NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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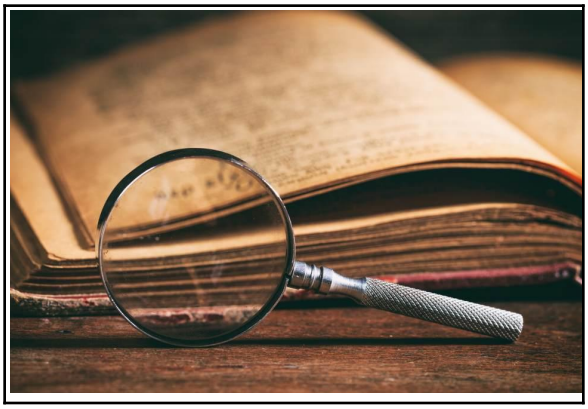
Honest But Mistaken Belief In Jury Instructions



The "Air of Reality" Test

The defence of "honest but mistaken belief" in consent in a sexual assault trial is not always available to an accused and can cause a lot of confusion even in trials with a judge alone. Jury instructions can get even more confusing.

The Ontario Court of Appeal recently ruled in favour of the Crown appeal on the subject of *mens rea* instructions in *R. v. H.W.*, 2022 ONCA 15. In addition to discussing the burden of proof, the decision outlines suggested jury instructions for both situations where the defence of honest but mistaken belief has an air of reality and when it is unavailable based on the evidence at trial.

To claim an honest but mistaken belief in consent the defence must be putting forward a version of events that includes reasonable steps. The three pathways to conviction were outlined as a finding that the accused knew the complainant did not consent, was reckless as to whether there was consent or had reckless indifference as to whether there was consent.

Where the accused argues honest but mistaken belief they are acknowledging that the complainant may not have consented to the sexual activity but that the accused believed that consent was communicated at the time of the events. That belief cannot be based in silence or passivity from a complainant as "implied consent." The accused must explain the actions or words *communicated* to him that led to the mistaken belief.

In sexual assault trials, the testimony of the accused is usually a different version of events than what the complainant describes. Though consent is based on the complainant's subjective state of mind, an accused can argue that her testimony should not be believed or that, despite that state of mind, she communicated a different signal to him.

As Justice Zarnett wrote for the Court:

> The *mens rea* stage of the analysis is typically reached after the trier of fact has concluded that the *actus reus* has been committed. In the sexual assault context, this means that the trier of fact has concluded that touching of a sexual nature occurred, and that the complainant did not actually,

> subjectively, consent within the meaning of the Code to that sexual touching.

The "air of reality" to an accused's defence of honest but mistaken belief can only be assessed during trial and is commonly the reason an accused will bring an application for prior sexual history evidence.

In the case of *H.W.*, the accused testified at trial that there was very little communication during the brief encounter and was only arguing that he had consent. As such, the jury should have been instructed that honest but mistaken belief was not an available defence.

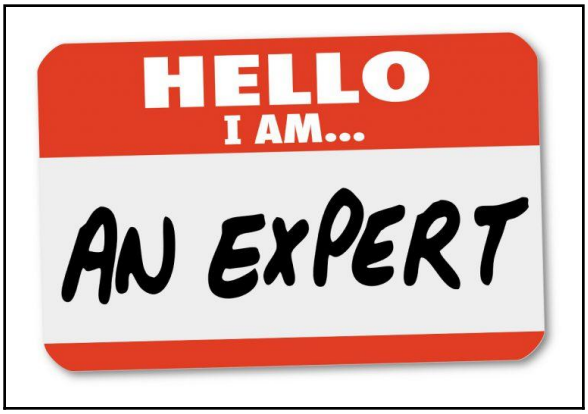
On appeal the Crown had two alternate positions. The Court of Appeal rejected the first suggestion that the Crown's burden of proof on the *mens rea* of sexual assault is met if the jury accepts the complainant's evidence that she did not consent and honest but mistaken belief is not available as a defence.

There is a section in the *H.W.* ruling explaining the Supreme Court's decision in *R. v. Morrison*, 2019 SCC 15 (CanLII), [2019] 2 SCR 3 and why "negativing a defence is not the same as proving the Crown's case." Nevertheless, it was agreed that it would be rare for the *mens rea* to not be established where there was no honest but mistaken belief claim available.

