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NEWSLETTER: Sexual Assault Law Updates

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Is "Context" and "Narrative" Dead Since Goldfinch?

Pre-Trial Records Applications

Since the decision in *R. v. J.J.*, 2022 SCC 28 the defence in sexual assault cases are now required to bring pre-trial applications to request admissibility rulings on all evidence in their possession.

There are two Stages to these applications. The first is to determine if a hearing is warranted or required. The second is to determine the admissibility based on relevance and probative value versus possible prejudicial effect. The complainant only has standing at Stage Two to make submissions.

The first stage is a low threshold in favour of the defence. The question is only if the evidence is *capable* of being admissible. The actual argument about the probative value is part of Stage Two.

If the defence evidence is determined not to be a "record with an expectation of privacy," the application is no longer required to continue and the defence is free to use the evidence in accordance with the regular rules of relevance.

If the application proceeds to Stage Two, it is now a common argument from the Crown that the evidence in defence possession is a "collateral fact" and that evidence containing content of a sexual nature should not be permitted if the sole purpose is for narrative, context or to attack the credibility of the complainant.

The "narrative" issue is cited as stemming from *R. v. Goldfinch*, 2019 SCC 38 in which the Supreme Court states at para 5:

> A s. 276 application requires the accused to positively identify a use of the proposed evidence that does not invoke twin-myth reasoning. In other words, relevance is the key which unlocks the evidentiary bar, allowing a judge to consider the s. 276(3) factors and to decide whether to admit the evidence. Bare assertions that such evidence will be relevant to context, narrative or credibility cannot satisfy s. 276.

The Goldfinch decision was not intended to declare that narrative, context and credibility will never be permissible uses for evidence. It is only in cases where it is a "bare assertion" of relevance not grounded in any material issue.

It remains that, when a complainant puts the very nature of the relationship with the accused into question, evidence regarding that relationship may have increased probative value.

In *Goldfinch*, at para 63 the Supreme Court notes that "[e]vidence of a sexual relationship may also be relevant when complainants have offered inconsistent statements regarding the very existence of a sexual relationship with the accused." Further, at para 65 they acknowledge that "[t]here will, of course, be circumstances in which context will be relevant for the jury to properly understand and assess the evidence."

Paragraph 95 of *Goldfinch* similarly relates context evidence where the accused must demonstrate that the evidence goes to a legitimate aspect of his defence and is integral to his ability to make full answer and defence.

The current legislation specifies that the evidence is presumptively inadmissible unless it has "significant" probative value. This language appears to put an onus on the defence to not just provide a purpose for the evidence but to provide a compelling purpose for each and every piece of evidence.

In determining that the legislation was constitutional, the Supreme Court, citing *R. v. Darrach*, 2000 SCC 46, was careful to point out in para 131 of *J.J.* that the word "significant" is interpreted that it "simply requires that the evidence not 'be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt.'"

Goldfinch at para 66 also does not rule out that context evidence may be necessary to the coherence of the defence narrative.

In *Darrach*, the Supreme Court further notes at para 39 that:

> At the same time, Morden A.C.J.O. agrees with *R. v. Santocono* (1996), 1996 CanLII 828 (ON CA), 91 O.A.C. 26 (C.A.), at p. 29, where s. 276(2)(c) was interpreted to mean that "it was not necessary for the appellant to demonstrate 'strong and compelling' reasons for admission of the evidence". This standard is not a departure from the conventional rules of evidence. I agree with the Court of Appeal that the word "significant", on a textual level, is reasonably capable of being read in accordance with ss. 7 and 11(d) and the fair trial they protect.

Darrach also notes at para 40 that a balance must occur in order to not violate the accused's right to full answer and defence. The words "significant probative value" must be balanced by the words that follow, allowing only that any non-trifling value should not be "substantially outweighed" by the risk of prejudice.

The value versus risk assessment is essential to ensure the defence is not denied evidence that may legitimately assist in their defence.

It is also commonly argued that evidence should be barred if it *could* result in a myth or stereotype about sexual assault complainants. The permissible inferences drawn from the evidence are a completely separate issue to be outlined at trial. The legislation is specifically designed to block evidence that can *only* be used to advance a myth or stereotype.

Justice Paciocco explains this issue in detail in *R. v. J.C.*, 2021 ONCA 131. He notes at para 68:

> The second critical point in understanding the rule against stereotypical inferences is that this rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence (citations omitted).

