

CURRENT COMPLICATIONS IN THE LAW ON MYTHS AND STEREOTYPES

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Myths and stereotypes represent an ongoing problem in Canadian sexual assault trials. Often, and paradigmatically, defence lawyers and trial judges rely on discredited sexist assumptions to the prejudice of female sexual assault complainants. However, a review of the recent appellate case law reveals many cases that do not fit this paradigm. Complications that have arisen include stereotypes about men or accused persons, legitimate defence arguments misidentified as stereotypes, close cases where reasonable people disagree about whether stereotypes have been invoked, and prejudicial forms of reasoning based other axes of discrimination. This paper surveys these developments and assesses an attempt by the Court of Appeal for Ontario to bring order to this area of law in the 2021 case of R v JC.

Les mythes et les stéréotypes continuent de s'inviter aux procès pour agression sexuelle au Canada. De fait, les avocats de la défense et les juges dans ces affaires s'appuient souvent, et de façon paradigmatique, sur des préconceptions sexistes pourtant discréditées, au détriment des plaignantes. Un examen de la jurisprudence d'appel récente révèle cependant qu'un grand nombre d'affaires n'entrent pas dans ce paradigme. Parmi les complications soulevées, notons des stéréotypes à l'égard des hommes ou des accusés, des arguments de légitime défense perçus à tort comme issus de stéréotypes, des affaires difficiles à trancher où la raison ne suffisait pas à déterminer s'il était juste ou non de crier au stéréotype, et des raisonnements préjudiciables basés sur d'autres motifs de discrimination. L'auteure recense ces développements et évalue une tentative de la Cour d'appel de l'Ontario pour remettre de l'ordre dans ce domaine du droit dans l'affaire R v JC en 2021.

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1. Introduction

When it came to light that an Alberta judge asked a teenaged complainant in a 2014 trial why she couldn't just keep her knees together to fend off a sexual assault, it generated concern and condemnation across Canada and around the world.¹ Since that time, there has been heightened, sustained public attention in Canada to the danger that rape myths may be operating to the prejudice of complainants in sexual offence trials.² Canadian courts have seen a corresponding explosion of case law as

¹ See Sean Fine, "[The Robin Camp transcript: '... keep your knees together' and other key passages](#)", *The Globe and Mail* (9 September 2016) online: <www.globeandmail.com> [perma.cc/GAT6-96M3]; "[Robin Camp faces review after Calgary law professors file complaint](#)", *CBC* (10 November 2015) online: <www.cbc.ca> [perma.cc/ZZE3-V6YV]; Bill Chappell, "[Canadian Judge Resigns After Furor Over 'Knees Together' Remarks In Rape Case](#)", *NPR* (10 March 2017) online: <www.npr.org> [perma.cc/H6L5-PFRL]; "[Canadian judge faces inquiry over handling of sex assault trial](#)", *BBC News* (7 September 2016) online: <www.bbc.com> [perma.cc/QX55-VYE5]; Ashifa Kassam, "[Canada judge resigns over 'keep your knees together' comment in rape trial](#)", *The Guardian* (9 March 2017) online: <www.theguardian.com> [perma.cc/FM9B-FSVE].

² See Samantha Beattie, "[When Judges Make Sexual Assault Victims Feel Like Criminals](#)" *HuffPost Canada* (8 August 2019) online: <huffpost.com> [perma.cc/6RMP-6QH3]; Kate Puddister & Danielle McNabb, "[#MeToo: In Canada, rape myths continue to prevent justice for sexual assault survivors](#)", *The Conversation* (5 March, 2019) online: <www.theconversation.com> [perma.cc/H9EB-KPLT]; John Ibbitson, "[The sooner Parliament mandates sexual-assault training for judges, the better](#)", *The Globe and Mail* (15 October 2020) online: <www.globeandmail.com> [perma.cc/F29P-NSVG]; Janice Dickson, "[Judicial council offers courses for judges on handling sex-assault cases](#)", *The Canadian Press* (6 July 2018) online: <www.thecanadianpress.com> [perma.cc/7YPC-2NDV]; Jennifer Koshan, Melanie Randall & Elizabeth Sheehy, "[Marital rape myths have no place in Canadian law](#)", *The Globe and Mail* (27 October 2017) online: <www.globeandmail.com> [perma.cc/K5R3-BS4E].

lawyers increasingly make claims that evidence and arguments put forward by opposing counsel and the reasoning of judges in sexual offence cases invoke prohibited stereotypical reasoning. The paradigm case has become familiar: in a sexual assault trial, defence counsel, the trial judge, or both rely on discredited myths and sexist stereotypes about complainants, often under the guise of common sense. Judging by the public discourse, one might think that all the cases on myths and stereotypes in sexual assault fit this paradigm.³ Many do. But an examination of the recent cases reveals an area of law that is much murkier and more complex.

The law of evidence sometimes addresses issues of discriminatory and stereotypical reasoning in sexual assault within the context of larger, established admissibility frameworks. The complex statutory schemes governing other sexual activity evidence⁴ and the disclosure and admissibility of private records pertaining to complainants⁵ are examples. These areas of law are not the focus of this paper. Rather, this analysis centres on what we might call the residual category of myths and stereotypes in sexual assault: the prohibition of stereotypical reasoning in and of itself, outside the context of a more specific regime of evidentiary regulation. When courts reason that the complainant's actions after an alleged sexual assault should not be judged according to preconceived notions or how a victim would behave,⁶ or when they reject arguments that the complainant's manner of dress undermines her credibility⁷ or that passivity equals consent,⁸ they are operating within the doctrinal space that concerns us here.

This analysis will show that the Canadian law on myths and stereotypes in sexual assault has entered a turbulent period of growth and change. What once may have been regarded as a straightforward matter of rooting out tenacious sexist stereotypes about sexual assault complainants is being recognized for the difficult and delicate exercise it is. Complications, countercurrents and gray areas abound: stereotypes operating against men or accused persons, legitimate defence arguments misidentified as stereotypes, close cases where reasonable people might disagree about

³ See e.g. Elaine Craig, "[Do we still need to teach judges not to rely on stereotypes about sexualized violence?](http://www.globeandmail.com)", *The Globe and Mail* (1 March 2021) online: <www.globeandmail.com> [perma.cc/V29N-WAL9].

⁴ *Criminal Code*, RSC 1985, c C-46, ss 276, 278.93–278.97.

⁵ *Ibid*, ss 278.1–278.97.

⁶ See *R v Caesar*, 2015 NWTCA 4 at para 6; *R v CAM*, 2017 MBCA 70 at paras 50–52.

⁷ See *R v Cain*, 2010 ABCA 371 at para 30; *R v Nyznik*, 2017 ONSC 4392 at para 188.

⁸ See *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 [*Ewanchuk* SCC cited to the SCR]; *R v Barton*, 2019 SCC 33 at para 98 [*Barton*].

whether stereotypes have been invoked, prejudicial forms of reasoning based on race or other axes of discrimination, and so on. This paper analyzes recent Canadian case law, with a focus on appellate cases decided since 2019, and aims to reveal the complexity and ambivalence in this area of law. The analysis unfolds in three parts. First, the original and very real problem of sex and gender-based stereotyping in sexual offence cases will be briefly discussed. Second, a number of emerging concerns in the law on myths and stereotypes will be reviewed. Finally, a recent attempt by the Court of Appeal for Ontario to frame clearer rules on stereotypical reasoning in *R v JC*⁹ will be outlined and evaluated.

2. The original problem

For decades, Canadian law has recognized that stereotypical and discriminatory forms of reasoning often operate against complainants in sexual offence cases. This reality has been extensively documented by academic commentators¹⁰ and repeatedly acknowledged by the Supreme Court of Canada, including in the following passage from *R v Find*:¹¹

Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases—the belief that women of “unchaste” character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some women invite sexual assault by reason of their dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes.¹²

⁹ 2021 ONCA 131 [*JC*].

¹⁰ See Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen’s University Press, 2018); Susan Ehrlich, “Perpetuating – and Resisting – Rape Myths in Trial Discourse” in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012), 389; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal victims’: Consent, Resistance, and Victim Blaming” (2010) 22 *CJWL* 397; David M. Tanovich, “Regulating Inductive Reasoning in Sexual Assault Cases” in Benjamin L. Berger, Emma Cunliffe & James Stribopolous, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Aurora: Thomson Reuters, 2017) 73.

¹¹ 2001 SCC 32 [*Find*].

¹² *Ibid* at para 101. See also *R v Mills*, [1999] 3 SCR 668 at para 90, 180 DLR (4th) 1; *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193 [*Seaboyer* cited to the SCR]; *R v Osolin*, [1993] 4 SCR 595 at paras 48-53, 109 DLR (4th) 478 (Justice L’Heureux-Dubé, dissenting).

