NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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The Self-Induced Extreme Intoxication Defence

Punishing the Morally Innocent

On May 13, 2022 the Supreme Court of Canada ruled that Parliament had overstepped their bounds when enacting section 33.1 of the *Criminal Code*, eliminating the defence of self-induced extreme intoxication in cases that involved interference with bodily integrity. Thus, the Supreme Court struck down section 33.1 as being unconstitutional.

The legislation was crafted in response to the 1994 Supreme Court decision in *Daviault*. At the time, there was public outrage over the *Daviault* ruling and many journalists were being told that the ruling gave men a "license to rape" if they drink alcohol first. In reality, the defence is extremely rare and shifts the onus to the defence to prove that the accused was actually in a state akin to automatism.

The defence is so rare that it took over 25 years for the legislation to be successfully challenged in the courts of appeal.

The new decision, *R. v. Brown*, 2022 SCC 18, involved three cases in which the accused had taken intoxicants other than alcohol and were witnessed to be in an unexpected state of delusion. In two cases, the accused could not recognize their own parents and all three were hallucinating when they engaged in the physical assaults.

The Supreme Court recognized the noble intent of the legislation, targeted to protect women and children from domestic violence and sexual assault. Nevertheless, the legislation specifically stated that a person in a state of automatism or psychosis must be held accountable for their actions even when they had no control over their actions at the time or lacked the intent. This essentially substitutes the moral blameworthiness for becoming intoxicated with the secondary, unintended crime that resulted.

The crafting of the legislation was based on input from women's advocates who had been vocal in the media, generating public hysteria about the *Daviault* decision. At the time, the Court had been very clear that though Daviault should have been permitted to raise the intoxication defence it was unlikely that he would succeed.

Indeed, in *Brown*, Justice Kasirer notes "there is good reason to believe Parliament understood that alcohol alone is unlikely to bring about the delusional state akin to automatism it sought to regulate."

The problem with the legislation is that Parliament sought to hold the accused responsible for the resulting crime. Parliament, when having enacted this section, rejected creating a new stand alone offence of criminal intoxication as they thought it would have the appearance of a "drunkenness discount."

> Instead, s. 33.1 deems a person to have departed markedly from the standard of care expected in Canadian society whenever a violent act occurs while the person is in a state of extreme voluntary intoxication akin to automatism. This is so even where a loss of control or awareness of one's behaviour and a risk of harm was unforeseeable and even where the accused's conduct did not in fact depart markedly from the standard of a reasonable person.

Justice Kasirir suggested that Parliament could try to minimize the infringement on *Charter* rights by focusing on better defining the "marked departure" element of the manner in which the intoxicants were acquired and consumed.

While giving deference to Parliament on how they choose to craft their legislation, Justice Kasirir stated that "even if those who defend the law as minimally impairing were right, I am unequivocally of the view that s. 33.1 must fail on the last branch of the proportionality test which reveals the most profound failings of the provision."

Minister of Justice David Lametti has publicly stated that the government is reviewing the decision carefully and they consider the resulting "gap" in the Criminal Code to be an urgent matter.

Defining "Air of Reality"

In *R. v Wong*, 2022 ABCA 171 the Alberta Court of Appeal brought some clarification to how to assess whether or not there is an "air of reality" to the defence of honest but mistaken belief in consent (HBMB).

This was a jury trial in which the trial judge did not put the HBMB defence to the jury as an option. The standard for HBMB relies on evidence that "could" show reasonable steps to ascertain consent were taken.

It is a common error to discount the possibility of honest but mistaken belief when the complainant and accused have drastically different versions of events. The assessment for air of reality has to start with the assumption that the evidence the defence relies on is true. In addition:

> The evidential foundation can be indicated by evidence emanating from

> the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused.

