Irrelevant and Invasive Police Inquisitions into the Sexual History of Sexual Assault Complainants

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In a sample of 220 police interviews, twenty-one percent of sexual assault complainants in Nova Scotia fourteen years of age or older were asked questions about their sexual history or other sexual activities. In the overwhelming majority of these cases, the questions had no bearing on the investigation, would be barred in a court proceeding, and were unnecessary, prejudicial intrusions into the dignity and privacy interests of these complainants. These questions also risked setting complainants, and the trial process, up for section 276 applications that would otherwise be highly unlikely to be brought, and virtually never granted. It is critical that the police be taught that a complainant's sexual history is as irrelevant to the vast majority of sexual offence investigations as it is to the investigation of any other crime. To render this part of the sexual assault legal process more effective and less discriminatory, investigating officers must genuinely accept that a thorough and complete investigation into an allegation of sexual assault never requires an investigation into a complainant's "sex life" generally and only requires them to ask about other specific sexual activity in a very narrow set of cases. This study demonstrates that, to date, this training has either not occurred, or, if it has, it has not been accepted by police.

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Introduction

The Royal Canadian Mounted Police (RCMP) have a website with an FAQ on "Information for Sexual Assault Survivors".[1] One of the questions on this site asks, "What will happen when you report the assault to police?"[2] According to the RCMP, if you "choose to report a sexual assault to the police" you will be asked to "provide a description of what occurred, to clarify details through interview questions, and to provide the names of any suspects, witnesses and bystanders."[3] The RCMP advise that "you can expect the investigator to ask questions about the incident to get a better understanding of what happened".[4] Nowhere on this site does it indicate that for many sexual assault survivors, you can also expect to be asked intrusive, irrelevant, stereotype-driven questions about your sexual history with the accused, about whether you are a virgin, have been previously sexually victimized, or about whether you are having sex with anyone else.

Other policing organizations' information for survivors, on what to expect if they report the sexual violence that they have experienced to the police, are equally bereft of warnings regarding the likelihood that they will be asked irrelevant, invasive questions about their other sexual activities.[5] Like the RCMP, these police agencies tell survivors that they should expect to be asked "details about what happened";[6] none of them suggest that they should also be

1. Royal Canadian Mounted Police, "Information for Sexual Assault Survivors: What will happen when you report the assault to police?" (last modified 5 March 2025), online: <rcmp.ca/en/relationship-violence/information-sexual-assault-survivors#s4> [perma.cc/BM5Y-WWEF].
2. *Ibid*.
3. *Ibid*.
4. *Ibid*.
5. See e.g. London Police Service, "Sexual Assaults FAQ's: If I do call police what happens next?" (last visited 24 February 2024), online: <londonpolice.ca/en/services/reporting-sexual-assaults.aspx> [perma.cc/UZH8-JUQX]; Vancouver Police Department, "Sex Assault" (last visited 24 February 2024), online: <vpd.ca/report-a-crime/sex-crime/> [perma.cc/XDW6-YAXB].
6. See e.g. London Police Service, *supra* note 5.

prepared for questions about their sexual history irrelevant to the investigation of the sexual violence that they are reporting. This lack of forewarning on police websites is unsurprising given that the police should not be conducting investigations in this manner. Yet, for a substantial proportion of adolescent girls and women, this is exactly what will occur when they are interviewed by the police regarding the sexual assaults that they have experienced.

Twenty-one percent of sexual assault complainants in Nova Scotia fourteen years of age or older, in a sample of 220 police interviews conducted between 2018 and 2023, were asked questions about their prior sexual history or other sexual activities. In over eighty per cent of these interviews the questions were irrelevant to the investigation and wholly inappropriate. In other words, in the overwhelming majority of cases in which the police asked adolescent girls and women questions about their other sexual activity, the questions had no bearing on the investigation and were unnecessary, prejudicial intrusions into the dignity and privacy interests of these complainants. These questions also risked setting them, and the trial process, up for section 276 applications that would otherwise be highly unlikely to be brought, and virtually never granted.

Police must be cognizant of the social context in which women and girls come forward to report the sexual violence that they have experienced. It is a context in which discriminatory assumptions about sexual assault continue to operate to discredit victims.[7] Indeed, this context is evidenced by the irrelevant, stereotype-driven questions about sexual history that are frequently put to complainants by the police, as demonstrated by the results of this study.

To be clear, a substantial majority of the interviews in this sample revealed officers who presented as compassionate and assumed a largely respectful tone and demeanour towards the complainants. Their irrelevant and harmful questions about complainants' other sexual activity appear not to have been motivated by intentional malice. The problem appears to stem from a combination of ignorance of the law and discriminatory thinking on the part of some police regarding the irrelevance and inadmissibility of the vast majority of evidence of this nature. This is consistent with the Nova Scotia Mass Casualty Commission's conclusion with respect to the "operation of misogyny" within policing: "[P]olice bring to their work a set of largely unexamined assumptions about their role as police, about what real violence and real victims look like, and about what kinds of problems they can help to solve."[8]

The most obvious recommendation emanating from this study is one that echoes, amplifies, and particularizes some of the recommendations made by the Mass Casualty Commission: the police need markedly more training in relation to the investigation of sexual offences and the issues of sexualized violence and

7. *R v Goldfinch*, 2019 SCC 38 at para 2 [*Goldfinch*]; *R v Barton*, 2019 SCC 33 at para 1 [*Barton*]; *R v Kruk*, 2024 SCC 7 at paras 31–44.

8. Mass Casualty Commission, *Turning the Tide Together: Final Report of the Mass Casualty Commission*, vol 5 (Truro: Privy Council Office, 2023) at 13.

gender-based violence.[9] In particular, as evidenced by this study, to avoid police interviews interlaced with prejudicial and irrelevant questions about sexual assault complainants' other sexual activities, police must be provided with:

- basic legal education on the definition of consent and its relationship to Canada's rape shield law;
- specific, concrete instruction on the particular stereotypes that have been legally rejected under Canadian sexual assault law, and, perhaps most importantly, why they have been rejected;
- tools to increase self-awareness regarding the role that unconscious bias plays in their own thinking regarding sexual violence and the credibility of sexual assault complainants;
- and specific, explicit training on the particular questions about prior sexual history and/or other sexual activities that the police should never ask sexual assault complainants, as well as on the types of cases in which, due to the nature of the allegations, the police should never ask about consensual prior sexual history.

There is an important caveat to this recommendation. Feminist advocates and front-line workers have been offering training to police on issues related to sexualized violence for decades. Police training, as Sunny Marriner observes, will only be effective if the officers being educated: (i) are committed to the training; (ii) accept that there are things that they do not know; and, (iii) are "receptive to learning new information even if it challenges their core beliefs".[10] Relatedly, there must be greater oversight of this police function: training without appropriate supervision and efficacy standards has not proven effective.

This study of Crown files reveals both a failure of the police educational system and a failure to create and maintain an effective oversight and supervision mechanism to ensure that the training provided achieves its desired impact.

The remainder of this article proceeds in six parts. Part I explicates the legal context in which police interviews of sexual assault complainants and the legal proceedings that follow them are situated. Part II explains the methodology for this study and provides a brief numerical overview of the study's findings. Part III provides examples, drawn from interviews in the sample, of the types of questions that the police should never ask in any sexual offence investigation.

There are also some types of allegations for which evidence of consensual sexual activity, including with the accused, will never be independently admissible. Part IV will canvass one example—sleeping or unconscious complainants—of the types of cases in which the police ought never to ask about other consensual sexual activity.

9. *Ibid* at ch 14.

10. Advocate Case Review, "For training to have an impact . . ." (6 June 2020), online: <x.com/sa_casereview/status/1269448650599526402?s=42> [archive.ph/BkXF6].

Part V provides guidance to police, more generally, on how to determine whether the case they are investigating is one of the very few in which it is relevant and necessary to ask a complainant targeted questions about her other sexual activity. Part VI offers conclusory remarks.

I. Understanding the Legal Context in Which Police Interviews of Sexual Offence Complainants Are Situated

Nearly every question about sexual history asked by the police in this sample would be barred at trial by section 276 of the *Criminal Code*.[11] Part V examines the characteristics of the small minority of cases in which this is not true.

The objective of Canada's rape shield regime, under section 276, is to protect "the integrity of the trial process by striking a balance between the dignity and privacy of complainants and the right of accused persons to make full answer and defence."[12] The regime is intended to serve the dual function of (i) preventing sexual history evidence that is either irrelevant, or relevant but more prejudicial than it is probative, from distorting the truth-seeking function of the trial and; (ii) protecting the dignity and privacy rights of complainants from being unnecessarily intruded upon.[13]

The regime has two parts. The first part, section 276(1), creates an absolute bar against evidence of a complainant's other sexual activities for the purpose of raising either of the "twin-myth" inferences: those being that, by reason of the sexual nature of the prior, or other, sexual activity, the complainant is (i) more likely to have consented to the sexual activity at issue in the charge or (ii) less credible. Other sexual activity, or prior sexual history as it is often described, refers to any sexual activity that is not part of the sexual activity that formed the subject matter of the charge.[14] This means any sexual activity that is not part of the "specific factual events of which the alleged offence is a component".[15] In other words, other sexual activity refers to any sexual activity that is not "integrally connected, intertwined, or directly linked" to the impugned sexual act(s).[16] Any sexual activity that is not so "closely connected by time and circumstance" that it can be considered part of the same sexual transaction as

11. *Criminal Code*, RSC 1985, c C-46 s 276 [*Criminal Code*].
12. *Goldfinch*, *supra* note 7 at para 39.
13. *Ibid* at para 40; *R v Darrach*, 2000 SCC 46 at para 43.
14. *Criminal Code*, *supra* note 11, s 276(1).
15. *R v McKnight*, 2022 ABCA 251 at para 254.
16. *R v Choudhary*, 2023 ONCA 467 at para 29.

the alleged offence constitutes other sexual activity or prior sexual history,[17] and is subject to the section 276 regime.

