Quick Reference Guide: Relevance, Good Faith, and Prejudice in Cross Examination in Sexual Assault Trials (Emphasizing matters not explicitly dealt with in SS. 276 and 278 CCC)

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1. Goal for use of the cross examination chart:

To provide quick reference support for objection to defence cross-examination of the complainant on prejudicial (and often conjectural) matters not covered by the screens set out in the Criminal Code for sexual history and personal records.

Reflecting the uneven level of courts' sophistication, the matters about which such questions are posed by the defence may be seen as irrelevant from the point of view of a judge who understands rape myths, or they may be considered "relevant" by a judge who does not.

As Justice L'Heureux-Dube has pointed out in *Osolin*:

> Despite the fact that there is much wider recognition, both among those involved in the administration of justice and among the public at large, that unfounded beliefs about sexual assault victims prejudicially affect both the victims and the trial of the issue, their force and effect has not been eliminated. Of their very nature, beliefs will inform notions of relevance. However, as they often function unconsciously, their effect can be unacknowledged and identifying them may be a difficult and elusive process.

Particularly for questions not clearly covered by Code sections 276 and 278, effort may be required to illuminate for the judge the unconscious and unacknowledged rape myths imbedded in cross-examination.

Examples of troubling defense cross-exam questions offered by several of the participating prosecutors included:

1. Isn't it true you are addicted to crack?
2. You were looking for a man that night, weren’t you?
3. You go regularly to that bar, looking for a man, don’t you[1]?
4. You'd already agreed to have sex before this night with this man?
5. When you asked your boyfriend to "stop" in the past, he always did, didn't he?
6. You've had no reason to complain about your sex life with the accused before?
7. You've made complaints about sexual assaults in the past, haven't you?

[1] Additionally, this question about what she "regularly" does may be excluded by CC s. **277.**
" In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant. "

In my view, questions like 4, 5, and 6 are clearly covered by the requirements of s. 276, and will not be dealt with here.

While 2 and 3 may also be covered by s. 276, the myths and stereotypes that could make such questions seem relevant will be examined here. While 7 also may be covered, because there is specific case law disallowing this line of questioning except in certain circumstances, it will be examined here.

The accompanying objection tool emphasizes quick reference for objections to questions which are based on rape myths and stereotypes about women, but not necessarily explicitly dealt with by the Criminal Code screening provisions.

2. General limits to relevant questioning

Even if a question does relate to a matter deemed relevant by the trial judge, limitations apply, and judges have discretion to exclude. These limitations are reviewed in Justice L'Heureux-Dube's dissent in *Seaboyer*, with an eye to their implications in sexual assault trials:

> Significant for our purposes is the long-recognized discretion in the trial judge to exclude otherwise relevant evidence. Hence, a determination that something is relevant does not answer the further question whether, regardless of its relevance, there exists some rule or policy consideration that nevertheless mandates exclusion of the proffered evidence. Thus, *Cross on Evidence*, *supra*, at p. 60, quoting Wigmore, observes that, "[a]dmissibility signifies that the particular fact is relevant and something more, -- that it has also satisfied all the auxiliary tests and extrinsic policies." Indeed, highly relevant evidence that could greatly benefit the cause of the accused may, in our legal system as it presently exists, be excluded as may evidence that could assist in the judicial "search for truth". Though generally stated, more notable examples of relevant though excluded evidence include: hearsay, opinion, character, conduct on other occasions, the collateral fact rule which treats answers given by witnesses to questions involving collateral facts as final, privilege against self-incrimination, evidence obtained in a manner violating a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms*, lawyer-client privilege and other professional relationships that may from time to time be accorded a similar privilege (for a fuller discussion of this type of privilege see S. Schiff, *Evidence in the Litigation Process* (3rd ed. 1988), vol. 2, at p. 1010), communication between spouses, government information whose disclosure would be "injurious to the public interest", etc.