Where the complainant and accused give very different versions of events it does not preclude the defence of honest but mistaken belief in consent. The trier of fact can cobble together parts of each version to reach an independent finding of fact. As stated by Justice Durno in *R. v Masewich*, 2015 ONSC 2394:

> However, that the complainant and accused give diametrically opposed versions of the events does not preclude the defence of an honestly but mistakenly held belief in consent defence having an air of reality. In *R. v. Osolin* 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595, five justices held that while the defence would rarely arise in that situation, it was not logically impossible for a jury to accept parts of the two witnesses' testimony.

"Air of reality" is of particular concern not only in determining whether or not the defence is available at trial but also in pre-trial evidentiary hearings in which the defence seeks to use other sexual history evidence to support the defence of honest but mistaken belief.

If not approached properly prior to trial, the defence can end up being denied evidence that would give an air of reality to their claim of honest but mistaken belief on the basis that there appeared to be no air of reality based only on the complainant's police statement.

In this case, the trial judge determined that the accused was required to engage in verbal communication and declined to put HBMB to the jury. The Court of Appeal ruled that the judge had usurped the role of trier of fact in making that decision stating:

> Whether consent was communicated by words or conduct (or both) is highly contextual, and what is required will vary from case to case.

The availability of the defence of honest but mistaken belief in communicated consent continues to include both actions and words. In addition, in assessing the air of reality, the defence evidence must be taken at its highest.

Much of the confusion over HBMB is due to comments from the Supreme Court of Canada in *R. v. Barton*, 2019 SCC 33 which stated that "testing the waters" is not a reasonable step. This has sometimes been interpreted to exclude non-verbal communications despite *Barton* continuing to include both words and conduct as a form of communication.

Gender Diversity and Jury Selection

Processes for jury selection have been an issue since new legislation in September 2019 which eliminated peremptory challenges in an attempt to diversify jury panels. On May 10, 2022 the Ontario Court of Appeal ruled that gender can not be used as a justification to eliminate jury members.

In *R. v. Azzi*, 2022 ONCA 366 Chief Justice Strathy wrote that the trial judge was incorrect to stand aside jurors to create a "better gender balance" on a sexual assault trial jury.

Concerned about stereotypes and myths about sexual assault the trial judge ruled that "the case required a gender balance, given the nature of the evidence, the degree to which the verdict would hinge on the assessment of personal communications, and the need to avoid twin-myth reasoning."

Only two weeks prior to the *Azzi* trial Justice Boswell had ruled against "tinkering" with jury composition based on gender in *R. v. Campbell*, 2019 ONSC 6285. In *Campbell* the defence had requested a more gender diverse panel after four of the first five jury members were female. In *Azzi* the judge intervened after only two of the first ten jury members were male.

Though there has been some disagreement on how to interpret the Supreme Court's decision in *R. v. Chouhan*, 2021 SCC 26, the Court of Appeal noted and endorsed that "[t]wo post-*Chouhan* Superior Court decisions reflect the conclusion that five of nine members of the Supreme Court 'proposed limits on the stand aside power, holding that it could not be used to secure a representative petit jury'".

The curative proviso was not employed as the judge's comments about gender diversity were made in front of the jury members.

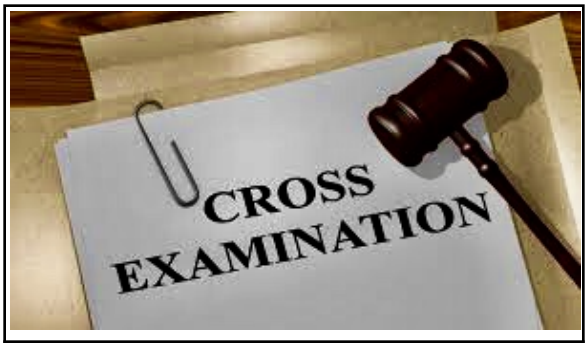
Conditional Sentences and Mandatory Minimums

Ontario Superior Court Justice Schreck recently ruled that people convicted of sexual assault should have access to a conditional sentence. He noted:

> A conditional sentence is statutorily unavailable in this case by virtue of s. 742.1(f)(iii) of the *Criminal Code*, which precludes such sentences in sexual assault cases prosecuted by way of indictment.

