Myth, Inference and Evidence in Sexual Assault Trials

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In sexual assault cases, the ability to distinguish myths and stereotypes from legitimate lines of reasoning continues to be a challenge for Canadian courts. The author argues that this challenge could be overcome by clearly identifying problematic inferences in sexual assault cases as prohibited lines of reasoning, while allowing the defence to bring forward evidence that is logically relevant to the material issues so long as it does not raise these prohibited inferences.

This paper advances that judges should take a broad view of relevance as an evidentiary approach in the adjudication of sexual assault cases. This approach allows for a consideration of circumstances surrounding the alleged assault, which may include an analysis of the nature of the interactions between the accused and the complainant leading up to the alleged assault and in its aftermath. This approach is necessary in order for the accused to make full answer and defence. However, common myths and stereotypes about sexual assault are prohibited grounds that the law has rightly removed from legal consideration. The author discusses a number of these myths, with a special focus on the "twin myths", which the law has rejected: that the complainant is more likely to have consented, or is less worthy of belief, given prior sexual activity. Lastly, the author turns to the evidence of the perpetrator and the complainant's relationship subsequent to the alleged assault—where provincial courts have split in determining what is or is not a prohibited inference when examining this subsequent relationship.

This paper ultimately argues that the current challenge facing Canadian courts is ensuring that judges and juries avoid these prohibited lines of reasoning, while retaining broad access to information about the circumstances and the ability to draw reasonable, context-specific inferences. Doing so would bring clarity to this important area of evidence law.

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Introduction

Some of the most difficult problems in the law on sexual assault are evidentiary.[1] In deciding disputed factual issues in sexual assault cases, challenging questions persist about what types of evidence are relevant and what inferences can be drawn from that evidence. For example, what, if anything, can be made of evidence that the complainant communicated to the accused an intention to engage in sex with the accused hours before the alleged sexual assault?[2] What, if anything, can be made of evidence that the complainant continued to have an affectionate or sexual relationship with the accused after the alleged sexual assault?[3] These questions turn on our understanding of relevance. They are also complicated by the fact that, as L'Heureux-Dubé J recognized almost three decades ago, sexual assault is an area where common sense judgments about relevance are frequently infused with stereotypes and myths.[4]

Canadian law is properly committed to eliminating myths and stereotypes from the adjudication of sexual assault cases. Rape shield provisions prohibit use of evidence of other sexual activity of the complainant to raise the discriminatory inferences that the complainant is less credible or more likely to consent by

1. See generally Susan Estrich, "Teaching Rape Law" (1992) 102:2 Yale LJ 509 (stating that "society's continued ambivalence towards acquaintance rape is increasingly being expressed in evidentiary rules and standards of credibility rather than in the definitions of force and consent" at 519–20).

2. See e.g. *R v Ururyar*, 2017 ONSC 4428 [*Ururyar* ONSC].

3. See e.g. *R v Ghomeshi*, 2016 ONCJ 155.

4. See *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 679, 83 DLR (4th) 193, L'Heureux-Dubé J, dissenting in part [*Seaboyer*].

virtue of her sexual experience.[5] Other stereotypical inferences have been prohibited in the case law, such as the inferences that a woman who dresses in a provocative manner invites sexual assault,[6] and that a lack of resistance amounts to consent.[7] The law's aspiration to eliminate these discriminatory forms of reasoning remains, of course, imperfectly realized. Scholars have documented the persistence of myths and stereotypes about sexual assault, demonstrating that lawyers and judges continue to rely on them with troubling regularity.[8] Undoubtedly, more work must be done to remove the influence of stereotypical reasoning in sexual assault cases.

At the same time, the category of myths and stereotypes is controversial. Some warn that excessive expansion of this category could threaten the fair trial rights of the accused by unjustifiably limiting the inferences that may be drawn from relevant evidence.[9] Professor Don Stuart put it this way: "[N]ot all assertions of myths and stereotypes are beyond critical scrutiny and fair trial considerations . . .. When a judge asserts that something is a myth or false stereotype, the factual inquiry into relevance is pre-empted and turned into an indisputable question of law."[10] On this view, care must be taken to ensure that efforts to eliminate myths and stereotypes do not result in the inappropriate rejection of relevant evidence.

This paper takes seriously both the need to remove myths and stereotypes from the adjudication of sexual assault cases and the importance of ensuring that the defence can rely on relevant evidence for legitimate purposes. I will argue that the law requires judges to take a broad view of relevance. In general, this generous approach to relevance permits consideration of the circumstances surrounding an alleged sexual assault, including the nature of the interactions

5. See *Criminal Code*, RSC, 1985, c C-46, s 276.

6. See e.g. *R v Cain*, 2010 ABCA 371 at para 30.

7. See *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 [cited to SCR]; *R v Barton*, 2017 ABCA 216 at para 180.

8. See e.g. Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) [Craig, *Trials on Trial*]; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 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* (Toronto: Thomson Reuters, 2017) 73; Janine Benedet, "Probity, Prejudice and the Continuing Misuse of Sexual History Evidence" (2009) 64 CR (6th) 72 [Benedet, "Sexual History Evidence"].

9. See e.g. David M Paciocco, "Techniques for Eviscerating the Concept of Relevance: A Reply and Rejoinder to 'Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection'" (1995) 33 CR (4th) 365 [Paciocco, "Concept of Relevance"].

10. Don Stuart, Case Comment on *R v Schmaltz*, (2015) 17 CR (7th) 281 at 281 [Stuart, Comment on *Schmaltz*].

between the accused and the complainant leading up to the alleged assault and in its aftermath. The accused's constitutional right to make full answer and defence demands that the defence be permitted to explore the circumstances surrounding the alleged assault without undue constraint.[11] In this context, the legal disavowal of myths and stereotypes about sexual assault operates to prohibit use of evidence for particular purposes. Clarity is required in specifying these prohibited lines of reasoning. This analytical clarity is the key to distinguishing myths and stereotypes from legitimate inferences.

The analysis will unfold in three parts. First, the concept of relevance will be discussed, along with the forms of evidence that can be relevant in adjudicating sexual assault cases. This discussion will show that relevance and admissibility of evidence are context-dependent and that relevance is not a demanding threshold. Second, the analysis will turn to myths and stereotypes about sexual assault. Some of these rejected myths will be identified, and the law's approach to removing them from the courtroom will be discussed, with special attention to the legal response to evidence of the complainant's sexual history and delayed disclosure of sexual assault. The third part of the analysis will focus on evidence about the complainant's relationship with the perpetrator subsequent to the alleged assault, which is one area where Canadian courts are currently grappling with how to distinguish legitimate inferences from prohibited myths. Ultimately, I will argue, the challenge is to ensure that judges and juries avoid prohibited lines of reasoning while retaining broad access to information about the circumstances and the ability to draw reasonable, context-specific inferences.

I. Relevance in Sexual Assault

This part reviews the law on relevance both in general and in the context of sexual assault cases specifically. Particular attention will be given to evidence relevant to consent, which is a central and frequently contested issue in sexual assault cases.

A. The Relevance Requirement Generally

The most fundamental rule of evidence in the common law system is that only relevant evidence is admissible, and all relevant evidence is admissible absent a clear reason to exclude it.[12] Evidence is considered relevant when "it has

11. See *Seaboyer*, *supra* note 4 at 610–11; *R v Lyttle*, 2004 SCC 5 at para 2; *R v Schmaltz*, 2015 ABCA 4 at para 20 [*Schmaltz* ABCA].

12. See *Morris v The Queen*, [1983] 2 SCR 190, 1 DLR (4th) 385, Lamer J, dissenting on other grounds [*Morris*]; *R v Grant*, 2015 SCC 9 at para 18.

any tendency to prove or disprove a fact in issue".[13] The rules of evidence prohibit certain uses of evidence and lines of reasoning, but beyond this the question whether evidence has the probative tendency required for relevance is a matter that is not decided by applying rules of law. Instead, relevance is governed by logic and human experience: "Relevance . . . requires a determination of whether as a matter of human experience and logic the existence of 'Fact A' makes the existence or non-existence of 'Fact B' more probable than it would be without the existence of 'Fact A'. If it does then 'Fact A' is relevant to 'Fact B'."[14] To be considered relevant, evidence does not need to be conclusive of a factual issue or even to reach some less demanding threshold of probative value.[15] Relevance is a binary question and "any" probative value will do.[16]

An example may help to illustrate the expansiveness of this concept. Imagine a robbery case where the identity of the robber is the disputed issue, and there is evidence that the accused was in the neighbourhood an hour before the robbery. Obviously, the evidence is neither determinative of the issue of identity nor sufficient on its own to prove the issue of identity to any reasonable standard. The accused may be one of hundreds of people who were in the area. Nevertheless, the fact that the accused was in the area of the robbery near the time it occurred makes it more likely that the accused was the robber than it would be if we did not have this information about the accused's location. The evidence is therefore relevant on the issue of identity.

Relevance is not a demanding test to meet. Moreover, where reasonable people disagree about whether evidence is relevant, the law requires that we "err on the side of inclusion".[17] The parties may disagree about whether the evidence has any logical bearing on the material issues, but where it is arguable that it does have a legitimate bearing, that evidence passes the test of relevance. Subject to the rules of evidence, ultimately it will be for the trier of fact to determine whether the evidence has any probative value in the context of the case as a whole. Chief Justice Dickson explained in *R v Corbett*:

> basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little

13. *R v Grant*, *supra* note 12.

14. *R v Watson* (1996), 30 OR (3d) 161 at 177, 50 CR (4th) 245 (CA).

15. See *Morris*, *supra* note 12.

16. *R v Grant*, *supra* note 12 at para 18.

17. Paciocco, "Concept of Relevance", *supra* note 9 at 367.

> weight, or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion.[18]

The "inclusionary policy" of the law means that evidence should not be excluded as "irrelevant" where there is a reasonable argument that it has some probative value for a legitimate inferential purpose.

This inclusionary inclination is particularly appropriate to relevance determinations made in the course of trials, because the probative value of any individual piece of evidence must ultimately be determined in relation to all the other evidence in the case.[19] Relevance is therefore inherently contextual, and categorical prejudgments about it are inappropriate.[20] The law's inclusive attitude toward relevance also has special salience in relation to defence evidence. The accused has a right to make full answer and defence under sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.[21] Canadian courts therefore take great care to ensure that the defence has access to relevant evidence.[22] In the words of McLachlin J (as she then was) writing for a majority in *R v Seaboyer*, "to deny a defendant the building blocks of his defence is often to deny him the defence itself".[23]

Of course, relevant evidence is not necessarily admissible. Relevant evidence will be excluded if it is subject to an exclusionary rule or, generally, if the trial judge concludes that its probative value is outweighed by its prejudicial effect.[24] Prejudice is a complex concept that includes the tendency of the evidence to create unfairness against the opposing party, to generate confusion or waste time in the trial, or to invite prohibited lines of reasoning.[25] Evidence that supports

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18. [1988] 1 SCR 670 at 697, 28 BCLR (2d) 145.

