NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

# NEWSLETTER: Sexual Assault Law Updates

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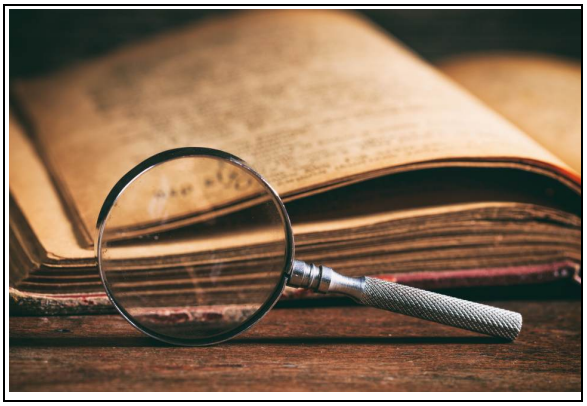
## "Doubt About Doubt": Rethinking *R. v. W.(D.)*



### Credibility and Reasonable Doubt

When an accused testifies in a sexual assault trial it triggers what is classically referred to as a *W.(D.)* framework for assessing reasonable doubt. In 1991, the Supreme Court of Canada, in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, provided a three step process to ensure that a trier of fact did not simply choose whom to believe between the competing testimony of a complainant and accused person.

Since the decision in *W.(D.)* there have been flaws identified in the original wording or approach. Among the clarifications and alterations made, an article titled "Doubt About Doubt: Coping with R. v. W.(D.) and Credibility Assessment" by Ontario Justice Paciocco has become increasingly popular. It is regularly cited by provincial and appellate courts across Canada.

Published in the Canadian Criminal Law Review, February 2017, the article was designed both for judges and to assist lawyers in preparing submissions at trial.

One of the main criticisms of the *W.(D.)* wording is that it appears to advise a specific sequence assessing credibility. Additionally, Justice Paciocco points out that the *W.(D.)* framework actually applies to all the evidence at trial, not just when an accused testifies.

The original instruction is only three steps:

> First, if you believe the evidence of the accused, obviously, you must acquit.
>
> Secondly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit. Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence you do accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused.

One of the first major changes came from the case of *R. v. J.J.R.D.*, 2006 CanLII 40088 (ON CA) in which the trial judge found the accused's testimony believable but still convicted. This appeared to violate the first step of *W.(D.)*. The

Court of Appeal upheld the conviction based on the third step - the whole of the evidence.

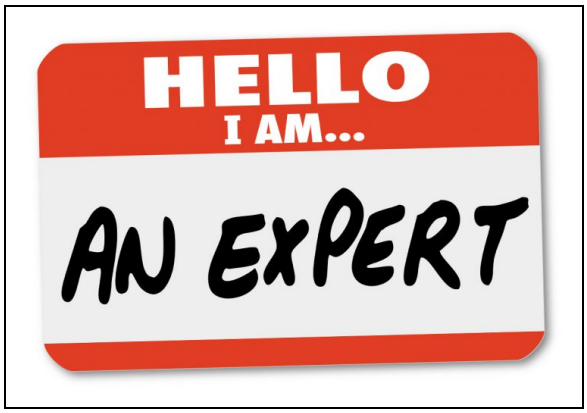
The article recommends starting at the third step of *W.(D.)* which also ensures that "even if no exculpatory evidence had ever been presented; the accused should not be convicted unless the evidence that is credited proves the guilt of the accused beyond a reasonable doubt."

Justice Paciocco also warns that, when invoking *J.J.R.D.*, "there are obvious risks in rejecting exculpatory evidence that is immune from criticism." The strength of the inculpatory evidence must be extremely compelling to surpass a reasonable doubt in such a situation.

"Doubt About Doubt" offers a reformulation of *W.(D.)* to better articulate the underlying principles:

> (1) Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
>
> (2) A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
>
> (3) Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder cannot decide whether that evidence is true, there is a reasonable doubt and an acquittal must follow;
>
> (4) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
>
> (5) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

In addition to offering guidance on assessing reasonable doubt, Justice Paciocco also gives a useful outline of all the factors that should be considered in relation to credibility and reliability of testimony. The increased citations of "Doubt About Doubt" demonstrates that the courts are receptive to and appreciative of new ways to articulate their reasons for judgement.




## Non-consensual Orgasms

The Ontario Court of Appeal recently upheld a conviction in *R. v. Vigon-Campuzano*, 2022 ONCA 234 in which the complainant had texted a friend that she felt guilty about enjoying the non-consensual touching.

The case involved a massage therapist and two clients who complained that he sexually assaulted them during the massage session.

The text message was used by both the Crown and defence for "narrative" and the complainant was very candid about having told her friend "On the one hand I think to myself, 'I really enjoyed that handsome Cuban bringing me to orgasm.' But on the other hand I think to myself 'I feel guilty for being promiscuous… Even though I asked him to stop even before it got really intense.'"

The more she thought about the situation, in hindsight, her feelings about being violated became stronger. The trial judge found that the complainant's guilt and confusion did not detract from her credibility.

The judge "concluded that deriving physical pleasure from the assault was 'well within the psychological norm' and any resulting guilt was 'normal psychological fallout from a sexual assault.'"

