SECTION 276 MISCONSTRUED: THE FAILURE TO PROPERLY INTERPRET AND APPLY CANADA'S RAPE SHIELD PROVISIONS

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Despite the vintage of Canada's rape shield provisions (which in their current manifestation have been in force since 1992), some trial judges continue to misinterpret and/or misapply the Criminal Code provisions limiting the use of evidence of a sexual assault complainant's other sexual activity. These errors seem to flow from a combination of factors, including: a general misunderstanding on the part of some trial judges as to what section 276 requires; and a failure on the part of some trial judges to properly identify, and fully remove, problematic assumptions about sex and gender from their analytical approach to the use of this type of evidence. A lack of clarity as to how section 276 works, and the ongoing reliance on outdated stereotypes about sexual assault to interpret these provisions, are particularly problematic because trial judges continue to face applications to adduce evidence of a complainant's sexual activity which are inflammatory, discriminatory and clearly excluded by section 276 of the Criminal Code. The reality that some defence counsel continue to ignore, or attempt to undermine, the legal rules dictated by section 276 heightens the need for competence, rigour and accuracy among trial judges tasked with the adjudication of these applications. Following a brief explanation of how Canada's rape shield regime works, four types of problems with the interpretation and application of section 276 are identified using examples from recent cases.

Malgré le fait que les dispositions sur la protection des victimes de viol au Canada (en vigueur, dans leur forme actuelle, depuis 1992) aient été adoptées il y a longtemps, certains juges de procès interprètent ou appliquent toujours erronément les dispositions du Code criminel qui limitent le recours à des éléments de preuve liés aux autres activités sexuelles des personnes qui portent plainte pour agression sexuelle. Ces erreurs semblent découler d'un ensemble de facteurs, notamment, de la méconnaissance générale de la part de certains juges de procès des exigences prévues à l'article 276 du Code criminel, ainsi que de la difficulté qu'ont certains d'entre eux à bien identifier, et à mettre complètement à

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l'écart, les présomptions posant problème quant au sexe ou au genre de la personne dans le cadre de leur analyse du recours à ce type de preuve. Un manque de clarté quant à la façon d'appliquer l'article, couplé aux stéréotypes du passé concernant les agressions sexuelles qui persistent dans le cadre de l'interprétation de ces dispositions, est particulièrement problématique; les juges du procès continuent d'être aux prises avec des demandes présentant des éléments de preuve concernant les activités sexuelles d'un plaignant qui sont incendiaires, discriminatoires et qui devraient manifestement être écartés aux termes de l'article 276. Le fait que certains avocats et avocates de la défense continuent d'ignorer ou de miner les règles juridiques découlant de l'article 276 accentue le besoin de compétence, de rigueur et d'exactitude chez les juges de procès qui doivent statuer sur ces demandes. À la suite d'une brève explication du fonctionnement du régime de protection des victimes de viol au Canada, l'auteure cerne quatre types de problèmes liés à l'interprétation et à l'application de l'article 276 à l'aide d'exemples tirés d'affaires récentes.

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1. Introducing the Need for Rigorous Adjudication of Section 276 Applications

Despite the vintage of Canada's rape shield provisions (which in their current manifestation have been in force since 1992),[1] some trial judges continue to misinterpret and/or misapply the *Criminal Code* provisions limiting the use of evidence of a complainant's prior sexual history. These errors seem to flow from a combination of factors, including a general misunderstanding on the part of some trial judges concerning what section 276 requires and, in some cases, failing to properly identify and fully remove problematic assumptions about sex and gender from their analytical approach to the use of this type of evidence.

A lack of clarity as to section 276's operation, and the ongoing reliance on outdated stereotypes of sexual assault used to interpret these provisions, are particularly problematic because trial judges continue to face applications to adduce evidence of a complainant's sexual activity that are inflammatory, discriminatory, and clearly excluded by section 276 of the *Criminal Code*.[2] Consider the following example from a recent

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1 The current version of the *Criminal Code*, RSC 1985, c C-46, s 276 was enacted in 1992 [*Criminal Code*]. Elizabeth A Sheehy, "Rape Shield Laws: Canada" in Nicole Hahn Rafter, ed, *Encyclopedia of Women and Crime* (Phoenix: Oryx Press, 2000) 226 at 226–27.

2 See e.g. *R v A(A)*, 2004 ONCJ 101, 2004 CarswellOnt 2764 (WL Can) (defence counsel asserted that the complainant had engaged in sex with others that day making it more likely she also consented to sex with the four accused); *R v P(NA)*, 50 WCB (2d) 23 at para 15, 2001 CarswellOnt 1527 (WL Can) (SC) (attempt to introduce evidence of 15-year-old complainant's sexual relationship with her boyfriend rejected by trial judge on the basis

assault and sexual assault trial in British Columbia. The accused in *R v JSS* allegedly engaged in repeated acts of physical and sexual assault against his wife at the time, the complainant.[3] These acts included dragging her around the house, grabbing her by the throat, and punching her vagina. The sexual assault allegations involved forced anal intercourse on one occasion, and forced anal intercourse and forced fellatio on a second occasion. His defence was that his former spouse consented to the acts involved.

The jury convicted him of assault and sexual assault causing bodily harm.[4] Prior to trial, defence counsel brought an application to adduce evidence of the complainant's prior sexual history with his client.[5] In addition to his application to admit a (presumably nude) photograph of the complainant with "semen between her posterior," defence counsel, SR Chamberlain, QC, sought to admit evidence that:

- the complainant initiated sexual activity on the couple's first date;
- the couple had engaged in acts of fellatio, cunnilingus, and vaginal intercourse in the accused's car during their marriage;
- the complainant used sex toys to stimulate herself;
- the complainant encouraged the accused to ejaculate on different parts of her body;
- the complainant suggested to the accused that the couple have vaginal intercourse while she was menstruating;

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that it invoked the very stereotypes section 276 is aimed at eliminating); *R v Hicks*, 86 WCB (2d) 965 at para 17, 2009 CarswellOnt 920 (WL Can) (SC) (clear purpose of leading evidence of the complainant's sexual activity after the incident would be to invoke twin myth reasoning); *R v Bildfell*, 2015 ONSC 3781 at para 8, 2015 CarswellOnt 8768 (WL Can) [*Bildfell*] (defence explicitly asked to admit evidence on basis that by reason of the sexual nature of the activity, the complainant is more likely to have consented to the sexual activity that formed the subject matter of the charge); *R v T(J)*, 2015 ONSC 3866 at para 32, 2015 CarswellOnt 9052 (WL Can) [*JT*] ("The defence seeks to introduce to the jury inflammatory evidence of sexual misconduct by a complainant on an unrelated matter."); *R v A(WJ)*, 2010 YKTC 108, 80 CR (6th) 132 [*WJA*] (defence seeking to introduce a list of everyone the complainant had sex with and of what type, between 2003 and 2005); *R v D(WC)*, 2012 MBQB 128, 285 Man R (2d) 109 (seeking to adduce a full year of complainant's prior sexual history despite its collateral nature). Section 276 is the statutory regime for admitting (or excluding) evidence of a complainant's sexual activity other than the activity that forms the subject matter of the charge. It will be described in detail in Part II.

3 2014 BCSC 804, 2014 CarswellBC 4153 (WL Can) [*JSS*].

4 *R v S(JS)*, 2015 BCSC 1369, 2015 CarswellBC 2198 (WL Can) (sentencing decision).

5 *JSS*, *supra* note 3.

- the complainant permitted the accused to photograph and videotape them as they engaged in sexual activity;
- the couple had engaged in four to five acts of consensual anal intercourse on occasions prior to the acts of forced anal intercourse; and
- on two or three of those occasions, the complainant was menstruating and can be said to have enjoyed the anal intercourse because of the additional lubrication her menstrual blood provided.[6]

As Crown counsel noted, in objection to the application, the evidence defence counsel sought to introduce would "badly distort the fact-finding process by humiliating the complainant and prejudicing the jurors against her, based on entirely irrelevant considerations."[7] Indeed, given the allegations and the defence of consent offered, the impetus for attempting to introduce this evidence—for example, whether the complainant encouraged the accused to ejaculate on different parts of her body during the course of their marriage, initiated sex on their first date, used sex toys, stimulated herself during anal intercourse, or engaged in sexual activity while she was menstruating—must have been to achieve one or both of the following two objectives: to humiliate and shame the complainant, and/or to represent her to the jury as 'the type of woman' who would consent to anything.

The reality is that some defence counsel continue to ignore or attempt to undermine the legal rules dictated by section 276. This heightens the need for competence, rigour, and accuracy among trial judges tasked with the adjudication of these applications. This will be explored in-depth in Part II. To be clear, many trial judges correctly apply section 276 to either admit or exclude evidence of prior (or subsequent) sexual history.[8] Unfortunately in other cases, including *JSS*,[9] trial judges misconstrue or misapply the rape shield provisions in ways that: undermine the protections intended by section 276, perpetuate discriminatory stereotypes about sexual assault, and otherwise distort the truth seeking objective of the trial process. The

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6 *Ibid* at para 9.

7 *Ibid* at para 23.

8 For recent examples see *R v G(G)*, 2015 ONSC 5321, 22 CR (7th) 415 [*GG*]; *R v Nistor*, 2014 SKQB 126, 444 Sask R 92 [*Nistor*]; *R v Reid*, 2014 ONSC 1795, 2014 CarswellOnt 4945 (WL Can) [*Reid*]; *JT*, *supra* note 2; *R v I(J)*, 2015 ONCJ 61, 2015 CarswellOnt 1860 (WL Can).

9 The trial judge in *JSS*, *supra* note 3 rightly excluded much of the evidence sought by defence counsel. The problematic aspects of Justice Schultes' reasoning in *JSS* involve his decision to admit evidence of the previous acts of anal intercourse. His reasoning will be discussed in Part IV.

remainder of this paper examines four of the ongoing problems with the interpretation and application of section 276 of the *Criminal Code*.

A search of recent section 276 application decisions reported on CanLII was conducted in an effort to identify and demonstrate the types of errors that have and/or continue to occur in the interpretation and application of these provisions. Part II provides a brief explanation of the rape shield regime stipulated under section 276. In Part III, four types of problems with the interpretation and application of section 276 are identified using examples from recent cases. These problems include: (a) conflating the objective and requirements under subsection 276(1) with those under subsections 276(2) and 276(3); (b) admitting evidence of a complainant's other sexual activity on the basis that it demonstrates a "pattern of consent"; (c) misinterpreting section 276 because of an erroneous understanding of the law of consent and; (d) inadequate and flawed application of the criteria judges are required to consider under subsection 276(3).

2. The Requirements Under Section 276 of the Criminal Code

The current version of section 276 of the *Criminal Code* was enacted in 1992.[10] Section 276 creates exclusionary rules making evidence of a complainant's sexual activity, other than the sexual activity that forms the subject matter of the charge, presumptively inadmissible (unless introduced by the Crown).[11] Section 276 also establishes criteria to determine the circumstances that rebut the presumption of inadmissibility, such that evidence of a complainant's extrinsic sexual activity is admissible. Section 276.1 creates a two-step process in which the accused may bring a written application to adduce evidence of a complainant's extrinsic sexual activity on the basis that it meets the requirements for admission stipulated under section 276. Section 276, in its entirety, reads as follows:

> **Evidence of complainant's sexual history**
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> **276. (1)** In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
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> **(a)** is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

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10 *Criminal Code*, *supra* note 1.

