
STILL A SIGNPOST OF INEQUALITY: AN UPDATE ON HYSTERIA IN THE COURTS

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Abstract

More than twenty years ago, I examined the use of the label “hysterical” to discredit the testimony of witnesses in several areas of the law, including personal injury, criminal law – especially sexual assault crimes – and child custody cases. The labels were quite effective, especially against the testimony of women and girls who did not conform to cultural expectations about how individuals in their situations should behave. This study updates that research and asks whether anything has changed. Is the use of hysteria as a label still gendered? Does its use still successfully suggest that women and girls are not credible or reliable witnesses? The results of this study give little reason for optimism. Eighty percent of all of those labelled hysterical are still female. The proportion of female witnesses found to be credible and reliable despite being labelled hysterical remains at just over one-half of those women and girls. Most changes have been in the wrong direction. While thirty percent of the predominantly female victims of crime were dismissively labelled hysterical two decades ago, that proportion has increased to forty-five percent. The gendered paradigm of when hysteria is seen as rational because it conforms to cultural expectations—and when it is seen as irrational for not conforming—seems entrenched in Canadian law and Canadian society.

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I INTRODUCTION

More than twenty years ago, I examined the use of “hysteria” in Canadian courtrooms.¹ As I explained then, I chose to focus on hysteria because it was understood as the epitome of irrationality and because it has, throughout history, been an important site of inequality based primarily on gender stereotyping.² In our courtrooms, it has been a label most often used to attack the credibility and reliability of women’s testimony.³ The label of hysteria has been a signpost signalling gendered inequality in our legal system.

My 2002 article, “The Use of Metaphor,” primarily described the results of a discourse analysis of 128 cases that used cognitive theories of conceptual metaphors to determine how, why, and when that labelling worked to discredit the testimony of women in Canadian courtrooms.⁴ However, a small portion of that article provided some percentages and numbers about the types of cases in which hysteria was most often used, who used that label to try to discredit others, who was labelled hysterical, and whether persons labelled hysterical were found to be credible and reliable witnesses.

Twenty years after the publication of “The Use of Metaphor,” I wondered whether its numerical data could be repurposed and the use of “hysteria” in Canadian courtrooms updated to see if anything had changed. There would be limitations on what an update could show because the earlier numbers had been collected only to provide context for the discourse analysis. Still, I was curious about whether a multitude of efforts directed toward greater substantive equality in Canadian courtrooms—efforts such as Justice L’Heureux-Dubé warning in *R v Seaboyer*; *R v Gayme* about the myth of the “emotionality of females” that prevailed in sexual assault cases,⁵ and optional educational courses offered to the judiciary and lawyers⁶—had made a perceptible positive impact over the past twenty years. Unfortunately, the results of this update looking at 438 newer cases are discouraging.

In Part II of this article, I describe the history, theory, and methodology informing the 2002 article. Part III sets out the methodology I used to locate and analyze the post-2002 cases. Part

¹ Jonnette Watson Hamilton, “The Use of Metaphor and Narrative to Construct Gendered Hysteria in the Courts” (2002) 1:2 JL & Equality 155 [Watson Hamilton, “The Use of Metaphor”].

² *Ibid* at 160–167. See also Cecilia Tasca et al, “Women and Hysteria in the History of Mental Health” (2021) 8 Clinical Prac & Epidem in Mental Health 110 [Tasca et al]; Linda L Berger & Kathryn M Stanchi, “Gender Justice: The Role of Stories and Images” in Michael Hanne & Robert Weisberg, eds, *Narrative and Metaphor in the Law* (Cambridge: Cambridge University Press, 2018) at 157.

³ See e.g. Suzanne Zaccour, “Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes” (2018) 31:1 Can J Fam L 57 [Zaccour]; Lindsay M Orchowski et al, “Barriers to Reporting Sexual Violence: A Qualitative Analysis of #WhyIDidntReport” (2022) 28:14 Violence Against Women 3530 [Orchowski].

⁴ Discourse analysis is a collective term for various qualitative research methods that explore what is said and how it is used in its social and cultural context; see LaiYee Ho & Alex Limpaecher, “What Is Discourse Analysis? An Introduction & Guide” (1 November 2023), online (blog): <delvetool.com/blog/discourseanalysis> [perma.cc/38TT-Y5UB].

⁵ *R v Seaboyer*, 1991 CanLII 76 (SCC) [Seaboyer].

⁶ Some courses were offered by the National Judicial Institute, such as its family law seminars, which included topics such as assessing credibility in matters involving intimate partner violence (see National Judicial Institute, “NJI Course Descriptions: January–December 2024” at 21, 25, 28, online (pdf): <nji-inm.ca/index.cfm/judicial-education/course-descriptions/course-descriptions-2024/?langSwitch=en> [perma.cc/7JY6-D2AP].

IV presents a comparison between the two sets of numerical results. Part V delves into one difference between the two sets of findings in greater detail, focusing on the “hysterical” child in child custody cases. The conclusion summarizes how little has changed in the labelling of parties, witnesses, and others as hysterical in Canadian courtrooms.

II “THE USE OF METAPHOR AND NARRATIVE TO CONSTRUCT GENDERED HYSTERIA IN THE COURTS”

I chose hysteria as the focus of my 2002 study because it has, for more than twenty centuries, been a site of inequality for women that is firmly tied to the notion that they are not to be believed. The following summary of the historical literature reviewed in the 2002 article supports that point.

That brief history is followed by an even shorter description of the cognitive theory of metaphor that I applied to the pre-2002 cases where someone had been labelled as hysterical and the stock story that I discovered lay behind the use of that label. How and why the label of hysteria works is not the subject of this update, but some familiarity with my findings in that earlier article will help in understanding why the label continues to be employed to disproportionately discredit women in Canadian courtrooms.

At the end of this part, I describe the methodology I used to locate and categorize the 128 pre-2002 cases, the results of which I contrast with the post-2002 results in Part III. That methodology was secondary to the application of the cognitive theory, which only required a large enough group of cases to analyze. As a result, there are some limitations in the earlier methodology that are replicated in this update to make the results comparable.

A. A Very Brief History of Hysteria

The word “hysteria” is derived from the Greek word for “uterus.”⁷ It arose in the second century when influential Greek physicians thought of the uterus in terms of an animal that moved around to explain the emotional instability of women with “wandering wombs.”⁸ It was not until the seventeenth century that the cause of hysteria was thought to be a brain disorder and a diagnosis of hysteria became available for both women and men.⁹ However, as a disorder, it was still diagnosed more often in women than men, and this was attributed to a perceived weakness in women’s anatomic nervous constitution and their insatiable sexual

⁷ Ilza Veith, *Hysteria: The History of a Disease* (Chicago: University of Chicago Press, 1965) at 1 [Veith]; the Greek adjective *hysterikos* means “from the womb” (see Helen King, “Once Upon a Text: Hysteria from Hippocrates” in Sander L Gilman et al, eds, *Hysteria Beyond Freud* (Berkeley: University of California Press, 1993) 3 at 6 [King]).

⁸ King, *ibid* at 22–24; Francis Adams, *The Extant Works of Aretaeus, the Cappadocian* (London: Sydenham Society, 1856) at 285–87, quoted in Phillip R Slavney, *Perspectives on “Hysteria”* (Baltimore: Johns Hopkins University Press, 1990) [Slavney] at 14; Rudolph E Siegel, *Galen on the Affected Parts*, (Basel: S Karger AG, 1976) at 184–86, quoted in Slavney at 15. Others have attributed the identification and naming of hysteria to Hippocrates in the fourth century (see e.g. King, *ibid* at 3).

