NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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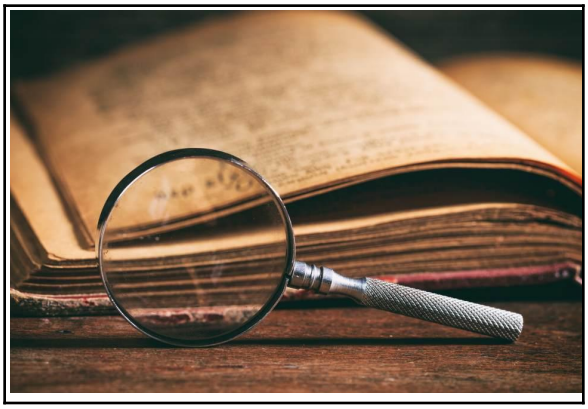
Adult Witness Credibility in Historic Allegations



Credibility "Discounts" Don't Apply

It is well established that the testimony of children can't be held to the same standards as what a trier of fact would expect of an adult. At the same time, there is a difference between the language and perception skills of a child and those of a person testifying as an adult about historic events.

In *R. v. D.D.*, 2022 ONCA 786 the Ontario Court of Appeal overturned a conviction due to the trial judge making numerous credibility assessments that involved treating the adult complainant as if she was a child. They found that "[t]he trial judge erred by assessing the complainant's credibility as if she were a child at the time that she testified."

This point can be quite subtle but it is important, given the difficulty of defending against historic sexual assault allegations in which much of the evidence may have been lost due to the passage of time.

The leeway given to the evidence of child complainants recognizes that they do not possess the language skills of an adult and cannot be expected to articulate their evidence in a detailed coherent fashion. It is also less concerning when there are inconsistencies in the testimony regarding peripheral details in the narrative. This can be seen as somewhat of a "discount" that children are given when relating their version of events.

The principle hails back to the Supreme Court decision *R. v. W.(R.) [R.W.]*, [1992] S.C.J. No. 56, in which Justice McLachlin wrote:

> Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.

The Court of Appeal in *D.D.* was very careful to note that the trial judge's appreciation of the "child like" descriptions creating a strong impression of honesty were not the sole issue on appeal. They gave five examples of passages from the reasons that showed that the age of the witness at the time of testimony

was conflated with the age of when the abuse was alleged to have happened.

To clarify the Court wrote at para 8:

> To be clear, there can be no issue taken with a trial judge finding that details provided by an adult witness about a childhood experience are the kinds of things a child would remember, or that details recounted by the adult witness provide plausibility or coherence to the account. But what a trial judge cannot do is infer that such details, being provided by an adult witness, must be true because a child would not have the intelligence or experience to concoct those details.

Historic allegations are replete with unique problems, not only for complainants but also for an accused who has the right to a fair trial in the face of allegations that can be decades old.

While it is understandable that children's evidence should not be held to the same high standards as that of an adult, we must be careful to not undermine the burden of proof. Lack of detail and inconsistencies remain relevant when they are not peripheral but relate to core details of the allegations.

Crown Witnesses: Oath Helping and Prior Discreditable Conduct

In the recent decision of *R. v. R.M.*, 2022 ONCA 850 the Ontario Court of Appeal ordered a new trial after the Crown led evidence that primarily served to bootstrap the evidence of the complainant by bringing in bad character evidence without a pre-trial application and eliciting improper evidence regarding how the witness felt about testifying at the trial.

The trial was inappropriately flush with Crown witness evidence that the accused was "controlling" and an "unlikeable man." Justice Copeland noted at para 11:

> No motion was brought by Crown counsel regarding the admissibility of the discreditable conduct evidence. There is no discussion on the record indicating that the parties had reached an agreement about admissibility of this evidence. As prior discreditable conduct evidence is presumptively inadmissible, there should have been a discussion about the admissibility of this evidence on the record, or, if admissibility was contested, a voir dire: see *R. v. Z.W.C.*, 2021 ONCA 116, 155 O.R. (3d) 129, at paras. 93-114, 121-132; *R. v. J.H.*, 2020 ONCA 165, at paras. 52-59.

The defence counsel at trial conceded that much of the evidence was admissible as "narrative" but the failure to object did not justify the lack off a limiting instruction to the jury on how that testimony could be used.

Because the conviction was overturned on the first ground of appeal, the Court only briefly commented on the second ground of appeal, regarding "oath helping."

