November 8, 2023

The Myth of False Allegations of Intimate Partner Violence

By: Jennifer Koshan

Case Commented On: *R v RMD*, 2022 ABKB 851 (CanLII)

A colleague recently brought to my attention a decision concerning intimate partner sexual violence that was released earlier this year. In *R v RMD*, Justice Robert Graesser dealt with an application by the accused to cross-examine the complainant – his previous partner – on her past sexual activity in a criminal trial for alleged sexual assault. The court's reasons for decision on this application arguably perpetuate one of the most common myths about intimate partner violence (IPV): that litigants make false or exaggerated claims of violence to gain an advantage in family law disputes. Indeed, the court went so far as to take judicial notice of this "fact" (at para 45). This post unpacks the decision, placing it in the larger context of gendered myths and stereotypes about IPV and the relevant research and case law.

Background on IPV and Myths and Stereotypes

The most recent statistics provide that 33% of all police-reported violence in 2021 related to family violence (defined as violence committed by spouses, parents, children, siblings and extended family members). Women and girls account for 69% of police-reported family violence victims, and when we narrow the lens to IPV, 79% of victims are women. As many people expected, the rates of police-reported IPV increased during the COVID-19 pandemic, with a 4% increase between 2019 and 2021 and a very concerning 22% increase in reports of level 1 sexual assault (i.e. sexual assault violating the sexual integrity of the victim) between intimate partners from 2020 to 2021. These numbers reflect only part of the picture, because IPV remains vastly underreported to the police. The 2019 General Social Survey on Canadians' Safety (Victimization), which captures self-reported violence, found that only one out of five (19%) of victims of spousal violence reported the violence to the police.

Just as the statistics on IPV reflect its gendered nature, the myths and stereotypes about IPV are also gendered. I have written previously on these myths and stereotypes on ABlawg and in a special volume of the Canadian Journal of Family Law published in spring 2023 (see here - focusing on Supreme Court of Canada decisions, and here - focusing on civil protection order and family law cases). I find it useful to synthesize the false and faulty assumptions about IPV into two main categories: myths and stereotypes about the credibility of survivors of IPV, and myths and stereotypes about the nature and harms of IPV. The myth of false allegations of IPV is a credibility myth, and that category will be my focus in this post. However, it is essential to recognize that credibility myths are connected to myths about IPV. A complainant may not be believed based on misassumptions about the type of violence she reported, or if she is not believed, the violence may be discounted in its relevance to the legal issues in the case.

False allegations are possible in many contexts. What distinguishes false allegations of gender-based violence is that gendered stereotypes have led to the assumption that women are likely to be vengeful towards, and lie about, their ex-partners. This misassumption was first called out by the Supreme Court of Canada as a myth in a sexual assault decision, *R v Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577 (per Justice Claire L'Heureux Dubé at para 141, dissenting but not on this point). The more specific myth that women falsely allege IPV in family disputes is also longstanding and pervasive (for a discussion of its origins in the family law context, see here). For example, when women report violence to the police, apply for protection orders, or raise IPV in family proceedings, they are often met with the accusation that they are fabricating the violence to gain an upper hand in family disputes. In interviews I conducted in the spring of 2022, one lawyer stated that in the protection order realm, this type of counter-allegation "is a number one playbook response from a respondent counsel. I mean, that's the greatest hit, like you just expect that song is going to be played every time."

This myth has also found its way into popular culture. In Ian MacEwan's 2015 novel *The Children Act*, the protagonist – a family court judge – bemoans "wives lying and spiteful… And the children? Counters in a game, bargaining chips for use by mothers" (at 137, 138). And it is not just in parenting disputes that this myth arises. Women are also perceived to be driven by a quest for property, spousal support, or other financial redress – according to MacEwan, "women demanding a life of ease, forever" (at 138). Whether these quotes were intended as satire is a matter of interpretation, but they reveal a cultural script that reinforces the myth of the lying and vengeful wife and mother.

