File Number: 37715

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

A.R.J.D.

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE RESPONDENT, ATTORNEY GENERAL OF ALBERTA

PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*
PUBLICATION BAN PURSUANT TO SECTION 486.4 OF THE *CRIMINAL CODE*

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TABLE OF CONTENTS

Page No.

PART I – OVERVIEW and STATEMENT OF FACTS 1

OVERVIEW 1

STATEMENT OF FACTS 2

Complainant's s.715.1 *Criminal Code* statement 2

Complainant's trial testimony 3

Trial Judge's Reasons for Judgment 3

Alberta Court of Appeal Memorandum of Judgment – majority decision 5

Alberta Court of Appeal Memorandum of Judgment – minority decision 11

PART II – ISSUES 12

PART III – ARGUMENT 13

QUESTION IN ISSUE 1 – DID THE CROWN RAISE THE NECESSARY QUESTION OF LAW AS REQUIRED UNDER S.676(1)(A) OF THE *CRIMINAL CODE OF CANADA*? 13

The problems posed by sexual stereotyping in Canadian law remain as an ongoing concern 13

Myths and stereotypes have long plagued Canadian criminal justice 15

Stereotypes and children 18

What is a sexual stereotype? 19

An appellate court may overturn an acquittal where reasonable doubt is tainted by the use of myths and stereotypes 20

Judgments from other Canadian courts support the Crown's jurisdiction to appeal 24

The majority of the Court of Appeal correctly concluded that the Trial Judge made the asserted legal error 28

Response to selected arguments made by the Appellant 31

The "recent complaint" jurisprudence assists in consider the approach to stereotyping .. 32

Other concerns raised by the Appellant 35

QUESTION IN ISSUE 2 - DID THE TRIAL JUDGE MAKE THE LEGAL ERROR ASSERTED, NAMELY, RELYING UPON STEREOTYPICAL ASSUMPTIONS ABOUT HOW A VICTIM OF A SEXUAL ASSAULT WOULD BEHAVE? 37

The Trial Judge's credibility assessment was rooted in a stereotype 37

PART IV – SUBMISSIONS ON COST 39

PART V – ORDER SOUGHT 39

PART VI – TABLE OF AUTHORITIES AND LEGISLATION 40

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The assessment of the credibility and reliability of witnesses is central to the criminal trial process and the trier of fact has sole responsibility for making such determinations. It is not a matter for a polygraph,[1] or for an expert.[2] Rather, the trier of fact must bring his/her knowledge and personal experiences to the deliberations, to draw inferences from proven facts, and to assess credibility.[3] Credibility is the product of the trier of fact's view of the evidence, combined with experience, logic and an intuitive sense of the matter.[4] The issue of credibility is one of fact and is not determined by following a set of legal rules.[5]

2. In general, credibility assessments by a trial judge attract a high degree of deference.[6] An appellate court cannot ignore the trial judge's unique position to see and hear witnesses, as the process of assessing credibility is more of an art than a science.[7] It is often difficult to articulate the complex intermingling of impressions that result in a particular witness being believed or disbelieved.[8]

3. Although the trier of fact necessarily views the evidence through the lens of judicial experience, the credibility of a witness must be judged on the evidence, and not upon generalized and stereotypical assumptions about how a victim of sexual abuse ought to properly behave. While some sexual assault victims delay reporting, others do not. While some sexual assault victims suffer discernable post-traumatic stress disorder, others do not. While some domestic assault victims leave the abuse, others do not.[9] In short, there is no valid profile in existence which can identify a child who has been sexually abused.[10] For that reason, generalized and

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[1] ***R v Beland,*** [1987] 2 SCR 398
[2] ***R v Marquard,*** [1993] 4 SCR 223 at p 248
[3] ***R v Pan,*** [2001] 2 SCR 344 at para 43
[4] ***R v Marquard,*** [1993] 4 SCR 223 at p 248
[5] ***White v The King,*** [1947] SCR 268 at p 272
[6] ***R v Vuradin,*** [2013] 2 SCR 639 at para 11
[7] ***R v S(RD),*** [1997] 3 SCR 484 at para 128
[8] ***R v REM,*** [2008] 3 SCR 3 at para 28
[9] Paciocco, David M., "Coping with Expert Evidence About Human Behavior", (1999), 25 Queen's LJ 305 at p 312 [Tab 1]
[10] ***R v Olscamp,*** **[**1994] OJ No 2926 at para 17 (ON SC)

stereotypical assumptions made by the trier of fact about a victim of sexual abuse risk injustice and jeopardize the fair trial process.

4. When, as here, the trier of fact drinks from the poisoned chalice of myths and stereotypes in the expectation that a youthful victim of sexual abuse will demonstrate some behavioural change(s), such as avoiding her abuser, and resorts to that stereotypical thinking (with no foundation in the evidence) to acquit, the resulting reasonable doubt is tainted by legal error and is properly subject to a Crown appeal from acquittal.

5. This Court, and other Canadian appellate courts, have rejected the drawing of presumptive adverse inferences against the credibility of a Complainant based upon stereotypical assumptions of how persons react to sexual abuse, and have clearly and consistently indicated that to do so constitutes reversible legal error. Crown appeals from acquittal based upon the stereotypical assessment of witness credibility involve legal error as the resulting reasonable doubt is irrevocably tainted. To deny an appeal on the basis that is simply a veiled attempt to appeal an "unreasonable acquittal" is to immunize pernicious stereotypical thinking from appellate review, and to permit such myths to continue to thwart criminal justice unabated. The criminal law must relentlessly guard against the use of myths and stereotypes in the assessment of complainant credibility. Where it occurs, an appeal must be permitted whether it arises from conviction or acquittal. To decide otherwise would be to risk the significant efforts made by Parliament and Canadian courts to identify and eliminate the various myths and stereotypes that persist, often remain unrecognized, and dangerously masquerade as "logic and common sense".

Statement of Facts

6. Except as they are added to or commented upon, the Respondent accepts the facts and the review of the lower court Judgments as set out in the Appellant's factum.

Complainant's s.715.1 *Criminal Code* statement

7. In addition to CM, the Complainant, advising the interviewing police officer that her relationship with the Appellant was "okay I guess", and that they sometimes "fought and yelled

about school", the Complainant was directly asked if she got along with the Appellant. CM responded, "I kinda think so".[11]

Complainant's trial testimony

8. CM testified at trial that the touching incidents would usually happen in her room, the kitchen, or the bathroom,[12] and that she was uncertain about the usual duration. When pressed for an estimate, she indicated it was, "maybe more than five minutes".[13]

9. CM advised that she told two friends about the Appellant sexually assaulting her, but denied that she informed her cousin. CM could only speculate as to how her aunt became aware of the allegations, which resulted in her aunt telling her mother about the sexual assaults. CM speculated that her cousin must have suspected something.[14] The first person CM told was her friend Maverick, "maybe a couple of months, a year" before she gave her statement to police on July 31, 2014.[15] CM told Maverick because he was a friend, and she waited before telling anyone because "it's not something I wanted to tell anyone".[16] CM first told her mother about the sexual abuse the day before she went to her police interview, but confided in Maverick because he was someone she could talk to.[17]

Trial Judge's Reasons for Judgment

10. The Trial Judge described the Appellant's testimony that he was never alone with the Complainant, except in the kitchen, as "incredible" when rejecting the Appellant's evidence. The Trial Judge had no doubt that over the six-year period the Appellant would have had the opportunity to commit at least some of the alleged acts.[18] The Trial Judge's description of the Appellant's credibility did not end there.

11. In the view of the Trial Judge, the Appellant "was caught in the exaggeration which became ludicrous the more he tried to explain himself", and his testimony "that he was never

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[11] Transcript of C.M. Interview - Appellant's Record ("AR"), Vol 1, Part IV, Tab 6 at p 54/5-6
[12] Transcript of the Trial ("Transcript") - AR, Vol II, Part V, Tab 7 at p 14/3-8
[13] Transcript - AR, Vol II, Part V, Tab 7 at p 14/14-18
[14] Transcript - AR, Vol II, Part V, Tab 7 at pp 24/4-35/2, 26/9-16
[15] Transcript - AR, Vol II, Part V, Tab 7 at pp 14/33-15/2
[16] Transcript - AR, Vol II, Part V, Tab 7 at p 15/15-16
[17] Transcript - AR, Vol II, Part V, Tab 7 at p 15/18-27
[18] Appellant's Factum at para 18; Transcript - AR, Vol II, Part V, Tab 7 at pp 60/5-6, 60/19-20

alone with the Complainant is simply not worthy of belief".[19] The Trial Judge concluded that he did not believe the Appellant.[20]

12. The Complainant's inability to be precise about the number of instances of sexual touching or the details of those events, did not trouble the Trial Judge.[21] The Trial Judge reasoned that the Complainant was "simply guessing", but did not feel in the circumstances that her estimations served to render the Complainant's evidence less believable or reliable.[22]

13. In addition to these credibility observations, the Trial Judge found one additional factor supported the Complainant's general credibility. The Trial Judge noted that the Complainant did not exaggerate the details of the sexual contact, even though the police interview provided, "incentive to add detail, colour, and exaggerate and yet [the Complainant] did not appear to do any of those things".[23]

14. As the Appellant correctly argues, the Trial Judge properly instructed himself that he must avoid relying upon the doctrine of recent complaint, or stereotypes that require a sexual assault victim to make a timely complaint.[24] The Trial Judge stated as follows:

> 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 behaviour of the usual victim tells me nothing about this particular victim. [Emphasis Added][25]

15. Following this legally correct self-instruction, the Trial Judge erroneously concluded he had a reasonable doubt as a "matter of logic and common sense" because of the incongruity posed by the absence of evidence suggesting the Complainant demonstrated behaviours consistent with sexual abuse, or that her behaviour changed such as by avoiding the Appellant:

> 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

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[19] Transcript - AR, Vol II, Part V, Tab 7 at p 60/16-20
[20] Transcript - AR, Vol II, Part V, Tab 7 at p 61/13-15
[21] Appellant's Factum at para 19
[22] Transcript - AR, Vol II, Part V, Tab 7 at p 60/32-35
[23] Transcript - AR, Vol II, Part V, Tab 7 at p 60/25-30
[24] Appellant's Factum at para 20
[25] Transcript - AR, Vol II, Part V, Tab 7 at p 60/37-41

> 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 assault 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 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 to leave me in doubt about these allegations. [Emphasis Added][26]

Alberta Court of Appeal Memorandum of Judgment – majority decision

16. Paperny J.A. and Schutz J.A. ("the majority") framed the issue raised on appeal by posing this question: did the trial judge err by relying on an impermissible stereotype, or myth, about the behaviour of sexual assault victims in assessing the Complainant's credibility and acquitting the Appellant? In reaching the conclusion that the Trial Judge erred, the majority earmarked the Trial Judge's expectation that "a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change in behaviour such as avoiding the perpetrator", as a form of legal error.[27]