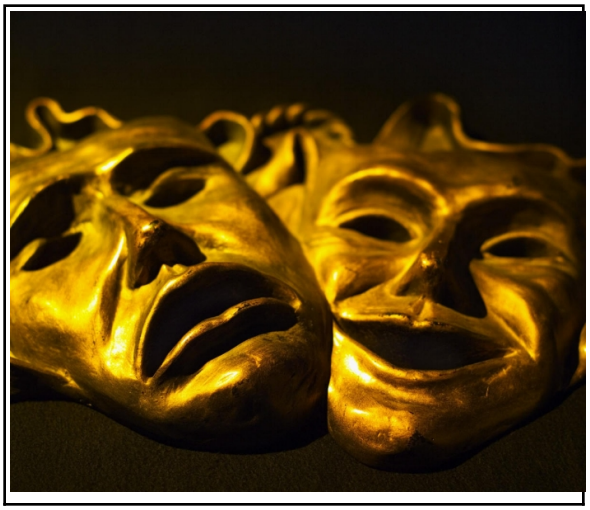
Importantly, it was noted that it is improper to ask a witness if they would rather not be giving testimony in the trial. Specifically, whether or not they were given an option to not testify.

Though the first set of questions was seen as an attempt to put the witness at ease while testifying, the Court of Appeal objected to the closing set of questions, noting at para 38:

> However, the second passage, at the end of the examination-in-chief, was clearly intended to elicit that the complainant had been given the option not to attend and testify at the trial, and that, having been given that option, she chose "of [her] own free will" to attend and testify. The questions are notable for their placement at the end of the examination-in-chief, as it suggests Crown counsel intended them to give a strong finish to the examination.

This line of questioning is very similar to the forbidden question of why the complainant would lie or endure the rigours of a trial unless s/he was telling the truth.

Oath helping remains a subtle but important area of improper evidence to be monitored.



Stereotypes About Complainant Behaviour

Stereotypes remain an ongoing issue for Appellate Courts. The Supreme Court of Canada rejected the appeal in *R. v. D.R.*, 2022 SCC 50 based on perceived stereotypes about how a "real victim" would behave.

The dissenting judge in *R. v D.R*,. 2022 NLCA 2 disagreed, finding that the trial judge had found numerous reasons to find a reasonable doubt aside from myth based reasoning.

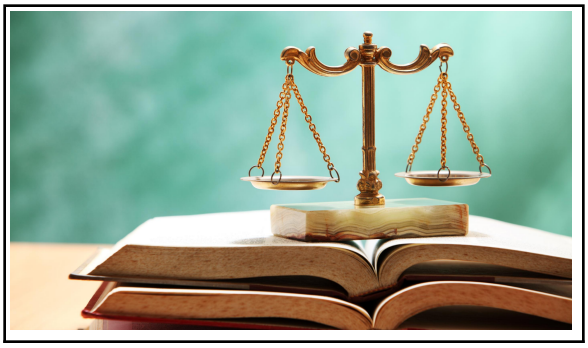
Justice White of the Newfoundland and Labrador Court of Appeal found that the trial judge had grounded the acquittal in inconsistencies from the complainant as to her attitude towards the accused after the alleged assaults.

The Supreme Court agreed with the majority that maintaining a "strong and normal relationship" with a relative is not dispositive of a sexual assault. In their dismissal of the appeal the Supreme Court stated:

> While the trial judge set out other lines of reasoning relating to the complainant's credibility, his reliance on stereotypical inferences undermines his assessment of her credibility and, thus, his verdict.

This is a strong reminder for judges as well as for defence counsel that it is important to clarify precisely what inferences are to be drawn from the evidence and separate out myth based reasoning from proper inferences that can be drawn directly from the evidence at trial.

While it is improper to subject complainants to myth based reasoning, it is also improper to subject an accused to a retrial based on inferences that were not suggested at trial.



Admissibility of Hearsay

There are many principled exceptions to the rule against hearsay evidence. Spontaneity is one of the factors that can weigh in favour of admissibility, particularly when the witness is unable to testify.

In the case of *R. v. Adekunle*, 2022 ONSC 5552 the conviction was overturned due to a failure to properly consider the reliability of the utterance.

In overturning the conviction, Justice Harris noted that the trial judge had relied on *R. v. Khan*, [1990] 2 S.C.R. 531 but "[t]he more recent jurisprudence from the Supreme Court provides indispensable guidance in grappling with a hearsay problem, particularly one that is heavily dependant on corroboration as this one was."

