NEUBERGER & PARTNERS LLP
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NEWSLETTER: Sexual Assault Law Updates

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The Ongoing Error Of Credibility Contests

W.(D.) Is Still The Guideline

Since the Ontario Court of Appeal decision in *R. v. J.J.R.D.*, [2006] O.J. No. 4749 there has been significant movement away from following the three step process for assessing testimony, as previously outlined in the Supreme Court's 1991 decision in *R. v. W.(D.)*

Many judges have focused on the third step, beginning with a review of the evidence as a whole. This is in recognition that the evidence of an accused cannot be viewed in a vacuum as if the Crown called no evidence at all. Just as a recitation of *W.(D.)* does not prove that the principles were followed, the three prongs do not have to be assessed in any particular order.

The unique factor in the case of *J.J.R.D.* was that the trial judge found that, though there was nothing inherently troubling about the testimony of the accused, nevertheless, the strength of the Crown's case was compelling enough to meet the burden of proof.

The Court of Appeal ruled that the trial judge's reasons allowed for meaningful appellate review and dismissed the appeal. As Justice Doherty wrote:
"An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence."

Pursuant to that decision, *J.J.R.D.* has been misapplied, in some cases resulting in retrials. The primary issue has been a lack of detailed reasons sufficient to explain why the Crown's evidence overcame reasonable doubt.

In two December 2020 Ontario Court of Appeal decisions, the importance of *W.(D.)* was reaffirmed.

In *R. v T.A.*, 2020 ONCA 783 the Ontario Court of Appeal wrote that "a finding that a complainant is both reliable and credible is not

sufficient to satisfy the burden of proof beyond a reasonable doubt."

In that case, the trial judge had explicitly noted that the testimony was diametrically opposed and stated "[t]hey both cannot be telling the truth." The Court of Appeal noted that this approach is the "antithesis of a *W.(D.)* analysis" and ignored the possibility that defence evidence could still raise a reasonable doubt even if not fully accepted.

The trial judge's reasons need to offer a meaningful explanation as to why testimony was accepted or rejected and must also explain how material issues raised at trial were resolved.

In *R. v. Smith*, 2020 ONCA 782, Justice Harvison Young wrote:
"Credibility is not an either/or proposition; treating it as such 'shifts the burden of proof to the accused by' suggesting that the accused can only be acquitted 'if the accused's story is believed rather than that of the complainant.'"

In the case of *Smith*, the trial judge had failed to grapple with inconsistencies and evidence that tended to corroborate the testimony of the accused by simply rejecting the defence evidence as a whole.

While judges are not required to address every detail of the evidence at trial, a blanket rejection or acceptance of evidence does not permit meaningful review or explain why the trial judge was not left with a reasonable doubt.

As Justice Harvison Young noted, "in the absence of any analysis of the evidence, other than what appears to have been a complete rejection of the appellant's testimony, it is not clear whether or how the trial judge resolved these issues."

These decisions confirm that *J.J.R.D.* is only of assistance in very specific cases when the trial judge is faced with a situation where the testimony of the accused is not outright rejected but, instead, is overcome by a *reasoned* acceptance of the Crown's case as whole and explaining why the strength of the evidence against the accused met the threshold for a conviction.

Supreme Court Rulings From The Bench

Throughout October, November and December 2020, the Supreme Court of Canada heard appeals in ten different cases involving sexual assault appeals. In seven of those cases the appeal was granted or dismissed after only a short recess.

In all seven rulings from the bench, the Supreme Court found in favour of the Crown and confirmed or restored the convictions.

While the final outcome in many of these cases may not be controversial, the volume of appeals indicates that the lower courts required more guidance. In five of the rulings, the Supreme Court overturned the majority from the Courts of Appeal and did not take the opportunity to explain why.

One of those opportunities, in *R. v. Langan*, 2019 BCCA 467, involved the correct interpretation of the recent Supreme Court rulings in *R. v. Barton*, 2019 SCC 33, *R. v. Goldfinch*, 2019 SCC 38 and *R. v. R.V.*, 2019 41, which explicitly recommend that Crown-led sexual history evidence should be subjected to a *voir dire* for admissibility.

Instead, the Supreme Court endorsed the dissenting opinion which, in part, concluded that because "the Crown was obviously supporting the complainant's testimony" the evidence would not violate the "twin myths."