19. See *R v Blackman*, 2008 SCC 37 at para 30; *R v Morin*, [1988] 2 SCR 345 at 370, 66 CR (3rd) 1.

20. See Paciocco, "Concept of Relevance", *supra* note 9.

21. *Canadian Charter of Rights and Freedoms*, ss 7, 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See *Seaboyer*, *supra* note 4 at 604; Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 222 [Stuart, *Charter Justice*].

22. See *Seaboyer*, *supra* note 4 (recognizing that "Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence" at 611).

23. *Ibid* at 614.

24. See *R v Grant*, *supra* note 12; *Morris*, *supra* note 12; *Seaboyer*, *supra* note 4.

25. See *R v Grant*, *supra* note 12 (unknown third party suspect evidence carries prejudicial effect of confusing issues and wasting trial time); *R v Corbett*, *supra* note 18 (prejudicial effect of criminal record evidence flows from tendency to invite prohibited inference from propensity to guilt).

a prohibited line of reasoning and has no relevance for any other purpose has no legitimate probative value and will be inadmissible. As the Supreme Court of Canada noted in *Seaboyer*, more difficult issues arise where evidence has relevance for some permissible purpose but also supports some other, prohibited line of reasoning.[26] In such cases the admissibility of the evidence depends on the balancing of the probative value of the evidence in relation to its permissible use against its potential prejudicial effect in terms of its tendency to invite prohibited reasoning. Because of the special reluctance to exclude evidence supporting the defence, this balancing is adjusted so that relevant defence evidence is only excluded where its prejudicial effect *substantially* outweighs its probative value.[27]

While a finding that evidence is relevant is not conclusive of admissibility, a finding that evidence is irrelevant *is* conclusive of admissibility. Irrelevant evidence is automatically inadmissible, and no legitimate inferences can be drawn from it. Questions inviting irrelevant evidence in response cannot be asked of witnesses.[28] These stark consequences of finding evidence irrelevant, along with the contextual nature of the relevance inquiry, confirm the wisdom of the broad view of relevance accepted in Canadian law.

B. Relevance and Consent

The disputed issues in sexual assault cases often include the question whether the complainant consented to the sexual activity that occurred. This section considers the evidence that can be relevant to the issue of consent. The analysis will show that, like other disputed issues, consent is an issue susceptible of proof by both direct and circumstantial evidence.[29]

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26. See *supra* note 4 (noting that "the same piece of evidence may have value to the trial process but bring with it the danger that it may prejudice the fact-finding process on another issue" at 609).

27. See *ibid* at 611.

28. See *R v Lyttle*, *supra* note 11 at para 44; *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478 [cited to SCR] (noting that cross-examination "must conform to the basic principle that all evidence must be relevant in order to be admissible" at 665).

29. It should be acknowledged that lawyers and judges frequently avoid engaging directly with the relevance of circumstantial evidence in sexual assault cases by claiming that evidence of the circumstances is being admitted to go to the "narrative". For recent examples of uses of this narrative concept in sexual assault cases, see *R v JH*, 2018 ONCA 245 at paras 33–34; *R v Qhasimy*, 2018 ABCA 228 at para 12; *R v Shenava*, 2017 ONSC 7667 (CanLII) at 14–15; *R v DKN*, 2017 ONSC 3890 at paras 67–77. While it may sometimes be necessary in the course of trials to hear evidence solely for the purpose of establishing a coherent narrative of the underlying events, the judge must decide whether an item of evidence is relevant to a disputed

Lack of consent on the part of the complainant is an element of the *actus reus* of sexual assault.[30] Like all elements of the offence, absence of consent must be proven by the Crown beyond a reasonable doubt before the accused can be convicted. Consent for the purposes of sexual assault is defined in the *Criminal Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question".[31] What the Crown must prove, then, is that the complainant did *not* voluntarily agree to the sexual activity that is charged as sexual assault. In the landmark case of *R v Ewanchuk*, the Supreme Court of Canada confirmed that consent is a question of the complainant's state of mind at the time of the sexual activity.[32] Consent is *subjective* in the sense that it exists in the mind of the complainant.[33] To be effective, consent must also be *contemporaneous* with the sexual activity.[34]

These two features of consent—that it is subjective and contemporaneous—are central to understanding the offence of sexual assault under Canadian law. They are part and parcel of a conception of consent that laudably aims to protect the bodily integrity of sexual assault complainants, who are usually women, and to prevent sexual exploitation.[35] These two features also sometimes generate misunderstandings about the evidence that is relevant and probative on the issue of consent. Subjectivity and contemporaneity are features of the absence of consent on the facts, which is the object of proof. They are not requirements limiting the evidence that goes to consent. One might, however, mistakenly conclude that if consent must be subjective and contemporaneous then the evidence that goes to consent must share those features.

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issue at trial before it can be relied upon directly in deciding the case. The analysis in this paper therefore focuses on whether evidence is relevant and admissible, and not on whether it might be admitted as narrative.

30. See *R v Ewanchuk*, *supra* note 7 at para 25.

31. *Supra* note 5, s 273.1(1). Some situations where no consent is obtained are listed in subsections 265(3) and 273.1(2) of the *Criminal Code*; these include where the complainant lacks capacity to consent and where consent is vitiated by fraud (*ibid*, ss 265(3), 273.1(2)). Subsection 273.1(1.2) of the *Criminal Code*, which was introduced in December 2018, provides that "whether no consent is obtained" under these sections is a question of law (*ibid*, s 273.1(1.2)). The effect of this subsection is uncertain, but it will likely make trial findings under these subsections reviewable on appeal on a standard of correctness.

32. See *supra* note 7 at para 26.

33. See *ibid*.

34. See e.g. *R v JA*, 2011 SCC 28 at para 46. Parliament recently reaffirmed this principle by enacting the new subsection 273.1(1.1) of the *Criminal Code*, which provides: "Consent must be present at the time the sexual activity in question takes place." See *supra* note 5, s 273.1(1.1).

35. See generally *R v JA*, *supra* note 34.

Consider first the fact that consent is subjective: the object of proof is the complainant's state of mind. Since consent is subjective, one might think that a court would be bound to prefer or accept the complainant's "subjective" testimonial account of her own state of mind, or that evidence relevant to consent is limited to the complainant's account. To understand why these intuitions are misguided, it is helpful to consider how mental states are proven in the criminal law generally. Professor Stuart, Canada's leading scholar on the subjective/objective distinction in criminal law,[36] explained that for crimes of subjective fault, "the trier of fact must determine what was actually going on in the mind of this particular accused at the time in question".[37] The law understands the presence or absence of the requisite state of mind as a fact about which there is a ground truth and which is susceptible of proof like other facts.[38] The evidence that bears on this question can include direct testimony from accused persons about their own mental states, but it can also include any circumstantial evidence that speaks to state of mind. Stuart put it succinctly: "even where the substantive test is subjective awareness, the approach to proof is objective".[39]

These insights about the objective approach to proof of subjective *mens rea* are equally applicable to proof of non-consent in cases of sexual assault. The factual issue to be decided is the complainant's state of mind, but the complainant's testimony is not determinative because her account of her mental state at the time (like the evidence of any witness testifying to any factual issue) might be dishonest or mistaken.[40] Just as it is wrong to think that accused persons will always be acquitted when they deny having had the requisite *mens rea*,[41] it is a

36. Stuart's work is cited in *Ewanchuk* in support of the proposition that consent is a matter of "the complainant's subjective internal state of mind". See *R v Ewanchuk, supra* note 7 at para 26. His work is also frequently cited on the broader question of subjective tests in the criminal law. See *R v Hundal*, [1993] 1 SCR 867, 19 CR (4th) 169 (majority and concurring judgments citing Stuart on subjective tests); *R v Briscoe*, 2010 SCC 13 (citing Stuart on wilful blindness as a subjective state of mind); *R v Tatton*, 2015 SCC 33 (citing Stuart on the specific and general intent in intoxication).

37. Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) at 179 [Stuart, *Criminal Law*].

38. See *ibid* at 177.

39. *Ibid* at 176.

40. To acknowledge that sexual assault complainants might, like any witnesses, be dishonest or mistaken about factual issues is not to endorse the discredited myth that sexual assault complainants are uniquely likely to be fabricating their accounts. See *infra* note 71 and accompanying text. On the other hand, to start from the proposition that complainants must be believed would run contrary to basic norms of the criminal trial, including the presumption of innocence. See e.g. *R v Nyznik*, 2017 ONSC 4392 at para 17.

41. See Stuart, *Criminal Law*, *supra* note 37 at 176–77.

mistake to think that non-consent is necessarily established by a complainant's testimonial claim of non-consent. In both cases the factual issues must be decided by reference to the whole of the evidence, including any circumstantial evidence that could undermine witnesses' testimonial claims about their own states of mind.

In the context of subjective *mens rea*, relevant circumstantial evidence often takes the form of evidence about the nature of the accused's acts, which can give rise to reasonable inferences about what was in the accused's mind. For example, an accused person who calmly shoots another person in the head will likely be found to have intended to kill even if the accused denies that intention on the stand.[42] With respect to consent in sexual assault, the defence may point to evidence of the complainant's acts and communications suggesting that there was in fact voluntary agreement to engage in the sexual activity, even if the complainant now says there was no consent.[43] As Professor Stuart observed, "to determine what was in the complainant's mind, one source of evidence is the complainant's testimony and another is drawing reasonable inferences from the complainant's conduct".[44]

The requirement that consent must be contemporaneous with the sexual activity raises similar issues. The Crown must prove beyond a reasonable doubt a lack of consent at the very time of the sexual activity. But evidence relevant to this factual question can come from other time periods. The Supreme Court of Canada clearly recognized this possibility in *Ewanchuk*: "It is open to the accused to claim that the complainant's words and actions, *before and during the incident*, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place."[45] In sum, while consent is subjective and contemporaneous, evidence going to consent can come from sources other than the complainant and can be linked to time periods other than the moment of the alleged assault. The relevance requirement demands only that the evidence logically support an inference that consent was more or less likely to have been present at the time of the sexual activity.