11 S Casey Hill, David M Tanovich & Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed (Toronto: Canada Law Book, 2013) (loose-leaf release 5), ch 16 at 16-8 [Hill, Tanovich & Strezos].

(b) is less worthy of belief.

Idem

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.[12]

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12 *Criminal Code*, *supra* note 1.

The objective of section 276 of the *Criminal Code* is to eliminate the misuse of evidence of a complainant's sexual activity for irrelevant or misleading purposes, while also ensuring that an accused's right to a fair trial is not compromised. Essentially, this involves removing any discriminatory reasoning based on gendered stereotypes about sexuality and sexual assault. This also involves providing some protection against the use of sexual history evidence to perpetuate unnecessary incursions on the dignity and privacy interests of complainants.

Section 276 is comprised of two parts. The first part, subsection 276(1), creates a categorical exclusion of evidence of a complainant's other sexual activities, where it is being offered for the purposes of invoking what are referred to as the "twin myths". The twin myths involve two discriminatory types of reasoning: (1) reliance on a complainant's other sexual activities to infer an increased likelihood that, by virtue of the sexual nature of that activity, she also consented to the sexual activity forming the subject matter of the charge; and (2) inferences that a complainant may be less credible by virtue of her other sexual activities.[13]

The second part of section 276, under subsections 276(2) and 276(3), exclude all evidence of the complainant's extrinsic sexual activity unless that evidence meets certain criteria for admission. To be admissible under subsections 276(2) and 276(3), the evidence must be: of a specific instance of sexual activity, relevant to an issue at trial and have significant probative value that is not substantially outweighed by its prejudicial effect, as assessed against the criteria articulated in subsection 276(3).[14]

3. The Failure to Properly Interpret and Apply Section 276

Unfortunately, the potential of section 276 to meet its objective has not been fully achieved. In part, this is the result of the approach to the provision taken by some trial judges. There remains several problems with the way in which Canada's rape shield provisions are interpreted and/or applied by trial judges adjudicating applications under section 276.1. What follows is by no means a comprehensive discussion of these ongoing difficulties. Rather, this section identifies and discusses four of the ways in which some trial judges misinterpret or misapply section 276 of the *Criminal Code.*

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13 Hill, Tanovich & Strezos, *supra* note 11 at 16-7.

14 *Criminal Code*, *supra* note 1.

A) The Conflation of Subsection 276(1) with Subsections 276(2) and 276(3)

One of the potential obstacles to the proper application of Canada's rape shield regime involves the way in which some trial judges interpret the relationship between the subsections of section 276. Several recent decisions have misleadingly stated that section 276 only excludes evidence of prior sexual history that is reliant for its probative value on one of the twin myths.[15] Frequently, trial judges who make this assertion rely on a passage from Justice Gonthier's decision in *R v Darrach* to support this erroneous interpretation of section 276.[16] The following excerpt from Justice Heeney's reasoning in *R v Latreille* demonstrates this mischaracterization of section 276:

> Section 276 is not a blanket prohibition against ever using the sexual history of the complainant on the issue of consent. It is only where the defence seeks to do so in a way that invokes the "twin myths" that this line of reasoning is prohibited. […]
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> Gonthier J. makes this clear at para. 32 of *Darrach*:
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> Far from being a "blanket exclusion", s. 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences. These are known as the "twin myths" […].[17]

Neither the reasoning in *Darrach*, nor the Supreme Court of Canada's prior decision in *R v Seaboyer*, nor its subsequent decision in *R v Osolin*, support the contention that "[the sexual history of the complainant] is inadmissible only where the defence seeks to use it in a way that invokes the "twin myths"".[18] In the passage quoted from *Darrach*—in *Latreille* and in other cases—the limit on the exclusionary rule that Justice Gonthier is referring to is in subsection 276(1) specifically, not section 276 as a whole. Subsection 276(1) creates a blanket prohibition on the use of a complainant's other sexual activity to support an inference that, by reason of the sexual nature

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15 See e.g. *R v Latreille,* 2005 CanLII 41547, 2005 CarswellOnt 6449 (WL Can) (SC) [*Latrielle*]; *R v G(J)*, 2015 ONSC 5482, 2015 CarswellOnt 13459 (WL Can) [*G(J)*]; *R v Strickland*, 45 CR (6th) 183, 2007 CanLII 3679 (ONSC) [*Strickland*]; *WJA*, *supra* note 2 at para 34; *R v AG & EK*, 2015 ONSC 181 at para 25, 2015 CarswellOnt 175 (WL Can); *R v Antonelli*, 2011 ONSC 5416 at paras 18–19, 280 CCC (3d) 96; *R v N(BH)*, 2013 SKPC 71 at paras 6–7, 424 Sask R 58; *R v Anstey*, 2002 NFCA 7 at para 17, 224 Nfld & PEIR 302 [*Anstey*] (in which the NLCA made the same mistake).

16 2000 SCC 46 at para 32, [2000] 2 SCR 443 [*Darrach*].

17 *Latreille, supra* note 15 at paras 15–16.

18 *R v Sanghar*, 2012 ABPC 34 at para 24, 2012 CarswellAlta 192 (WL Can) [*Sanghar*]; *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 4 OR (3d) 383 [*Seaboyer*]; *R v Osolin*, [1993] 4 SCR 595, 1993 CanLII 87 [*Osolin*].

of the activity, the complainant is more likely to have consented or be less worthy of belief. Justice Gonthier's statement regarding the limit on the blanket prohibition in subsection 276(1) should not be considered applicable to section 276 as a whole. The limit Justice Gonthier was referring to in the passage quoted in these cases is in relation to the unqualified exclusion under subsection 276(1), which "categorically prohibits" inferences reliant on the twin myths, but does not create a blanket exclusion of all prior sexual history evidence.[19] A consequence of misconstruing the limit on the categorical exclusion under subsection 276(1) as applicable to section 276 as a whole is that it obscures the exclusionary aspect of subsection 276(2).

Subsections 276(1) and 276(2) create distinct exclusionary rules. Subsection 276(1) *categorically* excludes evidence of prior sexual history where its relevance is premised on one or both of the twin myths. Subsection 276(2) creates a *presumption of inadmissibility*, making all evidence of the complainant's prior sexual history inadmissible unless it is specific, relevant to an issue at trial, and of significant probative value that is not substantially outweighed by its prejudicial effect. The factors to assess admissibility are outlined in subsection 276(3)(a–h).[20] To put it another way, pursuant to subsection 276(1), evidence of prior sexual history introduced to give rise to one of the two prohibited inferences identified in the subsection is never admissible. Subsection 276(1) creates a limited, *categorical* exclusion. Subsection 276(2) offers a second exclusionary rule *qualified by an exception*. Subsection 276(2) "rejects all evidence of other sexual activity unless the evidence satisfies each of the requirements of the inclusionary exception" stipulated in subsections 276(2) and 276(3).[21] Justice Watt helpfully explains the distinction between the exclusionary rules in subsections 276(1) and 276(2) as follows:

> Section 276(1) excludes evidence that the complainant "engaged in sexual activity" with another person at another time and place if it is tendered for either purpose proscribed by the subsection. The exclusionary rule in s. 276(2) rejects all evidence of other sexual activity unless the evidence satisfies each of the requirements of the inclusionary exception.[22]

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19 *R v Darrach, supra* note 16 at para 2.

20 *Criminal Code*, *supra* note 1.

21 *R v T(M)*, 2012 ONCA 511 at para 42, 289 CCC (3d) 115 [*MT*]. Thus the provision's wording under section 276(2): "no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless" the evidence meets the criteria and factors under subsections 276(2) and 276(3); see *Criminal Code*, *supra* note 1, s 276(2).

22 *MT*, *supra* note 20 at para 42.

Stating that only evidence that invokes the twin myths is excluded under section 276 conflates two provisions (subsections 276(1) and 276(2)) that in fact create different rules.[23] A similar mischaracterization occurs when subsection 276(2) is described as "an exception to the exclusionary rule"[24] created under subsection 276(1). There is no exception to the blanket prohibition in subsection 276(1). To suggest otherwise is to propose that in some circumstances twin myth reasoning is permitted. To repeat, evidence of prior sexual history—the relevance of which relies on one of the two inferences prohibited under subsection 276(1)—is never admissible. As Justice Gonthier stated in *Darrach,* "the "twin myths" are simply not relevant at trial."[25]

The purpose of subsection 276(2) (and subsection 276(3)) is not to establish a set of criteria to determine when twin myth-based evidence *will* be admissible. The process and criteria under subsections 276(2) and 276(3) together create an exception to the presumptive inadmissibility of any evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge."[26] The legislative history of section 276 and the Supreme Court of Canada's reasoning in *Seaboyer* and *Osolin* support this interpretation of section 276.[27]

The current version of section 276 was enacted in response to the Court's conclusion in *Seaboyer* that the former version of the provision was unconstitutional. The version of section 276 struck down in *Seaboyer* involved a blanket exclusion of all evidence of prior sexual history with three exceptions: rebuttal evidence, evidence going to identity, and evidence of consensual sexual activity on the same occasion as the alleged incident.[28] Justice McLachlin, as she then was, determined that the blanket categorical exclusion of all evidence of the complainant's prior sexual history under the

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23 For an explicit example of this see Judge Allen's reasoning in *R v S(BJ)*, 2005 ABPC 158 at para 28, 382 AR 311: "The present version of *s. 276* is not a blanket exclusion of such evidence. The first two subsections of *s. 276* should be read together as regulating the admission and use of evidence of other sexual conduct. Such evidence is not admissible where it is offered to support an inference that it is more likely the complainant consented to the sexual activity charged or that the complainant's version is thereby less worthy of belief: *s. 276(1)*."

24 Justice Watt gives subsection 276(2) this problematic characterization in *MT*, *supra* note 21 at para 33. That said, his overall reasoning is correct and as cited in footnote 22, he properly and helpfully characterizes subsection 276(2) as an exclusionary rule later in his decision (*supra* note 21 at para 42).

25 *Darrach, supra* note 16 at para 33.

26 *Criminal Code*, *supra* note 1 at s 276(2).

27 *Seaboyer*, *supra* note 18; *Osolin*, *supra* note 18.

28 *Seaboyer, supra* note 18 at 613, 642.

former version of section 276 would exclude relevant evidence that should be received in the interests of a fair trial.[29] In other words, she determined that a categorical exclusion, with three exceptions, was unconstitutionally broad. However, Justice McLachlin did not conclude that the *Canadian Charter of Rights and Freedoms* required the reverse of this rule—a presumptive inclusion of all evidence of sexual history but for two exceptions (the twin myths).[30] Indeed, nothing in her approach suggests a rape shield regime limited only to the exclusion of evidence that invokes the twin myths. To the contrary, in *Seaboyer*, Justice McLachlin confirmed that while the approach of a general exclusion supplemented with three exceptions is constitutionally problematic, evidence of prior sexual history will nevertheless generally be inadmissible.[31] Judges, she concluded, could be charged with determining when such evidence should be admitted.