The list of "myths and stereotypes" continues to grow. The "twin myths" remain the focus - that a complainant is more likely to consent or less worthy of belief solely based other sexual activity not subject matter of the charge. In addition, it is now accepted that victims may remain in contact with an abuser and may not report in a timely manner.

In *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, Justice L'Heureux-Dubé listed a number of "rape myths" and stereotypes that concerned her. The list includes motives to fabricate as being stereotypes and questions the legitimacy of an accused whose defence is that no sexual encounter actually occured.

Some of these alleged stereotypes run dangerously afoul of fundamental principles of our justice system. If a denial that a sexual encounter occured is a myth, it would rob an accused of access to a legitimate defence.

Similarly, some people do have motives to fabricate. The evidence must always be tethered to the specific individuals and grounded in the anticipated evidence on a case by case basis. (*R. v. R.V.*, 2019 SCC 41 at para 34, citing *Seaboyer*)

Goldfinch specifically rejects "bare assertions" related to narrative, context and credibility. This means the purpose of the evidence must be fleshed out. As also noted at para 124 of *Goldfinch*, "Credibility is a key issue in almost every sexual assault trial".

Contrary to some interpretations, context and narrative are not "dead since *Goldfinch*."

Subject Matter of the Charge

In the recent decision of *R. v. T.W.W.*, 2022 BCCA 312 a number of issues arose in relation to admissibility of prior sexual history evidence. This is a split decision, which has the right of appeal to the Supreme Court of Canada.

The primary focus was on whether or not the accused should have been granted his s. 276 application and how to classify proximate sexual activity to the subject matter of the charge.

In this case, there were three, discrete timeframes of sexual activity in the sequence of events. The accused denied that sexual activity occured at the time of the alleged assault but wanted to advance his version of events that sex occured at two other moments in proximity.

His application did not precisely match his evidence at trial. The BC Court of Appeal majority held that the trial judge was correct in ruling that the other sexual activity was inadmissible based on the way the application was written at the time.

Though the evidence, as it came out at court, could have changed the way the application was viewed, the trial judge was deemed to have been correct in denying reopening the application as the way it was framed in writing did not match the arguments later made on appeal.

In a lengthy dissent, Justice Frankel laid out all the evidence tendered during testimony at trial and found that the evidence was essential to the accused being able to present his version of events.

The majority disagreed. Emphasis was placed on the need for s. 276 applications to be "framed with clarity and managed with care."

The issue of how much detail is required from an accused in pre-trial applications has been directly challenged in terms of the constitutionality of the current legislation. The Supreme Court majority in *R. v. J.J.*, 2022 SCC 28 confirmed that an accused is not actually required to give a personal affidavit in support of the pre-trial application.

This can cause some confusion when the application is denied due to insufficient information about the nature of the accused's anticipated evidence.

One of the criticisms, by the dissenting members of the Supreme Court in *J.J.*, is that the majority failed to give meaningful guidance or protection to the accused while ratifying the new rules of evidence.

The case of *T.W.W.* will potentially offer an opportunity for the Supreme Court to clarify what has been left unclear in their *J.J.* decision. The level of precision and whether or not an accused must lay out their entire defence in the pre-trial application will be at the heart of any Supreme Court appeal.

One further concern remains with a comment from the majority of the BC Court of Appeal at para 98 stating that "[e]vidence of prior sexual activity will 'rarely be relevant to support a denial that sexual activity took place or to establish consent'" [emphasis in original].

The fact that an accused may be denying the sexual activity in question should not preclude other evidence of a sexual nature. Though rare, there may be circumstances where it is an essential part of the accused's version of events.

The concern must stay focused on whether or not a valid use of the evidence sought to be introduced is articulated and relevant to that particular issues in the case.

Demeanour Evidence As Corroboration

In *R. v. Bhadresa*, 2022 ONSC 4691, Justice Harris of the Ontario Superior Court allowed a summary conviction appeal due to misuse of the complainant's emotional state.

Both the accused and the complainant agreed that they had a very intense argument prior to the police becoming involved and that the complainant had attempted self-harm.

When the emotional state of a complainant is equally consistent with the accused's version of events it loses probative value. The demeanour of the complainant was as equally capable of supporting innocence as it was of supporting guilt. As such, it was deemed to be an error of law to place corroborative weight on the emotional state of the complainant in this case.