While Canadian law on these points is clear, misunderstandings have arisen in the cases and commentaries. In *R v Ururyar*, a female complainant testified that the male accused, an acquaintance, engaged in sexual activity with her,

42. See *ibid*.

43. See e.g. Janine Benedet, "*Barton*: 'She Knew What She Was Coming For': Sexual Assault, Prostitution and the Meaning of Consent" (2017) 38 CR (7th) 445 at 449 [Benedet, "*Barton*"].

44. Don Stuart, "*Ewanchuk*: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles" (1999) 22 CR (5th) 39 at 43. See also *R v Ewanchuk*, *supra* note 7 (stating that "[w]hile the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed . . . in light of all the evidence" at para 29).

45. *Supra* note 7 at para 29 [emphasis added].

including intercourse, without her consent.[46] The accused testified that the sexual activity was all consensual. The accused and the complainant met up at a bar where other friends were also gathered, and later they went to the accused's apartment, where the sexual activity took place. The evidence included a text message sent a few hours before the alleged assault from the complainant to the accused, inviting the accused to the bar and saying, "[c]ome drink and then we can have hot sex."[47] The trial judge concluded that the text message was irrelevant, and while his reasons are unclear, they could charitably be interpreted as suggesting that the text was irrelevant because it was not contemporaneous with the sexual activity.

As a matter of logic and human experience, however, the fact that the complainant hours earlier expressed a willingness to engage in consensual sex with the accused had an obvious bearing on the disputed factual issue of consent. As a general proposition, the law accepts that a person's expressed intention to do something at a future time can be evidence that the person went on to do that thing.[48] The text message was not, of course, determinative of the issue of consent; people do not always follow through with their expressed intentions, and in the context of sexual touching a complainant is free to change her mind at any time.[49] But relevance does not require that the evidence be determinative. As a piece of circumstantial evidence that could shed light on whether the complainant voluntarily agreed in her mind at the time of the sexual activity, the text message was relevant on the issue of consent.[50]

R v Nyznik provides another example of a court appearing to limit evidence relevant to consent to evidence contemporaneous with the sexual activity.[51] The case involved three male police officers accused of sexually assaulting the female complainant in a hotel room after a night of drinking. The complainant testified that she did not consent to the sexual activity and that in any event she was incapacitated by alcohol, drugs administered without her knowledge, or a combination of the two. The defence claimed that all the sexual activity was consensual and one of the accused testified to that effect. In the course

46. 2016 ONCJ 448.

47. *Ibid* at para 52.

48. See *R v Starr*, 2000 SCC 40 (hearsay exception for statements of present intention permitting "statements of intent . . . to support an inference that the declarant followed through on the intended course of action, provided it is reasonable on the evidence for the trier of fact to infer that the declarant did so" at para 169).

49. See *R v JA*, *supra* note 34 at para 40.

50. See *Ururyar* ONSC, *supra* note 2. In allowing the appeal against conviction, Dambrot J reasoned that the text was relevant on the issue of consent because it "was part of the narrative of the present encounter" and could be understood as an expression of consent (*ibid* at para 39).

51. See *supra* note 40.

of a carefully-reasoned judgment acquitting the accused, Molloy J wrote the following about the evidence relevant to consent:

> To be clear, it does not matter that the complainant appeared to be interested in Mr. Nyznik. It does not matter that she was flirting, or kissing Mr. Kara, or that she willingly agreed to accompany a group of her male workplace colleagues to a strip bar. It does not matter if she was exchanging sexual banter with the other two men in the back seat of the cab. It would not even matter if she proposed going back to the hotel to have group sex (although I hasten to add that I am not finding as a fact that she made such a proposition). *In terms of consent, all that matters is what happened at the time of the activity in question.* Did the complainant consent? Or was she too incapacitated to consent? Whatever the complainant said or did earlier that night does not mean she consented later.[52]

To be sure, the factual issue to be decided is whether the complainant consented at the time of the sexual activity. It is also undoubtedly true that the complainant's words and actions earlier in the evening "[do] not mean she consented later", in the sense that they are not determinative of the issue.[53]

Still, the complainant's words and actions earlier in the evening might be circumstantial evidence relevant to the disputed issue of consent. It goes too far to suggest that the complainant's conduct and communications earlier in the evening "[do] not matter" or are irrelevant simply because they took place before the sexual touching.[54] This reasoning confuses the substantive rule that consent must be contemporaneous with the evidentiary requirement of relevance. Particularly problematic is the suggestion that even if the complainant had suggested that the group go to the hotel room to have group sex, this fact would be irrelevant on the issue of consent. In fact, like the text message in *R v Ururyar*,[55] such an expression of an intention to engage in consensual sex with the accused would have clear relevance on the issue of consent, because a person's expressed intentions are relevant to the question whether the person went on to act in accordance with those intentions.

A similar issue arises in one passage in Professor Elaine Craig's important new book on sexual assault trials in Canada. In discussing *R v Schmaltz*,[56] a

52. *Ibid* at para 138 [emphasis added].

53. *Ibid*.

54. *Ibid*.

55. See *Ururyar* ONSC, *supra* note 2 at para 39.

56. See *Schmaltz* ABCA, *supra* note 11.

case where consent was in issue and evidence was led about whether there was flirting earlier in the evening between the accused and the complainant, Professor Craig writes: "Under Canadian law, whether the complainant was flirting earlier in the evening is irrelevant to the issue of consent. Consent to sexual touching must be contemporaneous. It must be given at the time of the sexual contact."[57] To the extent that it relies on the timing of the flirting to argue its irrelevance to consent, this argument seems to confuse a requirement of the substantive law with an evidentiary requirement. As explained above, the fact that consent must be contemporaneous does not mean that evidence relevant to the factual question of consent must also be contemporaneous.

In fairness to Professor Craig, the claim that the earlier flirting was irrelevant to consent appears defensible on the facts of the case. *Schmaltz* involved an allegation that the male accused digitally penetrated the complainant's vagina while she was asleep, while the accused testified that the sexual activity was consensual.[58] In that factual context, it is difficult to see how any flirtatious behaviour on the part of the complainant earlier in the evening could have much logical bearing on the question of consent.[59]

The discussion and examples above demonstrate that circumstantial evidence can assist the defence in raising a reasonable doubt on the issue of consent. Circumstantial evidence can also assist the Crown in proving non-consent. Indeed, the Crown must rely exclusively on circumstantial evidence to prove non-consent in cases where complainants are unavailable to testify or for other reasons cannot recall and communicate their states of mind at the time of the sexual activity.[60] Most often a lack of memory flows from intoxication. In *R v Al-Rawi*, for example, a taxi driver was accused of sexually assaulting a woman.[61] According to the facts as found by the trial judge, the complainant had been refused admission into a nightclub because she was intoxicated, and she hailed the accused's taxi to take her home. Eleven minutes later, a police officer found the complainant unconscious, naked from the breasts down in the back of the taxi. The accused had his pants partly undone and was observed trying to hide

57. Craig, *Trials on Trial*, *supra* note 8 at 183–84 [footnotes omitted].

58. See *ibid*; *R v Schmaltz*, [2015] AJ No 1444 (QL) (Alta Prov Ct).

59. In dissent in *Schmaltz* ABCA, Paperny JA reasoned that the flirting "does not go to the ultimate issue at trial, namely whether the complainant consented to being digitally penetrated by the appellant". See *supra* note 11 at para 82. See also Stuart, Comment on *Schmaltz*, *supra* note 10 (stating "it seems likely that any earlier flirting that night had little probative force on the issue of whether there was consent" at 282). One might even argue that earlier flirting by the complainant amounted to other sexual activity that should be excluded by the rape shield provisions, although those provisions are not generally applied to exclude sexual interactions between the accused and the complainant on the same occasion as the alleged sexual assault.

60. See *R v Al-Rawi*, 2018 NSCA 10 at para 69.

61. See *ibid*.

the complainant's urine-soaked pants and underwear. The complainant did not know the accused and later had no memory of her interaction with him.

The trial judge found that the accused touched the complainant sexually when he removed her pants and underwear, but went on to conclude that there was no evidence on the issue of consent.[62] The trial judge reasoned: "at the critical time of 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*".[63] As in the cases discussed above, here the trial judge mistakenly reasoned that evidence relevant to consent is limited to the complainant's direct evidence of non-consent or other evidence contemporaneous with the sexual touching. In fact, as the Nova Scotia Court of Appeal noted in allowing the Crown's appeal against the acquittal, in the *Al-Rawi* case "there was ample circumstantial evidence that would permit the inference to be drawn that either the complainant did not voluntarily agree or lacked the capacity to do so".[64] That the complainant was on her way home in a taxi, so intoxicated that she had already urinated in her pants and was unconscious minutes later, surely provides a strong basis for rejecting the defence claim that the complainant was capable of, and actually did, consent to sexual activity with a stranger.[65] The trial judge's failure to consider this evidence, and his repeated erroneous assertions that there was no evidence on the issue of consent, amounted to an error of law demanding appellate intervention.[66]

C. Context and Circumstances

At the stage of determining relevance, it is appropriate to take a broad view of the circumstances that may have a bearing on disputed factual issues in sexual assault cases. Evidence relevant to consent can include circumstantial evidence, including evidence of "the complainant's words and actions, before and during the incident".[67] While the focus has been on the issue of consent, circumstantial evidence can play a similar role in cases that raise issues of mistaken belief in consent (where the accused's state of mind is at issue) or where the occurrence of the sexual activity itself is disputed. In general, subject to the rules of evidence and the prohibited lines of reasoning that will be discussed in the next section,

62. See *ibid.* The trial judge repeatedly and clearly expressed the view that there was no evidence of a lack of consent at the relevant time (*ibid* at paras 89, 92).

63. *Ibid* at para 93 [emphasis in original] (quoting from the trial judge's reasons).

64. *Ibid* at para 94.

65. For further discussion, see Elaine Craig, "Judging Sexual Assault Trials: Systemic Failure in the Case of *Regina v Bassam Al-Rawi*" (2017) 95:1 Can Bar Rev 179.

66. See *R v Al-Rawi*, *supra* note 60 at para 103.

67. *R v Ewanchuk*, *supra* note 7 at para 29.

both the Crown and the defence should be afforded the opportunity to bring evidence of the circumstances of the alleged assault that may assist the trier of fact in making reasonable findings of fact.