Rather than a rule presumptively including prior sexual history evidence with two categorical exceptions for the twin myths, Justice McLachlin advanced a presumption of inadmissibility for all evidence of prior sexual history combined with a list of examples illustrative of admissible prior sexual history evidence (as well as a categorical exclusion of twin myth-based evidence).[32] Had she intended a rape shield regime based on a presumption of admissibility, and in which only evidence reliant on the twin myths would be excluded, it would not have been necessary to offer examples of evidence that would be admissible. Furthermore, she carefully tailored her description of the types of purposes for which such evidence would be admissible, and characterized such circumstances as exceptional.[33] This would not have been necessary had she intended to create a rule

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29 *Ibid* at 613.

30 *Ibid* at 598.

31 *Ibid* at 605: "If we accept, as we must, that the purpose of the criminal trial is to get at the truth in order to convict the guilty and acquit the innocent, then it follows that irrelevant evidence which may mislead the jury should be eliminated in so far as possible. There is no doubt that evidence of the complainant's sexual activities has often had this effect. Empirical studies in the United States suggest that juries often misused evidence of unchastity and improperly considered "victim-precipitating" conduct, such as going to a bar or getting into a car with the defendant, to "penalize" those complainants who did not fit the stereotype of the "good woman" either by convicting the defendant of a lesser charge or by acquitting the defendant."

32 *Ibid* at 634–35.

33 *Ibid* at 634: "First, the judge must assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence. The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional."

in which only twin myth-based evidence was to be excluded.[34] It is not tenable to read Justice McLachlin's decision in *Seaboyer* as authority for the proposition that the current rape shield regime under section 276 (which was drafted in response to *Seaboyer* and is said to reflect or incorporate the rape shield regime articulated therein)[35] only excludes evidence that seeks to invoke one or both of the twin myths.

Similarly, it is not reasonable to conclude that Parliament, in enacting the current post-*Seaboyer* version of section 276, intended only to exclude evidence of prior sexual history that invokes one or both of the twin myths. For example, the preamble to Bill C-49, enacting the current version of section 276, states: "AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny."[36] A review of the House of Commons debates preceding the enactment of Bill C-49 clearly reveals an intention to create an exclusionary rule under which all evidence of a complainant's prior sexual history evidence is presumptively inadmissible.[37] Moreover, it would be unsound to assume that Bill C-49 would have garnered the degree of support from feminist scholars and activists that it received, had it transformed the

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34 Nor would she have stated that "[e]vidence of consensual sexual conduct on the part of the complainant *may* be admissible" where its probative value is not substantially outweighed by its prejudicial effect, *ibid* at 635 [emphasis added]. It is clear she was not suggesting that evidence that invokes the twin myths may sometimes be admissible, see *ibid* at 630: "[T]he twin myths […] are just that—myths—and have no place in a rational and just system of law." She was referring here to other relevant evidence of prior sexual history. The fundamental principle governing the reception of evidence is that relevant evidence in which the probative value is not outweighed by its prejudicial effect *is* admissible. The contingent language of "may" and the addition of the word "substantially" indicates some modification to this basic principle (that relevant evidence of which the probative value is not outweighed by the prejudicial effect is admissible. Her modification to this basic rule of admissibility suggests the creation of a rule excluding some prior sexual history evidence in addition to that which has already been categorically rejected as always irrelevant.

35 Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 at 293–95 [McIntyre].

36 Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 34th Parl, 3rd Sess, 1992, (as passed by the House of Commons 15 June 1992).

37 See e.g. *House of Commons Debates*, 34th Parl, 3rd Sess, No 9 (15 June 1992) at 12042–43 (Scott Thorkelson: Edmonton–Strathcona, Member of the Legislative Committee for Bill C-49): "According to the bill's provision, evidence of the victim's sexual activity would not be admissible unless that evidence was specific, was relevant to the issue to be proved, and its probative value was not substantially outweighed by the danger of prejudice to the proper administration of justice." See also *ibid* at 12044–45 (Shirley Maheu: Saint-Laurent–Cartierville): "The most important element of this bill is that it says a complainant's sexual history is rarely relevant."

previous provision's blanket prohibition into a rule of general admissibility with two exceptions. Indeed, support for Bill C-49 from feminist and women's organizations was contingent, in part, on an amendment to the original draft of the bill to create a presumption that sexual history evidence is inadmissible.[38] Lastly, the inclusion of subsection 276(3)(d)—requiring trial judges to consider "the need to remove from the fact-finding process *any* discriminatory belief or bias" [emphasis added] when weighing the probative value of the evidence against its prejudicial effect—further supports this interpretation of section 276. By requiring trial judges to consider the need to remove *any* discriminatory belief from the fact finding process, subsection 276(3)(d) establishes that otherwise admissible evidence will sometimes be excluded on the basis that it perpetuates discriminatory stereotypes other than the twin myths.

The reasoning in *Osolin* further supports this interpretation of section 276.[39] According to the Supreme Court of Canada in *Osolin*, the rape shield provisions articulated in *Seaboyer* exclude "a number of rape myths."[40] The majority decision in *Osolin*, which was released one year after the current section 276 was enacted, acknowledged that the exclusionary effect of section 276, and Justice McLachlin's reasoning in *Seaboyer*, extends beyond the twin myth stereotypes to other discriminatory generalizations:

> The reasons in *Seaboyer* make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper. A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.[41]

The myths identified by Justice Cory in the above passage include stereotypical concepts like the notion that women cannot be raped against their will—a stereotype not premised on either of the twin myths. Throughout the decision, Justice Cory refers to "rape myths" rather than the twin myths.

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38 McIntyre, *supra* note 35 at 302.

39 *Supra* note 18.

40 *Ibid* at 670. Justice McLachlin, as she then was, wrote a dissenting decision in *Osolin*, however, her dissent was not related to the majority's discussion of her reasoning in *Seaboyer*. It is clear from her reasoning in *Osolin* that she agrees with Justice Cory's interpretation of her decision in *Seaboyer*. She states at 641: The only purpose he [defence counsel] gave for wanting to cross-examine on the medical record was to show "what kind of person the complainant is". As Cory J states, this is the very sort of improper purpose for which evidence cannot be adduced under the principles which this Court adopted in *Seaboyer* […]."

41 *Ibid* at 670.

For example, he states: "It might be helpful to summarize the principles that can be taken from *Seaboyer* with regard to the cross-examination of complainants […]. Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative."[42] Certainly on Justice Cory's reading of *Seaboyer*, Canada's rape shield regime is aimed at removing discriminatory generalizations beyond the twin myths. It is important to note in this context that the roster of discriminatory stereotypes used to discredit complainants on the basis of their sexual activities is not static. Stereotypical assumptions about the implications of post-alleged offence sexual contact between the complainant and the accused come to mind. The analytical process mandated under section 276(2) applies to all other rape myths, regardless of their vintage.

To summarize, the text of section 276 and the legislative context surrounding its enactment, as well as the Supreme Court of Canada's jurisprudence both preceding and following the enactment of section 276, support the contention that the provision creates a categorical exclusion of evidence that invokes the twin myths, as well as a presumption of inadmissibility with respect to all other evidence of a complainant's sexual activity. As discussed in the paragraphs to follow, the problematic interpretation of Justice Gonthier's reasoning in *Darrach* adopted by some trial judges risks an unduly narrow interpretation of the scope of exclusion required under section 276.

A failure to appreciate the distinction between subsections 276(1) and 276(2), or to recognize that subsection 276(2) contains an exclusionary rule of its own, may lead courts to conclude that a hearing to determine the criteria under section 276(2), and to consider the factors under section 276(3), is only necessary when the defence seeks to adduce evidence of a complainant's prior sexual history for the purpose of invoking one or both of the twin myths. While not the decision of a trial judge, the Newfoundland Court of Appeal's decision in *R v Anstey* provides a clear example of this type of error. In *Anstey*, the accused appealed his conviction on the basis that the trial judge did not permit cross-examination as to the details of alleged non-consensual sexual activity between the complainant and other individuals. In determining that the trial judge had erred, Justice O'Neill reasoned as follows:

> Although [*Darrach*] might appear to require that the line of questioning which counsel for the appellant wished to follow here would require a consideration and

42 *Ibid* at 671. In *Darrach, supra* note 16 at para 33, Justice Gonthier also referred to stereotypes other than the twin myths: "Evidence of non-consensual sexual acts can equally defeat the purposes of s. 276 by distorting the trial process when it is used to evoke stereotypes such as that women who have been assaulted must have deserved it [...]."

> a determination by the trial judge, at a hearing, as set out in s. 276(2) and s. 276(3), in my view, in the particular circumstances here, it would not. The questioning sought to be conducted by counsel for the appellant did not arise nor was it sought to be introduced "to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity … or is less worthy of belief."[43]

In other words, Justice O'Neill concluded that the application of subsections 276(2) and 276(3) was unnecessary because the prior sexual history evidence was not being adduced for the purpose of invoking one or both of the twin myths.

As noted, a complainant's prior sexual history, with the accused or anyone else, is presumptively inadmissible.[44] Contrary to Justice O'Neill's conclusion in *Anstey*, trial judges must conduct a subsection 276(2) analysis whenever the accused seeks to introduce evidence of the complainant's other sexual activities: "[s]ection 276 is mandatory and applies in every circumstance where the defence seeks to adduce evidence regarding sexual activity […] which is not the subject matter of the charge."[45] Justice O'Neill wrongly concluded that because the "purpose of the line of questioning proposed was to test the complainant's credibility" and to demonstrate a similar pattern to her allegations, it should have been permitted.[46]

It may be that, upon a proper hearing under subsection 276(2), the evidence in *Anstey* was similar enough that it should have been admitted. Regardless, the purpose of section 276 is to ensure that prior judicial consideration is given before potentially prejudicial and humiliating or harmful lines of cross-examination are conducted. In *Anstey*, the Newfoundland Court of Appeal misdirected its lower courts not to embark upon a consideration of the criteria and factors under subsections 276(2) and 276(3) unless the evidence is aimed at invoking one or both of the twin myths. This reasoning obscures the exclusionary rule under subsection 276(2) and circumvents the analysis required under subsection 276(3). It also undermines the requirement, pursuant to section 276.1, that the defence make an application in writing, outlining with sufficient particularity the evidence sought to be introduced and its proposed relevance before a judge considers its admissibility under subsections 276(2) and 276(3).

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43 *Anstey*, *supra* note 15 at para 17. In support of this conclusion, Justice O'Neill quoted from the passage in *Darrach, supra* note 16 at para 33 in which Justice Gonthier addresses the qualified blanket exclusion under subsection 276(1) (see para 25).

44 *MT*, *supra* note 21.

45 *R v D(V)* (1999), 184 DLR (4th) 137 at para 16, 141 CCC (3d) 541 (ONCA), cited in Hill, Tanovich & Strezos, *supra* note 11 at 16-8.

46 *Anstey*, *supra* note 15 at para 20.

The approach in *Anstey* erroneously narrows the scope of judicial review required under section 276. Subsection 276(3) requires that before admitting evidence of a complainant's sexual activity (other than the activity at issue in the allegation), trial judges must consider issues such as "the need to remove from the fact-finding process any discriminatory belief or bias" and the impact on "the complainant's personal dignity and right of privacy."[47] Without such an assessment under subsections 276(2) and 276(3), evidence of prior sexual history not adduced for the purposes of invoking one or both of the twin myths could be admitted even if its prejudicial effect were to outweigh its probative value.

