NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

July 2023

Male Accused Found To Be Akin To a Battered Spouse

Accused Suffered from "Complex Trauma" in an Abusive Relationship

In the recent, groundbreaking case of *R. v. F.Z.*, 2023 ONSC 3159, the male accused was found to be suffering from complex trauma due to the conditions of his marriage which supported his evidence to rebut the allegations of sexual assault and coercive control.

Expert evidence was called by the defence to demonstrate that the accused lived in a passive state of "learned helplessness" due to the explosive and controlling nature of the complainant's behaviour during their brief marriage.

Justice O'Marra accepted that the accused had been banished from his own home by the complainant for trying to give her a surprise gift and lying to her about the conversation in which the gift was being planned.

This banishment stood in stark contrast to the complainant's claim that she was unable to "safely flee" the household until the day she moved out of the condo a year later.

The Judge also did not accept the complainant's testimony that the accused suddenly transformed into the stereotype of an entitled husband the moment they got married. All of the message exchanges showed that the accused continued to live in fear of the complainant up to the date of their separation in addition to being extremely careful about how he approached and interacted with the complainant.

In his credibility assessment, Justice O'Marra wrote:

> [61] There are a number of areas in which I found WLM's evidence to have been disingenuous attempts to mislead the court that affect her credibility.
>
> [62] First, I found WLM's description of FZ as being controlling and entitled person to have been disingenuous and incongruent in face of the numerous texts which displayed his passive apologetic personality, a person who was trying continuously to avoid conflict.

> [63] I accept the evidence of Dr. Gojer that FZ displayed the characteristics of a person with complex trauma - a hypervigilant, passive, and apologetic person who sought to please WLM to avoid her anger, which appeared easily triggered.

The judge additionally found that the complainant had attempted to use her criminal allegations to obtain financial rewards in their family court matter.

Numerous text based messages were presented in court that, cumulatively, showed that the accused was regularly apologizing to the complainant for mundane events that had triggered her anger.

Individually, the messages may not have been conclusive but as a whole it painted a clear picture of the true power dynamic in the household, in which the accused was living in constant fear of the complainant's rage.

Combined with the expert evidence of complex trauma and the supporting documentation from the relationship the defence was able to prove that the accused was not guilty.

Men's experiences of domestic violence are treated differently than those of women and are presumed to be less traumatic. The comments of Justice L'Heureux-Dubé in *R. v. Malott*, 1998 CanLII 845 (SCC), [1998] 1 S.C.R. 123 at paragraph 44 remain the current mode of thinking:

> My focus on women as the victims of battering and as the subjects of "battered woman syndrome" is not intended to exclude from consideration those men who find themselves in abusive relationships. However, the reality of our society is that typically, it is women who are the victims of domestic violence, at the hands of their male intimate partners. To assume that men who are victims of spousal abuse are affected by the abuse in the same way, without benefit of the research and expert opinion evidence which has informed the courts of the existence and details of "battered woman syndrome", would be imprudent. [emphasis added]

Ultimately, the Judge concluded that he could not accept that the accused had a "sudden personality change, 'like something switched' as suggested by WLM, but then him reverting to being passive and acquiescence as reflected in the text messages and his psychological profile relied on by the defence."

Ultimately, the expert evidence, supported by the messages significantly undermined the narrative of the complainant resulting in acquittals on both counts of sexual assault.

The Importance of Motive

The Saskatchewan Court of Appeal recently ordered a new trial in *R v Murillo*, 2023 SKCA 78 primarily on the grounds that the trial Judge failed to grapple with or address the motive to fabricate suggested by the defence.

Citing Justice Doherty in *R. v. W.B.*, 2000 CanLII 5751 (ON CA) the trial judge agreed that "motive to fabricate can be an important factor bearing on credibility."

He also noted that motive or lack of motive is only one factor to be considered but, when evidence is presented of a motive, the trial Judge is obligated to address the issue.