II. Myths and Stereotypes About Sexual Assault

Assessing relevance requires judges and juries to interpret the meaning and value of evidence, including evidence of human behavior, in light of their understanding and experience. This open-ended inquiry creates space for the operation of biases and misconceptions, especially in the area of sexual assault. As L'Heureux-Dubé J observed in *Seaboyer*, determinations of relevance are "particularly vulnerable to the application of private beliefs [because they are] . . . filled by the particular judge's experience, common sense and/or logic".[68] Sexual assault, she further explained, is one domain where "experience, common sense and logic are informed by stereotype and myth".[69] The Supreme Court of Canada has subsequently acknowledged that myths and stereotypes about sexual assault have operated to unfairly discredit complainants in cases of sexual assault and abuse.[70]

This part explores how these myths have operated in our law and the efforts that have been made to eliminate them from the adjudication of sexual assault cases. After identifying a number of forms of reasoning that have been rejected, the analysis will focus on the law's response to the discriminatory uses of evidence of the complainant's sexual history and delayed complaint. This part will conclude with suggestions for a general approach courts might take in trying to avoid stereotypical and discriminatory reasoning. I will argue that myths and stereotypes about sexual assault are properly understood as prohibited

68. *Supra* note 4 at 679.

69. *Ibid*.

70. See e.g. *R v Find*, 2001 SCC 32. The unanimous Court held that

> myths and stereotypes about . . . complainants are particularly invidious because they comprise part of the fabric of social 'common sense' in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

Ibid at para 103. See also *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [cited to SCR]. The majority noted that "speculative myths, stereotypes, and generalized assumptions about sexual assault victims . . . have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences" (*ibid* at para 119).

inferences, and that the law can and should manage the distinction between prohibited and legitimate inferences by defining clearly the lines of reasoning that are forbidden.

A. Some Recognized Myths

In Canadian legal discourse, the phrase "myths and stereotypes" refers to false beliefs about sexual assault that distort the fact-finding process.[71] Sometimes these beliefs are false in the factual sense that they do not match the known realities of sexual assault as a social phenomenon. The beliefs that sexual assault complainants are uniquely likely to be lying,[72] and that rapists are usually strangers to their victims,[73] fall into this category. Other sexual assault myths involve misconceptions about the law and legal responsibility, such as the beliefs that non-consent must be demonstrated through physical resistance,[74] that a complainant's consent can be implied from the circumstances even in the absence of voluntary agreement in the complainant's mind,[75] and that a complainant's testimonial account must be corroborated by independent evidence before guilt can be proven.[76] It is difficult to know how widely-held

71. See *R v Find*, *supra* note 70 at paras 101–03; *R v Mills*, *supra* note 70 at para 119.

72. See Craig, *Trials on Trial*, *supra* note 8 (discussing the history and tenacity of the idea that "false rape allegations are prevalent" at 95); Robyn Doolittle, "Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless", *The Globe and Mail* (3 February 2017), online: <theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309> (documenting widespread disbelief of sexual assault complainants by Canadian police).

73. See *Seaboyer*, *supra* note 4, L'Heureux-Dubé J, dissenting in part (noting reliance on stereotypes to discredit sexual assault complainants, including the stereotype of the "[r]apist as a [s]tranger" at 652–53); Statistics Canada, *Self-Reported Sexual Assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017) (great majority of sexual assaults perpetrated by friend, acquaintance, neighbour, family member or spouse).

74. See e.g. *R v Barton*, *supra* note 7 (tenacity of "'ghost element' of victim resistance" in sexual assault at para 156).

75. See *R v Ewanchuk*, *supra* note 7 (trial judge erred in relying on spurious defence of "implied consent" and concluding that complainant's conduct amounted to consent even though she did not consent in her mind at para 31).

76. The former requirement that the complainant's testimony be corroborated was abrogated by the enactment of what is now section 274 of the *Criminal Code*, which provides that, for sexual offences, "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration." See *supra* note 5, s 274.

are these beliefs in Canadian society, but the Supreme Court of Canada has accepted that such myths are common enough that they can and do distort the adjudication of sexual assault cases.[77]

Regrettably, Canadian case law furnishes many examples of lawyers and judges endorsing these misconceptions.[78] For example, in *R v SB*, the Court of Appeal of Newfoundland and Labrador determined that the trial judge erred in permitting defence counsel to lead evidence of the complainant's sexual history that depicted her as promiscuous and led to her "gratuitous humiliation and denigration".[79] The most notorious recent example is that of then Camp J, whose egregious conduct in the 2014 trial in *R v Wagar*[80]—which included his asking a sexual assault complainant why she could not just keep her knees together to ward off the sexual assault—led the Canadian Judicial Council to recommend his removal from the bench.[81]

While it would be difficult to compile an exhaustive list, and there has been no attempt to do so here, numerous myths and stereotypes have been recognized in Canadian law and can be readily identified. The two most notorious surround complainants, usually women, who have previously engaged in sexual activity. These discriminatory inferences are known as the "twin myths"[82] and they hold that:

i. a complainant's sexual experience makes it more likely that she consented on the occasion in question; and
ii. a complainant's sexual experience undermines her credibility as a witness.[83]

Other discriminatory beliefs about sexual assault complainants include:

i. a woman who dresses in a sexually appealing or provocative manner lacks credibility or is responsible if she is sexually assaulted;[84] and

77. See *R v Find*, *supra* note 70 (where the court discussed the "prevailing existence of such myths and stereotypes" at para 101).

78. For sources citing many examples of such mythical and stereotypical reasoning in recent Canadian trials, see Craig, *Trials on Trial*, *supra* note 8; Randall, *supra* note 8; Tanovich, *supra* note 8; Benedet, "Sexual History Evidence", *supra* note 8.

79. 2016 NLCA 20 at paras 60, 43, rev'd on other grounds 2017 SCC 16.

80. (2014) CarswellAlta 2756 (Alta Prov Ct).

81. See *Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (Ottawa: Canadian Judicial Council, 2017). Justice Camp later resigned.

82. *Seaboyer*, *supra* note 4 at 604.

83. See *ibid*; *R v Darrach*, 2000 SCC 46 at para 2.

84. See e.g. *R v Cain*, *supra* note 6 ("long-discredited myths and stereotypes about women

ii. consultation with a mental health professional, in itself, indicates that a complainant is not a reliable witness.[85]

Some myths surround what constitutes consent, including:

i. a lack of verbal objection constitutes consent;[86] and
ii. a lack of physical resistance constitutes consent.[87]

Finally, the law rejects a number of common but unrealistic expectations about how people who have experienced sexual assault behave, including:

i. a real victim of sexual assault will resist physically;[88]
ii. by virtue of having resisted physically, a real victim will be physically injured;[89]
iii. a real victim will immediately report the assault to police;[90] and
iv. a real victim will thereafter avoid the perpetrator.[91]

Each of these misconceptions has been recognized as an inference from evidence that is capable of distorting the fact-finding process in sexual assault trials.

B. Two Key Examples

To understand how the law seeks to remove these myths and stereotypes, it will be useful to consider more closely two forms of evidence: the complainant's sexual history and delayed complaint. These two forms of evidence have much in common. In both cases, certain inferences from the evidence that are now rejected as stereotypes were once endorsed by the common law. Both areas have seen statutory reform aimed at rejecting these stereotypes, followed by developments in the case law. Examination of how these forms of evidence are regulated in Canadian law will yield insights into the greater project of removing myths and stereotypes from the adjudication of sexual assault cases.

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deserving to be raped because they dress provocatively" at para 30).

85. See e.g. *R v Mills*, *supra* note 70 at para 119.

86. See e.g. *R v Ewanchuk*, *supra* note 7 ("that silence, passivity or ambiguous conduct constitutes consent is a mistake of law" at para 51).

87. See e.g. *R v Barton*, *supra* note 7 ("historical tendency to treat a complainant's *silence, non-resistance or submission* as 'implied consent'" at para 180 [emphasis in original]).

88. See *ibid*; *Seaboyer*, *supra* note 4 at 651–52.

89. See e.g. *Seaboyer*, *supra* note 4 at 660.

90. See e.g. *R v W(R)*, [1992] 2 SCR 122 at 136, 13 CR (4th) 257.

91. See e.g. *R v Caesar*, 2015 NWTCA 4 at para 6.

(i) Complainant's Sexual History

Historically, the common law permitted a rape complainant to be cross-examined about her sexual reputation and her prior sexual acts with the accused and others.[92] These matters were understood as relevant to the complainant's credibility as a witness because the common law viewed "unchaste" women as less worthy of belief.[93] The complainant's sexual reputation and sexual history with the accused were also seen as relevant to consent because "unchaste" women were viewed as more likely to consent generally[94] and having consented to sex with the accused in the past was thought to suggest consent on the occasion in question.[95] The common law's assumptions about women, and particularly the "twin myths" that sexually experienced women are more likely to consent and less worthy of belief, are obviously offensive. More than a quarter century ago, the Supreme Court of Canada proclaimed these twin myths "discredited".[96]

Legislative attempts to combat these stereotypes have come in the form of rape shield laws. An early version of Canada's rape shield provisions came into force in 1983, restricting cross-examination and other evidence on the complainant's sexual activity on other occasions. The 1983 law made evidence of the complainant's sexual reputation inadmissible to go to credibility, and also excluded all evidence of the complainant's sexual activity with anyone other than the accused, with three stipulated exceptions.[97] In *Seaboyer*, the Supreme Court of Canada struck down section 276 of the *Criminal Code*, which demanded "blanket exclusion" of sexual history evidence that did not fit within the exceptions.[98] By a majority, the Court held that the legislated exceptions

92. See *Seaboyer*, *supra* note 4 at 604; *R v Krausz* (1973), 57 Cr App R 466 at 472 (CA (Eng)); Ronald Joseph Delisle et al, *Evidence: Principles and Problems*, 12th ed (Toronto: Thomson Reuters, 2018) at 296–97.

93. In *Seaboyer*, the Supreme Court of Canada acknowledged that historically the common law accepted "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief". See *supra* note 4 at 604.

94. *Ibid*.

95. See Delisle et al, *supra* note 92 at 296–97.

96. *Seaboyer*, *supra* note 4 at 604.

97. See *Criminal Code*, RSC 1970, c C-34, ss 246.6–246.7, as amended by *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 1980–81–82–83, c 125, s 19. At the time these provisions were struck down in *Seaboyer*, they had been renumbered as sections 276 and 277. See *Criminal Code*, *supra* note 5, ss 276–77, as it appeared on 14 August 1992 (other sexual activity and reputation evidence, respectively).