The Ontario Court of Appeal recently discussed the proper uses of demeanour in *R. v. J.L.*, 2022 ONCA 271. At para 6:

> It is appropriate for trial judges to consider the demeanour of witnesses when evaluating their credibility [citations removed]. However, this court has cautioned that demeanour can be an unreliable gauge of credibility because of the impact that culture, personality and pressure can have on courtroom behaviour, and the risk that stereotypes about credibility will distort the evaluation [citations removed]. Therefore, it is an error to give undue weight to demeanour in making credibility determinations. Although the trial judge arguably gave more attention to demeanour in his reasons for judgement than is optimal, we are left unpersuaded that the trial judge erred by giving undue weight to demeanour.

In contrast, the *Bhadresa* case relied primarily on the complainant's demeanour at the time the police arrived. The defence gave an alternate reason for her state of distress at that time which was in relation to their argument. The defence explanation for the complainant's distress was also partially corroborated by the complainant herself.

Justice Harris also noted at para 26:

> The situation is not dissimilar from consciousness of guilt evidence relating to an accused's after-the fact conduct. It has been recognized for many years that there are situations in which an accused's after-the-fact conduct is equally explained by innocence as it is with guilt. If true, the evidence is of no probative value.

Crown-led Sexual History

Where Crown-led sexual history is anticipated, the common law guidance of *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577 applies. It is uncommon for Crown to bring a *Seaboyer* application and is usually mentioned in the defence pre-trial application, seeking to rebut the anticipated evidence.

Crown-led sexual history evidence is usually intended to support the inference that the complainant was *less* likely to consent and thus cannot be violating the prohibited "twin myths": *R. v. Langan*, 2019 BCCA 467 at paras 109-111.

In *R. v. Bethune*, 2022 NSSC 246 the Crown sought to use evidence that the complainant had disclosed a prior sexual assault to her physician in order to establish an enhanced position of trust or authority.

The trial judge rejected the Crown application, stating at para 36:

> In its essence, the argument seems to implicitly accept the proposition that a victim who discloses childhood abuse tends to be more trusting of, under the authority of, or more submissive in relation to the professional to whom she entrusts it. With respect, that premise has not been established. A premise without a foundation is every bit as fallacious as either of the twin myths enshrined in s. 276.

Also of note in *Bethune* is that the trial judge denied the complainant standing to make submissions at the *Seaboyer* hearing. As the complainant had already expressed her consent to the Crown using the prior sexual history evidence, the judge found that her privacy interests were not engaged.

In a similar case, *R. v. G.L.*, 2021 ONSC 271, Justice Bondy denied a Crown application to adduce evidence that the complainant was a lesbian, thus less likely to consent to sex with a male. At para 8:

> The language of section 276(1) is at the heart of that assertion. The Crown maintains that the section only applies to evidence which demonstrates that a complainant is "more likely to have consented" and "less worthy of belief." The Crown, however, is proposing the converse which is that the complainant is "less likely to have consented" and "more worthy of belief" as is the case here.

Aside from being a distinction without a difference, Justice Bondy noted that society had advanced in understanding gender identity and sexual orientation as being more "fluid." He noted at para 17 that the Crown's proposition would result in impermissible reasoning if the accused was female:

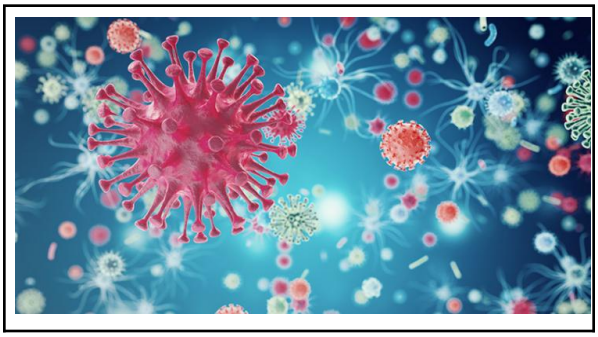
> I disagree with that conclusion. A finding by this court that an individual who identifies as homosexual is, as a result of that identity, less likely to have consented to sex with a heterosexual would logically require a conclusion by me that an individual who identifies as homosexual is more likely to have consented to sex with another who also identifies as homosexual. I find that to be propensity reasoning which section 276 seeks to exclude.

The Crown was inviting "propensity reasoning" which is presumptively inadmissible. Normally, testimony from a complainant about what he or she was unlikely to have consented to is only permissible where there is a lack of memory due to drug or alcohol consumption.

