

JUDGING SEXUAL ASSAULT TRIALS: SYSTEMIC FAILURE IN THE CASE OF *REGINA V BASSAM AL-RAWI*

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The recent decision to acquit a Halifax taxi driver of sexual assault in a case involving a very intoxicated woman, who was found by police in the accused's vehicle unconscious and naked from the breasts down, rightly sparked public criticism and consternation. A review of the trial record in Al-Rawi, including the examination and cross-examination of witnesses, the closing submissions of the Crown and defence counsel, and the trial judge's oral decision suggests a failure of our legal system to respond appropriately to allegations of sexual assault—a failure for which, the author argues, both the trial judge and legal counsel may bear some responsibility.

La récente décision d'acquitter un chauffeur de taxi de Halifax accusé d'agression sexuelle, dans une affaire impliquant une femme en état d'ébriété avancé que la police a retrouvée inconsciente et nue depuis la poitrine dans la voiture de l'accusé, a fait l'objet, à juste titre, de critiques et de consternation auprès du public. L'examen du dossier d'instruction de l'affaire Al-Rawi, notamment l'interrogatoire et le contre-interrogatoire des témoins, l'exposé final du procureur de la Couronne et celui de l'avocat de la défense, ainsi que la décision rendue oralement par le juge du procès, fait ressortir l'échec de notre système judiciaire quant à la façon appropriée de répondre aux accusations d'agression sexuelle—échec pour lequel le juge et les avocats en question seraient, selon l'auteure, en partie responsables.

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Contents

1. A Failure of Our Legal System	180
2. Capacity to Consent, Evidence of Non-Consent & Speculation Based on Stereotype	183
A) The Legal Test for Lack of Capacity to Consent	183
B) Evidence of Non-Consent	186
i) Memory loss	187
ii) Bladder incontinence and unconsciousness	188
iii) Following her usual routine	189
iv) Emotional state: upset, crying, distraught	190
v) Short timeframe between entering taxi and sexual touching	191
vi) Attempt to hide her urine-soaked clothes and being in an inexplicable area of the city	191
C) Speculation Based on Stereotype	194
3. The Role of Stereotype in <i>R v Al-Rawi</i>	195
4. Conclusion	209

1. A Failure of Our Legal System

A review of the trial record in *R v Al-Rawi*—including the examination and cross-examination of witnesses, the closing submissions of the Crown and defence counsel, and Judge Greg Lenehan’s oral decision—suggests a failure of our legal system to respond appropriately to this allegation of sexual assault—a failure for which all three of the legal professionals accountable for the legal proceeding in this case may bear some responsibility.

The Complainant in *Al-Rawi* was a 28-year-old woman. She had spent the evening socializing and drinking with friends in a Halifax bar, and was highly intoxicated at the time of the incident. She entered the accused’s taxi at 1:09 am and was found by the police 11 minutes later, in the backseat of the accused’s vehicle, unconscious and naked from the breasts down. Her legs were propped up on the bucket seats in front of her, in a straddle position, with one foot on each seat. The accused was in between her legs, facing her, with his pants undone and partially lowered.¹

¹ *R v Al-Rawi*, Audio Trial Transcript (9–10 February 2017) Halifax 2866665 (NSPC) [Audio Trial Transcript (9–10 February 2017)]. The officer who found her testified that Al-Rawi was between her legs and that he was facing towards the back of the vehicle—which would mean he was facing her (*infra* note 81).

In addition to police testimony describing the circumstances and condition in which the Complainant was found, Judge Lenehan heard the following evidence:

- They were parked on a poorly lit street at 1:20 am when the police found them.
- Rather than taking her in the direction of her home, the accused had driven her to a different, and inexplicable, part of the city.
- The Complainant remained unconscious as Al-Rawi was ordered to exit the vehicle; when she did re-gain consciousness, after being shaken by the officer, she was confused and upset.
- Her DNA was found around the accused's mouth.
- Beyond her lack of consciousness, the Complainant showed other signs associated with severe intoxication, including bladder incontinence.
- Her blood alcohol level was high: between 223 and 244 milligrams per cent. She had been denied re-entry to the bar due to her level of intoxication.
- She had no memory of entering, nor of what occurred in, the taxi.
- The accused was holding her urine-soaked pants and underwear, which he attempted to hide when he became aware of the police officer's presence.²

None of this evidence was challenged in any significant way by the defence, yet Al-Rawi was acquitted. Judge Lenehan found that Al-Rawi had removed the Complainant's pants and underwear. However, he concluded that there was no evidence that this was non-consensual. He also determined that there was insufficient evidence to conclude that the Complainant lacked the capacity to consent as a result of her intoxication.³ Responding to Judge Lenehan's decision, legal scholar Elizabeth Sheehy commented that a failure to convict on an evidentiary record of this nature sends the message that "it is open season on incapacitated women."⁴

² Audio Trial Transcript: 9–10 February 2017, *supra* note 1.

³ *R v Al-Rawi*, Audio Trial Transcript: Oral Decision (1 March 2017) Halifax 2866665 (NSPC) at 13h:36m:43s to 13h:57m:23s [Oral Decision].

⁴ Ashifa Kassam, "[Canada sex assault acquittal signals 'open season on incapacitated women'](http://www.theguardian.com)" *The Guardian* (7 March 2017), online: <www.theguardian.com>.

How did this trial result in such a perverse outcome? To begin with, Judge Lenehan made several legal errors, including the following: (1) he failed to apply the proper legal standard for capacity to consent; (2) he confused the *actus reus* and *mens rea* elements for the offence of sexual assault; (3) he failed to uphold section 276 of the *Criminal Code*;⁵ and (4) he failed in his legal approach to the evidence as a whole.

Arguably, both the Crown and defence counsel also contributed to the problematic outcome in *Al-Rawi*. For example, defence counsel introduced evidence that the Complainant had flirted and danced inappropriately earlier in the evening on the night of the incident. The theory of the defence appears to have been that the Complainant, when she consumes alcohol, becomes the “type of person”⁶ who flirts and dances inappropriately with men in bars, and can reasonably be inferred to have entered a taxi, stripped her urine-soiled clothes off, thrown them at the unknown driver, perhaps kissed or licked his face, and then propped up her legs in the straddle position minutes or seconds before passing out. The Crown did not object when defence counsel introduced this evidence, which arguably should have been excluded under Canada’s rape shield regime; nor did the Crown, in his closing, urge the trial judge to ensure that it not be relied upon to draw stereotypical inferences about women, alcohol, and sex.

The adversarial model upon which our criminal trial process is premised involves different legal actors performing particular, and interdependent, roles. Systemic failure occurs when the errors of the individual components of the system alone do not fully explain the miscarriage. An examination of the trial proceedings and the disturbing outcome in *Al-Rawi* suggests a failure of this type.

The remainder of this article proceeds in three parts. Part II examines some of the legal errors made by Judge Lenehan with respect to two of the central issues in this case: lack of capacity to consent and lack of actual consent. Part III considers the ways in which the Crown and defence counsel may have contributed to the judicial errors in this case by invoking (or in the Crown’s case failing to challenge) the stereotype of the “unchaste party girl”: willing and ready to consent to sex anywhere, with anyone, in any circumstances. The concluding section suggests that this case demonstrates

⁵ RSC 1985, c C-46 [*Criminal Code*].

⁶ *R v Al-Rawi*, Audio Trial Transcript: Testimony of the Complainant (9 February 2017) Halifax 2866665 (NSPC) at 15h:24m:42s [Testimony of Complainant]. In his cross-examination, defence counsel asked the Complainant whether, when intoxicated, she forgets where she is going or what she is doing. She responded that she does not know because she cannot always remember what happens when she is drunk. He then suggested that was because “you don’t necessarily remember the type of person you become when you’re ... [Complainant]: Yeah I just ... I can only speculate”.

why better sexual assault training for judges is required, and why trial judges should be required to provide written decisions in all sexual assault cases.

2. Capacity to Consent, Evidence of Non-Consent & Speculation Based on Stereotype

Judge Lenehan's decision is filled with legal errors. Three of those errors include: (i) a failure to apply the correct legal test for lack of capacity to consent; (ii) a failure to consider the significant circumstantial evidence of non-consent adduced by the Crown; and (iii) speculation about the Complainant's behavior that appears to be based on stereotypical assumptions about women and sex.

A) The Legal Test for Lack of Capacity to Consent

One of the central issues in this case was whether the Complainant, due to her level of intoxication, lacked the capacity to consent to Al-Rawi removing her pants and underwear.⁷ The Complainant was unconscious when the police found her. She had lost control of her bladder and had no

⁷ The focus in this section of the article is on Judge Lenehan's failure to apply the correct legal test for lack of capacity. His failure to conclude that the Complainant lacked capacity to consent was also wrong. Judge Lenehan stated that the toxicologist's evidence provided the possibility that with her blood alcohol level the Complainant "might very well have been capable of appearing lucid but drunk and able to direct, ask, agree or consent" (Oral Decision, *supra* note 3 at 13h:55m:47s.). The toxicologist did testify that an individual under the influence of alcohol has the ability to make decisions, but that alcohol can impair their mental functions to such an extent that "incorrect or bad decisions" are made. However, it is not clear whether, at this point in her evidence, she was referring to individuals with intoxication or severe intoxication. The Complainant's blood alcohol level was in the range normally associated with intoxication for an average drinker. However, the toxicologist also testified that the Complainant showed some signs of severe intoxication. She testified that loss of bladder control and loss of consciousness are associated with someone who is severely intoxicated and would be signs that the Complainant in this case was severely intoxicated. The toxicologist stated that someone who is severely intoxicated would have an inability to walk or stand, decreased sensation to pain, and loss of continence and consciousness. She testified that with severe intoxication: "we are expecting there to be a really great deterioration in the mental and sensory processes." She opined that such a person would have "severe mental deficiencies, adverse effect with respect to attention, comprehension, judgment, information processing." In response to a question by the trial judge, she testified that some of the Complainant's symptoms (like incontinence and unconsciousness) were consistent with severe intoxication, others (like blackouts) could suggest varying degrees of intoxication. Judge Lenehan's decision did not reference any of this evidence. In addition, he misstated the Complainant's evidence on the amount of alcohol she had consumed. She testified to having consumed five pints of beer before she attended the bar, where she drank two shots of tequila and a mixed drink. Judge Lenehan stated that the Complainant recalled drinking the two shots of tequila and the mixed drink. He made no reference to the five pints of beer she had also consumed. See e.g. *R v Al-Rawi*, Audio Trial Transcript: Testimony of

memory of what occurred after she entered the taxi. She testified that she had consumed five pints of beer, two shots of tequila, and at least one mixed drink that night, that she had not eaten dinner beforehand, and that she was not a regular drinker at the time of the incident.⁸ Her best friend described her as getting drunker as the night progressed, and testified that at some point during the evening the alcohol “hit her fast ... kinda all at once.”⁹ The toxicologist testified that some of her symptoms (like incontinence and unconsciousness) were consistent with severe intoxication, while others (like blackouts) could suggest varying degrees of intoxication.¹⁰

