NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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Improper Crown-Led Evidence Results In Overturned Sexual Assault Convictions

"You Don't Get Points for Not Exaggerating"

There has been increased scrutiny on Crown-led evidence in sexual assault trials since the Supreme Court of Canada ruled in *R. v. Barton*, 2019 SCC 33 and *R. v. Goldfinch*, 2019 SCC 38 that the Crown-led evidence of a sexual nature should be subjected to a *voir dire*.

Two recent Ontario decisions focused on other types of improper evidence.

In *R. v. Alisaleh*, 2020 ONCA 597, the Ontario Court of Appeal ruled in the accused's favour after the Crown conceded "that the trial judge erred in finding that the complainant's credibility was enhanced because she did not appear to exaggerate her allegations against the appellant."

This factor was advanced by the Crown in closing submissions and was given undue weight in the trial judge's reasons for conviction. Defence counsel had objected to this submission at the time, correctly pointing out that "you don't get points for not exaggerating".

The Court of Appeal declined to apply the curative proviso, pointing out that "the lack of embellishment was cited as one of two important reasons that enhanced the complainant's credibility."

In *R. v. Larion*, 2020 ONSC 5611 the Crown conceded "that the evidence at issue was inadmissible bad character evidence" but was unsuccessful in their argument that the effect was harmless.

In her reasons, the trial judge acknowledged that she had been "wrong" when she ruled that the door had been opened to put the

accused's character on trial because the defence had put the complainant's character into question.

Citing *R. v. Hart*, 2014 SCC 52, Justice Stribopoulos found that the "poisonous potential" and risk of "both moral and reasoning prejudice" could not be overlooked.

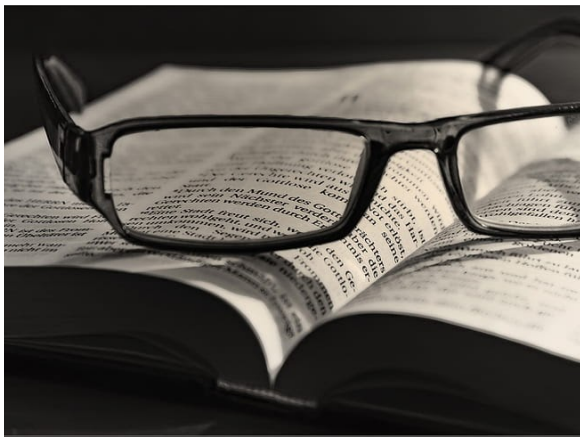
The impugned evidence included testimony from the complainant and other Crown witnesses that, in general, "the appellant was violent, menacing, brutish, homophobic, and misogynistic." Importantly, there was a failure on the part of the trial judge, the Crown and the defence counsel to appreciate the need for an admissibility ruling.

In the opening comments, the *Larion* decision observed that the Crown rarely provides opening statements in the Ontario Court of Justice thus "the trial judge had no forewarning regarding the substance of each Crown witness' testimony."

While an opening statement from the Crown prosecutor may offer the opportunity to flag inappropriate evidence, there are other ways to meet that objective.

With the elimination of most preliminary hearings in sexual assault cases, it would clearly benefit all parties to have more rigorous pre-trial conversations and to seek advance rulings on the parameters of both Crown and defence-led evidence.

In sexual assault trials witness credibility is always a central factor and the trial process can easily be distorted by either side. It is no longer acceptable to only scrutinize the evidence of an accused.



SCC Asked To Give Guidelines For Crown-Led Evidence

On November 5, 2020 the Supreme Court of Canada will hear arguments in the appeal of *R. v. Langan*, 2019 BCCA 467. There are four interveners in the case: The Attorney General of Ontario, The Criminal Lawyers' Association (Ontario), The Independent Criminal Defence Advocacy Society (CDAS) and The Canadian Association for Equality (CAFE).