The Supreme Court jurisprudence on myths and stereotypes consistently frames the central problem as one of discrimination on the basis of sex and gender.¹³ Persons accused of sexual offences are overwhelmingly male, while the great majority of complainants are female.¹⁴ The false premises and discredited assumptions that operate in sexual offence cases have generally targeted complainants as women and girls.¹⁵

At one time, the law openly embraced many of these sexist stereotypes. Female rape complainants were viewed as so untrustworthy that it was considered unsafe to ground a conviction on their testimony without corroboration,¹⁶ there was a marital exception for the offence of rape,¹⁷ a rape complainant's failure to make an immediate report was considered "a virtual self-contradiction of her story,"¹⁸ and sexually experienced women were understood as less credible and more likely to consent.¹⁹ In the 1980s and 90s, these overtly discriminatory principles were excised from Canadian law through statutory changes brought about by feminist law reform efforts.²⁰ The risk of stereotyping sexual assault complainants in

¹³ See especially the concurring reasons of Justice L'Heureux-Dubé in *Ewanchuk* SCC, *supra* note 8 (linking myths and stereotypes in sexual assault to Canada's international obligations to protect women from sex discrimination).

¹⁴ See Statistics Canada, "Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile", by Cristine Rotenberg, in *Juristat*, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 3 October 2017) (in a study of police-reported sexual assaults in Canada, 87% of victims were female and 98% of accused persons charged were male).

¹⁵ See *R v AL*, 2020 BCCA 18, application for leave to appeal to the Supreme Court of Canada dismissed 25 June 2020 [*AL*] (the Court of Appeal for British Columbia held that "the phrase 'gender-based myths' reflects both the gendered nature of sexual violence and the inescapable reality that the myths and stereotypes the law has recently attempted to ferret out have traditionally disadvantaged female complainants" at para 231).

¹⁶ *Criminal Code*, RSC 1970, c 34, s 142.

¹⁷ *Ibid*, s 143.

¹⁸ *Kribs et al v The Queen*, [1960] SCR 400 at 405, 127 CCC 1.

¹⁹ *Seaboyer*, *supra* note 12 at 604.

²⁰ Sexual offences in the *Criminal Code* were overhauled in 1982, when the offence of rape was repealed and replaced with the offence of sexual assault: *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980-81-82, c 125, s 19. The doctrine of recent complaint, which enshrined the expectation of immediate reporting, was statutorily abrogated (*Criminal Code*, *supra* note 4, s 275) and the corroboration requirement was removed (*ibid* s 274). For discussion of the history and context of these reforms, see Christine LM Boyle, *Sexual Assault* (Toronto: Carswell, 1984). The current statutory restrictions on evidence of the complainant's other sexual activity, which forbid use of this evidence to support the twin myths that sexual experience makes women less credible more likely to consent, became law in 1992: *Criminal Code*, *supra* note 4, s 276. Some amendments to the substantive and procedural provisions relating to sexual assault were introduced in 2018, but these did not substantially change the rules discussed here.

more subtle ways persisted, however, because sexist myths and attitudes remained prevalent in society and among justice system participants. In the landmark case of *R v Seaboyer*,²¹ Justice L’Heureux-Dubé delivered an influential and frequently-cited judgment in partial dissent that catalogued numerous common mythical and discriminatory beliefs surrounding sexual assault,²² including the faulty notions that women are required to struggle to defend themselves against rape, that they frequently fantasize and lie about rape, and that a rapist is always “a stranger who leaps out of the bushes.”²³ As Justice L’Heureux-Dubé observed, when police officers, prosecutors, judges and jurors engage in these stereotypical ways of thinking, the investigation and prosecution of sexual offences can be derailed.²⁴

Justice L’Heureux-Dubé further noted in *Seaboyer* that the prevalence of stereotypical thinking about sexual assault raises problems for determining the relevance of evidence and finding facts.²⁵ In Canadian law, evidence is presumptively admissible if it is relevant to the facts in issue, and relevance is determined by assessing the relationship between the evidence and the facts in issue in light of logic, human experience, and common sense.²⁶ As Justice L’Heureux-Dubé recognized in *Seaboyer*, sexual assault is an area “where experience, common sense and logic are informed by stereotype and myth,”²⁷ which raises a concern that relevance determinations and, ultimately, findings of fact in sexual assault cases may be influenced by stereotypical thinking. In sum, because judges and juries are permitted, and even required, to rely on their common sense and human experience in adjudicating cases, there is a risk that biases that are prevalent in society will find their way into Canadian courtrooms.²⁸

And indeed, in the decades since our sexual assault laws were overhauled and *Seaboyer* was decided, stereotypes against women and sexual assault complainants have been raised in many sexual offence prosecutions. In another landmark case, *R v Ewanchuk*,²⁹ the trial judge relied on a doctrine of “implied consent”³⁰ to acquit the accused of sexual

²¹ *Seaboyer*, *supra* note 12.

²² *Ibid* at 651–653.

²³ *Ibid* at 654.

²⁴ *Ibid*.

²⁵ *Ibid* at 678–680.

²⁶ *Ibid*; *R v Watson* (1996), 30 OR (3d) 161, 50 CR (4th) 245 at 257 (CA).

²⁷ *Seaboyer*, *supra* note 12 at 679.

²⁸ *Ibid* at 679–680; *Find*, *supra* note 11 at para 103. For discussion of the relationship between common sense reasoning and stereotypes, see Tanovich, *supra* note 10.

²⁹ *Supra* note 8.

³⁰ *Ibid* at para 31.

assault even though he found that the complainant repeatedly said no to the accused's progressively intrusive acts of sexual touching, did not consent in her mind and was fearful throughout the encounter. The majority of the Court of Appeal dismissed the Crown's appeal, noting that the complainant did not arrive on the scene "in a bonnet and crinolines"³¹ and that she could have stopped the accused with a "well-directed knee."³² The full Supreme Court of Canada allowed the Crown's appeal and entered a conviction. The majority judgment of Justice Major held that the courts below made fundamental errors about the nature of consent: there was no defence of implied consent and the key question was whether the complainant consented in her mind, which, on the facts as found by the trial judge, she did not. In a concurring judgment, Justice L'Heureux-Dubé (Justice Gonthier concurring) agreed with the majority but went further, stating that the case was "about myths and stereotypes"³³ and that the Court had a responsibility to complainants to recognize and denounce stereotypical reasoning in sexual assault cases.³⁴ Among the "mythical assumptions" she identified in the lower courts' judgments were the ideas that a woman who says no really means yes, that the complainant invited the sexual assault and that it was her responsibility to physically resist the accused's advances.³⁵

The concurring judgment of Justice L'Heureux-Dubé in *Ewanchuk* is an early and influential example of what has become the paradigm for judicial reasoning about myths and stereotypes in sexual assault. In this paradigm, the court explicitly identifies and rejects discriminatory lines of reasoning about women and sexual assault complainants that have been invoked and, typically, represented as matters of common sense by defence lawyers or judges at lower levels of court.

Nearly 20 years later, in *R v Wagar*, the case referenced at the beginning of this paper, the trial judge made numerous troubling comments, including asking the complainant why she could not keep her knees together or sink her pelvis into the basin of a bathroom sink to prevent the accused from penetrating her vaginally.³⁶ As in *Ewanchuk*, the judge evidently relied on the faulty notion that a complainant must signal non-

³¹ *R v Ewanchuk*, 1998 ABCA 52 at para 4.

³² *Ibid* at para 21.

³³ *Ewanchuk* SCC, *supra* note 8 at para 82.

³⁴ *Ibid* at para 95.

³⁵ *Ibid* at paras 87–93.

³⁶ *R v Wagar*, 2015 ABCA 327 [*Wagar*]; Canadian Judicial Council, *Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (Ottawa: Canadian Judicial Council, 2017) at para 17 [*Camp Inquiry Report*].

consent with physical resistance.³⁷ The trial judge, former judge Robin Camp, acquitted Wagar, but the Court of Appeal of Alberta set aside the acquittal on grounds including that the trial judge misunderstood the law on consent and relied on “sexual stereotypes and stereotypical myths, which have long since been discredited.”³⁸ Former judge Camp’s conduct of the trial was so egregious that it led to a complaint to the Canadian Judicial Council, which held an inquiry and recommended his removal from the bench.³⁹ He subsequently resigned.

