NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

# NEWSLETTER: Sexual Assault Law Updates

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# Motive and The "Forbidden Question" in Sexual Assault Trials

## Why Would She Lie?

Three recent Court of Appeal decisions addressed the role of motive or absence of motive in sexual assault trials and reached different outcomes. In *R. v. Bernier*, 2021 ABCA 27 a new trial was ordered. On the other hand, in *R. v. Ignacio*, 2021 ONCA 69 and *R. v. Sivasubramanian*, 2021 ONCA 61 the conviction appeals were dismissed, allowing trial judges to consider the absence of motive in their analyses. The main difference was related to who put the question into consideration.

The issue of motive in a sexual assault trial, when raised by the Crown, has been called "the forbidden question" by the Alberta Court of Appeal in *R. v. Kusk*, 1999 ABCA 49.

In the *Kusk* case, the Crown had asked the accused why the complainant would lie when the defence had not alleged a motive. The Court of Appeal overturned the conviction, denouncing the forbidden question as "beguiling" and pointing out that it reverses the onus of proof in such a subtle way that even experienced judges can fall prey to this "false train of reasoning."

Finding an absence of motive can serve to bolster the complainant's credibility and sexual assault trials often hinge on credibility assessments. Though there is a marked difference between a lack of motive and a "proven absence of motive," the rejection of a motive suggested by the defence can have the same result.

In *Sivasubramanian*, the two complainants worked at a centre for sexual assault survivors and were alleged to have colluded with each other in fabricating their allegations. On appeal, the accused argued that the trial judge had misapprehended the suggested motive "arising from the connection to the sexual assault organization" when he concluded the complainants lacked evidence of malice.

The trial judge determined that there was an absence of animus from the complainants

towards the accused and the Ontario Court of Appeal agreed with the reasoning that, due to the seriousness of the harm done by a false allegation, it would imply a degree of ill-will on the complainants' part.

Additionally, in that case, there were a number of reasons the trial judge gave for finding the complainants to be credible which did not connect to the rejection of an alleged motive.

In *Ignacio*, the sole issue on appeal was whether or not the trial judge had taken the rejection of a suggested motive to be equivalent to a proven absence of motive to fabricate, and then improperly bolstered the complainant's credibility.

Again, the Ontario Court of Appeal ruled that the trial judge was "entitled to consider the absence of evidence of a motive to fabricate as one of many factors in his credibility analysis."

In this case, the defence had alleged that the complainant's motive was a concern about a potential pregnancy. The Crown pointed out that the trial judge's comments on this issue were "responsive to the arguments surrounding motive made by the defence."

In the unanimous decision to dismiss the appeal, Justice Pepall addressed the difference between "proof of no motive to fabricate" and why the alternate "absence of evidence of motive to fabricate" may be considered in a credibility analysis.

Justice Pepall acknowledged that "if the Crown has proven that the complainant had no motive to fabricate, the Crown has 'a powerful platform to assert that the complainant must be telling the truth.'" The onus is on the Crown to prove absence of motive and it is a less common finding. In *Ignacio*, the trial judge had simply rejected the motive suggested by the defence.

Though a rejection of a defence suggested motive can be a factor in the decision, the Court still cautioned against falling into the error of "placing an onus on the accused to prove the complainant had a motive to lie."

The situation in *Bernier* was much more complicated. In that case, a video recorded police statement given by the accused was entered into evidence on consent.

In the course of the interview, the officer had asked the accused the "forbidden question" and the accused had offered three guesses as to the complainant's motive in response.

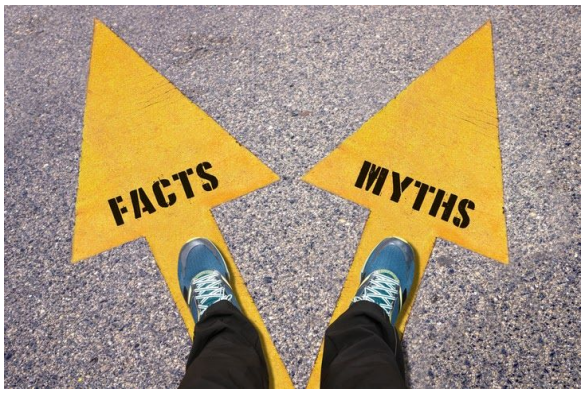
While the officer was permitted to ask that question in the course of an investigation, that portion of the interview should not have entered into the trial.

