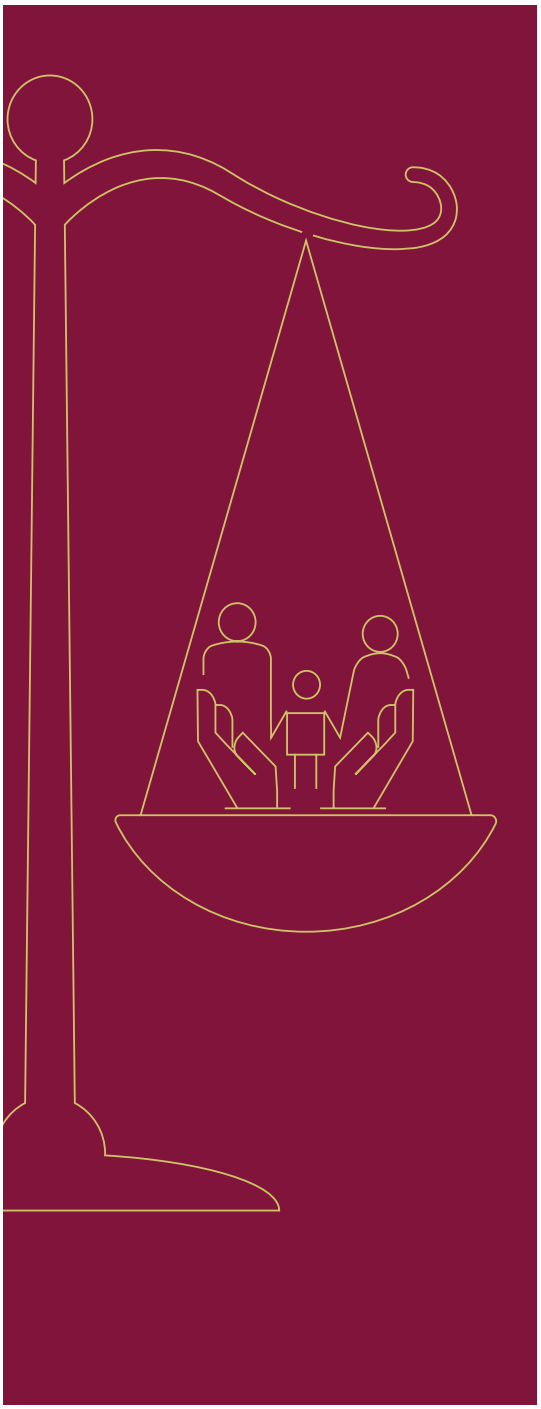
LEGAL BULLETIN

Schuetze v. Pyper, 2021 BCSC 2209 (Part 1) and *Pyper v. Schuetze* 2023 BCCA, 334 (Part 2)



Introduction (Parts 1 and 2)

Considering the applicability of social realities and contextual analyses in the FREDA Centre for Research on Violence Against Women and Children's legal article, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases," to two domestic violence related court cases in British Columbia (BC).

The two recent domestic violence cases in the BC courts discussed below were selected because they each profile judicial approaches to the making of meaning in a family violence court case through the application of/focus upon a detailed contextual analysis to arrive at their rulings (see Part 1/*Schuetze v. Pyper*, 2021 BCSC 2209 and Part 2/*Pyper v. Schuetze* 2023 BCCA, 334). As discussed within *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases*, contextual analysis "can be described as the way in which equality rights and values can be incorporated into legal analysis. It requires an understanding of the context – the lived reality – of those being judged" (Martinson & Jackson, 2017, p. 25). Chief Beverley McLaughlin spoke about the importance of contextual analysis, saying the "the judge understands not just the legal problem, but the social reality out of which the dispute or issues before the court arose" (ibid, p. 25).