⁹ Henri Ey, “Hysteria and Analysis of the Concept,” in Alec Roy, ed, *Hysteria* (Chichester: John Wiley & Sons, 1982) 3 at 5.

appetites, as well as their domestic situations—domestic situations favourable to hysterical excesses.¹⁰ The dominance of the nerve-based explanation based in the brain faded in the nineteenth century, replaced by the idea that physical symptoms or illnesses were caused by psychological factors and based in the mind.¹¹ Sigmund Freud was of this school of thought, believing that hysteria was caused by unconscious and repressed conflicts and best treated by psychoanalysis.¹² Relocating the source of hysteria from the brain to the mind reduced it to a deceit perpetrated by women for many in the medical professions.¹³ Although one twentieth-century version of hysteria as deceit was unequivocally linked to men—men characterized as suffering from “shell shock” in World War I and seen by military authorities as malingerers or cowards¹⁴—sociological theory put forward an explanation of the “sick role” for women to describe how women who were unable to cope with their families and society denied and disassociated their way into a role where others needed to care for them.¹⁵ One author explained that the predominance of the “sick role” among women and the young and immature was due to the commonalities between those roles and the roles of a child and an invalid who were dependent on men and lacking in power.¹⁶ By the mid-twentieth century, with hysteria firmly located in the mind, hysteria became linked to a vulnerability in an individual’s personality, making hysteria something a person was, and not something they did or had.¹⁷ The hysterical personality type was typified by emotional instability, over reactivity, attention-seeking behaviour, seductive self-dramatization, immaturity, self-centredness, vanity, and dependence on others.¹⁸ The concept of a hysterical personality type has been controversial, with one critic suggesting it was nothing more than a description medical professionals used to label “irritating female patients.”¹⁹

This brief summary of the literature review in the 2002 article illustrates the continuity across more than twenty centuries in the ways that hysteria has been reasoned and talked about, and displays the role of gender in the construction of hysteria through the centuries.

¹⁰ GS Rousseau, “A Strange Pathology: Hysteria in the Early Modern World, 1500–1800” in Sander L Gilman et al, eds, *Hysteria Beyond Freud* (Berkeley: University of California Press, 1993) 91 at 142–74.

¹¹ Slavney, *supra* note 8 at 34–35.

¹² Gerald L Klerman, “Hysteria and Depression,” in Alec Roy, ed, *Hysteria* (Chichester: John Wiley & Sons, 1982) 211 at 213.

¹³ See e.g. Roy Porter, “The Body and the Mind, The Doctor and the Patient” in Sander L Gilman et al, eds, *Hysteria Beyond Freud* (Berkeley: University of California Press, 1993) 225 at 227; Augustus W Thornton, *Hysterical Women: Their Trials, Tears, Tricks and Tantrums* (Chicago: Donohue & Hennebury, 1893).

¹⁴ Elaine Showalter, “Hysteria, Feminism, and Gender” in Sander L Gilman et al, eds, *Hysteria Beyond Freud*, (Berkeley: University of California Press, 1993) 286 at 321–22.

¹⁵ Talcott Parsons, *Social Structure and Personality* (New York: Free Press of Glencoe, 1964) at 274–75; Talcott Parsons, *The Social System* (New York: Free Press of Glencoe, 1951) at 436–37.

¹⁶ RE Kendall, “A New Look at Hysteria” in Alec Roy, ed, *Hysteria* (Chichester: John Wiley & Sons, 1982) 27 at 33 [Kendall].

¹⁷ Slavney, *supra* note 8 at 41, 55.

¹⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed (Washington: American Psychiatric Association, 1980) at 313–14 [DSM-III]. See also Kendall, *supra* note 16 at 28.

¹⁹ King, *supra* note 7 at 10–11.

While hysteria is said to have disappeared in the twentieth century,²⁰ and the word itself has vanished from official diagnostic use,²¹ the use of hysteria in Canadian courtrooms since 2002 indicates that “[n]o term so vilified is yet so popular; none so near extinction appears in better health.”²²

B. Theory

Metaphors are fundamentally about conceptualizing some type of thing as some other type of thing—a kind of analogizing.²³ In cognitive theory, metaphor refers to mappings between cognitive domains where part of the structure of one domain (the “source domain”) is projected on to another domain (the “target domain”), and the inferences we draw from the source domain are projected onto the target domain. For example, consider a computer virus: “*viruses* are programs covertly *implant[ed]* in other programs”; “*infections* can *spread* from computer to computer”; and “files are *contaminated*.”²⁴ Concepts from the source domains of health, biology, and medicine—that viruses are present but unwanted, replicate, disrupt normal operations, and are harmful—are used to talk and reason about the target domains of computers and programming. We have these source domain features available to us in an integrated and elaborate network that fits and highlights certain aspects of one type of computer problem. The fit of this metaphoric mapping has been so good that we now talk and think about this type of computer problem not just as if harmful programs are *like* biological viruses; we also act upon those thoughts by creating options for dealing with those problems *as* viruses.

The most important points are that conceptual metaphors within their elaborate networks are used to reason, and, unless a metaphoric mapping is very new, our use of conceptual metaphors is usually unconscious.

²⁰ Veith, *supra* note 7 at viii; Sander L Gilman et al, eds, *Hysteria Beyond Freud* (Berkeley: University of California Press, 1993) at vii.

²¹ What had been labelled “conversion hysteria” in the 1968 second edition of the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 2nd ed (Washington: American Psychiatric Association, 1968)) became known as “conversion disorder” in the 1980 *DSM-III* (*supra* note 18), and the second edition’s “hysterical” personality type became the “histrionic” personality type in the third edition. These category labels remained in the revised third edition (*DSM-III-R*), which appeared in 1987 (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed, revised (Washington: American Psychiatric Association, 1987)), in the *DSM-IV*, which replaced it in 1994 (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed (Washington: American Psychiatric Association, 1994)), and in the replacement text revision, *DSM-IV-TR* (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, revised (American Psychiatric Association, 2000)).

²² Slavney, *supra* note 8 at 3. For recent studies, see e.g. Tasca et al, *supra* note 2; Cecily Devereux, “Hysteria, Feminism, and Gender Revisited: The Case of the Second Wave” (2014) 40:1 *Engl Stud in Canada* 19; Richard A Kanaan, “Freud’s Hysteria and Its Legacy” (2016) 139 *Handbook of Clinical Neurology* 37; Cecilia Maria Esposito & Giovanni Stanghellini, “The Power of Images: Hysterical Symptoms as Representations of the Self” (2024) 36:6 *Intl Rev Psychiatry* 647.

²³ George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) at 5.

²⁴ Gilles Fauconnier, *Mappings in Thought and Language* (Cambridge: Cambridge University Press, 1997) at 18.

My analysis of the conceptual metaphors used to talk and think about hysteria revealed metaphoric networks that are widespread and relatively stable in English Canadian culture. Those metaphoric networks included the “divided selves” (e.g., our struggle to gain control over ourselves, which is a struggle between our rational Subject and our emotional Self);²⁵ the “states are locations” network favoured by the medical profession (e.g., being on the *verge* of hysteria);²⁶ and the “attributes are possessions” network favoured by lay witnesses (e.g., a personality disorder *remains with* the patient).²⁷

The paradigm of rational hysteria is constructed from an idea basic to our concept of emotions—that is, the conceptual metaphor that emotional impacts are physical attacks. When I examined the pre-2002 case, I found that credibility and reliability assessments tended to depend on whether a person followed or deviated from a stock story (i.e., a master narrative or paradigm).²⁸ In this stock story, hysteria is presented as a series of rational, expected, and reliable reactions to stressful events or emotional blows.²⁹

Put briefly, the stock story of rational hysteria concedes that all of us can be—and sometimes should be—overcome by strong emotions triggered by traumatic events. But, although temporarily overcome, we can and should battle our strong emotions head on and quickly conquer them. Individuals who conform to the stock story of rational hysteria are seen as purposive agents with legitimate aspirations. The hero of the rational hysteria stock story is the knight riding through the woods who is suddenly attacked by a highwayman or the sheriff leading a posse through a coulee who is ambushed by outlaws. The valiant knight or stalwart sheriff may initially struggle to beat back their foes, but they are soon victorious. The enemy is vanquished, and the world is set right.

Our use of the stock story of rational hysteria is usually unconscious, which means that a great deal of the testimony in court and the findings of fact and inferences drawn are not based on rational argument, or any argument at all. They are based on the taken-for-granted, so-called common sense and “what everyone knows.”³⁰

Deviations from the stock story of rational hysteria elicit judgments that the individuals, by diverging from our settled expectations about how they should behave, are irrational. Their behaviour and testimony are looked upon with suspicion.