The failure to distinguish between the different exclusionary rules under subsections 276(1) and 276(2) may also cause trial judges to misapply the factors under subsection 276(3). For example, subsection 276(3)(d) requires judges to take into account "the need to remove from the fact-finding process any discriminatory belief or bias." In *Latreille*, Justice Heeney misapplies this provision as follows:

> The fourth [factor] is the need to remove from the fact-finding process any discriminatory belief or bias. This speaks to the need to remove the "twin myths" from any place in our law, and is not relevant here.[48]

Given the categorical exclusion of twin myth-based evidence under subsection 276(1), it is illogical to interpret subsection 276(3)(d) as aimed at eliminating twin myth reasoning from the fact-finding process. Such an interpretation renders section 276(3)(d) redundant. In other words, on Justice Heeney's reasoning, subsection 276(3)(d) would never be relevant.

The objective of subsection 276(3)(d) is to remove from the fact-finding process other discriminatory beliefs or "rape myths",[49] like the ones identified by the Supreme Court of Canada in *Seaboyer*, *Osolin* and other cases.[50] This would include myths such as the stereotype that women cannot be raped against their will,[51] that women who have actually been sexually

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47 *Criminal Code*, *supra* note 1 at ss 276(3)(d), (f).

48 *Latreille*, *supra* note 15 at para 27. He adopts the same reasoning in *Strickland*, *supra* note 15 at para 54: "Assuming, then, that the fourth consideration must be dealt with, I must address the need to remove from the fact-finding process any discriminatory belief or bias. In my view, since the focus of the enquiry is on the relationship between the parties, and not on the general unchaste character of the complainant, this objective is accomplished."

49 *Osolin*, *supra* note 18.

50 *Seaboyer*, *supra* note 18; *Osolin*, *supra* note 18; *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33 [*Shearing*].

51 *Osolin*, *supra* note 18 at 670.

assaulted will behave a certain way,[52] that women are really only sexually assaulted by strangers[53] or that "bad girls" are more likely to consent.[54] In addition to being illogical, interpreting the discriminatory beliefs targeted by subsection 276(3)(d) as including only the twin myths would remove trial judges' statutory obligation to consider the many other harmful stereotypes about sexual assault capable of distorting the fact-finding process and unnecessarily humiliating the complainant. Trial judges must be careful not to conflate the discriminatory beliefs targeted by subsection 276(3)(d) with the so-called twin myths categorically rejected under subsection 276(1).[55] The twin myths are a subset of discriminatory beliefs, and as a matter of logic are not the focus of subsection 276(3)(d). The conflation of these provisions unduly limits the assessment of whether the evidence of extrinsic sexual activity invokes other discriminatory generalizations about women or sexual assault.

Justice Gareau made a similar error in *R v Beilhartz*.[56] He admitted evidence of the complainant's prior sexual activities without conducting the required analysis under section 276(3). As a result of the failure to distinguish between the two parts of section 276, Justice Gareau wrongly suggested that the balancing process required under section 276(3) was aimed at protecting the complainant from twin myth reasoning.[57] That is not the purpose of subsection 276(3). Trial judges must determine that the probative value of any evidence of extrinsic sexual activity is not reliant on twin myth reasoning (and thus excluded by subsection 276(1)) *before* considering whether the evidence satisfies the criteria for admission under subsections 276(2) and 276(3).

In other words, section 276 requires a two-stage determination.[58] First, a trial judge must determine whether the defence application to adduce extrinsic sexual activity evidence is categorically excluded under subsection 276(1) because its probative value is derived from twin myth reasoning.[59] If the proposed evidence is not excluded under subsection 276(1), then its

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52 *Shearing*, *supra* note 50 at para 172.

53 *Seaboyer*, *supra* note 18 at 659, L'Heureux-Dubé J, dissenting in part.

54 *Osolin*, *supra* note 18 at 670.

55 Judge Derrick's reasoning in *R v JWS*, 2012 NSPC 101 at para 17, 2012 CarswellNS 841 (WL Can) risks this type of conflation by labeling the broader category of discriminatory beliefs about sexual assault as the twin myths, see para 16.

56 *R v Beilhartz*, 2013 ONSC 5670, 6 CR (7th) 79 [*Beilhartz*].

57 *Ibid* at paras 17–18.

58 Justice Lacelle's reasoning in *R v L(D)*, 2015 ONSC 4631, 2015 CarswellOnt 10898 (WL Can) [*DL*] provides a clear example of the proper interpretive approach to section 276 and of the relationship between subsection 276(1) and subsections 276(2) and 276(3).

59 *Ibid* at para 9.

admissibility must be further considered to determine whether it complies with the dictates of subsection 276(2).[60] This second stage of the process requires judges to determine whether the proposed evidence is of specific instances of sexual activity; whether it is relevant to an issue at trial; and whether it has significant probative value that is not substantially outweighed by its prejudicial effect.[61] It is at this second stage of the analysis that the trial judge must consider the factors set out in subsection 276(3).[62]

B) Improper Admission of "Pattern of Consent" Evidence

In *Seaboyer*, Justice McLachlin stated that, "the fact that a woman has had intercourse on other occasions [including with the accused] does not in itself increase the logical probability that she consented to intercourse with the accused [on the occasion at issue in the allegation]."[63] Similarly, as Justice Gonthier noted in *Darrach*: "Actual consent must be given for each instance of sexual activity."[64] Despite these statements from the Supreme Court of Canada, some trial judges erroneously admit evidence of other sexual activity with the accused, for the purposes of demonstrating consent, on the basis that such evidence establishes a "pattern of consenting" and is therefore not reliant for its probative value on the stereotype that women who have consented to sex in the past are more likely to have consented to the sex at issue in the allegation.[65]

This error appears to flow from a distortion of the majority's reasoning in *Seaboyer*. Justice Heeney's reasoning in *Latreille* provides an example of this problematic approach to section 276. In *Latreille*, Justice Heeney relies on Justice McLachlin's decision in *Seaboyer* as authority for the conclusion that evidence of a "pattern of consenting" to sexual activity with the accused in the past is admissible for the purpose of demonstrating consent. He cites the following passage in *Seaboyer* as precedent for the admissibility of this type of "pattern of consent" evidence: "Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of

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60 *Criminal Code*, *supra* note 1 at s 276.1(4); *DL*, *supra* note 58 at para 9. This second stage of the analysis involves two steps. First, trial judges must determine whether the defence application has met the requirements under section 276.1 such that a hearing will be held under section 276.2. Section 276.2 requires judges to determine whether the evidence is admissible under subsection 276(2) and to provide reasons for that determination.

61 *DL*, *supra* note 58 at para 10.

62 *Ibid* at para 11.

63 *Seaboyer*, *supra* note 18 at 604.

64 *Darrach*, *supra* note 16 at para 58.

65 See e.g. *G(J)*, *supra* note 15; *Latreille*, *supra* note 15; *Strickland, supra* note 15; *WJA*, *supra* note 2; *JSS*, *supra* note 3.

the alleged encounter with the victim as to tend to prove that the victim consented to the act charged [should be admissible]."[66]

Justice Heeney wrongly attributes this passage to Justice McLachlin. In fact, the passage is part of a longer excerpt from an article by Professor Harriett Galvin offering a proposed framework for rape shield provisions. In *Seaboyer*, Justice McLachlin indicates that Galvin's proposal, "with some modification", reflects an appropriate approach to the use of evidence of a complainant's other sexual activity.[67] Significantly, one of the modifications included in her own proposed framework removes the passage Justice Heeney quoted and replaces it with the following: "Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence [should be admissible], bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness[.]"[68]

Given the stringent requirements for the reception of similar fact evidence, it is important to identify this modification to Galvin's proposed framework. Arguably, the requirements for the admission of similar fact evidence are even stricter than Professor Galvin's suggested criteria for the admission of "pattern of sexual conduct" evidence.[69]

Justice McLachlin suggests admitting this pattern of conduct type of evidence under section 276 on the issue of consent only where it meets the requirements for the reception of similar fact evidence.[70] To gain a sense of the type of admissible pattern of conduct evidence contemplated by Justice McLachlin in *Seaboyer*, consider her description of the requirements for the reception of similar fact evidence offered four months earlier in *R v C(MH)*:

> There will be occasions, however, where the similar fact evidence will go to more than disposition, and will be considered to have real probative value. That probative

66 *Latreille*, *supra* note 15 at para 13.

67 *Supra* note 18 at 632–33.

68 *Ibid* at 635.

69 Notably, Justice Heeney's reasoning is not actually consistent with either Justice McLachlin's approach or Professor Galvin's approach. Galvin's proposal contemplates admitting evidence of a pattern of the complainant's prior sexual conduct where the conduct is "so distinctive" and "so closely resembling" the accused's account of the incident that it tends to prove his version of events. Galvin's approach is not the appropriate standard in any event. Unlike Justice McLachlin, Galvin's proposed framework was confined to the exclusion of evidence of sexual activity with persons other than the accused. Harriett R Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70:4 Minn L Rev 763 [Galvin].

70 *Seaboyer*, *supra* note 18 at 615.

> value arises from the fact that the acts compared are *so unusual and strikingly similar* that their similarities cannot be attributed to coincidence. Only where the probative force clearly outweighs the prejudice, or the danger that the jury may convict for non-logical reasons, should such evidence be received. [emphasis added][71]

In other words, according to the standard established by Justice McLachlin in *Seaboyer*, pattern of conduct evidence involving a complainant's other sexual activity should only be admitted if the "probative value [of it] arises from the fact that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence." Indeed, Justice McLachlin's language in *Seaboyer* with respect to admitting pattern of conduct evidence is quite cautionary: "*[e]ven* evidence as to pattern of conduct *may on occasion* be relevant. Since this use of evidence of prior sexual conduct draws upon the inference that prior conduct infers similar subsequent conduct, it closely resembles the prohibited use of the evidence and must be carefully scrutinized."[72]

The example that Justice McLachlin offers in *Seaboyer* as admissible to demonstrate a pattern of conduct is telling. Her example is of very specific previous conduct by the complainant—conduct that could properly be characterized as evidence of *modus operandi*: "A woman alleges that she was raped. The man she has accused of the act claims she is a prostitute who agreed to sexual relations for a fee of twenty dollars, and afterwards, threatening to accuse him of rape, she demanded an additional one hundred dollars."[73] The accused man in this example seeks to introduce "the testimony of other men [indicating] that, using the same method, she had extorted money from them."[74] Justice McLachlin's conclusion is that it would be unfair to exclude "evidence of this *modus operandi*."[75] The type of pattern of conduct evidence that Justice McLachlin considers admissible in *Seaboyer* involves highly specific, "unusual and strikingly similar" conduct. She explicitly invokes the standards of admissibility for similar

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71 [1991] 1 SCR 763 at 771–72, 63 CCC (3d) 385 [*CM(H)*]. The case law interpreting the similar fact evidence rule has obviously continued to evolve since 1991. However, so long as *Seaboyer* remains the authority for admitting "pattern of consent" evidence under section 276(2), the language of "so unusual and strikingly similar" used in *CM(H)* remains the appropriate standard because this is the standard that Justice McLachlin was invoking in *Seaboyer*.

72 *Seaboyer*, *supra* note 18 at 615 [emphasis added].

73 *Ibid* at 615–16.

74 *Ibid* at 616.

