November 29, 2024

Myths, Stereotypes, and Substantive Equality

By: Jennifer Koshan

Case Commented On: *R v Kruk*, 2024 SCC 7 (CanLII)

Canada's legal frameworks related to substantive equality and sexual assault law have led to a robust body of jurisprudence on myths and stereotypes about sexual violence. The Supreme Court of Canada first used the language of myths and stereotypes in *R v Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852. In *Lavallee*, Justice Bertha Wilson repudiated the myth that real victims of intimate partner violence (IPV) will leave their abusers, noting that there are many reasons why women may be unable to do so. A year later, the Court identified several myths and stereotypes about sexual assault, including the "twin myths" that women with a sexual history are more likely to have consented to the alleged sexual activity or that they are less worthy of belief (see *R v Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577; most recently see *R v TWW*, 2024 SCC 19 (CanLII)). In the decades since, numerous myths and stereotypes about gender-based violence (GBV) have been debunked by the Supreme Court (see here), and in cases where such misconceptions have infected trial decisions, errors of law have been found on appeal.

In spite of this legal history, lawyers continue to make arguments based on myths and stereotypes in criminal law, family law, and tort law proceedings, and sometimes, judges accept these arguments to the detriment of survivors. Another strategy used by the defence in criminal sexual assault cases has been to argue that judicial reliance on "ungrounded common sense-assumptions" that prejudice the accused's case should have the same status as myths and stereotypes, resulting in an error of law reviewable on a correctness standard. This type of argument has led to convictions being overturned on appeal (see e.g. *R v Kruk*, 2022 BCCA 18 (CanLII); *R v JC*, 2021 ONCA 131 (CanLII)). Other defence lawyers have argued that some myths and stereotypes about sexual assault have become so well understood that juries do not need to hear expert evidence about them – a trial judge's instructions to the jury can sufficiently guard against any biases (see *R v Hoggard*, 2024 ONCA 613 (CanLII); *R v Nygard*, 2024 ONCA 744 (CanLII)).

This post examines the Supreme Court's decision in *R v Kruk* through the lens of substantive equality. Substantive equality is the accepted approach to equality rights under the *Canadian Charter of Rights and Freedoms*, recognizing (amongst other things) that differential treatment may be required in order to achieve true equality (see e.g. *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at 165-167; *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at para 40). While *Kruk* did not involve a *Charter* challenge or use the term 'substantive equality,' this lens is a helpful one for understanding the decision and its analysis of rape myths. I also categorize and discuss the range of myths and stereotypes recognized in *Kruk* and identify some gaps, including those related to the impact of trauma on survivors of

GBV (with reference to *Hoggard*). Lastly, I examine the implications of *Kruk* for other areas of law, including IPV cases in the criminal and family law systems.

Kruk – Background and Lower Court Decisions

Kruk came to the Supreme Court of Canada as one of two Crown appeals from decisions of the British Columbia Court of Appeal (BCCA) in sexual assault cases (see also *R v Tsang*, 2022 BCCA 345 (CanLII), which I will not be examining in detail here). The facts indicated that the accused took the complainant to his house after finding her lost, intoxicated, and distressed in downtown Vancouver. Although the complainant did not remember much, she testified that she recalled waking up with her pants off and the accused on top of her, penetrating her vagina with his penis. The accused denied this and testified that the complainant went to his room to change after spilling water on herself, after which he found her passed out on his bed with her pants around her ankles. When he tried to wake her, he said that she became startled, kicked off her pants, and ran around the house in a panic (*Kruk* SCC, at para 6). The main issue was whether the sexual activity had occurred, which rested largely on the trial judge's assessment of the accused's credibility and the complainant's reliability (at para 5).

The trial judge convicted the accused of sexual assault. He found material inconsistencies in the accused's testimony and rejected his explanation of the complainant's state when she awoke. He also found the complainant's evidence to be "largely unreliable" because of her intoxication and "massive gaps in her memory", but he accepted her evidence on the key issue — that "she had felt Mr. Kruk's penis inside of her vagina" (at para 7). On this point, the trial judge stated: "It is extremely unlikely that a woman would be mistaken about that feeling" (at para 7).

