NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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Sexual Stereotypes vs Logical Inferences

Avoiding The Stereotype Trap

The Ontario Court of Appeal recently overturned acquittals in *R. v. Steele*, 2021 ONCA 186 finding that, yet again, myths about sexual assault victims had tainted the trial judge's reasoning.

The two particular instances identified by the Crown involved speculation on why the complainant agreed to enter an abandoned trailer with the accused and why she lied about her whereabouts when her father called her cellphone.

There was a difference of opinion on the issue of stereotypes but, in concurring reasons, Justice van Rensburg agreed with the result stating:

"This case highlights the challenge that appellate courts can face in distinguishing between prohibited lines of reasoning and reasonable, context-specific inferences drawn by a trial judge in assessing credibility in sexual assault cases."

Justice van Rensburg also noted that "it can be difficult on appeal to determine whether a trial judge crossed the line from drawing legitimate inferences from circumstantial evidence to reliance on stereotypical reasoning."

One of the difficulties in sexual assault trials is that evidence which has legitimate purposes can often be used to draw improper inferences. Even if the defence does not suggest that particular inference in their submissions, it would be helpful to have a robust discussion of the proper relevance prior to deliberation.

This difference between allowable usages and forbidden inference was recently analysed in depth by the Ontario Court of Appeal in *R. v. J.C.*, 2021 ONCA 131. In summary, Justice Paciocco emphasized that it is not the evidence which is impermissible, it is the improper inferences which stray into forbidden territory.

In *R. v. Steele*, the question of why the complainant chose to enter the trailer may have relevance to the factual matrix of the other testimony. The trial judge in that case had also noted that the complainant's testimony seemed less forthcoming on this question. On the issue of why the complainant

didn't tell her father her true location, it was agreed there was no legitimate factual basis for the trial judge's credibility conclusions.

While the trial judge may have had other reasons for acquitting, the gateway was opened to question how heavily these considerations had weighed in his decision.

The number of sexual assault cases which result in retrials due to apprehended reliance on stereotypes, or over-apprehension of being accused of stereotypes, show the need for greater care in closing submissions.

Just as prior consistent statements, also at issue in the *R. v. Steele* case, require advance discussion as to what uses are permissible, it benefits an accused to clearly outline the intended proper purposes of evidence which could otherwise lead to stereotype based errors.

Where relevant evidence could lead to a stereotype, these appellate cases suggest that it behooves the defence to identify the possible stereotypes and thoroughly tether those lines of questioning to the relevant issues at trial.

As explained by Justice Paciocco in *R. v. J.C.*, the evidence may be probative when tied to the factual matrix of the case and it is only "untethered generalizations about human behaviour" which lead to reversible error.

Sexual assault cases are often decided on the basis of credibility assessments, which makes them more susceptible to ambiguity. It is often difficult to explain with precision why one witness was credible while another was not, yet still ensure that the trial is not reduced to a credibility contest.

Judges can clearly be assisted by greater care from both the defence and the Crown to identify which areas are prone to improper stereotypes. Focus on articulating the intended relevance at the time of submissions could help to avoid unnecessary and costly retrials.

Complainant's Complaints

It is often said that prosecutors are the most powerful people in the legal system because of their discretion in the charging and plea-bargaining processes. This exercise of discretion was the subject of a recently published decision in *R. v. A.I.*, 2020 BCSC 1791.

In this case, the complainant had made five allegations in her complaint to police and the prosecutor had only proceeded on one sexual assault charge. As a result, the other allegations became "other sexual activity" which required an application under section 276 prior to trial.

The Crown did not dispute that cross-examination on the contents of the

police statement would be permissible, within limits. The problem arose from the complainant's position in the hearing.

Now that complainant's are given standing to dispute admissibility of evidence in most provinces, they have the ability to access the defence material and strategize prior to testifying. In *A.I.* the complainant argued that the application should be dismissed because the accused's affidavit was deficient.

The complainant's position was "that the accused's application is deficient because he has failed to set out in his affidavit: his defence; his version of events regarding the subject-matter of the charge; and the evidence he seeks to admit."

The Crown took no position on this issue and, despite determining that the complainant had overstepped the limitations of involvement, Justice Shergill went on to consider the unique situation.

Though it is rare to have little to no information about the proposed defence contained in the accused's affidavit, Justice Shergill noted that "Indeed, in *R. v. Edgar*, 2020 BCSC 381, Justice Schultes did the very thing that complainant's counsel asserts has never been done."

Relying on the Supreme Court's 2019 decision in *R. v. Goldfinch*, it was determined that the evidence must go to a legitimate aspect of the defence and that "the most fundamental of all defences is to assert that the Crown has not proven its case beyond a reasonable doubt."