The second part of the regime creates a presumption of inadmissibility for any other defence-led sexual history evidence not categorically barred under section 276(1) (and not part of the subject matter of the offence), stipulating that it will only be admissible if it is sufficiently specific, relevant, and has significant probative value not substantially outweighed by its prejudicial effect.[18] As a consequence of Canada's rape shield regime, in conjunction with the legal definition of consent under Canadian criminal law,[19] evidence of a complainant's other sexual activities is irrelevant, immaterial, and inadmissible in the vast majority of proceedings related to sexual offences.

However, one basis upon which this type of evidence is sometimes admitted is on the grounds that it is probative of the complainant's credibility because she has made inconsistent statements about her other sexual activity (particularly activity with the accused) that are material and pertinent to the case.[20] Using a prior inconsistent statement to impugn the credibility of a witness is one of the most relied-upon tools of cross-examination,[21] which is in turn a key element of the accused's right to make full answer and defence.[22] This can include statements the complainant made during her police interviews.

Accused individuals may be allowed to introduce evidence of otherwise irrelevant sexual activity by cross-examining complainants on purported inconsistencies between, for example, digital records like text messages, and statements they made to the police regarding other sexual activity with the accused—particularly, as the majority outlined in *Goldfinch*, a denial of the existence of any prior intimate relationship with the accused.[23] While courts should not admit evidence of other sexual activity on this basis if the inconsistency is minor or ancillary to the facts at issue,[24] or bears only

17. *R v XC*, 2020 ONSC 410 at para 39.

18. *Criminal Code*, *supra* note 11, s 276(2).

19. See *R v Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 SCR 330 [*Ewanchuk*]. See also *R v JA*, 2011 SCC 28 [*JA*]. The definition of consent established in cases like *Ewanchuk* and *JA* eliminated the doctrine of implied consent. Combined with the reasonable steps requirement under s 273.2(b) of the *Criminal Code*, *supra* note 11, these legal developments significantly limit the circumstances in which prior sexual history between the complainant and the accused will be relevant.

20. See e.g. *R v Crosby*, 1995 CanLII 107 (SCC), [1995] 2 SCR 912 [*Crosby*]; see also *R v Ali*, 2024 ONSC 5208.

21. *R v MG*, 1994 CanLII 8733 (ONCA), [1994] OJ No 2086 at para 23.

22. *R v Lyttle*, 2004 SCC 5 at paras 1, 41.

23. *Goldfinch*, *supra* note 7 at para 63.

24. *Crosby*, *supra* note 20 at para 18.

marginally on a fact at issue,[25] the existence of any inconsistencies will increase the likelihood that a section 276 application is brought, and some courts will grant them—both in cases where they should,[26] and in cases where they ought not to have been granted.[27]

Police interviews of sexual assault complainants should not be a test of complainants' willingness to disclose irrelevant information about their sexual history with the accused (or anyone else). However, when the police ask irrelevant questions probing for sexual history evidence which would only be rendered admissible if the complainant fails this 'sexual history truth test', that is what occurs. A problematic decision from the Ontario Court of Justice reflects the dilemma well: "[C]omplainants are not required to volunteer details regarding other sexual activity but, if the authorities seek to pursue the matter, the complainant can either not respond or respond truthfully."[28] Authorities who "seek to pursue the matter", as the Ontario Court of Justice callously described it, leave complainants with a paradoxical and deeply unjust choice: deny or minimize their sexual history with the accused (which risks creating a foundation for a section 276 application that would not otherwise exist); refuse to respond to such questions and risk appearing uncooperative and evasive; or answer intrusive questions about highly personal information that is not pertinent to the investigation of the sexual offence that they allege, and which, in court, they would have a *Charter*-protected right not to be asked about or required to disclose (absent the unusual circumstances in which some other basis for admissibility exists). Choosing to answer means choosing to provide information about one's sexual history in spite of the social context in which these questions arise—a context in which some women and girls continue to be discredited and disbelieved on the basis of irrelevant sexual history, as is evidenced by the very police officer asking them to reveal irrelevant details about their other sexual activities. As Karakatsanis J observed in *Goldfinch*, "[N]early 30 years [after the enactment of section 276 of the *Criminal Code*] the investigation and prosecution of sexual assault continues to be plagued by myths."[29] As she went on to state, "[T]he notion that some complainants 'invite' assault and, by inference, do not deserve protection persists both inside and outside our courtrooms."[30]

25. *Goldfinch*, *supra* note 7 at paras 83, 95–96 ("evidence of other sexual activity must be integral to the accused's ability to make full answer and defence to be admitted," per Moldaver J).

26. See e.g. *R v Harris* (1997), 1997 CanLII 6317 (ONCA), 118 CCC (3d) 498; see also *R v Temertzoglou*, 2002 CanLII 2852 (ONSC), 11 CR (6th) 179.

27. See *infra* note 62 (regarding admission of the video evidence).

28. *R v Clarke*, 2013 ONSC 3232 at para 26.

29. *Goldfinch*, *supra* note 7 at para 2.

30. *Ibid* at para 45.

Sexual assault complainants should not be required to lay bare unrelated details of their sexual activities or history with the accused (or anyone else) as the penalty for, or cost of, reporting a sexual offence. It is profoundly unfair to require survivors to 'run a truth gauntlet' about this aspect of their private lives, in a social context in which "complainants continue to be treated as less deserving of belief based on their previous sexual conduct"[31] when they attempt to access the criminal justice system in response to the sexual violence that they have experienced.

This means that investigating officers must be attentive to the risk that their questions could generate statements by complainants that create a basis for a section 276 application that would otherwise not exist. When the police fail in this regard, they undermine the policy objectives underpinning section 276: the protection of sexual assault complainants' dignity and privacy rights from unnecessary intrusion, the preservation of the truth-seeking function of the trial from empirically unfounded stereotypes about sexual assault and women, and the public interest in encouraging sexual assault survivors to come forward. If their questions bear no relevance to their investigation, the police should not ask them.

It is critical, then, that the police be taught and that they genuinely accept that a complainant's other sexual activities are as irrelevant to the vast majority of sexual offence investigations as they are to the investigation of other crimes. It is critical that the police be taught, and that they genuinely accept, that a thorough and complete investigation into an allegation of sexual assault never requires them to investigate the complainant's sex life generally, and only requires them to ask about other specific sexual activity in a very narrow set of cases. This study demonstrates that, to date, this training has either not occurred, or if it has occurred, has not been accepted by police.

II. Methodology and Overview of Findings

This study uses data collected from a sample of prosecution files in cases involving sexual offences: specifically, cases involving charges under sections 271, 272, 273, 151 and/or 152 of the *Criminal Code*.[32] Access to these files was provided by the Nova Scotia Public Prosecution Service (NSPPS). The files all involved cases that were closed between 2020 and 2023; files were taken from every region of the province, with a representational split between regional offices, and files from the Halifax Regional Municipality (which includes Halifax and Dartmouth offices). The files were randomly selected by administrative staff at the NSPPS. In total, 299 Crown files were relied upon

31. *Ibid.*

32. *Criminal Code*, *supra* note 11, ss 151, 152, 271–273.

for this study; in 220 of these cases the complainant was fourteen years or older at the time of the alleged offence.[33]

The sample includes cases from seven different law enforcement organizations across the province of Nova Scotia. Aggregating the interviews from different police services into the same sample was necessary to maintain privacy. It is also defensible. While there are substantial differences in the size of police agencies in Nova Scotia, and the setting of police forces in the province (with some being more urban, and some rural), there were no discernible differences between these agencies in terms of the types of cases in which investigating officers asked about prior sexual history, nor the types of questions frequently asked. Given that one of these organizations, the RCMP, provides policing in various parts of Canada, the implications of this study are arguably of significance beyond Nova Scotia.

In order to anonymize information in relation to the complainants, the accused, and the police officers conducting these interviews, the investigating police forces studied have not been identified. Identifying the specific organization risks revealing an individual officer. In addition, identifying the police force risks revealing the communities in which interviews were conducted, and in many instances presumably also the communities in which the complainants resided at the time they reported.

Nor are the sex or gender presentation of the officers conducting the interviews identified, for the same reason. Both male- and female-presenting officers conducted interviews in this sample that included asking complainants irrelevant questions about prior or other sexual activity.

