NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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New Rules of Evidence to be Challenged in the Supreme Court

Leave To Appeal Granted

The Supreme Court has granted leave to appeal in a BC case, *R. v. J.J.*, 2020 BCSC 349, which found the seven day notice requirement in s. 278.93(4) of the Criminal Code violated s. 7 of the Charter and could not be saved under s. 1.

Since new rules of evidence in sexual assault trials were enacted by Bill C-51 in December 2018 there have been numerous constitutional challenges launched across Canada. This is the first time that the Supreme Court of Canada will be weighing in directly on the issue of how the new process of the 276 regime and addition of 278.92 affect the rights of an accused now that complainants are granted standing in pretrial applications.

The lower courts have been split over how to deal with the problem of complainants having access to the defence evidence prior to testifying. The result of this division has been that the new provisions are being applied differently in criminal trials depending on the province.

The original decision from the Supreme Court of BC has not yet been made publicly available. Given the impact the decision will have across the country, we can expect to see a large number of intervenors including the Attorneys General of other provinces.

The new legislation was mostly seen as a response to the trial of Jian Ghomeshi in which the three complainants who testified were confronted with inconvenient emails and correspondence which undermined their narratives and credibility. The trial judge found that the complainants in the Ghomeshi trial

exhibited a “wilful carelessness with the truth” which was exposed through confrontation with the evidence in the possession of the accused.

The Ghomeshi trial should have been seen as a textbook case of why an accused’s access to full answer and defence and ability to fully cross-examination should not be impeded and is essential to a fair trial. Instead, it has become a rallying point for interest groups who see every acquittal in a sexual assault trial as a miscarriage of justice.

The legislation enacted by Bill C-51 added section 278.92 which requires an accused to engage in an admissibility hearing for all records in their possession in which the complainant may have an expectation of privacy. The application has to be in writing, detail the particulars of the evidence sought to be admitted, and outline the intended purpose of the evidence regarding probative value.

The trial judge in *J.J.* ruled that the requirement for seven days notice was unconstitutional only as it applies to s 278.92 evidence. He “read down” the section to allow defence counsel to make their applications “at the conclusion of the complainant’s examination in chief, or as otherwise required by the judge, provincial court judge or justice in the interests of justice.”

This is the first constitutional challenge of the new rules of evidence to reach the Supreme Court of Canada. The Crown appealed pursuant to s. 40 of the Supreme Court Act, R.S.C. 1985, c. S 26

At the core of the issue is the balancing of the rights of the accused with the privacy rights of complainants which cannot be at the expense of fundamental principles of fair trials.

Intoxication And Determining Capacity To Consent In Sexual Assault Trials

The law on capacity to consent remains a high bar to establish that a complainant’s consent was vitiated by intoxication. As confirmed in *R. v. Al-Rawi*, 2018 NSCA 10, “a drunken consent is still a valid consent.”

Two cases involving intoxication will be heard in the Supreme Court of Canada in October, 2020, that may offer better guidance to the lower courts on how to assess the impact of intoxication and more consistently determine when a complainant lacks the capacity to consent.

In *R. v. Kishayinew*, 2019 SKCA 127 the complainant testified that she was not overly incapacitated by alcohol despite significant gaps in her memory. The prosecutor argued that the complainant should not be believed on that point but that her evidence should otherwise be accepted as reliable where it supported a sexual assault conviction.

The accused was convicted at trial and the majority in Saskatchewan's Court of Appeal ordered a retrial. The judge's finding that the complainant lacked the capacity to consent was incompatible with the evidence. The dissent argued that the finding of non-consent removed the need to determine capacity.

The often cited case of *R. v. G.F.*, 2019 ONCA 493 will also be heard by the Supreme Court of Canada in October on the issue of capacity assessments. Both cases should be heard within a week of each other. This case, along with *Al-Rawi*, is one of the leading decisions on the factors to apply in determining capacity.

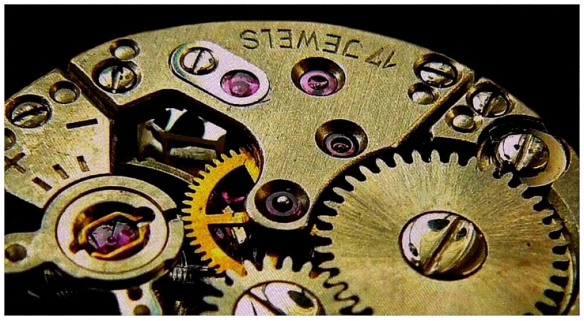
G.F. mandates that a judge's analysis of consent, capacity to consent, and honest but mistaken belief in consent should be resolved separately by a trial judge and in that order. If it is determined that the complainant did not consent there is no need to determine the capacity question.

Paragraph 38 in *G.F.* is regularly cited by the Crown where it states "some physical actions such as walking a short distance, making a phone call, speaking, and some awareness of or resistance to sexual activity do not necessarily preclude a finding of incapacity."

The signifiers of capacity are still hotly contested and there remains some division on whether or not the complainant's ability to assess the "risks and consequences" of the sexual activity should be a factor. *Al-Rawi* and *G.F.* rejected this standard, saying it goes too far.

In *G.F.* the unanimous Ontario Court of Appeal stated at paragraph 36 that "capacity for considered evaluation of the collateral risks and consequences of sexual activity sets the bar too high for capacity to consent to sexual relations."

While the main issue on appeal to the Supreme Court is the correct interpretation of *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, where appellate courts expand on or raise new issues, we can reasonably expect this decision to address the process of a capacity analysis.



Other Cases To Watch

R. v. Langan, 2019 BCCA 467, SCC Case # 39019
Issues: Prior consistent statements; failure to hold a *voir dire* on Crown-led sexual history evidence; insufficiency of reason concerning proper application of W.(D.)principles.

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.

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