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There are many reasons why relevant evidence may be excluded and such exclusions play a significant and important role in the traditional law of evidence. Some evidence is excluded in order to protect values that our society holds dear. Other evidence may be excluded because of its inherent unreliability. As well, evidence will be excluded if it distorts rather than enhances the search for truth. McCormick, *McCormick's Handbook of the Law of Evidence* (2nd ed. 1972) at pp. 439-40, quoted in J. A. Tanford and A. J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980), 128 *U. Pa. L.*

Rev. 544, at p. 569, sets out four reasons for the exclusion of this latter type of "prejudicial" evidence:

> **First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy.**
>
> **Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues[2].**
>
> **Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time.**
>
> **Fourth, the likelihood that the evidence offered and the counter proof will consume an undue amount of time the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.**
>
> [emphasis and tabulation added]

3. Limits to defence cross-examination without an evidentiary predicate

Notwithstanding the above limitations, the breadth allowed to defence cross-examination without evidentiary basis is very wide, and broader than that allowed to the Crown. However, this right too is not without limitations. The point was most recently considered by the Supreme Court of Canada in *Lyttle* (2004): A question *can* be put to a witness in cross examination regarding matters that need not be proved independently, and the cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. There is no requirement of an evidentiary foundation for every factual suggestion put to a witness in cross-examination.

However, the Court in *Lyttle* also said that where a question implies the existence of a disputed factual predicate that is *manifestly tenuous or suspect*, a trial judge may seek assurance that a *good faith basis* exists for the question. With respect to the meaning of "good faith basis" the Court stated:

> In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness.

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[2] An interesting example of the disallowing of questioning based on the likely distraction of the jury from "real issues" in a sexual assault trial was the disallowing of cross-examining of a complainant on affidavit evidence as to the reasons why she did not wish her daughter, born of incest and sexual assault, to be informed of the nature of her conception : R. v. W(D.D.)(1997), 90 B.C.A.C. 191, 147 W.A.C. 191, 114 C.C.C. (3d) 506 (B.C.C.A.), aff'd R. *v*. W. (D.D.), [1998] 2 S.C.R. 681

> In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly[3] or that he or she knows to be false.
> The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; **to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited**. [emphasis added]

I suggest *Lyttle* can be used to argue that conjectural questions which capitalize on rape myths can never be considered to have a "good faith basis." Lawyers in the wake of several SCC decisions could be assumed to be familiar with rape myths, and therefore, questions which capitalize on rape myths could be considered to be known to be false in their basis. Counsel's overriding duty to the court would not permit, I suggest, the use of conjectural questions based on known rape myths. [4] Further, even if defence counsel genuinely believes the rape myths, these rape myths can not be considered to be "*reasonable* inference, experience or intuition" to form the basis of conjectural questioning.

Lyttle is vague as to the exact boundaries of good faith, but offers the following references to color the discretion expected of judges:

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[3] It is unclear what "recklessly" means in the context of cross-examination. Its meaning with regard to *mens rea* of a criminal offence was defined in ***Sansregret v. Queen*** 1985 CanLII 79 (S.C.C.), (1985), 18 C.C.C. (3d) 223 at 233 (S.C.C.):

> ... In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence.

As cross-examiners constantly "see the risk, but take the chance" of asking impermissable questions, this definition is likely of limited utility in the context of cross-examination. U.S. cases considering 'reckless cross-examination" by defence counsel do so in order to examine the introduction of information prejudicial to the *accused* which may be defined using a different standard than when the prejudice os to a complainant or the administration of justice.

[4] See *Lyttle*:
"Counsel, however, bear important professional duties and ethical responsibilities, not just at trial, but on appeal as well. This point was emphasized by Lord Reid in *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.), at pp. 227-28, when he said: Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession. . . ." [Emphasis added.]

> There will thus be instances where a trial judge will want to ensure that "counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box". See *Michelson v. United States*, 335 U.S. 469 (1948), at p. 481, *per* Jackson J.
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> Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may properly take appropriate steps, by conducting a *voir dire* or otherwise, to seek and obtain counsel's assurance that a good,faith basis exists for putting the question.
>
> If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness.

The Crown is entitled to object and ask that the judge make an inquiry as to whether there is a good faith basis for the questions or to show good faith on a voir dire if "a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect." [5]

3. Prejudice vs. probative value when rape myths are involved

Even if a question without evidentiary predicate is permissable with the judge satisfied as to good faith, *Lyttle* reaffirms that it is still subject to the ordinary limitations of cross-examination: Counsel are bound by the rules of relevancy and barred from (among other things) putting questions *whose prejudicial effect outweighs their probative value*.[6]

When courts speak of prejudice they are concerned with prejudice to *the accused* (criminal trial), *the parties* (civil trial), *the complainant* (sexual assault CC 276(3)(f)&(g)) and R. v. Osolin (1993) 26 CR (4th) 1 (SCC), and "*the proper administration of justice*" (CC 276(2)(c)). In this context, "prejudice" means a *tendency of the evidence to divert the trier of fact from a reasoned decision*.