Even today, long after the *Canadian Charter of Rights and Freedoms* came into effect, women's lived realities are still interconnected with systemic discrimination, as was true in the two related cases presented in parts 1 and 2 of this case bulletin. The woman/mother (Katy Schuetze) does experience multiple disadvantages as a result of the abuse, including, but not limited to, financial disadvantage because her physical and mental health suffered decline - both from the physical harm (e.g., concussion, mild brain injury and PTSD), such that Ms. Schuetze could no longer work full-time; her mental health which was also affected by her chronic fear of the

further harm she might receive from her ex-partner (John Pyper). In addition, the legal system failed Ms. Schuetze along the way – two examples being that she was not informed about the information in the Agreed Statement of Facts (ASOF) document and, in fact, strongly disputed its content. Nor did the sentencing judge consider the injuries Ms. Schuetze described in her victim impact statement, which was by agreement of both the Crown and defense counsel.

Writing frequently in her ruling about the social realities of the two individuals involved generally, the Supreme Court Justice, The Honourable Justice Fleming, did pay specific attention in her contextual analysis to the demeanor and behaviour of each in the courtroom. She provided great detail and consideration of how the expert testimony, which assessed each of the two parties' behaviour and demeanor, informed her own determination of the key issue of the credibility of each. Additionally, in that regard, Justice Fleming found that Mr. Pyper was very calm and recalled close detail of all the interactions in his testimony, while Ms. Schuetze was less clear about the detail but was clearly stressed at many points during the recounting. As will be seen, and setting the foundation for the two cases, in the BC Supreme Court case (see Part 1), the Justice did in fact delve deeply into the social lived realities of the two parties in order to make accurate assessment of their credibility and, hence, the credibility of their evidence. She did spend time to become informed by not just "facts" but by the meaningful social context.

Part 1: BC Supreme Court Civil case, *Schuetze v. Pyper*, 2021 BCSC 2209[1] [2]

The plaintiff, Ms. Katy Schuetze, and the defendant, Mr. John Pyper, are separated spouses. In this civil action, they seek damages from one another based on the intentional tort of battery, commonly understood as assault. Both parties assert a *"Violent Incident"* occurred on September 16, 2018, in the presence of their two young children.

Ms. Schuetze alleges that Mr. Pyper committed a particularly violent and vicious battery of her that culminated in powerful blows to both sides of her head as she lay pinned beneath him in the upstairs hallway of the former family home. Mr. Pyper alleges it was primarily Ms. Schuetze who attacked him. My Pyper asserts that he restrained Ms. Schuetze to protect himself, and his only act of battery may have involved pulling a cellphone from her grasp which injured her wrist and finger. Both of these versions of the battery together formed what was termed the *"Violent Incident"* in the case.

A 911 call on the date in question was placed by their six-year-old daughter. Police attended and Mr. Pyper was arrested; Ms. Schuetze taken to the hospital by ambulance. Mr. Pyper plead guilty to the assault and was sentenced to an absolute discharge in late 2020. However, Ms. Schuetze contested that the judge had not considered the injuries she sustained which had been communicated in her victim impact statement. An Agreed Statement of Facts (ASOF) had not been read by Ms. Schuetze.

Ms. Schuetze claimed that she sustained significant injuries including a mild traumatic brain injury and post-traumatic stress disorder with many ongoing symptoms, such as headaches dizziness and some cognitive symptoms (e.g., difficulty concentrating and light sensitivity); the latter affected Ms. Schuetze's ability to have sustained computer screen time, a major component of her work-related assignments. Ms. Schuetze could no longer work more than 12 hours per week; the injuries also affected her recreational functioning.

In addition to claiming Ms. Schuetze was the primary aggressor during the *"Violent Incident,"* Mr. Pyper alleged it was Ms. Schuetze, not he, who was violent in the past, characterizing her as emotionally

[1] The part 1 case, *Schuetze v. Pyper*, 2021 BCSC 2209 (CanLii), can be located here: https://canlii.ca/t/jl5wr

[2] Condensed information and direct quoting from the CanLii case databased are presented in the Part 1 Case Bulletin.

unstable and prone to fits of physical aggression with him. Mr. Pyper also disputes almost all of her alleged injuries and ongoing symptoms and seeks damages for injuries he claims Ms. Schuetze caused during the *"Violent Incident"* that resulted in extreme pain in his right testicle, a throbbing headache, other short term pain symptoms, and on-going emotional or psychological effects that he alleged have undermined his ability to perform as a high-level business executive.

