The Avoidance of Stereotypical Reasoning in Rendering Judgment

Wayne K. Gorman

Canadian trial judges have been encouraged to rely upon "reason, common sense and life experience" in making credibility assessments (see *R. v. Delmas*, 2020 ABCA 152, para. 31, *aff'd* 2020 SCC 39). However, a number of recent Canadian Court of Appeal decisions have concluded that this use of common sense has, at times, caused Canadian trial judges to stray into stereotypical reasoning, rendering their credibility-based judgments invalid. In very succinct terms, the Nova Scotia Court of Appeal recently indicated that "[r]eliance on a stereotype in assessment of credibility is impermissible and an error of law" (see *R. v. Stanton*, 2021 NSCA 57, para. 84).

WHAT IS STEREOTYPICAL REASONING?

The British Columbia Court of Appeal has suggested that it involves a trial judge drawing "an adverse inference about a witness's credibility based on stereotypes, generalizations, or assumptions about how individuals would behave in a particular circumstance that are not (a) grounded in the evidence, or (b) so uncontroversial that they could properly be the subject of judicial notice" (see *R. v. Greif*, 2021 BCCA 187, para. 60).

In *R. v. Roth*, 2020 BCCA 240, it was indicated that although trial judges "are entitled to rely on their human experience in assessing the plausibility of a witness's testimony, they must avoid speculative reasoning that invokes 'common sense' assumptions not grounded in the evidence." When "inferences reflect conjecture and speculation, based on stereotypical reasoning, a generalization about a particular role or type of individual, unfounded assumptions or otherwise, it amounts to legal error" (paras. 65 and 73).

In this column, I intend to review a number recent Canadian Court of Appeal decisions in an to attempt to determine when the use of "common sense" by Canadian trial judges, in making credibility assessments, has strayed in to stereotypical reasoning. I will offer some suggestions to avoid this occurring. I intend to start with assessing the nature of the problem in Canada.

THE NATURE OF THE PROBLEM

It has been pointed out that credibility assessments "tainted by improper speculation or stereotypical reasoning have been particularly problematic in the context of sexual offences. Triers of fact must be aware 'there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave'. Reliance on myths, stereotypes, or unfounded inferences to ground credibility assessments is an error, whether it is applied against a complainant or an accused" (*Greif*, para. 61).

In *R. v. Chen*, 2020 BCCA 329, the British Columbia Court of Appeal noted that "the use of a common-sense approach to assessing credibility in sexual assault cases is fraught with danger. This is because so-called 'common sense' can mask reliance on stereotypical assumptions and pre-conceived views about how victims of sexual assault can be expected to behave.… Although the law has sought for decades to eradicate such myths and stereotypes, they are remarkably persistent, pervasive, and invidious. In consequence, when instructing juries on how to assess the credibility of a sexual assault complainant, a judge must provide clear limiting instructions to guard against the use of impermissible reasoning based on discredited myths and stereotypes and thus ensure a fair trial" (para. 23).

The Alberta Court of Appeal has suggested that "myth- and stereotype-based" thinking "continues to linger in the legal landscape like a fungus" (see *R. v. AE*, 2021 ABCA 172, para. 153).

THE NATURE OF THE UNDERLYING MYTHS

In *Chen*, the Court of Appeal set out some of the "myths and stereotypes" about victims of sexual assault in the following manner (para. 24):

> I will not review the many myths and stereotypes about victims of sexual assault and their expected behaviour that are subtly woven into the fabric of "common sense" in our society. For present purposes, it is sufficient to note they include the notion that sexual assault victims can reasonably be expected to resist or cry out during an attack, avoid their attacker thereafter and manifest signs of the trauma they endured for all to see and understand. However, it has long been recognized that, in reality, there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" and stereotypical assumptions to the contrary have been soundly rejected as a proper basis upon which to draw inferences.…

Similarly, in *R. v. JC*, 2021 ONCA 131, it was pointed out that "it is a myth or stereotype that a complainant would avoid their assailant or change their behaviour towards their assailant after being sexually assaulted, and it is an error to employ such reasoning.… Similarly, it is a stereotype that women would not behave in a sexually aggressive manner, or that men would be interested in sex. Reasoning that is based on such inferences is not permitted" (para. 66).