Relevancy and prejudicial effect of cross-examination was considered by the Court prior to *Lyttle* in *Osolin. Osolin* remains the touchstone case for the boundaries of relevancy, and examines the question in the context of sexual assault.

Importantly, Cory J. establishes that questions related to consent or credibility based on rape myths are ***always*** more prejudicial than probative:

> It might be helpful to summarize the principles that can be taken from *Seaboyer* with regard to the cross-examination of complainants. Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which might flow from

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[5] R. v. Jacobson (2004) 196 CCC 3d 65

[6] See *R. v. Meddoui*, [1991] 3 S.C.R. 320; *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.); and *Osolin*.

> it. **Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative.** Such evidence can fulfill no legitimate purpose and would therefore be inadmissible to go to consent or credibility. Cross-examination which has as its aim to elicit such evidence should not be permitted. *[emphasis added]*

Cory, J emphasizes the role of public policy considerations, specifically the equality protections afforded women as set out in the Charter, as relevant to judges' limits on cross-examination in sexual assault cases:

> We have seen that the accused's rights to a fair trial and to cross-examine are protected by the common law and given constitutional sanctity by ss. 7 and 11(*d*). However in the context of sexual assault the rights of the complainant cannot be completely overlooked. The provisions of ss. 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant.

While Cory J. was considering the scope of Criminal Code s. 276 in this case, the above statement and constitutional factors are equally relevant to the impact of rape myths other than those associated with sexual history. He goes on to state for the majority:

> **As a general rule the trial of an accused on a charge of sexual assault need not and should not become an occasion for putting the complainant's lifestyle and reputation on trial.** The exception to this rule will arise in those relatively rare cases where the complainant may be fraudulent, cruelly mischievous or maliciously mendacious. [emphasis added]

While reaching a different conclusion regarding the specific evidence in *Osolin*, L'Heureux-Dube's powerful dissent yields extensive descriptions of rape myths and their impact, which are in no way disputed by the majority:

> It is obvious that the proposed cross-examination to determine "what kind of person the complainant is" would have been highly prejudicial. Its purpose was to attack the complainant's credibility in a general way by putting before the jury every difficulty in her personal life in the hope that they would then draw negative inferences about her character and credibility. Cross-examination for this purpose is clearly impermissible. These are precisely the inferences based upon rape myths which work to the prejudice of complainants in sexual assault cases... Furthermore, the proposed cross-examination could only have prejudiced the trial by distracting the jury from the narrow issue of consent.
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> In the words of McCormick, *supra,* at p. 438, "relevance is not always enough". Trial judges possess the undoubted discretion to both exclude evidence and limit cross-examination on matters which, although arguably relevant to the issue, are outweighed by their potential to prejudice the trial of the issue. Central among these concerns are the following: such facts may unduly arouse sentiments of prejudice, hostility or sympathy; they may distract the trier of fact from the main issue to be

> decided; and the exploration of the issue may consume an undue amount of time. (See also: *Wigmore on Evidence*, vol. 1A (Tillers rev. 1983), at p. 969.)

L'Heureux-Dube walks us through the most common rape myths prevalent in society and the justice system:

> Historically, a host of factors were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault. In *Seaboyer, supra*, I discussed at length the hurdles that complainants faced in sexual assault trials due to these unfounded presumptions. They include myths that deem certain types of women "unrapable" and others, because of their occupations or previous sexual history, unworthy of belief. These myths suggest that women by their behaviour or appearance may be responsible for the occurrence of sexual assault. They suggest that drug use or dependence on social assistance are relevant to the issue of credibility as to consent. They suggest that the presence of certain emotional reactions and immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event. Furthermore, they are built on the suggestion that women, out of spite, fickleness or fantasy and despite the obvious trauma for victims in many, if not most, sexual assault trials, are inclined to lie about sexual assault. The net result has been that sexual assaults are, and continue to be, underreported and underprosecuted; furthermore, the level of convictions that result in those cases that do reach the courts is significantly lower than for other offences.