98. *Supra* note 4 at 613.

were insufficient because there were other situations where the complainant's sexual history would be relevant and probative for the defence without relying on myths or stereotypes.[99] Blanket exclusion of sexual history evidence violated the accused's *Charter* right to a fair trial by excluding evidence potentially "of critical relevance to the defence".[100]

Following *Seaboyer*, Parliament amended the rape shield provisions to comply with the *Charter*. The version of section 276 that was adopted at that time remains largely in force today. Parliament passed some amendments to the section in December 2018,[101] but for the most part these amendments do not appear to change the legal tests for admissibility of evidence of the complainant's sexual history. One key provision that has remained constant since 1992 is subsection 276(1), which provides that in sexual offence cases:

> 276(1) . . . evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.[102]

Subsection 276(1) operates to prohibit entirely the admission of evidence of the complainant's other sexual activity to support the twin myths.

Next, subsection 276(2) makes sexual history evidence generally inadmissible but allows for its admission when four conditions of admissibility are met. That subsection was amended in 2018 and currently provides that in sexual offence cases:

> 276(2) . . . evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless . . . the evidence
>
> (a) is not being adduced for the purpose of supporting an inference described in subsection (1);

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99. See *ibid* (stating that "jurisprudence affords numerous examples of evidence of sexual conduct which would be excluded by s. 276 but which clearly should be received in the interests of a fair trial").

100. *Ibid* at 616.

101. See *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29.

102. *Criminal Code*, *supra* note 5, s 276(1).

> (b) is relevant to an issue at trial; and [*sic*]
> (c) is of specific instances of sexual activity; and
> (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[103]

The first condition of admissibility—that the evidence is not being adduced to support the twin myths prohibited in subsection 276(1)—was added in 2018. This addition does not appear to change the effect of the provision, since twin myths reasoning was already, and remains, prohibited by subsection 276(1).

The last major component of the analysis is subsection 276(3), which like subsection 276(1) was unaffected by the recent amendments. Subsection 276(3) lays out a number of factors judges are required to take into account in determining the admissibility of such evidence. These factors include the accused's right to make full answer and defence, the complainant's dignity and privacy, the need to remove discriminatory biases from fact-finding, and society's interest in encouraging the reporting of sexual assault.[104] The broad range of factors to be considered in the admissibility decision reflects a legislative intention not only to eliminate prohibited forms of reasoning based on sexual history but also to prevent the use of sexual history evidence to harass, demean or intimidate sexual assault complainants.

Finally, the 2018 amendments added a new subsection, 276(4), which provides: "For the purpose of this section, *sexual activity* includes any communication made for a sexual purpose or whose content is of a sexual nature."[105] This new subsection seems likely to present courts with interpretive challenges. For example, should it be read to apply to communications from the complainant to the accused that could indicate consent? Would it, for example, cover the "[c]ome drink and then we can have hot sex" text message that was sent by the complainant to the accused a few hours before the alleged sexual assault in *Ururyar*,[106] as discussed above?[107] One might argue that the rape shield provisions should not apply to such communications between the complainant and the accused because, provided that they take place on the same occasion as the alleged sexual assault, they are not "other" sexual activity but rather are part and parcel of "the sexual activity that forms the subject-matter of the charge".[108] Alternatively, one might conclude that the rape shield provisions do apply to such communications, and that their admissibility must be determined under

103. *Ibid*, s 276(2).

104. See *ibid*, s 276(3).

105. *Ibid*, s 276(4) [emphasis in original].

106. *Ururyar* ONSC, *supra* note 2 at para 37.

107. See *supra* notes 48–52 and accompanying text.

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

subsection 276(2) by weighing their legitimate probative value on issues including consent against their prejudicial effect, including their tendency, if any, to invite twin myths reasoning.

An even more difficult and long-standing problem of interpretation is to determine exactly what subsection 276(1) prohibits. Early on, some read the legislation broadly to prohibit all use of sexual history evidence to go to consent and credibility, a construction that raised *Charter* concerns because it seemed to recreate the kind of blanket exclusion criticized in *Seaboyer*.[109] This broad construction has not been adopted by the Supreme Court of Canada. In *R v Crosby*, for example, the Court ruled evidence of the complainant's prior sexual encounter with the accused admissible because it was bound up with a prior inconsistent statement that shed light on her credibility.[110] In *R v Darrach*, the Supreme Court of Canada unanimously upheld the constitutionality of section 276, finding that it does not constitute an impermissible "blanket exclusion".[111] The Court held that subsection 276(1) only prohibits admission of evidence to support "two specific, illegitimate inferences": the twin myths.[112] Prohibiting these "discriminatory generalizations"[113] does not preclude the admission under subsection 276(2) of sexual history evidence to support non-discriminatory inferences, even on the issues of consent and credibility. These permissible, non-discriminatory inferences could include "evidence of sexual activity . . . proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement".[114]

The most troubling questions regarding the scope of the twin myths surround the use of evidence of prior sexual activity between the accused and the complainant. The previous version of section 276 struck down in *Seaboyer* applied only to evidence of the complainant's sexual activity with persons other than the accused. In laying out common law guidelines governing admissibility of sexual history in *Seaboyer*, McLachlin J wrote, "I question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none."[115] When Parliament enacted the new section 276 shortly thereafter, it accepted the Court's invitation and made the rape shield provisions equally applicable

109. See e.g. RJ Delisle, "Potential Charter Challenges to the New Rape Shield Law" (1992) 13 CR (4th) 390. See also David M Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive *Charter* Challenge" (1993) 21 CR (4th) 223 [Paciocco, "New Rape Shield"].

110. [1995] 2 SCR 912, 141 NSR (2d) 101.

111. *Supra* note 83 at para 32.

112. *Ibid*.

113. *Ibid* at para 34.

114. *Ibid* at para 35.

115. *Supra* note 4 at 633.

to sexual activity with the accused and with others. This extension of the rape shield provisions has been controversial. Professor Stuart has consistently taken the position that "Canada's rape shield protection should not apply equally to prior sexual history with the accused."[116]

Arguably, however, the time to question whether sexual activity with the accused should be covered by the rape shield provisions has passed. Justice McLachlin's observation that such evidence often has little or no value has proven true. For example, in *R v JSS*, the defence sought to lead evidence of numerous details of the prior sexual relationship between the accused and the complainant, including the use of sex toys and acts of intercourse during menstruation.[117] The trial judge excluded most of the evidence as irrelevant and inviting only the "discredited myths that a woman who enjoys sex must therefore have consented on these occasions, or is inherently less believable because of her supposedly loose morals".[118] As Professor Craig has pointed out, the effect of this evidence was to portray the complainant "as 'the type of woman' who would consent to anything".[119] To the extent that it operates to exclude evidence tendered for such purposes, the extension of the rape shield provisions to cover sexual activity with the accused appears easily defensible.

Since section 276 does apply to sexual activity with the accused, the challenge is to understand precisely the inferences the provisions prohibit. Clarity on this point has proven elusive, especially when it comes to inferences about consent where the evidence relates to other consensual sexual activity between the complainant and the accused.[120] One reading of the provisions is that, regardless of the factual circumstances, the twin myths prohibition rules out any inference that the complainant's having consented to sexual activity with the accused on some other occasion makes it more likely that the complainant consented on the occasion in question.[121] This broad reading of the twin myths is arguably available on the language of subsection 276(1), but it brushes close to the proposition rejected in *Darrach* that subsection 276(1) is a blanket exclusion of sexual history evidence going to consent.[122]

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116. Stuart, *Charter Justice*, *supra* note 21 at 281.

117. 2014 BCSC 804 at para 9.

118. *Ibid* at para 31.

119. Craig, *Trials on Trial*, *supra* note 8 at 51.

120. See Stuart, *Charter Justice*, *supra* note 21 at 280.

121. This broad reading of subsection 276(1) has been advanced, for example, by Professor Janine Benedet, who has argued that the inference "that consent to activity on a prior occasion makes it more likely on a subsequent occasion . . . is an impermissible inference that cannot be saved by resort to the balancing factors — this evidence is deemed inadmissible by the *Code*". See Benedet, "*Barton*", *supra* note 43 at 447.

122. See *R v Darrach*, *supra* note 83 at para 32.

An alternative view holds that the twin myths categorically prohibited by subsection 276(1) are the bad character inferences that the complainant's sexual history makes her "the type to consent, or the type who should not be believed".[123] Professor David Paciocco, now Justice of the Court of Appeal for Ontario, advanced this view of the twin myths soon after the adoption of the new section 276 in 1992, and *Darrach* has been read as an affirmation of this more limited reading of the section.[124] This understanding of the twin myths prohibition is grounded on a reading of subsection 276(1) that emphasizes the statutory limitation that the inferences prohibited are those that suggest that increased likelihood of consent or decreased credibility flow "by reason of the sexual nature of that activity".[125] This narrower view also maps on to the historical use of sexual history as a form of bad character evidence targeting women, which is the context in which twin myths reasoning was defined and rejected.[126]

Canadian courts remain divided over the scope of the twin myths prohibited by subsection 276(1).[127] Ontario courts have often defined the twin myths narrowly. In *R v Strickland*, Heeney J admitted evidence of the existence of a prior sexual relationship between the accused and the complainant.[128] The evidence was relevant on the disputed issue of consent because it is "at least somewhat more probable that a complainant would consent to having sex with a man with whom she had an existing sexual relationship, than if no such relationship existed at all".[129] The prior sexual relationship was admissible to show an increased likelihood that the complainant consented, Heeney J reasoned, but not in a manner prohibited by section 276.[130] The jury would be misled if evidence of the ongoing sexual relationship were excluded, and admitting the evidence provided context to "dispel the inference of the unlikelihood of consent" that would arise from leaving the jury with the impression that the alleged sexual

123. Paciocco, "New Rape Shield", *supra* note 109 at 226.

124. See Stuart, *Charter Justice*, *supra* note 21 at 278–79; RJ Delisle, "Adoption, Sub-silentio, of the Paciocco Solution to Rape Shield Laws" (2001) 36 CR (5th) 254.

125. Paciocco, "New Rape Shield", *supra* note 109 at 233.

126. See *Seaboyer*, *supra* note 4. The Court identified the "twin myths" as "the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief" (*ibid* at 604).

127. See Stuart, *Charter Justice*, *supra* note 21 at 280.

128. (2007), 45 CR (6th) 183, 2007 CanLII 3679 (Ont Sup Ct).

129. *Ibid* at para 28.