Numerous courts have grappled with identifying the point at which a complainant’s level of intoxication means she is incapable of consenting.¹¹ Judge Lenehan’s assertion that “clearly a drunk can consent” was insensitive and carelessly worded, but it was legally correct.¹² Up to a certain point of intoxication, an individual is considered legally capable of consenting to sexual contact. The *Criminal Code* stipulates that no consent is obtained if the complainant is “incapable of consenting to the activity.”¹³ The issue is determining at what level of intoxication a complainant becomes incapable of consenting. According to the Supreme Court of Canada, individuals must have “the mental capacity to give meaningful consent.”¹⁴ This requires the ability to understand the “sexual nature of the act” and the capacity to realize “that he or she may choose to decline participation.”¹⁵ Lower courts have also considered the issue. In *R v Innes* for example, Justice Lack provided the following definition of capacity to consent to sexual touching:

There is no requirement that a complainant be a virtual robot before she will be found to be incapable of consenting to sexual activity. Consent requires a reasonably informed choice, freely exercised, without interference with the freedom of a

Tracy Cherlet (10 February 2017) Halifax 2866665 (NSPC) at 11h:12m:28s to 11h:47m:18s [Testimony of Tracy Cherlet].

⁸ Testimony of Complainant, *supra* note 6 at 14h:10m:20s to 14h:15m:00s.

⁹ *R v Al-Rawi*, Audio Trial Transcript: Testimony of L.I. (9 February 2017) Halifax 2866665 (NSPC) at 15h:47m:34s [Testimony of LI].

¹⁰ Testimony of Tracy Cherlet, *supra* note 6.

¹¹ See e.g. *R v Daigle* [1998] 1 SCR 1220 at paras 2–3, 127 CCC (3d) 129 [*Daigle*]; *R v Innes*, 2004 CanLII 33306 at paras 20–21, [2004] OJ No 4150 (QL) (SC) [*Innes*]; *R v Siddiqui*, 2004 BCSC 1717 at para 55, [2004] BCJ No 2690 [*Siddiqui*]; *R v AA* (2001), 155 CCC (3d) 279, 2001 CanLII 3091 (ONCA) at paras 7–11 [*AA*]; *R v Polo Cedeno*, 2005 ONCJ 91 at 7–9, 195 CCC (3d) 468 [*Polo Cedeno*]; *R v Cornejo*, (2003), 68 OR (3d) 117 at paras 15–16, 181 CCC (3d) 206 (CA).

¹² Unfortunately because he was careless in the way he worded it—“Clearly a drunk can consent”—this aspect of his decision drew particular public criticism and outrage (Oral Decision, *supra* note 3).

¹³ *Supra* note 5, s 273.1(2)(b).

¹⁴ *R v JA*, 2011 SCC 28 at para 36, [2011] 2 SCR 440 [*JA*].

¹⁵ *R v Daigle*, 127 CCC (3d) 130, [1997] JQ no 2668 (QL) (CA) at paras 23–24.

person's will. Free will can be constrained in many ways, one of which may be by the influence of alcohol.¹⁶

Other courts have described the standard as: the capacity to understand the risks and consequences associated with the activity;¹⁷ the ability to understand and agree;¹⁸ and “something more than the capacity to execute baseline physical functions.”¹⁹

Judge Lenehan's initial statement of the law concerning capacity to consent was consistent with what other courts have articulated. He stated: “a person would be incapable of giving consent if she is unconscious or is so intoxicated by alcohol or drugs as to be incapable of understanding or perceiving the situation that presents itself.”²⁰ Despite this initially correct description of the law, other parts of his decision suggest that he applied the wrong legal test for capacity to consent.

Judge Lenehan determined that there was no question the Complainant was drunk and unconscious when Constable Thibault found her in Al-Rawi's vehicle. Based on these findings he concluded that: “therefore at that moment, when Constable Thibault approached Mr. Al-Rawi's vehicle, [the Complainant] was in fact incapable of consenting to any sexual activity. That also means that whenever she did pass out, she would have been incapable.”²¹ These statements are true and reflect an application of the correct legal standard for capacity to consent. An unconscious person lacks capacity to consent.²² However, what Judge Lenehan said next suggests he may have relied upon an erroneous understanding of the law. He stated: “What is unknown, however, is the moment [the Complainant] lost consciousness. That is important. Because it would appear that prior to that she had been able to communicate with others ... she had appeared to make decisions for herself, however unwise those decisions might have been.”²³

Whether the Complainant was conscious, or could speak, or whether she appeared to make decisions for herself, such as to enter a taxi or stay out partying, is not the legal standard for capacity to consent to sexual touching. The test is whether, when her clothing was removed and her legs were spread apart and propped up on the seats in front of her, she was sufficiently aware

¹⁶ *Innes*, *supra* note 11 at para 24 [footnotes omitted].

¹⁷ *Siddiqui*, *supra* note 11 at para 55; *AA*, *supra* note 11 at para 9.

¹⁸ *R v P*, 2004 NSCA 27 at para 15, 221 NSR (2d) 370. See generally Janine Benedet, “The Sexual Assault of Intoxicated Women” (2010) 22:2 CJWL 435 at 442.

¹⁹ *R v Haraldson*, 2012 ABCA 147 at para 7, 524 AR 315.

²⁰ Oral Decision, *supra* note 3 at 13h:47m:59s.

²¹ *Ibid* at 13h:49m:03s.

²² *JA*, *supra* note 14 at para 48.

²³ Oral Decision, *supra* note 3 at 13h:49m:29s.

of her surroundings, able to appreciate the risks and consequences of having sexual contact with Al-Rawi, and capable of making a choice to do so.²⁴ Despite having articulated a version of this legal test earlier in his decision, it is not clear that Judge Lenehan applied it. For example, he does not appear to have considered whether, at her level of intoxication, the Complainant would have been capable of assessing the risks of unprotected sex, or public sex, with an unknown man.

Judge Lenehan also erred by supporting his assertion that the Crown had provided no evidence on the issue of lack of consent with the conclusion that the Complainant might have *appeared* capable of consent:

[A]t the critical time when Mr. Al-Rawi would have stripped [the Complainant] of her clothes, the Crown has provided absolutely no evidence on the issue of lack of consent. The evidence of the [toxicologist] provided the possibility that with a blood alcohol level of 223 to 244 milligrams per cent, [the Complainant] might very well have been capable of appearing lucid, but drunk and able to direct, ask, agree or consent to any number of different activities.²⁵

The issue of non-consent is not determined based on how the Complainant appeared; it is based on her subjective state of mind at the time the sexual touching occurred.²⁶ The issue of capacity—what a complainant was capable of—is determined based on her actual level of awareness and ability to make an informed decision to consent to sex, not on whether she *appeared* capable of doing so. Judge Lenehan seems to have conflated the *actus reus* and the *mens rea* elements of the offence of sexual assault in this part of his judgment. Whether she was capable of *appearing* lucid and able to direct Al-Rawi to remove her clothes is relevant to the *mens rea* element of the offence, not the *actus reus* (which is what he was addressing in this paragraph).

B) Evidence of Non-Consent

Although he found that the accused had removed the Complainant's pants and underwear, Judge Lenehan determined that the Crown had offered no evidence that the Complainant did not consent to being stripped by Al-Rawi. Indeed, Judge Lenehan asserted throughout his decision that “the Crown provided absolutely no evidence on the issue of lack of consent.”²⁷ Given the evidentiary record in this case, his assertion that there was no

²⁴ *Daigle*, *supra* note 15 at paras 23–24.

²⁵ Oral Decision, *supra* note 3 at 13h:55m:28s [emphasis added].

²⁶ *R v Ewanchuk* [1999] 1 SCR 330 at para 26, 131 CCC (3d) 481 [*Ewanchuk*]; *JA*, *supra* note 14 at para 48.

²⁷ Oral Decision, *supra* note 3 at 13h:55m:28s. He later stated: “The Crown marshalled no evidence of this. The Crown had no evidence to present on the issue of consent prior to Constable Thibault arriving on scene” (*ibid* at 13h:53m:18s) and “the Crown failed to produce

evidence on the issue of consent is difficult to understand and must have flowed from one of the following two errors: (1) a failure to consider the significant circumstantial evidence of non-consent adduced by the Crown; or (2) an erroneous assumption that only direct evidence of non-consent is probative of the issue.

Trial judges are required to consider all of the evidence in relation to the ultimate issue²⁸—in this case, lack of consent to the removal of the complainant’s clothing. As the Supreme Court of Canada explained in *R v JMH*, if the reasons demonstrate that this was not done the trial judge has committed a legal error.²⁹ In *R v McKay*, for example, the Saskatchewan Court of Appeal overturned an acquittal on the basis that: “[a]lthough a trial judge is not “required to refer to every item of evidence considered or to detail the way each item of evidence was assessed ... the trial judge’s reasons, in the case at hand, demonstrate that a comprehensive consideration of the evidence was not completed.”³⁰

Judge Lenehan’s repeated assertions that the Crown adduced no evidence on the issue of lack of consent indicates that he did not perform this requirement. It is not simply that he failed to reference or record in his decision the Crown’s evidence of non-consent—which would not constitute a legal error.³¹ It is not even just that he failed to consider the evidence cumulatively—which would be a legal error.³² It is that he repeatedly stated that such evidence did not exist. As delineated in the paragraphs to follow, there was, in fact, significant circumstantial evidence of non-consent introduced at trial. To begin with, consider the Crown’s evidence of the Complainant’s intoxication.

i) Memory loss

First, there was clear evidence of the Complainant’s alcohol-induced loss of memory. While Judge Lenehan was correct to state that “a lack of memory does not equate to a lack of consent,”³³ he was wrong not to identify the Complainant’s blackout as circumstantial evidence of both actual non-

any evidence of lack of consent at any time when Mr. Al-Rawi was touching [the Complainant]” (*ibid* at 13h:51m:51s).