The *Murillo* decision also cites Professor Lisa Dufraimont commenting on *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000 noting that "where a case turns on circumstantial evidence, 'the criminal standard of proof beyond a reasonable doubt requires triers of fact to consider 'other plausible theories' and 'other reasonable possibilities' which are inconsistent with guilt'"

Dufraimont has also been cited in the recent case of *R. v. Oliver*, 2023 NLSC 81 regarding motive and the difference between myths and stereotypes versus legitimate inferences drawn from the evidence. From *Oliver* at para 144:

> Defence counsel asserts that the Complainant had a motive to lie by hiding from her former boyfriend that she had consensual sex with the Accused. It is not impermissible to make such inference, if grounded in the evidence: (Lisa Dufraimont, *Current Complications in the Law on Myths and Stereotypes*: (2021) 99 Canadian Bar Review 3, 2021 CanLIIDocs 13421, at pages 551-552, citing *R. v. JC*, 2021 ONCA 131, at para. 75).

Ultimately, motive or absence of apparent motive is not determinative of the credibility issue but it is a factor to be considered.

In *Murillo,* the Court of Appeal also cited *R. v. JC,* 2021 ONCA 131 in addressing stereotypes about what a young woman would do, which unfairly prejudiced the Accused.

The trial judge had disbelieved Murillo regarding his testimony that the complainant had engaged in a game of "truth or dare" at 5 a.m. before agreeing to have sexual interactions with him under the condition that he washed his genitals first.

From *Murillo supra* at para 38:

> There is no doubt but that two young people, having spent the evening together socializing and drinking, might continue their evening by playing a game. That is so despite that they had walked home, that it was cold when they did so, and that it was 5:00 a.m. That would be true even if the complainant had not yet decided that

> she was or might be willing to engage in sexual activity, but only to continue talking. Similarly, the answer to the trial judge's question as to why the complainant would ask Mr. Murillo to wash himself is readily apparent if, as he claimed, she intended to join him in the bathroom and initiate sexual activity in the manner he described. It is plausible and accords with human experience that a person might make such a request in those circumstances. Indeed, and with respect, the notion that events could not have unfolded in the manner described by Mr. Murillo appears to be rooted in a stereotypical assumption that a woman would not initiate sex in this way.

The problem identified by Professor Dufraimont in her article about complications in the law regarding stereotypes relates to the increased vigilance in protecting against improper reasoning and the resulting, equally problematic result of improperly rejecting legitimate arguments about motive by assuming it to be a myth or stereotype.

The ultimate risk identified by these cases is that wrongful convictions can result because of hypervigilance by improperly assuming that defence challenges to a complainant's credibility are automatically related to a myth.

It is important that trial judges properly articulate how they used evidence of motive and internal inconsistencies in arriving at their decisions. In *Oliver*, the Judge acquitted, noting at para 153:

> However, it is permissible and appropriate to assess the credibility of Complainant's testimony in the context of other evidence about what transpired after the Incident. This is so even where the evidence involves the Complainant's reaction to the alleged sexual assault: *R. v. Roth*, 2020 BCCA 240, at para. 136.

While it still remains a problem that myths and stereotypes are improperly employed in criminal trials, it must still be open for judges to properly consider problems with the Crown's case that are grounded in the evidence at trial.

It is never an onus on the accused to answer the question "why would she lie." That reverses the burden of proof. It is now also a problem that when an accused person does offer a motive to lie it is cast as a myth or stereotype even when it is grounded in evidence.

Stereotypes and Common Sense

In the pending SCC decision in *His Majesty the King v. Edwin Tsang* SCC File# 40447, previously noted in this newsletter as cases to watch, the decision in *R. v. JC*, 2021 ONCA 131 is under

scrutiny in terms of alleged "ambiguity" on how to assess credibility when stereotypes are assessed in favour of the accused in overturning convictions.

Notably, these concerns do not arise from the same people when acquittals are overturned on the same grounds.

The case of *J.C.*, written by Justice Paciocco of the Ontario Court of Appeal (and not appealed to the SCC), recognized that stereotypes and myths are related to improper inferences about both complainants and accused but that, in some cases, those stereotypes are not myths but grounded in evidence given at trial. Justice Paciocco gave an outline in *J.C.* that helped separate out myths from proper inferences. Specifically he stated that evidence is not a myth or stereotype if it is properly grounded in evidence at trial. Where it is based on proper evidence at trial there is no improper use.

This clarification is now under scrutiny in the Supreme Court appeal in *Tsang*. The argument made by the Crown and Women's Legal Education and Action Fund (LEAF) is that there is an apparent substantive difference between stereotypes about complainants and stereotypes about the accused. The main argument is that complainants should be believed because consent is subjective. That ignores that subjective claims of non-consent are still subject to credibility findings.