The myth of false allegations persists despite research that repudiates it. A 2021 study in BC by Rise Women's Legal Centre reported that women are often counselled by their lawyers not to raise IPV in family law proceedings because this risks a counter-allegation of parental alienation or other adverse outcomes in parenting disputes. This report is backed up by case law reviews that call into question whether there is any upper hand to be gained at all by raising IPV in family disputes (see here, here, and here). In 2018, the federal Department of Justice noted that intentionally false allegations of family violence in family law disputes "are generally understood to be rare" (see Family Violence: Relevance in family law). Australia's National Domestic and Family Violence Bench Book, 2023 edition instructs judges that "false denials of true allegations are more common" than false allegations of family violence (at s 4.1). In the United Kingdom, Michael Flood's research cites a 2022 report of the Metropolitan Police that found that from 2018 to 2021, police flagged domestic abuse complaints as false in only 0.01% of complaints in that period.

Although the myth of the vengeful ex-partner was repudiated in *Seaboyer*, the Supreme Court has not yet debunked the more specific myth of strategic false allegations of IPV. Some lower court decisions have tackled IPV credibility myths, however. In *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 (CanLII), which Deanne Sowter and I blogged on here, the court considered whether to accept a new tort of family violence. In her reasons at trial, Justice Renu Mandhane rejected the father's claim that the mother had fabricated IPV "because of her anger over him abandoning her, and her desire for financial gain" (at para 74). To support his argument, the father had raised the points that the mother did not leave the relationship and in fact immigrated to Canada to join him, and that she had only complained to the police several years after their separation, in advance of the family law trial (at para 74). Justice Mandhane "refuse[d] to draw any negative inferences"

about the mother's credibility from these facts, noting the various barriers that make it tremendously difficult for women to leave abusive relationships and report violence, particularly for immigrant women like Ms. Ahluwalia (at paras 75-95). Justice Mandhane's decision to recognize a new tort was overturned on appeal, and while the Court of Appeal did not interfere with her findings on credibility, it unfortunately reiterated the myth of strategic claims (see 2023 ONCA 476 (CanLII) at paras 120, 122).

With this background in mind, we can now turn to the *R v RMD* decision.

The *R v RMD* decision

As noted, *RMD* involved an application by the accused to cross-examine the complainant on sexual history evidence in a sexual assault trial. These applications are governed by s 276 of the *Criminal Code*, RSC 1985, c C-46, which provides both procedural and substantive protections. Under s 276(1), evidence that the complainant has engaged in other sexual activity is not admissible to support an inference that she is more likely to have consented to the sexual activity in question, or that she is less worthy of belief. These are the "twin myths" first recognized in *Seaboyer*, and evidence of sexual activity cannot be adduced for these purposes. If the defence seeks to adduce the evidence for other purposes, it is presumptively inadmissible unless the accused can establish that it is relevant to an issue at trial, relates to specific instances of sexual activity, and has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (at s 276(2)). Courts must hold a hearing to determine whether the evidence is admissible, and the defence must set out "detailed particulars of the evidence" they seek to adduce and its relevance to an issue at trial (at s 278.93).

In *R v Goldfinch*, 2019 SCC 38 (CanLII), the Supreme Court ruled that "evidence of a relationship that implies sexual activity", such as an intimate partner relationship, "clearly engages" s 276 (at para 42). Justice Andromache Karakatsanis's majority reasons noted that "[e]ven 'relatively benign' relationship evidence must be scrutinized and handled with care" so as not to perpetuate myths such as the assumption that an intimate partner is more likely to consent to sexual activity because of her relationship with the accused (at para 46). In terms of the evidence required to support a s 276 application, "[b]are assertions that [relationship] evidence will be relevant to context, narrative or credibility cannot satisfy s. 276" (at para 5).

In *R v RMD*, the accused's affidavit provided that he and the complainant began dating in 2017 and had a 4-year-old daughter together. The sexual assault was alleged to have occurred in August 2020 during a family camping trip after the complainant refused to have sex with the accused. In his affidavit in support of the s 276 application, the accused stated that when the complainant asked him to drive her back to town the next morning, "he told her that he was going to go back to a lawyer he had consulted in January 2020 about their relationship. He had initially changed his mind about separating but told her following the events of August 2020 that 'he was done with her now'" (at para 11). The complainant reported the incident to the police after that, and the parties had "since been engaged in family law litigation" (at para 12).