Mr. Pyper did not present any expert evidence either in response to Ms. Schuetze's medical evidence or regarding his own alleged injuries and damages. Aside from his own evidence he relies on the testimony of his sister, who did not witness the *"Violent Incident"* or any of disputed past incidents of violence. Nor did Mr. Pyper's sister provide evidence relevant to his alleged injuries. Instead, his sister gave what the judge would characterize as good character evidence, indicating she has never seen Mr. Pyper lose his temper and how impressed she is by his parenting.

Ms. Schuetze, on the other hand, described previous physically alleged abusive incidents. Mr. Pyper also alleged previous physically abusive incidents from Ms. Schuetze. Finally, both parties gave evidence that Ms. Schuetze harmed herself during a second pregnancy by punching her own stomach.

There was an attempted reconciliation and some counselling attempts by both parties. But Ms. Schuetze gave consistent evidence that she could not return to work at her previous number of hours. She also described on-going pain and symptoms, including headaches, dizziness, diarrhea, ear ringing and light sensitivity (the latter affecting her ability to work on her computer), as well as symptoms of PTSD. Ms. Schuetze also became quite fearful of Mr. Pyper and was profoundly traumatized by the incident.

Expert evidence played a key role in the subsequent BC Supreme Court of Appeal's case (see part 2), and The Honourable Justice Margot Fleming describes the credibility of the two parties as the *primary contested issue* in it. The Justice found Ms. Schuetze's testimony to be credible, but, in sharp contrast, that of Mr. Pyper's not to be credible. Generally speaking, the Justice found Mr. Pyper's demeanor one in which he never displayed any feelings of empathy for his children in relation to their exposure to the *"Violent Incident,"* in stark contrast to the concerns expressed by Ms. Schuetze.

The claims of both parties were based upon the intentional tort of battery. The Justice noted the law requires that the force used in self-defence must be reasonably necessary and proportionate to the harm being threatened. She did not accept that Mr. Pyper's violence (in the *"Violent Incident"*) towards Mr. Schuetze constituted self-defence. Therefore, The Justice found that Mr. Pyper committed serious battery of Ms. Schuetze and, thus, dismissed his own claim in battery against her.

In explaining the damages claims of Ms. Schuetze, Justice Fleming indicated Ms. Schuetze sought non-pecuniary damages of $155,000 to $185,000. The Justice granted an award of $100,00, taking into consideration that there was likelihood of her improvement. The costs of future care, including compensation for those costs, such as psychology/trauma counselling, kinesiology/rehab assistant for a kinesiologist, restorative yoga, physiotherapy, active vestibular therapy, neuropsychological assessment, occupational therapy, and loss of earning capacity (for both past and future earning capacity), and special and punitive damages – all coming to a total of $795,029.68. Mr. Pyper's counterclaim, on the other hand, was dismissed.

Justice Fleming was quite certain that the ongoing family litigation to follow would also be a source of significant, if not intense, stress and, therefore, an ongoing trigger for Ms. Schuetze's symptoms. The Justice concluded that, "I am satisfied that the very significant damages awards I have made will serve to punish him (Mr. Pyper) and deter other wrongdoers."

Part 2: BC Court of Appeal case, *Pyper v. Schuetze* 2023 BCCA, 334[3] [4] [5]

This appeal centres on an allegation of uneven scrutiny of the evidence of former spouses in a personal injury action for battery. The appellant claims the trial judge subjected his evidence to more rigorous scrutiny than that of the respondent; impermissibly relied on hearsay and similar fact evidence; erred in assessing the cause of the respondent's psychological issues; and erred in awarding the respondent partial special costs. In consequence, he claims he was deprived of a fair trial.