75 *Ibid.* The example offered in *Seaboyer* is endorsed here for its analytical significance. It is relied upon with the self-conscious acknowledgment that it invokes the problematic stereotype of the dishonest and conniving sex worker. I am grateful to one of the anonymous reviewers for drawing my attention to this point.

fact evidence. Justice McLachlin's proposed standard does not support the use of prior sexual history evidence in the manner suggested in *Latreille*.

Consider the case further. The Crown in *Latreille* conceded that it would be appropriate to adduce evidence that the complainant and the accused had had sexual relations in the ten days prior to the alleged incident.[76] However, the Crown objected to cross-examination of the complainant regarding any details of the sexual activity or its surrounding circumstances. The complainant's evidence was that she regularly visited with the accused on her way to work. Her allegation was that on the date of the alleged offence she went to the accused's home to tell him that the relationship was over. He accused her of cheating on him. During this discussion, part of which occurred in his bedroom, he told her that he was going to have sex with her. She declined, and he then proceeded to have forcible sexual intercourse with her following which he called her a "slut", told her to get her belongings out of his house, and return his key.[77]

Justice Heeney granted the defence application to cross-examine the complainant, and to lead evidence, on the incidents of sexual intercourse (and their surrounding circumstances) occurring between the accused and the complainant during the seven to ten days preceding the alleged offence. He admitted this evidence, as relevant to the issue of consent, in part on the basis that it established a "pattern of repeatedly consenting to sex with the accused in similar circumstances."[78] The "similar circumstances" involved attending at the accused's home before her work shift, bringing tea with her, going up to his bedroom, and having sexual intercourse.[79]

Justice Heeney's replacement of pattern of conduct evidence (as it is referred to by Justice McLachlin and Professor Galvin) with "pattern of consent" evidence is significant. Contrary to Justice Heeney's reasoning here, evidence that the complainant had "a pattern of repeatedly consenting to sex with the accused in similar circumstances"[80] is not remotely the type of evidence of "unusual and strikingly similar" past conduct contemplated

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76 *Latreille*, *supra* note 15 at paras 6, 9.

77 *Ibid* at para 4.

78 *Ibid* at paras 19, 34. The defence argued that it was admissible on two grounds. The other justification for its admission was to explain physical evidence regarding an area of redness on the complainant's vagina. The defence argued that it was essential for the jury to know that they had had consensual sexual intercourse earlier in the week because this offered an alternate explanation for the existence of the redness (see para 8). The analysis offered here takes issue with Justice Heeney's reasoning regarding "pattern of consent" evidence, not his decision to admit the evidence as relevant to explaining the physical evidence.

79 *Ibid* at para 9.

80 *Ibid* at para 19.

by Justice McLachlin in *Seaboyer*, nor does it meet the highly "distinctive" standard described by Professor Galvin.

Justice Heeney asserted that it was "not the sexual nature of the activity that was relevant, but rather the repetitive pattern of consenting."[81] Accepting this proposition would entirely undermine the categorical exclusion of prior sexual history evidence that derives its probative value from the inference that women who have consented to sex in the past are more likely to have consented to the sexual activity at issue in the allegation. As Hill, Tanovich & Strezos note, the conclusion that a repetitive "pattern of consenting" is relevant to consent "appears to fall squarely within the prohibited reasoning that because she consented before she is more likely to have consented again."[82]

Consider Justice McLachlin's general comments in *Seaboyer* concerning the admissibility of evidence of sexual history: "[my] examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional."[83] The examples she referred to included evidence to demonstrate bias or animus held by the complainant towards the accused, evidence to demonstrate that physical injury evidenced by the Crown was caused by someone other than the accused, evidence that a young complainant's sexual knowledge was not obtained through interactions with the accused, and as noted above, evidence of a complainant's sexual *modus operandi* as that term is understood in the similar fact evidence context. Given the prevalence of sexual violence between intimate partners,[84] had she intended to include evidence of a complainant's "pattern of consenting" to sexual contact with the accused, presumably she would not have concluded that the admission of prior sexual history evidence to establish consent will be exceptional.

Similarly in *Darrach*, Justice Gonthier stated that "evidence of prior sexual activity will rarely be relevant to […] establish consent."[85] Again, given that an accused and a complainant will often have a history of consensual sexual activity, the Supreme Court of Canada in *Darrach* cannot be said to have interpreted section 276 as permitting evidence of a complainant's "pattern of consenting" to the accused to infer consent to the sexual activity that forms the subject matter of the charge without requiring

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81 *Ibid*.

82 Hill, Tanovich & Strezos, *supra* note 11 at 16-15.

83 *Seaboyer*, *supra* note 18 at 634.

84 Statistics Canada, *Measuring violence against women: Statistical trends*, edited by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 February 2013), online: <www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>.

85 *Darrach*, *supra* note 16 at para 58.

some further connection. Otherwise the admission of such evidence would hardly be rare.[86]

Justice Tausendfreund's recent decision in *R v G(J)* employs similarly problematic reasoning.[87] In *G(J)*, defence counsel for the accused brought an application to cross-examine the complainant and to allow the accused to testify regarding both prior and subsequent sexual activity with the complainant.[88] The accused and the 16-year-old complainant were involved in a sexually intimate relationship at the time of the alleged sexual assault. The complainant alleged that the accused, after unsuccessful attempts to penetrate her vaginally while they were "spooning", "chose to penetrate her anally" and continued to do so despite her repeatedly telling him to stop.[89] The application was to adduce evidence of their sexual relationship before this incident occurred, evidence of an incident of anal sex that the accused maintained was consensual that occurred approximately one month after the alleged sexual assault, as well as evidence of a second incident of anal intercourse that occurred approximately six months later.[90]

The accused argued that this evidence demonstrated a "pattern of consensual sexual activity" and was a relevant and necessary aspect of his defence. He further suggested that it was "not the sexual nature of the activity that is relevant [...] but rather the repetitive pattern of consenting."[91] Lastly, the accused suggested that the absence of this evidence would lead to a distorted representation of the type of relationship between him and the complainant.[92]

In his reasons for granting the defence application, Justice Tausendfreund misinterpreted: the scope of exclusion of evidence under section 276(1);[93] the Supreme Court of Canada's interpretation of the rape shield provisions

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86 One of the additional risks with admitting this type of evidence to establish a supposed "pattern of consent", beyond the potential distortion of the truth finding process in a particular case, is the risk that it will reify the stereotypical assumption that real sexual assaults are perpetuated by strangers, and that ongoing sexual partners do not sexually assault one another. See *Seaboyer*, *supra* note 18 at 659, Justice L'Heureux-Dubé, dissenting in part.

87 *G(J)*, *supra* note 15; *Strickland, supra* note 15.

88 *G(J)*, *supra* note 15 at para 5.

89 *Ibid* at para 12.

90 *Ibid* at paras 13–14.

91 *Ibid* at para 5.

92 *Ibid*.

93 *Ibid* at paras 10–11: Relying on Justice Heeney's decision in *Latreille, supra* note 15, Justice Tausendfreund also made the mistake, discussed in Part I, of conflating the exclusionary rule under subsection 276(1) and the rules under subsections 276(2) and 276(3). In other words, he concluded that section 276 only excludes evidence that invokes the twin myths.

in *Darrach*;[94] and Justice McLachlin's reasoning in *Seaboyer*.[95] Citing Justice Heeney's reasoning in *Latreille*, Justice Tausendfreund concluded that the complainant could be cross-examined on, and the accused could testify to, the particulars of their sexual relationship prior to the alleged sexual assault and the two incidents of anal intercourse subsequent to the alleged offence.[96] This evidence of other sexual activity with the complainant—which he characterized as "pattern of consent" evidence—should have been excluded under subsection 276(1). Other than the bare assertion that it was being adduced to show a "pattern of consent", and was not intended to advance either of the twin myths, Justice Tausendfreund did not provide any explanation as to why this evidence was admissible on the issue of consent.

His failure to identify some (permissible) linkage between the evidence of other sexual activity and the issue of consent is not consistent with *Seaboyer* or the requirements under section 276. Nothing in the decision suggested that evidence of the details of their prior sexual activities would satisfy the "unusual or strikingly similar" requirements for similar fact evidence contemplated by Justice McLachlin in *Seaboyer*. Indeed, the decision does not include any analysis as to why the "particulars of their sexual relationship leading to the incident" would be relevant to the issue of consent.

In terms of the two incidents of anal intercourse that occurred after the alleged offence, it is not possible to conclude that the reasoning was premised on inferences other than the prohibited inference that because she allegedly consented to anal intercourse on another occasion, it is more likely that she consented to the anal intercourse that formed the subject matter of the charge. There was no suggestion that this evidence demonstrated a highly distinctive, unusual and strikingly similar pattern of conduct. In fact, the decision does not offer any analysis as to the relevancy of this post-offence conduct evidence other than to assert that it demonstrates a "pattern of consenting". Based on these reasons, or lack thereof, the only logical conclusion is that this evidence was admitted to support the prohibited inference that a woman who has consented to anal intercourse on another occasion is more likely to have consented to the anal intercourse forming the subject matter of the charge.

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94 *G(J)*, *supra* note 15 at paras 8–9.

95 *Ibid* at paras 8, 11. While he did properly attribute Professor Galvin's approach to her, unlike Justice Heeney, he did not recognize that Justice McLachlin modified Professor Galvin's approach. Nor did he properly apply either Galvin's "so distinctive and so closely resembling" standard or Justice McLachlin's "unusual and strikingly similar" standard.

96 As discussed in Part IV, he also failed to apprehend the definition of consent to sexual touching and the concept of honest but mistaken belief in consent—mistakes which further distorted his erroneous reasoning with respect to the section 276 application.

Justice Schultes made a similar error in *JSS*—the case described in the opening paragraphs of this article. He properly excluded evidence that the accused and complainant previously had a robust sexual relationship that included a variety of sexual acts, aids and locations and that she was willing to be videotaped and photographed while engaging in sex acts. However, he granted the defence application to adduce evidence of previous acts of consensual anal intercourse as relevant to consent. His justification for allowing the defence to cross-examine the complainant on prior allegedly-consensual acts of anal intercourse with her ex-husband was that some jurors would obviously assume that a woman in a heterosexual relationship would not willingly engage in anal intercourse.[97] Justice Schultes reasoned that unless the jurors were given evidence that the complainant was a heterosexual woman who would consent to anal intercourse, the defence of consent would not be fairly assessed.[98] In other words, the jurors could not properly assess the credibility of the complainant's assertion that the anal intercourse forming the subject matter of the charges was non-consensual unless they were made aware of the fact that the complainant, unlike most heterosexual women, had a history of consenting to anal intercourse.[99] The evidence of the complainant's other sexual activity admitted in *JSS* does not meet the standard for pattern of conduct evidence articulated in *Seaboyer.* Anal intercourse among heterosexual couples is quite common.[100] When applying the standard for pattern of conduct evidence, judges should be careful not to assess the sexual activity at issue based on their personally-held views about what constitutes so called "mainstream" sexual activity.[101] Judicial assumptions as to whether an objective, outside observer would consider a particular sexual act highly unusual are equally problematic. In fact, this type of evidence should only be admitted in these circumstances to rebut the Crown's inference that the sexual act is so unusual no one would engage in it consensually.

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97 *JSS*, *supra* note 3 at para 39.

98 *Ibid*.

99 *Ibid* at para 27: "Exceptionally however, such evidence may assist the trier of fact to assess the credibility of her claim that she subjectively did not wish to engage in the activity, and/or of the accused's descriptions of actions by her that are inconsistent with her professed state of mind."