A trial judge’s reliance on stereotypes about sexual assault complainants also led to a successful Crown appeal in *R v ARJD*.⁴⁰ The Crown alleged that the accused sexually abused his step-daughter when she was between 11 and 16 years of age. There was no evidence that the complainant took steps to avoid the accused during that period. In acquitting the accused, the trial judge cautioned himself against relying on stereotypes about the “expected behaviour of the usual victim”⁴¹ but went on to reason that “[a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator.”⁴² The Court of Appeal of Alberta divided over whether the trial judge had engaged in prohibited stereotypical reasoning, with the majority holding that he had erred in this way and overturning the acquittal. The Supreme Court of Canada dismissed the accused’s further appeal in brief oral reasons that substantially adopted the majority reasons of Justices Paperny and Schutz in the Court of Appeal. On behalf of the seven-member Court, Chief Justice Wagner observed:

In considering the lack of evidence of the complainant’s avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant’s credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.⁴³

³⁷ See *R v Barton*, 2017 ABCA 216 at para 156 (discussing the “‘ghost element’ of victim resistance” in sexual assault); *R v Nikdima*, 2021 SKCA 60 (“[i]t is without question that it is an error in principle to suggest that victims of sexual assault must actively resist” at para 55).

³⁸ *Wagar*, *supra* note 36 at para 4.

³⁹ *Camp Inquiry Report*, *supra* note 36.

⁴⁰ 2017 ABCA 237 [*ARJD Alta CA*], *aff’d* 2018 SCC 6 [*ARJD SCC*].

⁴¹ *ARJD Alta CA*, *supra* note 40 at para 22 (quoting from the trial judge’s reasons).

⁴² *Ibid* at para 23 (quoting from the trial judge’s reasons).

⁴³ *ARJD SCC*, *supra* note 40 at para 2.

ARJD has been frequently cited for the propositions that courts must avoid relying on rigid expectations about how people act after being sexually assaulted⁴⁴ and that reliance on stereotypes in deciding a case can amount to an error of law.⁴⁵

The Canadian Judicial Council released its report recommending Robin Camp's removal from the bench in 2017, and the Supreme Court of Canada decided *ARJD* in 2018. These developments corresponded in time with the rise of the #MeToo movement and heightened public interest in the prosecution of sexual offences.⁴⁶ In Canada, the danger that complainants might face sexist stereotyping from lawyers and judges has become a prominent part of the public discourse around sexual assault.⁴⁷

The last few years have also seen a proliferation of case law on myths and stereotypes, much of which tracks the familiar paradigm of courts repudiating stereotypical and sexist lines of reasoning used against sexual assault complainants by defence lawyers and trial judges. Courts across Canada have released numerous decisions in this vein since 2019. For example, in *R v AE*,⁴⁸ the trial judge acquitted two adult males accused of sexual assault after they, together with a male young person, engaged in oral and vaginal sex with a female complainant while also committing various acts of violence against her, including slapping and punching her. Many of these acts were captured on video. The trial judge found that the complainant initially consented to rough group sex but did not consider whether that consent was withdrawn when the complainant repeatedly cried out in pain, said "no" and pleaded with the accused to stop.⁴⁹ The Court of Appeal of Alberta was unanimous in setting aside the acquittals and entering convictions on the charge of sexual assault, with two of three appellate judges concluding that the trial judge erred in relying on the faulty notion that the complainant offered "broad advance consent" to whatever violence the accused decided to inflict on her.⁵⁰ In the words

⁴⁴ See *R v Greif*, 2021 BCCA 187 at paras 26, 28, 66; *R v CLS*, 2021 ABCA 147 at para 28.

⁴⁵ See *Lemire-Tousignant c R*, 2020 QCCA 1065 at para 10 [*Lemire-Tousignant*]; *R v CMM*, 2020 BCCA 56 at para 139.

⁴⁶ See generally Robyn Doolittle, *Had it Coming: What's Fair in the Age of #MeToo* (Toronto: Allen Lane, 2019).

⁴⁷ See *supra* notes 1–3 and accompanying text. Recent books by journalist Robyn Doolittle, *supra* note 46, and legal scholar Elaine Craig, *supra* note 10, both address this danger.

⁴⁸ 2021 ABCA 172 [*AE*].

⁴⁹ *Ibid* at para 40.

⁵⁰ *Ibid* at para 35 (Justice Martin) and para 152 (Justice Pentelchuk). The third judge, Justice O'Ferrall, found it unnecessary to address whether the complainant consented because, in his view, the acts of sexual violence were such that consent was not available

of Justice Pentelchuk, the trial judge’s reasoning raised “myth- and stereotype-based thinking that continues to linger in the legal landscape like a fungus: because the complainant initiated group sex and asked that it be rough, she got what she asked for.”⁵¹

Other examples of cases where appellate courts have explicitly rejected sexist stereotypes relied on by trial judges and defence lawyers include *R v Lacombe*,⁵² in which the trial judge attributed significance to the facts that the complainant did not immediately report a sexual assault and that she wore loose fitting pyjamas without a bra or underwear in her encounters with the accused. The Court of Appeal for Ontario set aside the acquittal, noting that “[r]eliance on discredited stereotypes in the assessment of credibility is an error of law”⁵³ and observing the idea that delayed reporting undermines a complainant’s credibility is a well-known myth and that the complainant’s attire “does not signify consent, nor does it justify assaultive behavior.”⁵⁴ The Court of Appeal for Ontario set aside another acquittal in *R v ABA*⁵⁵ on the ground that the trial judge improperly measured the complainant’s actions during, between, and after an alleged series of sexual assaults against “how the trial judge would have reasonably expected her to behave.”⁵⁶ The evidence that the trial judge wrongly weighed against the complainant’s credibility included that she continued to associate with the accused after the initial assaults and that she did not escape or cry out for help. In *R v Durocher*,⁵⁷ the Court of Appeal for Saskatchewan held that the trial judge was right to reject a defence argument that the complainant’s failure to fight back or scream represented odd behaviour that undermined her credibility; the trial judge had “correctly identified this argument as a sexual myth.”⁵⁸

as a defence. In *Barton*, *supra* note 8 at para 99, the Supreme Court held that the notion of “broad advance consent” is inconsistent with the meaning of consent in Canadian law. The two accused in *AE*, *supra* note 48, also faced a separate charge of sexual assault with a weapon in relation to the insertion of an electric toothbrush into the complainant’s vagina. At trial, one of the accused was convicted of this charge and the other was acquitted. The Crown’s appeal against the acquittal was dismissed because the judges of the Court of Appeal were unable to agree on the appropriate disposition.

⁵¹ *Supra* note 48 at para 153.

⁵² 2019 ONCA 938 [*Lacombe*].

⁵³ *Ibid* at para 33.

⁵⁴ *Ibid* at para 39.

⁵⁵ 2019 ONCA 124.

⁵⁶ *Ibid* at para 11.

⁵⁷ 2019 SKCA 97.

⁵⁸ *Ibid* at para 120. See also *R v Gill*, 2021 BCSC 332 (rejecting as stereotypical defence counsel’s argument that the complainant’s testimony was contrary to common sense because she admitted that, after being sexually assaulted, she used the washroom, talked to the accused and ate a banana before leaving his home); *R v JE*, 2019 NLSC 231 (rejecting a defence argument that the complainant’s failure to flee from the car while the

In summary, a review of the recent cases confirms that both lawyers and judges continue to introduce mythical and discriminatory inferences that operate against women and complainants in sexual assault prosecutions. In response, a substantial body of recent case law references the prohibition on stereotypical reasoning and explicitly rejects these kinds of prohibited inferences.⁵⁹ These cases reflect a recognition, now well-accepted in the law and in the public sphere, that sexual assault complainants have faced and continue to face sex and gender-based stereotyping in the courts.

3. Emerging concerns

As the foregoing discussion has shown, many recent cases fit the familiar paradigm of courts repudiating sexist stereotypes against sexual assault complainants that are advanced by defence lawyers and lower court judges. What is perhaps surprising about the recent cases on sexual assault myths is how many of them do not fit that paradigm. This part of the analysis examines trends and emerging concerns in the cases that are taking the law in this area in new directions.

A) Stereotypes operating against men and accused persons

Increasingly, courts recognize that stereotypes about sexual behaviour can operate not only against women and sexual assault complainants but also against men and persons accused of sexual assault.⁶⁰ On the rare occasions where the accused is a woman, gender-based sexual assault myths may be deployed in favour of the prosecution. On the other hand, stereotypes about male and female sexuality are sometimes used against men accused of sexual offences.⁶¹ Several recent appellate decisions grapple with these problems.