17. The majority held that the Trial Judge's reliance upon a stereotype to assess credibility bearing on reasonable doubt, constitutes an error of law. In the majority's view, "reasonable doubt is not a shield for appellate review if that doubt is informed by stereotypical and therefore prejudicial reasoning". Similarly, they viewed the Trial Judge's suggestion that his stereotypical thinking was merely logic or common sense as a licence for such impermissible thinking to continue "unmasked and unabated". This, in turn, answers the question of why stereotypical reasoning cannot be insulated from appellate review.[28]

18. Nor did the majority feel an accused could rely upon the right to make full answer and defence, and the related criminal standard of proof beyond a reasonable doubt, as justification for prejudicial generalizations about the credibility of sexual assault victims. In the majority opinion, when dealing with child complainants, this consideration is of paramount importance. The analytical difficulty often occurs without the trier of fact being aware that he/she is drawing inferences based upon prejudicial generalizations that have no foundation in the record. In its

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[26]Transcript - AR, Vol II, Part V, Tab 7 at p 61/2-11
[27] Reasons for Judgment of the Court of Appeal of Alberta ("Reasons CA") - AR, Vol I, Part I, Tab 4 at para 5
[28] Reasons CA - AR, Vol I, Part I, Tab 4 at para 9

stead, the trier of fact resorts to inaccurate and unfair inferences, which the trier interprets as "common sense and logic".[29]

19. The majority observed that sometimes the impermissible stereotypical form of reasoning is quite "opaque", but on the facts of this appeal, the impermissible reliance was "patent". Although the Trial Judge warned himself about certain myths, he then relied upon another that he did not recognize, "cloaked as it was with the *faux imprimatur* of common sense".[30] The majority framed the issue as follows: "is the expectation of avoidant conduct or clear behavioural changes by a sexual assault victim a matter of logic and common sense, or is it just another stereotype or myth that cannot be supported either as a matter of logic or as an available inference on the record"?[31]

20. The majority reminded themselves that a Crown appeal from acquittal under s.676(1)(a) must necessarily involve an error of law, and that such errors are reviewable on a standard of correctness. They concluded, following this Court's decision in *R v JMH,* [32] that reasonable doubt must be tainted by a legal error before appellate intervention in an acquittal is permitted. The onus is a heavy one. The majority cautioned that the Crown may not appeal an "unreasonable acquittal".[33]

21. In the majority view, "although witness credibility is a question of fact, not law, legal error arises if the 'assessment of a witness' evidence is based on a wrong legal principle, or the judicial consideration about the witness' evidence is derivative of a misapprehension of a legal principle". Further, citing this Court's Judgment in *R v D(D),*[34] "…presumptive adverse inference[s] based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse" constitute reversible error.[35]

22. The majority also reminded themselves that on a Crown appeal from acquittal, assuming an error of law is demonstrated, that the identified error must have a material bearing on the

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[29] Reasons CA - AR, Vol I, Part I, Tab 4 at para 6
[30] Reasons CA - AR, Vol I, Part I, Tab 4 at para 7
[31] Reasons CA - AR, Vol I, Part I, Tab 4 at para 8
[32] ***R v JMH,*** [2011] 3 SCR 197 at para 39
[33] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 24-26
[34] ***R v D(D),*** [2000] 2 SCR 275 at para 63
[35] Reasons CA - AR, Vol I, Part I, Tab 4 at para 28

acquittal; although, as the majority noted, this requirement falls short of requiring the Crown to demonstrate the verdict would necessarily have been different.[36]

23. The question of law, identified by the majority, was the legal effect ascribed by the trial judge to the finding that there was no evidence of avoidance "either conscious or unconscious" or change of behaviour such as the Complainant avoiding the Appellant.[37] The *sole* reason provided by the Trial Judge to acquit the Appellant was there was no evidence that the Complainant avoided the Appellant or changed her behaviour after the incidents of sexual touching [Emphasis Added]. The Trial Judge deemed the absence of such evidence to be "inconsistent with her evidence of having been abused, thus negatively affecting her credibility and raising a reasonable doubt".[38] It follows, the majority reasoned, that if the reasoning about the Complainant's credibility is based on an impermissible myth or stereotype, it "in the concrete reality of the case…had a material bearing on the acquittal[s]" such that the Crown met its burden to establish an error of law warranting a new trial.[39]

24. The majority, reviewing the trial evidence, noted that the Complainant was never asked in her police statement, or at trial, if she ever attempted to avoid the Appellant. The Appellant testified that he never noticed the Complainant trying to avoid him. In cross-examination, the Complainant was only asked if she felt uncomfortable when the Appellant drove her to school, which she denied. The Complainant maintained throughout her RCMP statement and her testimony that she "didn't really want anyone to know about it"… "didn't want anyone to find out"…. "[b]ecause it changes everything". The Complainant further explained when she was questioned about not remembering some details of the events that it was because she "spent a very long time trying to forget it". She was asked directly about nightmares and bedwetting, which she denied. When the prosecution asked her about how the events had affected her "emotionally or physically", she stated: "I'm a very closed person. I don't like to talk to people anymore". As the majority observed, she was never asked if becoming "closed" or developing a disinclination to talk, included closing down or withdrawing from the Appellant.[40] The Complainant described her relationship with the Appellant as we "kinda" got along, "didn't

[36] Reasons CA - AR, Vol I, Part I, Tab 4 at para 27
[37] Reasons CA - AR, Vol I, Part I, Tab 4 at para 29
[38] Reasons CA - AR, Vol I, Part I, Tab 4 at para 31
[39] Reasons CA - AR, Vol I, Part I, Tab 4 at para 32
[40] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 33-37

really not get along, but it was just kind of neutral", and they would otherwise have "family fights".[41]

25. The majority concluded that evidence of a lack of avoidant behaviour by a complainant tells the trier of fact nothing.[42] They observed there was no explanation given by the Trial Judge to support his *expectation* that a post-assault victim *generally,* or the Complainant *specifically*, would avoid her assaulter such that the failure to do so would damage her credibility as being inconsistent with the sexual abuse alleged.[43]

26. In the view of the majority, the limited questions and answers provided by the Complainant and the Appellant translated into a crucial fact finding by the Trial Judge that there was no evidence of avoidant behaviour (or a change in behaviour), which, standing alone, is questionable and problematic. The Trial Judge did not assist by explaining how this evidence was weighed, assessed or how he determined the evidence to be sufficient to reach that conclusion.[44]

27. The majority further explained as follows:

(i) The search for avoidant behaviour involves circular reasoning as "avoidance", as an interactional aspect can be equally attributable to both the Appellant and the Complainant - or to neither of them - its presence or absence signifies nothing;[45]

(ii) There is no inviolable rule on how victims of sexual assault will behave. Just like the failure to make a timely complaint, a failure to demonstrate avoidant behaviour "must not be the subject of any presumptive inference based upon now rejected views of how persons (particularly children) react to acts of sexual abuse" (citing this Court in *R v D(D)* at para 63);[46]

(iii) The reliance on "logic and common sense" by the Trial Judge about how humans react to sexual assault is questionable as to relevance and reliability. It is not

[41] Reasons CA - AR, Vol I, Part I, Tab 4 at para 37
[42] Reasons CA - AR, Vol I, Part I, Tab 4 at para 39
[43] Reasons CA - AR, Vol I, Part I, Tab 4 at para 40
[44] Reasons CA - AR, Vol I, Part I, Tab 4 at para 38
[45] Reasons CA - AR, Vol I, Part I, Tab 4 at para 41
[46] Reasons CA - AR, Vol I, Part I, Tab 4 at para 42

logical nor a matter of common sense to expect a child complainant to behave in any particular manner;[47]

(iv) Stereotyping is not a "legitimate anchor" on which to tie credibility assessments, and cannot translate to less credibility;[48]

(v) Although an acquittal can rest upon the "absence of evidence", the absence of evidence cannot be used to support the Trial Judge's unmet expectation of a stereotypical behavioural response (citing *R v RGB* [49]);[50]

(vi) A Trial Judge may evaluate the "actual evidence" in a case, but where the evidence and relevance is not identified, and the Trial Judge relies instead upon "expected" post-sexual assault behaviour, the evaluation of credibility is rooted in impermissible myths and stereotypes;[51] and

(vii) There is no juridical foundation upon which a trial judge could correctly conclude that child sexual assault victims *will* demonstrate avoidant behaviour in relation to their sexual assault perpetrators. Or, on the evidence, that this particular Complainant would exhibit avoidance. This judicial expectation is devoid of the certainty or invariability that is a precondition to legal reliability. The expected prescriptive behavioral norm perniciously tainted the Trial Judge's credibility assessment of the Complainant.

28. Citing legal authorities from this Court, and from the Alberta Court of Appeal, the majority identified the Trial Judge's expectation of avoidant behaviour as error of law.[52] They explained this is because reliance upon myths and stereotypes invokes impermissible reasoning that is often, if not always, an error of law.[53]

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[47] Reasons CA - AR, Vol I, Part I, Tab 4 at para 43
[48] Reasons CA - AR, Vol I, Part I, Tab 4 at para 44
[49] ***R v RGB,*** 2012 MBCA 5 at para 59
[50] Reasons CA - AR, Vol I, Part I, Tab 4 at para 45
[51] Reasons CA - AR, Vol I, Part I, Tab 4 at para 46
[52] ***R v ADG,*** 2015 ABCA 149 at para 33; ***R v Caesar,*** 2015 NWTCA 4 at para 6; ***R v Hajar,*** 2016 ABCA 222; ***R v Barton,*** 2016 ABCA 68; ***R v Wagar,*** 2015 ABCA 327; ***R v Seaboyer,*** [1991] 2 SCR 577 at p 634; ***R v Mills,*** [1999] SCR 668 at para 119; ***R v D(D),*** [2000] 2 SCR 275 at paras 63, 65; ***R v TEM,*** 1996 ABCA 312
[53] Reasons CA - AR, Vol I, Part I, Tab 4 at para 50

29. The majority agreed with the Crown's contention that the Trial Judge initially and correctly instructed himself that he must not discount the Complainant's credibility because she delayed complaint, but that the legal correctness of his self-instruction stopped there. The Trial Judge then proceeded erroneously to instruct himself that a credible Complainant would demonstrate some avoidance of her step-father.[54] The Trial Judge reached this conclusion in the absence of evidence, expert or otherwise, to support his view that avoidant behaviour would be expected or exhibited by the Complainant. Further, the Trial Judge disregarded the plausible explanation that the Complainant wanted to maintain normalcy in the family home because, as she testified, telling would "change everything".[55]