The Court of Appeal indicated in *JC* that "factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour… Pursuant to this rule, it is an error of law to rely on stereotypes or erroneous common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility" (para. 63).

RECOGNIZING THE ERROR

Sometimes recognizing the use of stereotypical reasoning by a trial judge is easy. In *R. v. Lacombe*, 2019 ONCA 938, for instance, the trial judge drew a negative inference in relation to the complainant's credibility, in part, because she was "dressed in a loose-fitting pajama top with no bra, shorty pants, PJ pants, and no underwear" (*see* para. 17 of the Court of Appeal's decision). Similarly, in *JC*, the Court of Appeal indicated that the trial judge erred by relying "on the stereotypical view that victims of sexual aggression are likely to immediately report the acts, and conversely, to conclude that the lack of immediate reporting reflects either absence of assaultive or non-consensual behaviour" (para. 41). Finally, in *R. v. A.R.H.D.*, 2018 SCC 6, the trial judge, in acquitting the accused, indicated that "[a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator." In setting aside the acquittal, the Supreme Court of Canada said that the trial judge "judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law" (para. 2).

However, determining whether a trial judge has strayed into stereotypical reasoning is not always obvious. In *R. v. Steele*, 2021 ONCA 186, Justice van Rensburg pointed out that it can at times be difficult to distinguish "between prohibited lines of reasoning and reasonable, context-specific inferences drawn by a trial judge in assessing credibility in sexual assault cases" (para. 52).

One manner in which trial judges can seek to avoid improper reasoning is to consider appellate judgments in which such an error is said to have occurred. Thus, a closer look at *Lacombe* is useful, because it illustrates some easily avoided errors.

R. V. LACOMBE

In *Lacombe*, the accused was charged with two counts of sexual assault. The complainant and the respondent were tenants in an adult assisted care residence for persons with disabilities. Each resident had their own room. The complainant alleged that the respondent sexually assaulted her on two consecutive days. The primary issue at trial was whether the complainant consented to the sexual touching that occurred.

THE TRIAL

The accused was acquitted. In acquitting the accused, the trial judge indicated that he was troubled by the reliability of the complainant's evidence. In the course of his reasons, the trial judge made the following comments concerning her evidence:

> While not determinative it is significant that the next night April the 19th, [the complainant] was dressed in a loose pyjama top with no bra, shorty pants, PJ pants, and no underwear, and was quite prepared to go down the hallway and out onto the fire escape and smoke cigarettes with Richard Lacombe.

The Crown appealed from the acquittal. It argued that the "trial judge's analysis was tainted by reliance on discredited stereotypical assumptions and biases about how victims of sexual assault behave" (*see* para. 21).

THE COURT OF APPEAL

The appeal was allowed and a new trial ordered. The Ontario Court of Appeal noted that the "Supreme Court has repeatedly held that myths and stereotypes about sexual assault victims have no place in a rational and just system of law. Relying on myths and stereotypes to assess the credibility of complainants jeopardizes the court's truth-finding function" (para. 31). The Court of Appeal concluded that the trial judge had relied on improper stereotypes in a number of ways.

THE COMPLAINANT'S CLOTHES

The Court of Appeal concluded that the trial judge's comments concerning the complainant's clothing, illustrated "discredited reasoning" (paras 36, 38 and 39):

> The trial judge stated that it was significant that the complainant "presented herself to Richard Lacombe dressed in a loose-fitting pyjama top with no bra and underwear." He again referenced her clothing as being significant when addressing the second encounter the following evening, when he stated that it was significant that the complainant "was dressed in a loose pyjama top with no bra, shorty pants, PJ pants, and no underwear." The trial judge did not explain how the complainant's dress could have been significant.
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> The stereotypical assumption that "if a woman is not modestly dressed, she is deemed to consent" no longer finds a place in Canadian law…
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> Dress does not signify consent, nor does it justify assaultive behavior. As such, it had no place in the trial judge's assessment of the complainant's credibility and reliability. The trial judge's attribution of significance to this factor impermissibly adopted discredited reasoning.