100 Debby Herbenick et al, "Sexual Behavior in the United States: Results from a National Probability Sample of Men and Women Ages 14–94" (2010) 7:Suppl 5 J Sexual Medicine 255 (in some age groups 40% to 45% of heterosexual men and women reported having had anal intercourse); Jami S Leichliter et al, "Prevalence and Correlates of Heterosexual Anal and Oral Sex in Adolescents and Adults in the United States" (2007) 196:12 J Infectious Diseases 1852 at 1854 (showing that one third of men and women had had anal intercourse).

101 *JSS, supra* note 3 at para 39.

Contrast the reasoning in *JSS* with that of Justice Fairburn in *R v D(D)*.[102] In *D(D)*, the accused and the complainant lived together at the time of the alleged assault. The complainant alleged that the accused forced her to engage in anal and vaginal intercourse and that the following day he attempted to force anal intercourse again. When that failed, he forced her to engage in vaginal intercourse. The accused brought an application to introduce evidence of two instances of anal intercourse that he claimed occurred prior to the alleged offence. The complainant testified at the preliminary hearing that she had not engaged in anal intercourse prior to the alleged attack.[103] Justice Fairburn determined that—assuming the Crown did not elicit evidence from the complainant at trial that she had never engaged in anal intercourse—the defence application should be denied on the basis that: "To allow the prior sexual history to be adduced in this situation will be of no ascertainable relevance and only encourage discriminatory beliefs and bias."[104] Simply put, absent the impermissible inference that if she consented to anal intercourse in the past she is more likely to have consented to the anal intercourse at issue in the allegation, the evidence the defence sought to adduce was irrelevant.

It should be obvious that to be admissible, pattern of conduct evidence related to prior sexual acts must be sufficiently similar to the acts forming the subject matter of the charge, in addition to the requirement that they share a highly distinctive character. In *R v P(G)*, Justice Moore problematically admitted evidence of six sexual encounters between the complainant and the accused over a three year period preceding the incident.[105] He admitted them as relevant to both consent and mistaken belief in consent. Justice Moore did not identify any distinctive aspect shared by the previous sexual acts and the sexual activity forming the subject matter of the charge. In fact, his reasons note that the prior sexual acts *differed* from the alleged act of forced sexual intercourse that formed the subject matter of the charge. Despite his assertion that he would not engage in twin myth reasoning, his reasons did not identify any other basis upon which these prior acts of fondling and kissing could have been relevant to the issue of consent. Relevancy seems to have been based on the prohibited inference that because she had engaged in sexual intimacy with the accused in the past, she was more likely to have consented to the sexual intercourse at issue in the allegation. Justice Moore's comment, "And again, it's not a situation that it is alleged that he met her on the night in question, that she's a total stranger, and that it was just good luck that they end up in bed together" is revealing.[106]

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102 *R v D(D)*, 2015 ONSC 3340, 2015 CarswellOnt 8710 (WL Can).

103 *Ibid* at paras 2, 5–6.

104 *Ibid* at para 18.

105 *R v P(G)*, 2008 CarswellOnt 8825 (WL Can) (CJ).

106 *Ibid* at para 25.

The similar fact evidence requirements for admitting evidence of a complainant's pattern of sexual conduct to establish an element of the *actus reus* in *Seaboyer* are not illusory. Indeed, in large measure it is in the context of sexual assault cases that our modern law of similar fact evidence has developed.[107] To understand the requirements for admitting pattern of sexual conduct evidence, trial judges should be guided by how these same requirements have been applied to evidence of an accused's pattern of sexual conduct. Evidence of an accused's pattern of sexual conduct will not be admitted where the "identified similarities describe general, rather than specific, aspects of the conduct and contain limited detail."[108] It is an error of law to admit evidence of an accused's prior sexual conduct under the similar fact rule where the evidence relates to "non-specific conduct and lack[s] detail" or where it involves "no distinctive unifying features."[109] The type of evidence admitted in cases like *Latreille*, *G(J)*, and *JSS*—evidence merely of a "pattern of consenting" to sexual activity with the accused in similar circumstances—is not sufficiently distinctive. Trial judges do not tend to admit similarly generic and non-distinctive evidence of an accused's prior sexual misconduct to demonstrate a pattern of sexual violation.[110] When they do admit evidence of this nature they are often overturned.[111]

One of the justifications that some trial judges offer for admitting "pattern of consent" evidence as relevant to the issue of consent is that not permitting the complainant to be cross-examined on "the particulars of their sexual relationship" prior to the incident would produce "a distorted representation of the type of relationship that had developed between these two."[112] They assert that this type of evidence is necessary to provide

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107 David Tanovich, "Why Equality Demands that Prior Sexual Misconduct Evidence be Presumptively Admissible in Sexual Assault Cases" in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice & Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2012) 541 at 559, n 74 [Tanovich, "Why Equality Demands"]. See also Lynne Hanson, "Sexual Assault and the Similar Fact Rule" (1993) 27 UBC L Rev 51.

108 *R v Blake* (2003), 68 OR (3d) 75 at para 73, 181 CCC (3d) 169 (CA), aff'd 2004 SCC 69, [2004] 3 SCR 503.

109 *Ibid* at paras 78, 90. See also *R v T(L)*, 196 OAC 394, 2005 CanLII 792 (CA) [*T(L)*]. For an examination of these, and other cases in which courts have excluded evidence of an accused's prior sexual history, see Tanovich, "Why Equality Demands", *supra* note 107.

110 See e.g. *R v W(J)*, 70 WCB (2d) 591, 2006 CarswellOnt 5026 (WL Can) (SC) and *R v K(A)*, 2006 BCPC 152, 2006 CarswellBC 896 (WL Can), cited in Tanovich, "Why Equality Demands", *supra* note 107.

111 See e.g. *G(J)*, *supra* note 15 and *T(L)*, *supra* note 109, cited in Tanovich, "Why Equality Demands", *supra* note 107.

112 *G(J)*, supra note 15 at paras 5, 17. See also *Latreille, supra* note 15 at para 21 and *Strickland, supra* note 15 at para 34.

context. Cases such as *R v Harris*,[113] *R v MM*,[114] *R v Temertzoglou*,[115] *R v Blea*[116] and *R v Perkins*[117] are relied upon as authority for this proposition.[118] There is a critical (and sometimes overlooked) distinction between the reasoning in these cases and that of the courts in "pattern of consent" cases like *JSS*, *G(J)*, and *Latreille*. In those "distorted representation" cases, the complainant either denied the existence of a prior sexual relationship with the accused, or made prior inconsistent statements as to whether the relationship had been platonic prior to the incident forming the subject matter of the charge.[119]

In cases like *MM*, *Harris* and *Blea*, the trial judge determined that denying the defence application to adduce evidence of prior sexual interactions between the accused and the complainant would leave the trier of fact with the (potentially erroneous) impression that the prior relationship had been platonic.[120] This would deprive the jury "of the tools needed to fully and fairly assess the conduct of the parties and the believability of their respective positions."[121] In these cases, evidence of other sexual activity with the complainant was properly admitted to show a "pattern of consent". It was admitted to rebut the complainant's assertion that the prior relationship had been platonic.

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113 10 CR (5th) 287, 1997 CanLII 6317 (ON CA) [*Harris*].

114 29 CR (5th) 85, 1999 CanLII 15063 (ON SC) [*MM*].

115 11 CR (6th) 179, 2002 CanLII 2852 (ON SC) [*Temertzoglou*].

116 2005 CarswellOnt 4791 (WL Can), [2005] OJ No 4191 (QL) (SC) [*Blea*].

117 2005 CarswellOnt 7594 (WL Can), [2005] OJ No 5421 (QL) (SC) [*Perkins*].

118 See e.g. *Strickland, supra* note 15 at paras 36–45; *JSS*, *supra* note 3 at paras 16–19.

119 In *Temertzoglou, supra* note 115 there was a significant age difference between the accused and the complainant, he was married to someone else (paras 5–6), in a previous statement to the police she denied any sexual history between them (para 12), and the evidence of prior sexual contact was necessary to explain aspects of the defence account of the incident, such as why he had come with lambskin condoms (According to him during a previous encounter she had indicated she was allergic to latex condoms) (para 14). The defence application to cross-examine her on prior sexual encounters with the accused was granted on the basis that it showed the relationship was more than platonic, notwithstanding the age difference (paras 29, 32). That the prior inconsistent statement was to the police is problematic. Law enforcement officials should not ask questions that elicit evidence from the complainant regarding sexual activity other than the activity that forms the subject matter of the incident.

120 See *Blea, supra* note 116 at para 16; *Perkins supra* note 117 at para 2*; MM*, *supra* note 114 at paras 16–19; *R v RRW*, 300 Nfld & PEIR 118 at paras 5, 25, 2010 NLTD(G) 136 (SC (TD)); *R v Abdulkadir*, 2009 ABQB 602 at paras 19–20, 2009 CarswellAlta 2561 (WL Can).

121 *Harris*, *supra* note 113 at para 49.

In *MM* for example, the complainant denied any sexual relationship with the accused prior to the alleged sexual assault.[122] Her allegation was that the accused (with a co-accused) forcibly raped her. The accused asserted that the sexual activity was consensual. The accused sought to adduce evidence of approximately four incidents of consensual sexual intercourse with the complainant in the months preceding the alleged offence. Justice Langdon admitted the evidence on the basis that without it the defendant's account of the incident would "appear utterly improbable."[123]

In *Harris*, the complainant testified that she was shocked when the accused asked her if they were going to have sex and indicated to her that he had brought protection. According to her there had been nothing sexual between them and she had made it known to the accused that she was not interested in a sexual relationship with him.[124] The accused's evidence was that they had engaged in consensual sexual activity prior to the date of the alleged assault. By testifying as she did, the complainant placed the nature of their relationship in issue. The application was granted on the basis that the proposed evidence was probative of the issue of credibility because of "its ability to contradict specific evidence given by the complainant that was central to her version of the relevant events."[125]

Similarly, in *Blea*, the complainant's evidence was that they were friends and that he had on previous occasions tried to initiate sexual contact and she "blew him off."[126] The accused's account was that they were friends publicly, but in private had engaged in consensual sexual activity on two occasions prior to the alleged incident. Citing the reasoning in *Harris*, Justice Bryant granted the defence application to adduce evidence of the alleged prior two instances of sexual activity as "relevant to the credibility of the complainant concerning her characterization of the relationship."[127] In doing so, Justice Bryant was careful to limit the cross-examination to establishing the fact of the relationship, not the details of the alleged sexual conduct.[128] This limit appropriately allowed the defence opportunity to rebut the claimant's testimony without permitting unnecessary incursions on her privacy and dignity interests.

None of the complainants in *Latreille*, *Strickland*, *G(J)* nor *JSS* suggested that their prior relationship with the accused was platonic. In each of these cases, the fact of a prior intimate relationship between the

122 *MM*, *supra* note 114 at para 2.

123 *Ibid* at para 26.

124 *Harris*, *supra* note 113 at para 16.

125 *Ibid* at para 50.

126 *Blea*, supra note 116 at para 16.

127 *Ibid* at paras 11, 26.

