NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

November 2020

The Subject Matter Of The Charge

Allowable Usage of Narrative

The Ontario Court of Appeal recently issued a decision in *R. v. M.R.S.,* 2020 ONCA 667 which took aim at how "narrative" evidence was submitted by the Crown which amounted to a volume of "similar fact" or bad character evidence at trial.

In paragraph 72 of that decision, Justice Paciocco cited *R. v. Gareau*, 2016 NSCA 75 that "'Narrative' isn't a portal for gratuitous propensity evidence about uncharged similar facts" and disagreed with the Crown that the evidence didn't "fit" as discreditable conduct if it was presented as part of the narrative.

As the Supreme Court of Canada stated in *R. v. Goldfinch*, 2019 SCC 38, relationship evidence cannot be granted exclusion from evidentiary concerns simply by claiming it is required for "narrative" or "context" and the decision in *M.R.S.* reaffirms that rules which apply to the defence also apply to Crown-led evidence.

While the Crown is still exempt from having to file a written application for how it intends to lead evidence, it is becoming clear that how the Crown frames the "narrative" of the case needs to be properly vetted prior to trial.

In another Ontario decision, *R. v. X.C.*, 2020 ONSC 410, Justice Dawe noted that broad sweeping statements of a complainant about what allegedly "always" or "never" happened in the course of a relationship becomes relevant to determining the probative value of defence evidence at trial.

In *X.C.*, Justice Dawe determined that the "subject matter" of an offence must be seen as part of the larger transaction where a complainant has characterized what she would or wouldn't have consented to in general.

At paragraph 38, Justice Dawe writes "In my view, 'sexual activity', in the form of both sexual acts and communications about sexual acts, can properly be considered to 'form the subject matter of the charge' if it is part of the 'transaction' that is captured by the charge, even if the 'sexual activity' in question is not in itself an element of the charged offence."

At paragraph 49 Justice Dawe determined that what may otherwise be seen as “other” sexual activity would be deemed “subject matter of the charge” if the complainant testifies that she “never” consented to that sexual activity.

These considerations complicate cases where charges are laid in which the complainant is not specific on the date of an alleged sexual assault and makes generalized statements about the nature of the relationship.

Evidence connected to the subject matter of a charge does not need to be included in pre-trial applications but when there is ambiguity from the Crown about when the alleged offence took place it raises serious concerns about how to limit the range of evidence the accused may need to call to make full answer and defence.

Another consideration which often results in appellate intervention is how prior consistent statements are used when they are presented as “narrative as circumstantial evidence” exceptions.

What is increasingly clear, especially with the loss of preliminary hearings in most sexual assault cases, is that both the Crown and the defence would benefit from more vigorous communication prior to trial to discuss how the charges are framed and why.

Prosecutors can no longer claim evidence is pure narrative while simultaneously locking the door to a defendant producing evidence to correct that narrative.

Disabilities and Complainant Reliability Assessments

On November 6, 2020 the Supreme Court of Canada will hear arguments in the appeal of *R. v. Slatter*, 2019 ONCA 807. There are numerous interveners in the case: Inclusion Canada, Women's Legal Education and Action Fund Inc., DisAbled Women's Network Canada, ARCH Disability Law Centre, Barbra Schlifer Commemorative Clinic, and Criminal Lawyers' Association of Ontario.

The majority of the Ontario Court of Appeal overturned Mr. Slatter’s conviction on a sexual assault charge, finding that the trial judge’s reasons were insufficient because he didn’t grapple with suggestibility evidence that arose in connection to the complainant’s disability.

The majority of intervenors are concerned that women “labelled” with intellectual disabilities are being treated unfairly as a class of person if that disability undermines their credibility or reliability as a witness.

The Crown expert during the trial testified that the complainant had a high suggestibility score

and the trial judge failed to address that concern while also referring to the complainant's repetition of the allegations as confirmatory.

The Supreme Court will be asked to determine how to balance credibility and reliability concerns specific to a complainant while also acknowledging the unfortunate vulnerability of complainants with disabilities.