²⁸ *R v JMH*, 2011 SCC 45 at para 31, [2011] 3 SCR 197 [*JMH*]. Ignoring items of evidence that the law requires a trial judge to consider is an error of law, see *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 42, 144 DLR (4th) 1.

²⁹ *Ibid.*

³⁰ 2017 SKCA 4 at para 22, 2017 SJ No 18 (QL) [*McKay*] [citations omitted].

³¹ *JMH*, *supra* note 28 at para 32.

³² *JMH*, *supra* note 28 at para 31; *McKay*, *supra* note 30 at para 24.

³³ Oral Decision, *supra* note 3 at 13h:55m:56s.

consent *and* lack of capacity to consent.³⁴ As Justice Greene noted in a recent case involving the sexual assault of a severely intoxicated woman in Ontario: “a complainant’s alcohol induced lack of memory of an alleged sexual assault may be circumstantial evidence relevant to the issue of actual consent and/or capacity to consent.”³⁵ Similarly, in *R v JR*, Justice Ducharme determined that “evidence of memory loss or a blackout ... may well be circumstantial evidence which, when considered with other evidence in a case, may permit inferences to be drawn about whether or not a complainant did or did not consent[.]”³⁶

ii) Bladder incontinence and unconsciousness

In addition to memory loss, the Crown in *Al-Rawi* adduced evidence that the Complainant was so intoxicated that she lost control of her bladder and urinated in her pants and underwear. Judge Lenehan found that Al-Rawi removed the Complainant’s urine-soaked pants and underwear, which means he must have accepted that she urinated in her clothing before the sexual touching occurred. He also found that she was unconscious when the police arrived, and that Al-Rawi picked the Complainant up in downtown Halifax approximately 11 minutes before they were found by the police in the south-end of the city. At that time of night, it would have taken Al-Rawi approximately 5 minutes to drive from the pickup location to where the police found them. Thus, Judge Lenehan had before him unchallenged evidence capable of supporting the inference that Al-Rawi stripped the Complainant of her clothes, at the very most, not more than roughly 6 minutes before it is *certain* that the Complainant was unconscious. In other words, at the time the sexual touching occurred the Complainant had urinated in her clothing and was, assuming she was still conscious, within seconds or minutes of passing out.

A finding that the Complainant lost control of her bladder and urinated on herself, combined with evidence establishing that at most, giving him the benefit of the doubt, Al-Rawi removed the Complainant’s clothing within about 6 minutes of when she became unconscious, constitutes powerful circumstantial evidence that she did not consent to sex with him. As a matter of common sense, it is reasonable to infer that someone, who because of alcohol consumption, is within minutes of passing out is not feeling well. Moreover, given widely accepted social conceptions of desirability and attraction, and the relationship between these concepts and norms

³⁴ In her article Benedet, *supra* note 18, notes several cases in which the courts have determined that evidence that a complainant’s level of intoxication was so high that she has no memory of the events is circumstantial evidence of lack of capacity. See e.g. *Polo Cedeno*, *supra* note 11; *R v Chahal*, 2002 BCPC 98, [2002] BCJ No 631 (QL).

³⁵ *R v Tariq*, 2016 ONCJ 614 at para 68, 343 CCC (3d) 87 [*Tariq*].

³⁶ *R v JR*, 40 CR (6th) 97, [2006] OJ No 2698 (QL) (SCJ) at para 20.

regarding personal hygiene, it is reasonable to infer that a young woman who has urinated in her clothing would not be interested in having sex with anyone, let alone a complete stranger. All of which is to say, based on general precepts about human behavior, it is highly unlikely that someone who is within minutes or seconds of passing out would decide, after having urinated in their pants, to have sex with an unknown taxi driver.

Unlike Judge Lenehan, trial judges in other cases have identified this type of circumstantial evidence of non-consent by relying on basic, common understandings about human sexual behavior.³⁷ For example, in *R v BSB*, a case which also involved a highly intoxicated complainant with memory loss, Justice Romilly determined that evidence that the Complainant had vomited prior to the sexual contact made it unbelievable that she had engaged in passionate kissing with the accused: “[b]ased on the independent evidence that the complainant had vomited, and human experience and logic, I have great difficulty believing this evidence of the accused” that she had engaged in passionate kissing.³⁸ In convicting the accused, he concluded that: “the Complainant’s vomiting, supports the inference that the complainant did not consent to sexual intercourse with the accused.”³⁹

iii) Following her usual routine

In addition to evidence of the Complainant’s severe intoxication, the Crown also introduced other circumstantial evidence that the sexual touching was not consensual. For example, the Complainant testified that she had a routine she followed whenever she took a taxi home. She would typically enter the car, sit in the backseat on the passenger side in order to “give [the driver] some space”, say hello to the driver, tell him her address, and then “get [her] money ready”—which for a taxi ride from where she was downtown that night to her home would mean readying a \$20 dollar bill.⁴⁰ The police found a \$20 dollar bill on the floor in the front, passenger side of the vehicle, which Judge Lenehan accepted tended to indicate that the complainant had followed her usual practice.⁴¹ Her testimony describing her usual routine, considered in conjunction with the \$20 dollar bill found

³⁷ *R v BSB*, 2008 BCSC 917 at para 72, [2008] BCJ No 1319 (QL) [*BSB*], aff’d 2009 BCCA 520, 71 CR (6th) 306; *R v Kontzamanis*, 2011 BCCA 184 at paras 38–39, [2011] BCJ No 670 (QL) (jury reasonably relied on “collective human understanding of the behavior of a young woman” to reject accused’s version of events).

³⁸ *BSB*, *supra* note 37 at para 72.

³⁹ *Ibid* at para 90.

⁴⁰ Testimony of Complainant, *supra* note 6 at 14h:30m:42s.

⁴¹ Oral Decision, *supra* note 3. Judge Lenehan did note that her purse and jacket were found on the front, passenger-side seat, which was not consistent with her usual routine. However, he concluded that she could not have been sitting on that seat given that it had her articles on it.

in the car, constitutes circumstantial evidence of her intent to be driven home that night, not taken in a different direction to an area of the city where she knew no one, in order to have sex with the driver in his car.

iv) Emotional state: upset, crying, distraught

Judge Lenehan also heard testimony from both the Complainant's best friend and the best friend's boyfriend that the Complainant was upset, crying, and very emotional that night. Her best friend testified that as the night progressed the Complainant became more drunk and more and more upset.⁴² She described the Complainant as very sad, highly emotional, and unwilling to accede to LI's attempts to have her take a taxi home.⁴³ She testified that after the bouncer precluded her from re-entering the bar because she was too intoxicated, her friend found the Complainant outside "crying heavily" and "upset".⁴⁴ The friend's boyfriend testified that "as the evening wore on she became more and more intoxicated as she drank more and then obviously to the point where, uh, she was removed from the bar and, you know, we couldn't even get her a safe ride home because she was so, um, distraught and upset."⁴⁵ The Crown introduced evidence of a text that the Complainant sent less than 20 minutes before entering Al-Rawi's taxi advising another friend that she was not okay.⁴⁶ Distraught, crying, very sad, and upset: the Crown introduced unchallenged evidence indicating that this was the emotional state that the Complainant was in when her friends last observed, or heard from, her. Evidence that she was crying, distraught, and very sad—perhaps inconsolable—shortly before entering the taxi is circumstantial evidence of her state of mind when she was in the taxi. It is evidence that supports the inference that the Complainant was not in the emotional state that one would expect of someone who decides, upon entering a taxi, to immediately consent to sexual contact with the unknown driver.

Contrast Judge Lenehan's failure to consider this circumstantial evidence of lack of consent with the approach taken by Justice Dillon in a British Columbia case that also involved a highly-intoxicated young woman with a lack of memory regarding the sexual contact that occurred between her and an unknown taxi driver. In *R v Singh*, Justice Dillon relied, in part, on evidence that the intoxicated Complainant was upset and crying prior to being taken to the accused's home where the sexual contact occurred, to

⁴² Testimony of LI, *supra* note 8 at 15h:47m:34s to 15h:48m:33s.

⁴³ *Ibid* at 15h:37m:20s to 15h:46m:10s.

⁴⁴ *Ibid* at 15h:46m:40s.

⁴⁵ *R v Al-Rawi*, Audio Trial Transcript: Testimony of C.O. (10 February 2017) Halifax 2866665 (NSPC) at 10h:16m:18s [Testimony of CO].

⁴⁶ Testimony of Complainant, *supra* note 6 at 14h:23m:54s.

conclude that “[i]t is highly unlikely that she would have consented to sex with a complete stranger, a taxi driver with whom she had no conversation.”⁴⁷

v) Short timeframe between entering taxi and sexual touching

In addition to the short period of time between the undisputed evidence of her distraught emotional state and when she entered the taxi, the Crown introduced evidence establishing that only 11 minutes passed between when the Complainant entered the taxi in downtown Halifax and when the police found her—naked from the breasts down, with Al-Rawi between her legs, in the south-end of the city. The time frame in which these events occurred makes it highly unlikely that the accused and the Complainant conversed in any meaningful way, certainly before the decision to drive to a different area of the city was made, but also before he stripped her of her clothing. The fact that Al-Rawi was unknown to the Complainant and that there would have been little, if any, discussion between them given the timeframe in which events occurred, also constitutes circumstantial evidence of non-consent.

Again contrasting these two cases that share several facts, in *R v Singh*, Justice Dillon (unlike Judge Lenehan) did identify the short window of time between when the Complainant was upset and crying and when the sexual contact occurred, the fact that the accused was previously unknown to the Complainant, and the lack of discussion between the two, as circumstantial evidence which gave rise to the inference that the Complainant did not consent. She stated: “[i]t is a considerable stretch to conclude that K.B. would have consented to sex with a taxi driver with whom she had no prior conversation or knowledge, within eight minutes after she was extremely upset, stumbling, visibly intoxicated and only wanted to go to her boyfriend’s house.”⁴⁸

vi) Attempt to hide her urine-soaked clothes and being in an inexplicable area of the city

Judge Lenehan heard unchallenged evidence that the accused tried to hide the Complainant’s pants and underwear when he became aware of the police officer’s presence.⁴⁹ He also heard unchallenged evidence that Al-Rawi,

⁴⁷ 2011 BCSC 1014 at paras 6, 35, [2012] BCJ No 2641 (QL) [*Singh*].