The BCCA overturned the conviction and ordered a new trial. It held that while trial judges "can rely on personal life experiences to assess the credibility of witnesses", they cannot use "speculative reasoning that invokes common sense assumptions not grounded in the evidence" (at para 9). Applying this reasoning, the BCCA found that the trial judge's conclusion regarding the likelihood of a woman being mistaken about feeling penile-vaginal penetration was speculative and not properly subject to judicial notice. Because the trial judge's finding on penetration was the primary basis for accepting the complainant's evidence, the BCCA held that the conviction was "fatally affected" by a legal error (at para 9).

Kruk was one of several sexual assault decisions of the BCCA and ONCA that relied on this 'rule' against ungrounded common-sense assumptions to find errors of law in trial judges' assessment of credibility and reliability in sexual assault cases (see paras 19-22). The Supreme Court agreed to hear the appeals in *Kruk* and *Tsang* to consider whether this approach was itself erroneous.

Kruk at the Supreme Court of Canada – Substantive Equality Meets Sexual Assault Law

Justice Sheilah Martin wrote the majority decision in *Kruk* at the Supreme Court. She began by noting that in sexual assault cases, "constitutional imperatives call for the consideration of the *Charter* rights of both accused persons and complainants as well as the interests of society at large" based on the duty of "fair, ethical and non-discriminatory adjudication of sexual assault cases" (at para 17, references omitted). Reviewing the basis for the proposed new rule, she explained that the

Courts of Appeal had drawn an analogy with the prohibition against assumptions based on myths and stereotypes about sexual assault complainants – in other words, they found that it was "*equally wrong*" to make assumptions that prejudice the defence (at para 24, emphasis added). Justice Martin rejected this approach, stating that it "disregards the *distinct nature* of myths and stereotypes about complainants, transforming all factual generalizations regardless of their nature into errors of law and imposing a *false symmetry* to the circumstances of accused persons" (at paras 26, 28, emphasis added).

To read these statements through the lens of equality principles, Justice Martin's point is that the appellate courts took a formal equality 'sameness of treatment' approach that failed to recognize a key lesson of substantive equality – that the same treatment of things that are unalike can produce inequality. According to Justice Martin, "this impulse towards *symmetry* and *formally identical treatment* is unwarranted. It reflects a misunderstanding of the *distinct* body of law associated with myths and stereotypes in sexual assault cases, which developed in a particular historical context to *protect complainants alone*" (at para 30, emphasis added).

Using additional substantive equality language, Justice Martin then reviewed the "*unique history*" of myths and stereotypes about sexual assault complainants and the "*specific remedial purpose*" behind prohibiting this type of reasoning: "to remove *discriminatory* legal rules that contributed to the view that women, as a group, were less worthy of belief and did not deserve legal protection against sexual violence" (at para 31, emphasis added). She noted that myths and stereotypes about sexual assault had led to "*exceptional* procedural protections" for accused persons, which in turn contributed to the underreporting of sexual assault and made it "*exceptionally* difficult to prove in court" (at para 32). Sexual assault is in these ways "*inherently dissimilar*" to other crimes (at para 32).

Elaborating on the concept of myths and stereotypes, Justice Martin defined them as "widely held ideas and beliefs that are not empirically true" (at para 37). Again, using equality-based language, she went on to state that they reflect "inaccurate, outdated, and *inequitable* social attitudes" that have "impeded the *equal treatment* of sexual assault complainants" (at para 38). More specifically, myths can "involve the wholesale discrediting of women's truthfulness and reliability" as well as "conceptualize an idealized victim and her features and actions before, during, and after an assault" (at para 37). They also "convey traditional stories and worldviews about what, in the eyes of some, constitutes "real" sexual violence and what does not" (at para 37). Stereotypes reflect the application of "inaccurate or untrue" generalizations to a specific individual to convey a legal meaning that is "rooted in *discrimination* and *inequality* of treatment" (at para 49).