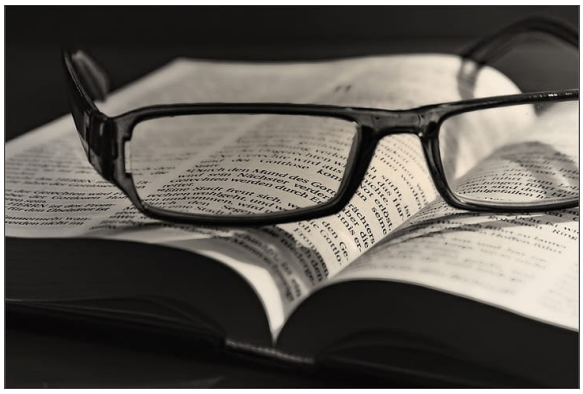
The complainant's credibility is clearly a significant issue at trial in a sexual assault allegation and Justice Shergill noted that the cross-examination material related to statements made to the police by the complainant herself. In considering societies interest in encouraging the reporting of sexual assault, Justice Shergill made the following comment:

"While society has an interest in encouraging the reporting of sexual offences, society also has an interest in ensuring that the offences reported are truthful."

Accordingly, the Court ruled that it was sufficient for the defence to deny the allegations, and it is not required to lay out the defence version of events in the *voir dire*. Further, the application judge stated:

"In my view, requiring the accused to provide an affidavit asserting a positive defence in every instance of a s. 276(2) or s. 278.92(2) application would be akin to mandating that an accused must always call a defence in a sexual assault trial."

This case is an interesting example of how a complainant's involvement in evidentiary applications can complicate and disrupt the process and unfairly turn the trial into a tripartite litigation.



Post-Incident Behaviour

The Ontario Court of Appeal ordered a new trial in an unusual case, *R. v. J.M.*, 2021 ONCA 150, wherein the trial judge inappropriately used his own experience as a lawyer and conducted independent research on "victim" behaviour without notifying the Crown or defence counsel of the material.

While this is not a common issue in many trials, the research was brought in to determine whether or not post-incident behaviour should factor into the complainant's credibility assessment.

The Supreme Court ruling in *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218 dealt specifically with the issue of stereotypes involving expectations that a victim of sexual assault would exhibit avoidant behaviour. The trial judge was correct that it would be an error to negatively assess the complainant's behaviour due to a lack of distancing or avoidance after an assault.

The bigger concern is how post-incident behaviour is introduced during the trial, by whom, and for what purpose. Quite often, the complainant's demeanour or prior consistent statements are adduced by the Crown for narrative purposes intended to be supportive of the complainant's account.

The defence must then address the evidence given during testimony in chief and this type of cross-examination can then be misconstrued or mishandled. As outlined in other recent decisions such as *R. v. J.C.*, 2021 ONCA 131, there may be probative value in post-incident behaviour but only where it connects to a material issue at trial.

In this case, the stereotype went in the opposite direction by claiming that a lack of distancing was "commonplace" and somehow supportive of the allegation. Judicial notice was given to theoretical research on "battered wife syndrome" and "involuntary paralysis" even though the evidence at trial did not engage either of those claims.

There is a growing body of academic research which seeks to understand how people report their responses during and after an alleged assault. The overall goal of such research is to show that there is no consistent behaviour which can either bolster or undermine the credibility of a complainant based on stereotypes of how a "real" victim would react to a sexual assault.

Some of these claims, especially those which transform a temporary "freezing" response into theories about "tonic immobility" can lead to unnecessary complications in what is otherwise straightforward testimony.

This particular concern is not unique to the trial judge in *J.M.* and can be seen in other cases such as *R. v. S.P.*, 2018 ONSC 5826 in which, despite acquitting the accused, there

was a section in the judge's reasons called "The Complainant's Paralysis During the Touching."

The judge wrote that "Several times the complainant testified that she felt paralyzed during the sexual touching. I find that this detail tends to strengthen the credibility of her account."

The purpose of research on things like "tonic immobility" is to help complainants who may struggle with self blame and is best suited to therapy instead of courtrooms. Whether or not a complainant actually "froze" or otherwise became immobilized is part of a factual matrix which can only be assessed in light of the other evidence particular to that trial.

While it is important to remove stereotypes about sexual assault from criminal trials, it is also important that specific types of alleged behaviour do not become new stereotypes as proof of a sexual assault. In the end, whether or not a complainant actually "froze" is just another part of the evidence to be tested for its veracity.

"Self serving" Testimony?

The Alberta Court of Appeal overturned a conviction in *R. v. Titong*, 2021 ABCA 75 after the accused's evidence was rejected as "self serving."

While the court noted that the term "self serving" is not necessarily an error of law but that there must be "an articulation of *why* the accused's evidence is self-serving or why, overall, the accused is found not to be credible."

In this case, the trial judge rejected the bare denial of the accusation on the sole basis that it benefitted the accused to deny the allegation.

An accused has a right to know why their evidence was rejected and the characterization of an accused's testimony as "self-serving" is always problematic and raises concerns about the presumption of innocence in a trial judge's reasons.

While a judge's credibility assessments receive great deference in the appellate courts, this case is a good reminder that they are not immune from review.

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Other Cases To Watch

R. v. J.J, 2020 BCSC 349 SCC File # 39133 and
A.S. v. Her Majesty the Queen, et al. SCC File # 39516

An appeal by the complainant in the constitutional ruling of *R. v. Reddick*, 2020 ONSC 7156 has been combined with the J.J. case. The hearing should take place in the Fall of 2021

R. v. Kirkpatrick, 2020 BCCA 136 SCC File # 39287

This case will be looking at the correct interpretation of the Supreme Court decision in *Hutchinson* as it relates to consent being dependent on condom usage. The lower court was also split on whether failure to use a condom was a form of fraud.

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