⁴⁸ *Supra* note 47 at para 37. There was other circumstantial evidence available in *Singh*, such as evidence that she had expressed a desire to find her boyfriend. So too was there other circumstantial evidence introduced in *Al-Rawi*, such as the fact that she had lost control of her bladder and urinated in her pants and underwear, that was not present in *Singh*.

⁴⁹ *R v Al-Rawi*, Audio Trial Transcript: Testimony of Constable Monia Thibault (9 February 2017) Halifax 2866665 (NSPC) [Testimony of Cst Thibault]. Defence counsel conceded in his closing address that Al-Rawi had tried to hide her clothes, although he argued

rather than immediately exiting the vehicle when ordered to do so, first tried to hide the Complainant's shoes, which were on the floor in front of him, on the front, driver's side of the car. This evidence of Al-Rawi's "after-the-fact conduct" also supports the inference that the Complainant did not consent to the removal of her clothes.⁵⁰

Moreover, Judge Lenehan had before him evidence that the accused had driven the Complainant to, and parked on, a poorly lit, residential street at 1:20 a.m., in a part of the city that one would not pass through on the way to the Complainant's home.⁵¹ The location where Al-Rawi was found with the Complainant, when considered in conjunction with his efforts to conceal her clothing and shoes, also constitutes circumstantial evidence of an intention to, or an awareness of having, engaged in non-consensual sexual touching.⁵²

Unlike Judge Lenehan, in *R v Palani*, another case involving an intoxicated young woman and a much older, unknown taxi driver, Justice Nadel did point to the Crown's evidence that the accused had inexplicably diverted from the logical route and parked in a dark and secluded location as evidence of non-consent: "unless there is an innocuous or innocent reason for [the accused] driving off the main thoroughfare of [G Street] and stopping his taxi behind a row of businesses, that diversion is a telling piece of evidence against him."⁵³

that this did not necessarily suggest consciousness of guilt but rather an awareness of how the situation would look to an outsider.

⁵⁰ *R v White*, 2011 SCC 13, [2011] 1 SCR 433 at para 22: "The principle that after-the-fact conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence is admissible is simply a matter of relevance".

⁵¹ Constable Thibault described Atlantic Street at that time of night (where she found the accused and the Complainant) as "pretty dark" (Testimony of Cst Thibault, *supra* note 49 at 11h:44m:31s). She noted that none of the houses had their porch lights on.

⁵² In *R v Aulakh*, 2010 BCSC 1026 at para 43, [2010] BCJ No 1457 (QL) [*Aulakh*], aff'd 2012 BCCA 340, 295 CCC (3d) 315, which also involved a sexual assault by a taxi driver of an intoxicated woman with very little memory of what had occurred, Justice Ehrcke based his decision to convict primarily on circumstantial evidence, including evidence that the accused had stopped the taxi in a secluded area of the city at a time of day when most people would be asleep (*ibid* at para 36). While the main issue in *Aulakh* involved identity, not consent—thus the probative value of the evidence was different than in *Al-Rawi*—Justice Ehrcke pointed to evidence that the accused had driven the complainant to a location where they would be less likely to encounter passersby as circumstantial evidence that it was the accused who had engaged in non-consensual intercourse with the complainant (*ibid* at para 43).

⁵³ 2013 ONCJ 12 at para 20, [2013] OJ No 170 (QL).

To summarize, Judge Lenehan failed to identify any of this circumstantial evidence demonstrating the profound implausibility that this emotionally distraught, crying and upset young woman entered a taxi and either immediately, or within 6 minutes, consented to sexual activity with the unknown, 40-year-old driver. He acquitted on the basis that there was no evidence of lack of consent and that the Complainant “might very well have been capable of appearing ... able to ... consent.”⁵⁴ Setting aside that, in this part of Judge Lenehan’s decision, he misstated the legal test for capacity to consent—which again, is not based on whether she *appeared* able to consent but rather whether she was, in fact, *able* to consent—the determination that there was no evidence of lack of consent was simply wrong. Perhaps his focus on the issue of capacity led to his failure to recognize any of this evidence of non-consent. As Janine Benedet has observed of cases in which a complainant is intoxicated:

The focus on incapacity can obscure other evidence of non-consent or of coercive circumstances that should call consent into question, such as differences in age, physical size ... or other factors. Thus, when the court decides capacity is present, intoxication as a factor falls away and is treated as no longer relevant. This is not correct in law because even where the complainant has the capacity to consent, her intoxication is still relevant to the voluntariness of that consent.⁵⁵

Judge Lenehan erred in law by concluding that there was “absolutely no evidence” on the issue of non-consent.⁵⁶ His repeated assertion that it did not exist suggests that he either outright ignored the Crown’s evidence of non-consent (despite having noted the existence of at least some of it in his decision) or that he did not recognize that evidence of severe intoxication and other factors constitutes circumstantial evidence of non-consent. Whether he ignored the Crown’s evidence, or failed to recognize its legal significance, Judge Lenehan’s treatment of the evidence was legally incorrect.

To be clear, the problem with Judge Lenehan’s decision raised in this section is *not* that he failed to give proper, or any, weight to the Crown’s evidence of non-consent, or that his decision to acquit based on the evidence as a whole was unreasonable (both of which also occurred in this case). The problem identified here is that his approach to the evidence was not legally correct. Contrary to Judge Lenehan’s assertions, the Crown did introduce substantial evidence of non-consent.

⁵⁴ Oral Decision, *supra* note 3 at 13h:55m:47s.

⁵⁵ Benedet, *supra* note 18 at 459.

⁵⁶ Oral Decision, *supra* note 3 at 13h:55m:28s. See e.g. *JMH*, *supra* note 28.

See e.g. *R v Rudge*, 2011 ONCA 791 at para 47, [2011] OJ No 5709 (QL): “the prosecution is entitled to a legally correct approach to the evidence that bears upon the determination of whether the onus has been met?”

C) Speculation Based on Stereotype

In addition to these legal errors, Judge Lenehan's decision included speculation that the Complainant consented to, and perhaps even initiated, the sexual contact that occurred. He stated: "[i]f [the Complainant] consented to Mr. Al-Rawi's removal of her clothes, Mr. Al-Rawi was under a moral or ethical obligation to decline the invitation ... He knew going along with any flirtation on her part involved him taking advantage of a vulnerable person."⁵⁷ Was the inference that this emotionally distraught young woman consented to having her pants and underwear removed, her legs spread apart and propped up on the seatbacks in front of her, on a public street, in a taxi cab, by a man she had met only minutes before, based on the evidence adduced in this trial open to Judge Lenehan? The answer is no.⁵⁸

In order to convict an accused of sexual assault the Crown must prove, beyond a reasonable doubt, that the accused intentionally engaged in non-consensual touching of a sexual nature.⁵⁹ Judge Lenehan found that Al-Rawi removed the Complainant's pants and underwear. In the context of this case, such conduct constitutes intentional touching of a sexual nature. Judge Lenehan acquitted on the basis that the Crown failed to introduce any evidence that this sexual touching was non-consensual. As explained above, in doing so he either ignored the significant circumstantial evidence of lack of consent or misapprehended its legal significance. Accused individuals can be convicted on circumstantial evidence if the only reasonable inference to be drawn from that evidence is that the accused is guilty.⁶⁰ In other words, "[t]he issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt."⁶¹ A reasonable inference that the sexual touching at issue in a sexual assault case was consensual does not have to arise from

⁵⁷ Oral Decision, *supra* note 3 at 13h:54m:38s. Of note, this statement reflects yet another legal error in his decision. Given the Complainant's level of intoxication, had she engaged in the type of behavior speculated by Judge Lenehan, Al-Rawi's obligation would not have been merely ethical or moral, but also legal. An accused is not entitled to rely on a mistaken belief in the complainant's capacity to consent (or actual consent) unless he has taken reasonable steps in the circumstances known to him to ascertain that she has capacity (and is consenting). See *Criminal Code*, *supra* note 5, s 273.2. See also *R v Spicer*, 2015 ABCA 190, 397 DLR (4th) 194 (error in jury charge on legal requirements of defence of mistaken belief in consent at paras 3–4).

⁵⁸ I am grateful to my colleague Steve Coughlan, both for drawing this point to my attention and identifying for me the salient legal precedent.

⁵⁹ *Ewanchuk*, *supra* note 26 at paras 25–26.

⁶⁰ *R v Villaroman*, 2016 SCC 33 at paras 30, 35, [2016] 1 SCR 1000 [*Villaroman*].

⁶¹ *Ibid* at para 35.

proven facts; it can arise from a lack of evidence.⁶² However, it has to be a *reasonable* inference. It must be “based on reason and common sense which must be logically based upon the evidence or lack of evidence” available.⁶³ In other words, inferences must be reasonable, not just possible.⁶⁴ Judge Lenehan had substantial circumstantial evidence to support the inference that the sexual touching was non-consensual. He had no evidence before him to support the inference that the Complainant consented to sexual contact with the accused. While a lack of evidence of consent is certainly not fatal to the accused (who is entitled to a presumption of innocence) a reasonable doubt cannot arise from speculation or conjecture drawn from hypothetical scenarios. It must be based on the application of reason and common understanding to the evidence, or lack of evidence, introduced at trial.

On what basis could a trial judge reasonably infer, in the absence of any evidence, that this severely intoxicated, emotionally distraught young woman entered a taxi, driven by a man unknown to her, and within minutes agreed to have her pants and underwear removed, her legs spread apart, her feet elevated to straddle the vehicle’s front seats?⁶⁵ How could any trier of fact consider this to be a reasonable inference? The reality is that an inference of this kind defies logic. To draw an inference of consent in the face of the circumstantial evidence of non-consent presented in this case, would require reliance on the legally-rejected stereotype that women, in the right circumstances (in this case, the circumstance of intoxication), will consent to sex with anyone.⁶⁶ It should not need to be stated that inferences based on legally-rejected stereotypes—such as the notion of the “unchaste woman”, ready and willing upon consumption of alcohol to consent to sex with anyone, anywhere—are not reasonable.

3. The Role of Stereotype in *R v Al-Rawi*

How could such a pornographic, hypersexualized account of human female behavior arise in a legal proceeding in 2017? A review of the testimony and closing submissions offered at trial suggests at least one possible source: Al-Rawi’s defence lawyer, Luke Craggs.⁶⁷

⁶² *Ibid.*

⁶³ *Ibid* at para 36, citing *R v Lifchus*, [1997] 3 SCR 320 at para 30, 118 CCC (3d) 1.