In addition, the examples used are presented in a summary and generalized fashion. Only a skeletal account of the facts is offered, and details regarding the outcomes in cases are not provided. Only the few particulars necessary to analyze the specific questions asked of complainants are included. This was done to further safeguard the privacy and anonymity of complainants, accused, and police, and because the focus of this study is on the investigations conducted by police, and does not require detailed discussion of the personal experiences of complainants. Similarly, evidence of a complainant's other sexual activities, in response to inappropriate, irrelevant questions by the police, is not included. Including this information would only aggravate the violations of their privacy, even if in an anonymized fashion, caused by the police. Nor are important demographic details about complainants, such as African Nova Scotian identity or Indigeneity, included.

There is an analytical cost to excluding details about cases and their outcomes and instead providing information in this summative and generalized format. There were cases in this sample in which a section 276 application was raised

33. Cases in which there was more than one complainant, at least one of whom was fourteen years or older, were included in this category. In sixteen files the age of the complainant was unknown; these cases were also included in the over fourteen category.

because of a police interview, the Crown admonished or challenged the police for asking irrelevant sexual history questions, or it appeared a complainant may have withdrawn from the process in part because of irrelevant and intrusive sexual history questions asked of them by the police. While the specificity of these examples serves as powerful substantiation of the problems caused when police ask complainants irrelevant questions about their other sexual activities, to properly aggregate and anonymize the information in these files the exclusion of this information was necessary.

Members of the research team reviewed all content in the Crown files.[34] The content in these files varied depending on how the case proceeded, but all files included some combination of police occurrence reports, investigation notes, digital records, transcripts of witness interviews, preliminary inquiry or trial proceedings, photo exhibits, medical records, and audio-video recordings, or audio recordings of police witness interviews. In files that included transcripts of police interviews, members of the team read the transcripts and briefly scanned the audio-video recordings of the same. In files that did not contain transcripts of the interviews, but instead only recordings of them, members of the team watched or listened to the entirety of the recorded police interviews. Most police interviews of the complainants in these cases were audio and video recorded; a minority of these interviews had an audio but no video recording. Specific to this study, data was collected from each file on: whether the police asked the complainant about other sexual activity with the accused; other sexual activity with anyone else; the point of time in the interview at which the questions were asked; and whether the questions were relevant to the investigation.

As noted, in twenty-one per cent of the interviews of complainants fourteen years or older in this sample of cases (43/220) the police asked about other sexual activities. In twenty-nine of these cases the complainant was asked about other sexual activity with the accused. In seventeen cases, the complainant was asked about other sexual activity with someone other than the accused; and in three of these sixteen cases the complainant was asked about both sexual activity with the accused and with someone/or anyone else. In only five cases

34. The research team included the principal researcher and four research assistants. To ensure inter-coder consistency and reliability, the first file was coded by the principal researcher and then coded again with the research team as a training exercise. The next twenty files were coded twice: once by different research assistants and then a second time by a more senior research assistant who worked with the principal researcher to design the coding tool. Differences in how these files were coded were discussed amongst the research team and resolved. The next sixty files were each coded twice (once each by two different research assistants). The remaining files were coded once by a research assistant and then reviewed by either the principal researcher or a second research assistant. The coding protocol and coding tool were developed by the principal researcher in consultation with the Deputy Director/Acting Director of the Nova Scotia Public Prosecution Service and specialized sexual assault Crown Attorneys from Nova Scotia and Ontario.

was this information relevant to the investigation. In one additional case, the complainant was asked questions about her sexual history that were relevant and questions that were irrelevant and inappropriate. In three cases, it was unclear, based on the information available, whether the questions were relevant. In the vast majority of interviews then, over eighty per cent, the investigating officers' questions were not pertinent to the investigation and were unnecessary intrusions into the dignity and privacy interests of the complainants, eliciting prejudicial information that was not (independently) admissible. In these cases, there were no factors such as DNA from more than one individual, sexually transmitted infection, pregnancy, injuries, physical evidence at the scene, or statements by the complainants or other witnesses, which raised the possibility that these questions had any bearing on these investigations.

This sample does not include any cases closed without a charge being laid because the police decided that a sexual assault complaint was unfounded, cases in which police did not lay a charge because they concluded that there was insufficient evidence, or cases in which no charges were laid because police concluded that the complainant did not want to proceed. Nova Scotia is a police-charging jurisdiction. Like other provinces, excepting New Brunswick, Quebec, and British Columbia, the police in Nova Scotia decide whether to lay charges in a case, sometimes after consulting the Crown. This study, because it is a study of Crown files, only examined police interviews in cases in which the police laid sexual offence charges. Approximately two-thirds of sexual assaults reported to the police do not result in charges.[35] Given the relationship between 'real rape' biases on the part of an interviewing officer and the likelihood that a woman's report of sexual violence will be deemed credible,[36] it may be that the proportion of complainants questioned about their sexual history would be even higher, or even substantially higher, in a sample of cases in which charges were not laid. The bias some police have been found to have regarding the relationship between a woman's supposed reputation and social choices (including her sexual reputation and sexual choices), and her credibility as a sexual complainant has been shown to impact police decisions on whether to

35. Statistics Canada, "Criminal justice outcomes of police-reported sexual assault in Canada, 2015 to 2019" (6 November 2024), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2024001/article/00007-eng.htm> [archive.ph/Iq3TL].

36. See e.g. Eryn Nicole O'Neal, "'Victim is Not Credible': The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants" (2017) 36:1 Justice Q 127; Eryn Nicole O'Neal "Victim Cooperation in Intimate Partner Sexual Assault Cases: A Mixed Methods Examination" (2016) 34:6 Justice Q 1014.

charge.[37] One might expect to find, for instance, that a high proportion of police interviews of complainants deemed by interviewing officers to be of so-called questionable moral character, and in which the police do not lay charges, include irrelevant questions about the complainant's other sexual activities with the accused or someone else.

III. Types of Questions About Sexual History that the Police Should Never Ask

In criminal proceedings in relation to sexual offences, "broad exploratory questioning [of a complainant's sexual history] is never permitted under s 276".[38] The rape shield regime "requires the accused to identify 'specific instances of sexual activity' to avoid unnecessary incursions into the sexual life of the complainant."[39] A complainant's sexual history is not admissible for broad, generic purposes.[40] The justification for the specificity requirement mirrors the policy objectives underpinning the regime: the broader and more general information about a complainant's sexual activities is, the more likely it is to be both reliant for its probative value on empirically unfounded, legally rejected twin-myth reasoning, and prejudicial to the dignity and privacy interests of the complainant.

Correspondingly, the police should never make broad, generalized inquiries into the sexual histories of complainants. Not only are these types of questions unduly intrusive of a complainant's dignity and privacy, but they elicit evidence that would never be independently admissible. These types of questions are frequently motivated by twin-myth thinking or other prejudicial and discriminatory social assumptions about sex, women, consent, and sexualized violence. Unfortunately, the sample of NSPPS files revealed many examples of the police asking complainants broad, generalized, and irrelevant questions about their sexual activities. Consider the following examples of questions, taken from the NSPPS sample, that the police should never ask sexual assault complainants.

37. See e.g. Cassia Spohn & Katharine Tellis, "Sexual Assault Case Outcomes: Disentangling the Overlapping Decisions of Police and Prosecutors" (2019) 36:3 Justice Q 383 at 389; Katherine Lorenze, "How Do Investigation Experiences Shape Views of the Police? Qualitatively Exploring Sexual Assault Survivors' Interactions With Police Detectives and Subsequent Views of the Police" (2023) 69:2 Crime Delinq 342.

38. *R v RV*, 2019 SCC 41 at para 47 [*RV*].

39. *Ibid*. The degree of specificity, particularly in a case involving an ongoing, or former, intimate relationship, will turn on the nature of the case. See *Goldfinch*, *supra* note 7 at para 53 ("The words 'specific instances of sexual activity' in s 276(2)(a) must be read in light of the scheme and broader purpose of s 276").

40. *Goldfinch*, *supra* note 7 at para 5.

In one case involving allegations of ongoing psychological abuse and severe physical and sexual violence perpetrated against her by her ex-husband, the interviewing officer asked the complainant: "Presumably early in the marriage you both wanted to have sex?" In addition to being unnecessarily intrusive and insensitive, this question is aimed at eliciting evidence that is clearly irrelevant and inadmissible: non-specific evidence of the complainant's sexual history with the accused, unrelated in time and nature to the alleged offence. This officer's question was also almost certainly motivated by the first of the twin-myths: that women who have consented to sex in the past are more likely to have consented to the sex at issue in the allegation, and the intimate connection between this stereotype and the legally rejected notion of implied consent.[41] Presumably, had the question been aimed at determining the duration of the abuse, the officer would have asked about other non-consensual sexual touching, not sex she "wanted" early in the marriage.

In another case, the complainant was asked whether she had ever attended the accused's house with the intention of having sex with him. He was the brother of her ex-boyfriend. Her allegation involved a physically violent attack, facilitated by the use of a weapon and an intoxicating substance she was forced to consume, making any consensual prior sexual history between them irrelevant. The police should never ask these types of general, open-ended questions about a complainant's sexual history.

In another interview, the officer interrogated the complainant about her sexual history, both with the accused and with her current partner ("John"), in a case in which the complainant alleged that she was unconscious due to alcohol consumption when she awoke to being penetrated by the accused. She reported two weeks later. The officer asked her these questions:

> "So, are you dating 'John'?"
> "Do you have sexual relations with 'John'?"
> "Were you dating 'John' at the time?"
> "Did you sleep with [the accused] previously? How many times?"
> "So you are now in a sexual relationship with 'John'?"

