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Legal Gaps Persist For Intimate Partner Sexual Violence After Key Ruling

By: Jennifer Koshan and Lise Gotell

Case Commented On: *R. v. Goldfinch*, 2019 SCC 38 (CanLII)

It has been over 25 years since Supreme Court of Canada Justice Claire L'Heureux Dubé discredited the myth that rape is most often perpetrated by strangers in *R v Seaboyer; R v Gayme*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577. Sexual violence by men against their female intimate partners is, sadly, a common occurrence in Canada and worldwide. Yet myths about spousal sexual violence – marital rape myths – continue to infuse the approach to sexual assault by a wide range of legal actors, including police, prosecutors, defence lawyers and judges.

These myths include the beliefs that consent can be assumed or implied within intimate relationships, that women frequently make false accusations to gain an advantage in family law proceedings, and that marital rape is less serious than rape between strangers because the parties have had sex before. Social science evidence has established that marital rape is often more violent, not less, that injuries are more commonly experienced, and that survivors experience higher rates of trauma.

Several cases of intimate partner sexual violence have come before the Supreme Court, yet it was only in 2019 in *R v Goldfinch* that the Court first discounted some of these marital rape myths. Still, even after the progress made in *Goldfinch*, as well as by recent changes to the Criminal Code provisions on sexual assault, it is clear that judicial education, training for Crown prosecutors, and sufficient legal aid for complainants are all necessary to address the justice gap for women who allege marital rape.

Dealing with the complainant's sexual history

In *Goldfinch*, the parties had dated and then lived together for a time and continued to have sex periodically after the relationship ended. On the night in question, the accused claimed that he and the complainant had consensual sex. The complainant testified that he physically and sexually assaulted her, and she was left with visible bruises and swelling following the incident.

At trial, the accused wanted to introduce evidence that he and the complainant were involved in a "friends with benefits" relationship. The Crown was prepared allow for the introduction of some evidence of the parties' relationship, including that the complainant would occasionally stay overnight at the accused's home. The evidence was offered for context, and to address defence concerns that the jury would assume that the relationship was simply platonic, but s 276 of the *Criminal Code* requires that all prior sexual history evidence meet a strict test in order to be admitted at trial.

In this case, following the Crown's introduction of some evidence of the parties' history, the defense sought to cross-examine the complainant on her "friends with benefits" relationship with the accused. The trial judge allowed for this, finding that the evidence was "relatively benign" and that to keep it from the jury would be artificial and harmful to the accused's right to full answer and defence. The jury acquitted Goldfinch of sexual assault.

A majority of the Supreme Court held that the trial judge erred in allowing evidence of an ongoing sexual relationship (para 45). According to Justice Karakatsanis, "the obvious implication" of this evidence was that the complainant was more likely to have consented (para 47). The discriminatory myth that a woman is more likely to have consented if she had had sex with the accused in the past is one of the reasons behind s 276, which bars the admission of a complainant's sexual history unless certain conditions are met.

In *Goldfinch*, the Supreme Court found that evidence of a relationship "that implies sexual activity" between the accused and complainant must be subject to a sexual history application under s 276 (para 42). In other words, what the Crown had been prepared to allow in the trial of this case should have been subject to an application. Because the defence application to cross-examine the complainant on the "friends with benefits" evidence had failed to put forward any other legitimate use beside the prohibited inference that this relationship made the complainant more likely to consent, the Supreme Court said the evidence should have been excluded at trial. The Court also recognized that the existence of an intimate relationship does not diminish the severity of a sexual assault (para 45).

Trial judges still allowed much discretion

We are encouraged by the majority decision in *Goldfinch*. Women raped by current or former partners are amongst those most likely to be disbelieved in sexual assault proceedings, and it is positive to see the Court take steps to discredit the pernicious marital rape myths that continue to undermine prosecutions of sexual violence within intimate relationships.

However, *Goldfinch* leaves the door open for evidence of a sexual relationship to be introduced in cases where the accused can show it is relevant to an issue at trial. The Supreme Court said examples of this would be when there is an honest but mistaken belief in communicated consent; or a situation where the complainant has made inconsistent statements about the existence of a sexual relationship (paras 62-63). If the accused can establish the potential relevance of relationship evidence, the trial court will have to balance the probative value of the evidence against its prejudicial effects, considering factors such as the accused's right to make full answer and defence, the complainant's privacy, security, and equality interests, and society's interest in the reporting of sexual offences (*Criminal Code*, s 276(3)).

This balancing of interests leaves much discretion to trial judges, and research shows that s 276 applications continue to be a site of inequality for complainants in sexual assault trials. Women in intimate relationships with the accused are susceptible to discriminatory reasoning here, perhaps especially those whose relationships fall outside expected norms. Women who are sex workers, who were intoxicated or affected by disabilities at the time of the sexual activity, or

who are Indigenous or racialized, are often the subject of stereotypical thinking in the context of sexual history assessments.

Independent legal counsel for complainants is key

In addition to the need for ongoing training and implementation of ethical standards for legal actors, women require independent legal counsel who will vigorously refute marital and other rape myths in these applications. Crown counsel cannot be counted on to do so, with the *Goldfinch* trial showing how prosecutors are sometimes prepared to allow evidence that requires scrutiny under s 276. Another recent example is *R v Barton*, 2019 SCC 33 (CanLII), where the Crown overlooked its obligations under s 276 and referred to the deceased victim Cindy Gladue in language that was extremely prejudicial to her as an Indigenous woman and someone who had engaged in sex work.

Since amendments were passed in 2018, the *Criminal Code* now explicitly allows for complainants to be represented by their own counsel in s 276 applications (s 278.94(3)). In order to be meaningful, however, this right to counsel provision needs to be accompanied by robust funding. Several provinces and territories have implemented legal aid funding or other programs for complainants' counsel in sexual assault cases in the last few years. In Alberta, for example, legal aid will now fund 5 hours at $92 per hour for lawyers representing complainants in s 276 applications. In a complex trial with a contested sexual history application, this is grossly insufficient. There are also a limited number of lawyers with the requisite expertise and who lack of conflicts of interest who are available to effectively represent complainants in these applications, especially in rural areas.

In applications where the defence seeks access to the complainant's confidential records, having independent legal representation results in decisions that achieve a better balance between the rights of the accused and the rights of the complainant. This will also be a pivotal factor in s 276 hearings when an accused who is a current or former intimate partner seeks to introduce sexual relationship evidence.

In a recent case in British Columbia, a Court "found it particularly helpful" to have independent counsel for the complainant, noting that "the additional perspective added much to the Court's understanding of the issues" (see *R v TAH*, 2019 BCSC 1614 (CanLII), para 67). These remarks support our contention that funding and training for complainants' counsel in s 276 applications and more broadly are critical to ensuring that marital and other rape myths do not continue to undermine women's equality, security of the person and privacy in sexual assault proceedings.

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