It is against this backdrop that challenges to the credibility of sexual assault victims on psychiatric grounds must be examined. There is absolutely no evidence to suggest that false allegations are more common in sexual assaults than in other offences; indeed, given the data indicating the strong disincentives to reporting, it seems much more likely that the opposite is true. Nonetheless, myths about the extraordinary need for caution with respect to the credibility of complainants continue to play a role in the prosecution of sexual assaults. To illustrate their persistence, it is only necessary to point out that, apart from cases of sexual assault, it is rare to encounter a suggestion that the psychiatric history of a witness is at all relevant to the trial of the issue. Moreover, trial judges are normally unlikely to even entertain such submissions unless the defence is able to conclusively establish beforehand that an inquiry into a witness's medical history is crucial to the determination of the issue at bar.

(Note the number of rape myths listed above in *Osolin* that are unrelated or only tangentially related to sexual history. Many of them are stereotypes about women in general.)

The Court's current Chief Justice wrote her own dissent in *Osolin*. McLachlin J, as she then was, wrote:

> I agree with my colleague Cory J.'s review of the principles governing the decision of the trial judge whether to permit cross-examination on matters such as this. I also agree with the emphasis my colleague L'Heureux-Dubé J. places both on the discretionary nature of the judge's decision where the evidence relates to the prior sexual conduct of the complainant, and on the **caution which a court must exercise in permitting examination on matters like the complainant's background, which may have little or no relevance to the actual issues and at the same time may unduly prejudice her reputation and privacy.** [*emphasis added*]

From *Osolin*, we can conclude that the weighing of prejudice versus probative value in sexual assault trials must be done in the specific context of the history of myths surrounding sexual assault, and with consideration of the goal of equality[7].

Unfortunately, judges seldom do this even in making decisions regarding s. 276 applications, where they tend to rely on narrow "full answer vs. privacy" analyses[8] and ignore the other factors stated in the Criminal Code which would require a much more thorough understanding of rape myths and their impact on justice. These factors (which the judge *must* consider) are stated in s. 276(3):

> (*a*) the interests of justice, including the right of the accused to make a full answer and defence;

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[7] Note also ss. 274 and 275 of the Criminal Code:

Corroboration not required

274. If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

R.S., 1985, c. C-46, s. 274; R.S., 1985, c. 19 (3rd Supp.), s. 11; 2002, c. 13, s. 12.

Rules respecting recent complaint abrogated

275. The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1, 155 and 159, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

R.S., 1985, c. C-46, s. 275; R.S., 1985, c. 19 (3rd Supp.), s. 11; 2002, c. 13, s. 12.

These rules regarding lack of corroboration and recent complaint are in place to counter rape myths. While not forbidding cross-examination in these areas necessarily, their presence and purpose should highlight the prejudicial impact, and diminish the probative value of such questions.

[8] See Lise Gotell (2006) "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" 43 Alta. L. Rev. 743

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

(emphasis added)

R.S., 1985, c. C-46, s. 276; R.S., 1985, c. 19 (3rd Supp.), s. 12; 1992, c. 38, s. 2; 2002, c. 13, s. 13.

If judges are not regularly weighing these public interest factors, including equality, in s. 276 and 278 applications, can it be expected that they will sustain objections to questions not explicitly caught by these sections, based on the social goal of eliminating rape myths from the justice process? It is unlikely unless the prosecutor is willing to highlight these factors very explicitly.

With regard to the narrower ground of prejudice ,in *Seaboyer*, McLachlin J. had already stated:

> Empirical studies in the United States suggest that juries often...improperly considered "victim-precipitating" conduct, **such as going to a bar or getting into a car with the defendant**, to "penalize" those complainants who did not fit the stereotype of the "good woman" either by convicting the defendant of a lesser charge or by acquitting the defendant: H. Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986), 70 *Minn. L. Rev.* 763, at p. 796. It follows that society has a legitimate interest in attempting to eliminate such evidence. [emphasis added]

McLachlin J. goes on to describe such evidence of "victim-precipitating conduct" as "**unprobative and misleading**. "

In *Seaboyer*, L'Heureux-Dube (dissenting in part) also enumerates additional undisputed rape myths:

> The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e. who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the **myths**, it is unlikely that an arrest will be made or a conviction obtained.