Justice Martin's articulation of specific myths and stereotypes in relation to sexual assault can generally be placed into two broad categories – (1) those relating to the credibility of complainants, and (2) those involving consent and the nature of sexual assault itself (for a similar categorization of IPV myths and stereotypes, see here).

The first category of myths and stereotypes is rooted in the assumption that "women, as a group, [are] less worthy of belief" and their testimony is "inherently unreliable" (at paras 31, 32). This faulty assumption led to special evidentiary rules in sexual assault cases that protected the accused, including a statutory corroboration requirement and the doctrine of recent complaint, both

legislatively repudiated in 1983 (at para 34). Notions of an "ideal victim" of sexual assault have also prevailed, with "[p]rejudicial beliefs about women who were Indigenous, racialized, persons with disabilities, or part of the 2SLGBTQI+ community" operating to undermine their credibility (at para 35; see also para 54). Other credibility myths include the assumption that women commonly make false allegations of sexual assault "out of self-interest or even revenge" (at para 35, see also para 36), and that sexually active women are less credible (at para 36). Complainants who have had psychiatric treatment, therapy, or counselling have also been considered less credible, and their records of such treatment sought by the defence on that basis (at para 41). Justice Martin noted that the testimony of very young complainants has been treated with "inherent suspicion" as well, despite "the inherent vulnerability of children and the particular problems they may face when giving evidence" (at para 54).

The second category of myths and stereotypes, related to understandings of sexual assault, includes the historical notion that women could not be raped by their husbands because wives "forfeited [their] legal capacity to refuse unwanted sexual activity" (at para 33). Relatedly, this category includes the mistaken assumptions that "genuine sexual assaults are perpetrated by strangers to the victim" and that "[r]eal victims of sexual assault should have visible physical injuries" because only forceful rape counts (at para 36). These ideas are tied to myths about consent, such as the myth that a complainant's passivity or failure to resist signifies her consent, and that complainants may say "no" when they actually mean "yes" (at para 36). Sexually active women are also presumed to be more likely to consent, which has led to sexual history evidence being considered relevant at trial (at para 36). In addition, a complainant's "immodest" attire and her failure to avoid the accused after the alleged sexual assault have been taken to indicate that she is likely to have consented to any sexual activity (at para 41).

Justice Martin noted that many of these myths and stereotypes have been repudiated in previous Supreme Court decisions, which has resulted in their recognition as errors of law (at paras 36, 41). Some of them have also been legislatively eradicated, including through the repeal of the marital rape exemption, abrogation of legal rules around corroboration and recent complaint, adoption of an affirmative definition of consent, and limitations on the use of sexual history evidence and personal records (see para 39). Invoking language consistent with substantive equality, Justice Martin stated that these judicial and legislative developments designed to address myths and stereotypes "do not create any *special benefits* in law" for sexual assault complainants. Rather, they "simply remove *discriminatory barriers*, establish a *level testimonial field* between sexual assault complainants and complainants in other cases, and ensure the truth-seeking function of the trial is not distorted" (at para 44, emphasis added). She emphasized that there is ongoing need for courts to be vigilant about myths and stereotypes, given that they threaten the rights of women and children to equality and undermine fair trials (at paras 42-43).

This discussion supported Justice Martin's conclusion that there are "distinct reasons" to hold that judicial reliance on sexual assault myths and stereotypes amounts to an error of law rather than an ordinary finding of fact reviewable for palpable and overriding error (at para 44). It followed that the proposed rule against ungrounded common-sense assumptions should be rejected because it does not share a similar history and character to sexual assault myths and stereotypes and their "overwhelming" basis in social science evidence (at para 46). While not condoning improper factual generalizations, Justice Martin noted that they do not necessarily amount to discriminatory

stereotypes (at para 49; see also para 52). She also expressed concerns that a rule against ungrounded common-sense assumptions would lead to an expansion of applications for sexual history evidence, as questions would likely be sought about complainants' sexual preferences or practices to provide the "grounding" required to avoid the rule (at para 55).