The principles from *R. v. Bradshaw*, 2017 SCC 35 were reviewed:

> Admissibility in this case depended almost exclusively on substantive reliability. The Supreme Court summarized the correct approach in *Bradshaw* (para. 57):
>
> 1. identify the material aspects of the hearsay statement that are tendered for their truth;
>
> 2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
>
> 3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
>
> 4. determine whether, given the circumstances of the case, the corroborative evidence led at the voir dire rules out these alternative explanations such that the only remaining likely explanation for the

> statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

Another case on admissibility of out of court statements will be heard by the Supreme Court on January 10, 2023 in the case of *His Majesty the King v. S.S.* SCC File # 40147

In the *S.S.* case, a child complainant's police statement was admitted into evidence without any ability to cross-examine as the child complainant was deemed too fragile.

The Law of Entrapment

In November 2022, the Supreme Court of Canada released a number of decisions stemming from Project *"Raphael"*, a York Regional Police investigation into underage sex work (now ongoing in Durham Region). The typical charges arising from this project were internet luring, luring to commit a sexual assault, and obtain sexual services of a person under 18. The Supreme Court clarified the law of entrapment as it relates to investigations involving the internet, and ultimately concluded that those who were caught in the Project's net were not entrapped.

Project Raphael was a "buyer side" operation to attempt to curb child sex trafficking in York Region. Officers would post ads on the escorting section of Backpage.com with indications that the person offering those services was young, if not necessarily a child. The ads were posted with pictures of a female officer (in her 30s, but not showing her face) wearing a t-shirt from a local high school. The officers posing as a sex worker would, after agreeing to meet with the person under investigation, reveal that they were underage. If the person under investigation was unbothered by this, they would be invited to a hotel, and upon entering the hotel room, be arrested. The Supreme Court was called upon to decide whether the accused in *R. v. Ramelson,* [2022] S.C.J. No. 44 and its companion cases were entrapped.

Entrapment is not a traditional defence in the same way that self-defence or duress would be. Rather, it is a form of "abuse of process"—essentially, the state using its powers in an unfair way. A successful claim of entrapment does not result in an acquittal—but rather a stay of proceedings. It is not that the Crown has not proved the offence in full, and it is not that the accused is entitled to an acquittal on the charges before the court—but rather, because of the unfairness exhibited by the state actors, the Crown is disentitled to a conviction.

Certain crimes, such as those under investigation here, or drug trafficking, are more difficult to investigate because they take place covertly and in private, and in circumstances wherein even those harmed by the perpetrators of the offences—such as underage sex-workers or those addicted to drugs—will

not readily report the offence. The law recognizes this and allows the police significant leeway in crafting investigations that will be able to root out these crimes and hold those who commit them accountable. However, that leeway has important limits: while the police can legitimately provide a would-be offender with a chance to commit an offence, they cannot induce someone into committing an offence when they wouldn't otherwise.

A successful entrapment claim will require that the accused prove either that:

- the authorities provided a person an opportunity to commit an offence without acting on a reasonable suspicion that that person is already engaged in criminal activity, or without acting pursuant to a bona fide inquiry; or

- even if the police are acting on reasonable suspicion, or acting in the course of a bona fide inquiry, they go beyond providing an opportunity to commit an offence and actually induce the commission of the offence.

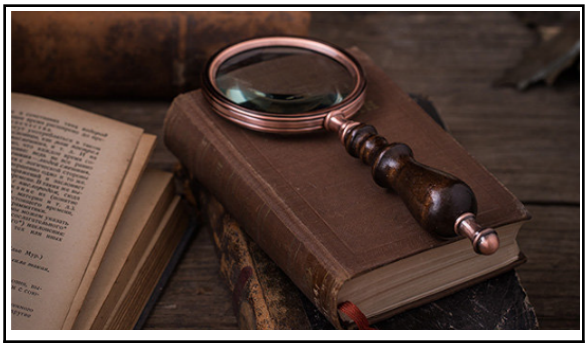
An investigation will be a bona fide inquiry when there is reasonable suspicion over a sufficiently precise space (which, as this case demonstrates, can be physical or virtual) and the police must have a genuine purpose in investigating and repressing crime.

Mr. Ramelson appealed on two issues with respect to the entrapment doctrine: whether the police had a reasonable suspicion over a sufficiently precise space, and if that was the case, whether the child luring offences he was also charged with were sufficiently connected to the offence of communicating to obtain sexual services from a person under 18.