Her sexual history with the accused was of no investigatory significance to these allegations, nor were her current sexual activities with her boyfriend. Indeed, there was no forensic need for any of these questions, which reveal an interview that investigated the complainant, and her sexual reputation, history, and activities generally, rather than one confined to a thorough investigation of the offence she alleged. Asking questions about whether a complainant is

41. *Ibid* at para 44. See also Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', the Law: Honest but Mistaken Judicial Beliefs" (2008) 32:2 Man LJ 144.

having sexual relations with her current partner, whether she was dating him at the time of the incident, or how many times she had sex with the accused in the past are almost certainly motivated by discriminatory assumptions about the relationship between a woman's sexual history and her credibility, or the likelihood that she consented to the sex at issue in the allegation. There is no other logical reason for asking these questions of this woman.

There were multiple cases in which teenaged complainants who alleged sexual assault, including in some cases by adults, were asked by the police:

> "Is this your first time having sex?"
> "Have you ever had sex before?"
> "Have you ever been in an intimate relationship?"
> "Have you ever watched porn?"
> "Was that your first time having sex?"
> "Was he your first person?"

Of note, these complainants were not disclosing their first time "having sex" to the police; they were reporting alleged sexual assaults. In addition to the fact that the police should not ask these general sexual history questions, it is both problematic and revealing when the police frame inquiries in this way.

Even in the fraction of investigations in which the physical consequences of sexual activity make sexual history with someone other than the accused potentially pertinent to an investigation—consequences such as genital injuries, pregnancy, the presence of multiple sources of DNA, or a sexually transmitted infection—the police should never ask complainants broad, general questions like "is this your first time" or "have you ever had sex before".[42] In the minority of investigations in which the physical consequences of sexual activity make sexual activities with other people a legitimate part of a thorough investigation, the police should tailor their questions to avoid general interrogations of a complainant's sexual reputation or history. Asking a focused question centered on relevance to the investigation such as, "did you engage in any other sexual activity during the time period when the genital injury was sustained/the pregnancy occurred/the STI was contracted that could have been the cause?", is a more modest intrusion into a complainant's privacy, and is less likely to yield the type of unspecified, broad and prejudicial sexual history evidence inadmissible under section 276.[43]

A young adult complainant in one case was asked if she had had boyfriends in the past and whether she had ever stayed overnight at any of their homes. A similarly aged complainant in another interview was asked whether she had had sex with anyone else at the university she was attending. These are also broad,

42. *RV*, *supra* note 38 at para 8.

43. *Ibid* at para 55.

general, and inappropriate sexual history questions that the police should never ask complainants.

In one case, a social worker who participated in the police interview asked a teenaged complainant whether the adult accused was the only person she had agreed to have sex with, in order to determine, according to the social worker, "why [she] behave[s] this way". Complainants should never be asked to provide a list of the people with whom they have had sexual contact, consensual or otherwise. Obviously, the victim blaming impetus for this social worker's question—to discern 'why she behaves this way'—was also offensive and highly likely to be harmful to the complainant.

In a case in which a teenaged complainant alleged that a set of accused individuals known to her had touched her breasts and genital region without her consent, the investigating officer asked her: "P: Ok. Um, have you ever, had, ah sex before?" When the complainant responded in the negative, the officer asked her: "P: But you know what it is? So how . . . can you describe to me what you know about that? Just how that works?"

Whether the complainant had had sex before was not relevant to this investigation. Nor was it necessary or appropriate to ask this adolescent girl whether she knew what sex was, nor was it necessary to ask her to describe how sex works. What she knew or could describe about sex had no bearing on this investigation. Her allegation was that the three accused touched her breasts and genital region without her consent. If the officer had reason to doubt whether this fourteen-year-old knew what part of her body she was referring to when she alleged, for instance, that the accused grabbed her "boobs" and touched her private parts, then appropriate follow-up questioning would involve confirming the area of her body to which she was referring, not interrogations into whether she had ever had sex and what she knew about how sex works. Officers could ask, for instance: Can you describe in more detail which parts of your body they touched? Do you know another word you might use for "boob"? What does "private parts" mean?

In one case in which the complainant alleged that the accused forced anal penetration on her, she was asked whether she had "ever done anal before" with anyone. The police should never ask sexual assault complainants such a broad and general question.

In another interview, in an investigation against a man accused of sexually assaulting several women, one of the complainants was asked whether she was "a lesbian". The police should never ask a sexual assault complainant their sexual orientation. This question seeks information about a complainant's sexual reputation, evidence of which is categorically barred by section 277 of the *Criminal Code*. Asking complainants to confirm or deny a minority sexual identity or practice is particularly problematic.

The complainant in the next example was fifteen years old. Her allegation involved an adult accused that she met through someone else, but who was virtually unknown to her. She alleged that, on the singular occasion on which she

spent time with him, he physically forced sexual acts upon her. Her description of the incident was a clear, detailed and concise allegation of a violent sexual assault. Yet, the interviewing officer asked her:

> Q. And I know this is an uncomfortable topic and stuff um was that the first time you had sex?
> C. [. . .]
> Q. So you had sex with somebody else previous? And was that a relationship or . . . ?
> C. [. . .]
> Q. Ok and was that the only other time?
> C. (Inaudible)
> Q. With, with your other relationship?

Like with the previous examples, these questions were irrelevant to the investigation, did not produce admissible evidence, and were a serious infringement of the complainant's dignity and privacy interests. It was also problematic for the officer to characterize what this complainant alleged as "hav[ing] sex".

In one case, the officer interviewed the complainant's parent and asked them, "Do you know if she has been sexually active before?" When the complainant's parent responded "No", the officer pressed the issue: "This would have been her first time, or you don't know?" Asking other witnesses, particularly the parents of teenaged sexual assault complainants, what they know about their child's consensual sexual history is deeply problematic. This type of investigative approach could create an argument, albeit hopefully a tenuous and unsuccessful one, for a section 276 application depending on a complainant's responses to the police about her past sexual activities—which the investigating officer also asked the complainant about in this case. If a complainant and parent give contradicting statements to a police officer's questions, defence counsel might argue that this is evidence that a complainant was not honest with her parent about her sexual activities, and that the accused should be permitted to cross-examine the complainant on this matter to demonstrate her lack of credibility.

This is not to suggest such an application would succeed, given its prejudicial impact and minimal probative value regarding the complainant's credibility. Hopefully, most judges would conclude that a teenage daughter's disinclination to be forthcoming with her parents about her sexual activities is not probative of her credibility as a complaining witness in a sexual assault proceeding. The point is that by asking these questions, of both the complainant and her parent, an officer unnecessarily opens the door to an application that would needlessly encumber the trial process, burden the Crown, further impact the dignity and privacy rights of the complainant, potentially cause distress to a complaining witness already facing the daunting task of testifying, and that would, but

for the officer's baseless and invasive questions about her sexual history, have absolutely no foundation and be highly unlikely for defence counsel to bring.

In this particular case, the officer went on to ask the complainant's parent other questions about the complainant's supposed relationships with "older guys":

> Q. Um so back to the fact she has relationships with older guys [in fact, her parent had not said that].
> A. Oh no, she doesn't have relationships with them
> Q. She she hangs out with older guys . . .
> A. She doesn't hang out with them or meet up or anything . . .
> Q. That you know of?

As is evident from this passage, despite the parent's insistence that their daughter did not have relationships with older men, the officer persisted in asserting otherwise. Later in the interview the officer asked the witness whether they thought their daughter was "an honest person". Particularly following on the heels of the officer's questions about the complainant's sexual history, their parent's knowledge of this history, and her supposed relationships with older men, this question about whether they think their child is an honest person makes it difficult not to query who this officer thought they were investigating. While conducting a sexual assault investigation does require the police to pursue all possibly relevant information, their job is not to investigate the complainant. The circumstances in which asking a third-party witness what they know about a complainant's sexual history with individuals other than the accused will yield evidence that is relevant to the investigation are exceedingly rare. Unfortunately, this was not the only example in the sample in which the police asked a third party about the complainant's sexual history.

The teenaged complainant in the next example was under the age of consent at the time of the incident, and the accused was an adult. Partway through the interview and seemingly out of the blue, the interviewing officer asked her "Have you ever been in an intimate sexual relationship with anyone?" The officer then admonished her for a supposedly revealing picture she had posted on social media. Chasing an irrelevant question about a complainant's general sexual history with a moralizing reprimand about other sexual behaviour strongly suggests that the impetus for the prior sexual history question was stereotype-infused thinking about teenage girls who allege sexual assault.

In the next example, a thirteen-year-old complainant was contacted by the adult accused online. The interviewing officer asked her, "Would you reach out to other males for money and stuff?" It is noteworthy that the interviewer framed the question this way: the complainant's evidence was that the accused reached out to her, not the other way around. The police followed this question by asking her: "there's nothing you can think of like to like I say, corroborate, what you're saying?" It is the duty of police officers to investigate and obtain

confirmatory evidence if they think it might exist.[44] (Although, of course, thankfully the law of sexual assault no longer requires corroboration to convict and appellate courts have indicated that the language of corroboration should not be used, even in a non-technical sense, in sexual offence cases.) However, the sequencing of questions in this interview, chasing questions about other sexual activity with questions seeking evidence of corroboration, suggests that the irrelevant questions about her sexual activity with others may have been motivated by legally rejected stereotypes about the relationship between a complainant's sexual history and her credibility.