The accused sought to question the complainant to confirm their relationship and that they were parents of a daughter together. The proposed cross-examination of the complainant was framed as advancing the defence theory that the complainant "fabricated the allegation of sexual assault to

improve her position in the family law litigation" (at para 16). The Crown's response was that this type of questioning "falls within the stereotypic thinking and discrimination against women" that was repudiated in *Seaboyer* and *Goldfinch* (at para 25). The Crown characterized the defence application as a "fishing expedition" based on a "bare assertion" that the parties were "engaged in family law litigation" (at para 37), noting that there was no evidence that the proceedings were acrimonious or that the complainant had raised the criminal charges against the accused in the other litigation (at para 46). The complainant also appears to have had independent legal representation, which is permitted under s 278.94(3), but the decision says nothing about any submissions of her counsel on the s 276 application.

Justice Graesser ruled in favour of the s 276 application. He found that the defence's proposed line of questioning was necessary for background and context, to make sense of the allegation that the sexual assault occurred on a family camping trip (at paras 39-40). The only sexual activity that would be raised related to the fact the parties had a child together. The questioning had more to do with "whether the Complainant fabricated evidence of sexual assault to enhance her position in the family litigation, presumably by portraying the Accused as a criminal who committed family sexual violence against her" (at para 42). This, the court found, did not engage either of the twin myths – for example, that the complainant was "less worthy of belief because of her sexual past" (at para 43). Section 276(1) was therefore not engaged.

Under s 276(2), the first question was whether the proposed evidence was relevant to an issue at trial. Here, Justice Graesser stated that "[i]t is not fanciful that someone might lie about an assault. A common line of cross-examination is to probe whether the witness has a motive to lie about what happened to them in order to gain an advantage in some collateral matter" (at para 45). He went on to find that:

> I can take judicial notice that it is not unheard of for a party involved in family law litigation to lie or exaggerate about violence having been committed against them to gain an advantage in parenting matters or property matters. (at para 45)

As to the evidentiary foundation for establishing relevance, the court acknowledged that some s 276 applications require evidence from the accused, especially "when the risk of improper use of the evidence is high" (at para 47). This was not such a case, however, because "[t]he presence of *any* collateral dispute between a Complainant and the Accused may form the basis for a motive to fabricate" (at para 49, emphasis in original). Where "the potential for a motive to lie is clear", it is generally sufficient to have evidence of the accused's denial of violence and a statement of the defence theory that another dispute provided a motive for the complainant to lie (at para 49).

On the second question under s 276(2), the defence was proposing to question the complainant on the nature of their relationship, which inherently includes specific instances of sexual activity (at para 53, citing *Goldfinch* at para 54). This requirement was satisfied.

Speaking to the third question under s 276(2), Justice Graesser found that the answers to the proposed line of questioning "will have significant probative value on the issue of motive to lie" (at para 58). As to the prejudice to the complainant, he repeated his view that the questions had no bearing on the twin myths of consent and credibility as related to previous sexual activity (at para 59). The Crown argued that the proposed evidence was prejudicial to the administration of justice

in that it perpetuated the false myths "that women are fickle, that they are filled with malice and seek revenge, and that they will fabricate sexual activity out of spite" (at para 35, relying on *Seaboyer* at para 141). The court's response was that "[l]ying is not influenced by gender, and motives to lie are gender neutral" (at para 62). Justice Graesser also stated that he could not see how the proposed questions "might impact on reporting sexual assaults", one of the factors relevant to prejudice to the administration of justice under s 276(3) (at para 66). Moreover, the complainant's "personal dignity and privacy rights are not being impacted in any unusual way, and certainly in no way related to her gender", nor would the questioning affect her "personal security or deprive her of the full protection and benefit of the law" (at para 66). Rather, the proposed questions were ones "that could be asked in the family law proceedings without any pre-clearance by a judge" (at para 66).