30. The majority also agreed with the Crown's submission that there is no legally relevant distinction between a trial judge impermissibly relying upon the lack of a timely complaint to devalue credibility, and his impermissible expectation that a victim of sexual assault would demonstrate some change of behaviour, such as avoiding the abuser, as somehow being confirmatory or corroborative.[56] This is because the generalization is logically irrelevant and cannot form the basis of a credibility assessment as absence of avoidant behaviour or behavioural changes tells the trier of fact nothing about the credibility assessment because all victims behave differently [Emphasis Added].[57] To say that a particular child's behaviour is incongruous with the stereotypical child's behaviour, and to assess that child's credibility negatively because of that finding, amounts to misdirection and is wrong in law.[58]

31. It constitutes misdirection because there is no inviolable rule on how people who are victims of trauma like a sexual assault will behave. Therefore, an expectation of avoidant behaviour, or other behavioural changes, is not permitted in law. The search for avoidant behaviour or a change of behaviour in a sexual assault complainant, particularly a child, is nothing more than a search for confirmatory evidence, without which a complainant becomes less believable. The problem is that there are no predictable behaviours. An accused's constitutionally-protected right to make full answer and defence does not extend to permit reliance on prejudicial generalizations about assault victims. Reasonable doubt does not shield

[54] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 52-53
[55] Reasons CA - AR, Vol I, Part I, Tab 4 at para 54
[56] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 55-57
[57] Reasons CA - AR, Vol I, Part I, Tab 4 at para 58
[58] Reasons CA - AR, Vol I, Part I, Tab 4 at para 61

appellate review if informed on external, personal assumptions or expectations about how sexual assault victims behave either generally, or specifically. Appellate courts must scrutinize judicial reasons to ensure that unfair and inaccurate viewpoints do not masquerade as "common sense and logic", that find no foundation in the record.[59]

32. The majority concluded that the Crown demonstrated the necessary error in law, and that the resulting legal error is directly tied to the acquittal. The credibility assessment of the Complainant's testimony was not based on an assessment of the evidence; the credibility assessment instead was directly tainted by an impermissible stereotype, or myth, that had a material bearing on the acquittals.

Alberta Court of Appeal Memorandum of Judgment – minority decision

33. The Appellant properly summarizes the minority decision of Slatter J.A., however, some additional comment is necessary.

34. While the Trial Judge indicated that he did not believe the evidence of the Appellant,[60] and described his evidence as "ludicrous" and "not worthy of belief",[61] Slatter J.A. seemingly ignored the Trial Judge's credibility findings with respect to the evidence given by the Appellant:

> The trial reasons came down to a determination of whether the Crown had proven the case beyond a reasonable doubt. While the respondent was not completely believable, his evidence had enough weight to create a reasonable doubt and invoke the principle in *W(D)*….[emphasis added][62]

35. Slatter, J.A., was also of the view that it was of some significance that the Trial Judge made no finding regarding whether or not the Complainant was practicing avoidance techniques vis-á-vis the Appellant. In Slatter, J.A.'s opinion, this appeal was not about the Trial Judge's fact findings, but instead about the absence of evidence. Slatter, J.A., was of the view that an "absence of evidence" is not a "fact finding", but rather a conclusion there remained a reasonable doubt.[63]

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[59] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 62-71
[60] Transcript - AR, Vol II, Part V, Tab 7 at p 61/13-15
[61] Transcript - AR, Vol II, Part V, Tab 7 at p 60/16-20
[62] Reasons CA - AR, Vol I, Part I, Tab 4 at para 84
[63] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 85-86

36. Slatter, J.A. agreed, that in some circumstances, unsupportable assumptions about the behaviour of sexual assault victims can lead to the drawing of false or unavailable inferences from the evidence. Although he did not expressly describe those unsupportable assumptions as legal error, Slatter J.A. explained that an "analytical error" arises when the trier of fact a) identifies or assumes normal conduct by a sexual assault victim in a particular situation, and b) makes a finding, draws an inference, or relies on a presumption arising from the assumption of normative behaviour (this is what amounts to stereotyping). On the other hand, Slatter, J.A. noted that it is not an error for the trier of fact to rely on the actual conduct of the actual complainant in the actual context before the Court.[64]

37. Slatter, J.A. accepted that the case law confirms that the trier of fact can rely on "reason and common sense", "logic" and "life experiences" to draw inferences, but that the use of common sense and life experience does not permit resorting to the "prohibited reasoning" that underlies forbidden stereotypes.[65]

38. Having made this observation, Slatter J.A. concluded, "<u>while a change in the Complainant's behaviour would not invariably or necessarily follow a sexual assault, 'some behaviours consistent with that abuse or a least some change of behaviour' would not be unexpected.</u>" [Emphasis Added] Having made this comment, Slatter J.A. noted that the Trial Judge did not hear third party evidence suggesting behavioural changes in the Complainant (as, for example, from the Complainant's mother), and reasoned that the Trial Judge could rely upon the absence of this evidence as raising a reasonable doubt.[66]

PART II –ISSUES

Question in Issue 1 Did the Crown raise the necessary question of law as required under s. 676(1)(a) of the *Criminal Code of Canada*?

Respondent's Position with regard to Question in Issue 1 **A majority of the Court of Appeal correctly concluded that the Crown appeal raised the necessary question of law, and consequently the Court of Appeal did not lack jurisdiction to hear and allow the**

[64] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 94-95
[65] Reasons CA - AR, Vol I, Part I, Tab 4 at para 99
[66] Reasons CA - AR, Vol I, Part I, Tab 4 at para 106

Crown acquittal appeal. Neither the *Criminal Code* nor the relevant jurisprudence bar the Crown from appealing a sexual assault acquittal where the Trial Judge's credibility assessment of the child complainant's evidence was not solely based on the evidence, but instead was directly tainted by an impermissible stereotype, or myth, that had a material bearing on the acquittals.

Question in Issue 2 Did the Trial Judge make the legal error asserted, namely, relying upon stereotypical assumptions about how a victim of a sexual assault would behave?

Respondent's Position with regard to Question in Issue 2 **The Trial Judge made the legal error asserted, as his sole reason to acquit the Appellant was based upon his stereotypical expectation that there be some evidence suggesting the Complainant avoided the Appellant, or otherwise changed her behaviour, after the incidents of sexual touching.**

PART III – ARGUMENT

Question in Issue 1 – Did the Crown raise the necessary question of law as required under s.676(1)(a) of the *Criminal Code of Canada?*

The problems posed by sexual stereotyping in Canadian law remain as an ongoing concern

39. Speculative myths, stereotypes and generalized assumptions about sexual assault victims have plagued our system of criminal justice since its earliest days. The Alberta Court of Appeal recently remarked that notwithstanding the persistent attempts of Parliament, this Court, and the courts across this country, "myths and stereotypes continue to stalk the halls of justice in cases involving sexual offences, enabled sometimes by inadequate legal instruction".[67] The Court of Appeal noted that persistent presumptions and problematic legal instructions reduce the entitlement of all individuals to the equal recognition and protection of the law. This inequality falls most heavily on women since sexual assaults are largely a gender-based crime with the vast majority of victims being female, and the vast majority of perpetrators male. [68]

[67] ***R v Barton,*** 2017 ABCA 68 at para 8
[68] ***R v Barton,*** 2017 ABCA 68; ***R v O'Connor,*** [1995] 4 SCR 411 at para 120; ***R v Osolin,*** [1993] 4 SCR 595 at p 669

40. It is concerning that the crime of sexual assault is the most under-reported and under-prosecuted offence. It involves the highest rate of acquittals and the highest rate of convictions overturned by appellate courts. Sexual stereotypes continue to exist, notwithstanding significant law reform and feminist activism. The offence itself, more often than not, involves a complainant who is more vulnerable than the accused because of gender, age, race, or disability.[69] This Court, in recognition of this special vulnerability, has observed that the equality rights of a complainant cannot be overlooked as they are afforded special protection under ss.15 and 28 of the *Charter*. [70]

41. It is these equality concerns, for example, that played a significant role in the majority decision of L'Heureux-Dubé J., when considering the constitutionality of the *Criminal Code* provisions dealing with the production of therapeutic records in sexual assault cases.[71]

L' Heureux-Dubé J., explicitly recognized the difficulties posed by stereotypes and myths in the search for the truth:

> As has been frequently noted, speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences. See *Seaboyer, supra*, at p. 634. The myths that a woman's testimony is unreliable unless she made a complaint shortly after the event (recent complaint), or if she has had previous sexual relations, are but two of the more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law…[72]

42. Similarly, in *R v O'Connor,* L'Heureux-Dubé J. was of the view that the evidentiary rules, which permitted extensive and unwarranted inquiries into a sexual assault complainant's past sexual history were "pernicious".[73] In her view, the uninhibited disclosure of complainants' private lives indulges discriminatory suspicion that women and children's reports of sexual

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[69] Tanovich, David M, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases." (2015) Ottawa Law Review, Vol 45, No 3 at p 502. Available at SSRN: https://ssrn.com/abstract=2726304

[70] ***R v Osolin,*** [1993] 4 SCR 595 at p 669; *Canadian Charter of Rights and Freedoms,* RSC 1985, App II, No 44, Sched B, Pt I, ss 15, 28

[71] ***R v Mills,*** [1999] SCR 668 at para 90

[72] ***R v Mills,*** [1999] SCR 668 at para 119

[73] ***R v O'Connor,*** [1995] 4 SCR 411 at para 122

victimization are likely to be false.[74] Viewed in this manner, production should only be ordered where relevance was demonstrated on the basis of actual relevance, without the assistance of stereotypical lines of reasoning.[75] By observing respect for the equality rights of complainants in sexual assault trials, L'Heureux-Dubé, J., was of the view that the elimination of discriminatory practices would enhance rather than detract from trial fairness. Consequently, sexual assault trials that are fair will promote equality for women and children who are most often the victims.[76]

43. Equality concerns contextually inform the circumstances in which the right of full answer and defence will come into play. As such, it is necessary to understand the myths and stereotypes in the context of sexual violence to delineate the boundaries of full answer and defence.[77] Notably, this Court has recognized that myths and stereotypes undermine a fair trial, which means a trial that is fair to the public, the accused and the complainant.[78]

Myths and stereotypes have long plagued Canadian criminal justice

44. The improper use of myths and stereotypes in formulating legislation and assessing the conduct and veracity of complainants has long tainted the adjudication of sexual offences in Canada. S.L. Martin, J., as she then was, in a recent sexual assault summary conviction appeal from acquittal, comprehensively reviewed the history of many of the "unique provisions, principles and practices", applicable only to the prosecution of sexual offences.[79] S.L. Martin, J. described the problems that result from the unfettered use of sexual stereotypes and mythology as follows:

> It has not been widely recognized by Parliament, the Supreme Court of Canada, and courts across this country that previous legal rules and outdated and unequal social attitudes historically operated to impede the fair prosecution and defence of sexual offences. A unique set of provisions, principles and practices – that applied only to sexual offences – placed a firm finger on the scales of justice. The result was a legally

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[74] ***R v O'Connor,*** [1995] 4 SCR 411 at para 123
[75] ***R v O'Connor,*** [1995] 4 SCR 411 at para 124
[76] ***R v O'Connor,*** [1995] 4 SCR 411 at para 129
[77] ***R v Mills,*** [1999] SCR 668 at para 90
[78] ***R v CMG,*** 2016 ABQB 368 at para 62; citing ***R v Harrer,*** [1995] 3 SCR 562 and ***R v Lyons,*** [1987] 2 SCR 309
[79] ***R v CMG,*** 2016 ABQB 368 at paras 56-59

> sanctioned credibility gap between complainants based on the type of crime they alleged…[80]

45. Professor Janine Benedet, a witness for the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Robin Camp, extensively reviewed the history of sexual assault reforms in Canadian criminal law from the first *Criminal Code* of 1892 to the present.[81] Professor Benedet identified several sexual stereotypes expressly codified in early *Criminal Codes* of Canada, including the following: sexual assault complainants are inherently untrustworthy, and absent corroboration it was unsafe to convict;[82] real victims of sexual assault will tell someone promptly;[83] and, rape complainants could be cross-examined on their sexual history consistent with the scant protection provided by the common law rules of evidence.