Requiring sexual assault complainants to answer broad, open-ended, irrelevant questions about their sexual history is a significant infringement of their dignity and privacy interests. Again, general and unspecified evidence of a complainant's sexual history is never admissible at trial. Depending on other aspects of the evidentiary record in a particular case, this approach also risks setting complainants, and the trial process, up for what is an otherwise unavailable (and almost certain to be prejudicial) application by the accused to introduce evidence of her other sexual activities should she, for understandable reasons, choose to minimize or deny her sexual history when asked about it by the police.

IV. The Police Should Not Ask About Other Sexual History in Cases Involving Sleeping or Unconscious Complainants

In addition to the types of questions that the police should never ask, there are certain types of cases in which the police should not ask questions about the complainant's other sexual activities. In cases in which the complainant alleges she was asleep or unconscious at the time of the incident, evidence of other consensual sexual activity will never be admissible on its own, and so the police ought not to ask these questions, both because of the unnecessary adverse impact they have on the complainant's dignity and privacy, and because, from an evidentiary perspective the only purpose to which the complainant's answers could be put at trial is to demonstrate a prior inconsistent statement. Asking complainants about irrelevant sexual history in these types of cases is a deeply unjust set-up to those who serve the criminal trial process as complaining witnesses in sexual offence prosecutions.

Before considering interviews involving allegations by the complainant that she was unconscious or asleep, it is informative to consider police interviews with children who allege sexual offences. Of the 299 cases in this sample, 79

44. *R v Brown*, 2022 ONCA 417 at para 15. See also *R v MacKenzie*, 2015 ONCA 93 at para 6.

involved interviews of complainants who were under the age of 14 at the time of the alleged incident. Of these seventy-nine interviews, the police asked questions about sexual activity beyond the incident that instigated the report in twelve cases and in all but two of these interviews the officers' questions were relevant and appropriate.[45] The exceptions involved a thirteen-year-old complainant and a twelve-year-old complainant. But for these exceptions, in interviews with complainants under the age of fourteen, the officers' questions sought to elicit evidence of other instances of sexual offence perpetrated by the accused. The police in these interviews were investigating the allegations, not the complainants. They asked questions like: "Has anything like this ever happened with him before?" and "Is this the first time that he did this?" Imagine if, instead, these officers had asked these children: have you ever had sex with him before? Unlike with teenaged and adult complainants, the police did not ask this question of children under the age of thirteen in any of the cases in the sample.

The police appear disinclined to ask child complainants whether they have ever had sex with the accused before. Why? In part, because embedded in the question is the implication that the child could have had consensual sex with the accused. In part, because the question could be perceived as implying that previous sexual contact suggests that the alleged incident was consensual and perhaps even the child's fault; and in part, because the question might be understood to suggest that previous sexual contact between the child and the accused somehow makes the child less credible regarding the allegation of sexual assault. Central to the abhorrence of each of these propositions is the belief that children are not capable of consenting to sex. Police seemingly accept, with no difficulty, query, or angst, that sex with children—which, based on this study, appears for them to be around the age of thirteen and under—is never consensual. This is why the police never ask children under this age this question, and why, with one exception,[46] in every case in this sample in which the complainant was a child under the age of thirteen and the police did ask about sexual activity beyond the incident that instigated the report, their questions were relevant and followed an appropriate investigatory path.

Investigating officers should apply this insight when interviewing complainants who are not children, but whose allegations also involve sexual

45. In one case the interviewing officer also asked about sexual offences perpetrated by other accused. The police should not ask complainants about other unrelated non-consensual activity with separate accused. If complainants raise wholly unrelated sexual offences, police should gently remind them of the focus of this interview, and a separate interview under a separate file, with a separate file number, should be conducted. At a minimum, if the police follow this approach defence counsel will have to bring an application before gaining access to this aspect of a complainant's private information.

46. The one exception involved a twelve-year-old Indigenous girl who alleged sexual assault by an adult acquaintance. The police asked her whether this was her first time "having sex".

touching for which the complainant lacked the capacity to consent. This would include complainants who allege that they were asleep or unconscious when the sexual touching occurred. The only questions about other sexual activity that officers should ask in these circumstances are the same ones they would ask children: questions seeking to elicit evidence of other sexual offences perpetrated against these adolescent girls and women by the same individual. The inclination to instead ask about other sex with the accused in these types of cases is driven by a lack of understanding of the law and/or legally rejected inferences about sex, consent, and credibility: most frequently, the inference that a complainant is less credible by virtue of her previous sexual activity with the accused.

Under Canadian law, one cannot consent in advance to sexual contact to occur while asleep or unconscious; consent must be ongoing and contemporaneous with the sexual act that occurred, and an accused cannot rely on a complainant's supposed provision of advance consent to raise a reasonable doubt regarding *mens rea* (i.e. an honest but mistaken belief in communicated consent).[47] Evidence of other sexual activity will never be relevant to the issue of consent because one cannot consent to sexual activity while asleep.[48]

Instead, in cases in which the allegation is that the complainant awoke or regained consciousness to find the accused had perpetrated, or was perpetrating, sexual acts upon her, the issues are: (i) Did sexual touching occur? (ii) Was it the accused who engaged in the sexual contact? (iii) Was the complainant asleep or unconscious when any of the sexual touching occurred or when it commenced? (iv) Did the accused know, or was he reckless or wilfully blind to the fact that, the complainant was asleep or unconscious when the sexual touching occurred?

The complainant's credibility (and reliability) will virtually always be the linchpin to establishing the first three issues in a case of this nature. Evidence of consensual sexual activity between the complainant and the accused is not independently probative of a complainant's credibility in relation to any of these three issues (unless one ascribes to the inference, categorically prohibited by section 276(1) of the *Criminal Code*, that a complainant who has engaged in other sexual activity is, by virtue of that activity, less credible). Nor is evidence of the complainant's other sexual activities with the accused relevant to the fourth issue in a case involving a complainant who alleges she was asleep or unconscious at the time the sexual touching occurred: "[I]n seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she communicated consent to the sexual activity in question at the time it occurred."[49] It would require an extraordinarily unusual factual circumstance to

47. *R v JA*, *supra* note 19 at paras 135–136.

48. See e.g. *R v Crespo*, 2016 ONCA 454 at para 9.

49. *Barton*, *supra* note 7 at para 93.

render the complainant's consensual sexual history with the accused probative of whether the accused honestly but mistakenly believed that she was awake and consenting.[50] Moreover, and as is required under the *Criminal Code*,[51] for the defence to be available the accused must have taken reasonable steps to ascertain consent: "[H]ow can one take reasonable steps to ascertain whether a person is consenting to sexual activity while it is occurring if that person is unconscious?"[52] All of which is to say, in cases in which the complainant alleges she was asleep or unconscious when sexual acts occurred or were initiated, other consensual activity with the accused will never be admissible, on its own, to raise a reasonable doubt regarding lack of consent or the *mens rea* for the offence of sexual assault.[53] Asking complainants questions about their prior sexual history in this type of case serves no investigative purpose and is an unnecessary intrusion into their privacy and a violation of their dignity. Doing so also risks creating a basis for admissibility of otherwise inadmissible prior sexual history evidence. If a complainant is not forthcoming to the police about any sexual history she has with the accused, in response to questions she should not have to answer, then by asking them, the police create at least an argument for the accused that this sexual history is relevant to the complainant's credibility, should any statements to the contrary exist.

With the exception of asking the complainant whether she has previously awoken or regained consciousness to find *this* accused imposing sexual acts upon her, and/or whether this accused has perpetrated other types of sexual violence against her, the police should be instructed not to ask complainants about other sexual activities with the accused when the allegation is that the sexual touching was perpetrated while she was asleep or unconscious.

The following reported decision demonstrates what can occur when the police do not follow this instruction. In *R v Brown*, the complainant's allegation was that, after a night of partying with a group of friends, she awoke to find the accused on top of her penetrating her vagina with his penis.[54] During her interview the police asked the complainant:

> Q. Was there texting involved before that? Was there . . .

50. Presumably, it would only be probative of honest but mistaken belief in communicated consent if it included sexual encounters between the complainant and the accused in which, with express communication, the complainant role-played being asleep or unconscious during the sexual acts. Even in that unusual circumstance, an accused would still need to meet the reasonable steps requirement.

51. *Criminal Code*, *supra* note 11, s 273.2(b). See also R *v Esau*, 1997 CanLII 312 at para 49 (SCC).

52. *R v JA*, *supra* note 19 at para 42.

53. For a helpful exposition of the case law supporting this conclusion, see *R v JRM*, 2022 ONSC 1535.

54. *R v Brown*, 2022 ABQB 195 at para 5 [*Brown*].