In *R v Chen*,⁶² the adult female accused was charged with sexual assault after she had sexual intercourse with a 13-year-old boy who was living in the same transition house. The accused acknowledged that

sexual activity was ongoing suggested that she consented because it improperly relied on “myths and stereotypes about how people, and women in particular, behave” at para 78).

⁵⁹ In addition to the cases cited in the last two paragraphs, see *R v Spicer*, 2021 ONSC 398 (trial judge improperly reasoned that the complainant entering a washroom stall with the accused amounted to consent to the sexual activity that took place there).

⁶⁰ See *Lemire-Tousignant*, *supra* note note 45 at para 10; *R v TL*, 2020 NUCA 10 at para 35.

⁶¹ See e.g. *R v Heymerdinguer*, 2021 ABCA 112 at 47 (a sexual assault case in which both the accused and the complainant were men. The Court of Appeal of Alberta held that it would amount to impermissible stereotyping to reason that a heterosexual man would not consent to sexual activity with another man).

⁶² 2020 BCCA 329.

intercourse occurred but testified that the young complainant forced her and she did not consent. In his charge, the trial judge instructed the jury to consider a range of facts in determining whether the accused was a willing participant, including that she did not cry out for assistance during the sexual activity and that she did not avoid the complainant after the alleged assault. The jury convicted the accused, but the Court of Appeal for British Columbia set aside the conviction, noting that the trial judge failed to caution the jury against relying on stereotypes, including expectations that victims cry out while being assaulted and thereafter avoid perpetrators. The trial judge was required to offer “a clear, specific and contemporaneous caution to avoid impermissible reasoning based on discredited stereotypes.”⁶³ Instead, she invited the jury to rely on sexual assault myths to the prejudice of the female accused.⁶⁴ *Chen* demonstrates that, in cases where the accused is a woman, there is a danger of well-known sexist stereotypes being used to the prejudice of the accused.

*R v Cepic*⁶⁵ raised the problem of stereotypes about male and female sexuality operating against a man accused of sexual assault. The accused was a male dancer in a strip club who engaged in sexual activity with a female customer. The complainant testified that the accused forced fellatio and intercourse on her during a lap dance, while the accused testified that the complainant was a willing participant in the sexual activity. The trial judge convicted the accused, finding that the complainant was a credible and reliable witness while the accused’s testimony was implausible. For example, the trial judge reasoned that because the complainant had never had a lap dance before, she would not have touched the accused’s penis before the alleged assault as the accused claimed. The trial judge also concluded that the accused’s account suggesting that the complainant was the sexual aggressor did not accord with common sense. The Court of Appeal for Ontario set aside the conviction, holding that the trial judge erred in relying on “assumptions about what a woman would or would not do”⁶⁶ and “stereotypes about male aggression.”⁶⁷ The appeal court concluded that the trial judge’s characterization of the accused’s testimony as implausible was based not on the evidence but on these improper

⁶³ *Ibid* at para 28.

⁶⁴ For an example of sexist stereotypes operating against a female accused in the context of domestic violence, see *R v Thompson*, 2019 BCCA 1 (the trial judge convicted the accused of breaking and entering and theft after rejecting her account of events as implausible in part because she did not call police after she said she had been assaulted by her boyfriend. The Court of Appeal for British Columbia, by a majority, allowed the appeal on the basis that the trial judge erred in relying on stereotypes about how victims of domestic assault are expected to act).

⁶⁵ 2019 ONCA 541 [*Cepic*].

⁶⁶ *Ibid* at para 15.

⁶⁷ *Ibid* at para 24.

assumptions. It appears that trial judge dismissed the defence claim that the complainant was the sexual aggressor largely because it conflicted with her “common sense” view that men, but not women, are sexually aggressive.

In *R v Quartey*,⁶⁸ the male accused was charged with sexually assaulting a female acquaintance who testified that he forced intercourse on her after she repeatedly rejected his advances. The accused testified that the sexual activity was consensual and much of it was initiated by the complainant, that he asked her three times before they had intercourse and that she said “yes” each time. The trial judge convicted, rejecting the accused’s evidence as insincere and unbelievable and accepting the complainant’s evidence as sincere and candid. Among the elements of the accused’s testimony that the trial judge rejected as unbelievable were his claims that he was not really interested in sex but just wanted to undress and fool around and that he refused the complainant’s attempt to perform fellatio on him because he does not like that.

Parts of the trial judge’s reasons in *Quartey* suggested that he was operating on some questionable premises: for example, that men are more interested in engaging in sex than women and that all men like fellatio. The Court of Appeal of Alberta split over whether the trial judge relied on impermissible reasoning. In dissent, Justice Berger concluded that the trial judge erred in relying on inappropriately generalized “assumption of normative behaviour.”⁶⁹ The majority dismissed the conviction appeal, holding that, in the context of the reasons as a whole, the trial judge’s comments were not about “men in general”⁷⁰ but, rather, were conclusions about the accused that found reasonable support in the evidence. The Supreme Court of Canada dismissed the accused’s further appeal in brief reasons, agreeing with the majority in the Court of Appeal that the trial judge’s conclusions were specific to the accused in the circumstances and did not reflect a “stereotypical understanding of how *men* in those circumstances would conduct themselves.”⁷¹ The clear implication of *Quartey*, however, is that the accused’s appeal would have succeeded if the trial judge had indeed relied on stereotypes about men and male sexuality.

Similar issues reached the Supreme Court of Canada again in *R v Delmas*,⁷² which like *Quartey* was a defence appeal as of right that was dismissed in brief reasons. In *Delmas*, the accused testified that he was in a relationship with another woman but that he also considered that he

⁶⁸ 2018 ABCA 12 [*Quartey* Alta CA], aff’d 2018 SCC 59 [*Quartey* SCC].

⁶⁹ *Quartey* Alta CA, *supra* note 68 at para 87.

⁷⁰ *Ibid* at para 34.

⁷¹ *Quartey* SCC, *supra* note 68 at para 3 [emphasis in original].

⁷² 2020 SCC 39 [*Delmas* SCC] aff’g 2020 ABCA 152 [*Delamas* Alta CA].

and the complainant were boyfriend and girlfriend when they engaged in the sexual activity charged as sexual assault; he further testified that the complainant consented to have unprotected sex with him even though she knew he was positive for Hepatitis C. In rejecting the accused's testimony, the trial judge reasoned that these and other parts of the accused's account did not make sense. Dissenting judges in the Court of Appeal of Alberta and the Supreme Court of Canada would have allowed the accused's appeal on the basis that the trial judge engaged in prohibited stereotypical reasoning. As Justice O'Ferrall explained in dissent, the concern was that the judge relied on "stereotypical views and generalizations"⁷³ about how both the accused and the complainant would be expected to conduct their sex lives. Majorities in both Courts dismissed the accused's appeal, with the majority of the Supreme Court holding that the trial judge did not engage in stereotyping and that any inferential error he might have made about the accused's relationships was harmless. Still, the majority of the Court of Appeal described the trial judge's reasoning about the accused's relationships as "problematic",⁷⁴ while the majority of the Supreme Court labelled it "illogical."⁷⁵ Since all the appellate judges found the trial judge's reasoning about the plausibility of the accused's account to be problematic at best, *Delmas* arguably provides further support for the proposition that a trial judge can fall into error by relying on stereotypical assumptions about what a man accused of sexual assault might have done.

Finally, in *R v JC*, the Court of Appeal for Ontario allowed an appeal against conviction in part because the trial judge relied on stereotypical generalizations about sexual behaviour to the prejudice of the male accused.⁷⁶ The accused was charged with sexually assaulting a female friend. He testified that the sexual activity was consensual and that his practice was to expressly seek the complainant's consent before engaging in sexual activity. The trial judge rejected the accused's testimony on this point on the grounds that it ran against "common sense and experience about how sexual encounters unfold"⁷⁷ and was "too perfect, too mechanical, too rehearsed, and too politically correct to be believed."⁷⁸ Writing for the Court, Justice Paciocco concluded that this part of the trial judge's reasoning was impermissible for two reasons. First, it relied on a "bald generalization"⁷⁹ about human behaviour that was not properly grounded in the evidence. Second, it invoked a stereotype that no one

⁷³ *Delmas* Alta CA, *supra* note 72 at para 68.

⁷⁴ *Ibid* at para 35.

⁷⁵ *Delmas* SCC, *supra* note 72 at para 65.

⁷⁶ *Supra* note 9.

⁷⁷ *Ibid* at para 96 (quoting from the trial judge's reasons).

⁷⁸ *Ibid* at para 4 (quoting from the trial judge's reasons).