What of the fact that sexual assault law has moved to a more gender-neutral framework? Justice Martin noted that courts must be "sensitive to the fact that complainants in sexual assault cases come from all walks of life" and indicated that stereotypes formerly targeting women are also legally erroneous when applied to complainants of any gender (at para 53). Nevertheless, it remains true that most sexual assault complainants are women, and the "wholesale discrediting of complainants as a *particular category* of witness" is at its core "rooted in *inequality* of treatment" (at para 53, emphasis added).

Justice Martin also found that this differentiated approach to myths and stereotypes versus ungrounded common-sense assumptions adequately protects the rights of the accused (at paras 58-66). As part of this analysis, she noted that the prohibition against sexual assault myths and stereotypes "is not unbounded" – courts must ensure that "myths and stereotypes are not extended beyond their permissible scope" (at para 64). That evidence may align with a myth or stereotype "does not necessarily mean that any inferences that can be drawn from that evidence will be prejudicial" (at para 65). Here, she gave the example of alleged fabrication of sexual assault, which engages myth-based reasoning if fabrication is assumed, but would not be erroneously accepted if supported by actual evidence of a motive to fabricate. She also acknowledged that stereotypes rooted in inequality may affect the assessment of the accused's testimony and that this argument could be raised in future cases (at para 54).

Lastly, Justice Martin found that the proposed rule against ungrounded common-sense assumptions would undermine the well-accepted approach to trial judges' assessment of witness credibility and reliability, which often relies on common sense. As an example of an appropriate common-sense assumption, she cited the "now-universal idea that witnesses who are inconsistent are less likely to be telling the truth" (at para 73). Increased scrutiny of trial judges on their common-sense based testimonial assessments would also improperly increase the scope of appellate review (at paras 80-91).

For these reasons, the proposed rule against ungrounded common-sense assumptions was not accepted as a basis for finding an error of law (at para 92). Justice Martin set out a helpful framework for appellate review of trial-level testimonial assessments in future cases, requiring consideration of (1) whether the trial judge relied on an ungrounded assumption rather than evidence; (2a) if there was reliance on an assumption, and it related to a recognized error of law (e.g. reliance on sexual assault myths and stereotypes, reasonable apprehension of bias, or improper judicial notice), review is to be based on correctness; OR (2b) if there was reliance on an assumption, and it did not relate to a recognized error of law, review is to be based on palpable and overriding error (at paras 94-97).

Applying this framework to the facts of *Kruk*, the Court held that the trial judge's observation about penile-vaginal penetration was not a generalized assumption about all women. Instead, taken in the context of the trial reasons as a whole, it was an acceptance of the complainant's testimony

"that *she* was not mistaken" (at para 105, emphasis in original). In fact, it was the defence that had raised the idea of a mistaken feeling of penetration in its closing submissions (at para 106). Even if the trial judge did rely on an assumption, however, it did not fall in the category of assumptions reviewable for correctness, nor did it disclose a palpable and overriding error – it was a permissible assumption as a matter of common sense (at para 107). The Crown's appeal was allowed, and the conviction was restored.

Commentary

Although *Kruk* focused on adult complainants in sexual assault cases and the particular legal history of sexual offences, Justice Martin left open the application of her analysis of myths and stereotypes to other types of GBV and witnesses. Her judgment recognized that "reliance on stereotypes, being rooted in inequality of treatment, is certainly not just a problem for sexual assault complainants alone" (at para 54; see also para 96). As her own reasons indicated, this might include child/youth complainants in sexual offence cases (see para 54). It could also include adult complainants or witnesses in cases involving other forms of GBV, such as IPV.

Even though the first decision repudiating GBV myths and stereotypes involved IPV (*Lavallee*), subsequent recognition of misconceptions about IPV has not been as well-developed relative to those relating to sexual assault. My previous work has argued that lessons can be learned for IPV cases from the approach to myths and stereotypes in sexual assault cases, not just for criminal law but also for family law (see here). One week before *Kruk* was released, the BCCA repudiated the myth of false allegations of IPV in a family law decision, *KMN v SZM*, 2024 BCCA 70 (CanLII), where it found that reliance on this myth without supporting evidence amounts to an error of law. This decision shows that courts are receptive to *Kruk*-type analysis outside the context of sexual assault law, but much work remains to be done in this area (for a comment on *KMN*, see here).