A. We-
Q. . . . illusions of maybe . . . you know
A. We text but it was like . . . it was like he was sending me pictures of the Northern Lights like . . . it was not like much of a text like hey how are you bla-bla-bla
Q. Ok.
A. It wasn't nothing sexual.[55]

Defence counsel followed a similar line of questioning during the preliminary inquiry:

Q. And again, the only messages you ever sent Ron were of a platonic relation – message, correct?
A. As a friend.
Q. Yes.
A. It wasn't sexual, nothing.[56]

Defence counsel should not have asked, and should not have been permitted to ask, these questions at the preliminary inquiry without first having brought and been granted a section 276 application.[57] Canada's rape shield law applies not only to trials, but "proceedings" in relation to sexual offences,[58] which includes preliminary inquiries. Critically, and as explained next, had the police refrained from asking the complainant about 'sexting', an application to ask these questions at the preliminary inquiry, if properly adjudicated, would have been denied.[59]

After the preliminary inquiry and before trial, the accused did bring a section 276 application to introduce evidence that the complainant had sent him a series of text messages the evening before the incident asking him to return to her home to have sex with her. She claimed the texts were sent by a friend who had her phone, and that she had no knowledge of their content. The trial judge determined that this evidence was not admissible regarding either consent or honest but mistaken belief in communicated consent. As Whitling J properly reasoned, any communication or behavior (sexual or otherwise) the

55. *Ibid* at para 7.
56. *Ibid* at para 10.
57. *Criminal Code*, *supra* note 11, s 276(4).
58. *Barton*, *supra* note 7 at paras 72–73.
59. See *R v Reimer*, 2024 ONCA 519 at para 75 [*Reimer*]. This would be true even under the Ontario Court of Appeal's recent decision in *Reimer*. Unlike in *Reimer*, the complainant's allegation in this case was that she was asleep when the sexual touching occurred. Even based on the reasoning in *Reimer*, which is problematic for other reasons, this makes anything she said in these text messages, short of a present intention to (in the future) pretend to be asleep while they engaged in sexual activities, irrelevant.

night before was not probative of either consent or the *mens rea* in this trial regarding the sexual activity allegedly imposed upon her while asleep the next day.[60]

However, the accused's application to admit this evidence was still successful, on the basis of her prior inconsistent statements to the police. Whitling J admitted the evidence of other sexual activity despite specifically finding that it risked causing prejudice to the complainant, and risked causing the jury to erroneously conclude that an invitation to engage in sexual touching the day before made it more likely that she had consented to the sexual contact at issue in the allegation.[61] He also admitted a video of the accused touching the complainant's breast the evening before the incident, on the basis of the same reasoning, and despite his conclusion that it would cause an even more significant intrusion into the dignity and privacy interests of the complainant, and a heightened risk that it would cause jurors to engage in prejudicial, twin-myth-based reasoning. While the video had no probative value regarding either consent or honest but mistaken belief in communicated consent, he concluded that because the evidence, if accepted, would establish a prior inconsistent statement by the complainant to the police, its probative value was not substantially outweighed by these prejudices.[62]

Recall the nature of the complainant's allegation: she alleged that she was asleep in her bedroom when she awoke to find the accused on top of her, penetrating her with his penis. Had the police not asked about her prior sexual history with the accused, this private video of her, which was not independently probative of a relevant fact (absent reliance on prohibited stereotype-based inferences), the tenuous basis upon which this evidence was admitted would not have existed. This complainant would not have been cross-examined on this video—a potentially humiliating experience. Nor would evidence of the text-based sexual communications from the day before the alleged sexual assault have been admitted.

Whether this complainant sent the accused a text suggesting sex later that night, but was afraid to admit this to the police (which would be understandable given that sexual assault victims continue to be discredited and disbelieved on the basis of discriminatory stereotypes about their sexual history),[63] or whether her friend actually did take her phone and send these texts without her knowledge, it undermines the twin-policy objectives of the rape shield regime when sexual assault prosecutions unfold in this way. If we genuinely accept that her sexual communications the day before were not relevant to whether her allegation that she awoke to find herself being penetrated by the accused is credible, as the trial judge concluded and the law requires, and only become

60. *Brown*, *supra* note 54.

61. *Ibid* at paras 64–66.

62. *Ibid* at paras 71–74. This was a problematic conclusion.

63. Goldfinch, *supra* note 7 at paras 43–45.

relevant if she fails a sexual history truth test that the police ought not to have put her through, then the police must stop asking these types of questions in these kinds of cases.

The sample of cases in the NSPPS file review revealed numerous examples in which police asked about other sexual activity with the accused in cases in which the allegation was that the complainant awoke to find him sexually assaulting her. In these cases, like in *Brown*, the allegation was that the accused imposed sexual acts on the complainant while she was sleeping or unconscious. Evidence of other sexual activity was not probative of the issues of either consent or honest but mistaken belief in communicated consent in any of these cases. These questions served no investigatory purpose.

In one investigation, the complainant alleged two incidents of sexual assault perpetrated against her while she was asleep. Her statement to the police was that, in both instances, she awoke when the accused penetrated her anus. The investigating officer asked the complainant whether the accused had ever tried to engage her in this sexual act, while conscious and with consent, in the past. Again, because the allegation was that she was asleep when he engaged in the impugned sexual acts, their previous consensual sexual activity was not probative of a fact at issue. One cannot consent to sex while asleep and so the only issues in this case were her credibility regarding whether the impugned act occurred and her state of consciousness, and his knowledge of the latter. At a minimum, the officer's questions, which sought sexual history information not relevant to the investigation, reveal a lack of understanding of the law of consent. The questions may also indicate reliance on twin-myth reasoning on the part of the officer: that consensual anal intercourse in the past makes it more likely the impugned act was consensual or less likely she is telling the truth about what happened.

In this circumstance, the police could have asked whether these were the only occasions in which this woman awoke to find the accused imposing sexual acts upon her, or whether he had perpetrated other types of sexual violence on her in the past. But, given the nature of the allegations, the officer should not have asked the complainant questions about their previous consensual sexual activity.

The officer then asked the complainant a series of questions aimed at eliciting information about what the accused would have perceived in the past when the complainant was communicating consent:

> Q. So for [the Accused] . . . Let's pretend right now you're [the Accused].
> C. Me?
> Q. Yeah.
> C. I'm [the accused]?
> Q. Let's pretend you're [the accused] for a second.

The officer asked her to give examples of what the accused would see the complainant doing during consensual sex. Again, the complainant's allegation was that she awoke to find him sexually assaulting her, and so the contours of any previous consensual sex the accused and complainant may have engaged in, or communication regarding that sexual activity, were irrelevant. The allegation in this case was such that honest but mistaken belief in communicated consent could not have been raised as a defence. There was no legitimate reason to ask this complainant questions about how she had communicated consent to sex in the past, nor her perception of how the accused might have perceived communication of consent by her in the past.

In cases in which the allegation is of sexual acts perpetrated against a sleeping complainant officers should set parameters at the outset of the interview and confine their questions accordingly. The role of the police, when taking witness statements, is to investigate whether a criminal offence has occurred. This does not change when the alleged offence is a sexual one.

Consider the approach taken by the interviewing officer in *R v McCarthy*.[64] The complainant in *McCarthy* alleged that the accused sexually assaulted her while she was asleep. Defence counsel brought an application to introduce evidence of the complainant's other sexual activities, including with the accused, on the basis that it was inconsistent with her police statement. Her police statement did not include information regarding other sexual activity. In rejecting defence counsel's section 276 argument Valente J of the Ontario Court of Justice concluded that:

> In my opinion, there is no inconsistency between the complainant's police statement and statement provided to the Crown. I have reached this conclusion because of the very specific instruction provided to the complainant by the investigating officer prior to her statement. That instruction was to focus solely on the alleged assault and to treat any prior sexual activity as irrelevant. Specifically, Sergeant Shipp, as the investigating officer, directed the complainant as follows:
>
> > Sergeant Shipp: And I just wanna reiterate, while we're being recorded as well, that any of your sexual history isn't relevant and I don't want you to get into that, okay? We're just interested in what happened in the incident, okay? Do you understand all that?
> >
> > Complainant: Yes[65]

64. *R v McCarthy*, 2023 ONSC 3084 [*McCarthy*].

65. *Ibid* at para 22.

McCarthy demonstrates why it is important for officers to set these parameters. If police consistently took Sergeant Shipp's approach, and courts followed up with the type of reasoning adopted by Justice Valente, defence counsel would presumably be disinclined to bring section 276 applications in this type of case, and the objectives of section 276 would be upheld. In some interviews a complainant will introduce evidence about her other sexual activities, with the accused or others, without being prompted by the interviewer. This is just as capable of opening the door to a section 276 application as when the topic is introduced by the police. Setting parameters with sexual assault complainants at the beginning of interviews will diminish the likelihood that this occurs.

Interviewers should also, when it is necessary to ask complainants questions not specific to the impugned sexual activity, preface these questions with limits or qualifiers on what type of information the interviewer seeks, and more importantly what type of (sexual activity) information they do not want the complainant to share. The following excerpt from an interview in the NSPPS sample with a young woman demonstrates the latter:

> Q. . . . I'm going to ask you a question.
> . . .
> Q. So not about . . . not . . . not about your . . . what consent would look like to you with any other partner ever. I'm not asking about that. I just . . . I want to know because this is all going to come down to consent, right?
> C. Yes.