The paradigm of rational hysteria can be deviated from in two different ways. In the first, hysteria is seen as irrational if it was not caused by traumatic-enough events, or if the hysterical individual did not triumph quickly (or at all), or if they did not face their foe directly. Those whose story did not match the paradigm were judged to be irrational, their inherent nature

²⁵ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 175, 181–84.

²⁶ *Ibid* at 176–77, 180.

²⁷ *Ibid* at 178–79.

²⁸ *Ibid* at 184–90.

²⁹ For examples from the post-2002 cases, see e.g. *R v KK*, 2003 SKQB 241 (the accused’s “genuine state of panic verging on hysteria” at para 15, was not surprising and it was “unlikely she invented the many details” at para 74(b)); *R v Murphy*, 2015 YKSC 30 (the witness “said she was hysterical at that time. And wouldn’t she be?” at para 37); *R v JMS*, 2022 SKPC 11 (“[a]s soon as they were alone, she said the complainant was emotional to the point of hysteria” at para 65).

³⁰ Watson Hamilton, “The Use of Metaphor”, *supra* note 1 at 157.

weak, and their claims illegitimate. This was the most common type of irrational hysteria seen in the cases, both pre-2002 and post-2002.

In the second, rarer deviation from the stock story, traumatic events do not cause hysteria when hysteria is the expected reaction. There were a few examples of this type of “irrational non-hysteria” in the post-2002 cases. In one appeal from a conviction for criminal negligence causing death, the appellant was described by a witness, who was a healthcare professional, as “not hysterical” when she brought her non-responsive baby to the emergency room. The witness testified that other mothers in similar situations would have been in a hysterical state, and the witness thought it was unusual the appellant was not in hysterics, even though she was crying and upset.³¹ The appellant’s testimony had been found to be not credible at the trial level.

C. Methodology

In researching the 2002 article, I searched the Quicklaw Canadian Judgments database in July 2001 and again in May 2002, using the search term “hysteri!”³² In May 2002, that query retrieved 1,253 unique cases. Such a query does not pick up cases where synonyms or other medical labels—such as conversion disorder, histrionic personality type, disassociation, or hypochondria—have been used exclusively, which is a limitation of the research. However, given the history of the use of the “hysteria” label, I was focused on the type of behaviour that attracted that label regardless of the type of legal action involved, who did the labelling, or for what purpose.

The July 2001 query retrieved 116 cases in English where “hysteri!” was found more than once. The May 2002 query retrieved 128 cases in English where the same search term appeared more than once—the 116 cases previously retrieved and twelve new judgments.³³ Of the 128 cases analyzed, 62 per cent were decided in 1990 or later. Almost 90 per cent were decided after 1980. The oldest of the fourteen cases decided before 1980 was from the 1940s.

I excluded cases in which the search term was found only once because a lone “hysteri!” was rarely used to describe a person directly involved in the case, such as a party, a witness, or a child in a child custody case. When “hysteri!” was used only once, it would typically appear in a quote from another case or was said about someone not appearing in court, such as a bystander to a car accident.

I excluded cases with judgments written in French because the then prevailing thought was that the conceptual systems and cognitive structures of languages or language families were fundamentally different.³⁴ More recent research appears to have confirmed that conclusion.³⁵

³¹ *R v Schoenthal*, 2007 SKCA 80 at para 234.

³² That query generated twelve different words: hysteria, hysterical, hysterical, hysterical, hysterically, hysterica [sic], hysterics, hysterical, hysterie, hysterique, hysteriquement, and hysteriques.

³³ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 168.

³⁴ See Benjamin Lee Whorf, *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf*, ed by John B Carroll (Cambridge: The Technology Press of Massachusetts Institute of Technology, 1956).

³⁵ Over the past twenty years, there has been an increase in the number of cross-cultural studies of the use of conceptual metaphors, and a common conclusion appears to be that different modes of thinking and different cultures are why different cognitive metaphors are seen in different languages (see e.g. Zoltán Kövecses, “Metaphor, Language, and Culture” (2010) 26 DELTA 739; Maisarah M Almirabi, “When

The 128 cases in English in which “hysteri!” appeared more than once were divided into different categories to provide context for the discourse analysis. It is this categorization exercise that is being repurposed in this article.

First, cases were assigned to categories based on the type of case: personal injury, criminal, or family law.³⁶ The criminal cases were then divided between those where the person labelled was the victim of a crime (usually a sexual assault) or a person accused of a crime (typically someone claiming they were not criminally responsible or advancing a defence of non-insane automatism).

Second, cases were categorized by who did the labelling.³⁷ Lay witnesses, healthcare professionals, and police officers did most of the labelling. There were also some people labelling themselves, usually the accused in a criminal case. There were only two cases in which the judge introduced the hysteria label themselves, rather than simply using it while quoting a witness.

Third, cases were divided by whether those labelled were male or female.³⁸ Gender was determined based on judges’ descriptions of individuals as “male” or “female,” the pronouns judges used, and other ways in which gender was indicated, such as by a relationship to others involved in the case (e.g., as a “mother” in a custody case). Names were not relied upon. There were only three cases in which it was not possible to determine the gender of the individual labelled as hysterical. The type of case that each gendered individual was involved in was also noted.

The male and female categories were also divided into children and adults where that information was available, as it was in the family law cases. In the post-2002 cases, an attempt was made to note other aspects of identity in addition to gender and age, as had been done to a limited extent in the earlier research.³⁹ However, remarkably few post-2002 cases described parties by their education level, their place of birth, their employment, their race, or their Indigenous status—all aspects of identity noted in the pre-2002 cases—and so that attempt was abandoned.⁴⁰

Metaphors Cross Cultures” (2015) 6:1 J Language Teaching & Research 204; Hassan Banaruee et al, “Metaphors Across Cultures” (2024) 60:2 Poznan Stud Contemp Linguistics 133). A researcher would need to be proficiently bilingual and bicultural to apply cognitive theories of conceptual metaphors in both English and French, particularly as English is a member of the Germanic language family and French is part of the Romance language group (see Hassan Banaruee et al at 224–226). Although I may have been able to do this fifty years ago, I am no longer qualified.

³⁶ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 169.

³⁷ *Ibid.*

³⁸ I recognize that gender is not a male/female binary, but Canadian courts describe people as male or female. Of the 463 individuals labelled as hysterical in the 2002–2022 cases, only five were identified as gay, lesbian, or non-gender conforming.

³⁹ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 171–72.

⁴⁰ Most other aspects of the identity of those labelled hysterical were not discussed in the cases, whether before or after 2002. For example, in the 438 cases in the 2002–2022 period, only 28 (6 per cent) of the individuals labelled as hysterical were racialized. These percentages are well below Canadian share-of-population percentages. The 2021 census indicated that 7.1 per cent of Canadians identified as South Asian, 4.7 per cent as Chinese, and 4.3 per cent as Black (see Statistics Canada, *Census Profile, 2021 Census of Population*, Catalogue No 98-316-X2021001 (Ottawa: Statistics Canada, 15 November 2023)).

Finally, the impact of labelling was assessed by whether the person labelled was found to be both a credible and reliable witness. It was not unusual for people labelled hysterical to be found to be credible but not reliable.⁴¹ If testimony needed to be corroborated before it was considered credible or reliable or both, that testimony was categorized as discreditable or unreliable or both.

III METHODOLOGY

In order to update the data in the 2002 research, the post-2002 searches, categorizations, and analyses were duplicated as much as possible. The post-2002 case limitations (to cases in English⁴² and cases where “hysteri!” was used more than once) were adopted for the updated research.

The limitations built into relying on published court decisions were also reproduced. The Quicklaw Canadian Judgments database no longer exists, as LexisNexis acquired Quicklaw in July 2002.⁴³ The equivalent today of a search in the Canadian Judgments database is a Lexis+ Canada search confined to the fields of “CAN jurisdiction” and “Cases.”⁴⁴

A search for “hysteri!” in the Lexis+ Canada database confined to Canadian cases decided between May 1, 2002, and April 30, 2021, turned up 1,586 unique cases. This is not substantially more than the 1,253 cases retrieved in the May 2002 search, which was focused primarily on cases from the 1980s and 1990s. However, when cases were limited to those where the search term appeared more than once, the pre-2002 results had been reduced to 128 cases (about 10 per cent), whereas post-2002 cases were reduced to 438 (about 28 per cent).⁴⁵ As another limitation, it is important to remember that the 2002 data (and inferences drawn based on that data) were built on only one-third as many cases as those underlying the post-2002 results.

