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When Judges See SRLs, Do They See Gender? Observations on Gendered Characterizations in Judgments

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**The National Self-Represented Litigants Project
presents:**

The Self-Represented Litigants Case Law Database

Occasional Research Series

(Paper 2)

**When Judges See SRLs,
Do They See Gender?
Observations on Gendered
Characterizations in Judgments**

May 2018

Sandra Shushani & Julie Macfarlane

Introducing the Self-Represented Litigants Case Law Database

Over 200 Canadian decisions have now been read and analyzed for the [Self-Represented Litigants Case Law Database](#) (CLD) by a research team at the National Self-Represented Litigants Project ([NSRLP](#)).

The purpose of the Database is to track the emerging jurisprudence in all levels of courts across Canada, and to present findings that highlight patterns and themes evident within decisions reported by Canadian courts from coast to coast.

Self-represented litigants, or SRLs, face a variety of obstacles and challenges throughout trial proceedings. Cases identified and analyzed in the CLD highlight four issues that the NSRLP has noticed are raised with increasing regularity where one or both parties are self-represented: (1) the description of SRLs as vexatious litigants or as engaging in “vexatious behaviour”; (2) requested accommodations that are either declined or accepted; (3) questions about procedural fairness and judicial assistance; and (4) the nature of costs being awarded for or against the SRL. For a more detailed description of our methodology and the parameters we are focusing on, please see the [Preliminary Report](#) published in December 2017.

The Use of Gender Stereotypes by Judges

As more cases have been added to the CLD, some initial observations have emerged. One of these relates to the use of language suggesting gender stereotypes in decisions that involve a female SRL.

While the sample size does not allow for a statistically significant analysis, this report describes a number of case study examples of this phenomenon within the CLD.

Overall Outcomes for Male vs Female SRLs

When we break down outcomes among the cases currently in the CLD (n= 208), we find that a higher percentage of women are successful in their cases compared with male SRLs (44% female, 30% male). As well, more male SRLs (38%) were either designated “vexatious” or accused¹ of vexatious behaviour than females (31%).

These results are interesting within the limitations imposed (cases must qualify under one or more of our four parameters to be included in the CLD) and given the sample size. We shall continue to track this quantitative outcome as the CLD grows. However, this report focuses on a text-based analysis of patterns of language in some decisions that suggest gendered stereotypes may sometimes affect judicial reasoning and decision-making.

Why Are We Concerned About This?

The court process is adversarial and costly. Trial proceedings can be daunting for even experienced lawyers. SRLs are at an inevitable disadvantage at the outset when they face off against represented parties.

Where judges use language in their decisions that suggest reliance on and repetition of historical “canards” or gendered stereotypes, this may add to power imbalances and/or reinforce existing judicial biases that interpret SRL behaviour and even arguments in a negative way. Language is critical in shaping and reinforcing interpretation and evaluation². A judge has a responsibility to assist SRLs throughout their trial proceedings in an objective and

¹ Our database includes (and distinguishes between) decisions in which SRLs are designated as vexatious under Rules of Civil Procedure, cases in which they are referred to in terms that imply vexatiousness or process abuse, and cases in which pleadings are struck for vexatiousness.

² See the now classic *Metaphors We Live By* By Lakoff G. & Johnson, M. University of Chicago Press 1980

responsible manner, and we expect their analysis to be subject to the same objectivity and balance. When judges appear to be using stereotypes to understand the behaviour and conduct of female SRLs³ this threatens to compromise their objectivity, and over time may reduce confidence in judicial neutrality.

There is no suggestion here that this is a conscious bias. Rather, the purpose of this research report is to highlight some examples of judicial evaluations that appear to reference well-known “explanations” of what has historically been seen as “characteristic” feminine behaviour.

Explanations and Evaluations of Female Behaviour that Draw on Well-Known Negative Stereotypes

While we are not in a position to assess the fairness of these comments in individual cases, we are seeing fairly frequent examples of female SRL conduct being evaluated by judges using culturally prevalent gender stereotypes.