⁶⁴ *Villaroman*, *supra* note 60 at para 42.

⁶⁵ Oral decision, *supra* note 3 at 13h:57m:26s: The Complainant “might very well have been capable of appearing lucid but drunk and able to direct, agree or consent to any number of different activities”.

⁶⁶ *R v Seaboyer*, [1991] 2 SCR 577 at 685–86, 66 CCC (3d) 321, L’Heureux-Dubé J (dissenting in part, but not on this issue) [*Seaboyer*].

⁶⁷ The use of the names of the defence lawyer and Crown Attorney in this case is motivated by a desire to avoid the obfuscation and distancing that occurs when we speak

The theory of the defence in this case, reiterated during the cross-examinations of four Crown witnesses and emphasized in Craggs' closing submissions, appears to have been that when Jane⁶⁸ (the Complainant) consumes alcohol she becomes a different "type of person".⁶⁹ She is a "Jekyll and Hyde," to use defence counsel's words.⁷⁰ Arguably, Craggs' questions and submissions throughout the trial suggest an effort not simply to portray the Complainant as drunk and less inhibited on the night of the incident, but to construct an alternate personality—"Drunk Jane"⁷¹—devoid of *any* inhibition. In his cross-examination of the Complainant, Craggs asserted:

Defence: You don't necessarily remember the type of person you become when you're ... [drunk]?

Complainant: ... I can only speculate[.]

Defence: When you are sober you are a very together person ... you can handle real life responsibility ... [B]ut the Drunk Jane is very, very different than the sober, sensible person who works for [_____], right?

Complainant: I don't know.⁷²

only of roles and institutions, rather than individuals. When we speak only in terms of roles and institutions, the contrast between the profoundly personal exposure of the complainant that occurs during the sexual assault trial process and the faceless and nameless actors of the justice system becomes simply too stark. In addition, accountability is a bedrock principle of our justice system and can only occur through the critique and amelioration of the conduct of the individual actors who practice within it.

⁶⁸ *Pseudonym.

⁶⁹ *R v Al-Rawi*, Audio Trial Transcript: Defence Closing Submissions (10 February 2017) Halifax 2866665 (NSPC) at 13h:49m:48s [Defence Closing]. His questioning of Constable Thibault included: "[A]nd there are plenty of drunks downtown at that time of day, right? ... [S]ometimes they do foolish and erratic things, right?" (Testimony of Cst Thibault, *supra* note 49 at 11h:52m:29s). In his cross-examination of the Complainant, he suggested that she becomes a different type of person when intoxicated (Testimony of Complainant, *supra* note 6).

⁷⁰ Defence Closing, *ibid* at 13h:49m:59s. See *below* for the wording in an excerpt of the closing address.

⁷¹ Defence counsel made reference to "Drunk Jane" and contrasted "Drunk Jane" with "Sober, Sensible Jane" more than once during the trial. See e.g. Testimony of Complainant, *supra* note 6 at 15h:25m:07s; Testimony of LI, *supra* note 9 at 16h:02m:33s; Testimony of CO, *supra* note 45 at 10h:19m:17s. To be clear, Jane is being used here as a pseudonym. In his cross-examinations, defence counsel used the complainant's real name: "Drunk _____".

⁷² Testimony of Complainant, *supra* note 6 at 15h:24m:42s. It is true that the Complainant testified in chief that she has "very poor judgment" as a "not sober person" (*ibid* at 14h:34m:15s). When asked during cross-examination to clarify what she meant by this, she suggested she meant bad judgment about how much alcohol to consume (*ibid* at 15h:06m:44s).

In his cross-examination of the Complainant's roommate and childhood friend, Craggs' suggested that the Complainant "seemed reasonable and coherent up until a certain point" and then "her demeanor totally changed? ... [S]he went from, if I can say it, Sober, Sensible Jane to Drunk Jane? [Witness:] Yes."⁷³ In questioning the roommate's boyfriend, Craggs again asserted that her demeanor "changed from Sober, Sensible Jane to Drunk, not sensible, Jane."⁷⁴ In his closing submissions, defence counsel argued:

The staid and sensible Jane ... apparently becomes a very different person when she drinks in the quantity that she drank that night, um and that is something the court sees all the time. I've heard judges use the term "Jekyll and Hyde" personalities between the sober and the drunk person.⁷⁵

Craggs suggested that this case "is really about the inferences that can be drawn from [the] evidence."⁷⁶ The inference he invited Judge Lenehan to draw was that the Complainant is a woman transformed by the consumption of alcohol into an irrational, uninhibited person, who might quite imaginably enter the taxi of an unknown man, and immediately (or almost immediately) remove her clothing, throw her shoes, urine-soaked pants and underwear at him, and perhaps kiss or lick his face:⁷⁷

I would submit the more logical inference which is consistent with all of the evidence is that Ms. _____, intoxicated, uninhibited, exercising questionable judgment, did something to Mr. Al-Rawi to get [her DNA] on his face, maybe a kiss, maybe licking his face, something that deposited her DNA on his face ... it could be urine from her wet pants, there any number of inferences that could be drawn from the DNA evidence ... the logical inference, the likely inference, is actually inconsistent with an assault.⁷⁸

⁷³ Testimony of LI, *supra* note 9 at 16h:02m:14s.

⁷⁴ Testimony of CO, *supra* note 45 at 10h:19m:23s.

⁷⁵ Defence Closing, *supra* note 69 at 13h:49m:39s.

⁷⁶ *Ibid* at 13h:46m:51s.

⁷⁷ In his cross-examination of the Complainant, defence counsel suggested to her that she took her shoes, pants and underwear off in the back of the taxi, threw them into the front seat and then suggested to Al-Rawi that she might be interested in having sex with him. He asked the following questions: "Do you recall having a discussion with the taxi driver in which he essentially said: 'Listen pay your fare, get out...?'; "Do you remember, um, taking your pants off in the back of the taxi and throwing them up front?"; "Do you remember throwing your shoes up front into the front seat of the taxi?"; "Do you remember suggesting to the taxi driver that you may be interested in having sex with him?" (Testimony of Complainant, *supra* note 6 at 15h:21m:12s). In his cross-examination of the toxicologist, Craggs asked whether individuals become "more amorous or aggressive" in approaching people when intoxicated. The toxicologist agreed. (Testimony of Tracy Cherlet, *supra* note 7 at 11h:52m:44s).

⁷⁸ Defence Closing, *supra* note 69 at 13h:54m:14s.

...

The reasonable inference which is consistent with Ms _____'s demeanor and her placement in the car is that she pulled that shirt up on her own[.]⁷⁹

...

It is reasonable to infer from all of the evidence that Ms _____ drunkenly removed her own clothing and threw it at Mr. Al-Rawi and threw it in the front of the car.⁸⁰

...

Ms. _____ would, I would submit, never in a sober state do anything of the type that she did on the evening in question.⁸¹

Recall the physical position in which the Complainant was found by Constable Thibault: her legs propped up on the front seats, spread wide enough to have Al-Rawi in between them. Defence counsel submitted that, as matter of logic given Al-Rawi's location in the vehicle, it was more reasonable to infer that before passing out the Complainant placed herself in this position—that she “just put them [her legs] up there for some reason”—than to infer that Al-Rawi moved her into this position after she had passed out.⁸² Of note, his claim that Al-Rawi's location in the front seat of the car makes it unlikely that he was physically able to spread her legs in a straddle position (or perform a sexual act on her, which he also suggested) seems to ignore (as did Judge Lenehan's decision) Constable Thibault's unchallenged evidence that she saw Al-Rawi between the Complainant's naked legs, facing towards the back of the car, as well as the evidence that Al-Rawi's seat was reclined.⁸³

⁷⁹ *Ibid* at 13h:56m:02s. It is not clear whether he was suggesting that the most reasonable inference is that she pulled her shirt up intentionally. Earlier in the proceeding, he suggested that she positioned herself in the car in a way that may have pushed her shirt up, partially exposing her breasts.

⁸⁰ *Ibid* at 14h:10m:25s.

⁸¹ *Ibid* at 14h:10m:56s.

⁸² *Ibid* at 13h:57m:37s.

⁸³ According to Constable Thibault, when she arrived she found the accused in between the Complainant's legs: “Her legs were up over [the seat] and they were open ... one on each [seat] ... open enough to have somebody between them” (Testimony of Cst Thibault, *supra* note 49 at 11h:26m:15s). Under cross-examination, Constable Thibault reiterated that she saw the accused between the Complainant's legs: “What I saw was ... Mr. Al Rarwi [*sic*], um, turned, facing the back of the vehicle, in between legs, so I - and then the female had no pants on” (*ibid* at 12h:07m:17s).

The theory of the defence was revealed early in the proceeding, during his cross-examination of the Complainant.⁸⁴ Arguably, the Crown Attorney in this case, Ron Lacey, should have objected to Craggs' reliance on this type of propensity-based argument about the Complainant's alternate personality—"Drunk Jane"⁸⁵—as soon as it was raised. Moreover, even if one does not agree that Lacey should have objected, at a minimum, during his closing submissions, he should have flagged for the trial judge that it would be both inappropriate and erroneous to infer that "Drunk Jane"⁸⁶ was the type of person who would engage in the behavior suggested by defence counsel. While both the Complainant and her friend testified, or agreed in cross-examination, that she acted differently when she was drunk—for example by laughing a lot, exercising very poor judgment about how many drinks to consume, becoming more argumentative, less cautious, or more emotional—neither of them gave any evidence about her behavior after consuming alcohol that would warrant the types of inferences urged by defence counsel.⁸⁷

Upon what evidence did the defence rely to argue in favour of the inference that "Drunk Jane"⁸⁸ entered a taxi and immediately, or almost immediately, removed her urine-soaked underwear and pants, threw them at Al-Rawi, perhaps kissed or licked his face, and then for some reason spread her legs by propping her feet up on the front seats in a straddle position?

⁸⁴ Testimony of Complainant, *supra* note 6.

⁸⁵ Defence Closing, *supra* note 69.

⁸⁶ *Ibid.* For a discussion on the role and responsibilities of the Crown, see Alice Woolley, *Understanding Legal Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016), ch 9 [Woolley].