The issue is much more complicated. In *Barton*, *Goldfinch* and *R.V.*, the Crown did lead evidence that opened up inappropriate sexual history evidence even though they were advancing a position of belief in the complainant's testimony or, in *Barton*, belief in the accused's guilt.

In paragraph 79 of *R.V.*, Justice Karakatsanis wrote:
"[I]t would be prudent to consider both the Crown's proposed use of the evidence and any challenges proposed by the accused at the same time. A view of how both sides intend to use the evidence would allow trial judges to more accurately assess the impact of admitting such evidence and appropriately tailor the ways in which it may be adduced. Further, the Crown's decision to adduce evidence, or even to call a particular witness, is a matter of prosecutorial discretion. If the manner in which the evidence may be challenged is clear from the outset, the Crown can make an informed decision about whether the interests of justice are served by adducing the evidence in the first place." (citation omitted)

A presumption, like that of the dissent in *Langan*, that Crown-led evidence does not require advance scrutiny, leads to confusion as to how the Supreme Court's own previous rulings are to be applied.

The Supreme Court ruling in *Langan* was not unanimous, and the lack of written reasons leaves the lower courts with unclear guidance.

The majority of the BC Court of Appeal found that the trial judge had improperly used text messages as prior consistent statements, gave insufficient reasons in his *W.(D.)* assessment and failed to hold a voir dire to determine admissibility purposes of Crown-led evidence.

The dissent found the trial judge's reasons to be sufficient and saw no error in the failure to hold a voir dire as Crown-led evidence is not "presumptively inadmissible."

In the Supreme Court's brief decision of *R. v. Delmas*, 2020 SCC 39, Justice Moldaver wrote that the trial judge may have drawn "an illogical inference" in his ruling but that it

didn’t warrant intervention. In fact, during the hearing, Justice Brown had deemed the entire paragraph in the trial judge’s decision to be “illogical” on more than one issue.

While all of the Alberta Court of Appeal judges in *Delmas* agreed that the trial judge erred in failing to hold a voir dire regarding prior sexual history the majority ruled that it did not impact the outcome of the trial.

The majority also found that the “problematic generalization” concerns in his reasons were not the primary foundation of the trial judge’s rejection of the accused’s evidence. In this case, Mr. Delmas had testified that his memories of the incident had come back to him while he was incarcerated and waiting for trial thus diminishing his reliability and credibility.

The dissent found the conviction unsafe because of the use of the stereotypes and the paragraph that the Supreme Court agreed was “illogical.”

Additionally, the generalizations included assumptions that: the accused would not have considered the complainant to be his girlfriend while he was also in a relationship with another woman, that complainant would not have done drugs with the accused shortly after his arrival, and that the complainant would not have had sex with someone who she knew to be positive for Hepatitis C even though the complainant testified that she had consented to sex with the accused on two other occasions.

The Supreme Court only mentioned one of those generalizations in their decision in upholding the conviction.

The brief decision of *R. v. Mehari*, 2020 SCC 40 begins with the statement that “[t]his Court has not decided whether uneven scrutiny, if it exists, can amount to an independent ground of appeal or a separate and distinct error of law.”

This was not a question originally raised by the appellant or respondent, who both addressed it as a legitimate ground of appeal, if it was found to exist.

The Supreme Court has not heard an appeal based on “uneven scrutiny” in the past but numerous Courts of Appeal have accepted it as a valid ground in the past.

Since the *Mehari* decision, the Saskatchewan Court of Appeal has already issued another decision opining on the reasons for that statement from the Supreme Court.

In *R. v. M.G.S.*, 2021, SKCA 1, Justice Leurer wrote:
“One reason the Supreme Court may have had for raising the question of whether uneven scrutiny should be considered its own separate ground of appeal or error of law may relate to the impact that doing so may have on appellate review of trial decisions. If uneven scrutiny is not strictly limited to a review of a trial judge’s method of reasoning, it will tend to obscure or undermine the standard of review applicable when attacks are made on findings of fact or the reasonableness of a trial verdict, or other recognized grounds of appeal such as

relating to the sufficiency of trial judges' reasons."

Because the majority in *Mehari* did not resolve the other grounds of appeal, the *Mehari* case has been remitted back to the Saskatchewan Court of Appeal and could end up returning to the Supreme Court on other grounds.

Decisions have been reserved in the appeals of *R. v. G.F.*, 2019 ONCA 493, *R. v. R.V.*, 2019 ONCA 664 and a constitutional challenge in *R. v. C.P.*, 2019 ONCA 85. Hopefully those reasons will provide some stronger guidance for future cases.