130. See *ibid* at para 24.

assault occurred between strangers or people with no prior relationship.[131] This reasoning from *Strickland* has been followed in Ontario and elsewhere.[132]

An opposing view emerges from the Court of Appeal of Alberta. Recently in *R v Goldfinch*, that Court held that *Strickland* is not good law in Alberta.[133] *Goldfinch* involved an allegation of non-consensual sex between a male accused and a female complainant. The two had lived together for several months, after which the complainant ended the relationship. Subsequently, the two remained friendly and still saw each other, and occasionally they met for sex. The defence tendered evidence of the fact of the sexual relationship between the accused and the complainant that was ongoing at the time of the alleged offence. The Crown opposed admission of this evidence, and offered to concede by way of context "that the parties had had a prior relationship where they had lived together but that they had broken up and 'remained friends', that the complainant would come over to the respondent's place on occasion and would sleep over, and that the parties remained on good terms".[134] Relying on *Strickland*, the trial judge admitted the evidence of the ongoing sexual relationship. The jury acquitted the accused and the Crown appealed. In setting aside the acquittal, the majority of the Court of Appeal of Alberta held that the only purpose for admitting the evidence was to support one of the twin myths: "namely that the complainant was more likely to have consented to sexual activity on the occasion in question because she had consented in the past".[135]

The Court of Appeal of Alberta took a similarly broad view of the twin myths prohibition in subsection 276(1) in *R v Barton*.[136] In that complex, horrific and tragic case, the accused agreed to pay a woman for sex and then inflicted a fatal injury on her in the course of sexual activity.[137] The defence acknowledged

131. *Ibid* at paras 34–35. This reasoning was relied upon by Berger J in dissent in *R v Goldfinch*. See 2018 ABCA 240.

132. See *R v Provo*, 2018 ONCJ 474; *R v WJA*, 2010 YKTC 108 at para 34; *R v Field*, 2010 YKSC 11 at paras 2, 4.

133. *R v Goldfinch*, *supra* note 131 at para 31.

134. *Ibid* at para 7.

135. *Ibid* at para 46. For commentary supportive of the majority analysis in *Goldfinch*, see Hamish Stewart, *Sexual Offences in Canadian Law* (Toronto: Thomson Reuters, 2018) (loose-leaf updated 2018, release 32) at 8–16.1.

136. *Supra* note 7.

137. Barton was charged with first degree murder after Cindy Gladue died from an 11 cm perforation to her vaginal wall. The Crown's principal theory was that he intentionally cut her vaginal wall with a sharp object. The defence admitted that the accused inflicted the fatal injury in the course of sexual activity, but claimed that the injury was the accidental result of consensual digital penetration. The Crown's secondary theory was that even if the injury was caused by digital penetration of Gladue's vagina, the accused was guilty of manslaughter

that while the accused and the deceased, Cindy Gladue, agreed on a price in advance of the sexual activity, the accused did not actually pay Gladue for her sexual services on the night of her death. The Court of Appeal of Alberta determined that, in deciding whether the deceased consented to the accused's digital penetration of her vagina that night, it was irrelevant in law that he paid her the same agreed price for sex the night before and that similar sexual activity occurred.[138] Understanding how the rape shield provisions apply on the facts of *Barton* is complicated by the fact that, at trial, those provisions were never applied; evidence of the previous sexual activity between the accused and the complainant was improperly admitted without objection from the Crown and without any application or analysis under section 276.[139] The Court was clear, however, in holding that subsection 276(1) made the evidence of the prior sexual interaction categorically irrelevant and inadmissible on the issue of consent.[140] The Court held that under subsection 276(1), "evidence of consent to sexual activity between a complainant and an accused on a *prior* occasion is *irrelevant to whether the complainant consented* at the time in question."[141]

This broad view of the twin myths prohibition may raise trial fairness concerns. Disputed factual issues including consent should generally be decided on the basis of all the evidence, including any circumstantial evidence, that has a legitimate logical bearing on those issues. Adjudicating the case in *Goldfinch* on the basis that the parties were "friends" when they were in fact regularly having sex arguably means deciding the case on a fictitious set of facts more favourable to the Crown than the actual circumstances. In *Barton*, there was clearly a danger that the jury might draw discriminatory inferences about Gladue's character as an Indigenous woman who was intoxicated and involved in sex work; those inferences would be impermissible on any reasonable understanding of the rape shield provisions.[142] But quite apart from those prejudicial bad character

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because he caused her death by the unlawful act of sexual assault. This theory put in issue whether Gladue consented to the accused's digital penetration of her vagina on the night of her death. See *R v Barton*, *supra* note 7.

138. See *ibid* at paras 211–12. See also Benedet, "*Barton*", *supra* note 43 at 447.

139. The trial judge's failure to apply section 276 to the admission of this evidence was one of the legal errors that necessitated a new trial.

140. See *R v Barton*, *supra* note 7. See the section of the judgement entitled "Evidence of Prior Sexual Conduct Inadmissible Regarding Gladue's Consent" (*ibid* at paras 143–52). The Court explicitly left open the possibility that the evidence could be admissible to support a defence of mistaken belief in consent (*ibid* at para 149, n 67).

141. *Ibid* at para 149 [emphasis in original].

142. See *supra* note 7. As the Court of Appeal of Alberta rightly pointed out, the potential for discriminatory reasoning about the propensity to consent and general worthiness of the deceased

inferences, the evidence that the deceased agreed to sell her sexual services to the same man, in the same location, for the same price, on two consecutive nights could logically support an inference that she may, in her mind, have consented on the second night to the kind of digital penetration that occurred on the first night.[143] This inference is arguably not prohibited by subsection 276(1) because it flows from the commercial nature of the parties' interactions and not, as required by subsection 276(1), "by reason of the sexual nature" of the prior sexual activity.[144] In *Barton* there were also circumstantial factors favouring the Crown's position that there was no consent to the digital penetration on the second night, including the fact that the accused admitted to using more force on the second night and the level of violent force that would have been required to cause the fatal injury.[145] However, the existence of circumstantial evidence favouring the Crown cannot justify dismissing circumstantial evidence that favours the defence as irrelevant.

The exclusion under subsection 276(1) of the prior sexual history evidence in *Goldfinch* and *Barton* fits uneasily with the Supreme Court of Canada's conclusions that "s. 276(1) is an evidentiary rule that only excludes material that is not relevant",[146] and that a total ban on twin myths reasoning is acceptable because such reasoning is inherently discriminatory and has "no place in a rational and just system of law".[147] One might, of course, understand these conclusions as a rule of constructive irrelevance, such that evidence is deemed irrelevant and discriminatory because it fits within the language of subsection 276(1), broadly construed.[148] However, one of the main messages of *Seaboyer* is that the defence is generally entitled to rely on factually relevant evidence, and factual relevance cannot be negated by legislative or judicial fiat. I would argue that the Supreme Court of Canada's strong language in *Seaboyer* and *Darrach* about the discriminatory character and blanket irrelevance of twin myths reasoning should be understood to limit the kinds of inferences that merit being placed in that category. On this view, an interpretation of subsection

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and women like her was high (*ibid* at para 128). It was incumbent on the trial judge to warn the jury against these discriminatory forms of reasoning (*ibid* at paras 161–62).

143. See Don Stuart, "*Barton*: Sexual Assault Trials Must be Fair not Fixed" (2017) 38 CR (7th) 438 (noting that "on the issue of whether the complainant actually consented to sexual conduct including the violent fisting on the second night it was surely relevant that she might have consented to fisting the night before?" at 441).

144. *Criminal Code*, *supra* note 5, s 276(1).

145. See *supra* note 7 at paras 144, 195.

146. *R v Darrach*, *supra* note 83 at para 37.

147. *Seaboyer*, *supra* note 4 at 630.

148. This appears to be the effect of the reasoning in *Barton*, which distinguishes factual relevance from legal relevance and suggests that subsection 276(1) makes evidence legally irrelevant. See *supra* note 7 at para 146.

276(1) that excludes evidence that is factually relevant for non-discriminatory inferential purposes is an interpretation of subsection 276(1) that is overbroad.

It is well to remember that evidence of the complainant's sexual history that is not excluded under subsection 276(1) is not necessarily admissible. Rather, the admissibility of such evidence falls to be decided on the criteria outlined in subsection 276(2), including the balancing of probative value against prejudicial effect. Arguably, that balancing exercise is the central feature of the rape shield regime and most contested admissibility questions should be decided at that stage. Adopting a broad interpretation of twin myths reasoning under subsection 276(1) risks excluding relevant evidence without fully considering either its potential probative value or the extent of its prejudicial effect.

In any event, Alberta law clearly takes a broad view of the twin myths that are prohibited absolutely by subsection 276(1), while Ontario courts have tended to take a narrower view. The language of the *Criminal Code* appears flexible enough to support either of these views. Both *Barton* and *Goldfinch* have been appealed to the Supreme Court of Canada, so there is reason to hope that clarification on this point will be forthcoming. Whatever interpretation is ultimately adopted, clarity on the scope of the twin myths will improve the state of the law.

(ii) Delayed Disclosure

Like the complainant's sexual history, delayed reporting of sexual victimization was the subject of problematic assumptions at common law.[149] The law upheld an expectation that a true victim would immediately report the offence to authorities.[150] Consequently, delays in reporting were understood to suggest a false allegation.[151] This assumption grounded the common law doctrine of recent complaint, which comprised two rules. First, despite the general rule against prior consistent statements and without the defence raising the issue of delay, the prosecution was entitled to lead evidence of any prompt report of a sexual offence to rebut the adverse inference that was thought to flow naturally from delayed reporting.[152] Second, when reporting was delayed, judges were

149. For a detailed discussion, see Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence" (2011) 36:2 Queen's LJ 551 [Craig, "Delayed Disclosure"].

150. See *Kribs et al v The Queen*, [1960] SCR 400, 33 CR 57 [*Kribs* cited to SCR] ("presumptions . . . that she is expected to complain upon the first reasonable opportunity, and . . . that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story" at 405).

151. See *ibid*; *R v Boyce* (1975), 7 OR (2d) 561 at 577, 28 CR (NS) 336 (CA).

152. See *R v Boyce*, *supra* note 151.

required to instruct juries that they could draw an adverse inference against the complainant.[153]

We now know that most sexual assault victims never report the experience to police, and that many others delay in reporting.[154] The common law premises that a complainant's immediate reporting was "normal" and "natural" and delayed reporting was "a virtual self-contradiction of her story"[155] are on their face invalid and discriminatory. Consequently, in 1983, the doctrine of recent complaint was expressly abrogated by an amendment to the *Criminal Code*.[156] This statutory reform clearly repudiated the myth that real victims report immediately, and it abrogated the two rules above: the prosecution can no longer lead evidence of a prompt report unless the defence raises the issue of delay, and juries must not be instructed that delayed reporting tells against the complainant's credibility.[157] Beyond that, the effect of the amendment was unclear. The spare statutory language left open whether evidence of delayed reporting was admissible and what inferences could be drawn from it.