My research assistants and I then read the 438 cases and categorized the same elements of each as had been categorized for the pre-2002 cases, if applicable: type of case, who did the labelling (lay witnesses, healthcare professionals, police officers, the accused or the victim of a crime, or the judge), whether those who were labelled were male or female and children or adults, and whether the person labelled was found to be both credible and reliable.

⁴¹ *R v TT*, 2020 ONCJ 368, Justice Harris: “Credibility relates to a witness’s sincerity, whether he is speaking the truth as he believes it to be. Reliability relates to the actual accuracy of his testimony” (at para 12); *R v HC*, 2009 ONCA 56, Justice Watt: “A credible witness may give unreliable evidence” (at para 41).

⁴² Because the criteria were decisions written in English, seventeen cases from Quebec were included.

⁴³ Lexpert Business of Law, “LexisNexis Butterworths Canada Acquires Quicklaw” (1 September 2002), online: <lexpert.ca/big-deals/lexisnexis-butterworths-canada-acquires-quicklaw/343383>.

⁴⁴ The Lexis+ Canada database appears to be much larger than the Quicklaw Canadian Judgments database because, not only is every case reported by Canadian legal publishers since 1970 included, but so are the pre-1970 cases that are cited in the post-1970 decisions (see LexisNexis, “Practice Area: Commercial Law” (last visited 18 May 2026), online: <lexisnexis.com/en-ca/content/commercial-law> [perma.cc/PB4X-CFW2]).

⁴⁵ I am unsure of how to account for this difference in the percentage of relevant cases retrieved. My guess—and it is just a guess—is that judges are writing longer judgments thanks to technical advances. Many of the post-2002 cases used the search term in the judges’ summaries of witnesses’ testimony and then again when giving reasons for their findings. This repetition was especially noticeable in criminal and family law cases, which together accounted for 87.5 per cent of the cases.

IV COMPARING THE RESULTS

In the earlier research, the individuals labelled hysterical were primarily found in four different legal contexts. They were those involved in personal injury actions, those who were victims of crime, those who were accused of crimes, and those entangled in child custody disputes, in both the family law and child protection contexts.⁴⁶ Instances of the use of the label were fairly evenly distributed among these four categories in the pre-2002 cases, with victims of crime making up 30 per cent of the 128 cases and those accused of crime making up 18 per cent of the total.

In the 438 cases reported between 2002 and 2022, the number of personal injury cases had decreased slightly, from thirty-three to twenty-nine cases, but as a percentage of total cases they dropped from 28.5 per cent to 6.5 per cent. This may be partly because of the rise of no-fault insurance and the increased use of alternative dispute resolution methods for personal injury claims.⁴⁷ The percentage of child custody cases also fell as a percentage of total cases, from 24 of 128 (20.5 per cent) to 62 of 438 (14 per cent). In contrast, the number and proportion of cases in the crime victims and accused categories increased dramatically, the former from 35 of 128 (30 per cent) to 196 of 438 (45 per cent), and the latter from 18 (15.5 per cent) to 96 (22 per cent). In addition, the number of third-party witnesses to crimes who were labelled as hysterical increased enough to make up a new category of 28 cases (6.5 per cent). This left 6 per cent of the cases in a miscellaneous category. Overall, while 45.5 per cent of all the cases making use of the hysteria label before 2002 were criminal law cases, that percentage rose to 73.5 per cent in the 2002–2022 cases.

Figures 1 and 2 display these differences between the two time periods.

Figure 1: Percentage of Cases
by Type: Pre-2002

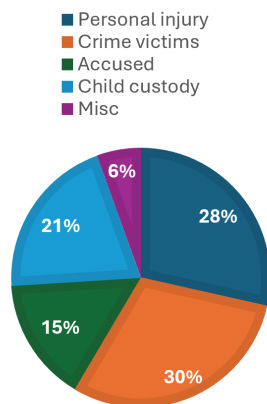
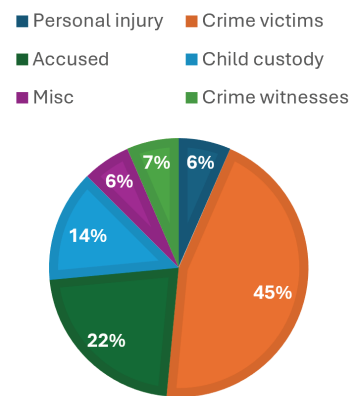


Figure 2: Percentage of Cases
by Type: 2002–2022



⁴⁶ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 169.

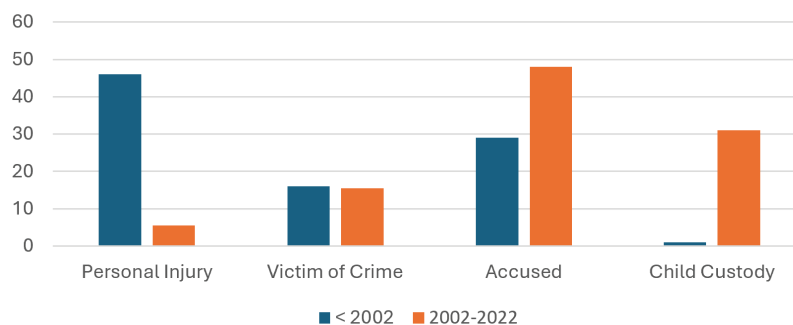
⁴⁷ Most notably, Ontario introduced a partial no-fault system in 1990, an entirely no-fault system in 1994, and returned to the partial no-fault system in 1996 (see Craig Brown, “No-Fault Automobile Insurance in Ontario: A Long and Complicated Story” (1998) 66:3 *Assurances* 399). Ontario and Alberta require mediation, and alternative methods of resolving disputes have increased in popularity due to problems with accessing courts (see Kairos Anggadol, “Personal Injury Lawsuits in Canada: What You Need to Know,” *Canadian Lawyer* (6 July 2023), online: <canadianlawyermag.com/practice-areas/personal-injury/personal-injury-lawsuits-in-canada-what-you-need-to-know/377636>).

I also looked at the gender of those labelled hysterical by lay witnesses, the accused or complainant, health care professionals, police officers, judges, or others in each type of case. Two things stayed the same. First, 80 per cent of all of those labelled hysterical in both the pre-2002 and the 2002–2022 cases were female. This was disappointing, but not a surprise. It was disappointing, particularly in the context of sexual assault victims, because Justice L’Heureux-Dubé’s oft-quoted warning in *R v Seaboyer*; *R v Gayme* about the myth of the “emotionality of females” that prevailed in sexual assault cases was delivered in 1991.⁴⁸ However, as will be discussed later in this part of the article, it is primarily non-lawyers—plaintiffs and defendants, victims and those accused of committing crimes, and other witnesses—who labelled people as hysterical in both the pre-2002 and post-2002 cases. Its enduring popularity with those not legally trained suggests that both the rational and irrational stock stories continue their gendered hold on “what everyone knows” and “common sense.”

Second, the proportion of adults and minors remained the same for both male and female individuals labelled hysterical. Of the 20 per cent of males so labelled, about one-third were minors in both time periods. As I noted in the 2002 article, those who are called hysterical are often thought of as child-like because of their limited rationality.⁴⁹ Labelling male children as hysterical is therefore not as dismissive of their cognitive abilities or reliability as is the labelling of adult males.⁵⁰ Of the females so labelled, only about one-fifth were minors in both time periods. To sum up the data on gender and age in both studies, almost two-thirds (64 per cent) of all of those called hysterical in courtrooms were women—not men, boys, or girls.

There were two major differences between the two time periods in the contexts in which males were labelled hysterical, as illustrated in Figure 3. Of all of the men and boys labelled hysterical, seven of twenty-four (29 per cent) were in the accused category in the pre-2002 cases, and that percentage rose to 48 per cent in the 2002–2022 cases. There was also a large increase in the child custody category—from two of twenty-four (1 per cent) to twenty-eight of ninety (31 per cent) of males labelled hysterical—where almost three-quarters of the males said to be hysterical were minors.