The problem with this type of evidence remains that witnesses are often seen or recorded doing precisely what they claim is behaviour they would not have engaged in.

For example, in *R. v. M.T.*, 2016 ONCJ 614 there was video from a club earlier in the evening. Justice Greene noted at para 16 that "[the complainant] K.S. watched the video in court and testified that from the video it looks like she was "into" Mr. P.M. even though she has no recollection of ever being interested in Mr. P.M.. K.S. testified that her behaviour on the video was surprising to her. She was talking and acting with a stranger in a way that she does not normally behave."

The independent video evidence ultimately led to a conviction based on incapacity.



New Evidence in HIV Convictions

The Ontario Court of Appeal has recently vacated convictions in two cases due to new scientific evidence about viral loads.

In *R. v. Murphy*, 2022 ONCA 615 and *R. v. Rubara*, 2022 ONCA 694 the convictions were based on a failure to disclose their HIV status. Fresh evidence revealed that the accused had such a low viral load at the time of the sexual interactiions that there was no risk of transmission.

In *Murphy*, the Court of Appeal declined to make a broader finding as to what conditions negate the reasonable risk of transmission. Citing "institutional concerns" and the fresh evidence related to the specific circumstances, there were other potential conditions which may result in a similar finding.

Indeed, in *Rubara*, the accused was not on ART therapy but was "an 'elite controller', which means his immune system response is naturally effective against the virus."

In both cases the convictions were overturned and acquittals entered.

Crown Disclosure: Is It a "Record"?

In the recent decision of *R. v. Martiuk*, 2022 ONSC 5577, Justice Goldstein ruled that evidence obtained through Crown disclosure can be used by the defence without need for a pre-trial application.

In this case, the complainant had produced some text messages, photos and hospital records to the police. The accused brought a s. 278.93(1) application to use other messages missing from the screenshots that the complainant provided. They included the Crown disclosure out of an abundance of caution.

Justice Goldstein agreed with the defence that, in providing the material to the police, the complainant had waived her privacy interests.

It was noted that the Supreme Court's ruling in *R. v. J.J.*, 2022 SCC 28, finding the new "defence disclosure regime" to be constitutional, they did not comment on whether or not material obtained through Crown disclosure was captured.

Myths And Stereotypes About Men

The BC Court of Appeal just overturned a conviction in *R. v. Tsang*, 2022 BCCA 345 due the trial judge relying on what stereotypes about the complainant and accused that were not grounded in the evidence.

The decision provides a very thorough summary of the prior case law regarding stereotypes about men as well as those about how a woman would be likely to behave.

In this case the trial just rejected the accused version of events as being "lifted from a pornographic script" even though there was agreement from the complainant on some of the dialogue.

Additionally, they noted at para 71 that "[t]he judge appears to have assumed that people attach significant importance to consensual sexual relations, and behave in "normal" ways thereafter."

At para 10, the Court of Appeal noted that the Crown argument was that " it is not enough to identify a stereotype or ungrounded generalization in a judgement. Instead, the appellant must identify the manner in which the stereotype or generalization is used."

Typically, when the Crown appeals an acquittal, they argue that any sign of a stereotype about complainants should be taken as a legal error and assumed to have informed the judge's or jury's reasoning for not convicting.

In this case, the Crown sought to use the curative proviso unsuccessfully arguing that the use of the stereotypes did not affect the outcome of the trial.

Other Cases To Watch

R. v. Ndhlovu, SCC File # 39360
Whether or not mandatory SOIRA order is unconstitutional. There are numerous intervenors in this case.

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

His Majesty the King v. S.S. SCC File # 40147
A child complainant's police statement was admitted into evidence without any ability to cross-examine as the child was fragile.

R. v. Christopher James Kruk SCC file #40095
Crown granted leave to appeal. Conviction overturned based on the trial judge using stereotypes about what a woman would "know"

B.E.M. v. His Majesty the King SCC File# 40221
Lack of corrective instruction after the Crown used a personal anecdote to jury in a historic sexual assault charge. The majority would have dismissed the conviction appeal.

Procureur général du Québec, et al. v. H. V. SCC File# 40093
Court of Appeal upheld that the mandatory minimum sentences in child luring convictions are unconstitutional.

Jason Donald Hay v. His Majesty the King SCC File# 40316
Access to Honest But Mistaken Belief defence based on past sexual activity that caused the accused to believe that the complainant would consent with anal sex. He quickly realized she wasn't consenting and stopped after he attempted it.

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