The Supreme Court of Canada addressed issues of delay in *R v DD*, which involved a delayed disclosure of sexual abuse by a child complainant.[158] The trial judge admitted expert evidence from a child psychologist, who testified that delay said nothing either way about the truth of an allegation. By a majority, the Supreme Court of Canada held that the psychologist's evidence should have been excluded as unnecessary because the proposition he advanced could be communicated in a jury instruction. The majority suggested that that juries be instructed as follows:

> there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint

153. See *ibid* at 579.

154. See Statistics Canada, *supra* note 73 at 17 (five per cent of sexual assaults reported to police in 2014); Craig, "Delayed Disclosure", *supra* note 149 at 557 (disincentives make delayed reporting likely).

155. *Kribs*, *supra* note 150 at 405.

156. See *supra* note 5. Section 275 provides that, in respect of sexual offences, "[t]he rules relating to evidence of recent complaint are hereby abrogated" (*ibid*, s 275).

157. See *R v O'Connor* (1995), 25 OR (3d) 19, 100 CCC (3d) 285 (CA) (Crown no longer permitted to bring evidence of recent complaint); Craig, "Delayed Disclosure", *supra* note 149 at 559.

158. 2000 SCC 43.

> is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.[159]

Arguably, the message contained in this jury instruction differs subtly from the psychologist's testimony.[160] While the expert could be understood as suggesting that delay was irrelevant (because it said nothing either way about the truth of the allegation), the Supreme Court of Canada stopped short of indicating that delay is irrelevant to credibility. Instead, the majority held that delay means nothing "standing alone", but that it is "one circumstance to consider in the factual mosaic of a particular case".[161]

If delayed reporting remains a circumstance to be considered, what inferences from this evidence remain open after *DD*? The qualification that delay means nothing "standing alone" might be read as an invitation to view delay as a factor that weighs against credibility where unrelated factors pointing to a lack of credibility are also present.[162] However, Professor Craig has persuasively argued that *DD* should be interpreted as prohibiting entirely the inference that delay is generally damaging to credibility.[163] On this view, rejecting the generalization that true victims disclose promptly means that delay can only be used to undermine credibility when there is something in the factual circumstances suggesting that the individual complainant would likely have made a prompt report.[164]

C. A Balancing Approach to Eliminating Myths

Canadian law on sexual history evidence and delayed disclosure reveals a consistent approach to removing myths and stereotypes from the sexual assault adjudication. Since relevance is contextual and, subject to the rules of evidence, the *Charter* requires that the defence generally be permitted to lead relevant evidence,[165] the Supreme Court of Canada has avoided sweeping

159. *Ibid* at para 65.

160. I am grateful to David Lepofsky for this insight.

161. *R v DD*, *supra* note 158 at para 65.

162. Craig, "Delayed Disclosure", *supra* note 149 at 565–68; *R v HT*, 2009 NLCA 69 at para 7.

163. See Craig, "Delayed Disclosure", *supra* note 149 at 564.

164. See *ibid*.

165. For discussion of the law's inclusionary inclination in respect of relevant defence evidence and its relationship to the accused's fair trial rights under the *Charter*, see generally *Seaboyer*, *supra* note 4. For further discussion of *Seaboyer*, see also *supra* notes 22–25 and accompanying text.

pronouncements about relevance and admissibility. Suggestions that sexual history evidence or delayed disclosure are always irrelevant or inadmissible, in general or in relation to particular issues like credibility or consent, have been rejected. Instead, the law prohibits stereotypical or discriminatory lines of reasoning flowing from these forms of evidence, but acknowledges that they may be relevant for other, legitimate inferential purposes.

I would argue that Canadian courts should maintain this approach in addressing other myths and stereotypes about sexual assault. Broad conclusions that particular forms of evidence are irrelevant should be avoided. Instead, false premises and discriminatory lines of reasoning should be identified and explicitly prohibited. Identifying the impermissible lines of reasoning will permit judges to distinguish them from legitimate lines of reasoning. In short, myths and stereotypes about sexual assault are properly understood as prohibited inferences, and the tendency of some forms of evidence to invite these prohibited inferences is a form of prejudice.[166] That prejudice can lead to exclusion of the evidence, but it will not invariably do so if the evidence is also relevant for some other purpose.

The exercise of weighing the permissible and impermissible uses of evidence is familiar in evidence law.[167] Evidence solely relevant to support a prohibited inference has no legitimate probative value and is inadmissible. Evidence that could support an impermissible inference but that also logically supports some legitimate line of reasoning is normally admissible subject to a limiting instruction.[168] Following *Seaboyer*, a trial judge will exercise discretion to exclude evidence where, despite any limiting instruction, its potential to be used for the prohibited purpose outweighs (or, for defence evidence, substantially outweighs) its legitimate probative value.

Admittedly, the flexible approach to admissibility described here may not be as effective as bright-line rules in rooting out myths and stereotypes from sexual assault trials. For example, blanket exclusion of sexual history evidence or evidence of delayed complaint would undoubtedly do more to prevent improper uses of these forms of evidence. If the evidence could not be used at all, there would be no concerns about its being used to support discriminatory or stereotypical inferences. However, Canadian law has rejected such bright-line

166. See Hamish Stewart, "Marc Rosenberg and the Implied Fairness Guarantee" in Berger, Cunliffe & Stribopoulous, *supra* note 8, 13 (stating that "arguably [the] most important . . . type of prejudicial effect is the danger of admitting evidence which . . . tends to encourage the drawing of impermissible inferences" at 25).

167. See e.g. *Seaboyer*, *supra* note 4 at 609.

168. See *R v Corbett*, *supra* note 18 ("best way to balance . . . is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information" at 691).

rules and embraced a flexible, context-sensitive approach to relevance and admissibility for good reasons. This approach remains the only way to ensure that the defence has access to relevant evidence for legitimate purposes.[169]

Examples where courts have successfully identified and rejected myths and stereotypes can be drawn from cases involving evidence about complainants' attire. Often, evidence of the complainant's manner of dress has no relevance at all outside the prohibited inferences that provocative attire impairs credibility or invites sexual activity. Thus, in *R v Cain*, the Court of Appeal of Alberta rejected a defence claim that the complainant's credibility was damaged because she allegedly wore a t-shirt with an image of a penis on it shortly after the alleged sexual assault.[170] The Court held that the complainant's "manner of dress was irrelevant to her credibility. By suggesting otherwise, defence counsel was relying on long-discredited myths and stereotypes about women deserving to be raped because they dress provocatively."[171]

Even where the complainant's manner of dress has some relevance for a legitimate purpose, courts can be careful to separate the permissible and impermissible purposes of the evidence. In *Nyznik*, for example, Molloy J addressed the complainant's attire in the reasons for judgment:

> There was nothing at all wrong with what [the complainant] was wearing that night. In cross-examination, defence counsel suggested to her that she wore a low-cut top in order to make herself attractive to all the men who would be present at the party. I found that suggestion to be offensive and irrelevant. What a woman wears is no indication of her willingness to have sexual intercourse, nor can it be seen as even the remotest justification for assuming she is consenting to sex.[172]

Nevertheless, Molloy J held that the complainant's attire was relevant for two legitimate purposes. Her willingness to stand outside in the freezing cold in light clothing was an indication of her strong interest in spending time with one of the accused, and her ability to walk in high-heeled boots shortly before the alleged sexual assault had probative value on her level of intoxication and capacity.[173] *Nyznik* was a judge-alone trial, but this approach to separating the

169. Recall that in *Seaboyer*, the Supreme Court of Canada concluded that blanket exclusion of sexual history evidence violated the accused's fair trial rights under the *Charter* because it could have the effect of excluding critical defence evidence that was relevant for legitimate, non-discriminatory inferential purposes. See *supra* notes 99–100 and accompanying text.

170. *Supra* note 6.

171. *Ibid* at para 30.

172. *Supra* note 40 at para 188.

173. See *ibid*.

legitimate and prohibited uses of the evidence could also be followed in a jury trial. Juries can be instructed on the permissible and impermissible inferences from evidence and warned to avoid the latter. Moreover, defence evidence about the complainant's attire could be excluded if its potential to invite prohibited reasoning substantially outweighed its probative value for legitimate inferential purposes.

Notice that this entire analysis depends on achieving a clear understanding of the lines of reasoning that are prohibited. Myths and stereotypes must be identified with precision. Absent a clear understanding of the prohibited inferences, judges will be unable to instruct juries (or themselves) to avoid them.[174] They will also be ill equipped to meaningfully balance the probative value of evidence against its prejudicial effect. Clarity in identifying and articulating myths and stereotypes about sexual assault is therefore fundamental to the task of separating these prohibited lines of reasoning from legitimate inferences and making those distinctions meaningful in the adjudication of sexual assault cases. As we will see in the next part of this paper, this clarity has not always been achieved.

III. Complainant's Subsequent Relationship with the Accused

Courts have struggled to define the permissible and impermissible uses of the complainant's after-the-fact conduct, and particularly the complainant's relationship with the accused after the alleged sexual assault. This issue arose in *R v Ghomeshi*, where the three complainants claimed that the accused suddenly and without consent subjected them to violent force in a sexual context while they were on dates.[175] All three complainants continued to socialize with the accused after the alleged assaults: each went on at least one further date with him, each sent him flirtatious correspondence inviting further contact, one had sexual contact with him, and another sent him flowers and an email less than a day after the alleged assault indicating a desire to have sex with him. The trial judge acquitted the accused on all counts, finding that the complainants

174. See e.g. *R v Barton*, *supra* note 7. The trial judge appears to have overlooked the prejudicial effects that could flow from the facts that the deceased was an Indigenous woman who was intoxicated and engaged in sex work. The Court of Appeal of Alberta noted that, given the prevalence of discriminatory stereotypes about Indigenous women, "without a sufficient direction to the jury, the risk that this jury might simply have assumed that Barton's money bought [the deceased] Gladue's consent to whatever he wanted to do was very real, indeed inescapable" (*ibid* at para 128). The trial judge's failure to instruct the jury to avoid such stereotyping was an error of law.

175. *Supra* note 3.

were not reliable witnesses primarily because they each misstated facts in testimony or police statements. In determining that the complainants were not credible and reliable witnesses, Horkins J also put some weight on the complainants' continued associations with the accused, which he found "out of harmony with the assaultive behaviour" alleged.[176] It is not clear whether this line of reasoning is open to a judge under Canadian law.