In this case, the police were found to have reasonable suspicion that sex work was being offered by children on the escort section of Backpages. This was proven through the testimony of Inspector Truong, Project Raphael's architect. The York Regional Police had located 85 juvenile sex workers between 2011 and 2016, and he had interviewed hundreds of sex workers over his years of service. The space that the police confined their investigation to—was defined as ads indicating a sex worker's extreme youth on the escort section of Backpage, and this was held to be a sufficiently precise place to ground reasonable suspicion.

With respect to the connection between the child-luring offences and the underage sex work offences, the claim was that the police, despite having reasonable suspicion that those under 18 were providing sex work through similar ads on backpages, were not allowed to then indicate that the fictional sex worker was under 16, thus increasing the potential penalty the accused would be subject to if convicted.

This case provides helpful clarification to the law of entrapment as it applies to the virtual spaces which have become so integrated into our everyday lives. It will provide important guidance to both Crown and defence counsel into how to approach an entrapment claim flowing from online sting operations.



Reasonable Doubt and Credibility

In the recent appeal of *R. v. N.P.*, 2022 ONCA 597, the Ontario Court of Appeal granted a new trial due to the trial judge's misapplication of the *W.(D.)* analysis.

In this case, the trial judge found that the accused's testimony raised a reasonable doubt "on the sequence and manner in which the sexual intercourse occurred." Nevertheless, the trial judge did not find that the accused's evidence raised a reasonable doubt as to his guilt. Further the judge had serious concerns about the complainant's evidence, rejecting her testimony that there was only one instance of sexual intercourse instead of two. This was a material issue at trial.

The Court of Appeal noted at para 27:

> Although there is no single method of giving effect to the principles in W.(D.), it is unclear why the trial judge declined to follow "the usual three steps of analysis" simply because the appellant's evidence did not raise a reasonable doubt. This, in itself, was a curious conclusion given the trial judge's finding that the appellant's evidence did raise a reasonable doubt "on the sequence and manner in which the sexual intercourse occurred." Nonetheless, the finding that the appellant's evidence does not raise a reasonable doubt ought to have resulted in greater attention being paid to the second and third steps in W.(D.).

On appeal, it was noted that a reasonable doubt can be raised both by defence and by Crown-led evidence. At para 28:

> The trial judge improperly limited her application of *W.(D.)* by failing to consider whether the complainant's evidence could have raised a reasonable doubt. [...]

This was a point also made by Justice Paciocco in the article Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment, (2017) 22 Can. Crim. L.R. 31.

> Notice, for example, that the first proposition [of *W.(D.)*] refers to "the evidence of the accused" a term broad enough to capture all defence evidence. Yet the second proposition describes only "the testimony of the accused," which refers to but one species of defence evidence. Now recall that, as a matter of principle and authority, the *W. (D.)* framework applies not only to defence evidence, but also to Crown evidence that favours the accused on vital issues the Crown must prove beyond a reasonable doubt, something not captured in the language of the framework.

In *N.P.*, by rejecting the complainant's evidence on the sequence and manner of the sexual encounter, the trial judge was required to grapple with how that affect her reasonable doubt assessment. More specifically, at para 29 the Court stated:

> The *W.(D.)* analysis is not restricted to the impact of the evidence of the accused; instead, it must embrace all of the evidence, including evidence tendered by the Crown, even when that evidence may contradict the appellant's own narrative. In this case, the trial judge should have demonstrated that the complainant's denial of the second incident was taken into account, but she did not do so. This omission was particularly important in light of the many shortcomings the trial judge identified in the complainant's account [...] and in light of her finding that the appellant's evidence indeed raised a reasonable doubt on the sequence and manner in which the sexual intercourse occurred [citations omitted].

This is another case that shows that trial judges can accept some of the evidence of each witness and cobble together their findings of fact, even where the testimony is diametrically opposed. But to do so requires detailed explanations of how the rejected evidence affects the overall credibility findings.

Other Cases To Watch

His Majesty the King v. S.S. SCC File # 40147
Use of hearsay evidence from a child.

R. v. Christopher James Kruk SCC file #40095
Crown appeal based on alleged stereotypes.

B.E.M. v. His Majesty the King SCC File# 40221
Lack of corrective instruction after the Crown used a personal anecdote in jury address.

Procureur général du Québec, et al. v. H. V. SCC File# 40093 Mandatory minimum sentences in child luring convictions.

Jason Donald Hay v. His Majesty the King SCC File# 40316
Access to Honest But Mistaken Belief defence based on past sexual activity.

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