In finding that the elimination of conditional sentences violated ss. 7 and 15 of the Charter Justice Schreck was concurring with Justice Nakatsuru in *R. v. R.S.*, 2021 ONSC 2263 and noted that, while *R.S.* is currently being appealed, three other Superior Court judges have ruled the same.

Mandatory minimums are repeatedly struck down due to the infringement on the ability for a judge to issue a proportional sentence based on the unique facts of a case.



The Importance of Cross-Examination

In a split decision the Ontario Court of Appeal ruled in *R. v. S.S.*, 2022 ONCA 305 that the accused was denied a fair trial after a child complainant's police statement was admitted into evidence without making the child available for cross-examination.

The complainant, who was 8 years old at the time of her statement, was "unable or unwilling to give any meaningful evidence" in the preliminary inquiry "as she purported to remember nothing about the interview or its substance." A child psychologist further claimed that the child was fearful that if she testified the Children's Aid Society would not permit her to live with her mother, which is what happened after she gave her statement to police.

The trial judge found that the police statement met the reliability threshold for admissible hearsay and that the complainant had no motive to fabricate.

The majority in the Court of Appeal noted that, when left alone in the room, the child sang "Some day I want day – I wanna live with my mom but not my uncle."

The psychologist acknowledged that the child's distress about testifying could also be caused by having lied in her police statement and not wanting to lie again. The child's mother testified for the defence saying that she had only signed an Agreed Statement of Facts admitting that she had erred by leaving her child in the appellant's care because it was a condition of getting back custody of her daughter.

While, when there is strong corroborating evidence, hearsay can sometimes be admissible for the truth of its contents the Court remarked:

> In this case, the two most important of the four hearsay dangers identified by the Supreme Court in *Bradshaw* were perception and sincerity: whether the complainant accurately perceived what happened to her, and whether she was telling the truth. Despite the Supreme Court's direction that "the scope of the inquiry must be tailored to the particular dangers presented by the evidence", the trial judge did not advert to these dangers: *Khelawon*, at para. 4. He did not consider the case-specific dangers that would result from

> admitting the statement without any opportunity for cross-examination.

Given the dissent of Justice MacPherson, the case will likely be appealed to the Supreme Court of Canada.

The Mischief of Expert Evidence

In *R. v. D.M.*, 2022 ONCA 429 Justice Paciocco overturned a sexual assault conviction on a number of grounds.

Primarily, an expert's testimony was improperly used in the Crown's closing submissions to support the credibility of the complainant, who had a mental disability. The expert had only been qualified to explain the nature of the disability. No corrective instruction was given to the jury after those submissions. The lack of a timely objection by the defence at trial did not undermine the importance of the error.

In a second error, the trial judge improperly summarised the burden of proof in the jury charge. When stating the three prongs of W.(D.) the judge specifically stated that if the accused's evidence was believed or raised a reasonable doubt then he should be acquitted.

Justice Paciocco has written a highly cited article called "Doubt About Doubt: Coping with *R. v. W.(D.)*" in which he makes the point that reasonable doubt can be raised by any evidence both from the Crown and the defence. Exculpatory evidence is not only reliant on an accused's testimony.

In *D.M.*'s case there were two witnesses, one called by the Crown and one by defence, who provided evidence that could raise a reasonable doubt aside from the accused's own testimony. Despite referencing the evidence of those witnesses elsewhere in the jury charge, Justice Paciocco wrote:

> The recitation of that evidence reminded the jury of what the evidence was but provided no guidance on how the credibility and reliability of that evidence is to be evaluated to determine whether it gives rise to a reasonable doubt.

The Crown also improperly asked the accused why the complainant would lie. This both violates the rule against asking a witness to testify about the veracity of another witness' testimony and reversing the burden of proof by requiring the accused to provide a motive for fabrication.

An additional error included potential improper use of after the fact conduct for cross count reasoning which would only have affected one of the convictions. Ultimately, the combination of errors was deemed to have resulted in an unfair trial.

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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