But the one specific concern in the above regard relates to the failure to anonymize the parties involved (see summary below). Mr. Pyper seeks orders that: (1) the style of cause and indexing in this Court and the court below be anonymized with initials; (2) all reasons be redacted to remove identifying information, including replacing the parties' and their children's names with initials; and (3) all reasons be redacted to remove the names of his employers. While the anonymization of the parties involved formed the major issue for the appeal, most of the other findings ("the lived realities") from the Supreme Court case are referenced.

Case Summary

The appellant applies for an anonymization order. While the names of the parties' children are already initialized for anonymity, the applicant says the parties' names should also be initialized. He says the public interest does not require the parties' names to be published and that doing so only causes harm to the children who are young and vulnerable. Held: Application dismissed. The applicant advances no more than a general claim to privacy which does not meet the high bar for limiting court openness. The fact that he committed a "serious battery" of his former spouse is not the kind of sensitive personal information that gives rise to a serious privacy risk. The anonymization order already in place sufficiently protects the children's privacy interests. Further anonymizing these reasons would undermine the crucial objectives of the open court principle, such as deterrence and the protection of victims.

The findings in the Civil Action (BC Supreme Court Civil Case – Part 1) provide important context for the appeal for Mr. Pyper's specific anonymization application. Among other things, as noted by the Supreme Court case trial judge, Justice Fleming, spoke to the "very negative findings" about Mr. Pyper's credibility and found that he had "committed a serious battery of Ms. Schuetze." More specifically, Justice Fleming found that Mr. Pyper had repeatedly kicked and punched Ms. Schuetze. The Justice also found that Mr. Pyper had been physically violent, controlling, and emotionally abusive to Ms. Schuetze on previous occasions. And, as noted in the Part 1 case (*Schuetze v. Pyper*, 2021 BCSC 2209) Justice Fleming awarded Ms. Schuetze $795,019.68.

The Three Grounds for Appeal

Mr. Pyper set out three grounds of appeal. It was argued that the judge erred in:

1. Assessing the parties' credibility, the judge subjected his evidence and that of Ms. Schuetze's to uneven scrutiny and, in doing so, relied upon impermissible reasoning or improperly admitted evidence;
2. Analyzing causation, whether Ms. Schuetze had proven that the *"Violent Incident"* caused the alleged psychological injury and symptoms from the reconciliation period forward; and
3. Awarding partial special costs, by purporting a) to *vary prior costs awards on interlocutory applications* without jurisdiction and b) *by sanctioning him for extra-legal conduct which did not justify a special costs award.*

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[3] The Part 2 case, *Pyper v. Schuetze* 2023 BCCA, 334 can be located here: https://canlii.ca/t/k0gqr
[4] *Pyper v. Schuetze* 2023 BCCA, 334 is the follow-up appeal case to *Schuetze v. Pyper*, 2021 BCSC 2209 (Part 1)
[5] Condensed information and direct quoting from the CanLii case databased are presented in the Part 2 Case Bulletin.

Discussion

From the Justice's analysis:

Credibility: I do not accept that the judge scrutinized the evidence unevenly in assessing Ms. Schuetze's credibility, on the one hand, and Mr. Pyper's credibility, on the other. Nor do I detect any error in principle in Justice Fleming's credibility analysis. Justice Fleming's credibility and related findings are grounded in the evidence, contextually reasonable and witness specific. While Justice Fleming reached different conclusions on the parties' credibility, when her reasons are read fairly and as a whole, it is clear that she subjected the evidence of both parties to rigorous, balanced, and transparent scrutiny.

Contrary to Mr. Pyper's submission, Justice Fleming did not treat the parties' abilities to recall details of the *"Violent Incident"* differently. Rather, she rejected Mr. Pyper's claim to having a highly detailed recall as implausible given the nature of the event. This was a view she was entitled to take. Nor did Justice Fleming draw different conclusions from the parties' similar presentations or rely on stereotypical assumptions in assessing Mr. Pyper's credibility. Rather, she found they presented very differently in significant respects, and drew reasonable inferences based on common sense, human experience and factors specific to the case.