Figure 3: Type of Case Where Males Were Labelled
(by percentage of males labelled)

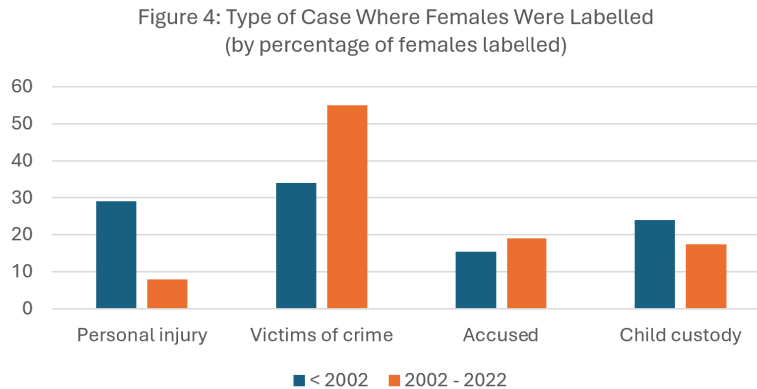


⁴⁸ *Seaboyer*, *supra* note 5. Justice L’Heureux-Dubé explained the myth of the emotionality of females as follows: “The expectation is that if a woman is raped, she will get hysterical during the event and she will be visibly upset afterward. If she is able to ‘retain her cool,’ then people assume that ‘nothing happened’” (at 653). This quotation is an example of the “rational” hysteria stock story. Rape myths and misconceptions about sexual violence persist; see Orchowski, *supra* note 3.

⁴⁹ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 171.

⁵⁰ *Ibid.*

In the much larger number and percentage of women and girls labelled hysterical, we see the same decrease in personal injury cases as a percentage of total cases as was the case for males, but no similar large increases in the accused or child custody categories. The proportion of minors to adults in the child custody category for females was only 44.5 per cent, a much smaller proportion than for males. Adult women were much more likely to be the ones labelled as hysterical in child custody cases than were adult men: 75 per cent of those labelled in this context were adult women. The most significant increase in female numbers and proportions was in the victims of crime context, which rose from 34 per cent of all cases to 55 per cent. Figure 4 illustrates some of these findings.



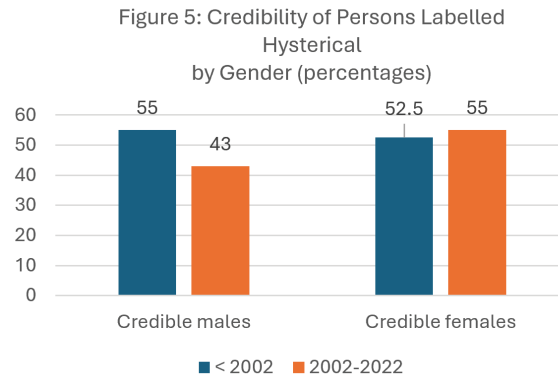
I also specifically examined the gendered percentages involved in sexual assault cases in the crime victim category.⁵¹ Only 18 per cent of the very small number of male victims of crime who were labelled hysterical in both the pre-2002 and the 2002–2022 cases were victims of sexual assaults.⁵² In the cases before 2002, 74 per cent of the female victims of crime were victims of sexual assaults, but that percentage dropped to 60 per cent in the 2002–2022 cases.

There was no significant change in the proportion of females found to be credible and reliable in the 2002–2022 time period in the 438 cases. The percentage of credible and reliable witnesses who were female in the pre-2002 cases was very similar to the percentage who were credible and reliable in the 2002–2022 cases: 52.5 per cent and 55 per cent, respectively.

In terms of gender and credibility, the only major difference between the two time periods was in the courts' assessment of males labelled hysterical, as indicated in Figure 5. While 55 per cent of males labelled hysterical were found to be credible and reliable pre-2002, in the 2002–2022 cases only 43 per cent of the males were.

⁵¹ A sexual assault case was defined for this research as a case that included a charge of sexual interference, sexual assault, sexual assault causing bodily harm, or sexual assault with a weapon.

⁵² In Canada, between 2009 and 2014, 87 per cent of victims of sexual assaults were female, particularly young women and girls, and one in four victims were children aged 13 and younger (see Statistics Canada, *Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, October 2017) at 3). In the pre-2002 cases, there were only 11 male victims of crime labelled hysterical, and only two of them were victims of sexual assaults. In the 2002–2022 data, there were only 10 male victims of crime labelled hysterical, and only six of them were male victims of sexual assault, with four of them being minors. The percentages were the same and the numbers stayed small.



The substantial decrease in the proportion of female victims labelled hysterical in sexual assault cases as compared to all criminal cases and the slight increase in the number of female witnesses found to be credible in all types of cases appears to be good news. However, a closer look at the 2002–2022 cases in some of the categories—those contexts that have a history of being sites of inequality for women and girls—tells a different story.

First, looking at only female victims of crime, I found that 69 per cent of those labelled hysterical were assessed as credible and reliable in the 2002–2022 period.⁵³ Narrowing that category further to consider only female victims of sexual assault crimes, 67 per cent of those labelled hysterical were found to be credible and reliable. Of those who were minors at the time of the sexual assault in the 2002–2022 cases, 69 per cent were credible and reliable witnesses. Considering the winnowing process that occurs between a sexual assault, reporting, charging, and trial,⁵⁴ the fact that the testimony of 33 per cent of all female victims was not believed is a high percentage.

The other category with concerning findings in 2002–2022 was the category of child custody cases, which included forty-five cases in the family law context involving fifty-six individuals labelled hysterical, and seventeen child protection cases involving twenty labelled individuals.⁵⁵ Both of these categories of cases were highly gendered. Of the fifty-six individuals in the family law context labelled hysterical, thirty (53.5 per cent) were children, twenty (36 per cent) were mothers, and six (10 per cent) were fathers. Labelling parents—most frequently

⁵³. As noted in the methodology section in Part II, witnesses whose testimony was accepted only if it was supported by other testimony or forensic evidence were categorized as neither credible nor reliable.

⁵⁴. Sexual assault is the most underreported violent crime in Canada, with a small percentage, perhaps only 5 per cent, of incidents reported by victims to police in 2014 (see Statistics Canada, *Self-Reported Sexual Assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, July 2017) at 17). The rate of police-reported sexual assaults did increase 38 per cent between 2017 and 2022 (see Statistics Canada, *Recent Trends in Police-Reported Clearance Status of Sexual Assault and Other Violent Crime in Canada, 2017 to 2022*, by Shana Conroy, Catalogue No 85-002-X (Ottawa: Statistics Canada, April 2024) at 3). When compared with physical assaults between 2009 and 2014, sexual assaults were far more prone to disappear from the criminal justice system between reporting to the police and court: 75 per cent of physical assaults proceeded to court after charges were laid, but only 49 per cent of sexual assaults did (see Statistics Canada, *From Arrest to Conviction: Court Outcomes of Police-Reported Sexual Assaults in Canada: 2009 to 2014*, by Christine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, October 2017) at 3).

⁵⁵. There are more individuals than cases because in some cases both a parent and one or more children were labelled hysterical.

mothers—as hysterical is often done to attack their credibility and their capacity to be a good parent and appears to be a common phenomenon in what are often referred to as “high conflict” custody cases.⁵⁶ This finding tracks with the research conducted by Suzanne Zaccour on the use of gendered mental health labels in custody cases.⁵⁷ A significant percentage of the 2002–2022 cases were seen as high conflict. Of the custody contests in the forty-five family law cases, sixteen (35 per cent) involved allegations or findings of family violence⁵⁸—another finding that supports Zaccour’s results⁵⁹—thirteen (29 per cent) involved allegations or findings of parental alienation,⁶⁰ and five (11 per cent) included both of these allegations.