Responding to numerous interventions in his appeal, Mr. Slatter's counsel wrote in their reply factum that "we would observe that the Interveners' argument on this point seems to add nothing beyond their support for the Crown's position."

The reply factum asserts that the Crown and supporting intervenors take an "untenable" position by trying to exclude evidence particular to a complainant.

The issue of confining the role intervenors play in appeals may also arise as a result of the repetition of argument identified by Mr. Slatter's counsel.

Where Crown appeals are conducted at the expense of the government, the accused not only faces increased costs when intervenors become involved, it can create the problem of multiple party litigation in which an already burdened accused must launch a defence against multiple fronts.

While intervenors can play a valuable role in appeals, it can also get mired in partisan interference and arguments crafted solely to bolster the position of an existing party.

The Limits of Expert Evidence

In *R. v. Czechowski*, 2020 BCCA 277, the BC Court of Appeal recently determined that a Crown expert went beyond the scope of expertise to comment on how "trauma" affects a victim's memory.

Dr. Martin was qualified to give evidence about the physical symptoms she observed but went further to say:

"[M]emory is often fragmented in an acute traumatic situation, where there will be sentinel moments and sentinel memories of – of the trauma. So moments that are embedded with fear or where there's been some sort of a change in the course of events. And often there's gaps in between those sentinel events that slowly fill in as time passes and the victim is able to – to think and process what's happened to them. And so that's not uncommon to see, sort of as a new memory comes back that they get distraught all over again."

Though the Court of Appeal found that this evidence went beyond Dr. Martin's expertise, they ruled that the curative proviso should be applied.

In an earlier case, *R v. Ennis-Taylor*, 2017 ONSC 5797, Justice Lemay denied a Crown application for evidence from Dr. Janine D'Anniballe as an expert on "the neurobiology of trauma."

Notably, Justice LeMay pointed out the conundrum at paragraph 51 that if an expert testifies about what is accepted to be a "rape myth" then they are subject to the defence cross-examining them and putting "rape myths" into dispute.

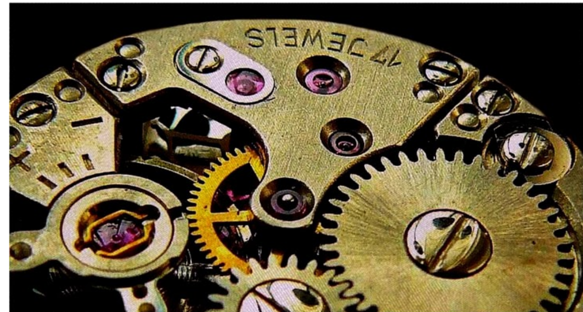
Ultimately it was decided in *Ennis-Taylor* that proper jury instructions would be more appropriate.

There is still a lack of consensus among memory experts and neuroscientists as to whether or not the "neurobiology of trauma" is scientifically sound or just repackaged "recovered memory syndrome" which resulted in the travesty of the 1980s so called "Satanic Panic."

The *Mohan* criteria for expert evidence lists four factors for consideration: Relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, separate and apart from the opinion rule itself and a properly qualified expert.

Given many recent concerns with peer reviewed articles, there are many reasons for caution when relying on the volume of published articles in determining the validity of an expert's opinion.

Primarily, all evidence should be rooted in facts specific to each case and witnesses should be constrained from offering generic or propensity evidence in all cases.



Other Cases To Watch

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.

R. v. C.P., 2019 ONCA 85, SCC Case #38546
Issues: Unreasonable verdict and constitutional challenge of s. 37(10) of the Youth Criminal Justice Act.

R. v. G.F., 2019 ONCA 493, SCC Case #38801
SCC decision reserved
Issues: Capacity to consent and "new issues" raised by appellate courts.

R. v. Cooke, 2020 NSCA 66
October 28, 2020 decision finding the trial judge over-cautioned herself regardinging stereotypes and improperly relied on prior consistent statements.

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