⁷⁹ *Ibid* at para 96.

acts so carefully to ensure sexual consent. In discussing the prohibition on stereotypical reasoning, Justice Paciocco held that stereotypes about complainants and accused persons are both impermissible and “equally wrong.”⁸⁰

B) Legitimate inferences misidentified as stereotypes

Stereotyping sexual assault complainants is an error of law, and trial judges must refuse to engage in such prohibited reasoning even when invited to do so by defence counsel. The fact that trial judges are ultimately responsible for rejecting stereotypical reasoning raises the risk that, if their understanding of the prohibited lines of reasoning is faulty or imprecise, they might erroneously exclude relevant evidence or legitimate inferences advanced by the defence.⁸¹ Relatedly, there is a risk that some Crown prosecutors might argue for an overbroad application of the concept of myths and stereotypes that could lead to the inappropriate rejection of defence evidence. These risks have materialized in a number of recent cases.

In *R v Percy*,⁸² the Crown advanced an overly broad understanding of the prohibition on stereotypical reasoning. The male accused was charged with sexual assault and related offences including voyeurism after he engaged in sexual activity with the female complainant, some of which he recorded on video. The trial judge acquitted the accused on the ground that he harboured a reasonable doubt on the issue of consent. He reasoned that some of the complainant’s actions as captured on video, such as giggling during oral sex and responding affirmatively when the accused asked if she liked his penis, were suggestive of her willing participation in the sexual activity. On appeal, the Crown argued that the trial judge engaged in stereotypical reasoning in relation to consent, emphasizing that the complainant testified that she did not consent to the sexual activity. However, as Justice Beveridge pointed out on behalf of the Nova Scotia Court of Appeal, a complainant’s testimony that she did not consent is not conclusive of the issue; a trial judge is required to assess that testimonial claim in the context of the evidence as a whole.⁸³ On examination, the argument advanced by the Crown in *Percy* appears to rely on a premise that the complainant’s direct testimony of non-consent should be treated as determinative and that any resort to circumstantial evidence of her state

⁸⁰ *Ibid* at para 63.

⁸¹ See generally L Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44:2 *Queen’s LJ* 316.

⁸² 2020 NSCA 11 [*Percy*].

⁸³ *Ibid* at paras 104–105.

of mind, including evidence of her own words and actions at the very time of the sexual activity, amounts to reliance on stereotypes.

Canadian law is clear that states of mind can be proven by direct or circumstantial evidence,⁸⁴ and the Supreme Court of Canada held in *Ewanchuk* that “the complainant’s words and actions, before and during the incident, [may] raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place”.⁸⁵ Thus, triers of fact are entitled to infer that a complainant who responded positively during sexual activity was more likely to be consenting. This kind of reasoning does not amount to impermissible stereotyping, and the Crown in *Percy* was overreaching by suggesting that it did. The Court of Appeal rightly rejected the Crown’s stereotyping argument in *Percy*, concluding that the trial judge appropriately assessed the complainant’s credibility in the context of all the evidence. As Justice Beveridge wrote for the Court, the trial judge did not engage in stereotyping and “never expressed any preconceived expectations about how an actual victim should behave, but instead he examined how this complainant behaved.”⁸⁶ *Percy* provides a clear example of Crown counsel pressing an overly expansive view of the rule against stereotyping that, if accepted, would lead to the rejection of legitimate defence evidence.

In *JC*,⁸⁷ which was discussed in the previous section, the Court of Appeal for Ontario determined that the trial judge erred when he dismissed a defence argument about the complainant’s motive to fabricate as based on stereotype. The Crown alleged that the accused engaged in non-consensual sex with the complainant on several occasions after threatening to post a sexually-explicit video of her on the internet if she did not participate in the sexual activity. The complainant testified that, before she reported these assaults to police, she disclosed the sexual activity with the accused to her boyfriend, who was angry and upset and urged her to call the police. The defence suggested that the complainant had a motive to fabricate her sexual assault allegations to conceal her infidelity and preserve her relationship with her boyfriend. In his reasons for convicting the accused, the trial judge rejected this suggestion, stating that there was no evidence to support it and that it invoked “stereotypical reasoning.”⁸⁸ In allowing the appeal, the Justice Paciocco concluded that the trial judge erred in rejecting the defence’s theory about the complainant’s motive, reasoning that “it is an error for a trial judge to exclude an inference as

⁸⁴ Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed. (Toronto: Carswell, 2014) at 176–79, 619.

⁸⁵ *Ewanchuk* SCC, *supra* note 8 at para 27.

⁸⁶ *Percy*, *supra* note 82 at para 107.

⁸⁷ *Supra* note 9.

⁸⁸ *Ibid* at para 76 (quoting from the trial judge’s reasons).

based on stereotype, when it is not based on stereotype.”⁸⁹ He concluded that the defence submission about the complainant’s motive to lie was not based on stereotype but was, instead, an available inference grounded in the evidence.

A similar problem arose in *R v Esquivel-Benitez*.⁹⁰ The male accused was charged with sexual assault after he had sexual intercourse with an adult female acquaintance in his home while her husband was asleep in an adjacent room. The complainant’s husband came into the room as the sexual activity was ending and promptly became enraged. On their walk home, the complainant’s husband persistently demanded that she tell him what happened, repeatedly asking whether or suggesting that the accused had abused her. At first, the complainant did not say that she had been assaulted. She told her husband that the accused assaulted her only after they returned home and in response to his persistent questioning.⁹¹ At trial, the central issue was consent. The defence suggested that these interactions with her husband undermined the complainant’s credibility, but the trial judge rejected this submission as “part of an ongoing myth regarding sexual consent.”⁹² The Court of Appeal for Ontario concluded that the trial judge erred in rejecting the defence submission about this evidence, which “ought to have been considered and not dismissed as irrelevant by the trial judge.”⁹³ The evidence was relevant because it could have supported an inference that the complainant had a motive to lie.

Trial judges must, of course, avoid stereotypes about complainants’ truthfulness. For example, it would be an error for a trial judge to rely on the idea that sexual assault complainants are generally untrustworthy⁹⁴ or that they are generally likely to lie to conceal from partners and family members that they have consented to sexual activity.⁹⁵ *JC* and *Esquivel-Benitez* remind us, however, that where there is an evidentiary basis for a defence suggestion that a particular complainant had a specific motive to lie, a trial judge is required to give that suggestion fair consideration. Ultimately, in their role as triers of fact, it would have been open to the trial judges in these cases to consider these defence suggestions about the complainants’ motives to lie in the context of all the evidence and

⁸⁹ *Ibid* at para 75.

⁹⁰ 2020 ONCA 160 [*Esquivel-Benitez*].

⁹¹ *Ibid* at paras 9–11.

⁹² *Ibid* at para 12.

⁹³ *Ibid* at para 15.

⁹⁴ See Craig, *supra* note 10 at 94–96; Doolittle, *supra* note 46 at 120–144 (for discussion of the prevalence of this idea).

⁹⁵ See *Seaboyer*, *supra* note 12 at 653 (the judgment of Justice L’Heureux-Dubé discussing the myth that women and girls are “under surveillance” in this way).

reject them. What was not open to the trial judges was to dismiss these submissions out of hand by labelling them stereotypes.⁹⁶

*R v Roth*⁹⁷ is another case where a trial judge relied on the rule against stereotyping to improperly dismiss evidence that grounded a legitimate inference favourable to the defence. The female complainant testified that the male accused forced sexual intercourse on her in her home, while the accused testified that the sexual activity was consensual. The trial judge convicted the accused, but the Court of Appeal for British Columbia set aside the conviction on the basis that the trial judge's scrutiny of the evidence was uneven and resulted in an unfair trial. Among the frailties in the complainant's evidence that the trial judge failed to consider was a contradiction between her evidence and the evidence of a taxi driver who interacted with her shortly after the alleged sexual assault. The complainant testified that, when she spoke with the taxi driver at the door of her home, she was unable to reach out for assistance because she remained under the control of the accused, who was monitoring her from the bottom of the stairs. By contrast, the taxi driver testified that the complainant exited her home and closed the door behind her before their interaction, which would have put her outside the control of the accused. The Court of Appeal held that the trial judge was right to reject an improper defence argument that the complainant's failure to disclose the assault to the taxi driver, in and of itself, undermined her credibility. However, the trial judge ought to have considered how the inconsistency between the complainant's testimony and that of the taxi driver affected her credibility. As the Court of Appeal explained, even where "a piece of evidence may carry the potential for impermissible reasoning, it may also have a permissible role to play"⁹⁸ in supporting legitimate inferences.