46. Professor Benedet described that extensive reforms, spurred on by the enactment of the *Charter* in 1982 and the s.15(1) equality provisions (which came into force in 1985), resulted in major changes to legislation, as past *Criminal Code* provisions were thought to be vulnerable to challenge as violating equality provisions. Professor Benedet cites the marital rape exception and the gendered nature of many of the sexual offences, as examples.[84] Significant legislative change to the sexual offence *Criminal Code* provisions occurred in 1983, 1988 and 1992.[85]

47. The 1983 reforms were significant because sexual assault replaced rape, and it became a gender neutral offence. The rules respecting corroboration and recent complaint were abolished. The 1988 reforms created a series of new sexual offences against children. A new sexual history provision was introduced, which this Court had occasion to rule violated the s.7 *Charter* right to make full answer and defence as unduly restrictive.[86]

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[80] ***R v CMG,*** 2016 ABQB 368 at para 56
[81] Affidavit of Janine Benedet, Report on Social History of Sexual Assault Laws, Discriminatory Beliefs and Sexual Assault Reporting Rates as Applied to the Comments of Justice Robin Camp in *R v Wagar,* August 5, 2016 ("Benedet Affidavit") - Canadian Judicial Council, "Inquiry Committee regarding the Honourable Robin Camp", Exhibits - Agreed Statement of Facts at Tab M
[82] Benedet Affidavit at p 4
[83] Benedet Affidavit at p 5
[84] Benedet Affidavit at pp 5-6
[85] Benedet Affidavit at pp 7-10
[86] Benedet Affidavit at pp 7-8; ***R v Seaboyer,*** [1991] 2 SCR 577

48. In 1992, further legislative reforms focused on consent and belief in consent. A positive definition of consent was added to the *Criminal Code*,[87] which defined consent as the voluntary agreement of the complainant to engage in the sexual activity in question. A list of circumstances for which no consent could be obtained was added. New provisions limited the honest belief in the complainant's consent by providing that the defence could not be advanced if it arose due to the accused's self-intoxication, recklessness or wilful blindness. Additionally, an accused was required to establish that he took reasonable steps, in the circumstances known to him at the time, to ascertain the complainant was consenting.[88]

49. The positive definition of consent, and the rape shield provision enacted post-*Seaboyer* addressed a number of inimical and stereotypical thought processes, including the belief that women can physically resist a rapist if they really wanted to; unchaste women are not harmed by rape, or suffer less harm; the failure to fight back or passivity signified consent; or, that "No" did not always mean "No" and sometimes meant "Yes"; and, stranger rape is worse than acquaintance rape.[89] These beliefs about the nature of sexual relations were once widely accepted, and are found in scholarly publications at least until the end of the 1970s.[90] Women of loose morals or low virtue were likely to lie about being sexually assaulted, or they were viewed as asking for sexual advances based upon provocative dress, being out late at night, consuming alcohol, or otherwise acting in such a way as to draw male attention.[91] In *Seaboyer*, L'Heureux-Dubé, J. noted 10 of the most common myths/stereotypes in a non-exhaustive list.[92] Research demonstrates that rape myths continue to find acceptance among significant numbers of people, including criminal justice system participants.[93]

50. A new version of the "rape shield" provision was enacted after *Seaboyer*.[94] It was designed to combat the "twin myths", which suggested by reason of the sexual nature of the

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[87] *Criminal Code*, RSC 1985, c C-46, s 273.1
[88] Benedet Affidavit at pp 8-9
[89] ***R v Find,*** [2001] 1 SCR 863 at para 101; ***R v Seaboyer,*** [1991] 2 SCR 577; ***R v Osolin,*** [1993] 4 SCR 595 at pp 669-71; ***R v Ewanchuk,*** 1998 ABCA 52 at paras 52-61; ***R v Ewanchuk,*** [1999] 1 SCR 330 at paras 82, 87, 94-97
[90] Benedet Affidavit at pp 11-13
[91] Benedet Affidavit at pp 13-14
[92] ***R v Seaboyer,*** [1991] 2 SCR 577 at pp 651-654
[93] Benedet Affidavit at p 21
[94] ***R v Seaboyer,*** [1991] 2 SCR 577

activity the complainant was more likely to have consented or was less worthy of belief.[95] Some academics have argued cogently that reliance upon outdated stereotypes by some trial judges continue to pose difficulties when considering the proper approach to s.276 of the *Criminal Code*.[96]

51. As the Alberta Court of Appeal has observed, victim blaming in the context of sexual offences is nothing particularly new:

> "Blaming the victim" is not new to the law of sexual assault. Parliament and the courts have worked hard to reform unfair laws that led in turn to unfair trials. Recognizing that an accused was entitled to a fair trial, not a fixed one, Parliament removed the judge-made requirement for corroboration in sexual assault cases and the judge-made rule allowing admission of past sexual history. And the courts removed the idea of implied consent in sexual assault cases: see, for example, *Ewanchuk*.[97]

Stereotypes and children

52. This Court and Parliament have made repeated and concerted efforts to cleanse any stereotypical prohibited reasoning from the adjudication of sexual offences involving child complainants. As noted by this Court in *R v W(R)*, the law affecting the evidence of children underwent two major changes. The first change was to remove the notion, found at common law and codified in legislation, that the evidence given by children had inherent unreliability and needed to be treated with special caution. This anachronistic view of children was exemplified by the requirement that a trier of fact must not convict on the unsworn evidence of a child without corroboration. The second fundamental change involved the guidance given by this Court that it is generally inappropriate for the trier of fact to apply adult tests for credibility to the evidence of children.[98] This change, however, does not mean that there may be times where the trier of fact finds it necessary to look for confirmatory evidence.[99] Finally, as this Court

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[95] Benedet Affidavit at p 9
[96] Craig, Elaine, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions". (March 30, 2016), 94 Can Bar Rev 45. Available at SSRN: https://ssrn.com/abstract=2756510
[97] ***R v Hajar,*** 2016 ABCA 222 at para 99
[98] ***R v (WR),*** [1992] 2 SCR 122 at pp 132-133; ***R v B(G),*** [1990] 2 SCR 30 at pp 54-55; ***R v F(CC),*** [1997] 3 SCR 1183 at paras 47-49
[99] ***R v Marquard,*** [1993] 4 SCR 223

observed, court processes often fail children, especially those who have been victims of abuse. For this reason, issues involving children must be approached with unwavering sensitivity.[100]

What is a sexual stereotype?

53. S.L. Martin, J. aptly described the difficulty caused by the use of myths and stereotypes in the criminal trial context:

> Broadly speaking, myths and stereotypes rest on untested and unstated assumptions about how the world works or how certain people behave in particular situations. They often involve an idealized standard of conduct against which particular individuals are measured. Sometimes general, assumed or attributed characteristics are applied to a particular individual or circumstance, often without an analysis of whether there is any merit in the general assumption or whether it truly applies in a particular situation. It was said in *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 654:
>
> Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly.
>
> This mythology…influences a judge or juror's perception of guilt or innocence of the accused and the "goodness" or "badness" of the victim, and finally has carved out a niche in both the evidentiary and substantive law governing the trial of the matter.[101]

54. This Court has described the inherent dangers that occur when the trier of fact subjects complainant credibility assessment to stereotypical assumptions as, "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".[102] [Emphasis Added]

55. The majority of the Court of Appeal described stereotypes as a "prejudicial generalization(s)" about sexual assault victims, "leading to the drawing of inferences that are not part of the record but are instead, based on their own 'common sense and logic' which is, in fact, unfair and inaccurate".[103] Slatter J.A., for the minority, described stereotypical thinking in a

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[100] ***R v L(DO),*** [1993] 4 SCR 419 at pp 439-443; ***R v Levogiannis,*** [1993] 4 SCR 475 at p 484; ***R v F(WJ),*** [1999] 3 SCR 569 at paras 13-16, 42-44
[101] ***R v CMG,*** 2016 ABQB 368 at para 60
[102] ***R v Find,*** [2001] 1 SCR 863 at para 103
[103] Reasons CA - AR, Vol I, Part I, Tab 4 at para 6

similar manner. He indicated that an "analytical error" arises when the trier of fact a) identifies or assumes normal conduct by a sexual assault victim in a particular situation, and b) makes a finding, draws an inference, or relies on a presumption arising from the assumption of normative behaviour (this is what amounts to stereotyping).[104]

56. Professor Tanovich remarked upon the mechanism by which stereotypical thinking, as opposed to reliance upon judicial experience, seeps into the process of adjudication. He observed that the process of drawing inferences depends upon inductive as opposed to deductive reasoning.[105] Professor Tanovich explains that a trier of fact uses the inductive reasoning process to draw inferences from circumstantial evidence, assess prejudicial effect, assess behaviour, and make credibility determinations. The inductive reasoning process relies upon "common sense, logic and human experience", and because this type of reasoning is highly subjective and susceptible to shifts in thinking over time, it can easily result in stereotyping, bias or unreliable decision-making. Deductive reasoning, on the other hand, necessarily results in a valid conclusion if the underlying premises are accepted.