Holmstrom and Burgess, *supra*, at pp. 174-99, conveniently set out and explain the most common of these myths and stereotypes:

> 1. *Struggle and Force: Woman As Defender of Her Honor.* There is a myth that a woman cannot be raped against her will, that if she really wants to prevent a rape she can.
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> The prosecution attempts to show that she did struggle, or had no opportunity to do so, while the defence attempts to show that she did not.
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> Women know that there is no response on their part that will assure their safety. The experience and knowledge of women is borne out by the *Canadian Urban Victimization Survey: Female Victims of Crime* (1985). At page 7 of the report the authors note:
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> Sixty percent of those who tried reasoning with their attackers, and 60% of those who resisted actively by fighting or using weapon [*sic*] were injured. Every sexual assault incident is unique and so many factors are unknown (physical size of victims and offenders, verbal or physical threats, etc.) that no single course of action can be recommended unqualifiedly.
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> 2. *Knowing the Defendant: The Rapist As a Stranger.* There is a myth that rapists are strangers who leap out of bushes to attack their victims. . . . the view that interaction between friends or between relatives does not result in rape is prevalent.
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> The defence uses the existence of a relationship between the parties to blame the victim. (Feild and Bienen, *infra*, report at p. 76 that "a significant proportion of reported rapes involve an assailant known by the victim." See also J. Check and N. Malamuth, "Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape" (1983), 45 *J. of Pers. and Soc. Psych.* 344, at pp. 344-45.)
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> 3. *Sexual Reputation: The Madonna--Whore Complex*. . . . women . . . are categorized into one-dimensional types. They are maternal or they are sexy. They are good or they are bad. They are madonnas or they are whores.
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> 4. *General Character: Anything Not 100 Percent Proper and Respectable*. . . . Being on welfare or drinking or drug use could be used to discredit anyone, but where women are involved, these issues are used to imply that the woman consented to sex with the defendant or that she contracted to have sex for money.
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> 5. *Emotionality of Females.* Females are assumed to be "more emotional" than males. The expectation is that if a woman is raped, she will get hysterical during the event and she will be visibly upset afterward. If she is able to "retain her cool," then people assume that "nothing happened". . . .
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> 6. *Reporting Rape*. Two conflicting expectations exist concerning the reporting of rape. One is that if a woman is raped she will be too upset and ashamed to report it, and hence most of the

time this crime goes unreported. The other is that if a woman is raped she will be so upset that she will report it. Both expectations exist simultaneously.

7. *Woman as Fickle and Full of Spite.* Another stereotype is that the feminine character is especially filled with malice. Woman is seen as fickle and as seeking revenge on past lovers.

8. *The Female Under Surveillance: Is the Victim Trying to Escape Punishment?* . . . It is assumed that the female's sexual behavior, depending on her age, is under the surveillance of her parents or her husband, and also more generally of the community. Thus, the defense argues, if a woman says she was raped it must be because she consented to sex that she was not supposed to have. She got caught, and now she wants to get back in the good graces of whomever's surveillance she is under.

9. *Disputing That Sex Occurred*. That females fantasize rape is another common stereotype. Females are assumed to make up stories that sex occurred when in fact nothing happened. . . . Similarly, women are thought to fabricate the sexual activity not as part of a fantasy life, but out of spite.

10. *Stereotype of the Rapist.* One stereotype of the rapist is that of a stranger who leaps out of the bushes to attack his victim and later abruptly leaves her .... stereotypes of the rapist can be used to blame the victim. She tells what he did. And because it often does not match what jurors *think* rapists do, his behavior is held against her.

A corollary of this myth is the belief that rapists are not "normal" and are "mentally ill".

Note L'Heureux-Dube's extensive reference to social science research elucidating these myths. Rape myths may shift their details in accord with prevailing social beliefs and knowledges and she also emphasizes that her list is not exhaustive. She also affirms the experience (which MAD prosecutors have described) of the challenge of delegitimizing rape myths which are so imbedded into our worldview that questions based on them are considered "relevant" based on "common sense:"

> This list of stereotypical conceptions about women and sexual assault is by no means exhaustive. Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly.

The objecting prosecutor may be the judge's or jury's first exposure to the delegitimizing of rape myths or gender stereotypes.

Based on Cory J.'s statement in *Osolin*, prosecutors would only need to show something as a rape myth for a question based on it to be considered more prejudicial than probative, in the context of consent or credibility.Questions based on rape myths are more prejudicial than probative in other contexts, too. For example, McLachlin J. has recognized in *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 82, that reliance on rape myths cannot ground a defence of mistaken belief in consent:

> Care must be taken to avoid the false assumptions or “myths” that may mislead us in determining whether the conduct of the complainant affords a sufficient

> basis for putting the defence of honest mistake on consent to the jury. One of these is the stereotypical notion that women who resist or say no may in fact be consenting.