Finally, *R v Cooke*,⁹⁹ like *Roth*, involved a successful defence appeal based on the trial judge's failure to consider inconsistencies in the complainant's testimonial account. Specifically, there were internal and external inconsistencies regarding the complainant's interactions with emergency and medical personnel and her refusal to participate in a Sexual Assault Nurse Examiner (SANE) procedure. The trial judge repeatedly cautioned herself to avoid stereotypical inferences and appeared to avoid addressing conflicts in the complainant's evidence for fear of engaging in prohibited reasoning. The Nova Scotia Court of Appeal noted that the trial judge correctly determined that the complainant's refusal to participate in the SANE procedure and failure to report the sexual assault to emergency

⁹⁶ See *Esquivel-Benitez*, *supra* note 90 at paras 13–15.

⁹⁷ 2020 BCCA 240.

⁹⁸ *Ibid* at para 130.

⁹⁹ 2020 NSCA 66.

medical personnel were not factors that undermined her credibility. However, to the extent that her evidence contained inconsistencies and contradictions on these matters, the trial judge erred in failing to consider these defects in assessing the complainant's evidence. The Court of Appeal concluded that the conviction could not stand because the trial judge's "overemphasis of cautions against stereotypical reasoning fettered her task of making credibility assessments."¹⁰⁰

To summarize, in several recent sexual assault cases, relevant defence evidence and legitimate inferences favourable to the defence have been misidentified as impermissible stereotypes. It is worth noting that this misidentification problem has a constitutional dimension, since the right of the accused to make full answer and defence is protected under the *Canadian Charter of Rights and Freedoms*.¹⁰¹ That right is at risk when Crown attorneys and trial judges embrace an overly broad understanding of what is prohibited by the rule against stereotypical reasoning.

C) Close cases

While stereotypes against sexual assault complainants are often easy to identify, in some cases it can be difficult to discern whether or not stereotypes have been invoked. The distinction between legitimate inferences and prohibited stereotyping can be elusive and context-dependent. The difficulty of this distinction may account for the significant number of cases in which appellate courts have divided over whether a lower court judgment was based on impermissible stereotypes: *Quartey*,¹⁰² *Delmas*¹⁰³ and *ARJD*¹⁰⁴ are all examples discussed above.

Another such case is *R v Steele*,¹⁰⁵ where judges of the Court of Appeal for Ontario disagreed about whether the trial judge engaged in stereotyping in relation to the complainant's reasons for entering an abandoned trailer. The accused and the complainant were acquaintances who visited at the complainant's home with her parents, after which the complainant offered to walk the accused partway home. On the walk, they entered the abandoned trailer and engaged in sexual activity that the complainant claimed was non-consensual but the accused testified was consensual. In his reasons for acquitting the accused, the trial judge stated that the

¹⁰⁰ *Ibid* at para 58.

¹⁰¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, ss 7 and 11(d); *Seaboyer*, *supra* note 12 at 602–604.

¹⁰² *Supra* note 68.

¹⁰³ *Supra* note 72.

¹⁰⁴ *Supra* note 40.

¹⁰⁵ 2021 ONCA 186.

complainant's credibility was damaged by her inability or unwillingness to provide a reason for entering the trailer with the accused late at night, which the trial judge considered inconsistent with her testimony that she did not like the accused. Writing for a majority of the Court of Appeal for Ontario, Justice Benotto overturned the acquittal and concluded that the trial judge erred in relying on the stereotype "that a woman would not enter a building at night with a man unless she wanted sex."¹⁰⁶ Justice van Rensburg, who issued a separate concurring judgment, would have allowed the appeal on other grounds but disagreed with the majority on the trial judge's reasoning about the trailer. For Justice van Rensburg, the trial judge was drawing reasonable inferences from the circumstantial evidence when he assessed the complainant's claim that she did not like the accused and was only walking with him to be polite "against the fact that she had gone into the trailer with him at a late hour 'for no reason' when she was expected home."¹⁰⁷

Steele illuminates a key reason why the distinction between impermissible stereotyping and legitimate inferences can be difficult to draw: stereotyping, where it occurs, is rarely express. Appellate courts must interpret trial judges' reasons to discern whether they reveal implicit reliance on myths and stereotypes. In some cases, the implication is relatively easy to spot. For example, when the trial judge in *Lacombe* cryptically stated that the fact that the complainant wore loose-fitting pajamas without undergarments was "significant", the only reasonable interpretation was that the trial judge improperly reasoned that the complainant invited the sexual activity through her manner of dress.¹⁰⁸ In other cases, trial judges' reasons are more difficult to interpret. In *Steele*, while the idea that women only enter buildings with men at night to have sex obviously constitutes an indefensible stereotype,¹⁰⁹ it is less clear whether the trial judge actually relied on that idea. His reasoning about the trailer could be read as implicitly relying on that stereotype, but it could also be interpreted more benignly as raising concerns about the coherence and consistency of the complainant's account of events. To the extent that both interpretations appear plausible, the latter interpretation is arguably preferable because it accords with the principle that trial judges are presumed to know the law.¹¹⁰ That is, an appellate court arguably

¹⁰⁶ *Ibid* at para 23.

¹⁰⁷ *Ibid* at para 69.

¹⁰⁸ *Supra* note 52.

¹⁰⁹ This line of reasoning is a version of what is sometimes called the "coffee myth:" the idea that a woman who invites a man to her home for coffee can be taken to consent to sex. See Helen Reece, "Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?" (2013) 33:3 *Oxford J Leg Stud* 445 at 461.

¹¹⁰ See e.g. *R v Youvarajah*, 2013 SCC 41 at para 47.

should not infer that a trial judge engaged in stereotypical reasoning when an innocuous interpretation of the reasons is available.¹¹¹

Regrettably, Canadian courts have yet to find a consistent approach to deciding how much to read in to trial judges' reasons in determining whether stereotyping has occurred. In *Quartey*, the accused's claim that he does not like fellatio was rejected by the trial judge as unbelievable—a conclusion that appeared unconnected to any factual circumstances.¹¹² Nevertheless, the Supreme Court determined that this and other conclusions the trial judge made were specific findings about the accused that were not based on generalizations about men. In *Steele*, by contrast, the trial judge's reasoning about the trailer was connected to a number of specific facts: as Justice van Rensberg noted, the complainant's decision to enter the trailer with the accused late at night when she was expected home was arguably in tension with her testimonial claims that she did not like him and was only walking with him out of politeness. Yet, in that case, the majority determined that the trial judge's reasons implicitly relied on a stereotype. If, in *Steele*, the trial judge's reasoning about the trailer was properly understood as implicitly relying on the stereotype that women only enter buildings with men at night to have sex, then arguably the trial judge's conclusion in *Quartey* that the accused's testimony was unbelievable should have been read as implicitly invoking a stereotype that all men like fellatio. The opposing results in these cases are difficult to reconcile and reflect a lack of clarity in the law about when appellate courts should infer that a trial judge has engaged in stereotyping.

The decision of the Court of Appeal for British Columbia in *R v AL*¹¹³ illustrates another difficulty with the distinction between legitimate inferences and impermissible stereotypes: the extent to which it depends on context. In *AL*, evidence that likely would have been admissible to go to consent in a case of acquaintance sexual assault was inadmissible because it raised the spectre of stereotyping in the context of an allegation of long-term abuse. The accused was charged with sexual offences against a female complainant who was left in his care when she was 8 years old. The Crown alleged that the accused sexually abused the complainant from that time for almost three decades and that he used threats to ensure the complainant's compliance with his sexual demands. The accused testified that his long-term sexual relationship with the complainant was consensual and began when she was 15 years old. The accused was convicted by a jury, and one

¹¹¹ See *R v GF*, 2021 SCC 20 [*GF*] (where Justice Karakatsanis, on behalf of a majority of the Supreme Court, wrote: “[w]here ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error” at para 79).

¹¹² *Supra* note 68.

¹¹³ *Supra* note 15.

of the issues on appeal was whether the trial judge was right to exclude evidence of a video recording of sexual activity between the accused and the complainant that took place when the complainant was an adult during a period covered by the indictment. The Court of Appeal determined that the video was properly excluded because its prejudicial effect substantially outweighed any probative value. The prejudicial effect of the video would flow both from the invasion of the complainant's privacy and from the "risk that the jury would be tempted to draw impermissible inferences based on stereotypes and myths about how sexual assault complainants who allege long-term abuse should behave."¹¹⁴ Specifically, there was a danger that the complainant's apparent agreement or responsiveness to the sexual activity depicted in the video would invoke the myths that victims should resist and remain unresponsive. The complainant's apparent agreement could be explained by years of alleged abuse, exploitation and threats, but there was a risk that it would become, for the jury, "an illegitimate proxy for consent."¹¹⁵

In many cases, video recordings of the sexual activity covered by the charges would have legitimate relevance, including on the issue of consent. In *AE*,¹¹⁶ the videos of the violent sexual activity and the complainant's protests showed that she did not consent. Conversely, in *Percy*,¹¹⁷ the trial judge was entitled to conclude that complainant's conduct as captured on video suggested that she willingly participated in the sexual activity recorded. In both cases, these inferences were reasonable in the context of disputes about consent involving casual acquaintances who engaged in sexual activity on one occasion. However, drawing a similar inference about consent from a video depicting one sexual act in an exploitive sexual relationship that lasted decades was inappropriate and risked invoking forbidden reasoning.

