

UNBELIEVABLE: The Funnel Effect of Rape Attrition in the Criminal Justice System

While perusing Netflix over the past couple months, you may have come across a mini-series called *Unbelievable*, and its name truly lives up to its premise. Based upon the true story of an American woman pseudonymously known as “Marie”, the show follows the victim of a serial rapist who reported her rape to the police and was both disbelieved and criminally charged with a gross demeanour for false accusation in Lynnwood, Washington.¹

Although false allegations of rape are relatively rare, accounting for between 2% and 10% of all rape allegations;² the question of whether to believe the victim (or not) is something continuously at issue throughout many investigations and trials which occur. While *Unbelievable* focuses upon the tragic life consequences when police investigations go wrong, the show’s premise surrounding the difficulties in reporting, investigating and prosecuting rape is endearing and has relevance even in a Canadian context. This is evidenced by the fact that in a 2017 exposé, *The Globe and Mail* found that nearly 20% of all reported sexual assault cases are dismissed as unfounded, or more applicably, unbelievable.³

As of 2014, there were 636,000 reported sexual assaults in Canada.⁴ However, the number of unreported sexual assaults is considerably higher given that nearly 40% of Canadians believe that rape is a minor crime and does not need to be reported.⁵ In Canada, it is believed that only 5% of victims of rape file a police report.⁶ Of the reported cases of rape, about half of the perpetrators are criminally charged (567 for every 1,000 reported rapes),⁷ even less face trial, and a very tiny fraction of perpetrators of sexual violence are convicted (65 out of every 1,000 reported rapes).⁸ Consequently, it can be theorized that the whole process; from report to conviction acts like a funnel through which very few cases successfully pass (the funnel effect of attrition). So, the question then becomes why is this the case?

¹ *Unbelievable*, 2019, Video (Los Gatos, Cal: Netflix, 2019).

² David Lisak et al, “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases,” (2010) 16:12 *Violence Against Women* at 1331, cited in Alana Prochuk, “Women’s Experiences of the Barriers to Reporting Sexual Assault” (2018) at 5, online (pdf): *West Coast Leaf* <www.westcoastleaf.org> [perma.cc/MF79-FYLC].

³ Robyn Doolittle, “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless” (3 February 2017), online: *The Globe and Mail* <www.theglobeandmail.com> [perma.cc/F7SK-58K4].

⁴ Report of the Coordinating Committee of Senior Officials Working Group on Access to Justice for Adult Victims of Sexual Assault, *Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults- Challenges and Promising Practices in Enhancing Access to Justice for Victims*, Doc 831-221 (St. John’s: 15-16 November 2018).

⁵ *Ibid.*

⁶ “Statistics”, online: *Sexual Assault Centre* <sacha.ca> [perma.cc/273T-ZL8F].

⁷ Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, (Ottawa: Statistics Canada, 26 October 2017).

⁸ *Ibid.*

Firstly, it is imperative to look at the common victim myths which have been purported to influence some of Canada's jurisprudence which act as deterrents when victims of rape are considering whether or not to file a police report. These myths non-exhaustively include that what the victim was wearing increased their chances of becoming a victim of rape,⁹ that the victim was to blame (for not "keeping their knees closed" or for being unwary of the danger posed by certain men),¹⁰ or even that the victim was responsible for fighting the rapist off.¹¹ While these are only a few of the myths that surround rape, they clearly contribute to some of the erroneously held beliefs by members of the general public (and in some cases, triers of fact), and may deter victims of rape from coming forward and reporting their victimization to police. Furthermore, these myths can lead to the stigmatization of victims of rape which may deter victims from even bringing their complaints to the police.

In addition to the fears of the victim stemming from stigmatization, the funnel effect of attrition is also caused by systemic issues. One of the major issues being that police often face difficulties in their investigation of rapes; either because they are unable to identify the perpetrator or because of lack of evidence on which a trier of fact could convict beyond a reasonable doubt.¹² Additionally, many cases concerning rapes simply just fall off the investigatory radar of police. Case in point, less than a month ago Minneapolis police found approximately 1,500 untested rape kits which spanned a period of over three decades.¹³ While it would be inaccurate to suppose that Minneapolis police wilfully intended to not seek justice (or at least attempt to provide answer) for the over 1,500 victims whose kits were untested, this situation raises major concerns regarding both the treatment and importance placed upon seeking justice for victims of rape by police, and the overall evidentiary burden of convicting in a rape case.

Furthermore, the funnel effect of attrition can even be seen at the level of the Courts wherein victims routinely fear attending Court and effectively re-living their rape whilst having their character is called into question by defence counsel. Fortunately, there are some limited safeguards which protect the victim's character (primarily found in s 276 of the *Criminal Code*). Ultimately, s 276 of the *Code* provides protection against what is commonly referred to as the "twin myths" (the two myths why victims of rape are disbelieved). What the twin myths suppose are:¹⁴

- (1) that the complainant based upon their sexual history is more likely to have consented to the sexual activity, and;
- (2) the complainant is less worthy of belief.

⁹ *R v Rhodes*, 2013 MBQB 166. In this case, the trial judge erroneously acquitted the accused. However, the acquittal was later overturned at the Manitoba Court of Appeal. The victim's intoxication was also an issue in this case since this was another reason supporting why the accused was acquitted.

¹⁰ Anna Mehler Paperny, "Canada judge fights to save job after 'victim-blaming' rape trial" (6 January 2017), online: <www.reuters.com> [perma.cc/7D5G-PPHL].

¹¹ *Supra* note 2.

¹² *Ibid.*

¹³ Tara Law, "Minneapolis Police Admit to Discovering 1,500 Untested Rape Kits, Spanning Over 30 Years, Found in Storage" (17 November 2019), online: <www.time.com> [perma.cc/AW35-L5NB].

¹⁴ *Criminal Code*, RSC 1985, c C-46, s 276.

While evidence that supports the twin myths cannot generally be brought forth,¹⁵ there are a series of factors a judge can consider in determining whether evidence which goes to the twin myths is admissible under s 276(3) of the *Code*. However, the practicalities such as the standard of proof of beyond a reasonable doubt must be kept in mind when understanding the funnel effect of attrition at the level of the Courts. As per *W(D)*, a case which effectively looks at a he said/she said situation, it was held that a trier of fact must acquit if they believe the evidence of the accused, are left in reasonable doubt by the accused's evidence, and they must be convinced beyond a reasonable doubt of the guilt of the accused.¹⁶ Ultimately, *W(D)* makes it particularly difficult for the Crown (especially when it is a he said/she said case) to secure a conviction when the accused contends that the victim consented. Obviously, this is something that turns on the facts of the case, and in some cases, the accused will clearly be found to be not credible. Nevertheless, where both the accused and complainant have testimonies which ring true, it is probable that the accused will not be convicted since the criminal standard of beyond a reasonable doubt will not be met; something which acts as another roadblock that contributes to the funnel effect of attrition in rape cases.

While it would be difficult to overhaul the criminal justice system to ensure that the funnel effect of attrition in cases of rape is non-existent, perhaps there should be broader recognition of the fact that individuals who claim they are victims of rape rarely lie about this fact, and society should be more weary of the myths surrounding rape, and turn the unbelieved victims into the believed.

¹⁵ *Ibid.*

¹⁶ *R v W(D)*, [1991] 1 SCR 742.