The court granted the s 276 application, and the defence was permitted to question the complainant on "the circumstances of the breakdown of their relationship" and the complainant's "conduct in the family law litigation", including parenting and property issues, provided that the questions were "relevant to the issue of a motive to lie" (at para 67). Justice Graesser assured the parties that he would be "diligent to ensure that the questions are relevant and appropriate" (at para 68).

We do not know the outcome of this cross-examination or the trial itself, as there are no other reported decisions in this matter. All we know is that this decision dates back to December 2022, but it was not released until earlier this year when a publication ban was lifted, suggesting that the matter was concluded somehow (see s 278.95).

Commentary

My concerns about this decision, and its potential use as a precedent, relate to the court's failure to see the gendered myths and stereotypes implicit in its reasoning, which then influenced the scope of judicial notice and the slim evidentiary foundation the court accepted for the s 276 application in support of the defence theory of false allegations.

Justice Graesser's inability to see the gendered implications of his reasoning, and its connection to the myth that women are routinely vengeful towards their ex-partners, is troubling. By holding that a complainant's motive to lie is engaged by the accused's denial of violence and by a mere assertion of a family dispute, this decision reinforces myths about the credibility of survivors of violence, engaging one of the "twin myths" in s 276(1) of the *Criminal Code*. In other words, evidence that the complainant engaged in other sexual activity – that she was in an intimate relationship with the accused that is now the subject of litigation – was admitted to support the inference that she is less worthy of belief on her allegation of sexual assault, by virtue of this fact alone. Evidence that supports the twin myths is inadmissible, so I believe the court erred in its interpretation and application of s 276(1). It was therefore unnecessary to consider s 276(2) and the requirement to assess relevance, probative value, and the potential prejudice to the administration of justice. However, given his holding on s 276(1), Justice Graesser did go on to apply s 276(2), and he was also unable to see the gendered nature of the accused's submissions at this stage of analysis. It is particularly troubling that he could not see the connection between allowing complainants to be subject to cross-examination like that sanctioned in this case and the underreporting of IPV, which greatly prejudices the administration of justice.

It is significant that women are also disbelieved if they do not report IPV to the police or other authorities. Failure to report violence, or to do so promptly, leads to assertions that future claims of IPV are false. The Supreme Court has repudiated this myth by recognizing some of the many barriers to reporting IPV (see e.g. *R v Stairs*, 2022 SCC 11 (CanLII) at para 123; *Barendregt v Grebliunas*, 2022 SCC 22 (CanLII) at para 183). Research also indicates that the barriers to reporting are vast for survivors who have faced systemic racism and colonialism, homophobia and transphobia, and other forms of oppression (for a discussion see here). However, the myth that women will always report violence if it actually happened or if it was serious enough continues to make its way into legal arguments, as seen in *Ahluwalia*. Survivors are thus faced with a Catch-22 – report violence and risk being stereotyped as trying to manipulate family proceedings, or avoid reporting and risk a credibility challenge if the violence comes to light later on.

How might these myths have influenced the court's approach to judicial notice and the evidentiary basis for the s 276 application?

To take judicial notice of particular facts, the court must find that they are "so notorious or generally accepted as not to be the subject of debate among reasonable persons; or … capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (*R v Find*, 2001 SCC 32 (CanLII) at para 48). This strict threshold exists because judicial notice means that the facts in question do not need to be proven under oath and they are not subject to cross-examination. When the relevant facts are in the nature of social context evidence, judicial notice can be taken if the facts "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used" (*R v Spence*, 2005 SCC 71 (CanLII) at para 65). In addition, "the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy" (*Spence* at para 65). An example here would be the Supreme Court's decades-long acknowledgment that there is systemic racism in the Canadian criminal justice system (see e.g. *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 at para 58, *R v Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688 at para 61).

