progress at a price: The construction of non-stranger rape in the *Millberry* sentencing guidelines. *Modern Law Review*, 66(6), 870–884.

- Sack, E.J. (2009). Is domestic violence a crime?: Intimate partner rape as allegory. *St John's Journal of Legal Commentary*, 24(3), 535–566.
- Schuller, R.A., & Hastings, P.A. (2002). Complainant sexual history evidence: Its impact on mock jurors' decisions. *Psychology of Women Quarterly*, 26(3), 252–261.
- Schuller, R.A., & Klippenstine, M.A. (2004). The impact of complainant sexual history evidence on jurors' decisions: Consideration from a psychological perspective. *Psychology, Public Policy, and Law*, 10(3), 321–342.
- Sentencing Council (2012). *Sexual Offences Guideline Consultation*. London, UK: Author.
- Sentencing Council (2013a). *Research to support the development of a revised sexual offences sentencing guideline*. London, UK: Author.
- Sentencing Council (2013b). *Sexual offences: Definitive guideline*. London, UK: Author.
- Tadros, V. (2006). Rape without consent. *Oxford Journal of Legal Studies*, 26(3), 515–543.

## Chapter 15

# Intimate partner sexual violence and family law

Angela Lynch, Janet Loughman, and “Eleanor”  
Commentary by Thomas P. Alongi

### Introduction

Intimate partner sexual violence (IPSV), as a manifestation of family violence, is relevant within the family laws that determine parenting outcomes for children in Australia and in some U.S. states after separation.

In Australia, the paramount consideration under the *Family Law Act 1975* is the best interests of the child. In determining a child's best interests, protecting a child from physical or psychological harm from being subjected to (or exposed to) abuse, neglect, or family violence is a primary consideration of the family courts, and one that should be prioritized over the benefit to the child of having an ongoing relationship with each of their parents. Family violence, and the existence and nature of any family violence protection orders, are also relevant considerations in determining a child's best interests. A sexual assault or other sexually abusive behavior is specifically included in the examples of behavior that may constitute family violence. However, despite the legislative relevance and serious impacts of IPSV on victims/survivors and consequently their children, IPSV is rarely if ever argued – or rarely if ever argued well – in family law. This might be for a variety of reasons, including:

- Professionals within the family law system may not ask women about their experience of IPSV as they do not understand its relevance to risk.
- Women themselves have not identified their experience as IPSV.
- Women may not want to reveal their IPSV experience to lawyers and other professionals because of a lack of trust, concern that it might expose them to public scrutiny, and worry about being judged harshly.
- And raising the issue may also subject them to being cross-examined about the IPSV, which they may want to avoid.

In addition, the judiciary, lawyers, and other professionals are generally not well trained on IPSV and its impacts on adults and/or children; they may lack training on trauma more generally.