While defence counsel at trial had pointed out that "[y]ou can't go around asking witnesses why other people would lie. It's not a particularly probative question," the Alberta Court of Appeal described the error as "offending the rule that a witness cannot be called upon to impeach the oath of other witnesses."

The Court suggested that the interview should have been redacted to exclude the passages in which the question of motive arose. They noted that, although the defence did not advance these motives at trial, the judge had

placed significant weight on his rejection of these portions of the interview.

The question of motive is always present in a sexual assault trial and when defence brings motive into play it becomes fair game. On the other hand, prosecutors must be cautious not incorporate the "forbidden question" as an element of their case.




## The Role of "Common Sense" in Sexual Assault Trials

In a March 3, 2021 Ontario Court of Appeal decision, Justice Paciocco addressed the growing complexity in defining what comprises a stereotype in sexual assault trials. *R. v. J.C.*, 2021 ONCA 131 offered a number of opportunities to examine how the accused are being blocked from adducing properly relevant evidence.

The first issue of stereotypes arose in relation to the suggested motive that the defence put into play during trial. The Crown position was that it was a stereotype that "women with boyfriends" are prone to lying about sexual assault. The defence suggestion, however, had an evidentiary basis which showed this particular boyfriend was instrumental in how the allegation was disclosed and acted upon.

Justice Paciocco outlined how to differentiate "untethered generalizations about human behaviour" from evidence that is a factual conclusion that is based on the evidence at trial. Additionally, the decision addresses the use and misuse of "common sense" with examples of how inferences can properly be drawn from the factual matrix of the evidence.

Justice Paciocco breaks down the issue into two categories: "The Rule Against Ungrounded Common-Sense Assumptions" and "The Rule Against Stereotypical Inferences." He then examines each of these errors in more detail.

The approach takes into consideration that "it is an error of law to rely on stereotypes or erroneous common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility." He cites a number of recent cases which have highlighted how these generalizations are sometimes misapplied to the accused as well.

He notes a "critical point in understanding the rule against stereotypical inferences is that this rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence."

This differentiation is often central to pre-trial applications which focus on determining admissibility of evidence and areas of cross-examination prior to trial. The onus is on the defence to show in advance that they will not be engaging in stereotypes or "twin myth" reasoning.

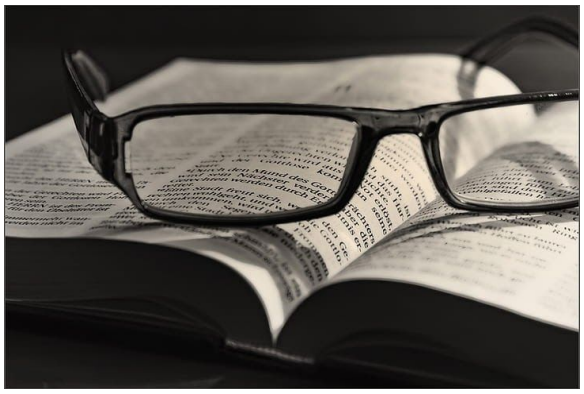
Another area of concern in this case was the improper consideration of why an untruthful complainant would submit herself to cross-examination. Justice Paciocco wrote:

"The primary concern with using a complainant's readiness to advance a criminal prosecution is that doing so cannot be reconciled with the presumption of innocence. The trial is to begin on the rebuttable premise that the accused is not guilty, not on the basis that the mere making of a criminal sexual assault allegation favours a finding of guilt."

The final consideration, aside from rejecting the curative proviso, was the trial judge's rejection of the accused's testimony that he obtained consent for each and every sexual act on the grounds that it was "not in accord with common sense and experience about how sexual encounters unfold."

Justice Paciocco pointed out that a presupposition "that no-one would be this careful about consent" undermines the law of consent. He summarizes this conundrum saying, "Simply put, the behaviour the trial judge rejected as too perfect to be true is to be encouraged, not disbelieved *ab initio*."

Most certainly, it would be a problem in our legal system if men were required to engage in sexual behaviour which, if followed, would render their testimony to be unbelievable and contrived.



## Reasonable Steps to Acquittals

The Crown successfully appealed an acquittal in the recent case of *R. v. I.A.D.*, 2021 ONCA 110 due to insufficient analysis by the trial judge regarding whether the accused's defence of honest but mistaken belief in communicated consent had an "air of reality" based on the "reasonable steps" requirement.