Canadian courts have rejected as a myth the idea that real victims of sexual assault do not continue to associate with the perpetrator.[177] In *R v CAM*, the trial judge convicted the accused of sexual assault and related offences against his ex-wife.[178] On appeal, the defence argued that it was unusual "for rape victims to invite perpetrators back into the house and console them (which was the complainant's evidence)".[179] Writing for the unanimous Manitoba Court of Appeal, Mainella JA rejected as "unsound" the defence argument the complainant's credibility was damaged because her actions "did not conform to some 'idealized standard of conduct'".[180] This holding accords with the principle affirmed by the Supreme Court of Canada in *DD* that "there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave".[181] These cases suggest that triers of fact fall into error when they rely on rigid, general expectations about how victims act in the aftermath of a sexual assault.

In *R v ARJD*, the trial judge acquitted the accused of sexual offences against his step-daughter when she was between eleven and sixteen years of age.[182] In acquitting the accused, the trial judge made comments that were scrutinized on appeal and are worth quoting in full:

> I do not discount the complainant's credibility because she delayed complaint or because she did not cry out or search out help from her mother or other family members. To judge her credibility against those myths of appropriate behaviour is not helpful. The supposed expected behaviour of the usual victim tells me nothing about this particular victim.

176. *Ibid* at paras 135–36.

177. See *R v Caesar*, *supra* note 91 at para 6; *Bernatchez c R*, 2013 QCCA 700 at para 18.

178. 2017 MBCA 70.

179. *Ibid* at para 47.

180. *Ibid* at para 52.

181. *Supra* note 158 at para 65.

182. (23 February 2016), Edmonton 140876020Q1 (Alta QB), rev'd 2017 ABCA 237 [*ARJD* ABCA], rev'd 2018 SCC 6 [*ARJD* SCC].

> Having said all of that, however, given the length of time that these events occurred over, and the fact that the most serious event occurred months before [the complainant] complained, I would have expected some evidence of avoidance either conscious or unconscious. There was no such evidence. As 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. While I recognize that everyone does not react in the same way, the evidence suggests that despite these alleged events the relationship between the accused and the complainant was an otherwise normal parent/child relationship. That incongruity is significant enough to leave me in doubt about these allegations.[183]

The trial judge thus acquitted solely on the basis of the lack of evidence that the complainant avoided the accused.

The Court of Appeal of Alberta split over whether the trial judge's comments amounted to a legal error. The majority overturned the acquittal, finding that the trial judge relied on an impermissible stereotype when he judged the complainant's evidence against a general expectation that a sexual abuse victim would avoid the perpetrator. The majority held that "absence of avoidant behaviour or a change in behaviour as a generalization is logically irrelevant and as such, cannot form the basis of a credibility assessment leading to reasonable doubt—because we know that all sexual assault victims behave differently".[184] In dissent, Slatter JA concluded that the trial judge was not relying on a myth but drawing a permissible inference about the credibility of a particular complainant in a particular factual context.[185] An appeal by right to the Supreme Court of Canada was dismissed, in brief reasons,

> substantially for the reasons of the majority of the Court of Appeal. 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

183. *ARJD* ABCA, *supra* note 182 at para 82 [emphasis omitted] (quoting the trial judge's reasons).

184. *Ibid* at para 58, Paperny & Schutz JJA.

185. See *ibid* at para 98, Slatter JA, dissenting.

> behaviour of the stereotypical victim of sexual assault. This constituted an error of law.[186]

ARJD confirms that upholding rigid, generalized expectations about the behaviour of sexual assault victims constitutes impermissible stereotyping. That was a point of agreement for all the appellate judges.[187] The conclusion that the trial judge engaged in such stereotyping also appears defensible on the facts, since the trial judge articulated a broad and questionable generalization about how "one would expect that a victim of sexual abuse" would behave.[188]

What seems less clear after *ARJD* is whether and when evidence of complainants' after-the-fact conduct is admissible and what legitimate inferences it can support. The majority in the Court of Appeal of Alberta used strong language in holding that a complainant's non-avoidance of the perpetrator says "nothing" about a sexual assault allegation and is "logically irrelevant".[189] One might read these comments as suggesting that a complainant's after-the-fact conduct in relation to the accused is generally (or even always) irrelevant and inadmissible, or that no inferences favourable to the defence can be drawn from it. The latter suggestion is problematic because, as pointed out by Slatter JA in dissent at the Court of Appeal of Alberta, evidence of the complainant's avoidant behaviour is frequently admitted to support the Crown's case in sexual assault prosecutions.[190] It hardly seems consistent with the presumption of innocence to hold that a particular species of evidence can be admissible when it assists the Crown but inadmissible when it assists the defence.[191]

Moreover, the idea that the complainant's after-the-fact conduct is inadmissible conflicts with the Supreme Court of Canada's usual approach to eliminating myths and stereotypes about sexual assault, as discussed in the previous section. That approach does not involve prejudging categories of evidence irrelevant. It would be more faithful to the Supreme Court of Canada's approach in other areas to acknowledge, like the dissent in *ARJD*, that prohibiting rigid expectations about how sexual assault victims behave does

186. *ARJD* SCC, *supra* note 182 at para 2.

187. See *ARJD* ABCA, *supra* note 182 (dissent disapproving "presumptions about how sexual assault victims, as a whole, should react" at para 97).

188. *Ibid* at para 5.

189. *Ibid* at paras 39, 58.

190. See *ibid* at para 96.

191. See *ibid* (noting that "[i]f actual behavioural changes of the complainant can be evidence of sexual assault, the absence of such behavioural changes must also be probative" at para 96, Slatter JA, dissenting). It is worth noting that Canadian courts have taken a broad view of the relevance of the after-the-fact conduct of accused in criminal cases generally. See e.g. *R v Calnen*, 2019 SCC 6 (where the accused's elaborate efforts to destroy his domestic partner's

not preclude inferences from the complainant's after-the-fact conduct that are rooted in the specific factual context.[192]

The complainant's after-the-fact conduct was found to have legitimate probative value in *R v LS*.[193] In that case, the Court of Appeal for Ontario ruled admissible evidence that an ongoing sexual relationship between the accused and the complainant continued as if nothing had happened after an alleged sexual assault. Writing for the Court, Doherty JA concluded that the evidence was relevant to support the inference suggested by the defence that "the parties carried on as if nothing had happened because nothing had in fact happened" and the alleged sexual assault never occurred.[194] Justice Doherty acknowledged that people's reactions vary and that it would be wrong to conclude that the unchanged relationship "demonstrated that the assault did not occur".[195] He observed, however, that relevance is a low standard that does not require the evidence to be determinative. *LS* thus suggests that, in some cases, the impermissible line of reasoning involves not just using the evidence but exaggerating its probative value.

Canadian law rejects stereotyping about the expected behaviour of sexual assault victims: victims do not follow a standard script, and courts cannot reason as if they do. To this point, however, Canadian law remains somewhat uncertain about where to draw the line between impermissible stereotypes and legitimate inferences from complainants' after-the-fact conduct. The cases suggest that while impermissible inferences are based on generalized expectations of victims, legitimate inferences will be rooted in the particular facts of the case.[196] Legitimate inferences are also likely to be modest: a claim that after-the-fact conduct is relevant may be defensible where a claim that it is determinative is not. Indeed, the idea the complainant's after-the-fact conduct is determinative—such that, for example, a woman who maintains a relationship with the accused cannot have been assaulted—constitutes a mythical line of reasoning that juries should be warned against, even if the evidence is understood as relevant. Given these complexities, evidence of the

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body were determined to be relevant both to whether her death was an accident or homicide and to whether the homicide was manslaughter or murder).

192. See *ARJD* ABCA, *supra* note 182 (noting that "[p]ost-event behaviour is relevant and probative, even if all complainants do not react the same way" at para 98).

193. 2017 ONCA 685.

194. *Ibid* at para 88.

195. *Ibid* at para 89.

196. This suggestion accords with the principle that findings of fact must be based on case-specific evidence and not generalizations, which the Supreme Court of Canada recognized in *R v S(RD).* See [1997] 3 SCR 484, 151 DLR (4th) 193.

complainant's relationship with the accused after the alleged assault remains a challenging issue for Canadian courts. The analysis would be advanced by a clearer authoritative statement of the inferences that are prohibited.

Conclusion

Eliminating myths and stereotypes from the adjudication of sexual assault cases is and should be a high priority for Canadian courts. Misguided beliefs about sexual assault skew the fact finding process, and reliance on those beliefs by judges and lawyers is one reason many experience and perceive courtrooms as a hostile environment for sexual assault complainants.[197] Enhanced social awareness of the pervasiveness of sexual violence and the impunity many perpetrators enjoy, coupled with compelling critiques of the Canadian legal response to that violence,[198] have undermined confidence in the criminal justice system more broadly. In this climate courts must make every effort to ensure that the sexual assault cases that come before them are adjudicated without resort to misconceptions and discriminatory lines of reasoning.

Criminal courts also carry the heavy responsibility of ensuring that every accused person has a fair trial. Subject to the rules of evidence and the prohibition of particular inferences, this requires that the defence generally be permitted to bring forward all evidence that is logically relevant to the material issues. Repudiating myths and stereotypes means rejecting certain discriminatory lines of reasoning, but it does not make whole categories of evidence irrelevant or inadmissible. Indeed, sweeping prohibitions that would rule out any consideration of particular forms of evidence are avoided as inconsistent with the accused's right to make full answer and defence and with our overall approach to finding facts. Outside the prohibited lines of reasoning identified as myths, relevance remains an elastic concept that leaves a wide scope for reasoning from logic and human experience.[199]

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197. See Elaine Craig, "The Inhospitable Court" (2016) 66:2 UTLJ 197.

198. See e.g. Craig, *Trials on Trial*, *supra* note 8.

199. As the Court of Appeal of Alberta recently put it:

> [A] stereotypical myth about sexual assault complainants is a form of prohibited reasoning and cannot be relied upon by triers of fact. However, triers of fact are entitled, indeed are required, to rely on common sense and human experience in assessing evidence and the credibility of witnesses, including reasonable assumptions about how ordinary people can be expected to act.

R v PFJ, 2018 ABCA 322 at para 14.

Distinguishing myths and stereotypes from legitimate lines of reasoning continues to be a challenge for Canadian courts. Judges cannot be expected to manage this task well and consistently unless the prohibited inferences are identified with clarity. As we have seen, there are areas in Canadian law—including the twin myths prohibited under subsection 276(1) and the use of evidence of the complainant's after-the-fact conduct—where this precision remains elusive. One hopes that appellate courts will provide leadership in bringing clarity to this important area of evidence law.