The majority decision in *Kruk* did not purport to catalogue a comprehensive list of myths and stereotypes about GBV or even within the narrower category of sexual violence. Nevertheless, there is one omission that merits explicit mention. Justice Martin's list was of previously recognized myths and stereotypes, and did not include assumptions about perception and memory that can prejudice complainants in the GBV context when their trauma is not considered. For example, trauma expert Judith Herman notes how survivors "often tell their stories in a highly emotional, contradictory and fragmented manner which undermines their credibility" (*Trauma and Recovery* (New York: Basic Books, 2015) at 1). Justice Martin's example of a common-sense assumption – that witnesses who give inconsistent accounts are less likely to be telling the truth (at para 73) – could actually be placed into the category of myths and stereotypes if applied in the context of GBV and viewed from a trauma-informed perspective.

In the *Hoggard* case referenced above, Dr. Lori Haskell provided expert evidence at trial on the neurobiology of trauma and the impact that trauma can have on responses to sexual violence (*Hoggard* ONCA, at para 15). The trial judge held that this evidence was relevant and necessary to counteract ideas the jury may have "about how a "real" sexual assault complainant would behave" (at para 16). Dr. Haskell also provided evidence on how trauma can cause "memory to fragment and lack a coherent narrative" (at para 17). The ONCA held that admission of this expert evidence on trauma was not necessary, however. While recognizing the mandate from *Kruk* to

eradicate myth and stereotypes (at para 26), the ONCA reasoned that it is "well-entrenched in the law" that there is "no standard way for a complainant to act in response to a sexual assault" and that this point should have been provided by way of jury instruction (at para 32).

The ONCA's ruling in *Hoggard* is concerning in its implication that jurors can avoid at least some rape myths and stereotypes without expert instruction. As argued by Melanie Randall in her comment in *Policy Options*, "If it were that simple, we'd be much farther along the road to equality and justice." However, the Supreme Court's decision in *Kruk* indicated that expert evidence would not be required on the impact of trauma (or other factors) on perception and memory in relation to the complainant's recollection of having felt vaginal penetration (at para 108). These decisions rely heavily on trial judges taking steps to understand the relevant myths and stereotypes and taking action against their influence. For those myths and stereotypes that are not yet legally recognized, expert evidence is arguably still necessary in some circumstances, not just in jury trials but in judge-alone trials as well.

Recognition of systemic inequalities is another tool for combatting myths and stereotypes and may further help to explain things such as why a complainant did not leave her abuser or report violence to the police at the first opportunity. Systemic factors such as misogyny, racism, and colonialism can affect these matters due to lack of appropriate supports and mistrust of the authorities. These systemic inequalities are the proper subject of judicial notice, or courts can alternatively rely on previous decisions in which these forms of oppression have been recognized. The challenge arises when courts don't see that there is a need to be alert to myths and stereotypes. Lawyers have an important role in assisting courts to identify myths and stereotypes, but they sometimes also rely on litigation strategies that perpetuate these misconceptions, as noted in the introduction to this post and in the work of Elaine Craig and Deanne Sowter. It is ultimately the responsibility of judges to be attentive to myths and stereotypes, trauma, and systemic inequalities, and to eradicate them from legal proceedings. To use Justice Martin's phrase from *Kruk*, this is a "constitutional imperative." And as this post has argued, this imperative applies to *all* areas of law and *all* forms of GBV.

The author wishes to thanks Melanie Randall and Deanne Sowter for their comments on an earlier version of this post, as well as the University of Calgary Research Excellence Chairs program for its support of her research.

This post may be cited as: Jennifer Koshan, "Myths, Stereotypes, and Substantive Equality" (29 November 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/11/Blog_JK_Kruk.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg