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Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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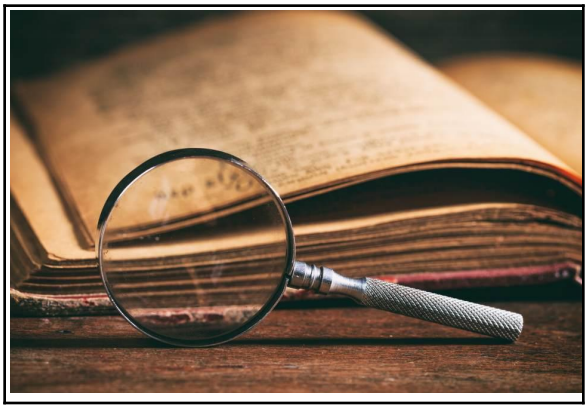
Historic Allegations and Repressed Memories



Experts and Memory "Science"

Recovered memories became the subject of focus in a recent retrial, *R v. S.K.M*, 2023 ABKB 144. This case had previously been granted a retrial after an expert witness was denied to testify in regards to recovered memories and the reliability of what could be honestly believed but false memories.

The quality of memories in historic allegations has long been a subject of contention. In this case, the expert, Dr. Deryn Strange, was found to be a leading expert on the issue and she was found to have testified without bias, acknowledging that she could not give evidence about that particular witness - only about the nature of memory and its frailties.

In the appeal that led to the retrial, *R v S.K.M.*, 2021 ABCA 246, the Court noted that the defence was not claiming the complainant was lying about believing she was sexually assaulted as a child but that the memories, which she honestly believed, were the product of false memories. The expert evidence was relevant to explain how a person can come to believe something to be true even when it never happened.

The judge ultimately accepted Dr. Strange's evidence that memory "does not work like a video recorder" and that memories are vulnerable to the process of reconstruction.

It was also noted that, just as a trier of fact can accept some, none or all of a witness' testimony, "[e]very memory a person has exists on a spectrum from entirely true to entirely false; most of our memories are somewhere in the middle".

During testimony, the complainant referred to her memories with specific terms which indicated she had been trying to research how memory worked. She referred specifically to her memories being stored in the "amygdala" until they became available to her "prefrontal cortex".

> She said these memories had been stored in her amygdala to enable her to proceed with her life without constant trauma, and then upon reactivation in 1995, the memories were resident in her prefrontal cortex which then allowed her uninhibited access to them

> and to understand their full significance.

Importantly, the memory expert testified that "traumatic memory is not a special memory system; while traumatic experiences may involve heightened emotions, the idea that there is a special place where traumatic memories are locked in is not supported by memory science."

The expert gave evidence about five stages in how a false memory can come to be ingrained in a person's mind as if it was true.

One of the concerns in this case was the difference between "suppressed" memories versus "repressed" memories.

The expert clarified that unwanted thoughts can be suppressed but that it is just a temporary act of relief from the unwanted memory or thought. When there are claims that a memory was forgotten and then recovered (repressed) that there is no science to support this type of memory function.

> The idea of repressed and then recovered memories (traumatic memories being locked away and inaccessible until a triggering event occurs) is a remnant of Freudian psychology, and while it finds some support among clinicians and non-empiricists (people who do not do scientific research), it has no empirical basis after more than 80 years of experimentation and thus is not founded in memory science.

The difference between "suppressed" memories and "repressed" memories mostly hinges on whether or not the complainant claims to have always had the memories or if the memories were somehow lost and then recovered.

Regarding suppression, the expert testified that suppression is generally not a successful strategy in dealing with traumatic memories and can often lead to the memory becoming more pervasive instead of less traumatic.

Additionally, Dr. Strange pointed out that there is no scientific method to determine the difference between a real and a false memory once the false memory has been ingrained.

These concerns with how memory works, and the misperceptions surrounding memory science and research, underscores the need for caution when assessing reliability in comparison to credibility in a complainant's testimony. Especially in historic allegations.

It is entirely possible for a complainant to be testifying with complete honesty, believing that they have been assaulted, but still be incorrect about what truly happened.

Citing the Court of Appeal, which granted S.K.M. a retrial, the trial judge noted that there is no "general rule that evidence on human memory is always admissible in a sexual assault matter" but that in this particular case "[a]ll parties and the trial court agreed that false memory was a pivotal issue in this trial as related to the evidence of the complainant; it was the crux of the Defence."

"Flashbacks" and "Triggers"

In a similar Ontario case, *R. v. B.B.,* 2023 ONSC 396, there was no expert evidence called regarding memory but Justice Dawe became concerned about the type of language being used to describe the complainant's memory.

What started as a "vague" feeling then turned into "flashbacks" which eventually were fully "triggered" by an intimate moment cuddling with her husband. The cuddling was not a unique or unusual act but the complainant claims the memories suddenly flashed in her mind.

The complainant attended counselling to deal with the new memories and described an analogy about memory provided to her by her therapist at the time:

> A lot of the times in your brain when you have memories, they basically create a path and when that path is harmful, your brain covers it up as if you are walking through the woods and leaves and grass and twigs cover it. And you don't walk that path again. What I also learned is that when you go through something traumatic, it can uncover other traumatic experiences.

The trial judge aptly explained the problems faced by a trier of fact based on their "common sense" and what may be limited to no personal experience regarding how memory functions.

> A judge or juror who has never personally experienced a "flashback" of a distant traumatic and long-forgotten event may have difficulty accepting that such memories can ever be reliable. Equally, a judge or juror who has not personally had a vivid and seemingly real "memory" of something that demonstrably never happened, or that can be shown to have happened in a different way, might find it highly counterintuitive that human memory can be so unreliable.

The Supreme Court recently decided in *R. v. Waterman*, 2021 SCC 5 that no expert witnesses need to be called by the Crown when presenting evidence involving recovered or repressed memories obtained during therapy.

Ultimately, Justice Dawe properly framed the burden of proof in a case with questionable memory evidence:

> [I]t is not the defence's burden to affirmatively prove that T.B.'s recollection has been corrupted or tainted by her therapy. Rather, the Crown must satisfy me that this is not a significant concern, as part of its overall burden of persuading me beyond a reasonable doubt that T.B.'s recovered memory is reliable.

Reasonable Steps and Mistake of Age

In the recent decision of *R v D.S.,* 2023 ABKB 154 the trial judge had to grapple with interpreting a number of cases regarding "reasonable steps" in cases of mistake of age, wherein the sexual assault complainant is underage and incapable of consent.

One of the often cited cases on this issue is *R. v. George*, 2017 SCC 38, in which a woman had intercourse with a friend of her son, mistakenly believing him to be at least 16 years old.

The two pathways to conviction are that the Crown must prove a) that the accused knew the person to be underage or that b) the accused was willfully blind or reckless as to determining the age of the young person.

In this particular case, the accused and complainant were aged 14 and 20, though it was agreed by all that the complainant represented herself as being 18 years old at the time they met.

The trial judge noted that there is an increased responsibility to ascertain the age of a young sexual partner when the age difference increases.

> [W]hile DS and HK were more than five years apart in age, the gap was not much larger (5 years, 10 months, 22 days). The case law confirms that, the greater the age difference, the higher the onus on the accused to take verification steps. See, for example, *R v RAK*, cited above, at para 10;

Every case is fact specific but this decision features an interesting analysis of whether or not decisions in cases subsequent to *George* have changed the standards of reasonable steps in mistake of age cases.

Other cases of note that were considered in this decision include *R. v. Morrison*, 2019 SCC 15, *R. v. Jerace*, 2021 BCCA 94, *R. v. Angel*, 2019 BCCA 449 and *R. v. Carbone*, 2020 ONCA 394.

Ultimately the accused in *D.S.* was acquitted based on a number of factors. One is that the complainant clearly presented herself as being 18 years old at the time they met. She continued to represent herself as 18 years old and there was nothing about her appearance that would have caused the accused to doubt her represented age.

The complainant and accused introduced each other to their respective parents and neither family expressed any concern about an age difference. The trial judge found this lack of clandestine secrecy to be a compelling factor in favour of the accused's honest belief that the relationship was legal and legitimate.

A variety of other factors played a role in the trial judge's decision that the accused could

have reasonably believed that the complainant was at least 16 and of the age of consent.

Each case has to be weighed on its own merits but the question of reasonable steps can be a daunting task in the new age of social media and dating apps like Tinder on which young people often misrepresent their age.

Ultimately, the trial judge in this case acquitted the accused based on the Crown's failure to show "something that obviates the need for such inquiry" into the age of the complainant given her misrepresentations of her age and no clear signs that she was lying about her age at the time the accused engaged in the sexual relationship.

Uncharged Acts Based On Withdrawn Charges

In a recent Ontario case, *R. v. J.M.*, 2023 ONCJ 48, the accused was facing charges both as a youth and after he turned the age of 18. The Crown withdrew the youth charges but sought to use the same evidence in the trial.

Prior discreditable conduct is presumptively inadmissible. In this case, the Crown withdrew the youth charges but sought to use them as evidence of a "grooming" pattern.

The youth allegations were unproven in court and the trial judge summarized the Crown position as being that "the crown argues the youth allegations allow the trier of fact to appreciate J.M.'s sexual attraction to the complainant and thus, his motive to engage in the alleged behaviour as an adult."

Justice Campitelli further noted that there was a significant ten year gap between the withdrawn youth charges and the later alleged offences.

It has been repeatedly noted in appellate courts that "narrative" cannot be used as a portal for either the defence or the Crown to bring in peripheral evidence for improper propensity or stereotypical reasoning. (*R v M.R.S.*, 2020 ONCA 667 and *R. v. Z.W.C.,* 2021 ONCA 116)

Ultimately, the trial judge determined that the youth charges created a high risk of moral prejudice and propensity reasoning that was not outweighed by the probative value. There were additional concerns about trial management and the risk of being distracted by collateral issues.

> I also find there is a very real possibility of a "trial within a trial" taking place on this record, where the admission of the prior discreditable conduct could distract the trier of fact away from the issues on which liability turns.

Other Cases To Watch

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.

His Majesty the King v. Edwin Tsang
SCC File# 40447
Use of stereotypes and generalizations about what people would or would not do in a sexual encounter with a stranger.

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