The officer clearly flagged for the complainant that while they were about to ask her a question regarding how consent was communicated between her and the accused, they did not want the complainant to provide information about her practices or communication regarding consent with other sexual partners.

Contrast it with the following investigation, in which the complainant alleged that she was sexually assaulted by an acquaintance. She stated during her police interview that while sleeping at a friend's house, she awoke in the middle of the night to find the accused, who was also sleeping over, imposing sexual acts on her. The officer interviewing her inexplicably responded to her description of the incident by asking her whether she and the accused had had consensual sex in the past: "[D]id you ever have a consensual relationship with him?"

There was a note in one of the police occurrence reports indicating that the complainant and accused had had one consensual sexual encounter a few years earlier. It was not clear from the file how the police obtained this information, nor was there anything in her statement, nor in any of the other documentation regarding the investigation, which suggested any basis for asking her about this supposed history.

The reasoning and outcome in *R v Hanrahan*, which involved similar allegations and similar questioning by the investigating officer regarding the complainant's prior sexual history, exemplifies the types of problems that can arise when the police ask these kinds of questions in this category of case.[66] In *Hanrahan*, the complainant and the accused were friends, or acquaintances, at the time of the alleged incident. The complainant had attended at the accused's residence to talk, watch movies, and drink wine. She slept over at his home.

Her evidence was that she went to sleep in her pajamas but awoke in the night to find her pajamas removed and the accused on top of her, sexually assaulting her. His evidence was that she initiated sexual contact and eventually guided his penis into her vagina, making credibility the central issue in this case.

Despite the nature of her allegation—that she was asleep when the accused penetrated her vagina with his penis—the police asked her if she had a sexual history with the accused. She revealed that they had been in a dating relationship a few years earlier; but they were not in a sexual relationship at the time of the incident.

Prior to trial, it was accepted that their sexual history was not relevant or admissible, that the complainant should be advised not to raise it during her testimony, and that it would not be presented to the jury.[67] During cross-examination of the complainant, defence counsel nevertheless asked:

> Q. So I just want to clarify that prior to this event, you and Lucas were pretty good friends?
> A. We were friends.
> . . .
> Q. You, I mean, you would consider him a good friend?
> A. I would consider him an acquaintance at the time.
> Q. An acquaintance?
> A. We had been good friends previously.
> Q. Right. I mean, this is a person that you chose on that day to confide in because you were having, as you said, a bad day about something completely unrelated. He is the person you chose to go to, right?
> A. Yes.
> Q. So you weren't acquaintances, you trusted him. You thought he was a good person, right?
> A. I ran into him when I needed to have a rant. Before that, this was the closest encounter we had had. Before that it was strictly quick drives.[68]

66. *R v Hanrahan*, 2024 NLCA 9 [*Hanrahan*].
67. *Ibid* at para 5.
68. *Ibid* at para 51.

As a result of this exchange, defence counsel brought a mid-trial section 276 application, seeking to cross-examine the complainant on her sexual history with the accused on the basis that her evidence at trial was inconsistent with her statement to the police.

The Crown opposed the section 276 application, arguing that the complainant was speaking "temporally" during the cross-examination when she suggested that this was the closest encounter they had had, and that it was clear she was not attempting to conceal their earlier, more intimate, relationship. She testified in direct that she had been to his home dozens of times. The Crown argued that the complainant had clearly characterized their relationship as having two stages (an earlier, closer, relationship and the current one) and that her comment that this was the closest encounter they had had was in reference to the second phase of the relationship.[69]

Directly prior to making the allegedly inconsistent statement, she had been giving evidence about the nature of their relationship at the time of the alleged sexual assault, not during the earlier era.

The trial judge rejected the Crown's argument and permitted the accused to lead evidence regarding their prior sexual relationship on the basis that "there was a material inconsistency between the complainant's testimony under cross-examination and her statement to police."[70] He stipulated that:

> Counsel for the accused shall ask the complainant whether she remembers making a statement to Cst. Piercey and, in particular, whether she recalls giving the following answers to the questions that Cst. Piercey posed:[71]
>
> > Cst. Piercey: Did you have any sexual relationship with him prior to this incident?
> >
> > [Complainant]: Yes, when me and him first met each other it's like two years ago I think for like two months we tried to date and it just didn't work out. . .
> >
> > Cst. Piercey: So since that time that would be close to two years, I guess, was there any consensual sexual relations after that. Even if you weren't technically I guess dating or trying to date each other were there any sexual relationship ongoing?

69. *Ibid* at para 58.

70. *Ibid* at para 56 (citing paras 7, 13 of the trial judge's s 276 decision).

71. *Ibid* at para 86 (quoting from para 34 of the trial judge's s 276 decision).

> [Complainant]: I think we might've, not within the past year, maybe once or twice after we stopped dating . . . [72]

The trial judge instructed defence counsel to then put to the complainant that it was not true when she testified that the closest encounter she had had with the accused was the alleged incident. The decision to admit this evidence of other sexual activity was upheld by the majority of the Court of Appeal of Newfoundland. As Goodridge J noted, in dissenting from the majority's decision "[d]efence counsel was permitted to insinuate to the complainant [in front of the jury] that she had lied . . . permitting the complainant to be accused of being inconsistent by lying about her previous sexual history with Mr. Hanrahan, evoked the first of the twin myths: that the complainant was more likely to have consented, because she had a sexual history with Mr. Hanrahan."[73]

It is clear that the complainant was not attempting to obscure the fact that she and the accused had dated during an earlier era of their relationship.[74] It is very likely that she had been instructed prior to trial not to raise their sexual history, making it exceedingly unfair to draw an adverse inference about her credibility for failing to raise it during cross-examination.[75] It is clear that the sexual nature of their previous relationship was not independently probative of a fact in issue, absent reliance on twin-myth reasoning, and that to place weight on it in order to discredit her allegation would be to rely on precisely the discriminatory thinking that the rape shield provision is intended to prevent. Lastly, it is clear the trial judge and the majority of the Court of Appeal of Newfoundland failed in their gatekeeping responsibility to prevent prejudicial, irrelevant evidence of other sexual activity from infecting the trial process.[76] But were it not for the irrelevant questions asked of this woman during her police interview, the opportunity to make these legal errors would not have arisen.

Police officers who conduct interviews with sexual assault complainants should be taught not to ask about their consensual sexual history in cases in which the allegation is that the complainant was asleep or unconscious when the sexual touching occurred or was instigated.

72. *Ibid* at para 52.
73. *Ibid* at paras 189, 191.
74. *Ibid* at paras 175, 181.
75. *Ibid* at para 183.
76. *Ibid* at para 66.

V. More Generally, the Police Should Rely on Three Guiding Factors

In addition to the types of questions the police should never ask, and cases in which the police should never ask about consensual sexual history with the accused due to the nature of the allegations (such as one involving sleeping or unconscious complainants), the police need direction on when to, and much more commonly when not to, ask questions about a complainant's other sexual activities more generally. To understand why their questions typically serve no investigative function, officers need a basic understanding of relevance, which requires a basic understanding of Canada's law of consent and section 276 regime, as well as increased self-awareness regarding the motivation or impetus for their questions. Are they driven by discriminatory and legally rejected social assumptions about sex, gender, and sexual assault? They also need the types of training and learning opportunities necessary to develop a genuine appreciation of the indignity and the privacy intrusion imposed upon sexual assault complainants by requiring them to recount irrelevant personal information about their sexual activities in exchange for accessing criminal justice.

Consider this recommendation in light of the following example from the NSPPS sample. The complainant's allegation was that a co-worker sexually assaulted her. She alleged that on one occasion, and despite her significant verbal and physical resistance, he persisted with a series of non-consensual sexual acts facilitated through physical force and violence. Her police interview started with questions about where this occurred, how she knew him, and the time of the alleged incident. But then the officer conducting the interview asked her:

> Q. Okay. Have you had any sort of sexual relationship with him before this?
> A. [. . .]
> Q What about sex or anything like that with him?
> A. No.

Based on the nature of her allegation and all other information in the file, there was no reason to ask about her sexual history with the accused or anyone else. On its own, evidence of another previous sexual encounter between the complainant and the accused in this case would not be admissible at trial. But how would an investigating officer know that this question served no investigatory function?

The first factor that ought to inform investigating officers' determination of whether an investigation requires them to ask about prior sexual history is self-awareness regarding the impetus for the question. Officers should ask themselves whether their question is motivated by a query genuinely pertinent to the investigation or an empirically unfounded, and potentially discriminatory,

assumption about sex, gender, women, or sexualized violence. They should consider whether they are investigating the allegation or the alleger. Most obviously, they should ask themselves whether their question is motivated by twin-myth thinking.