128 *Ibid* at para 24.

parties was readily apparent from the complainant's statements and/or testimony. Precluding the defence from cross-examining the complainant on prior sexual acts between the parties in these cases would not have left the trier of fact with the impression that prior to the alleged sexual assault the relationships had been strictly platonic.[129]

Cases in which the complainant is not refuting the sexual nature of the prior relationship are not analogous to cases in which denying the defence the ability to adduce evidence of prior sexual conduct would leave the trier of fact with the uncontested impression that the prior relationship had been platonic. It is misleading to rely on these cases as authority for the proposition that "pattern of consent" evidence of a conceded prior sexual relationship is relevant to the issue of consent and necessary to ensure that the trier of fact is not presented with a distorted representation of the relationship. Justice Lacelle explains this important distinction in *GG.*[130] In this case, the accused sought to adduce evidence of prior sexual activity between himself and the complainant, to whom he was married at the time of the alleged sexual assault. In denying the application, Justice Lacelle stated:

> This is not a case like *Harris* or *Temertzoglou* where the nature of the previous relationship between the parties requires amplification in view of the circumstances leading to the allegations. This allegation is made in the context of a marital relationship, although a brief one. The facts led as part of the narrative in this case, as set out in the summaries of the allegations above, are sufficient to establish the nature of the previous relationship between the parties for the purposes of understanding and assessing the narrative each may provide at trial.[131]

Justice Lacelle went on to conclude that there was nothing about the facts alleged by the complainant, nor the account provided by the accused, that were so unusual as to make evidence about their prior sexual encounters admissible.[132] Her reasoning in *GG* exemplifies a proper application of the *Seaboyer* criteria for admitting pattern of conduct evidence.[133]

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129 In *Latreille*, *supra* note 15 at para 4 the complainant's evidence was that she had attended at the accused's home in order to end their intimate relationship. In *Strickland*, *supra* note 15 at para 12 the complainant "admitted having 'had sex' with the accused, but did not describe […] details." In *G(J)*, *supra* note 15 at paras 3–4 it was clear from the complainant's allegation that she and the accused had been in a sexually intimate relationship at the time of the alleged sexual assault. In *JSS*, *supra* note 3 at paras 2–3 the accused and complainant were married at the time of the sexual assaults.

130 *Supra* note 8 at paras 4, 10.

131 *Ibid* at para 32.

132 *Ibid* at para 34.

133 See also *Bildfell*, *supra* note 2.

To summarize, evidence of a pattern of sexual conduct on the part of a complainant should only be admitted where the conduct is highly unusual, strikingly similar and is in fact a pattern. As such, trial judges should never admit, as relevant to consent, evidence of only one prior incident of any sexual act, regardless of how unusual that act may be.

Evidence of a prior sexual relationship between the complainant and the accused should only be admitted as relevant to the issue of consent on the basis that its absence would leave the trier of fact with a distorted representation of the circumstances surrounding the incident. In cases where the evidence is admissible for this purpose, it should be limited to the fact of the prior intimate relationship—not the details of the sexual activities in which the accused and complainant engaged.[134]

C) Misinterpreting Section 276 Based on Erroneous Interpretations of the Law of Consent

In some cases, the improper admission of evidence of a complainant's sexual activity other than the sexual activity forming the subject matter of the charge is premised on a trial judge's misapprehension of the law of consent. Often the error involves an inadequate application or understanding of the mistaken belief in consent defence.[135] In some cases, the problematic reasoning relates to a failure to apply the reasonable steps requirement of the mistaken belief in consent defence. Justice Tausendfreund's reasoning in *G(J)* demonstrates this mistake. Recall that in *G(J)*, in addition to admitting evidence of the accused and complainant's sexual activity before and after the alleged offence, Justice Tausendfreund also admitted evidence of an incident of anal sex between the parties approximately six months after the alleged offence that he described as follows:

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134 As such, and related to this point, as a general principle, complainants should not be faced with specific questions from any justice system actors about their other sexual activities. Law enforcement officials should be trained not to inquire into the specifics of a complainant's sexual activities other than those forming the subject matter of the incident. I am grateful to my colleague David Tanovich for drawing my attention to this point.

135 For cases in which evidence of prior sexual history was wrongly considered relevant and probative of the defence of honest but mistaken belief in consent see *R v Ingman*, 2004 SKQB 87 at para 12, 246 Sask R 305 [*Ingman*] (admitting evidence as to when the complainant began working as a prostitute, the geographical area in which she worked, and whether her dress and appearance when engaged in that activity were similar to her dress and appearance at the time of the alleged offence, as relevant to the defence of mistaken belief); *R v McDonald*, 2003 SKQB 165 at para 5, [2003] SJ No 508 (QL) (admitting evidence that she had planned a party for the sale of sexual aids as relevant to the defence of mistaken belief); *R v BJS*, 2005 ABPC 158, 382 AR 311 at paras 2, 8, 110; *R v B(AJ)*, 2007 MBCA 95, 220 Man R (2d) 8 at paras 50–51; *R v Felix*, 2005 NWTSC 87 at paras 2, 4, 6, 8, 2005 CarswellNWT 109 (WL Can). For a discussion of this issue see Janine Benedet, Annotation of *R v B(AJ)* 2007 MBCA 95 on Westlaw, 2007 CarswellMan 300 [Benedet].

> The accused states that the last encounter between these two on April 27, 2014 is critical to his defence. They reconnected that day and drove around in the van of the accused. He parked his vehicle and starting [sic] to kiss her. She stated that it was not a good idea, but he continued. He did not ask her for her consent, but took her clothes off and started to have sex with her. The complainant is expected to say that it was uncomfortable, but she did not say no. The accused was apparently very rough with her during that sexual encounter. When it was over she stated to him that she did not feel good about it. He took her home. She then had a panic attack based on what she said had happened to her. She texted the accused, stating that she did not know why she had "freaked out" when she got home, but felt that he had been too rough with her while having sex. The accused is expected to say that at no point during their sexual encounter did she voice any concerns or objections. Her direct quote of her text message to the accused is said to be that she "had never been fucked that rough". The accused then points to her evidence from the preliminary inquiry touching upon their sexual encounter that is the subject of this charge. Referring to that incident, the complainant described an extremely forceful anal penetration by the accused.[136]

This evidence, admitted to demonstrate a "pattern of consenting" to anal intercourse is, in fact, a description of a subsequent sexual assault six months after the alleged incident forming the subject matter of the charge. The affirmative definition of consent articulated in *R v Ewanchuk* and codified under sections 273.1 and 273.2 of the *Criminal Code* requires an accused to take reasonable steps to ascertain whether the complainant was consenting.[137] Where the complainant has expressed a disinclination to proceed, as she did here, the accused is obligated to stop. An accused who, at that point, resumes his advances without taking further steps to ascertain consent cannot rely on the defence of honest but mistaken belief in consent.[138]

According to Justice Tausendfreund's description, the complainant expressed a lack of consent. In response to his kisses she stated that "it was not a good idea, but [the accused] continued."[139] Instead of taking steps to ascertain whether she wanted to proceed, "[h]e did not ask her for her consent, but took her clothes off and started to have sex with her."[140] This is a description of a sexual assault.[141] Justice Tausendfreund goes on to state: "[t]he accused is expected to say that at no point during their sexual

136 *G(J)*, *supra* note 15 at para 14.

137 [1999] 1 SCR 330 at 355, 68 Alta LR (3d) 1 [*Ewanchuk*]; *Criminal Code*, *supra* note 1.

138 *Ewanchuk*, *supra* note 137 at 357.

139 *G(J), supra* note 15 at para 14.

140 *Ibid*.

141 *Ewanchuk*, *supra* note 137 at 357.

encounter did she voice any concerns or objections."[142] The fact that she did not voice further objections does not demonstrate consent.[143] Passivity does not indicate consent.[144] To note, in admitting evidence that supposedly demonstrates a "pattern of consent", that the accused was very rough with her "but she did not say no" reveals an erroneous application of the legal definition of consent.

The section 276 analysis in *G(J)* is fundamentally flawed both because it concludes that this type of evidence is not reliant on twin myth reasoning and because Justice Tausendfreund assesses its probative value based on a misunderstanding of the legal definition of consent. This evidence should have been rejected as inadmissible pursuant to section 276(1) because its probative value clearly hinges on the prohibited inference that because she "consented" to anal intercourse in the van six months later (which according to Justice Tausendfreund's description of the incident is not even the case), she is more likely to have consented to the anal intercourse forming the substance of the charge. Instead of excluding this evidence under subsection 276(1), he admitted it as "pattern of consent" evidence. Given the legal definition of consent, even if "pattern of consent" was a legitimate purpose for which to admit evidence of other sexual activity (which it is not), according to Justice Tausendfreund's own description of the evidence it does not demonstrate a pattern of *consenting*. Based on his description, this was evidence of a subsequent sexual assault and therefore not probative as to consent or mistaken belief in consent regarding the first alleged anal sexual assault.

Similarly, in *Beilhartz*, Justice Gareau admitted evidence of the complainant's sexual history based on a misapplication of the mistaken belief in consent defence.[145] Justice Gareau granted a defence application to adduce evidence that the complainant and the accused had cuddled; that on one occasion, more than two years prior to the alleged offence, the complainant took the accused's hand and placed it on her breast, and that one year prior to the alleged offence the complainant sent the accused a nude picture of herself.[146] Again, the *Ewanchuk* definition of

142 *G(J), supra* note 15 at para 14.

143 *Ewanchuk, supra* note 137 at 356.

144 *Ibid*.

145 *Supra* note 56 at para 23: "One of the essential elements that the crown must establish on a charge of sexual assault is that the accused knew that the complainant did not consent to the act." This is incorrect. In fact, what the Crown must establish is that the accused knew the complainant had not indicated consent through words or actions. Failure to appreciate the communicative nature of the definition of consent under the *mens rea* element for the offence of sexual assault is what produces the misapprehension of the defence of mistaken belief in consent discussed in this section.

146 *Ibid* at paras 24, 27.

consent to sexual touching is affirmative. Moreover, consent must be given contemporaneously.[147] The honest but mistaken belief in consent defence is only available to an accused who mistakenly believed that the complainant was contemporaneously communicating, through words or action, a desire to engage in the sexual touching that forms the subject matter of the charge. "A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence."[148] The fallacious reasoning in *Beilhartz* is captured by one of the excerpts from the accused's affidavit relied on by Justice Gareau to admit this evidence:

> In November 2009, I was driving the complainant home from Timmins. Only two of us were in the vehicle. I was driving, and […] I was tired. The complainant looked at me, said "you're tired eh", grabbed one of my hands, and put it on her breast. From conversations we had in the past, the complainant was aware that breasts made me sexually aroused. […] From that interaction, I have always felt that the complainant would be interested in a sexual encounter with me. When she decided to spend the night at my home, for the first time ever, on the evening of the alleged offence, that incident came to mind, and formed part of my belief that the complainant was consenting to a sexual encounter.[149]

An accused's mistaken belief that the complainant wanted to have sexual intercourse with him because she placed his hand on her breast once, two years earlier, is not a defence. Admitting this type of evidence on the basis that it is relevant to the defence of mistaken belief in consent, as occurred in *Beilhartz*, reflects a misunderstanding of the law of consent and a consequent misapplication of section 276.[150]

D) Inadequate or Inaccurate Assessment of the Criteria under Subsection 276(3)

While many trial judges do properly analyze and apply the criteria under section 276(3),[151] some cases also reveal a problematic approach to subsection 276(3). As described in Part II, subsection 276(3) requires trial

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147 *R v JA*, 2011 SCC 28 at paras 65–66, [2011] 2 SCR 440.