In laying out their proposed instructions, the Court of Appeal gave four elements to how a jury should be instructed:

> In sum, to guide the jury on the knowledge element in a case where the defence of honest but mistaken belief in communicated consent is unavailable, the trial judge should proceed as follows:
>
> a. The jury should be instructed that, as a matter of law, the accused cannot rely on a defence that the accused mistakenly believed the complainant consented to the sexual activity. Therefore, the jury is to proceed on the factual premise that the accused did not affirmatively believe that the complainant was consenting or communicating consent.
>
> b. The jury should be instructed that they should not rely on evidence if it is only relevant in supporting an inference that the accused believed that the complainant was consenting or had communicated consent, and the trial judge should provide guidance in this regard by identifying for the jury the type of evidence it should not consider.
>
> c. If there is an air of reality to a defence that the accused did not know of the lack of the complainant's consent on a basis other than a belief in consent (for example, the type of situation envisaged in the *MacIntyre* hypothetical), the jury should be directed to the evidence that they should consider on this issue.
>
> d. Where there is no air of reality to the defence of honest but mistaken belief in communicated consent, and no air of reality to a defence that the accused did not know of the absence of

> consent by the complainant on another basis, the trial judge may tell the jury that it should not be difficult for them to find that the accused knew that the complainant was not consenting, or was reckless or wilfully blind to the absence of consent.



Grounding the Evidence

The British Columbia Court of Appeal recently rejected a conviction appeal after the accused was denied the use of prior sexual history at trial.

In *R. v. Ravelo-Corvo*, 2022 BCCA 19 the Court found that the trial judge had properly rejected the s. 276 Application because of deficiencies in the Application connecting the proposed evidence to an issue at trial.

This case highlights the importance of how pre-trial Applications are formulated and argued.

The accused had requested to use evidence of sexual contact at a dance club earlier in the night before the complainant went back to his home. This activity was said to be connected to the decision making that eventually led to sexual intercourse.

The Court of Appeal did not agree with the trial judge's interpretation of the Supreme Court's decision in *Goldfinch* and what was described as an "unnecessarily restricted view" of how the first and second stages of the application should be processed. Regardless, the outcome was deemed to be correct because of the deficiencies in the accused's Application.

Specifically, Justice Fisher disagreed with the trial judge that "the s. 276 regime operates in a step-by-step manner" in which the balancing factors of probative vs prejudicial evidence would only take place in the second stage.

Justice Fisher commented that "the line between relevance and probative value is often blurred" in 276 hearings and clarified:

> Relevance requires an accused to identify a use of the evidence that relates to an issue at trial, is integral to his ability to make full answer and defence, and does not rely on twin-myth inferences: *Goldfinch* at paras. 14, 95. Probative value requires an accused to "situate the evidence within the particular factual matrix of the case": *Goldfinch* at para. 131. Both relevance and probative value require an accused to be specific in an application to enable the trial judge to conduct the analysis required under s. 276(2) and (3).

In this case there was potential relevance to the evidence that was denied but the application was deficient and the accused, or his counsel, was not able to articulate the

relevance to satisfaction. The subtlety of this distinction is summarized in *Ravelo-Corvo*:

> I do not accept the appellant's broad submission that he was "deprived of putting forth an explanation as to why he believed the complainant was consenting". He was only deprived of an opportunity to explain his perception of the complainant's alleged sexual conduct at the time they began to interact at the club. His evidence about the significance of this to his perception of communicated consent later on was vague and in some respects contradictory, but in my opinion, it was relevant to the question of how his perception of communicated consent at the apartment was shaped by the complainant's alleged sexual conduct throughout the entire encounter between the two that evening.

As with *Goldfinch*, the impugned evidence may have been relevant at trial but, because it was not articulated properly, the application had to be denied.

This case gives a guideline for what is required in a 276 application to pass both the first and second stage in the hearings. The Supreme Court of Canada will be making a ruling on the new formulation of these hearings, in which the complainant now has standing at the second stage, but it is not expected that the process will change in regards to prior sexual history evidence.

Who Knows What "A Woman" Would Do?

Normally cases that find inappropriate stereotypes at play involve overturning acquittals. In *R. v. Kruk*, 2022 BCCA 18 a conviction was overturned because the trial judge did not properly ground his acceptance of the complainant's evidence.

The evidence at trial involved an intoxicated complainant who had fallen asleep and believed that at some point in the night she was being sexually assaulted. The reliability of her evidence was the main concern at trial.

In convicting the accused the trial judge reasoned that "a woman" would not be mistaken about what it feels like to be sexually penetrated. The Court of Appeal described the error succinctly:

> The issue was never what *any* complainant *would* feel or even what *this* complainant *would* feel. The issue was always, appropriately, what *this* complainant *did* feel. (emphasis in original)

Collateral Damage

The use of collateral, hearsay witnesses recently came under fire in *R. v. C.B.P.*, 2022 ABCA 29. This was a successful appeal by the accused after the Crown called a witness who had no direct relationship to the case other than encouraging the complainant to make a police report.

The probative value of the hearsay evidence was considered in a *voir dire* which allowed the witness to testify but limited what the witness could say about her conversation with the complainant.