ABSENCE OF IMMEDIATE REPORTING

In acquitting the accused, the trial judge noted "that at the time of the first incident, the complainant did not report the assault to friends, staff, or the police" (*see* para. 40).

The Court of Appeal indicated that the "myth that a sexual assault complainant is less credible if she does not immediately complain is one 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'.… It is unacceptable to rely, as the trial judge did here, on the stereotypical view that victims of sexual aggression are likely to immediately report the acts, and conversely, to conclude that the lack of immediate reporting reflects either absence of assaultive or non-consensual behaviour" (para. 41).

The Ontario Court of Appeal held that there "is no rule as to how victims of sexual assault are apt to behave.… The trial judge's reference to the fact that the complainant remained reflects that he was comparing her conduct to conduct he expected of a sexual assault complainant without giving any consideration to her evidence of fear" (para. 45).

CONCLUSION IN LACOMBE

The Court of Appeal concluded that a new trial was required (para. 62):

> The trial judge's assessment of the complainant's credibility played a prominent role in determining both whether he would believe the respondent and whether he was left with a reasonable doubt as to his guilt. The trial judge's closing reference to *Nimchuk* reflects that he acquitted the respondent because he was unable to say what happened following his assessment of the conflicting testimony. However, his assessment of the entirety of the evidence was fatally flawed by the approach he took to the complainant's evidence. The verdict would not necessarily have been the same in the absence of the trial judge's legal errors.

AN APPLICATION OF THESE PRINCIPLES TO THE EVIDENCE PROVIDED BY THE ACCUSED

It has been noted that the type of error that occurred in *Lacombe* can occur whether the witness is a complainant or the accused (*see Roth*, paras 70-73). Thus, assessing an accused person's evidence on the basis of stereotypical reasoning also constitutes an error. The decision in *JC* illustrates this point. It also provides an interesting analysis as to how evidence capable of leading to stereotypical reasoning may still be admissible.

R. V. JC

In *JC*, the accused was convicted of the offence of sexual assault. The trial judge concluded that the accused engaged in unwanted sexual activity with the complainant (HD) on several occasions, though the accused had testified that he had specifically asked HD if she was consenting before any sexual activity took place. The trial judge rejected this evidence, concluding that the accused's testimony was "too perfect, too mechanical, too rehearsed, and too politically correct to be believed" (*see* paras 4 and 50).

The accused appealed from conviction. He argued that the trial judge erred in "impermissibly [using] stereotype to reject [his] testimony about his practice of expressly seeking HD's consent before engaging in specific sexual acts with her" (para. 4).

THE CONCLUSION IN JC

The Ontario Court of Appeal concluded that the trial judge's reasons for "rejecting JC's testimony on obtaining consent, contravenes both the rule against ungrounded common-sense assumptions, and the rule against stereotypical inferences" (para. 95). In ordering a new trial, the Court of Appeal described these errors in the following manner (paras 96 and 97):

> The trial judge committed the first error—invoking an ungrounded common-sense assumption—by concluding that JC's testimony is "not in accord with common sense and experience about how sexual encounters unfold." This is a bald generalization about how people behave. It is not derived from anything particular to the case, or any evidence before the trial judge on how all sexual encounters unfold.
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> The trial judge committed the second error of relying on stereotypical reasoning when he rejected JC's claimed conduct as "too perfect, too mechanical, too rehearsed, and too politically correct." The trial judge was invoking a stereotype that people engaged in sexual activity simply do not achieve the "politically correct" ideal of expressly discussing consent to progressive sexual acts. This is a generalization because it purports to be a universal truth and it is prejudicial because it presupposes that no-one would be this careful about consent.