In *RMD*, the purported "fact" or "social context" was that parties involved in family law litigation may lie about or exaggerate IPV to gain an advantage. Is this a notorious fact not subject to debate by reasonable people? Unfortunately, some lawyers share this perception, as indicated in a 2023 Justice Canada survey where 19% of respondents stated that they had concerns that asking their clients about family violence "may result in some parties making false allegations in an attempt to gain an advantage in litigation" (see here at 6). However, if reasonable people took the trouble to inform themselves on the topic, they would find that in spite of this perception, false allegations of violence are actually rare, and IPV claims do not typically assist survivors in family claims – quite the opposite. That the assumption of false IPV allegations is inaccurate and illogical is supported by the research and case law I cited above. Reasonable people would also understand that the accusation of false allegations is gendered, not just because women are the disproportionate victims of IPV, but also because of foundational myths like that of the vengeful, spiteful, and greedy wife and mother. Indeed, it would be more reasonable to take judicial notice that perpetrators – mostly men – often wrongly accuse survivors – mostly women – of making false allegations of IPV, as recognized in the Australian National Domestic and Family Violence Bench Book and in cases like *Seaboyer* and *Ahluwalia*. Perpetrators may also make false counter-allegations of violence themselves, for example to police, children's services, or immigration

authorities, as part of their ongoing abuse – a recognized phenomenon known as systems or litigation abuse (see e.g. here and here).

To return to *RMD*, observe the work that judicial notice is doing. Section 276 applications must be evidence-based, and judicial notice of false allegations allowed the application in this case to rest simply on the accused's denial of violence and assertion that there was family litigation underway. The court did not heed the point from *Spence* that the need for reliability and trustworthiness of the facts in question increases directly with their centrality to the disputed matter. Credibility was a central issue in *RMD*, and the court took judicial notice of false allegations as the basis for a possible motive to lie without any discussion of the reliability and trustworthiness of the purported facts.

The court's acceptance of the accused's thin evidentiary foundation combined with judicial notice of false allegations opens up virtually all sexual assault proceedings to this type of credibility challenge where there was a previous relationship between the accused and complainant and related family proceedings are underway or even contemplated. According to the court's logic, perhaps it would even be enough if the accused asserted that the parties had separated, with just the possibility of family proceedings raised. And if a court can take judicial notice of the supposed motive to lie or exaggerate about violence to gain an advantage in family litigation, nothing restricts this notice to s 276 applications or even to criminal cases. Survivors of violence may be subjected to similar assertions of false allegations, and even findings of false allegations, in civil protection order proceedings and in family law cases. This already happens, as noted above, but "judicial notice" gives this type of argument an inappropriate stamp of approval. When Justice Graesser noted by comparison that the defence's proposed questions "could be asked in the family law proceedings without any pre-clearance by a judge" (at para 66), this undermined the special regime put in place over 30 years ago to prevent inappropriate uses of sexual history evidence in sexual assault cases. This comment also calls to attention the problematic use of "false allegation" arguments in family proceedings.

That this type of reasoning continues to occur despite decades of judicial education and appellate court guidance on myths and stereotypes about sexual assault and IPV is deeply concerning. As I have argued before, acknowledging myths and stereotypes does not entail the acceptance of all IPV claims. It means that legal actors must assess the credibility of these claims without making assumptions, even those that appear to be "common sense." As the Supreme Court has noted, judicial reliance on myths and stereotypes must be avoided because they lead to prejudicial reasoning, false logic, and errors of law (see e.g. *R v Barton*, 2019 SCC 33 (CanLII) at para 60)). In *RMD*, the fundamental problem is that the court began with the assumption that complainants have a motive to lie about IPV merely because the accused asserted the existence of family law proceedings. Before accusations that allegations of violence are falsely and strategically made are given any weight, courts must ensure that any such assertions are supported by reliable and trustworthy evidence. To do otherwise is to perpetuate gendered myths and stereotypes about the credibility of survivors of IPV.

Thanks to Janet Mosher, Deanne Sowter, and Wanda Wiegers for comments on an earlier draft of this post. The author's research on family violence is supported by a University of Calgary Research Excellence Chair.

This post may be cited as: Jennifer Koshan, “The Myth of False Allegations of Intimate Partner Violence” (8 November 2023), online: ABlawg, http://ablawg.ca/wp-content/uploads/2023/11/Blog_JK_RMD.pdf