As to inconsistencies and flaws in a witness' testimony: the evaluation of the impact of specific inconsistencies and flaws in a witness' testimony lies at the core of a trial judge's function. The same is true of evaluating witness demeanor and drawing common-sense inferences untethered to stereotypical behavioural generalization. In the Appeal Court Justice Dickson's opinion, none of the inferences about those issues were reasonable or otherwise available. Therefore, Justice Dickson did not give effect to that ground of appeal.[6]

Causation: Mr. Pyper contended the judge erred in finding that Ms. Schuetze's psychological injuries continued to the date of trial in light of the undisputed evidence of the parties' 2019 reconciliation period. Mr. Pyper submitted that the judge did not address the critical causation issues. He says the judge failed to grapple with the obvious contradiction between the dynamics of PTSD and the fact that Ms. Schuetze successfully overcame them to reconcile with Mr. Pyper in 2019. The justice rejected this submission. Ms. Schuetze had produced a considerable body of evidence, including photographs of her bruising and testimony from her working colleagues about her functioning before and after the *"Violent Incident."*

Special Costs: Finally, here Mr. Pyper contended that the judge also erred in sanctioning him with special costs for applying for one defense lawyer's disqualification, when another Justice had already ordered costs against him in any event. He argued that the judge had also erred in sanctioning him for *extra-legal* contact with Ms. Schuetze at a time when Mr. Pyper was to have no-contact with her. The justice rejected Mr. Pyper's submission that the judge's findings related to "extra-legal" conduct, not to litigation misconduct.

[6] In order for a judge to be able to properly assess witness demeanor and behaviour appropriately, it is argued (Neilson, 2014, p. 538) that *specialized training* is needed for the judge. As Linda Neilson points out, "In the absence of specialized knowledge, problems with screening, mistaken assumptions about parenting and child safety, erroneous conclusions based on the demeanor and behaviour of targeted adults, or potentially misleading public demeanor and behaviour of violators can produce erroneous assumptions and conclusions" (p. 43).

Conclusion

Justice Dickson found that Mr. Pyper repeatedly and unfoundedly attacked the professionalism of one defense lawyer in *manipulative efforts* to persuade Ms. Schuetze to abandon her claim. The judge found that his impugned conduct related directly to the litigation. It was described as reprehensible, and it was felt that misconduct of this kind might well warrant a special costs award and in the justice's view it did. For all of the above reasons, Justice Dickson determined the appeal would be allowed to the limited extent of only varying the award of partial special costs to exclude all cost associated with the three interlocutory applications in which costs awards were made.

We close this part of the discussion with reference back to Chief Justice Beverley McLaughlin's expansion of the words, "social reality," by explaining that:

> *Judges apply rules and norms to human beings embedded in complex, social situations. To judge justly, they must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions.* (op. cit., p. 25)

It is clear that in the two cases present in the Parts 1 and 2 case bulletins both The Judge and The Justice adhered to those principles in their detailed deliberations about those social realities. They informed themselves about the detail involved in the weighing of the contextual realities of the two parties in coming to their conclusions.

…and now "coercive control" emerges as a consideration in determining the social realities in any contextual analysis of domestic violence cases

Before ending the discussion of the cases present in Parts 1 and 2 Case Bulletins, it is important to acknowledge that there is a term now being widely used in legal circles, and in the community, when referencing domestic violence cases, and that is "coercive control" or, more broadly, "coercive and controlling" behaviour. The connection to the above two cases is that throughout both, the notion of *controlling manipulation* is used to describe Mr. Pyper's behaviour over Ms. Schuetze. In the Court of Appeal case (Part 2), Justice Dickson said that Mr. Pyper's attempt to reconcile with her "was *motivated* by his goals of persuading Ms. Schuetze to recant her allegations of physical violence and to bring an end to this action." The Justice felt his reprehensible misconduct was far more sustained, multifaceted, and potentially more harmful given Ms. Schuetze's vulnerability and the nature of the action.