Reasonable Steps and Consent

In a number of recent cases, trial judges have been asked to find an accused guilty based on his own evidence. The Crown argument has been that, by the accused's own testimony, they failed to take reasonable steps to obtain affirmative consent prior to engaging in a sexual act.

In *R. v. M.F.*, 2020 ONSC 5061 Justice Varpio articulated the submission as such:

"In the alternative, the Crown submitted that the accused's own evidence is effectively a confession that a sexual assault occurred on the night of March 17/18, 2018. I should convict him as a result of same. The Crown further submitted that the accused's testimony that the complainant said nothing prior to sexual activity on the night of March 17, 2018 corroborates that she did not, in fact, consent."

Justice Varpio goes on to outline the guiding case law from the Supreme Court on consent, pointing out that, based on *Ewanchuk*, "The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct" and that if the trial judge finds the Crown has not proven non-consent then the reasonable steps question is not engaged.

In a section titled "Consent as elements of the *Actus Reus* and *Mens Rea*: Do They Affect One Another in Sexual Assault Cases?" Justice Varpio adopts the reasoning of the Court Martial Appeal Court in finding that "the *actus reus* and *mens rea* elements of sexual assault are discrete inquiries such that a defence of honest but mistaken belief in communicated consent that has no air of reality does not, by itself, prove the "lack of consent" element of the *actus reus*."

Put another way, *M.F.* clarifies that "as per *Barton*, the Crown must prove the lack of consent requirement of the *actus reus*, irrespective of the *mens rea* requirements." A failure by the accused to take reasonable steps to confirm consent does not undermine a finding that the complainant may have consented.

Though this failure will be fatal to a claim of honest but mistaken belief in consent, the trial judge will only move to that analysis if the Crown first proves non-consent.

In another, earlier case, *R. v. Solomon*, 2020 ONSC 2640, the Crown had appealed on a similar issue. While the Crown argued on appeal that the trial judge in *Solomon* had made a finding that the complainant consented on two occasions, Justice Copeland corrected that interpretation to state the trial judge had “found that the Crown had not proven non-consent beyond a reasonable doubt.”

One section in the *Solomon* ruling was titled “Did the Trial Judge err in not finding that the events on the couch constituted a sexual assault, even on the respondent’s evidence?”

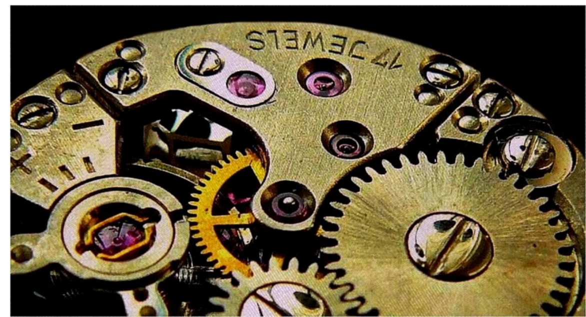
Ultimately, Justice Copeland found that the trial judge’s reasons as a whole explained how he reached the conclusion that there was consent. “The discussion in *Ewanchuk* about not ‘testing the waters’ is clear that it does not displace the law that consent can be conveyed by words or gestures.”

In both decisions, *Ewanchuk* was cited as the current guideline regarding the evaluation of consent or non-consent and that no subsequent ruling has altered the requirement that the Crown must prove non-consent before engaging the reasonable steps question.

The addition of “communicated consent” to the judicial lexicon did not change the law to require verbal consent. Nor has the complainant’s evidence been excluded from the required credibility assessments.

A finding of consent or reasonable doubt about consent resolves the primary question at trial.

As one Alberta judge recently stated in *R. v. K.G.Y.*, 2020 ABPC 227: “If a person is agreeing in their mind that an act is acceptable, absence of spoken or physical demonstration of that consent would not turn the action illegal.”



Other Cases To Watch

R. v. J.J, 2020 BCSC 349 SCC Case file # 39133
Crown appeal of the constitutional ruling regarding the new rules of evidence since Bill C-51. The defence was also granted leave to cross-appeal, opening up the case for a ruling regarding the entirety of the constitutional challenge.

R v Ndhlovu, 2020 ABCA 307, granted ability to appeal under s. 40 of the *Supreme Court Act*
Issue: Constitutional challenge to mandatory lifetime SOIRA compliance after multiple convictions.

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