The primary ground of appeal in the *Langan* case relates to the misuse of prior consistent statements during trial but, additionally, some of the Crown led text messages were found to comprise prior sexual history evidence from which the trial judge seemed to engage in propensity reasoning.

The CDAS factum, seeks to outline a new procedure or set of guidelines for how Crown led evidence should be vetted prior to trial. They point out that this is the first case before the Supreme Court of Canada in which this issue "squarely arises."

The CDAS submits that the Crown should provide written notification in advance of trial "setting out the details of the sexual history evidence that the Crown seeks to lead and the purpose(s) for which it is being led."

The seven day notice requirement for the defence will likely be a consideration with a potential for an interpretation offered on the exception granting "any shorter interval that the court may allow in the interests of justice." The constitutionality of the seven day notice requirement is the sole ground of appeal on another upcoming SCC case, *R. v. J.J.*, 2020 BCSC 349.

The CDAS argues that an advance *voir dire* would avoid trial delays after the complainant testifies in chief and assist the trial judge in better assessing the purpose of defence-led evidence.

The Supreme Court has previously indicated support for this line of reasoning in paragraph 79 of *R. v. R.V.*, 2019 SCC 41. Not only would an pre-trial *voir dire* assist the defence in determining what evidence they seek to admit, as Justice Karakatsanis wrote:

"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."

This may be the first decision in which changes to the Criminal Code enacted by Bill C-51 are put into context with previous SCC rulings.

Uneven Scrutiny Results in Retrial

The BC Court of Appeal recently overturned a conviction in *R. v. Roth*, 2020 BCCA 240 on the grounds that the trial judge had applied different standards while formulating her credibility assessments.

Uneven scrutiny is a notoriously difficult ground of appeal as a judge's credibility assessment is given deference due to their presence during testimony. Additionally, they are not expected to discuss every piece of evidence or articulate every thought behind their decision. The judge's reasons should always be read as a whole.

In the case of *Roth* Justice Stromberg-Stein, writing the unanimous decision, found that:

"While internal and external inconsistencies with the appellant's evidence resulted in the judge rejecting much of his testimony, significant inconsistencies involving the complainant's evidence were generically cast as minor, treated as relevant only to peripheral matters, and found to be easily explained away on grounds of confusion and lack of memory."

The concerns of the Court of Appeal involved a combination of elements which added to the appearance of unfairness.

During trial the accused was heavily questioned about being a "powerlifter" and significant weight was put on an assumption that the accused must have been extremely intoxicated if he'd been falling asleep.

This conclusion misapprehended the evidence that the accused had been working since early in the morning and was falling asleep due to exhaustion.

While the Court of Appeal felt that it "overreaches" to say that the trial judge strayed into "stereotypes of male behaviour," they found that the extensive consideration given to the accused's status as a power lifter incorporated speculative assumptions of the accused's levels of endurance.

There was also a concern that the Crown had engaged in some improper cross-examination areas by asking the accused if he thought other witnesses were lying and suggesting he had adopted the wording of an expert witness to tailor his evidence.

The suggestion that a defendant has tailored their testimony after listening to the evidence in court risks holding an accused's right to be present at their own trial against them when they finally testify.

Though the trial judge didn't venture into that forbidden line of reasoning there were hallmarks of uneven scrutiny in some of the language used to describe the accused's evidence.

Combinations of finding the accused's testimony to be "self serving," "tailored," "contrived" and "incredible" are often factors and tell tale signs of uneven scrutiny and are deemed to be a valid concern.

Other Cases To Watch

R. v. Slatter, 2019 ONCA 807, SCC Case #38870
Issues: Sufficiency of reasons; failure to grapple with reliability concerns related to the complainant; the use of expert evidence for credibility assessments of mentally disabled persons.

R. v. Delmas, 2020 ABCA 152, SCC Case #39163
Issues: Stereotypes about accused, lack of voir dire on Crown-led evidence, Crown asking that the complainant be disbelieved and the accused be convicted on his own evidence.

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