An appellate court may overturn an acquittal where reasonable doubt is tainted by the use of myths and stereotypes

57. The Respondent agrees with the Appellant's submission that an appellate court does not have jurisdiction to allow a Crown appeal from an "unreasonable acquittal".[106] The principle that it is an error of law to make a finding of fact for which there is no evidence does not apply, in general, to a decision to acquit based on a reasonable doubt. This is because the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden of proof in a criminal prosecution.[107] In particular, no legal error is demonstrated merely because an appellate court disagrees over the factual inferences drawn by a trial judge or the weight he/she afforded to the evidence.[108] Reasonable doubt is not an inference or a finding of fact that needs

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[104] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 94-95
[105] Tanovich, David M, "Regulating Inductive Reasoning in Sexual Assault Cases" (April 8, 2017) (Toronto: 2017, Carswell) at pp 74-76. Available at SSRN: https://ssrn.com/abstract=2949147
[106] ***R v JMH,*** [2011] 3 SCR 197 at paras 26-27
[107] ***R v JMH,*** [2011] 3 SCR 197 at paras 25-27
[108] ***R v JMH,*** [2011] 3 SCR 197 at para 28

support in the evidence presented at trial.[109] Nor, may an appellate court reverse an acquittal on the basis that the verdict was unreasonable, without any corresponding legal error.[110]

58. An appellate court, however, has jurisdiction to allow a Crown appeal where it is argued the trial judge took a legally incorrect approach to the evidence, amounting to misdirection.[111] In such circumstances there is jurisdiction to hear a Crown appeal, as the "reasonable doubt [held by the trier of fact] is tainted by a legal error [such that] appellate intervention in an acquittal is permitted".[112] In *R v B(G),* Wilson, J., in part, described this type of legal error as follows:

> Aside from clearly established questions of law such as the admissibility of evidence, the interpretation of a statute, or whether evidence is capable of being corroborative, this Court has recognized appellate jurisdiction where the question of law originates from the trial judge's conclusion that he or she is not convinced of the guilt of the accused beyond a reasonable doubt because of an erroneous approach to, or treatment of, the evidence adduced at trial.[113] [Emphasis Added]

59. The Appellant argues that the Respondent's power to appeal against acquittal did not properly arise when this matter was considered by the Court of Appeal. In essence, the Appellant argues the Alberta Court of Appeal did not have jurisdiction to entertain the appeal of an "unreasonable acquittal". According to the Appellant, any concerns with the weighing of evidence, the drawing of inferences, and assessments of credibility are fact-based errors that do not support a Crown appeal from an acquittal. The Appellant further argues that the Trial Judge's finding of reasonable doubt was based on the absence of evidence of the after-the-fact avoidant behavior of the Complainant, and the Crown cannot appeal as an error of law, the Trial Judge's conclusion that he had a reasonable doubt.

60. The majority of the Court of Appeal, when considering the jurisdictional issue, reminded themselves that there is no appeal by the Crown of an unreasonable acquittal and noted that the question of whether a witness is credible is a question of fact, not of law. The majority, however, concluded correctly that an error of law arises if the assessment of a witness' evidence is based upon a wrong legal principle, or the conclusion about the witness evidence is derivative of a misapprehension of a legal principle. They found support in this Court's Judgment in *D(D)* for

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[109] ***R v Villaroman,*** [2016] 1 SCR 1000 at para 28
[110] ***R v Biniaris,*** 2000 SCC 15 at para 32
[111] ***R v JMH,*** [2011] 3 SCR 197 at paras 29-30; ***R v Curry,*** 2014 ONCA 174 at para 37
[112] ***R v JMH,*** [2011] 3 SCR 197 at para 39
[113] ***R v B(G),*** [1990] 2 SCR 57 at p 71

the conclusion that adverse inferences of credibility based upon stereotypes constitute reversible error: "Further, '…presumptive adverse inference[s] based on now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse' constitute reversible error: *R v D(D)*, 2 SCR 275 at 63".[114]

61. In the majority's view, relying upon myths and stereotypes in assessing the credibility of sexual assault victims invokes impermissible reasoning that is often, if not always an error of law.[115] Although the majority allowed that a reasonable doubt can rest on an "absence of evidence", the absence of evidence found by the Trial Judge – no evidence of avoidance or behavioural change – was based on the Trial Judge's impermissible reliance upon a stereotypical expectation rather than the evidence before him. The majority concluded that the Trial Judge misdirected himself by basing his credibility assessment "not upon a proper evidentiary foundation, but on inappropriate judicial stereotyping".[116] There was no evidentiary foundation upon which the Trial Judge could conclude that child sexual assault victims will demonstrate avoidant behaviour in relation to their sexual perpetrators, or that this child in this situation, would exhibit avoidance. The Trial Judge's judicial expectation, devoid of certainty or invariability, did not meet the precondition as to legal reliability. As such, "the pernicious impact that prescriptive norms can have in the adjudication of sexual assault [trials] erroneously tainted the credibility assessment of the complainant".[117] The Trial Judge, according to the majority, engaged in a type of stereotypical thinking by stating that a particular child's behaviour is incongruous with the stereotypical child victim. To assess that child's credibility negatively because of that finding, constitutes misdirection, and is wrong in law.[118]

62. Slatter, J.A., in dissent, was of the view that the proposed analytical error, occurring during the Trial Judge's credibility assessment of the Complainant, did not arise in the circumstances. In his view, the Trial Judge's determination came down to a consideration of reasonable doubt. As such, the appeal in substance is not "about an error of law, or about an error of fact, or about a finding of credibility".[119]

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[114] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 24-28
[115] Reasons CA - AR, Vol I, Part I, Tab 4 at para 50
[116] Reasons CA - AR, Vol I, Part I, Tab 4 at para 45
[117] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 47-48
[118] Reasons CA - AR, Vol I, Part I, Tab 4 at para 61
[119] Reasons CA - AR, Vol I, Part I, Tab 4 at para 85

63. Slatter J.A., was also of the view that "while the [Appellant] was not completely believable, his evidence had enough weight to create a reasonable doubt and invoke the principle in ***W(D)***".[120]

64. The difficulty with Slatter J.A.,'s reasoning is that it does not find support in the Trial Judge's Reasons for Judgment. The Trial Judge was not of the view that the Appellant was not completely believable, nor was he of the view that the Appellant's evidence had enough weight to create a reasonable doubt. Instead, and to the contrary, the Trial Judge indicated clearly that he did not believe the Appellant.[121] The Trial Judge was also of the view that the Appellant's evidence that he was never alone with the Complainant, except possibly the kitchen, was "incredible", and the Appellant's exaggerations "became ludicrous the more he tried to explain himself".[122]

65. Slatter J.A., also felt it was significant that the Trial Judge made no finding that the Complainant failed to practice avoidance techniques with respect to her day to day interactions with the Appellant. Slatter, J.A., reasoned that an "absence of evidence" is not a fact-finding, but a conclusion there remained a reasonable doubt.[123]

66. With respect, Slatter, J.A., erred by concluding that there is a meaningful distinction between a reasonable doubt tainted by stereotypical thinking based upon some positive evidence of behavioural change; and, the unfulfilled expectation (lack of evidence) that the Complainant will act in a certain way, or will display some discernable change to her normative behaviour, on the other.

67. To illustrate this point, a Trial Judge would err legally by receiving evidence of the complainant's past sexual history, without more, as being relevant to her credibility in a sexual assault prosecution. This stereotypical view based on the positive evidence of the complainant's past sexual history, engages rape myths, and has the pernicious effect of tainting the credibility assessment of the complainant's truthfulness and the resulting reasonable doubt.

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[120] Reasons CA - AR, Vol I, Part I, Tab 4 at para 84
[121] Transcript - AR, Vol II, Part V, Tab 7 at p 61/13-15
[122] Transcript - AR, Vol II, Part V, Tab 7 at p 60/16-20
[123] Reasons CA - AR, Vol I, Part I, Tab 4 at paras 85-86

68. In a second example, this time based on the "absence of evidence", a trial judge would legally err by expecting "as a matter of common sense or logic" to hear some evidence that a victim of a sexual assault made a timely complaint; and concluding, in the absence of such evidence, that the complainant lacked credibility. In this second example, the "absence of evidence" taints the trial judge's reasonable doubt as perniciously as in the first example. It is for this reason that the majority of the Court of Appeal ruled that the absence of evidence in this case – no evidence of avoidance or behavioural change – was based upon the impermissible reliance on a stereotype.[124]

Judgments from other Canadian courts support the Crown's jurisdiction to appeal

69. Other Canadian appellate and lower court decisions that have considered the jurisdictional issue have reached a conclusion similar to the majority of the Court of Appeal. These courts conclude that the use of impermissible stereotypical thinking to assess the credibility of a complainant taints the resulting reasonable doubt, and permits a Crown appeal from acquittal under s.676(1)(a) of the *Criminal Code.*

70. Although not satisfied on the record that the Trial Judge made the asserted legal error, the Manitoba Court of Appeal in *R v RGB,*[125] considered a Crown appeal where it was argued, in part, that the trial judge improperly relied upon stereotypical reasoning concerning delayed disclosure of a sexual assault, and a second stereotype that a complainant would not return to an environment where she has been assaulted.

71. The Manitoba Court of Appeal concluded that they had jurisdiction to hear a Crown appeal from acquittal alleging improper reliance by a trial judge on unacceptable sexual stereotypes. In so doing, the Manitoba Court noted L'Heureux-Dubé's, J.'s comment in *Ewanchuk,*[126] suggesting that complainants should be able to rely upon a judicial system whose impartiality is not compromised by biased assumptions, and McLachlin, J.'s comments, as she then was, in the same case[127] that stereotypical assumptions have no place in Canadian law.[128]

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[124] Reasons CA - AR, Vol I, Part I, Tab 4 at para 45
[125] ***R v RGB,*** 2012 MBCA 5
[126] ***R v Ewanchuk,*** [1999] 1 SCR 330 at para 95
[127] ***R v Ewanchuk,*** [1999] 1 SCR 330 at para 103
[128] ***R v RGB,*** 2012 MBCA 5 at paras 53-54

The Manitoba Court of Appeal also noted that this Court held in *R v DD,*[129] that biased or stereotypical assumptions of how persons (particularly children) subjected to sexual abuse should react constitutes reversible legal error.[130]

72. After reviewing some of Cory J.'s comments, in this Court's decision in *R v S(RD),*[131] and his caution that a judge must avoid judging the credibility of a witness on the basis of generalizations or matter that were not in evidence, the Manitoba Court of Appeal concluded as follows:

> To sum up, because credibility findings are questions of fact, the Crown generally has no right to appeal from an acquittal on a ground that alleges an error with respect to such a finding. Similarly, the Crown cannot appeal a judge's conclusion that there exists a reasonable doubt, as that does not raise a question of law. Nevertheless, the credibility of a witness should be judged on the evidence before the judge, not on stereotypical assumptions. A judge would err in law if there is a sound basis to conclude, on appellate review, that a credibility finding was not based on a proper evidentiary foundation, but rather on in appropriate judicial stereotyping. [Emphasis Added][132]

73. In a similar fashion, the Alberta Court of Appeal in *R v ADG* set aside an acquittal in a sexual assault trial, because the trial judge's reasonable doubt was partially based on the delay in disclosure and comparing "the reaction of these victims to a reaction that might be objectively expected of them", and "his conclusion on the issue of disclosure must have affected his assessment of the complainants' credibility".[133] The Court of Appeal, in addition, concluded that the trial judge did not apply the correct legal principles for assessing evidence given by a child.[134]

74. The Alberta Court of Appeal in a terse Judgment, concluded that it had jurisdiction to hear a Crown appeal from the verdict of acquittal issued by Judge Camp in *R v Wagar*; on the bases that the trial judge's comments and reasons disclose that he misunderstood the law governing sexual assaults, and "sexual stereotypes and stereotypical myths, which have long

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[129] ***R v DD,*** [2000] 2 SCR 275 at para 63
[130] ***R v RGB,*** 2012 MBCA 5 at para 55
[131] ***R v S(RD),*** [1997] 3 SCR 484
[132] ***R v RGB,*** 2012 MBCA 5 at para 59
[133] ***R v ADG,*** 2015 ABCA 149 at para 36
[134] ***R v ADG,*** 2015 ABCA 149 at paras 38-39

since been discredited, may have found their way into the trial judge's judgment".[135] In a further example, the Alberta Court of Appeal permitted a Crown appeal from acquittal and entered a conviction in a sexual assault case where, in part, the trial judge's reasoning disclosed that he relied on the myth that passivity equals consent and "no" means "try harder".[136]

75. In *R v JR,*[137] the Alberta Court of Queen's Bench considered a Crown appeal from an acquittal where the incident was caught on videotape and the trial judge accepted the complainant's testimony that she told the accused to stop and felt uncomfortable.[138] Notwithstanding that factual finding, the trial judge acquitted the accused because of the complainant's complacency in being touched, and because her post-incident demeanour and text messages to a friend were inconsistent "with her having been serious or clear in her objections of having communicated any serious objection clearly to the accused".[139] Tolponiski J., had no difficulty in coming to the conclusion that the sexual stereotyping in this case permitted a Crown appeal as an error of law,[140] since "there is no place for sexual stereotyping in sexual assault cases and no inference should be drawn about a complainant's credibility on how a victim of sexual assault is to react to the trauma".[141]

76. In *R v CMG,*[142] S.L. Martin J. considered an appeal of a sexual assault acquittal where the trial judge relied upon several myths and stereotypes (failing to scream or run away, failing to tell her friend or her aunt and the absence of change in her behaviour).[143] After reviewing the legal authorities, and reaching the conclusion that there was no clear evidence of real or apprehended bias,[144] Martin J., concluded that the Crown demonstrated the requisite error in law as the "credibility findings were not based upon a proper evidentiary foundation, but rather on inappropriate judicial stereotyping", and to a reasonable degree of certainty "had the judge taken

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[135] ***R v Wagar,*** 2015 ABCA 327 at paras 4-5
[136] ***R v Adepoju,*** 2014 ABCA 100 at paras 2, 11-13
[137] ***R v JR,*** 2016 ABQB 414
[138] ***R v JR,*** 2016 ABQB 414 at para 18
[139] ***R v JR,*** 2016 ABQB 414 at para 22
[140] ***R v JR,*** 2016 ABQB 414 at paras 3-5
[141] ***R v JR,*** 2016 ABQB 414 at para 24; citing ***R v Shearing,*** [2002] 3 SCR 33 at para 121; ***R v DD,*** [2000] 2 SCR 274 at para 33; ***R v ADG,*** 2015 ABCA 149 at para 33
[142] ***R v CMG,*** 2016 ABQB 368
[143] ***R v CMG,*** 2016 ABQB 368 at para 52
[144] ***R v CMG,*** 2016 ABQB 368 at para 85

a correct view of the law, there would not necessarily have been an acquittal".[145] As to the specific statement made by the trial judge, that the complainant's credibility was lessened because her aunt did not notice a change in her demeanour, Martin J., found that was an error for the trial judge to make such an assertion in the absence of an explanation - it is an impermissible inference - as there is no inviolable rule as to how victims of trauma like a sexual assault will behave.[146]

77. In a different context, appellate courts have rejected appeals from conviction for the specific reason that the appellant's complaints about the plausibility of the verdict specifically invoked myths and stereotypes. For example, the suggestion made on appeal that it wasn't usual for rape victims to invite perpetrators back into the house and console them. The Manitoba Court of Appeal rejected this submission as constituting an impermissible reliance upon a stereotype.[147] The Manitoba Court concluded: "the law is now well settled that the use of myths and stereotypes has no place in the determination of credibility because such reasoning corrupts and distorts the trial process and may result in an unfair trial".[148] This, according to the Manitoba Court of Appeal, places a heavy responsibility on trial judges to make a timely and appropriate instruction to the jury, and in judge-alone trials, "judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility".[149] In *R v Nitsiza,*[150] the Court applied *DD* to reject the argument that the complainant's allegations were not credible because had she been sexually assaulted she would have been hostile to the accused afterwards, and would not have maintained any friendly contact. The Court concluded that a submission that assumes that people who are sexually assaulted will react the same way is not grounded in reality or law.[151]

78. Finally, it should be noted that the judicial concern with the reliance upon inappropriate stereotyping, is not a one-way consideration. At times, the use of sexual stereotypes can unfairly taint a conviction. For example, in *R v Kodwat,* the Yukon Court of Appeal, considered a situation where an accused was convicted of a sexual assault on the specific basis that it was

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[145] ***R v CMG,*** 2016 ABQB 368 at para 90
[146] ***R v CMG,*** 2016 ABQB 368 at paras 79-82
[147] ***R v CAM,*** 2017 MBCA 70 at para 47
[148] ***R v CMG,*** 2016 ABQB 368 at para 50
[149] ***R v CMG,*** 2016 ABQB 368 at para 51
[150] ***R v Nitsiza,*** 2007 NWTSC 53
[151] ***R v Nitsiza,*** 2007 NWTSC 53 at para 62

inconceivable that a 17-year-old girl would engage in prolonged kissing and unprotected sexual intercourse with an accused who meant nothing to her, and was 28 years her senior. The Court indicated that while the trial judge could have inferred a lack of consent from the evidence, the conclusion it was "inconceivable", "was a stereotypical assumption or generalization lacking in an evidentiary foundation".[152]

The majority of the Court of Appeal correctly concluded that the Trial Judge made the asserted legal error

79. The majority correctly concluded that the Trial Judge devalued the credibility of the Complainant, not on the evidence, but upon the stereotypical assumption that a victim of sexual assault would exhibit a discernable behavioural change such as, for example, practicing avoidance of the perpetrator. As a hallmark of judicial stereotyping, the Trial Judge's unmet expectation was based upon his own preconceived and generalized notion of how sexual assault victims should behave, and not on a proper evidentiary foundation. It was, in essence, the taking of improper judicial notice.

80. The absence of a proper evidentiary foundation demarks the line between a trial judge permissibly bringing his/her personal experiences and knowledge to the assessment of the evidence, and impermissibly taking improper judicial notice. The trier of fact must assiduously guard against the distinction between common sense inferences drawn from matters tendered *in evidence*, and judicial notice of facts *not* tendered in evidence.[153] The difficulty with judicial notice arises because the taking of judicial notice dispenses with proof by evidence given under oath, and because judicially noted facts remain untested by cross-examination. Judicial notice must, therefore, be limited to facts that are either (1) so notorious or generally accepted as to not be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[154]

81. A trier of fact must be self-aware of the distinction between findings of fact based upon judicial experience, and the reaching of a conclusion based only on the judge's untested perceptions of social context. The former is a conclusion based upon the evidence, and the latter is not. A limit is necessary for two reasons. First, it is impossible to explore or challenge a trial

[152] ***R v Kodwat,*** 2017 YKCA 11 at para 41
[153] ***R v Cloutier,*** 2011 ONCA 484 at para 96
[154] ***R v Find,*** [2001] 1 SCR 863 at para 48

judge's internal perception or experience of the social issues. Second, fact-finding based upon generalities the judge develops from past experiences may amount to fact-finding based upon stereotyping.[155]

82. As an example, the rejection by a trial judge of an accused's evidence that his condom came off during prolonged sexual intercourse as his penis had softened, on the trial judge's generalized view that a virile young man intent upon a climax would not lose his erection, constitutes improper judicial notice and reversible error in the absence of medical or other expert evidence.[156] This is because there was "nothing that elevates that observation from the personal to the notorious or that offers any assurance of the accuracy of the observation".[157] Similarly, in *R v MacIssac*,[158] the Ontario Court of Appeal allowed an appeal on the bases that the trial judge improperly rejected the accused's evidence. His evidence, given in the context of an aggravated assault charge arising from a hockey game, was rejected on the judge's speculation that it was "not logical" for three defenceman to be on the ice with the team down by two goals and not much time left in the game (along with other hockey related observations).

83. This Court in *R v S(RD),*[159] had occasion to comment on the limits of judicial notice in the context of the personal and life experience of judges. This appeal involved a black appellant who was charged with the assault of a white peace officer. The outcome of the trial depended upon a credibility assessment of those two individuals. The trial judge, in acquitting the accused, noted that police officers were known to mislead the court, and have been known to overreact with racial minorities. A majority of this Court allowed the appellant's appeal on the basis that a reasonable apprehension of bias had not been demonstrated; however, this Court commented upon the extent to which trial judges may use life experience to weigh evidence and assess witness credibility. Major J., in dissent, speaking for the three members of the Court who would have accepted the bias argument observed:

> The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence.

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[155] ***R v Hamilton,*** 2004 CarswellOnt 3214 (CA) at paras 126-128
[156] ***R v P(T),*** 2007 ONCA 585
[157] ***R v P(T),*** 2007 ONCA 585 at paras 33-42
[158] ***R v MacIsaac,*** 2015 ONCA 587
[159] ***R v S(RD),*** [1997] 3 SCR 484

> The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.[160]

84. Cory J., speaking for himself and Iacobucci J., joined the majority in rejecting the bias argument, but approached the judicial life experience issue in a similar manner:

> On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.[161]

85. *S(RD)* cautions judges to introspectively and cautiously examine their own internal and subjective mental processes, which a judge necessarily uses to weigh evidence and determine witness credibility, especially when the judge's viewpoint is guided by personal observation, as opposed to facts that were adduced in evidence. Such conscious introspection, is of benefit in helping to prevent an immediate jump to a generalized stereotype that finds no foundation in the evidence.

86. Clackson J., as Trial Judge in the present appeal, ran afoul of these warnings when assessing the credibility of the Complainant. As Trial Judge, he failed to appreciate the critical distinction between credibility assessments based upon his professed "logic and common sense", and the assessment that he actually made that was based on a generalization unsourced in the evidence. To make matters worse, in making this particular generalization, he failed to understand this Court's caution that there is no inviolable rule on how people who are the victims of trauma like a sexual assault charge will behave.[162] The gross generalization was manifestly wrong as a general statement about the behaviour of victims, and made worse by its application to the specific Complainant in the absence of any evidence that this Complainant (or any other) would be expected to exhibit some behavioural change.

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[160] ***R v S(RD),*** [1997] 3 SCR 484 at para 13
[161] ***R v S(RD),*** [1997] 3 SCR 484 at para 129
[162] Reasons CA - AR, Vol I, Part I, Tab 4 at para 42

Response to selected arguments made by the Appellant

87. The Appellant notes in *JMH*[163] that this Court made no comment upon "stereotyping" in the context of the Trial Judge rhetorically asking why the complainant would insist in going back to the same bed that she had been violated in. In fairness, however, it should be pointed out as the Manitoba Court of Appeal has previously noted, that the issue of stereotyping was not argued before this Court.[164] A review of this Court's decision in *JMH*,[165] and the factum filed by the Crown Respondent,[166] reveals that the jurisdictional issue argued before this Court narrowed to an argument that the trial judge erred by failing to consider the evidence as a whole, and instead took a piecemealed approach. At least one academic has lamented the lost opportunity to argue the stereotyping issue posed by *JMH*.[167]

88. The Appellant also refers this Court to the Ontario Court of Appeal decision in *R v LS,*[168] which considered the ongoing admissibility of sexual activity by the accused with the complainant both before and after the alleged sexual assault under s. 276 of the *Criminal Code*. In that case, the Court considered the admissibility of evidence that two individuals in a spousal relationship continued as if nothing ever happened (post-sexual assault), and concluded that it had probative value that was more than trifling.[169]

89. The Respondent submits, assuming *LS* was correctly decided, there is a marked difference between a jury being permitted to consider the continuation of an adult spousal relationship as evidence potentially probative as to whether an assault occurred, and the stereotypical expectation held by the Trial Judge on this appeal that the young Complainant would avoid the Appellant, or demonstrate some change in behaviour. Second, the Ontario Court of Appeal importantly made it clear that the jury must be expressly instructed to avoid the stereotype that arose in that case - that consensual sexual intercourse on other occasions between

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[163] ***R v JMH,*** [2011] 3 SCR 197
[164] ***R v RGB,*** 2012 MBCA 5 at para 60
[165] ***R v JMH,*** [2011] 3 SCR 197 at para 1
[166] Respondent's Factum dated April 21, 2011; ***R v JMH,*** [2011] 3 SCR 197
[167] Cunliffe, Emma, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality". (2012) 57 SCLR (2d) at pp 311-315. Available at SSRN: https://ssrn.com/abstract=2111652
[168] ***R v LS,*** 2017 ONCA 685
[169] ***R v LS,*** 2017 ONCA 685 at para 91

the parties had no relevance in determining consent on the occasion in issue.[170] That having been said, it is difficult to discern of what relevance the evidence could be to the jury? Recently, Professor Elaine Craig wrote that to be admissible under s.276, "pattern of conduct evidence" for the purposes of demonstrating consent, ought to be sufficiently similar to the acts forming the subject matter of the charge that they share a highly distinctive character such as to be admissible as similar fact.[171]

90. Nor should this Court's decision in *Shearing* be viewed as providing any assistance to the Appellant.[172] The majority Judgment makes it abundantly clear that the defence was precluded from *assuming* that if physical and sexual abuse had occurred it would have been recorded in the complainant's diary.[173] This is because "in the absence of some evidence that abuse ought to be recorded", cases must be decided without resort to folk tales about how victims of abuse are expected to react to trauma.[174] *Shearing*, properly understood, merely holds that the defence should not be precluded from cross-examination in the attempt to create an evidential foundation for a defence that does not rely upon folk tales or myths. It was also noted that a legitimate purpose for cross-examination had been established as the trial judge identified that there were some contradictions between what the complaint wrote in her diary 27 years before, and her present testimony as an adult.[175]

The "recent complaint" jurisprudence assists in consider the approach to stereotyping

91. The Appellant argues that the modern jurisprudence considering "recent complaint" is of assistance to this appeal on the basis that delayed disclosure remains a question of fact that may be properly considered by a trier of fact, so long as it does not rely upon the erroneous and stereotypical assumption that any honest complainant would raise a prompt complaint. An adverse inference against a complainant's credibility that relies on circumstances other than

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[170] ***R v LS,*** 2017 ONCA 685 at para 97
[171] Craig, Elaine, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions". (March 30, 2016), 94 Can Bar Rev 45 at pp 62-75. Available at SSRN: https://ssrn.com/abstract=2756510
[172] ***R v Shearing,*** [2002] 3 SCR 33
[173] ***R v Shearing,*** [2002] 3 SCR 33 at para 146
[174] ***R v Shearing,*** [2002] 3 SCR 33 at para 120-122
[175] ***R v Shearing,*** [2002] 3 SCR 33 at paras 123

delayed disclosure "standing alone" is question of fact, and is not properly reviewable on a Crown appeal from acquittal.

92. The Respondent agrees, however, the jurisprudence does not assist the Appellant in the factual mosaic of the evidence heard at trial, and in consideration of the Trial Judge's reasons for acquittal. Put simply, the Trial Judge's expectation that he would hear evidence suggestive of some change in the Complainant's behaviour, or at least some avoidant behavior, remains as the "stand alone" reason for the Appellant's acquittal. As noted by the majority in the Court of Appeal, the *sole* rationale given by the Trial Judge for acquitting the Appellant was based upon his impermissible stereotypical reasoning. As the majority noted, quoting from *D(D),* "presumptive adverse inference[s] based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse" constitute reversible error.[176]

93. Slatter J.A., made an identical error in the Court of Appeal, by re-introducing the stereotype as a "stand alone" consideration. According to Slatter J.A., "<u>while a change in the Complainant's behaviour would not invariably or necessarily follow a sexual assault, 'some behaviours consistent with that abuse or a least some change of behaviour' would not be unexpected.</u>"[177] Slatter J.A.'s statement effectively re-introduces the stereotype and ignores this Court's caution that "a trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are victims of trauma like a sexual assault will behave".[178]

94. The expectation of a change in the Complainant's behaviour is a "stand alone" consideration because, as the majority in the Court of Appeal notes, the absence of avoidant behaviour or behavioural changes tells the trier of fact nothing about the credibility assessment as all victims behave differently. Neither the Appellant, nor the Trial Judge nor Slatter, J.A., identify any other factor in the factual mosaic, which suggests that *this* Complainant, in *these* circumstances, would be likely to exhibit any behavioural change; let alone, the expectation of avoidant behaviour.

95. To use delayed disclosure as an example, Professor Elaine Craig suggests a couple of examples where the particular factual mosaic would permit an adverse inference to be drawn in the absence of a timely complaint, because the delay is not considered as a "stand alone"

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[176] ***R v D(D),*** [2000] 2 SCR 275 at para 63
[177] Reasons CA - AR, Vol I, Part I, Tab 4 at para 106
[178] ***R v D(D),*** [2000] 2 SCR 275 at para 65

consideration. One example, might be where a complainant had been sexually assaulted several times in the past, and had always promptly reported. As a second example, Professor Craig suggests the complainant who was given repeated opportunities to disclose in a safe and supportive environment, and knew that other individuals had accused the same person and were supported.[179]

96. The Appellant relies upon the Ontario Court of Appeal decision in *O'Connor*, to support the assertion that an allegation of recent complaint is a matter properly within the discretionary province of the trier of fact.[180] In that 1995 decision, the Ontario Court affirmed a line of cases suggesting, "it is erroneous to state that a trier of fact is no longer entitled to draw an adverse inference based on an absence of recent complaint".[181] The problem with this suggestion, as identified by Professor Craig, is that *O'Connor* is difficult to reconcile with this Court's decisions in *WR and D(D),* and the Ontario Court of Appeal case of *Talbot,*[182] which itself followed *D(D)* by two years.[183]

97. It should be remembered that the "doctrine of recent complaint" itself was abrogated in 1983 because it was based upon two outdated stereotypes: that women are not particularly credible witnesses and tend to fabricate claims of rape, and a presumption against credibility if no complaint was made in a reasonable time after the fact.[184] By the time of this Court's consideration of those outdated assumptions in 2000, Major J., speaking for the majority, was of the opinion that the child psychologist called by the Crown at trial to explain the child's delay in alleging sexual abuse was wholly unnecessary under the *Mohan* analysis. Major J., "found

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[179] Craig, Elaine, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence", (March 25, 2011). QLJ, Vol 36, 2011 at p 14. Available at SSRN: https://ssrn.com/abstract=1795354

[180] Appellant's factum at para 57

[181] ***R v O'Connor,*** 1995 CanLII 255 (ONCA) at para 18

[182] ***R v Talbot,*** 2002 CanLII 23584

[183] Craig, Elaine, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence", (March 25, 2011). QLJ, Vol 36, 2011 at pp 10-12. Available at SSRN: https://ssrn.com/abstract=1795354

[184] Craig, Elaine, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence", (March 25, 2011). QLJ, Vol 36, 2011 at p 5. Available at SSRN: https://ssrn.com/abstract=1795354

surprising the suggestion that a Canadian jury or judge alone would be incapable of understanding this simple fact".[185]

98. As a consequence of *D(D),* expert evidence is generally thought to be unnecessary (and inadmissible) for the purpose of assisting the trier of fact to understand that there is no inviolable rule as to how victims of trauma behave. This understanding is of such notoriety that this Court in *D(D),* ruled that a jury should be instructed that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave.[186] It would be perverse given the legal requirement for this instruction, to suggest that when the trier of fact fails to heed this instruction, the resulting error and acquittal could properly be immunized from a Crown appeal on the basis that it is mere fact-finding.

99. A Crown appeal from acquittal must be permitted, as here, from an acquittal where the trier of fact disbelieves a complainant because of the unmet expectation of a generalized stereotype that has no foundation on the record. The legal principles underlying recent complaint make it clear that such a "stand alone" mistake constitutes reversible legal error.[187]

Other concerns raised by the Appellant

100. The Appellant argues that the decision of the majority in the Court of Appeal, prevents the trier of fact from ever relying upon the absence of any change in a sexual assault complainant's behaviour. He further argues that an incongruity in the law arises because demonstrated changes in the after-the-fact behaviour of a complainant are relevant and admissible as indicative of some emotional trauma, and the converse is not.

101. The first concern, with respect is overstated. The majority of the Court of Appeal, following this Court's decision in *D(D),* concerned themselves with the assumption or expectation that the post-abuse conduct of a victim, "standing alone" should never give rise to an adverse inference against the credibility of the complainant. It was, according to the majority, "exactly this type of inference [a stand-alone inference] that was drawn when the trial judge

[185] ***R v D(D),*** [2000] 2 SCR 275 at para 59
[186] ***R v D(D),*** [2000] 2 SCR 275 at para 65
[187] ***R v D(D),*** [2000] 2 SCR 275 at para 63

found a lack of evidence of avoidance by the child complainant".[188] The majority also noted that "the reliance upon myth, said to be based on 'logic and common sense' was the *stand alone* reason the trial judge provided for drawing an adverse inference against the complainant's credibility".[189]

102. It is clear, therefore, that the majority permitted that there may be some circumstances where the absence of evidence of any behavioural change in a complainant may have relevance, but only where it is not a "stand alone" consideration.