One way to establish something as a rape myth is to identify it as one previously enumerated in such Supreme Court decisions as *Seaboyer, Ewanchuk* or *Osolin*. Another would be to use expert or social science evidence.

Social science research of the sort cited in L'Heureux-Dube's dissent in *Seaboyer* is useful. First, research cited in *Seaboyer* does establish the very wide prevalence of sexual assault and gender stereotypes[9]. This information re wide prevalence goes to the substantial nature of prejudice that would be caused by questioning in a sexual assault trial that would be more substantial than in another sort of trial. For example, a question regarding drug use arguably may be considered more probative than prejudicial in other sorts of trials, but in the context of a sexual assault trial and the prevalence of myths related to women's mendaciousness and the expectation that to be believable a rape victim's character must be 100% benign, such questioning is *much more* prejudicial than in other contexts. L'Heureux-Dube in *Seaboyer* describes:

> In a later study conducted by La Free (G. La Free, B. Reskin and C.A. Visher, "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials" (1985), 32 *Soc. Prob.* 389), post-trial interviews were conducted with jurors who had served in forcible sexual assault cases. At page 392 the authors state that, "[o]ur trial observations suggest that a major avenue for challenging the complainant's victimization in consent and no-sex cases is to encourage jurors to scrutinize her `character'." They also suggest at p. 400 that "a victim's nontraditional behavior may act as a catalyst, causing jurors' attitudes about how women should behave to affect their judgments under certain conditions." Also relevant for our purposes are their findings at p. 397 that, where the issue at trial is whether the act occurred or whether there was consent:
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> Of particular interest are the findings regarding evidence. <u>Although any evidence that a woman was forced to submit to a sexual act against her will (including use of a weapon or victim injury) might be expected to persuade jurors of the defendant's guilt, neither variable significantly affected jurors' judgments</u>....
>
> <u>In contrast, jurors were influenced by a victim's "character." They were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant -- however briefly -- prior to the alleged assault.</u> [Emphasis in original.]

Therefore, L'Heureux Dube includes questioning even as to non-sexual evidence such as a victim's non-traditional behaviour, "character," alcohol or drug use, or acquaintance with the accused however brief, as "stereotype and mythology...at work" in the context of the disbelief of women whose conduct is not regarded as 100% benign or is not in conformity with conventional gender roles. Where victims had engaged in even "non-

[9] a report prepared for the Ontario Women's Directorate in 1988, by Informa Inc., "Sexual Assault: Measuring the Impact of the Launch Campaign"

sexual" misconduct (running away, drug dealing) acquittals in sexual assault cases were disproportionate.[10] Further, evidence as to "precipitory" or "contributory" social behaviour of the victim was found to influence judges as well as juries, in research cited in *Seaboyer*.[11]

In *Ewanchuk*, the Supreme Court eliminates the notion of "implied consent" to sexual touching, and in so doing also categorizes additional beliefs as prejudicial myths, such as the ideas that:

- that women fantasize about being rape victims (and that affects their perceptions of actual interactions)
- that women say "no" but mean "yes"
- that any woman could resist a rapist if she really wanted to
- that it is a woman's responsibility to fight her way out of sexual assault
- that women deserve rape on account of their behaviour, dress or demeanour
- that sexually experienced victim/survivors experience less harm than less sexually experienced victim/survivors
- that rape by a stranger is worse than rape by an acquaintance
- that women's "normal" sexuality is passive, constituted largely of "submission"
- that sexually aggressive behaviour is more "hormonal" than "criminal"

McLachlin, J as she then was, added her own opinion emphasizing the rejection for the purposes of Canadian law of the wide range of myths and stereotypes listed by Justice L'Heureux-Dube:

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[10] "Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing" (1980), 58 *Soc. Forces* 833

[11] From Seaboyer:

Feild and Bienen, *supra*, write at p. 139 that, "[t]he results reported in this study confirmed what many writers and researchers studying rape have suggested: extra-evidential factors were found to influence the outcome of the rape trials." When juries are provided with certain types of information about the complainant, such as evidence regarding past sexual conduct, the weight of the evidence is that they then utilize the myths and stereotypes discussed above and focus on them in "resolving" the particular legal issues raised by the case. Though these researchers found that the effect of sexual history evidence was more complex than originally thought, they do note at pp. 118-19 that:

