

The Toronto Star

August 28, 2009 Friday

Authorities 'overreact' as warring couples use zero-tolerance rule to gain upper hand, lawyer says

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SECTION: NEWS; Pg. A01

LENGTH: 886 words

Ontario's "zero tolerance" policy on domestic violence has come into question following an unusual court case involving an Orangeville-area woman who was charged with assault after joking in emails that she could solve her marital problems with a gun, if only she could get one.

Alison Shaw, 40, was forced out of her home and ordered to stay away from her three children after her estranged husband claimed to have been "frightened" by the online missive, which followed what a judge described as a "one-punch bar fight" over a month earlier in an area Legion hall.

The ruling is unusual on two fronts:

It's a twist on what men's rights groups claim divorcing fathers have been suffering for years at the hands of police and the criminal court system. And it's creating buzz in legal circles because a well-respected family law expert who helped draft Ontario's so-called "duty to report" policy 30 years ago now says it needs a review and better use of discretion.

"This is a gross overreaction by the Crown and by the police in response to what they thought is the zero-tolerance rule," says Philip Epstein, a veteran divorce lawyer who sat on the committee that crafted the 1979 directive.

"We know so much more about domestic abuse now than we did back then. It's time to re-examine the policy and create some limited discretion for the police and Crown attorneys to deal with this problem," he said.

Criticism of Shaw's treatment first arose more than a year ago in a family law decision from Ontario Court Justice Bruce Pugsley, who said it's "commonplace" for the criminal justice system to be manipulated by estranged spouses claiming abuse, "no matter how remote the assault may be in time or, indeed, how trivial the contact."

Epstein has highlighted the decision - and his concerns - in the recently released Reports of Family Law, a critique of interesting or unusual family law judgments. He and other lawyers have praised Pugsley as being the first judge to so clearly tackle the thorny issue of how some warring couples use the criminal courts to get custody of their children and gain the upper hand in divorce cases.

The way such allegations are handled by police and Crown attorneys can have "the disruptive force of a hand grenade" for families, Pugsley said, setting in motion a chain of events that can wreak "havoc" on children.

Shaw's treatment was fairly typical: She had no criminal record, was charged and held in jail overnight until she could post \$5,000 bail, and ordered to stay away from her home and kids "without any regard for children's best interests," the judge said. Her bail conditions also restricted her from using the Internet.

"This is not for one moment to diminish the impact of spousal abuse on family members and children in Canada," said Pugsley, a point Epstein also stresses. But "the events after the arrest of Ms. Shaw do not, in retrospect, show the police, the Crown, counsel or the criminal judicial system in a good light."

Shaw and her husband, Stephen, were estranged, but still living in the same house, when he hacked into her computer in late 2007 looking for evidence of an affair. Instead, he found what Pugsley described as "vile language" and "gossipy joking" in an email to a girlfriend that talked about "solving her matrimonial problems with a gun, if she could only get one."

The husband reported them to police, as well as an incident over a month earlier in a bar in which she is alleged to have punched him. He returned to ask police to lay a charge of assault after meeting with a lawyer.

"I can only hope that no licensed lawyer in this province would have advised the father that the fastest way to get custody and exclusive possession of the family home was to report the mother's transgressions to the police," Pugsley said in his ruling.

While Epstein says false or trumped-up allegations are rare, and domestic abuse remains a "very, very serious and real issue," they can unfairly cripple an accused legally and financially because Ontario's court system is so slow and overburdened.

He added the legal aid system is so cash-strapped, it can take eight months to a year for a criminal case to be decided.

During much of that time, the parent has no access to their children. (Pugsley moved quickly to give Shaw 50/50 access to her kids on alternating weeks.)

Epstein had one case where a wife alleged abuse and then started clearing valuables out of the house while her husband awaited a bail hearing. Some men have started fighting back, says one lawyer whose female client is being threatened with a \$250,000 wrongful prosecution suit by her ex-husband.

Domestic violence experts such as University of Western Ontario professor Peter Jaffe says the research is clear on what constitutes domestic abuse, but more training of police and Crown attorneys is needed. In fact, they point to what they consider a far more worrisome trend: Police who are simply throwing up their hands, charging both partners, and leaving it up to judges to sort it all out.

"The number-one problem in 2009 isn't minor allegations that are blown out of proportion or the potential for false allegations. The number-one problem in Ontario in 2009 is that there are still 30 to 35 domestic homicides a year and that so many people are being abused and not seeking help," says Jaffe.