The fact that a complainant says they did not consent does not make that claim true just because consent is "subjective" in the mind of the complainant. A trial puts that subjective claim to trial and that trial must remain fair - not just in the realm of subjective imagination or rewriting.

Questioning the memory of a complainant is not the same thing as engaging in "rape myths." Sometimes people come to believe things that are not true.

In regards to criticisms against defence lawyers, there is an alleged difference between assumptions allegedly made about a complainant and assumptions about an accused person based on gender differences simply because men are assumed to have a power imbalance and be more likely to be sexually aggressive.

Much attention is paid to assumptions about female complainants while men are mostly mocked for defending themselves against false complaints.

Justice Paciocco's decision for the unanimous Court of Appeal in *J.C.* was not challenged at the time of its release. The decision did not seek to change the law but to apply it in equality to both complainants and the Accused.

The current challenges to the case of *Tsang* mostly argue that there is a substantive difference between Paciocco's "rule against ungrounded common-sense assumptions" and the rule against myths or stereotypes disguised as common sense.

This is a distinction without a difference.

The main difference is simply that Paciocco's clarification allows for an accused person to successfully argue that "common sense" was

improperly used to employ stereotypes that unfairly prejudiced the accused.

The facta from the Crown and LEAF intervenors in *Tsang* makes it clear that the Crown and intervenors see a "substantive" difference when the same rule against stereotypes is applied on both sides.

The main argument is that consent is subjective and, hence, when a female says she did not consent there is deference owed to the complainant's testimony. This argument stands in contrast to *Ewanchuk* which clearly states that a complainant's testimony of non-consent is still subject to a credibility assessment.

The Supreme Court has reserved their decision on the case of *R. v. Tsang* but this decision will be very important if we are to apply myths and stereotypes equally between genders.

In the meantime, the likely reason *J.C.* has come under scrutiny and challenge is because it has attempted to equalize what was previously an unequal field in which complainants were the only ones protected against myths and stereotypes.

Justice Paciocco did not attempt to rewrite the rule against myths and stereotypes with J.C. he only sought to clarify what is or is not a stereotype. The Supreme Court is now tasked with deciding whether or not "stereotypes" only exist against female complainants or whether they exist as a governing rule against improper reasoning regardless of gender.

The question for the Supreme Court will be whether or not the apprehension of stereotypes and myths are something that can be presumed as long as the accused was acquitted but cannot be presumed as long as the accused was convicted.

Misuse of Material Evidence

In the recent case of *R. v. D.C.*, NSCA 20 the Nova Scotia Court of Appeal ordered a new trial finding that the trial Judge engaged in a number of errors.

At the outset, the trial Judge commented that the Accused's demeanour outside of the witness box caused him to doubt the Accused's testimony.

Because the accused intentionally did not look at the complainant while she was testifying, the judge drew an adverse inference against the accused due to his avoidant behaviour. Evidence was brought to the appeal showing that the accused was instructed by his lawyer to not look at the complainant and it was deemed improper for the judge to use his "out of box" behaviour as a factor in conviction.

The trial judge was also found to have failed to resolve material inconsistencies in the complainant's evidence.

It is not required that judges address every inconsistency or challenge by defence to the complainant's evidence but it is required that the judge explain how they grappled with evidence that had substantive issues.

The additional issue in this trial involved the use of Snapchat messages that were submitted by the complainant but which exhibited clear problems in regards to missing messages.

Particularly, the messages showed gaps in the time of the screenshots and clearly showed that the screenshots, taken by the complainant herself, did not match up with the following screenshots.

The Accused did not challenge the messages as tendered by the Crown but challenged the completeness of the messages. This is an ongoing problem when complainants are put in charge of documenting their own messages instead of a proper police investigation.

The Snapchat messages were considered by the trial Judge to be a "critical piece of evidence" despite the obvious flaws in the captures of the full message exchange.

Cases To Watch

R. v. Christopher James Kruk SCC file #40095
Crown appeal based on alleged stereotypes.

B.E.M. v. His Majesty the King SCC File# 40221
Lack of corrective instruction after the Crown used a personal anecdote in the jury address.

Procureur général du Québec, et al. v. H. V. SCC File# 40093 Mandatory minimum sentences in child luring convictions.

His Majesty the King v. Edwin Tsang
SCC File# 40447
Use of stereotypes and generalisations about what people would or would not do in a sexual encounter with a stranger.

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