> Along with race of the defendant, <u>sexual experience of the victim proved to have important effects on juror decision making as it was involved in four of the seven significant interactions. Support for the reformers' sentiments concerning the elimination of evidence regarding third-party sexual relations is indicated by the presence of these interactions.</u>
>
> In the present research, the assailant in the nonprecipitory assault was given a more severe sentence than the offender in the precipitory case indicating that the jurors appeared to attribute blame to the victim when contributory behavior was implied. Several writers (Frederick and Luginbuhl 1976; Jones and Aronson 1973; Landy and Aronson 1969) have documented similar effects. Brooks, Doob, and Kirshenbaum (1975) found that <u>jurors were more likely to convict a defendant accused of raping a woman with a chaste reputation than an identical defendant charged with assaulting a prostitute. Information on the "good" or "bad" character of the victim appears to affect the decisions of the jurors, and the definitions of good or bad are likely to be broadly defined.</u> [Emphasis added.]

> I agree with the reasons of Justice Major. I also agree with Justice L'Heureux-Dubé that stereotypical assumptions lie at the heart of what went wrong in this case. The specious defence of implied consent (consent implied by law), as applied in this case, rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent (see L'Heureux-Dubé J.). On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.
>
> I join my colleagues in rejecting them.

4. Limits on questioning re prior allegations of sexual assault

Matters related to prior sexual assaults against the complainant and her handling of them are caught by s. 276 (*R.v. Bunn Sept 9/98 (Ont. C.A.)*), however, such questioning is subject to further and more basic limitations as well.

Cross-examination of a complainant about an alleged prior false complaint is permitted **only** if the "defence is in a position to establish that the complainant has recanted her earlier accusations or that they are demonstrably false." (*R. v. Riley* (1992), 11 O.R. (3d) 151). Further, an acquittal does not establish that the allegations were false. Additionally, since the proposed line of questioning on prior false allegation against someone other than the accused related to a collateral matter, the trial judge's decision to exclude cross-examination involving exercise of his discretion should not be interfered with on appeal (*R. v. Marcotte June 26/00 (Ont. C.A.)*

Evidence re prior sexual abuse by someone other than the accused has been held completely irrelevant: *R. v. Bunn*, where the complainant indicated previous sexual abuse by persons other than accused. Defence sought to cross-examine on these allegations and call the alleged abusers to contradict her. The trial judge disallowed this. The Ontario Court of Appeal held that prior sexual abuse was irrelevant to these charges and totally collateral. Though it falls within s.276, it was disallowed on conventional relevance considerations. The Ontario Court of Appeal called the tactic 'inimical' to the principle underlying s. 276 although reliance on that section was not ultimately necessary. The Court of Appeal held that the trial judge properly exercised discretion to reject evidence that was a tactic directed at creating confusion by relying on rape myths. This is significant in the Court of Appeal's recognition of the underlying principles of s. 276, and their role in safeguarding prejudice against the administration of justice.

R. v. Meddoui, [1991] 3 S.C.R. 320, at pp. 320-21, is also
relevant. There Sopinka J. stated, with respect to cross-examination on prior allegations of sexual assault unrelated to the accused:

> With respect to the ground relating to cross-examination, the proposed line of questioning related to a collateral matter. Furthermore, its relevance was extremely tenuous and while wide latitude is permitted in cross-examination in a criminal case, the trial judge properly exercised

his discretion in excluding the cross-examination.

TABLE OF CASES

Michelson v. United States, 335 U.S. 469 (1948)

R. v. Bunn Sept 9/98 (Ont. C.A.)

R. v. Esau, [1997] 2 S.C.R. 777

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R. v. Meddoui, [1991] 3 S.C.R. 320

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R. v. Riley (1992), 11 O.R. (3d) 151

R. *v*. Seaboyer; R. *v*. Gayme, [1991] 2 S.C.R. 577

R. v. W(D.D.)(1997), 90 B.C.A.C. 191, 147 W.A.C. 191, 114 C.C.C. (3d) 506 (B.C.C.A.), aff'd R. *v*. W. (D.D.), [1998] 2 S.C.R. 681

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