

Judges & the Weight of their Words by J Poe

Unfortunately, in many of the decisions in sexual assault cases the reasons that some trial judges have relied on are completely unsavoury and flat out rude and false. They add insult to injury by giving breath to the twin-myth reasoning that is rampant in sexual assault cases and try to blend stereotypes about women into the law. There are three recent cases in Canada that have involved the trial judge not only erring in applying the law but adding insult to injury by shaming the victims in court, and I will be focusing on *R v Ewanchuk*, *R v Wagar* and *R v Rhodes*. A recurring theme among the decisions and comments in these cases from the trial judges is that all of the judges were males. While the weight of their words cannot be erased, it is important to note that there was backlash from the public and that higher courts stepped in to remedy what they could and help to break down the stereotypical barriers that surround sexual assault cases.

In *Ewanchuk*, a case involving a girl repeatedly saying “no” to unwanted sexual advances while being trapped in the accused’s van, the trial judge had many unsavoury words to describe the complainant’s conduct but ironically not the accused’s. The trial judge, Justice John McClung, described the complainant as someone who “did not present herself...in a bonnet and crinolines” as well as making a number of other insensitive comments about ways that women can prevent sexual assault, including using force against an opponent who is much stronger than they are.¹ This would be concerning language and beliefs coming from anyone who is in power, but it is much more alarming that this came from the trial judge who unsurprisingly acquitted the accused due to the fact that is a case of “boys being boys”.

When *Ewanchuk* reached the Supreme Court of Canada, Justice L’Heareux-Dube in her response commented that this is a case that is about myth’s and stereotypes and could not possibly be about consent because none was given.² She wrote that complainants should be able to rely on a system free from such myths and stereotypes and that Justice McClung was at fault for having his impartiality compromised by such biased assumptions.³ Justice L’Heareux-Dube made it clear in her decision that stereotypical assumptions lied at the heart of the case and that they can no longer find a place in Canadian law.⁴ At no point did she make any personal attacks on Justice McClung.

When the SCC overturned Justice McClung’s judgement and reprimanded him he penned a response that was full of misogyny and patriarchal entitlement, while also taking a cruel jab at Justice L’Heareux-Dube, writing that “the personal convictions of the judge...could provide a plausible explanation for the disparate (and growing) number of male suicides being reported in the province of Quebec”. This is particularly hurtful considering that Justice L’Heareux-Dube’s husband had committed suicide.

¹ *R v Ewanchuk*, (1999), 3 SCR.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

When dealing with the cases of *Wagar* and *Rhodes* it shows the similarity of the views that the trial judges had, or in one case still have, about victims of sexual assault. In both cases the trial judges were disciplined by the Canadian Judicial Council, but to differing degrees. Much of the disparity in discipline comes from their conduct after the fact.

In *R v Wagar* the complainant was subjected to quarters where the accused confined her and sexually assaulted her, the trial judge, Justice Camp, referred to the attack merely as “misbehaviour” on the part of the accused.⁵ This comment was followed up by having the audacity to ask the complainant, while in a court of law, why she “couldn’t keep her knees together”.⁶ Justice Camp ultimately handed the accused sixty days of jail time with fifteen days credit for time served, because he did not find the victim credible and thought that the accused had “suffered enough by having to await trial for six months.”⁷ The Canadian Judicial Committee disciplined Justice Camp by removing him from office, citing the reasons that he had failed to meet the high standards expected of judges, as well as finding that the judge relied on discredited myths and stereotypes about women as well as continuing this conduct over a period of time.⁸ Although Justice Camp admitted to several mistakes during the trial and told the inquiry that he was “very sorry” for the comments that he made to the complainants, it was still unanimously recommended that he lose his job.

In *R v Rhodes* Justice Dewar made comments to the complainant in a sexual assault case that she was “dressed up in a tube top without a bra and jeans and made up and wore high heels in a parking lot outside a bar...[she] made [her] intentions publicly known and [she] wanted to party.”⁹ Justice Dewar chalked up the sexual assault to misread signals and gave the accused no jail time. There was much political fallout from this decision, and unlike Justice Camp in *Wagar*, Justice Dewar publicly apologized, as well as took steps to improve his understanding of gender equality issues. The Canadian Judicial Council in this case was satisfied that it was an isolated event in the judge’s career and dismissed the accused’s appeal and confirmed the conviction of sexual assault.¹⁰

Any myths that surround sexual assault are concerning enough to begin with, but there is an added level of concern when these myths are being repeated and believed by the very people who uphold our justice system. If a judge publicly denounces sexual assault as “boys being boys” and tells women to try harder to not get sexually assaulted instead of telling men that they should try harder to not sexually assault then any person in Canada is under the belief that this is the truth because it is coming from the mouth of a judge. Words carry the same

⁵ *R v Wagar* (2014) ABQB [transcript].

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Ottawa, Canadian Judicial Council, “Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp” (8 March 2017).

⁹ *R v Rhodes* (2011) MBQB at 73 [transcript].

¹⁰ *Ibid.*

weight as actions and everyone involved in a position of power, especially judges, need to choose their words more carefully.