⁸⁷ See e.g. Testimony of LI, *supra* note 9 at 15h:47m:34s (describing the Complainant becoming more emotional); Testimony of Complainant, *supra* note 6 at 15h:23m:18s (describing becoming less cautious and exercising poor judgment regarding the number of drinks she consumed). The Complainant also testified in direct examination that she has very poor judgment when she is drunk (Testimony of Complainant, *supra* note 6 at 14h:34m:35s). She did not provide any examples of this in direct, but when asked during cross-examination what she meant by "very poor judgment", she testified that she wouldn't necessarily remember because she was drunk, but in general she meant poor judgment about how many alcoholic drinks to consume (*ibid* at 15h:06m:44s). She also testified during direct examination that she loses control when intoxicated. However, this statement was in response to a question from the Crown asking about her ability to function given her level of intoxication (*ibid* at 14h:28m:31s). In cross-examination defence counsel asked her about losing control. She agreed that "people in general when they drink too much lose control" and she includes herself in that category. Defence counsel asked her if she becomes less inhibited when she is intoxicated. Instead of answering this question, she asked him to repeat it, and when he did he changed the words "less inhibited" to "less cautious" (*ibid* at 15h:22s:00s). There was nothing in her evidence to suggest that by poor judgment, or loss of control, she meant engaging in the kind of behavior suggested by the defence.

⁸⁸ *Supra* note 71.

Craggs relied, in part, on evidence that she had danced “inappropriately” and flirted earlier that evening while drinking and socializing at the bar.⁸⁹

Craggs first raised the issue of her alleged flirtation with men at the bar in his cross-examination of the Complainant. He read from a statement to the police given by her roommate’s boyfriend, CO, in which CO said: “[U]h, I mean she was, she was getting quite intoxicated for sure you know, um, very flirtatious with different people around, you know, around the venues stuff like that but I, we didn’t interact much, I don’t feel, you know, we weren’t talking a lot ... I mean she was quite intoxicated.”⁹⁰ Craggs asked the Complainant:

Defence: Does any of what I’ve just read to you from CO’s statement sound familiar?

Complainant: No.

Defence: Okay so it’s, I mean are you, I just want to be clear are you saying it’s untrue or you just don’t remember because you can’t comment on it either way because that is part of where you blacked out?

Complainant: I can’t comment.⁹¹

Craggs returned to this evidence that the Complainant was flirtatious or inappropriate earlier that night at the bar, prior to entering Al-Rawi’s taxi, during his cross-examination of CO:

Defence: From what you have told us, I get the impression that sometime after you arrived at Boomers her demeanor changed from sober, sensible Jane to drunk, not sensible Jane, is that a fair way to characterize it?

Witness: Yes.

Defence: And you believe that she was ... not sensible because she was being irrational and arguing with LI, your girlfriend?

Witness: Yes.

⁸⁹ In his closing submissions, defence counsel suggested that the trial judge should keep in mind evidence that she was irrational, wanting to keep the party fun going, and that she had “stepped over a line” when dancing with CO, as he assessed all of the other evidence (Defence Closing, *supra* note 69 at 13h:51m:15s).

⁹⁰ Testimony of Complainant, *supra* note 6 at 15h:13m:33s.

⁹¹ *Ibid* at 15h:14m:02s. It should also be noted that defence counsel appears to have entered this out-of-court statement for the truth of its contents. Even setting aside the issue of prior sexual activity evidence, the Crown should have objected when defence counsel put CO’s police statement to the Complainant and asked her to comment on its accuracy.

...

Defence: You also described her, and, and I think you were suggesting it was improper and inappropriate and not like sober Jane, uh, her as being flirtatious. Can you just describe more specifically what she did that led you to that conclusion?

Witness: Uh, not necessarily improper but, you know, when any individual drinks alcohol their, their inhibitions are lowered so they are going to be more flirtatious and do things, but, uh, you know, she was dancing with people, strangers, myself, and, uh, at the bar.⁹²

He continued to press the witness on whether the Complainant had been flirtatious or inappropriate, referring CO to his police statement:

Defence: "I'm just going to read it out loud just so that everyone knows what we're talking about here, it says, according to this you say:

'[W]e were all dancing together, uh, I think LI and I, Jane was trying to dance with me for a little bit ... and I kinda was not really super excited about that.'

Do you remember saying that?

Witness: Yeah.

Defence: Okay, um, can you tell us why you were not super excited about Jane dancing with you?

Witness: Uh, well, I was dating LI, her ... best friend, and I didn't want any disputes between the two of them. I don't know how either of them would react to it. So, I just wanted to keep it nice and friendly.

Defence: Okay alright was the, was her dancing with you, was it in a manner that was perhaps a bit more, how shall I say? Forward, than just standing in front of you and moving her body a bit?

Witness: Honestly, I don't recall.

Defence: Okay. But it appears that your impression here [in his statement to police], the impression it left you with is that she was stepping over a line by either dancing with you or how she was dancing with you, right?

Witness: Uh. Perhaps.

⁹² Testimony of CO, *supra* note 45 at 10h:19m:17s.

Defence: Alright Mr. O, those are all my questions.⁹³

Defence counsel should not have asked these questions, either of the Complainant or of CO. The introduction of this evidence was not consistent with Canada's rape shield laws under sections 276 and 276.1 of the *Criminal Code*.⁹⁴ Section 276 creates exclusionary rules which make evidence of prior sexual history presumptively inadmissible. The defence must bring a written application seeking the court's authorization before attempting to introduce evidence of a complainant's other sexual activity.⁹⁵ Courts are prohibited from granting such applications if the evidence the defence seeks to admit is being introduced to support an inference that, by reason of the sexual nature of the activity, the Complainant is less credible or more likely to have consented to the sexual activity at issue in the allegation.⁹⁶ The defence did not bring a section 276.1 application in this case.

The Crown should have objected when Craggs, during his cross-examination of the Complainant, introduced this evidence that she had been flirtatious earlier that night in the bar. He should have objected when Craggs returned to this evidence during his cross-examination of CO. Instead, the defence pursued this line of questioning with CO, despite the witness' seeming reluctance to characterize the Complainant's dancing as improper or inappropriate, without any objection from Lacey. Nor did the Crown, in his closing submission, mitigate the impact of this evidence by urging Judge Lenahan not to give it any weight, and emphasizing for him that it would be an error of law to infer that "Drunk Jane's"⁹⁷ supposed propensity to act in flirtatious or "inappropriate" ways made it more likely she stripped off her pants and underwear (or agreed to their removal), kissed or licked Al-Rawi, or spread her naked legs to straddle the front seats of the vehicle. Crown Attorneys have an obligation to ensure that criminal prosecutions are conducted through a process that is fair to the accused, the complainant, and the public.⁹⁸ It is incumbent upon the Crown to object when defence

⁹³ *Ibid* at 10h:21m:55s.

⁹⁴ *Supra* note 5.

⁹⁵ *Ibid*, s 276.1

⁹⁶ *Ibid*, s 276(1)(a).

⁹⁷ *Supra* note 71.

⁹⁸ See e.g. *Boucher v The Queen*, [1955] SCR 16, 110 CCC 263. Ontario states this explicitly in its Crown policy manual. Ontario, Ministry of the Attorney General, [Role of the Crown—Preamble to the Crown Policy Manual](#), October 2015 update (Toronto: Ministry of the Attorney General, 21 March 2005) at 3, online: <www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/CPMPreamble.pdf>: "Crown counsel, as key participants in the criminal justice system, play an important role in assisting to overcome any forms of discrimination that deny equal access to the criminal justice system. Crown counsel take a leadership role in ensuring that various forms of discrimination ... are not reflected in the criminal justice system".

lawyers attempt to introduce evidence of prior sexual activity without having obtained the trial judge's permission as a result of a successful application under section 276.1.

Trial judges also have a responsibility to ensure the proper application and enforcement of the legal rules created to protect sexual assault complainants. They have an obligation to intervene if defence counsel attempt to introduce evidence without complying with the requirements under sections 276 and 276.1. With both the Complainant and CO, the defence asked more than one question about her supposed flirtation in the bar that night. Despite ample opportunity to intervene, Judge Lenehan did nothing to prevent the introduction of this evidence. While trial judges must be very careful not to intercede in a manner that compromises the accused's right of cross-examination, or raises the appearance of any bias, attempts to introduce prior sexual activity evidence without the court's approval under section 276 is clearly a context in which judicial intervention is both necessary and appropriate.⁹⁹

While the case law on the definition of sexual activity is not extensive, both trial and appellate level courts in Canada have recognized that "sexual activity" is not limited to overtly sexual acts.¹⁰⁰ Interpreting "sexual activity" for the purposes of section 163 of the *Criminal Code*, the Supreme Court of Canada stated in *R v Sharpe*: "Sexual activity spans a large spectrum, ranging from the flirtatious glance at one end, through touching of body parts incidentally related to sex, like hair, lips and breasts, to sexual intercourse and touching of the genitals and the anal region."¹⁰¹ The Ontario Court of Justice, in a case involving charges of assault causing bodily harm and forcible

⁹⁹ See Woolley, *supra* note 85 at 895 (noting that the introduction of prior sexual history evidence without approval of the court is outside the scope of permitted cross-examination, because it has the "potential to undermine the fairness and accuracy of the trial process").

¹⁰⁰ For decisions in which section 276 was applied to this type of evidence, see *R v Drakes* (1998), 122 CCC (3d) 498, 1998 CanLII 14968 (BCCA) at para 16; *R v Clark*, 87 OAC 178, 1995 CanLII 1474 at para 3 [*Clark*] (evidence of flirtation excluded under section 276); *R v Zachariou*, 2013 ONSC 6694 at paras 18–21, [2013] OJ No 4899 (QL) (discussion of threesomes at bar constituted evidence of sexual activity for purposes of section 276). But see *R v Beilhartz*, 2013 ONSC 5670, 6 CR (7th) 79 [*Beilhartz*] (trial judge found evidence of complainant draping her legs over the accused did not constitute sexual activity). Professor Janine Benedet argues that *Beilhartz* was wrongly decided (see annotation in *Beilhartz* in CR, *infra*). Moreover, it should be noted that in *Beilhartz*, unlike in this case, the evidence was introduced as relevant to a mistaken belief in consent, rather than consent itself. See also *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 [*Sharpe*].

¹⁰¹ *Supra* note 100 at para 44.

confinement, relied upon the Supreme Court of Canada's conclusion that evidence of flirtation is evidence of sexual activity in *R v Ayenu*.¹⁰²

The use to which this evidence appears to have been put in *Al-Rawi* is similar to that in cases in which evidence of this nature has been excluded under section 276. For example, in *R v Clark*, the Ontario Court of Appeal concluded that evidence of flirting at social events was properly excluded under section 276.¹⁰³ Defence counsel in that case brought an application to introduce this evidence in order to demonstrate that the Complainant would become "sexually aggressive after drinking alcohol," which the defence argued supported the accused's position that she had consented to the sexual activity at issue in the allegation.¹⁰⁴ The Ontario Court of Appeal upheld the trial judge's determination that such evidence was inadmissible pursuant to section 276.

It is possible that neither legal counsel, nor the trial judge in *Al-Rawi*, recognized that evidence that the Complainant was "flirtatious,"¹⁰⁵ "improper and inappropriate"¹⁰⁶ with men at the bar, or dancing in a manner that "step[ped] over a line"¹⁰⁷ should have been subject to section 276 scrutiny. In other words, they may have assumed that the definition of sexual activity under section 276 does not include evidence of flirtation or inappropriate dancing. It is true that the case law on this issue is not robust. However, even if they failed to recognize the applicability of section 276—or did consider the provision, but rejected the contention that evidence of

¹⁰² 2013 ONCJ 260 at para 32, [2013] OJ No 2217 (QL): "[Section] 276 is to apply to all sexual activity on the part of the complainant, whether with an accused or with someone else. It is of significance to this case that sexual activity includes "flirting." The Court cited *Sharpe*, *supra* note 100 at para 44, and applied this statement in an assault causing bodily harm case, in consideration of whether the common law excludes evidence of an accused's flirtatious behavior on the basis that its probative value relies on twin myth reasoning and would distort the truth-seeking process, just as it would were it to be evidence of the complainant's flirtatious behavior.

¹⁰³ *Clark*, *supra* note 100 at para 3.

¹⁰⁴ *Ibid* at para 3. The notion that an individual may become sexually aggressive after consuming alcohol also arose in *Al-Rawi*. For example, defence counsel asked the Crown's expert witness whether it was true that individuals who consume alcohol may be more "amorous or aggressive approaching a person who they might not normally approach." The toxicologist agreed that someone who has consumed alcohol may approach someone in a bar that they would not approach if they were sober (Testimony of Tracy Cherlet, *supra* note 7 at 11h:52m:44s). Craggs' theory of the case as a whole portrays the Complainant as the initiator, if not aggressor.

¹⁰⁵ Excerpt of CO's statement to the police read aloud by defence counsel during Testimony of Complainant, *supra* note 6 at 15h:13m:33s; Testimony of CO, *supra* note 45 at 10h:20m:12s.

¹⁰⁶ Testimony of CO, *supra* note 45 at 10h:20m:12s.

¹⁰⁷ *Ibid* at 10h:22m:55s.

flirtation and inappropriate dancing is sexual activity for the purposes of section 276—this evidence still should have been excluded on the basis that it was irrelevant and likely to be prejudicial.¹⁰⁸ As explained below, absent reliance on legally-rejected stereotypes, whether the Complainant was flirting and dancing inappropriately in a bar prior to getting into Al-Rawi’s taxi is not probative of whether she took her clothes off and attempted to initiate sex with him.

Had Craggs brought a section 276.1 application, or had the Crown objected when he asked these questions of CO and the Complainant, Craggs would have been required to demonstrate that the relevance of this evidence was not reliant, for its probative value, on the inference that the Complainant’s flirtatious behavior earlier in the evening made it more likely that she: removed her own clothing, indicated to Al-Rawi that she may be interested in having sex, or licked or tried to kiss Al-Rawi later that night. Craggs would have been required to identify the evidence’s relevance on some other basis, and demonstrate that its probative value was not outweighed by the prejudicial effect of allowing this evidence.¹⁰⁹ Had he brought an application before introducing this prior sexual activity evidence, Craggs likely would have argued that the evidence was not being introduced in order to trigger the inference that the Complainant was more likely to have consented to (or initiated) the sexual touching in the taxi, but rather to demonstrate that Jane was acting differently than she acts when she is sober. This would not have been a compelling justification for admitting this evidence.

First, there was other evidence showing that the Complainant acted differently when drunk, making the prior sexual activity evidence unnecessary. Second, there is nothing unique or particularly noteworthy about this evidence sufficient to suggest that its probative value would outweigh its prejudicial effect: dancing and flirting is often what occurs in bars. Third, while it is impossible to know upon what basis the defence would have argued that this evidence was admissible, had he brought an application, or had the Crown objected, it seems reasonable to conclude (based on the defence’s closing submissions) that in fact this evidence was introduced in order to portray the Complainant as the “type of person”¹¹⁰ who, when drunk, would lick or kiss an unknown taxi driver, and strip off her pants and underwear, throwing them at him.

¹⁰⁸ *R v Osolin*, [1993] 4 SCR 595 at 665, 86 CCC (3d) 481: “[T]he right to cross-examination ... must conform to the basic principle that all evidence must be relevant in order to be admissible. In addition the probative value of evidence must be weighed against its prejudicial effect.” For a comprehensive examination of the legal constraints placed on cross-examination, see Woolley, *supra* note 85 at 393.

¹⁰⁹ *Criminal Code*, *supra* note 5, s 276(2)(c).

¹¹⁰ Testimony of Complainant, *supra* note 6.

If the defence had brought a section 276 application, or if the Crown had objected, it seems very likely that Judge Lenahan would have been required to exclude this evidence.¹¹¹ The inference that a complainant's flirtatious behavior in a bar with one man increases the likelihood that she later attempted to initiate sexual touching with another man is precisely the kind of problematic reasoning that section 276 aims to eliminate from sexual assault trials. Only on the basis of stereotypes about so-called "promiscuous women" could one decide that the fact that a woman danced in a suggestive manner with her friend's boyfriend, or flirted with a man in a bar, makes it more likely that she stripped her clothes off, propped her legs up in a straddle position, and perhaps kissed or licked the face of an unknown cab driver within minutes of meeting him.

Adding, as the defence did, a layer to the narrative that suggests that it is only upon the consumption of alcohol that a particular woman, in this case Jane, becomes the "type of person"¹¹² that flirts in bars, dances suggestively, and strips her clothes off in front of an unknown cab driver, does not alter the role that stereotype plays in establishing the supposed relevance of this evidence. Arguably, defence counsel's assertion that the logical inference to draw from the evidence offered at trial is that "Drunk Jane"¹¹³ entered this taxi, stripped her clothes off, threw them at Al-Rawi, and perhaps kissed or licked his face, is also reliant on the "promiscuous party girl" stereotype. The logic of this stereotype turns on the assumption that drunk women will have sex with anyone, anywhere, anytime—that the consumption of alcohol does not simply lower the party girl's inhibitions, it removes them entirely. To borrow from Justice L'Heureux-Dubé's decision in *Seaboyer*, this type of thinking is "implicitly based upon the notion that women will, in the right circumstances [in this case the consumption of alcohol], consent to anyone and, more fundamentally, that "unchaste" women have a propensity to consent."¹¹⁴ In *R v Mabior*, the Supreme Court of Canada characterized such thinking as "crabbed" and cited *Ewanchuk* (its pivotal decision on consent) for the proposition that "judges may not infer consent from the way the complainant was dressed or the fact that she may have flirted."¹¹⁵

¹¹¹ At a minimum, if Judge Lenahan had allowed this evidence to be introduced following a section 276 hearing, in order to demonstrate that the Complainant was intoxicated (which I would argue would have been wrong) there would presumably have been discussion on, and emphasis about, the need to ensure that it not be used to further the inference that the Complainant consented to, or initiated, the sexual touching that occurred in the taxi.

¹¹² Testimony of Complainant, *supra* note 6.

¹¹³ *Supra* note 71.

¹¹⁴ *Supra* note 66 at 685–86 (dissenting, but not on this issue) [quotation marks in original].

¹¹⁵ *R v Mabior*, 2012 SCC 47 at para 47, [2012] 2 SCR 584.

Yet the defence appears to have invited Judge Lenehan to draw precisely this inference in his closing submissions, suggesting that the trial judge should “assess all of the evidence” in light of the Complainant’s irrationality, desire to party, and manner of dancing earlier in the evening:

You’ll recall her friends talking about her being essentially irrational, about her expressing a desire to continue on with the sort of party fun nature of the evening. Her friends really thinking better of that idea ... You’ll also recall from Mr. O testifying this morning about how, his—I forget the exact term he used, but there was some displeasure or discomfort with [Jane] dancing with him. It was suggested to him [by defence counsel] that she had stepped over a line and he agreed with that. So Ms. [Jane] was behaving differently than she normally does, and certainly differently than she does in the witness box, and that is important to keep in the back of your mind as you assess all of this evidence.¹¹⁶

It is clear from this statement that by “behaving differently” Craggs meant, in part, dancing in a manner that “stepped over a line.”¹¹⁷ Why would it be important for Judge Lenehan to keep in mind Jane’s supposedly inappropriate dancing earlier in the evening with another man, as he assessed Constable Thibault’s evidence that she found the Complainant unconscious, naked from the breasts down, her legs spread apart with the accused, pants undone, in between them? Was Jane’s suggestive dancing important to Judge Lenehan’s assessment of the evidence that Jane’s DNA was found around the accused’s mouth, or that the accused tried to hide her pants, underwear, and shoes when he became aware of the police officer’s presence? The answer, of course, is that the Complainant’s allegedly inappropriate dancing earlier that evening is not relevant to any of this evidence.¹¹⁸ The fact that Jane may have danced suggestively with her best friend’s boyfriend at the bar does not increase the logical probability that she stripped her clothes off, kissed or licked the face of a taxi driver she had met only minutes before, and then propped her legs up in the straddle position.¹¹⁹ As I have already argued, it is reasonable to assume that the probative value of Jane’s supposedly “inappropriate” dancing was reliant on the stereotype of the unchaste party girl.

While Craggs asserted in his closing that this case was not about consent, this is clearly not true based on the nature of the evidence introduced at trial, which was almost entirely unchallenged by him. Nor does this assertion appear to reflect his theory of the case: that the Complainant removed her

¹¹⁶ Defence Closing, *supra* note 69 at 13h:50m:32s.

¹¹⁷ *Ibid.*

¹¹⁸ *Seaboyer*, *supra* note 66 at 682, L’Heureux-Dubé J (dissenting in part, but not on this issue): “Once the mythical bases of relevancy determinations in this area of the law is revealed ... [t]he irrelevance of most evidence of prior sexual history is clear”.

¹¹⁹ *Ibid* at 604, McLachlin J (as she then was) (for the majority).

own clothes, threw them at Al-Rawi, perhaps kissed or licked his face, and placed herself in the physical position she was in when the police found her.¹²⁰ To suggest that a woman stripped off her pants and underwear, perhaps kissed or licked the accused, and spread her legs straddling the front seats of a car, is to suggest that this woman was consenting.¹²¹

Section 276 serves two primary objectives. Arguably, the three legal professionals responsible for the conduct of the trial in *Al-Rawi* failed to ensure that either of these objectives were met. First, section 276 aims to protect sexual assault complainants from the humiliation that can occur when they are required to answer irrelevant questions, premised on stereotypical assumptions, about their prior sexual activities. The Complainant in this case did not receive this protection. Second, section 276 excludes most prior sexual activity evidence because of the likelihood that it will mislead the trier(s) of fact—that the stereotypes that underpin beliefs about the relevance of this type of evidence will distort the supposed truth-seeking function of the trial.¹²² Judge Lenehan’s reasoning in *Al-Rawi* appears to affirm this concern. For example, in his decision to acquit, Judge Lenehan speculated that the Complainant had flirted with Al-Rawi: “He knew going along with any flirtation on her part involved him taking advantage of a vulnerable person.”¹²³ This was conjecture. To borrow from Judge Lenehan’s language in the decision—and unlike his characterization of the evidentiary record with respect to the issue of non-consent—there actually *was* “absolutely no evidence”¹²⁴ that the Complainant flirted with Al-Rawi. Did Judge Lenehan speculate that she flirted with the accused because he accepted, based on evidence that she had danced suggestively

¹²⁰ Recall that in his cross-examination of the Complainant, defence counsel asked her: “Do you remember, um, taking your pants off in the back of the taxi and throwing them up front?” “Do you remember throwing your shoes up front into the front seat of the taxi?” “Do you remember suggesting to the taxi driver that you may be interested in having sex with him?” (Testimony of Complainant, *supra* note 6 at 15h:21m:12s).

¹²¹ It is true that during the proceeding defence counsel: (i) raised the possibility that there was no sexual touching once during his objection to the toxicologist’s testimony; (ii) speculated that the DNA on Al-Rawi’s face may have come from her urine; (iii) implied to the Complainant that she told Al-Rawi the wrong directions or forgot where she was going (which she did not accept as reasonable, on the basis that she always remembers her address but stated she could not remember); and (iv) speculated that perhaps the Complainant exited the taxi at some point to urinate (presumably to offer an alternative explanation for her lack of clothing, although he did not actually assert this conclusion). None of this changed the nature of his main argument: based on the circumstantial evidence available, the most reasonable inference was that the Complainant was not only a consenting party to the removal of her clothing and the highly-sexualized positioning of her partially naked body, but was in fact the initiator.

¹²² *Seaboyer*, *supra* note 66 at 605.

¹²³ Oral Decision, *supra* note 3 at 13h:55m:07s.

¹²⁴ *Ibid* at 13h:55m:28s.

with her best friend's boyfriend, that that was just the sort of thing "Drunk Jane"¹²⁵ would do? Did he ignore the significant circumstantial evidence of lack of consent, and accept as reasonable the proposition that this distraught young woman may have consented to the removal of her urine-soaked clothes by a complete stranger, within minutes of meeting him, because he accepted that she had been flirtatious with other men earlier that night? It is difficult not to question whether Judge Lenehan's speculation, implausible conclusions and legally incorrect reasoning were informed by the stereotype that "unchaste" women, or "promiscuous party girls", will consent to sex with anyone, anywhere.

4. Conclusion

What occurred in this legal proceeding is unacceptable. Judge Lenehan's failure warranted much of the public critique and outrage it received. His mistakes and deficiencies in this case were serious. Although the principle of judicial independence demands that we not lose sight of the difference between judicial error and misconduct, the public is right to expect and demand much better of those individuals granted the enormous power and responsibility to preside over sexual assault trials. As recently noted by the Canadian Judicial Council: "Canadians expect their judges to know the law but also to possess empathy and to recognize and question any past personal attitudes and sympathies that might prevent them from acting fairly."¹²⁶ While Judge Lenehan's decision is filled with errors and it should be overturned, his conduct of the case in *Al-Rawi* does not appear to amount to judicial misconduct. What it does amount to, however, is further evidence of the need for both a legal rule requiring judges in sexual assault trials to provide written decisions, and much more rigorous sexual assault training for judges.¹²⁷

Consider first the suggestion that judges be required to provide written reasons in sexual assault cases. Written decisions provide a degree of transparency and public accountability not available with oral decisions. This case, like other recent sexual assault cases,¹²⁸ came to light because a journalist happened to be in the courtroom and decided to report on the

¹²⁵ *Supra* note 71.

¹²⁶ Canadian Judicial Council, *In the Matter of S 63 of the Judges Act, RS c J-1: Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (Ottawa: Canadian Judicial Council, 8 March 2017) at para 2.

¹²⁷ Leader of the Official Opposition, Rona Ambrose, introduced a private member's bill, Bill C-337, *An Act to amend the Judges Act and the Criminal Code*, 1st Sess, 42nd Parl, 2015 (second reading & referral to committee 9 March 2017), which would require both written reasons in sexual assault cases and sexual assault training for judges.

¹²⁸ See e.g. Mike McIntyre, "[Rape victim 'inviting' so no jail](#)", *Winnipeg Free Press* (24 February 2011), online: <www.winnipegfreepress.com>. See also Sean Fine, "[Third Alberta](#)

decision.¹²⁹ Indeed, absent the Crown's decision to appeal or a journalist's decision to report, sexual assault cases involving oral decisions provide no opportunity for scrutiny by researchers, legislators, or the public. The provision of written reasons promotes the open court principle. Given the ongoing difficulties with the criminal justice system's response to sexualized violence, there are compelling reasons to ensure that, in the sexual assault context, judicial reasoning is as accessible and assessable as possible.

Requiring written decisions also has the potential to ensure more careful, thorough, and well-reasoned judgments in what is a sensitive and difficult area of law—an area of law in which the legal profession and the judiciary have struggled to maintain public confidence in the administration of justice. While Judge Lenehan's statement that "clearly a drunk can consent" was not legally incorrect, it was carelessly included in an oral judgement that, at a minimum, clearly had the potential to be highly controversial. It is possible that, in a written decision, he would have taken more care in wording his legal conclusion that it is only at a certain level of intoxication that a complainant will be found to lack capacity to consent. From the perspective of those interested in encouraging the public to engage in cautious and attentive ascertainment of consent when contemplating sex with an intoxicated person, a more carefully crafted decision by Judge Lenehan would have avoided the unhelpful phenomenon of headline after headline that read: "Clearly a drunk can consent."¹³⁰

Perhaps the exercise of composing written reasons would have prevented Judge Lenehan from making the legal errors that pervaded his oral decision. His oral decision in *Al-Rawi* stands in stark contrast to written decisions involving similar facts and legal issues, like that of Justice Greene in *Tariq*.¹³¹ In assessing whether an intoxicated complainant with severe memory loss lacked capacity to consent, Justice Greene carefully reviewed the relevant case law and legislative framework. Judge Lenehan did not cite or review a single legal precedent in *Al-Rawi*.

[Judge Faces Review Over Handling of Sex-Assault Case](#), *The Globe and Mail* (14 September 2016), online: <www.theglobeandmail.com> [Sean Fine].

¹²⁹ Haley Ryan, "['Clearly a drunk can consent' Halifax Judge says in acquitting taxi driver charged with sexual assault](#)", *Metro* (1 March 2017), online: <www.metronews.ca>.

¹³⁰ See e.g. Ashley Csanady, "['Clearly, a drunk can consent': N.S. judge acquits taxi driver of sexually assaulting woman in back seat](#)", *National Post* (2 March 2017), online: <www.nationalpost.com>; Alison Auld & Michael Macdonald, "['Clearly, a drunk can consent'; Cabbie's acquittal renews debate on alcohol, consent rulings](#)", *Toronto Sun* (3 March 2017), online: <www.torontosun.com>; Ryan, *ibid*; "[Transcript: Read the full decision from the judge who said 'clearly a drunk can consent'](#)", *CBC News* (3 March 2017), online: <www.cbc.ca/news>.

¹³¹ *Supra* note 35 at paras 77–94.

As noted, the judicial failure in *Al-Rawi* also raises the issue of proper training for judges who preside over sexual assault trials. While a rigorous examination of sexual assault training for judges—what it should entail, how it should be delivered, and by whom—is beyond the scope of this article, it bears mentioning that the potential harms that occur in sexual assault trials when judges lack proper training, legal knowledge, and the ability to identify and resist rape mythology are significant. The judicial failure in *Al-Rawi* can be added to the list of recent sexual assault cases across Canada that illustrate the need to better educate trial judges who adjudicate sexual assault proceedings.¹³²

To be clear, responsibility for what occurred in this case is likely not Judge Lenehan's alone to bear. In assessing the disturbing outcome in *Al-Rawi*, consideration should also be given to the role that legal counsel may have played in allowing this failure of the legal system to occur. Arguably, evidence of the Complainant flirting or dancing “inappropriately” with other men earlier that night, and propensity-based assertions about “Drunk Jane”,¹³³ should not have been introduced, let alone repeated and left with the trial judge unchallenged.

Legal commentators, particularly members of the criminal defence bar, often defend criticisms of the criminal justice system's response to sexualized violence by pointing to the many legal protections for complainants available under Canadian law.¹³⁴ First among those to which they are likely to point are the rape shield provisions.¹³⁵ To be effective, these legal protections rely on each of the legal professionals charged with complying with and upholding them.

Judge Lenehan's decision in *Al-Rawi* has been appealed by the Crown. Assuming that Judge Lenehan is overturned, a second trial is ordered, and the Complainant is willing to go through the ordeal of testifying again, the legal profession and the judiciary in Nova Scotia will have an opportunity to regain some of the public's understandably diminished faith in our legal system's ability to respond justly to allegations of sexual assault.

¹³² See e.g. *R v Wagar*, 2015 ABCA 327, [2015] AJ No 1152 (QL); *R v Rhodes*, Sentencing Transcript (18 February 2011) (MBQB). See also Sean Fine, *supra* note 128.

¹³³ *Supra* note 71.

¹³⁴ See e.g. Anne London-Weinstein, “[London-Weinstein: Judges don't need more coaching on sex assault](#)”, *Ottawa Citizen* (21 March 2017), online <www.ottawacitizen.com>.

¹³⁵ *Ibid.*