However, the Court of Appeal took the time in *JC* to point out that there is no "absolute bar on using human experience of human behaviour to draw inferences from the evidence.… Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using 'common-sense' or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour" (para. 61).

Thus, the question becomes: when does the use of evidence that could support an impermissible stereotype become appropriate?

THE PERMISSIBLE USE OF EVIDENCE THAT COULD SUPPORT AN IMPERMISSIBLE STEREOTYPE

In *JC*, the Court of Appeal indicated that "the rule against stereotypical inferences does not bar all inferences relating to behaviour that are based on human experience. It only prohibits inferences that are based on stereotype or 'prejudicial generalizations.'" The Court held that though "this rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence" for proper purposes (paras 69 and 70):

> …it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype: *Roth*, at paras. 130-38. For example, in *R. v. Kiss*, 2018 ONCA 184, paras 101-02, evidence that the complainant did not scream for help was admitted, not to support the impermissible stereotypical inference that her failure to do so undermined the credibility of her claim that she was not consenting, but for the permissible purpose of contradicting her testimony that she had screamed to attract attention.
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> By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead, based on the evidence. For example, although it is a stereotype that men are interested in sex, it was not an error to infer that the accused male was interested in sex at the time of the alleged assault where that inference was based on evidence.…Similarly, in *R. v. F.B.P.*, 2019 ONCA 157, the trial judge was found not to have erred in finding it implausible that the complainant would consent to spontaneous sex on a balcony, potentially in full view of others, because that inference did not rest in stereotypes about the sexual behaviour of women. The inference

was based on evidence about the ongoing sexual disinterest the complainant had shown in the accused, and the ready availability of a private bedroom.

Similarly, in *Greif*, the British Columbia Court of Appeal suggested that "[w]hile avoiding reliance on myths and stereotypes is essential to the pursuit of a more just criminal justice system, it is not the case that evidence capable of being relied upon to support a stereotypical assumption is necessarily being used for that purpose. Where the evidence is adduced to support a permissible inference, it is not an error for a trier of fact to rely on that evidence in assessing a witness's credibility" (para. 62).[1]

In my view, these two Courts of Appeal are attempting to draw a distinction between stereotypical inferences and acceptable inferences based upon human experience or common sense. They suggest that evidence upon which a stereotypical approach could be based may be admissible if it is not used in such a manner. Of course, it must be relevant in the specific circumstances of the case and there must be an evidentiary basis for the inference. What must be avoided is what the Ontario Court of Appeal refers to as "untethered generalization about human behaviour" (*see JC*, para. 62).

Having said this, there must be certain inferences that will always be legally unacceptable. For instance, at one time the doctrine of "recent compliant" was used in this country to undermine a complainant's evidence in sexual assault trials on the now discredited theory that women who have been sexually assaulted would immediately complain about it (or raise a "hue and cry"). Surely, such an inference is not acceptable based upon such evidence being used for other than stereotypical reasoning.[2]

The Ontario Court of Appeal points out in *JC* that that "there is no bar on relying upon common-sense or human experience to identify inferences that arise from the evidence. Were that the case, circumstantial evidence would not be admissible since, by definition, the relevance of circumstantial evidence depends upon using human experience as a bridge between the evidence and the inference drawn" (para. 59). It is "ungrounded common-sense assumptions" that are prohibited (para. 61):

> Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour.

Professor Dufraimont, in a case comment (*see* Criminal Law E-Letter 319, National Judicial Institute, July 16, 2021), describes this approach as a "dual analytical structure." She suggests that these Court of Appeal decisions call "for limits on trial judges' use of common sense and generalizations about human behavior" but do not seek "to eliminate all common-sense reasoning and behavioural generalizations, which remain acceptable if they find adequate support in the evidence or in judicial notice" (p. 16).