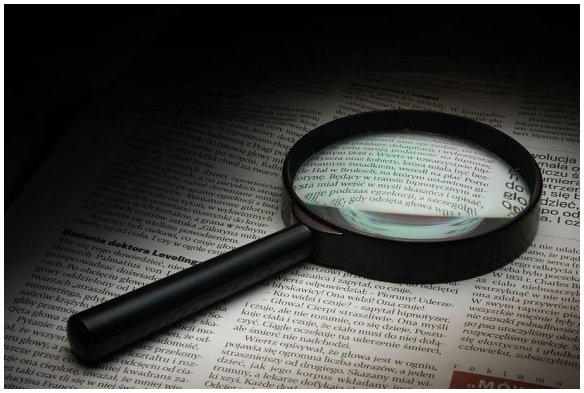
Despite the *voir dire* the witness ended up giving testimony that prejudiced the trial due to questions by both the Crown and Defence in the course of the trial.

As the Court of Appeal wrote:

> While counsel enjoy a broad discretion in which witnesses they will call, the fact that MC's evidence had already been constrained through a voir dire ruling should have signaled to all concerned, that MC's evidence was potentially perilous. How evidence is adduced may also impact trial fairness: *R v Goldfinch*, 2019 SCC 38 at para 75. Eliciting more restricted testimony or avoiding testimony altogether through an agreed statement of facts, and a more restrained jury address would have assisted the Crown in doing what it claimed to be doing, without the additional inflammatory elements.

This particular witness was only called to talk about why the complainant chose to report and we already know that that a delay in reporting is not significant in sexual assault cases.

The *C.B.P.* ruling is a good reminder for Crown to think about whether or not their witness helps their case or contributes to myth based reasoning in a sexual assault trial.



Minimum Requirements

In a recent decision from the Ontario Court of Appeal, *R. v. Sararas*, 2022 ONCA 58 weighed in on minimum requirements from legal counsel on sexual assault cases.

This case stands out because Crown conceded on appeal that the accused's trial lawyer did not meet basic expectations of performance

but argued that the case would have resulted in a conviction regardless of incompetent counsel.

It is well established that Courts of Appeal are not a substitute for a retrial. This is true whether it is the Crown or Defence that is asking the appellate courts to re-weigh the evidence.

In the case of *Sararas* the following Crown concessions were made:

> This case is somewhat unusual in that the Crown has conceded that the performance branch of the test has been made out. Specifically, the Crown concedes that trial counsel provided ineffective assistance in that he:
>
> (a) did not pursue in depth the nature and extent of the communications between the complainants as a precursor to an examination of any possible collusion;
>
> (b) did not pursue the issue of the appellant's opportunity to commit the offences alleged to have occurred at bedtime;
>
> (c) did not challenge the complainants' inconsistencies between their police statements, their preliminary inquiry evidence, and their trial evidence; and
>
> (d) did not challenge the complainants on their memories despite the historical nature of the allegations.

The Crown's argument that the outcome would have remained the same regardless of the insufficiencies was rejected though the Court made comment on the test for overturning a verdict on this basis:

> To succeed in an appeal based on ineffective assistance of counsel, an appellant must show that trial counsel's incompetence led to a miscarriage of justice. Under the unreliable verdict branch of the test for a miscarriage of justice, this requires showing that the appellant suffered a prejudice in that there is a reasonable possibility that the result at trial would have been different but for the ineffective assistance offered by counsel. As I have explained, a verdict can withstand collateral attacks. Generally, the ineffective assistance must impact one or more of the pillars supporting the conviction with sufficient force so as to show the court that the verdict rests on an uneasy foundation.

Though rarely a successful ground of appeal, ineffective assistance of counsel is not a rare event as evidenced from this case and *R. v. D.A.*, 2020 ONCA 738

Gatekeepers of Evidence

An important point was made in *R. v. R.K.K.*, 2022 BCCA 17 about the gatekeeper role of trial judges.

Evidence was put into trial in chief and cross-examination based on an agreement between the Crown and Defence about relevance and probative value. In the end, it is no longer available to counsel to make their own decisions on these matters.

The British Columbia Court of Appeal articulated the issue as a special note:

> While this is not a ground of appeal, my comments are intended as a reminder not only to trial judges, but to counsel as well, that the admissibility of prior sexual history, having regard to s. 276, is a determination only the trial judge can make. This will require the parties to factor in additional court time for sexual assault trials.

Other Cases To Watch

<u>Decisions are reserved in the following cases:</u>

R. v. J.J, 2020 BCSC 349 SCC File # 39133
Constitutional challenge of the new regime for evidence in an accused's possession.

R. v. Kirkpatrick, 2020 BCCA 136 SCC File # 39287
Interpretation of the Supreme Court decision in *Hutchinson* as it relates to consent being dependent on condom usage.

R. v. Ndhlovu, SCC File # 39360
Whether or not mandatory SOIRA order is unconstitutional. There are numerous intervenors in this case.

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