The Court of Appeal rejected the argument that the judge had engaged in improper reasoning in the absence of an expert. There was no specific syndrome invoked by the judge to explain the complainant's reaction. Instead, the judge had simply determined that her confusion did not detract from her credibility.

Given that the defence position was that the sexual touching did not occur at all, the complainant's honesty about her reaction was compelling.

The trial judge relied on *J.J.R.D.* in rejecting the testimony of the accused even though there was nothing inherently wrong with his testimony. The Court of Appeal found that the reasons were properly articulated and the judge had made a decision based on the strength of the evidence he did accept.

This is an example of how the *W.(D.)* analysis has been altered and the majority of cases commence the assessment of credibility from the third step of viewing the evidence as a whole.

**Continued Confusion Over "New Rules"**

In *R. v. Davies*, 2022 BCCA 103 the BC Court of Appeal had to determine whether or not the complainant in a sexual assault case had standing in an appeal.

The accused sought to use fresh evidence on an appeal regarding the complainant allegedly being in an intimate relationship with one of the Crown witnesses. The trial judge had deemed the witness credible due to a lack of bias.

The Court ruled that the complainant's privacy interests continued throughout the appeal process but left it unclear whether or not a complainant retained the right to appear and make submissions on an appeal.

The new rules enacted by Bill C-51 create a two part process to a section 276 application. The complainant only has standing at the second stage. In *Davies*, the Crown argued that "if the appellate court does not proceed with the weighing process, then a new trial may be ordered for no reason, as the trial judge may exclude the evidence in any event."

This approach was rejected noting that "the standard is not that the result would reasonably be affected, and the admission of fresh evidence on appeal does not guarantee a different outcome at a new trial." Forcing the appellate courts to make a trial determination on all fresh evidence applications would be "contrary to the principles of justice."

Because the complainant has no standing in stage one of an evidentiary application, she was not granted standing in *Davies* but the decision did not "foreclose" that a judge may decide it was appropriate to embark on a full hearing in another situation.

In a footnote, the Court of Appeal noted that the legislation granting standing to the complainant is currently under constitutional challenge in the Supreme Court. *R. v. J.J* was heard in October 2021 but the decision is still pending.

The *Davies* appeal is yet another example of the chaos created in the courts by legislation that lacked clarity in how to apply the new process. As it stands, some provinces have declared the legislation unconstitutional and, where it remains active, there are split decisions on how to interpret and apply the provisions.

Guidance from the Supreme Court is desperately needed to ensure all Canadians receive the same fairness at trial.

## The Conditions of Consent

In November 2021 the Supreme Court was asked to revisit their decision in *R. v. Hutchinson*. 2014 SCC 19, [2014] 1 S.C.R. 346.

The Appellant in *Ross McKenzie Kirkpatrick v. Her Majesty the Queen* had been acquitted at trial after a directed verdict. The trial judge found that the Crown failed to present any evidence of non-consent or deceit that would vitiate the complainant's consent.

The BC Court of Appeal overturned the acquittals in lengthy but split concurring reasons. The main issue was how to interpret *Hutchinson* and whether or not Kirkpatrick had deceived the complainant about condom usage.

The Crown and a number of intervenors were unambiguous about their disagreement with the *Hutchinson* decision and their submissions were not received well by most of the Supreme Court Justices.

Chief Justice Wagner reminded them that he was on the panel and concurred with the majority and it has only been seven years since the decision was released. When the Attorney General of Ontario said that he understood why the Court would be "reluctant" to revisit the decision the Chief Justice responded "Don't you think that the Supreme Court of Canada should be reluctant in changing or reversing a precedent of 2014?"

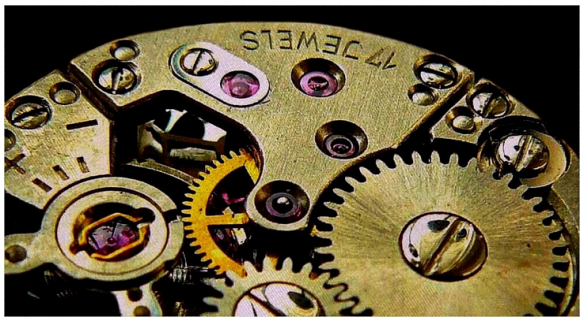
The controversy over the *Hutchinson* decision is connected to paragraph 55:

> [55] The "sexual activity in question" does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Thus, at the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act. Deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the Criminal Code, if the elements for fraud are met.

The elements of fraud were decided in the earlier Supreme Court cases of *R. v. Cuerrier*, 1998 CanLII 796 (SCC), [1998] 2 S.C.R. 371 and *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584. To vitiate consent the deception has to put the complainant at risk of serious bodily harm.

During the hearing for *Kirkpatrick*, Justice Rowe pointed out that even with a condom being used, there is still a risk of pregnancy or transmission of diseases.

The main concerns driving the *Hutchinson* decision were the "problems of uncertainty, over-criminalization, or inconsistency with *Cuerrier* and *Mabior.*"




## Other Cases To Watch

*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.

*D.R. v. Her Majesty the Queen* SCC File # 40039
Whether or not a judge used stereotypes or drew proper inferences about credibility.

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