R. V. STEELE AND THE DIFFICULTY OF DRAWING A DISTINCTION BETWEEN PROPER COMMON-SENSE INFERENCES AND STEREOTYPICAL THINKING

The difficulty that can arise in drawing a distinction between impermissible and permissible generalizations about human behavior is illustrated by the Ontario Court of Appeal's decision in *Steele*.

In *Steele*, the accused was charged with the offence of sexual assault. The evidence at the trial indicated that while the accused and the complainant (AV) were walking to the accused's residence, they stopped at an abandoned trailer. The complainant testified that acts of forced sexual intercourse took place inside the trailer. The accused testified that acts of consensual sexual intercourse occurred. After the incident, the complainant received a telephone call from her father. She told him she was on her way home. She did not mention having been sexually assaulted.

At trial, the accused was acquitted. In entering the acquittal, the trial judge made the following statements concerning the complaint's decision to enter the trailer and the telephone conversation she had with her father:

Footnotes

1. One suggested solution is to view myths and stereotypes about sexual offences as being "prohibited inferences." In this scenario, evidence that is "solely relevant to support a prohibited inference has no legitimate probative value and is inadmissible" (*see* Lisa Dufraimont, *Myth, Inference and Evidence in Sexual Assault Trials* (2019), 44 QUEEN'S L.J. 316, at pages 331 and 346). In some instances, this has occurred (see, for instance, section 276 of the *Criminal Code of Canada*, R.S.C. 1985, which prohibits the questioning of a complainant, without leave, about prior sexual activity in sexual offence trials). Another solution is to have counsel explicitly indicate, particularly in sexual assault trials, the "specific purpose" for leading evidence, which may have a stereotypical reasoning element (*see* R. v. Goldfinch, 2019 SCC 38, para. 119).

2. In *R. v. J.M.*, 2021 ONCA 150, the Ontario Court of Appeal considered this point and stated (para. 28):

> Canadian law has adopted several rules concerning the admissibility of evidence and the use of proven facts when assessing the credibility of a complainant in a sexual assault prosecution. For example: rules relating to evidence of recent complaint have been abrogated (*Criminal Code*, s. 275); a complainant's delay in disclosure, standing alone, can never give rise to an adverse inference against his or her credibility as there is no inviolable rule on how those who are the victims of trauma like a sexual assault will behave (*R. v. D. (D)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65); evidence of sexual reputation is not admissible for the purpose of challenging or supporting the credibility of a complainant (*Criminal Code*, s. 277); and evidence that a complainant has engaged in sexual activity is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge or is less worthy of belief (*Criminal Code*, s. 276(1)).

> In my view, A.V.'s decision to walk T.J. partway home, for no discernable reason, followed by her decision to enter the trailer with [him] especially at that late hour, is inconsistent with her testimony that she did not like T.J. Her refusal or inability to provide the court with a reason for entering the trailer with T.J. detracts from her credibility.
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> In my view, A.V.'s response to her father does not appear to be the response of someone who has just been sexually assaulted and has been kept in the trailer against her wishes. It is more consistent with the response of someone who is attempting to conceal her activities and whereabouts from her parents.

The Crown appealed from the acquittal, arguing that the acquittal was based on improper stereotypical thinking.

The appeal was allowed and a new trial ordered. A majority of the Ontario Court of Appeal concluded that the trial judge "applied irrelevant stereotypical views about the behaviour of sexual assault victims under the guise of a common-sense approach to credibility assessment. He did this twice: first when considering A.V.'s evidence about why she went into the trailer; second when discussing her call with her parents" (para. 20).

THE TRAILER COMMENT

A majority of the Court of Appeal indicated that the "implication in the trial judge's reasons is that consent can be inferred from the complainant's entry into the trailer. This is wrong in law" (paras 23-24):

> In the emphasized text above, the trial judge went beyond assessing credibility and made an inference about consent because he could not imagine another reason to enter the trailer other than to have consensual sex. It was open to the trial judge to hold that the complainant's inability to answer impacted her credibility, but he went further. In so doing, he relied on stereotypes and assumptions—that a woman would not enter a building at night with a man unless she wanted sex—to conclude that the complainant wanted to have sex.
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> It may be that a person's reasons for entering a premise—whether a trailer or a hotel room—may have relevance to a credibility assessment. I recognize the subtlety. But stereotypical assumptions are often couched as credibility assessments. Significantly, this was not the trial judge's only use of stereotypical reasoning. His use of the evidence concerning the phone call significantly crosses the line into impermissible reasoning and compounds my concern about his use of the complainant's reasons for entering the trailer.

TELEPHONE CONVERSATION WITH HER FATHER

The majority indicated that these "comments emphasized above reflect the use of an impermissible assumption.… Here the trial judge specifically found that A.V.'s conversation with her father 'does not appear to be the response of someone who has just been sexually assaulted.' This is a classic example of an assumption made by a trial judge as to what a victim of an assault would do" (paras 30 and 33).

CONCURRING OPINION

Justice van Rensburg agreed that a new trial should be ordered, but concluded that:

> [T]he trial judge's treatment of the evidence about why A.V. and the respondent entered the trailer was a proper, and in the circumstances of this case necessary, part of his overall assessment of the evidence. The trailer was where the sexual contact took place and the evidence of A.V. and T.J. about what happened before, during, and after they entered the trailer was relevant to the issue of consent.…I therefore disagree with my colleague's conclusion that the trial judge invoked impermissible myths and stereotypes in his analysis to infer consent from A.V.'s entry into the trailer based on assumptions that a woman would not enter a building at night with a man unless she wanted sex (paras. 62 and 71).

These differing opinions at the Court of Appeal level illustrate that it can at times be difficult to distinguish between conclusions reached as a result of stereotypical reasoning as compared to conclusions reached based upon the application of common sense or human experience. How then can a trial judge adopt a correct approach?

WHAT IS THE PROPER APPROACH FOR TRIAL JUDGES?

I would suggest that the proper approach is for trial judges to ensure that their conclusions are "drawn from the evidence in the record, rather than an unsupported assumption or generalization about how an individual would be expected to behave" (*Greif*, para. 65). Thus, in *R. v. Quartey*, 2018 SCC 59, the Supreme Court of Canada, in rejecting an attack upon a trial judge's reasons, indicated that the trial judge did not "err by applying generalizations and stereotypes in rejecting the appellant's evidence. We agree with the majority at the Court of Appeal that the trial judge's statements in this regard were directed to the appellant's own evidence and to the believability of the appellant's claims about how he responded to the specific circumstances of this case, and not to some stereotypical understanding of how men in those circumstances would conduct themselves" (p. 1).

Similarly, in *R. v. Pastro*, 2021 BCCA 149, it was argued on appeal that the trial judge had engaged in stereotypical reasoning in concluding that the accused's evidence that the seventeen-year-old complainant had consented to sexual activity with him (he was forty-nine years of age) was "unbelievable" because of their differences in age. In upholding the conviction for sexual assault, the British Court of Appeal indicated that that the trial judge had not engaged in any stereotypical reasoning or "perceived universal truths about human behaviour" because there was a factual foundation for this finding: the complainant described the accused's sexual advances as "creepy" and "disgusting" (paras 66-67).

Professor Lisa Dufraimont, in a comment on *Pastro* (*see* Criminal Law E-Letter 319, National Judicial Institute, July 16, 2021) suggests that the Court of Appeal's reference to "perceived universal truths about human behaviour" indicates "that a trial judge would clearly be prohibited from reasoning that no 17-year-old

woman would ever be interested in sexual activity with a 49-year old man" (p. 17). Interestingly, Professor Dufraimont also points out what was left undecided in *Pastro* (pp. 17-18):