D) Beyond sex and gender

A final emerging trend in the law on myths and stereotypes in sexual assault is a growing concern about discrimination on grounds other than sex and gender. In *R v Barton*,¹¹⁸ the accused was charged with first degree murder after a woman died from an injury he inflicted on her in the course of sexual activity. This complex and tragic case raised a number of troubling issues, including concerns about gender-based stereotyping that were heightened by the trial judge's failure to apply the mandatory admissibility standards in s. 276 of the *Criminal Code* before admitting

¹¹⁴ *Ibid* at para 230.

¹¹⁵ *Ibid* at para 253.

¹¹⁶ *Supra* note 48.

¹¹⁷ *Supra* note 82.

¹¹⁸ *Supra* note 8.

evidence that the accused and the complainant engaged in sexual activity on a previous occasion.¹¹⁹ More importantly for present purposes, the Supreme Court also emphasized the danger that the jury might engage in stereotyping the deceased because she was an Indigenous woman engaged in sex work. Writing for the majority, Justice Moldaver recommended that trial judges offer instructions to juries cautioning them against, in his words,

a number of troubling stereotypical assumptions about Indigenous women who perform sex work, including that such persons:

- are not entitled to the same protections the criminal justice system promises other Canadians;
- are not deserving of respect, humanity, and dignity;
- are sexual objects for male gratification;
- need not give consent to sexual activity and are “available for the taking”;
- assume the risk of any harm that befalls them because they engage in a dangerous form of work; and
- are less credible than other people.¹²⁰

The insight that biases against Indigenous and racialized people operate within the criminal justice system is not new,¹²¹ but *Barton* brings fresh attention to the ways in which these kinds of bias can amplify stereotypical reasoning about sexual assault.

¹¹⁹ The admission of this evidence raised a clear risk that the jury might rely on the well-known prohibited inference (one of the “twin myths” as identified in *Seaboyer*, *supra* note 12) that a woman who consented to sexual activity on a previous occasion is more likely to have consented on the occasion in question. The accused was acquitted by the jury, but the Crown’s appeal was allowed and a new trial was ordered because the trial judge failed to screen the other sexual activity evidence through the admissibility regime in s 276 of the *Criminal Code*, *supra* note 4, one of the central purposes of which is to prevent judges and juries from resorting to twin myths reasoning.

¹²⁰ *Barton*, *supra* note 8 at para 201.

¹²¹ See generally *R v Parks* (1993), 15 OR (3d) 324, 84 CCC (3d) 353 (CA) and *R v Williams*, [1998] 1 SCR 1128, 159 DLR (4th) 493 (these cases recognized that biases against Black and Indigenous people, respectively, are widespread in Canada and might affect jury adjudication in criminal cases).

*R v Slatter*¹²² is another Supreme Court of Canada decision that highlights myths and stereotypes in sexual assault that are not based on sex and gender. The complainant in *Slatter* was a young woman with an intellectual disability who testified that the accused, a family friend, sexually assaulted her on various occasions. The accused testified and denied that the sexual activity occurred. A clinical psychologist who testified for the Crown gave evidence that people with intellectual disabilities are predisposed to be suggestible and that the complainant in particular was suggestible. The complainant had been repeatedly questioned by authorities about her allegations, which became more serious over time. The defence argued that the reliability of her evidence was undermined by the prospect that, because she was suggestible, she was unwittingly influenced by others in constructing her account. The trial judge convicted the accused of sexual assault, finding that the complainant's testimony was credible and that the Crown had proved its case beyond a reasonable doubt. The Court of Appeal for Ontario, by a majority, allowed the appeal and ordered a new trial, finding that the trial judge's reasons were insufficient because he did not address the complainant's suggestibility and its impact on the reliability of her testimony. Justice Pepall, in dissent, would have dismissed the appeal on the basis the trial judge's reasons for conviction were adequate: he was alive to the issues of the complainant's reliability and suggestibility, and in any event the defence argument about suggestibility was based on generalized expert evidence and lacked a factual foundation.

On an appeal as of right, a seven-member Supreme Court of Canada unanimously allowed the appeal and restored the conviction, adopting Justice Pepall's dissenting reasons. In a brief oral judgment for the Court, Justice Moldaver stressed that the testimony of people with intellectual and developmental disabilities should be addressed on its individual merits and not on the basis of "expert evidence that attributes general characteristics to that individual ... Over-reliance on generalities can perpetuate harmful myths and stereotypes about individuals with disabilities, which is inimical to the truth-seeking process, and creates additional barriers for those seeking access to justice."¹²³ Once again, the Supreme Court emphasized a form of stereotyping that can affect sexual assault cases but is not based on sex or gender. Taken together, *Barton* and *Slatter* encourage trial judges to look beyond gender-based stereotyping in sexual assault cases to consider and guard against stereotyping on other, overlapping grounds of discrimination like race and disability.¹²⁴

¹²² 2020 SCC 36 [*Slatter* SCC] rev'g 2019 ONCA 807 [*Slatter* Ont CA].

¹²³ *Slatter* SCC, *supra* note 122 at para 2.

¹²⁴ For discussion of this theme in earlier cases, see Tanovich, *supra* note 10 at 78–81. See also *R v JG*, 2020 ONSC 7047 (where two Black male accused were charged with

4. A new framework of rules

The most significant Canadian case on myths and stereotypes to be decided in recent years is *R v JC*.¹²⁵ As discussed above, a unanimous Court of Appeal for Ontario allowed a defence appeal against conviction on grounds related to stereotypes: the trial judge erred in relying on stereotypes about sexual behaviour to reject the male accused's claim that he sought consent expressly and further erred by misidentifying the defence argument about the complainant's motive to lie as a stereotype. More important than these fact-specific determinations is the Court's effort to articulate the framework of rules around stereotypical reasoning in a new way. According to Justice Paciocco, there are actually two overlapping rules at work:

1. "the rule against ungrounded common-sense assumptions"¹²⁶ and
2. "the rule against stereotypical inferences."¹²⁷

These rules are both, Justice Paciocco explains, directed at "impermissible reasoning relating to the plausibility of human behaviour."¹²⁸ The first rule prohibits judges from speculating and relying on common-sense assumptions that are not supported by evidence or judicial notice.¹²⁹ The second rule prohibits reasoning based on "prejudicial generalizations"¹³⁰ about human behaviour, including stereotypical assumptions about how both complainants and accused persons in sexual offence cases are expected to conduct themselves.¹³¹ Justice Paciocco emphasizes that neither rule represents a wholesale prohibition on inference-drawing based on common sense and human experience.¹³² Rather, these rules prohibit only those common-sense inferences that are unmoored from the evidence or founded on stereotypes.

This novel way of conceptualizing the prohibition on stereotypical reasoning appears likely to be influential in Ontario and throughout

human trafficking and sexual services offences against a white female complainant. The trial judge cautioned himself against relying on myths and stereotypes including racial biases at paras 16–17).

¹²⁵ *Supra* note 9.

¹²⁶ *Ibid* at para 58.

¹²⁷ *Ibid* at para 63.

¹²⁸ *Ibid* at para 57.

¹²⁹ *Ibid* at para 58.

¹³⁰ *Ibid* at para 65.

¹³¹ *Ibid* at para 63.

¹³² *Ibid* at paras 59, 65.

Canada.¹³³ In *R v Pastro*,¹³⁴ the Court of Appeal for British Columbia cited *JC* and adopted an analogous two-part analysis, separating the prohibition against “generalizations about expected human behaviour that are unsupported by the evidence”¹³⁵ and the prohibition against “stereotypic reasoning.”¹³⁶ While framing the analysis as comprising two rules may seem to complicate the law, this dual structure nicely captures two distinct problems: prejudgments about certain groups, like women and sexual assault complainants, and assumptions about human behaviour that are not properly grounded in evidence. Both of these problems have been consistently recognized in the case law on myths and stereotypes.¹³⁷ Acknowledging that these problems are separate but overlapping helpfully clarifies the law.