In cases where the complainant and accused give diametrically opposed versions of events, the defence of honest but mistaken belief will normally fail if the complainant is believed.

Trial judges are not permitted to simply choose whom to believe and quite often accept parts of each witness testimony as they draw their conclusions about the facts of the case and whether there is reasonable doubt.

For honest but mistaken belief to be advanced, reasonable steps to discern consent are "a statutory prerequisite to the availability of that defence." This often requires a more detailed explanation of which parts of the testimony the judge accepted in order to make a finding on this particular path to acquittal.

The trial judge in this case accepted the complainant's evidence that she did not subjectively consent. She then moved to consider the accused's state of mind. Ultimately, the Court of Appeal concluded that:

"The trial judge's reasons are entirely silent as to whether the respondent took any objectively reasonable steps in light of the circumstances known to him at the time. Instead, the trial judge reviewed the evidence, made conclusions about what she could not reject, and then satisfied herself that it was impossible to reject the defence of honest but mistaken belief in communicated consent."

The Crown's appeal of the acquittals also sought to substitute convictions based on the trial record but the Court of Appeal declined because the reasons were insufficient to determine if a possible foundation for acquittal remained.

This case is a good reminder that, when advancing the defence of an honest but mistaken belief in communicated consent, the defence ought to be careful in submissions to lay out a pathway to acquittal grounded in facts that can be accepted even if the trial judges finds the complainant to be generally credible. This does not preclude the defence to advance facts that are equally as capable of belief or that raise a reasonable doubt.

The more robust these complex issues are fleshed out in closing submissions, the trial judge will be better assisted in articulating the findings and assessment which grant an air of reality to the defence.

## Uncharged Prior Bad Acts

Building on the previous decision in R. v. M.R.S., 2020 ONCA 667, the Ontario Court of Appeal again addressed the danger of admitting evidence of uncharged prior bad acts as narrative in *R. v. Z.W.C.*, 2021 ONCA 116.

Some of the evidence in this case related to alleged abusive behaviour that took place out of the country during the earlier years of a marriage. Both the complainant and the couple's daughter gave spontaneous new details of abusive incidents that had neither been disclosed to the defence nor anticipated by the Crown.

Because this was a jury trial, the effect of the impermissible testimony was amplified. The Crown had brought an application to adduce prior discreditable conduct evidence at the outset of the trial and the factum contained a point form list of anticipated evidence. The defence had objected due to a lack of formal notice prior to the application.

The evidence was admitted to establish animus and to explain why the complainant did not report the behaviour sooner or leave the relationship. The main question on appeal

was whether the trial judge properly balanced the potential probative value of the evidence against the risk of prejudice.

In their reasons, the Court of Appeal found that a volume of discreditable conduct evidence can confuse a jury who may "too readily use the evidence for an improper purpose." In this case, there was insufficient basis to conclude that the other alleged acts had actually occurred and only muddied the waters regarding which acts the accused was actually charged with. The volume of other alleged incidents was likely to lead to impermissible propensity reasoning.

Though the admissibility of prior bad act evidence will remain case-specific, this decision reinforces that the Crown cannot just rely on "narrative" to justify testimony about uncharged alleged other conduct.

Additionally, where a jury is involved, limiting instructions should be given immediately before and after the evidence is adduced as well as detailed instruction on the limited uses prior to deliberation to avoid misuse of this type of evidence.

It is important to recall Justice Paciocco's caution in the related *M.R.S.* decision:

"Whether evidence constitutes discreditable conduct evidence triggering the similar fact evidence rule is determined by the nature of the evidence, not the use the Crown proposes for that evidence. Where prejudicial bad character evidence unrelated to a charge being prosecuted is offered, the similar fact evidence rule is engaged, whether that evidence forms part of the narrative or not."


## Other Cases To Watch

*R. v. J.J*, 2020 BCSC 349 SCC File # 39133
The hearing for this Crown appeal of a constitutional ruling regarding the new rules of evidence since Bill C-51 has been adjourned from March 2021. The defence was granted leave to cross-appeal, opening up the case for a ruling regarding the entirety of the original constitutional challenge. There are currently 15 active and pending intervenor applications.

*R v Ramos,* 2020 MBCA 111 SCC File # 39466
The main ground of appeal against conviction was the adequacy of reasons. In dissent Justice Steel offered a definition of "a considered and reasoned explanation" for believing the evidence of a complainant over that of the accused. The primary concern was where the "reason" for believing is merely the "conclusion" that the complainant was believed.

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