The child protection context, although involving relatively few cases, revealed very different percentages for the labelling of children and their mothers. Thirteen (65 per cent) of those described as hysterical were mothers, one was a grandmother, five (25 per cent) were children, and only one was a father. As almost all of these cases involved the contested temporary or permanent loss of custody of children by a mother—and not loss by a father or return of a child to their mother’s custody—these too are gendered cases. Eighty-three per cent of the mothers labelled hysterical in this context were found to be not credible.

Indeed, in both types of child custody cases, the proportion of females labelled hysterical who were found to be not credible witnesses (55 per cent) was greater than those found to be credible (45 per cent). This is significantly higher than the results in Zaccour’s study, where 25 of 120 custody cases (21 per cent) saw mothers discredited by the use of mental illness labels such as “crazy,” “hysterical,” “insane” or “emotionally unstable.”⁶¹ Nevertheless, the credibility of women and girls in the post-2002 cases was significantly better than that of the males labelled hysterical in this context, as only 27 per cent of males were found to be credible witnesses. This percentage suggests that describing male witnesses in child custody cases as hysterical did more damage to their credibility than in other contexts. However, it must be noted that in two-thirds of the cases of adult males being accused of acting hysterically, it was

⁵⁶ The term “high conflict” has been critiqued for often masking family violence (see Jennifer Koshan, “Challenging Myths and Stereotypes in Domestic Violence Cases” (2023) 35:1 Can J Fam L 33 at 52 [Koshan]).

⁵⁷ Zaccour, *supra* note 3.

⁵⁸ See Mass Casualty Commission, *Turning the Tide Together: Final Report of the Mass Casualty Commission*, vol 3 (Ottawa: Public Works and Government Services Canada, 2023) at 7–11, comparing different terms used to discuss violent behaviour and its consequences in the family law context. I use the term “family violence”—meaning “any form of abuse, mistreatment, or neglect that a child or adult experiences from a family member or from someone with whom they have an intimate relationship”: *ibid* at 9—rather than “intimate partner violence” because some of the victims of violence were children or stepchildren of the perpetrators of violence, not partners.

⁵⁹ Zaccour, *supra* note 3 at 73.

⁶⁰ Previous Canadian studies have found that allegations and findings of parental alienation are gendered, see e.g. Linda C Neilson, *Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?* (Vancouver: FREDA Centre for Research on Violence Against Women and Children, 2018) at 11; Elizabeth Sheehy & Susan B Boyd, “Penalizing Women’s Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases” (2020) 42:1 J Soc Welfare & Fam L 80 at 81–82; *cf* Barbara Jo Fidler & Nicholas Bala, “Concepts, Controversies and Conundrums of ‘Alienation’: Lessons Learned in a Decade and Reflections on Challenges Ahead” (2020) 58:2 Fam Ct Rev 576.

⁶¹ Zaccour, *supra* note 3 at 69–70. On credibility in cases with claims of parental alienation, Nicholas Bala’s work found that fathers made three times as many unsubstantiated claims as did mothers (see Nicholas Bala, Suzanne Hunt & Carolyn McCarney, “Parental Alienation: Canadian Court Cases 1989–2008” (2010) 48:1 Fam Ct Rev 164 at 168).

a medical professional who did the labelling,⁶² and it was done as part of a diagnosis of a histrionic personality disorder.⁶³

What also needs to be emphasized when discussing the credibility and gender of those labelled in the child custody cases is the age of those labelled. In most instances where a minor was labelled hysterical—thirty cases—there was no finding of credibility. When findings were made, 29 per cent of the credible female witnesses labelled hysterical were minors, as were 19 per cent of the female witnesses who were not credible. All of the male witnesses found to be credible were minors, as were 55 per cent of those found not to be credible. If minors are excluded, this is a story about women being hysterical in court cases involving their children.

These dismal credibility results, where more of the witnesses are disbelieved than believed, are even more marked in the child protection context, as illustrated in Figures 6 and 7.

Figure 6: Credibility of Persons Labelled Hysterical in Both Types of Child Custody Cases, by Gender, 2002–2022 (percentages)

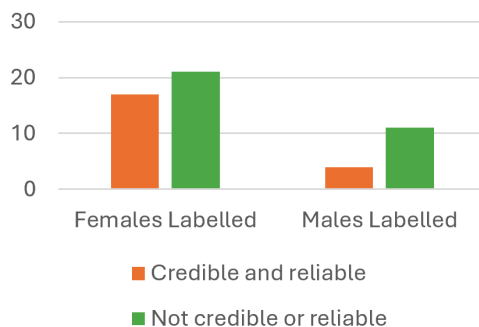
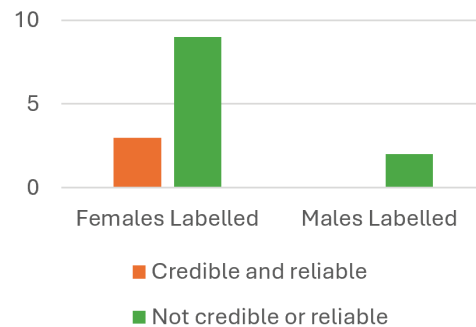


Figure 7: Credibility of Persons Labelled Hysterical in Child Protection Cases by Gender, 2002–2022 (percentages)



As can be seen in Figure 7, only two of the twelve women (eleven mothers and one grandmother) were found to be credible and reliable witnesses in the child protection context. Neither of the two men (fathers) were considered credible. These numbers are too small to make much of, but they do suggest that the child welfare context is unique.⁶⁴

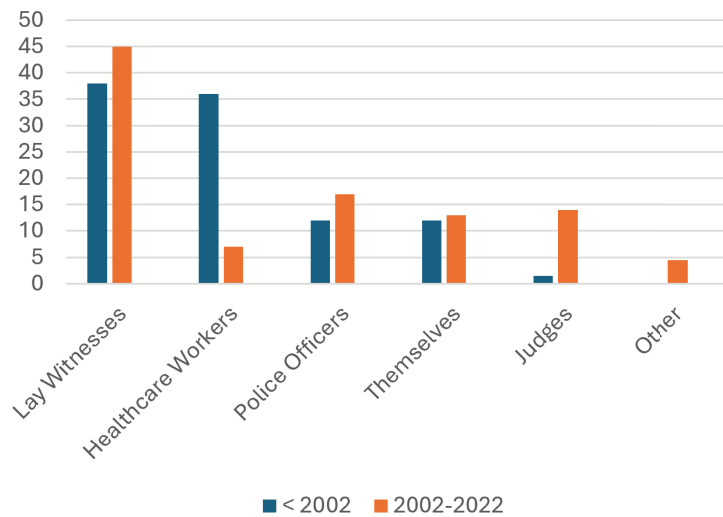
The last element that I compared focused on who did the labelling. Figure 8 compares the pre-2002 cases with the 2002–2022 cases in the frequency of labelling by lay witnesses (which here included the parties in the cases, such as mothers and fathers in child custody cases and the accused and the victim in criminal cases), healthcare professionals, police officers, individuals who labelled themselves, judges, and a few miscellaneous others.

⁶² A medical diagnosis was only made in the case of one adult female in the child custody context, and in that case the diagnosis of transitory hysterical psychosis was made by a doctor who had never met the mother and whose report was not allowed into evidence (see *Veneris v Koh Veneris*, 2018 ONSC 4164 at paras 18–20).

⁶³ A histrionic personality disorder was described as “a pervasive pattern of excessive emotionality attention seeking” (see *Jenkins v Jenkins*, 2010 ONSC 6 at para 93).

⁶⁴ See e.g. Nico Trocmé et al, “Urgent Protection versus Chronic Need: Clarifying the Dual Mandate of Child Welfare Services across Canada” (2014) 3:3 J Soc Sciences 483; Barbara Fallon et al, “The More We Change the More We Stay the Same: Canadian Child Welfare Systems’ Response to Child Well-Being” (2023) 137 J Child Abuse & Neglect 106031.

Figure 8: Who Did the Labelling (percentages)



The most notable difference is the decrease in use of the hysteria label by healthcare professionals from 36 per cent to 7 per cent. The most likely reasons for this decrease include the smaller number of personal injury cases and the change in diagnostic labels from “conversion hysteria” to “conversion disorder” and from “hysterical personality type” to “histrionic personality type” (discussed in Part II). Only 40 per cent of the cases involved a diagnosis preceding the labelling, with most of those in the child custody cases.