Next, the officer should ask themselves: is information that she had sex with this accused in the past, given that the allegation was of one incident of physically forced sexual acts perpetrated against her by a co-worker, pertinent to their investigation? To answer that question for themselves, an officer would need to rely on the second factor identified above: a basic understanding of the law of consent and the rape shield regime. They would need to know that because the complainant's allegation was one of physically forced sexual touching by her co-worker, in the face of her substantial verbal and physical resistance, the issue in this case was credibility. The accused would not be permitted, on this allegation, to assert to the trier of fact that he honestly but mistakenly believed that she was communicating consent. His available defences would be identity (it was someone else, not him); the sexual act did not happen; or the incident was consensual. The complainant's prior sexual history with him would not be admissible as probative of consent, pursuant to section 276(1); nor would it be admissible regarding honest but mistaken belief in communicated consent because that would not be an available 'defence' in this case due to her allegations of physical force and resistance. This leaves the officer with credibility. On the issue of her credibility, whether she had ever had "any sort of sex" with her co-worker in the past was not a legitimate investigative path for this officer to take. In this example, underpinning a question as to whether these two co-workers had ever had sex was either the twin-myth assumption that the complainant would be less credible simply by virtue of having had sex with the accused in the past, ignorance of the law of consent, or both.

The following example involved a teenaged complainant. She alleged that another teenager, an acquaintance, engaged in sexual touching without her consent. She told the police that on multiple occasions he grabbed her breasts or vaginal area, without warning, and that she had been clear with the accused that this was unwanted. Towards the end of the interview, the officer conducting the investigation asked:

> Q: . . . and at any time in the last year would [the accused] think that you were in some sort of relationship?
> C: No
> Q: Not dating?
> C: No
> Q: Not holding hands?
> C: No
> Q: Not kissing in secrecy?
> C: No

Q: Are you dating and holding hands and kissing in secrecy someone else?
C: No . . .
Q: Okay so you have boundaries then . . . ?
C: Yes.
Q: And those boundaries are that [the accused] is not to cross those boundaries?
C: Yes.

Given the nature of her allegations, the issue in this case was consent (and thus, again, the complainant's credibility was central to the case). Whether she had previously kissed the accused or held his hand was not probative of a relevant issue, absent reliance on the prohibited inference that consensual kissing or hand holding in the past made it more likely, by virtue of its sexual nature, that she had consented to him walking up to her and groping her, or that she was less credible. Obviously, asking whether she had been kissing someone else was also irrelevant. Moreover, asking her whether she had engaged in these acts secretly in the past strongly suggests the prohibited inference motivating this question by the officer was that evidence that she had consented to sexual acts in the past, *with anyone* and in secret, would make her less credible with respect to her current allegations. Asking these questions for this reason constitutes an unnecessary intrusion on her privacy, and a violation of her dignity. This is also the type of questioning that risks setting complainants up for the burden of section 276 applications that would otherwise never be brought, in cases in which the accused has evidence, such as text messages, diary entries, or social media that contradict a complainant's denial.

The fourteen-year-old complainant in the following example alleged an incident of forced sexual activity by her then boyfriend. The complainant's allegation was that she repeatedly verbalized "No" to the accused but eventually gave in because she knew from past experiences with him that he would not stop. Investigating this allegation presumably *would* require asking questions to gather information about the reason that this adolescent girl asserted that she knew from the past that the accused would not stop when she asked him to do so, as well as information about her decision to eventually give in. Instead, the officer asked questions about the details of what, if any, prior consensual sexual history had occurred between the complainant and the accused: "[H]ad you guys been sexual before?" and "[O]kay did you guys ever like kiss at all, like just was it mostly just kissing?"

In place of these questions, the officer should have asked the complainant why she believed he would not stop when she asked him to do so, whether he had refused to stop in the past, what made her decide to eventually "give in", and what she said and/or did both before and after "giving in", as well as details on how she had communicated to the accused that she wanted him to stop. Instead, the officer asked this follow-up question, which was disconnected from

the allegation or any of the evidence that the complainant had provided: "P: Have you ever been sexual with anyone else or just [the accused]?"

In the next example, the investigating officer recognized that evidence of other sexual activity between the complainant and the accused "did not matter" but asked the question, repeatedly, anyway. The complainant very clearly described a brutal attack by the accused in which he persisted in the face of repeated efforts by her to fight him off physically and verbally. She informed the officer conducting the interview that she told the accused "No" and tried to push him off of her over and over again, but that he would not stop. Part way through the interview, the officer asked:

> P: Have you had a sexual relationship with [accused] in the past?
> C: No
> . . .
> P: Okay. So . . .
> C. So . . .
> P: Have you, you've never had sex with him before?
> . . .
> P: And it doesn't matter. Whether you had sex with him . . .
> C: Oh yeah.
> P: . . . before or not doesn't matter. . .

If it does not matter, and in this case it most certainly did not, then the police ought not to ask about it . . . let alone ask repeatedly. Officers who rely on the guiding factors I have highlighted, to confine their questioning of sexual assault complainants, will not find themselves acknowledging to an alleged victim of sexual violence that their sexual history does not matter but then asking them about it repeatedly anyway.

Of the sixty-four cases in the sample in which complainants aged fourteen years and older were asked about other sexual activity, in five cases the questions were necessary to the investigations and thus appropriate. It is instructive to consider the application of these suggested principles in some of these cases—ones in which the police properly asked adolescent and adult complainants about other sexual activity.

In the first of these cases, a fourteen-year-old complainant was asked by the police whether she had engaged in sexual activity with anyone else, in order to determine whether the sexually transmitted infection she had contracted was from the accused, who was her adult-aged 'boyfriend'. He was charged with sexual assault and sexual interference. Evidence of her sexual activity, or lack of sexual activity, with someone else could be relevant and admissible at trial if the accused's defence was that he did not have sexual contact with the complainant,

and could not have been responsible for her STI.[77] In this circumstance, an accused would be permitted to make limited inquiries into the source of her sexually transmitted infection if the Crown introduced evidence of it as confirmatory of the sexual touching engaged in by the accused. For example, the accused might be permitted to ask whether she had engaged in sexual activity capable of transmitting the STI with which she was diagnosed with anyone else during the time-period when transmission occurred.

The police cannot predict what the Crown might argue by way of confirmatory evidence, or whether the accused will pursue a particular defence. On the facts presented to the police, the possibility that this evidence might be admissible at trial means they needed to investigate this aspect of the case. Applying the factors I have outlined should yield this conclusion. In this case, the impetus for the question was not twin-myth or other stereotype-driven inference. The questions were instead motivated by inquisition into the relevance of the physical consequences of the impugned sexual acts.

Similarly, in another case, which involved multiple incidents of intimate partner violence, the police asked the complainant whether she had sent intimate images to the accused. In addition to sexual assault, there was some indication that he had taken intimate images of her without her consent. As such, the officer's questions were appropriate and necessary: they were not motivated by discriminatory inferences about the complainant and there was a possibility that the complainant's response could yield admissible evidence regarding a sexual offence perpetrated against her by this accused. Specifically, there was uncertainty as to whether the intimate images the accused had taken of the complainant were without her consent, and whether he would be charged with additional offences in relation to these photographs.

In two examples from the sample, officers asked questions aimed at obtaining evidence regarding the complainant's physical state. In one, they asked the complainant how she sustained a hickey that was visible during the interview; in the other, they asked if she was a virgin, in relation to her evidence that the assault caused vaginal bleeding.

In the fifth case, the police asked about sexual text messages in an effort to determine whether the accused had committed an additional offence against the complainant.

The interviewing officers in these cases were investigating alleged criminal offences, not alleged victims. The distinction is critical.

Conclusion

The most obvious recommendation in response to the results of this study is significantly more and better education and training for the police. But this

77. See e.g. *RV*, *supra* note 38 at para 7.

police training must extend beyond the provision of information regarding section 276. It must include education that enhances their understanding of the objectives underpinning the rape shield regime, including the discriminatory stereotypes it seeks to neutralize, and that facilitates increased self-awareness of their own unconscious biases and reliance on problematic and empirically unfounded social assumptions about women, sex, and sexualized violence. Without this self-awareness, the inclination to ask intrusive and unnecessary questions about prior sexual history appears to be formidable. Moreover, and as already highlighted, police training as a strategy to mitigate the legal system's 'front-end' systemic failures in response to the prolific social problem of harmful sexual behaviour will only be successful if the police are receptive to this education and willing to challenge their own biases, and accountability measures are in place.[78]

Consider the following example. The complainant's allegation was that the sexual assault was initiated while she was asleep. The officer recognized that the police ought not ask complainants about sexual activity with other individuals, but considered it necessary to question the complainant about her sexual history with the accused:

> Q. So let me . . . I think I just have . . . have one last question about that, and that's what . . . This is . . . I'm going to be super honest with you. There's kind of new legislation that prior sexual history, we're not really supposed to ask about it. But I think it's important in this context, so I'm . . . I'm going to ask you a question.

This officer was aware of the rape shield regime (albeit they erroneously characterized it as "new") but asked the question anyway. They did so in a case in which any prior sexual history between the accused and complainant was irrelevant because the complainant alleged she was initially asleep when the impugned acts of penetration were imposed upon her.

When the police ask sexual assault complainants questions about their sexual history that are irrelevant to the investigation, the police confront them with an untenable choice: provide private information about their sexual activities that would be inadmissible at trial and about which a complainant may have an understandable fear of disclosing, or risk appearing dishonest or evasive.

Sexual assault complainants should not have to respond to irrelevant questions about their sexual history, often seemingly motivated by the same stereotypical thinking that section 276 aims to eliminate from the trial process, in order to report the sexual violence that they have experienced. When the police make them do so, they gravely undermine the objectives of, and protections promised by, Canada's rape shield regime.

78. Marriner, *supra* note 10.