Further, Justice Dickson repeated her view that Mr. Pyper was "dishonest, calculating and *cleverly manipulative*." Mr. Pyper also tried to get Ms. Schuetze to dismiss her lawyer for one he suggested. These behaviours can be described as coercive controlling ones, but, at the time these two cases were being dealt with, that type of behaviour was *not* referenced as being coercive and controlling. However, on the other hand, it should be noted that in the family law case involving the same parties with Justice MacNaughton presiding, the reasons for judgement were not delivered until five years afterward, and the same behaviours of Mr. Pyper described in the other two cases (civil/Part 1 and appeal/Part 2), and not referenced as coercive and controlling, *are* described as "coercive and controlling" in the family law case. In the latter case, Justice Fleming found "Mr. Pyper liable for the battery he committed against Ms. Schuetze on September 16, 2018."

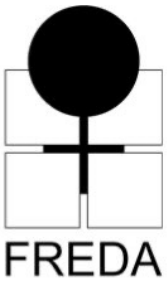
On a related note, it should also be mentioned that significant changes were made to the BC *Family Law Act* in 2013. The *Act* now has a broad definition of family violence that incorporates non-physical forms of violence, including coercion. It also directs judges to consider *patterns* of coercive and

controlling behaviour (such as were seen with Mr. Pyper's) when determining whether to make a protection order or not. The federal Divorce Act (2019) was also amended to include a new definition of family violence which specifically includes coercive and controlling behaviours.

Finally, just as Justice MacLaughlin indicated she felt judges needed *ongoing education* about social realities and social context, in order to specialize as family law judiciary, Linda Neilson argued to properly assess witness demeanor and behaviour appropriately *specialized training* is needed for the judge, and similarly another argument was made by Rise Women's Legal Centre and West Coast LEAF that coercive control represents a radically different approach to understanding violence. As such, it requires ongoing and *widespread* education, including a significant commitment to *training* legal system participants.[7][8][9]

About the FVFL Community of Practice

With the support of our local community of practice, the FREDA Centre for Research on Violence Against Women and Children is actively engaging in research and knowledge mobilization as part of the Supporting the Health of Survivors of Family Violence in Family Law (FVFL) Proceedings project. This is a Canada-wide project with the aim of building the capacity of health and social service professionals to work safely and effectively with survivors of family violence. The Communities of Practice project is a collaborative project with the Alliance of Five Centres. This project is funded by the Public Health Agency of Canada (PHAC) and runs November 2020 to November 2024.



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Announcements about upcoming webinars, newly released learning briefs, and related project news will be posted to the FREDA Centre's website, Facebook, Twitter, and Instagram. You can also locate information and knowledge mobilization materials from the national communities of practice on the Supporting the Health of Survivors of Family Violence in Family Law Proceedings project website.

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[7] The idea of whether or not to criminalize coercive control was the focus of one submission to the Department of Justice (October 20, 2023) by Kim Hawkins from Rise Women's Legal Centre (Rise) and Ragi Mangat from West Coast LEAF (WCL), with the support of additional staff members Rosanna Adams (Rise), Vicky Law (Rise), and Humera Jabir (WCL). A more recent submission to the Department of Justice on the same topic considering the criminalization of coercive control was made by Janet Mosher, Shushanna Harris, Jennifer Koshan and Wanda Wiegers (November 2, 2023). While the criminalization of coercive control is certainly a relevant topic worthy of further discussion, it is not the focus of this current case bulletin. However, the present cases may well have been dealt with differently had "coercive control" been criminalized at the time.
[8] Rise Women's Legal Centre: https://womenslegalcentre.ca
[9] West Coast LEAF: https://westcoastleaf.org

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