The increase in the use of the hysteria label by judges from 2 of 128 (1.5 per cent) to 56 of 404 (14 per cent) of those doing the labelling is also notable—and disappointing. Not included in the count of labelling by judges in Figure 8 are the times that judges adopted, repeated, or reported the labelling done by a witness. Of the instances when the judges were the only one to apply the label, 30 per cent were based on the judges listening to or watching an audio or video recording of a child.

Of course, there are examples of judges pushing back against the use of a hysteria label by a testifying witness.⁶⁵ One of the best examples involved a charge under a municipal noise bylaw that was laid against a woman who participated in a demonstration in Montreal:

In his testimony, Officer Peixe described the defendant as “*hystérique*” (hysterical). This unfortunate choice of word should be considered with great caution. The word “hysterical” is derogatory and suggests that a person is out of control. Its etymology shows that it comes from the Greek word for *uterus* and was used for decades to describe a mental disorder allegedly suffered by women which today is no longer even recognized by scientific literature in medicine or psychology. The word continues to be accepted by dictionaries in a broader sense, but, more often than not, it is used in a derogatory manner

⁶⁵ See e.g. *R v Billyboy*, 2016 BCPC 405 (judge including the police labelling of the complainant in an assault case as part of a “somewhat troubling absence of investigatory vigilance in this case” at para 54); *R v Contreras Ramirez*, 2016 BCPC 475 (judge very careful not to use the language of hysteria when summarizing the testimony of the accused and the police, both of whom labelled as hysterical a complainant in a sexual assault case who was found to be credible).

to describe a woman. Far too often, shouting men are described as loud, and shouting women are dismissed as hysterical. Officer Peixe did not use this word in his description of events in his abridged offence report written in 2012, but he added it on during his testimony in 2015. For all of these reasons, I will not give any weight to this part of Officer Peixe's description.⁶⁶

Overall, it is worth noting that lay witnesses' use of the label hysteria increased from 38 per cent to 45 per cent of all uses. Almost half the labellers are accused individuals talking about their victims or other witnesses to their crimes, witnesses to crimes talking about the victims of crime or the accused, and parents talking about each other or their children.

Two other differences are also worth pointing out. First, of the lay witnesses doing the labelling in the post-2002 cases, 36 of 182 instances (16 per cent) involved the accused labelling the crime victim. Only once did a crime victim label the accused as hysterical. Within the category of people labelling themselves, it was mostly the accused who did so in the cases that pre-dated 2002. This changed dramatically in the 2002–2022 cases, where 80 per cent of those labelling themselves were either the victims of crime or, much less frequently, the plaintiffs in personal injury actions. These self-labellings by victims and injured plaintiffs are examples of individuals recognizing, perhaps unconsciously, that the first chapter in the stock story of rational hysteria requires them to be overcome by strong emotions triggered by traumatic events.

V HYSTERICAL CHILDREN IN CHILD CUSTODY CASES

Recall that of the fifty-six individuals labelled as hysterical in the forty-five family law cases with parenting issues, thirty (53.5 per cent) were children.⁶⁷ In this section, I look more closely at the labels of hysteria that targeted children, in part because work has already been done on the labelling of mothers in child custody contexts.⁶⁸ However, my primary reason for this focus is that children are *not* characters in the stock story of rational hysteria. They can certainly be overcome by strong emotions, but they are not expected to immediately resist those emotions and quickly conquer them.⁶⁹

Sometimes children are merely labelled as hysterical in much the same way they would be described as “upset” or “emotional,” particularly by lay witnesses who are usually their parent or another relative. However, more commonly, the role that a child labelled as hysterical by one

⁶⁶. *Montreal (City of) c Nelson*, 2015 QCCM 146 at para 82.

⁶⁷. This overrepresentation of children was not seen in the child protection context, where only five of the seventeen individuals labelled hysterical were children (29 per cent).

⁶⁸. For an analysis of 120 cases involving the gendered use of mental health labels that were rendered by Canadian courts between 2000 and 2016, see Zaccour, *supra* note 3. My searches for “hysteri!” turned up only four cases after 2016 where mothers were labelled hysterical, and there is nothing in those few cases that adds anything new to Zaccour's analysis. See also Judith Mosoff, “A Jury Dressed in Medical White and Judicial Black: Mothers with Mental Health Histories in Child Welfare and Custody” in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 227; Odelia Bay, “In the Matter of the Female Mind: An Analysis of the Supreme Court of Canada's Approach to Women and Mental Health” (2011) 3 Crit Disability Discourses 1.

⁶⁹. Expectations vary by the age of the child, but only two of the children in these cases were teenagers and almost half were only age four or five at the time of the hearing.

parent appears to play in the stock story of rational hysteria is that of a weapon used to attack the other parent.⁷⁰ The results of weaponizing children in parenting disputes are usually very damaging to the children, who are my focus in this part. For example, Justice Pazaratz in *KM v JR*, discussing the *Divorce Act* requirement that parents protect children from conflict related to court proceedings, stated: “This is a vitally important reminder that while parents in family court always say they are ‘fighting for the sake of the child’, the reality is that children often end up being *collateral damage*.”⁷¹ The judge’s solution in that case—or at least his attempt to put an end to the latest “*skirmish in an unending war*”⁷²—was to require the parents to arrange their access exchanges in a neutral setting so that they never interacted with each other in the presence of their child,⁷³ a version of a demilitarized zone between warring parties.

More significantly, the labelling of children as hysterical often played a role in the courts’ negative assessments of the credibility of the person who did the labelling—something not found in the other contexts. This was most evident in cases involving antagonistic access exchanges, a group of cases that made up 30 per cent of the total and involved 60 per cent of the children labelled hysterical. Sometimes a parent’s account of their child’s hysteria and its cause—usually the conduct of the other parent—was entirely discounted.⁷⁴

Twice as many mothers were found to be responsible for their children’s hysteria immediately before, during, or after access exchanges than fathers, with only one case attributing the impact on the child to both parents. In all but one case, the parent found to have caused the child’s hysteria lost their application and the other parent was granted all or most of what they asked for.⁷⁵

Out of the fourteen cases in which children were labelled hysterical in the context of access exchanges, nine included allegations of parental alienation, with seven alleging the mother was alienating the children from their father.⁷⁶ Six included allegations of family violence, all said

⁷⁰ Metaphors of war are prevalent in Anglo-American adversarial systems and are often encountered in family law cases. See Jonnette Watson Hamilton, “Metaphors of Lawyers’ Professionalism” (1995) 33:4 *Alta L Rev* 833 at 839–43; Leslie Bender, “A Lawyer’s Primer on Feminist Theory and Torts” (1988) 38:1/2 *J Leg Educ* 3 at 6.

⁷¹ *KM v JR*, 2022 ONSC 111 at paras 58–60 [*KM v JR*] (emphasis added), discussing the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 7.2. It is not clear which parent described the child as hysterical or if both did, but the judge did so several times after listening to audio recordings of exchanges: *ibid* at paras 186(d), 190, 203(a), 353(c), 353(e).

⁷² *Ibid* at para 406 (emphasis added).

⁷³ *Ibid* at para 455.

⁷⁴ See, e.g. *DR v EPR*, 2014 BCSC 2558 at paras 25, 118, 138; *KM v JR*, *ibid* (finding the mother “lied outright in a deliberate attempt to deceive the Court and advance her position in this litigation” at para 107); *WC v CE*, 2010 ONSC 3575 at para 46 [*WC v CE*] (noting that statements in affidavits filed by the mother later proved to be “false or misleading”); *GF v CM*, 2009 NSSC 159 at para 310 (concluding that if the mother continued her current conduct of “sabotaging access” she might lose unsupervised parenting time).

⁷⁵ In that one case, the lower court’s order that changed the location of access exchanges was the source of the problem (see *Welch v George*, 2011 SKCA 33 at para 9(3)).