- *Women as schemers*: for example, “highly manipulative behaviour”⁴; exhibiting “deceitfulness, intrusiveness and deviousness”⁵; and non-compliant conduct described as “wanton”.⁶
- *Women as attention-seeking and dramatic*: for example, “(H)er testimony was dramatic and was given in an argumentative, rambling, vague, abrupt and non-responsive manner.”⁷; “The

³ As the number of cases in the database grows, we shall also be paying attention to any patterns of gendered characterization of male SRLs behavior. We expect to explore this when we report on “vexatiousness” cases later this summer.

⁴ *CLM v MJS*, 2017 BCSC 799 at 9

⁵ *M. (M.A.) v. M. (D.J.)*, 2013 ABPC 101 at 26

⁶ *Ottewell v Ottewell* 2013 ONSC 721 at 7

⁷ *SLMD v AVD*, 2017 BCSC 394 at 44

Wife made dramatic claims alleging the Husband constituted a threat to her... (T)here was no objective reason to support such an assertion.”⁸

- *Women as unreliable reporters*: for example, “false, distorted and scandalous statements”⁹; “Although the claimant did her best to honestly provide her version of the events leading up to this action, I did not find her evidence to be reliable in many areas.”¹⁰ “I found R.’s reasons for postponing the appeal on ...disingenuous and unconvincing.”¹¹
- *Women behaving emotionally*: for example, in several cases (including one in which the SRL plaintiff was eventually successful) described as “acting on a whim”¹².
- *Women expecting to “live off” their husbands*: for example, (in this case the SRL lived on a disability pension) “do not just come walking off the street saying, “I can’t work anymore. I want my former husband to pay for me for the rest of my life.”¹³
- *Women described by their appearance*: for example, a judge referring to a female SRL as an “attractive, intelligent and articulate woman.”¹⁴.
- *Women described as treating litigation like “shopping”*: for example, “(A)dding to the difficulties of this case is the

⁸ *M.W.B. v. A.R.B.*, 2011 BCSC 1663 at 162

⁹ *M. (M.A.) v. M. (D.J.)*, 2013 ABPC 101 at 26

¹⁰ *SLMD v AVD*, 2017 BCSC 394 at 44

¹¹ *U.R. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2016 NLTD(G) 25 at 11

¹² *Delichte v Rogers*, 2013 MBQB 93 and *Carbone v McMahon*, 2017 ABCA 384. Note that in *Carbone*, the plaintiff was eventually successful in her application to have the judge recused for bias ([Carbone v. McMahon, 2017 ABCA 384](#)).

¹³ *Kulbacki v. Kulbacki*, 2014 BCCA 82 at 29

¹⁴ *Bird v Bird*, 2013 SKQB 157 at 142

“customer-service” expectations that the mother brings to these proceedings. Unlike a retail environment...the administration of justice cannot possibly proceed in any meaningful way if litigants adopt a customer-service mentality at the courthouse.”¹⁵

- Finally, we have noticed some cases in which judges explicitly *compare and contrast* the behaviour of a female SRL to a male SRL in a way that shames the female SRL in comparison: for example, “Her actions and behaviour were clearly unreasonable. The behaviour of the (male SRL) was entirely reasonable and understandable.”¹⁶; in a case in which the female SRL is repeatedly described as “unreasonable”, “By comparison, I found the respondent’s testimony to be much more reliable. He had a good recollection of events and was calm and measured in giving his answers.”¹⁷

In Conclusion

While we do not suggest that the above examples of gendered characterizations represent a generalized pattern, we draw attention to the following conclusions from the cases analyzed to date in the SRL Case Law Database:

1. When evaluating litigants appearing without counsel, judges may inevitably be affected by their subjective assessments, which open the possibility of gendered assumptions and stereotypes.
2. There are a number of examples emerging of cases in which negative female stereotypes appear in the language of judicial reasoning.

¹⁵ *Delichte v Rogers*, 2013 MBQB 93 at 5

¹⁶ *Ottewell v Ottewell* 2013 ONSC 721 at 6

¹⁷ *SLMD v AVD*, 2017 BCSC 394 at 45

Working directly with SRLs without the intermediation of a professional agent is a huge challenge for our judiciary, and we hope that this Research Report will stimulate more focused discussion, both on best practices and on pitfalls to avoid.