103. The Appellant's second concern is that a "one-way evidentiary ratchet" will occur if the trier of fact can legitimately consider changes in the complainant's behaviour as indicative of emotional trauma, but cannot legitimately consider the absence of such changes. As the trier of fact may consider positive evidence of behavioral change, the Appellant argues that the absence of evidence of behavioural change must also have some relevance in the complainant's credibility assessment.

104. Although the Appellant's argument is beguiling, intuitive, and seemingly logical, it overlooks behavioural and human reality that there is no inviolable rule on how people who are victims of trauma will behave. Some people will outwardly react, and display behavioral changes such as bedwetting, nightmares and rebelliousness. Still others outwardly will show no discernable behavioural change. For this reason, the absence of evidence of observed behavioural change, *standing alone*, does not and should not have any impact upon the inferences drawn by the trier of fact concerning the credibility of a sexual assault complainant. To hold otherwise, would reintroduce the spectre of myths and stereotypes in criminal trials. Consistent with this Court's decision in *D(D)*, the Respondent suggests that it would be appropriate to instruct a jury in the assessment of a complainant's credibility, that the absence of some behavioural change is simply one circumstance to consider in the factual mosaic, but that it cannot, *standing alone*, give rise to a presumptive adverse inference as to credibility.

105. On the other hand, no myths or stereotypes are engaged in the suggestion that a trier of fact may properly consider evidence of a positive change in the normative behaviour of a

[188] Reasons CA - AR, Vol I, Part I, Tab 4 at para 63
[189] Reasons CA - AR, Vol I, Part I, Tab 4 at para 67

complainant post-assault as potential evidence of trauma, when that evidence is accompanied by the usual instructions as to the burden of proof and the presumption of innocence. The evidence of behavioral change may or may not tell the trier of fact that some emotional trauma has occurred, and, if so, it may or may not tell the trier of fact that the emotional trauma was caused or contributed to by the alleged sexual assault.

Question in Issue 2 - Did the Trial Judge make the legal error asserted, namely, relying upon stereotypical assumptions about how a victim of a sexual assault would behave?

The Trial Judge's credibility assessment was rooted in a stereotype

106. The majority of the Court of Appeal critically examined the Reasons for Judgment given by the Trial Judge, and agreed that he properly instructed himself on the issue of delayed complaint. As noted by the majority, these self-instructions are undoubtedly correct:

> 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.[190] [Emphasis Added]

107. However, when the Trial Judge's reasons are examined in their ordinary meaning, in context, it is clear that the Trial Judge's legally correct self-instructions stopped there. He expressly limited his self-instruction to a reminder that he should not discount the Complainant's credibility because of her delayed complaint. It was in that context that the Trial Judge properly instructed himself that the supposed behaviour of the usual victim, tells him nothing about this particular victim. To the extent that the Appellant suggests the Trial Judge's self-instructions extended to a more generalized appreciation that there is no expected behaviour from a victim of sexual assault, the suggestion does not accord with what the Trial Judge actually said, and more importantly, what he actually did.

108. Instead, as the majority noted, the Trial Judge's self-instruction did not end there. Rather, his reasoning pathway was rooted in a further self-instruction, based upon a stereotypical and specious assumption, that carried with it an expectation of some behavioural change in the

[190] Reasons CA - AR, Vol I, Part I, Tab 4 at para 52

Complainant such as avoiding the Appellant, and he further found, in the absence of such evidence, that the "otherwise normal parent/child relationship was incongruous, thus incompatible, with the complaint of sexual assaults.[191] Although the Trial Judge indicated that he recognized that everyone does not react in the same way, he *expected* some evidence of avoidance by the Complainant, either conscious or subconscious, and based upon his "logic and common sense", *expected* that a victim of sexual abuse would demonstrate behaviours consistent with that abuse. This aptly demonstrates that the Trial Judge either ignored, or did not appreciate the broader applicability of his earlier self-admonition that he should not judge credibility based upon myths or stereotypes, including his observation that the behaviour of the "usual victim tells me nothing about this victim".

109. The legal error is patent on a plain reading of the Trial Judge's Reasons for Judgment. It is abundantly clear that the Trial Judge engaged in a type of impermissible stereotypical thinking. As the majority noted: "to say that particular child's behaviour is incongruous with the stereotypical child victim, and to assess the child's credibility negatively because of that finding, is a misdirection and wrong in law.[192]

110. Slatter, J.A., for the minority judgment in the Court of Appeal, surmised that the Trial Judge decided that the Appellant was not completely believable, but that his evidence carried enough weight to create a reasonable doubt. This suggestion, however, does violence to what the Trial Judge actually said. The Trial Judge expressly said that the Appellant was not believable, and termed his denials of opportunity to commit the sexual assault as "ludicrous" and "not worthy of belief. Instead, as found by the majority, it is clear that acquittal was *solely* based upon a reasonable doubt that was tainted by a credibility assessment of the Complainant marred by a stereotypical expectation that as not founded upon the evidence.

111. As the Appellant noted, acquittals cannot be lightly overturned. However, appellate courts have a duty to overturn acquittals that are tainted by a legal error in the assessment of the evidence. There is no ambiguity in the Trial Judge's reasons. It is abundantly clear that the Trial Judge employed a pernicious stereotype in his credibility analysis. The Trial Judge was clearly alive to the dangers of drawing conclusions about credibility based upon the timeliness of

[191] Reasons CA - AR, Vol I, Part I, Tab 4 at para 53
[192] Reasons CA - AR, Vol I, Part I, Tab 4 at para 61

complaint, but the Trial Judge's "reasons nonetheless reflect an error of law in his reliance upon yet another, different myth or stereotype".[193] In the end, as the majority stated:

> An accused's constitutionally-protected right to make full answer and defence does not permit reliance on prejudicial generalizations about sexual assault victims. Reasonable doubt is not a shield against appellate review if that doubt is informed by inferences based on external, personal assumptions or expectations about how sexual assault victims behave either generally, or specifically. Appellate courts must carefully scrutinize reasons to ensure that findings said to be based on "common sense or logic" are reliably just that, and are not, in fact, unfair and inaccurate external viewpoints that find no foundation in the record.[194]

PART IV – SUBMISSIONS ON COST

112. As this is a criminal case, the Respondent is not seeking costs.

PART V – ORDER SOUGHT

113. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT Edmonton, Alberta this 10th day of January, 2018

DAVID A. LABRENZ, Q.C.
COUNSEL FOR THE RESPONDENT,
ATTORNEY GENERAL OF ALBERTA

[193] Reasons CA - AR, Vol I, Part I, Tab 4 at para 65
[194] Reasons CA - AR, Vol I, Part I, Tab 4 at para 71

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

AUTHORITIES	Cited at Paragraph No.
R v ADG, 2015 ABCA 149, [2015] AJ No 470 at paras 33, 36, 38-39	28, 73, 75
R v Adepoju, 2014 ABCA 100, 2014 CarswellAlta 370 at paras 2, 11-13	74
R v B(G), [1990] 2 SCR 30, [1990] SCJ No 58 at pp 54-55, 71 ***R c B(G)***, [1990] 2 RCS 30, [1990] SCJ No 58 at pp 54-55, 71	52, 58
R v Barton, 2016 ABCA 68, 2016 CarswellAlta 385 at para 8	28, 39
R v Beland, [1987] 2 SCR 398, [1987] SCJ No 60 ***R c Beland,*** [1987] 2 RCS 398, [1987] SCJ No 60	1
R v Biniaris, 2000 SCC 15, [2000] 1 SCR 381 at para 32 ***R c Biniaris,*** 2000 CSC 15, [2000] 1 RCS 381 at para 32	57
R v CAM, 2017 MBCA 70, 2017 CarswellMan 340 at para 47	77
R v CMG, 2016 ABQB 368, 2016 CarswellAlta 1483 at paras 50, 51, 52, 56-59, 60, 62, 79-82, 85, 90	43, 44, 53, 76, 77
R v Caesar, 2015 NWTCA 4, 2015 CarswellNWT 7 at para 6	28
R v Cloutier, 2011 ONCA 484, 272 CCC (3d) 291 at para 96	80
R v Curry, 2014 ONCA 174, 317 OAC 329 at para 37	58
R v D(D), [2000] 2 SCR 275, 2000 SCC 43 at paras 33, 59, 63, 65 ***R c D(D),*** [2000] 2 RCS 275, 2000 CSC 43 at paras 33, 59, 63, 65	21, 28, 71, 75, 92, 93, 97, 98, 99
R v Ewanchuk, 1998 ABCA 52, [1998] 6 WWR 8 at paras 52-61	49
R v Ewanchuk, [1999] 1 SCR 330, [1999] SCJ No 10 at paras 82, 87, 94-97, 103 ***R c Ewanchuk,*** [1999] 1 RCS 330, [1999] SCJ No 10 at paras 82, 87, 94-97, 103	49, 71
R v F(CC), [1997] 3 SCR 1183, [1997] SCJ No 89 at paras 47-49 ***R v F(CC),*** [1997] 3 RCS 1183, [1997] SCJ No 89 at paras 47-49	52

R v F(WJ), [1999] 3 SCR 569, [1999] SCJ No 61 at paras 13-16, 42-44 ***R c F(WJ),*** [1999] 3 RCS 569, [1999] SCJ No 61 at paras 13-16, 42-44	52
R v Find, [2001] 1 SCR 863, 2001 SCC 32 at paras 48, 101, 103 ***R c Find,*** [2001] 1 RCS 863, 2001 CSC 32 at paras 48, 101, 103	49, 54, 80
R v Hajar, 2016 ABCA 222, 338 CCC (3d) 477 at para 99	28, 51
R v Hamilton, 2004 CarswellOnt 3214 (CA), 186 CCC (3d) 129 at paras 126-128	81
R v Harrer, [1995] 3 SCR 562, [1995] SCJ No 81 ***R c Harrer,*** [1995] 3 RCS 562, [1995] SCJ No 81	43
R v JMH, [2011] 3 SCR 197, 2011 SCC 45 at paras 1, 25-27, 28, 29-30, 39 ***R c JMH,*** [2011] 3 RCS 197, 2011 CSC 45 at paras 1, 25-27, 28, 29-30, 39	20, 57, 58, 87
R v JR, 2016 ABQB 414, 2016 CarswellAlta 1390 at paras 3-5, 18, 22, 24	75
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