⁷⁶ For cases of allegations of alienation against the mother, see *KM v JR*, *supra* note 71 at para 22; *WC v CE*, *supra* note 74 at para 60; *Jackson v Mayerle*, 2016 ONSC 72 at 628 [*Jackson v Mayerle*]; *REG v TWJG*, 2011 SKQB 269 at para 74 [*REG v TWJG*]; *AF v JW*, 2013 ONSC 4272 at para 2 [*AF v JW*]; *Scott v Lloyd*, 2014 ONCJ 639 [*Scott v Lloyd*]; *Smith v Smith*, 2015 ONSC 4046 at para 13. For cases

to have been perpetrated by the father.⁷⁷ In addition, four of those nine cases included both allegations of parental alienation against the mother and intimate partner violence against the father,⁷⁸ and one involved allegations of both types of behaviour by the father.⁷⁹ Children's hysteria thus has a strong link to parental alienation and family violence claims, both of which are highly gendered.

There were wide variations in the relationship between children's hysteria and the exchanges that allegedly triggered the hysteria. In some cases, a child seen as initially hysterical at the prospect of going with the other parent eventually went with them willingly.⁸⁰ If a parent was found to have been experiencing overwhelming emotions before a change in custody, some children were seen as responding in kind to begin with, but their hysteria was said to have disappeared once they were transferred to the other parent's care.⁸¹ In other instances, parenting exchanges were accompanied by children's prolonged or overpowering hysteria.⁸² However, changes in arrangements were not necessarily ordered as a result of the children's reactions.⁸³

In many of the exchange cases, courts directly addressed the harm done to children. In one case, the trial judge held that the child could not continue to be subjected "to the hysterical access exchanges, to this battle any further [because she] deserves stability, permanence and emotional security."⁸⁴ Most of these cases see mothers as primarily responsible for their children's hysteria. However, some children, especially those who were older, withdrew from both parents because of the emotional and psychological harm caused by their parents' conflict.⁸⁵

of allegations of alienation against the father, see *LAI v KBZ*, 2014 BCSC 652 at para 30 [*LAI v KBZ*]; *Zantinge v Abdulrahman*, 2022 ONSC 1159 at paras 6–8 [*Zantinge v Abdulrahman*]).

⁷⁷ See e.g. *KM v JR*, *supra* note 71; *WC v CE*, *supra* note 74; *OA v AMEV*, 2013 ONSC 5997; *LAI v KBZ*, *supra* note 76; *REG v TWJG*, *supra* note 76; *Jackson v Mayerle*, *supra* note 76.

⁷⁸ *KM v JR*, *supra* note 71; *WC v CE*, *supra* note 74; *REG v TWJG*, *supra* note 76.

⁷⁹ *LAI v KBZ*, *supra* note 76.

⁸⁰ See, e.g. *APV v JLR*, 2012 ONCJ 658 at para 65 [*APV v JLR*].

⁸¹ *MEL v PRH*, 2010 NBQB 436 at para 332 [*MEL v PRH*]; *DML v DBL*, 2016 BCSC 925 at para 202 [*DML v DBL*]; *KH v JT*, 2006 ABPC 364 at para 166; *Scott v Lloyd*, *supra* note 76 at paras 69, 169; *AVP v JLR*, *supra* note 80 at para 23.

⁸² See e.g. *KM v JR*, *supra* note 71 at paras 186(d), 355; *AF v JW*, *supra* note 76 at para 135; *Chomos v Hamilton*, 2016 ONSC 5208 at paras 67–71; *Zantinge v Abdulrahman*, *supra* note 76 at para 5.

⁸³ See e.g. *WC v CE*, *supra* note 74 at paras 106, 121; *LAI v KBZ*, *supra* note 76 at paras 32, 46; *Fraser v Logan*, 2012 ONSC 4087 at paras 9, 51.

⁸⁴ *APV v JLR*, *supra* note 80 at para 66 (the mother was found to be responsible for the child's hysteria: *ibid* at paras 33, 65). See also *AF v JW*, *supra* note 76 at para 132 (mother's attempts to alienate the children from their father held to be severe emotional abuse of the children); *JWM v JLM*, 2007 BCSC 1405 at paras 35, 40, 58 (custody transferred to father to safeguard the children's well-being); *MEL v PRH*, *supra* note 81 at paras 98, 111 (judge describing child as "emotionally crumbl[ing]" under the influence of his mother); *DML v DBL*, *supra* note 81 at paras 172, 207 (mother did not acknowledge the child was harmed by the rage she displayed against the father in front of the child but did seek out and received anger management counselling).

⁸⁵ See e.g. *Jensen v Mains*, 2007 BCSC 506 at paras 144, 167. The youngest of two children was labelled hysterical by the mother during the course of one access exchange: *ibid* at paras 86–88).

Overall, while there are a significant number of cases involving children being labelled hysterical, it is often the parents who suffer the consequences of labelling their children and being seen as causing their children's hysteria. Children are not characters in the stock story of rational hysteria, but their parents—and most often their mothers—are.

VI CONCLUSION

In 2002, I was asked to revise my conclusion in “The Use of Metaphor and Narrative to Construct Gendered Hysteria in the Courts.” It was said to be “too bleak” in its assessment of the ways in which the labelling of individuals as “hysterical” worked to inflict such harm in courtrooms. I did revise that conclusion to be as optimistic as I felt the case law warranted at that time. Part of what I concluded was that

the power of dominant norms such as the paradigm of rational hysteria is that they are invisible to those who fit them and therefore assume those norms are universal. When someone tells a story of irrational hysteria, the difference is assumed to be in the individual labelled hysterical; they are weak or deceitful. The difference is considered intrinsic to the person. That allows for an individualistic solution to a systemic problem, which is no solution at all. The inequality is not even recognized as inequality.⁸⁶

This update to the use of the label “hysteria” gives very little reason for optimism. Eighty per cent of all of those labelled hysterical both before and after 2002 were female; the percentage remained unwaveringly gendered. Indeed, 64 per cent of all those labelled hysterical in Canadian courtrooms were women—not girls, boys, or men, but women. The proportion of cases in which the victims of crime were dismissively labelled as hysterical increased from 30 per cent of all labelled individuals before 2002 to 45 per cent in 2002–2022. The percentage of female witnesses found to be credible and reliable despite being labelled hysterical rose only slightly from 52.5 per cent in the pre-2002 cases to 55 per cent in 2002–2022. In sexual assault cases from that later period, the testimony of 33 per cent of female victims seen as hysterical was found neither credible nor reliable. That is one-third(!) of victims—despite the well-known underreporting and attrition rates of police-reported sexual assaults and the repudiation of myths and stereotypes by Justice L'Heureux-Dubé in *Seaboyer*⁸⁷ and those who have expanded on her message.⁸⁸

⁸⁶ Watson Hamilton, “The Use of Metaphor,” *supra* note 1 at 202.

⁸⁷ *Seaboyer*, *supra* note 5.

⁸⁸ See e.g. Koshan, *supra* note 56; Lise Gotell, “The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law” (2002) 40:3 Osgoode Hall LJ 251; Susan Ehrlich, “Perpetuating—and Resisting—Rape Myths in Trial Discourse” in Elizabeth A Sheely, ed, *Sexual Assault in Canada* (Ottawa: Ottawa University Press, 2012) 389; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 CJWL 397; Lisa Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44:2 Queen’s LJ 316; Lisa Dufraimont, “Current Complications in the Law on Myths and Stereotypes” (2021) 99:3 Can Bar Rev 536. Justice Martin, for the majority, thoroughly discussed myths and stereotypes in two sexual assault cases involving issues of appellate intervention in trial judges’ credibility and reliability findings and the role of common sense in assessing the evidence of witnesses (see *R v Kruk*, 2024 SCC 7).

The increase in the use of the hysteria label by judges from 2 of 128 (1.5 per cent) to 56 of 404 (14 per cent) is particularly discouraging. Although the absolute numbers are not large, they only include the times when judges initiated the use of label; they do not include all the times judges adopted, repeated, or reported the labelling done by a witness.

There is no reason for optimism about the possibility of greater gender equality in these outcomes. Women and girls labelled hysterical in many different legal contexts are still seen as deceitful. The gendered story of rational hysteria and its counterpart, irrational hysteria, appear to be as entrenched in Canadian law and Canadian society as they have always been.