148 *Ewanchuk*, *supra* note 137 at 354–55.

149 *Beilhartz*, *supra* note 56 at para 11.

150 As Benedet, *supra* note 135 has noted: "If the focus of the mistaken belief defence is on whether the complainant communicated her voluntary agreement to the accused, the only past history that is arguably relevant would relate to how voluntary agreement was communicated by the complainant to the accused in the past."

151 See e.g. *R v Zachariou*, 2013 ONSC 6694, 2013 CarswellOnt 14978 (WL Can), aff'd 2015 ONCA 527, 2015 CarswellOnt 10381 (WL Can); *R v V(M)*, 2014 ONCJ 764, 2014 CarswellOnt 19085 (WL Can); *DL*, *supra* note 58 at para 27; *Nistor*, *supra* note 8.

judges to consider an array of factors when assessing whether evidence of extrinsic sexual activity is admissible under subsection 276(2).[152]

One problem with the way that some trial judges address the criteria under subsection 276(3) involves a failure to provide the statutorily required analysis of their application of the criteria when admitting or excluding evidence of other sexual activity. Trial judges charged with deciding section 276.1 applications are required to provide reasons for their determinations,[153] and these reasons must state the factors under subsection 276(3) that affected their determination.[154] Where some or all of the evidence is to be admitted, their reasons must identify the manner in which the evidence is anticipated to be relevant to an issue at trial.[155]

Unfortunately, some trial judges merely recite the factors under section 276(3) without offering any analysis of them, nor identifying which factors affected their determination.[156] Justice Tausendfreund's decision in *G(J)* provides an example. The entirety of his section 276(3) analysis involved a reproduction of the text of section 276(3) and the following statement: "In making my decision, I am mindful that I must have regard and take into account section 276(3) of the *Code*."[157] In other cases, trial judges admit or

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152 *Criminal Code*, *supra* note 1 at s 276(3):

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

153 *Ibid*, s 276.2(3).

154 *Ibid*, s 276.2(3)(b).

155 *Ibid*, s 276.2(3)(c).

156 See e.g. *R v TS,* 2012 ONSC 6244,98 CR (6th) 167; *G(J), supra* note 15; *Ingman*, *supra* note 135 (neither the reasoning supporting the decision to exclude some evidence nor the decision to admit questions as to when she started and ceased working as a prostitute identified which factors under subsection 276(3) affected Justice Ball's determinations). This tendency to merely recite the factors was first identified in 1997 in government-commissioned research intended to review the implementation of the amendments to the *Criminal Code* adopting the current section 276 regime. See Canada, Department of Justice, *Implementation Review of Bill C-49*, by Meredith Colin, Renate Mohr & Rosemary Cairns Way (Ottawa: DOJ, Research, Statistics & Evaluation Directorate, 1997).

157 *G(J)*, *supra* note 15 at para 15.

exclude evidence of extrinsic sexual activity without any reference to the factors they are statutorily required to consider under subsection 276(3).[158]

A second error made by some trial judges involves a failure to properly apprehend the dignity and privacy interests of the complainant addressed under subsection 276(3)(f) and/or a misapprehension of the purpose that subsection 276(3)(b) is directed towards. Subsection 276(3)(f) requires trial judges to assess "the potential prejudice to the complainant's personal dignity and right of privacy" arising from the admission of evidence of other sexual activity.[159] Subsection 276(3)(b) requires trial judges to consider the impact of admitting sexual history evidence on society's interest in encouraging victims to report sexual offences.[160]

These two factors are included in subsection 276(3) in order to protect the complainant from unnecessarily humiliating and intrusive inquiries into her sexual history. They are included both for the sake of the individual complainant's experience of the trial,[161] and in an effort to decrease the likelihood that other sexual assault victims will fail to report their victimization because of a fear of the criminal trial process. These provisions must be interpreted in light of our historical legal context—one in which shaming and degrading the complainant through humiliating cross-examination about her sexual history was, and some argue remains, a common defence strategy.[162] The protection that these provisions are intended to afford should also be informed by the common sense assumption

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158 See e.g. *R v Acorn*, 78 WCB (2d) 282, 2008 CanLII 8615 (ON SC); *R v P(P)*, 2015 ONCJ 603, 2015 CarswellOnt 16440 (WL Can).

159 *Criminal Code*, *supra* note 1.

160 *Ibid*, s 276(3)(b).

161 Unnecessary incursions on the complainant's privacy and dignity are protected against both in the interests of the individual complainant and because awareness of the failure to protect individual complainants is likely to deter other complainants from coming forward. Related to this point, it is incorrect to state (as was stated in *R v Carrie*, 2012 ONSC 1687 at para 11, 2012 CarswellOnt 3189 and quoted verbatim without attribution in *Beilhartz, supra* note 56 at para 18) that the factors under subsection 276(3) are an "attempt to balance society's interest in encouraging the reporting of sexual assault against the accused's right to make full answer and defence to the charge." The complainant's dignity and privacy interests are an analytically independent (and important) factor under subsection 276(3). The trial judges in both *Carrie* and *Beilhartz* also wrongly assert that section 276 is designed to protect against twin myth reasoning. As discussed, the objective of Canada's rape shield provisions is significantly broader than that. See Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complaints, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743 at 755.

162 See Cristin Schmitz, "'Whack' sexual assault complainant at preliminary inquiry", *The Lawyer's Weekly* (27 May 1988) 22: "Whack the complainant hard at the preliminary inquiry […] Generally, if you destroy the complainant in a prosecution, you destroy the head […] You've got to attack the complainant with all you've got […]", cited from David M

that almost anyone would find it intrusive and undignified to be questioned in court about the details of their sexual practices.

Unfortunately, in some cases, judges do not apply these two factors under subsection 276.3(b) in a manner that seems sufficiently cognizant of the historical context and contemporary norms in which the provisions are rooted. The result is an analysis that does not place adequate emphasis on the complainant's experience of the criminal trial process. Justice Heeney's consideration of "society's interest in encouraging the reporting of sexual assault offences" in *Latreille* provides an example:

> The second factor is society's interest in encouraging the reporting of sexual assault offences. While laying bare the sexual history of a complainant could be a disincentive to the reporting of sexual assault offences, a series of questions to this complainant relating to her sex life with a man she was openly known to be living with off and on for more than nine years would have no such impact.[163]

Assessing the impact of admitting sexual history evidence against society's interest in encouraging sexual assault survivors to report sexual offences requires consideration of whether and how admitting that evidence will impact the individual complainant's trial experience. Public awareness of the failure to protect witnesses who testify against their sexual attackers will deter other complainants from coming forward.[164] It is implausible to submit that because others would assume some sexual intimacy in an on-again/off-again relationship between an accused and a complainant, that the complainant will not suffer humiliation when cross-examined about the details of that sexual intimacy. It is much more reasonable to accept that the potential for humiliation is high for anyone—complainant, judge, or lawyer—who is cross-examined in front of others about the details of their sexual interactions with their husbands, wives, or other on-again/off-again sexual partners. Contrary to the reasoning in these cases,[165] it is quite plausible that survivors of sexual assault would be deterred from

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Tanovich, "'Whack No More': Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2014) 45:3 Ottawa L Rev 495 at 495.

163 *Latreille*, *supra* note 14 at para 25.

164 This was, for example, the main justification offered by Alberta Justice Minister Kathleen Ganley as to why she was taking the unusual step of requesting that the Canadian Judicial Council conduct an inquiry into Justice Robin Camp's conduct, including his treatment of the complainant, in *R v Wagar* (9 September 2014), 130288731P1 (ABPC) [unreported]. Alison Crawford & John Paul Tasker, "Robin Camp, Federal Court judge, faces inquiry after berating sexual assault complainant", *CBC News* (7 January 2016), online: <www.cbc.ca>.

165 See e.g. *WJA*, *supra* note 2 at para 43: "In this case the existence of a prior sexual relationship with W.A. would not come as a surprise to anyone, as the complainant was married to him."; *R v B(JA)*, 2014 ONSC 6709 at para 14, 2014 CarswellOnt 18288 (WL

reporting their victimization by the prospect of having to answer a "series of questions" about their "sex life" with anyone.[166]

4. Concluding Discussion on the Interpretation of Section 276

Many trial judges today interpret and apply section 276 of the *Criminal Code* in a nuanced manner that achieves the objectives of the provision: to remove discriminatory and misleading stereotypes about sexual assault from the fact-finding process and provide some protection to complainants while ensuring the accused's right to a full and fair defence in which relevant and probative evidence is not unjustly excluded.[167] However, the application of Canada's rape shield regime by some trial judges remains problematic. These important evidentiary rules are complex. The substantive law of consent, with which every application of section 276 intersects, further complicates the adjudication of applications to adduce evidence of a complainant's sexual activities other than those forming the subject matter of the charge. In Part III, this paper highlights four problems with how section 276 is being interpreted and/or applied in some recent cases: (a) the conflation of subsection 276(1) with subsections 276(2) and (3); (b) the improper admission of supposed "pattern of consent" evidence; (c) the misinterpretation of section 276 based on legal errors concerning the legal definition of consent; and (d) improper assessments of the criteria under subsection 276(3).

This list is not comprehensive; there are other problems with the application of Canada's rape shield provisions. For example, in some cases evidence of extrinsic sexual activity is admitted without any consideration of the exclusionary rules under section 276.[168] There is a risk that trial judges may admit evidence as relevant to credibility in a manner that creates an end run around the protections created under section 276. This could be done

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Can) [*JAB*]: "There is no risk of prejudice to the administration of justice or the dignity and privacy of the complainant regarding the fact that she and her husband, prior to January 5, 2012, had sexual relations together, including the consensual use of some force" (In *JAB*, the evidence was properly admitted. The problematic aspect of Justice Kane's reasoning is the contention that cross-examination on their prior sexual intimacy would pose *no* risk to the privacy and dignity interests of the complainant.); *R v Obed*, 2008 NLTD 197 at para 23, 873 APR 231: "society's interest in encouraging the reporting of sexual assault offences is not really a factor here because the prior incident was already reported"; *Sanghar*, *supra* note 18 at para 51.

166 *Latreille*, *supra* note 15 at para 25.

167 *Supra* note 8.

168 See e.g. Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill LJ 515 at 534; Christine Boyle, "Sexual Assault as Foreplay: Does *Ewanchuk* Apply to Spouses?", Case Comment, (2004) 20 CR (6th) 359 at para 7.

by admitting evidence of extrinsic sexual activity as relevant to credibility in cases where an accused argues that past sexual acts were consensual, that the alleged sexual assault was consensual and that the complainant's denial of this consent puts her credibility at issue.[169]

With Parliament's enactment of Bill C-49 in 1992, Canada's rape shield regime became the most progressive legislation of its kind in the common law world.[170] Properly interpreted and applied, it removes inferences and reasoning likely to distort the truth seeking function of the trial, and provides significant protections for sexual assault complainants from irrelevant and unnecessary attacks on their privacy and dignity. It does this without unduly compromising the critically important due process rights of the accused. However, its capacity to improve the criminal law response to the problem of sexual harm is heavily dependent upon how it is interpreted and applied by today's trial judges.

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169 Hill, Tanovich & Strezos, *supra* note 11 at 16-20.

170 *Ibid* at 16-5.