As discussed above, it can be difficult to distinguish legitimate inferences grounded in common sense and human experience from prohibited stereotypical reasoning.¹³⁸ Canadian courts have been somewhat inconsistent and unclear about when reasoning about human behaviour crosses that line.¹³⁹ The analytical structure provided in *JC* should help to clarify the law on this point by providing guidance on what, precisely, is prohibited. As Justice Paciocco takes pains to point out, the fact that a lawyer or judge relies on common sense and human experience to draw inferences from human behaviour in a sexual assault trial does not, by itself, make those inferences objectionable. What *JC* calls on courts to avoid are inferences that lack a foundation in the evidence and generalizations and assumptions that are unfair and prejudicial, including stereotypes about male and female sexuality. Thus, as Justice Paciocco explains, it was unacceptable for a trial judge to rely, in convicting an accused, on a pure generalization that a complainant would not have consented to have sex outside on the dirt and gravel in December in the absence of any evidence about the particular complainant’s attitude toward her appearance, clothing and comfort.¹⁴⁰ That inference was improper because it lacked an evidentiary foundation. On the other hand, a trial judge was entitled to find it implausible that the complainant would

¹³³ *JC, ibid*, was cited 16 times by courts across Canada in the six months after it was released.

¹³⁴ 2021 BCCA 149 [*Pastro*].

¹³⁵ *Ibid* at para 4.

¹³⁶ *Ibid* at para 5.

¹³⁷ For example, negative stereotypes about women’s sexuality were the principal concern in *Ewanchuk* SCC, *supra* note 8 and *Lacombe*, *supra* note 52, while the appellate court identified factual findings that were not properly grounded in the evidence in *Cepic*, *supra* note 65.

¹³⁸ See *supra* notes 81–100 and 108–111 and accompanying text.

¹³⁹ See especially the text accompanying *supra* note 112.

¹⁴⁰ *JC, supra* note 9 at para 62, discussing *R v JL*, 2018 ONCA 756 [*JL*].

consent to have sex with the accused on a balcony open to public view where there was evidence that the complainant was not interested in engaging in sex with the accused and that a private bedroom was readily available.¹⁴¹ That inference was grounded in the evidence and did not draw on any prejudicial generalizations about women's sexuality. The guidance provided in *JC* should assist courts in drawing the distinction between permissible and impermissible inferences by providing a common language and a conceptual structure for the analysis.

One would not, of course, want to overstate the extent to which *JC* has resolved all the problems in this difficult area of law. Consider, for example, the apparent connection between the strength of the generalization relied on by the trial judge and its permissibility. In several cases, appellate Courts have ruled that trial judges err when they reason that *no* person or woman would *ever* agree to engage in the sexual activity in issue.¹⁴² In *Pastro*,¹⁴³ where the 17-year-old complainant claimed to have been sexually assaulted by a 49-year-old friend of her father, the Court of Appeal for British Columbia recognized that the trial judge would have erred if he had relied on "stereotypic assumptions" and "perceived universal truths" about whether 17-year-old girls are interested in sex with 49-year-old men.¹⁴⁴ However, the Court concluded that the trial judge did not err in the circumstances because his reasoning about the implausibility of the complainant's consent was grounded in the complainant's testimony that she found the accused's sexual attentions "'creepy', 'weird', 'inappropriate' and 'disgusting'".¹⁴⁵

It seems clear from *Pastro* that the strong generalization that *no* 17-year-old girl would *ever* engage in consensual sex with a 49-year-old man would amount to prohibited reasoning. What seems less clear is whether weaker generalizations along similar lines might be acceptable. For example, would the trial judge be entitled to consider that teenaged girls sometimes or often experience the sexual attentions of middle-aged men as inappropriate? The analysis in *JC* does not provide a ready

¹⁴¹ *JC*, *supra* note 9 at para 70, discussing *R v FBP*, 2019 ONCA 157.

¹⁴² See *JL*, *supra* note 140 ("I do not share the trial judge's view that it can be taken as a fact that no young woman would consensually engage in the alleged behaviour" at para 46); *R v JJ*, 2021 ONCA 351 (identifying a prohibited stereotype that "no woman would initiate sexual contact in the circumstances described" at para 22); *R v Kodwat*, 2017 YKCA 11 ("the conclusion that it was 'inconceivable' that any 17-year-old woman in these circumstances would have engaged in consensual sex with an unfamiliar man of the appellant's age was a stereotypical assumption or generalization lacking in an evidentiary foundation" at para 41).

¹⁴³ *Pastro*, *supra* note 134.

¹⁴⁴ *Ibid* at para 67.

¹⁴⁵ *Ibid* at para 66.

answer to this question. The answer may depend on whether any such generalization would be accepted as true by well-informed members of the community, such that it would be an appropriate subject for judicial notice.¹⁴⁶ The possibility that common-sense reasoning could survive the rule against ungrounded common-sense assumptions by being grounded in judicial notice is raised in *JC* but not discussed at length.¹⁴⁷ Its implications remain to be explored in future cases. In sum, the framework of rules announced in *JC* has advanced and clarified the law on myths and stereotypes in sexual assault, but significant uncertainties remain.

Arguably, the new framework in *JC* advances the law most significantly in its capaciousness: Justice Paciocco defines the rules at a high enough level of abstraction that they can account for all the complexities that have developed in the law on myths and stereotypes. They apply equally to assumptions about women, men, complainants and accused persons; to sexual offence cases and other cases; to stereotypes based on sex and gender and stereotypes based on other grounds of discrimination. They recognize that judges can err both by relying on stereotypes and by rejecting legitimate inferences as stereotypes,¹⁴⁸ and that evidence that could give rise to stereotypical inferences may also be relevant and admissible for other, legitimate purposes.¹⁴⁹ While no way of articulating rules can entirely eliminate the problem of close or difficult cases, Justice Paciocco provides a number of factual examples of permissible and impermissible inferences that should assist courts in drawing this distinction in future cases. In short, the *JC* decision articulates the organizing principles in the law on myths and stereotypes in a way that captures the issues raised in past cases and can serve as the foundation for future developments.

The principal weakness of the framework laid out in *JC* also flows from its capaciousness. Since Justice Paciocco defines the governing rules in an abstract way that is neutral between accused persons and complainants, women and men, sexual offences and other offences, the particular problem of gender-based stereotyping of female sexual assault complainants risks being obscured. Recall that to this point, and particularly in the judgments of the Supreme Court of Canada, the problem of myths and stereotypes in sexual assault has been understood almost exclusively as a problem of sexist stereotypes against female complainants. This understanding, in turn, has reflected an appropriate acknowledgment of the deep history and continuing reality of sex and

¹⁴⁶ See *R v Spence*, 2005 SCC 71 at para 65.

¹⁴⁷ *JC*, *supra* note 9 at para 5. See also *R v JM*, 2021 ONCA 150 (on judicial notice in the context of stereotypes about sexual assault).

¹⁴⁸ *JC*, *supra* note 9 at para 75.

¹⁴⁹ *Ibid* at para 68–69.

gender discrimination in the prosecution of sexual offences in Canada. To conceptualize the law on myths and stereotypes in a way that fails to acknowledge this context would be ahistorical and regressive. At the same time, the analysis in this paper has shown that an understanding focused exclusively on sex and gender-based discrimination against complainants simply cannot account for the many complications that arise regularly in the law on myths and stereotypes in sexual assault. The best way forward may be for the courts to employ the useful framework provided by *JC* while remaining keenly aware of the special implications of this body of law for women and complainants in sexual offence cases.

5. Conclusion

Myths and stereotypes remain a persistent problem in Canadian sexual offence prosecutions. Most often, these prejudicial lines of reasoning are invoked by lawyers and judges against sexual assault complainants and amount to a form of discrimination on the basis of sex and gender. A review of the recent case law demonstrates that myths and stereotypes also arise in other contexts, however. Some cases involve stereotypical reasoning being deployed against men and accused persons, while others raise issues of stereotyping based on other grounds of discrimination including Indigeneity, race and disability. The case law also demonstrates that the line between stereotypical reasoning and permissible inferences can be difficult to draw and that judges sometimes mistakenly reject legitimate defence evidence and arguments as raising stereotypes. The overall picture is complex. The recent attempt by the Court of Appeal for Ontario in *JC* to impose order in this area represents a real advance of the law. That Court's proposed rules against ungrounded common-sense assumptions and stereotypical inferences are framed broadly enough to contain all the complications presented in the case law. If those rules are more widely adopted, the challenge will be ensuring that the original and continuing problem of gender-based stereotypes against sexual assault complainants is not forgotten.