> What seems less clear in *Pastro* is whether a trial judge would be entitled to put any reliance on the proposition that sexual attentions directed at teenaged girls by middle-aged men are sometimes, even often, received as unwelcome and inappropriate. Arguably, this proposition could be a proper subject for judicial notice, in the sense that it might be accepted as true, based on human experience, by well-informed members of the community.…On the other hand, some passages in *Pastro* could be taken to suggest that trial judges are bound to confine their reasoning to factors specific to the immediate parties in the particular factual circumstances: see, for example, Fitch J.A.'s references to a "context-specific assessment" of the evidence of "this 17-year-old female" in the passage quoted above from *Pastro*, para. 67. Ultimately, it remains uncertain how much trial judges can rely on the lessons of human experience in drawing inferences from circumstantial evidence in sexual assault cases.

GUIDELINES

There are some general guidelines that can be suggested. First of all, these issues have been considered predominantly in sexual offence trials. Trial judges must therefore in such cases:

- avoid broad generalizations;
- refrain from conclusions based upon the expected behavior of sexual assault complainants, rather than the actions of the specific complainant;
- do not generally place any weight on delayed disclosure or lack of a complaint having been made to the police by the complainant;
- understand that the failure of the complainant to avoid the accused afterward is usually irrelevant;
- do not accept arguments based upon there having been an "implied consent";
- do not equate lack of physical resistance with consent (which in Canadian law is subjective);
- do not equate a lack of emotional reaction as an indication of consent;
- do not accept a consent argument based upon the complainant's sexual history or what he or she was wearing; and
- do not equate past consent to sexual activity as evidence of present consent.

CONCLUSION

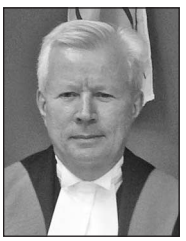
I use the words "generally" and "usually" purposely because there is often no bright-line rule that causes witness assessment based upon experience and common sense to stray into stereotypical reasoning.

As we have seen, this problem is particularly acute in Canada in sexual assault trials. However, trial judges can avoid prohibited lines of reasoning in such trials by avoiding basing credibility assessments based upon what we feel a complainant should or should not have done as compared to what they did. As pointed out in *Steele*, concerns arise "when the trier of fact draws inferences based on generalizations about human behaviour; it is in this process that drawing a common-sense inference may mask stereotypical or discriminatory reasoning" (para. 56).

The British Columbia Court of Appeal indicated in *Pastro* that trial judges must refrain from making findings of credibility based upon "a subjective assessment of what a hypothetical complainant or accused might reasonably be expected to do in the circumstances, but on what the evidence establishes the complainant and accused did or did not do in the context of the case being tried" (*see* para. 42). The Court of Appeal also indicated that trial judges "risk falling into reversible error if they make credibility determinations by relying on assumptions about the type of behaviour that would 'normally' be expected of a person without engaging with the evidence, including the context in which contentious events arose" This is "dangerous because it does not account for the unpredictable, surprising, and out of character ways in which human beings sometimes do behave" (*see* paras 43-45).

Thus, trial judges must acknowledge that their experience as to how people act is not always calibrated to assess how those who have been sexually assaulted might react. Professor Dufraimont points out that a trial judge must be careful not "to draw conclusions" from his or her personal experience "about what behaviours are 'commonplace' among victims of sexual abuse" (*see* Criminal Law E-Letter 316, National Judicial Institute, May 14, 2021, at p. 20).

One final comment. Written reasons are not yet required in sexual offence trials in Canada, but they can be an invaluable tool in avoiding stereotypical reasoning. It has been pointed out that nothing "better exposes any fallacies in your ideas than reading them in cold type" (*see* J.O. Wilson, *A Book for Judges*, Canadian Judicial Council, 1980, at p. 80). As Judge Posner has put it: "The judge by not writing, will be spared a painful confrontation with the inadequacy of the reasoning that supports his decision" (*see* Judge Richard Posner, *Judges Writing Styles (and Do They Matter)*, 62 U. CHI. L. REV. 1421, 1448 (1995)).



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