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NEWSLETTER: Sexual Assault Law Update

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Rioux and Circumstantial Evidence In Memory Loss Cases

Lack of Memory Does Not Equal Lack of Evidence

In November 2025, the Supreme Court rendered their decision in *R. v. Rioux*, 2025 SCC 34. The case dealt with how evidence from a complainant should be considered when there is a lack of memory due to intoxication.

There were two instances of alleged sexual assault in *Rioux*. The first was said to have taken place at a park, earlier in the day, and he was acquitted of the second assault in his home on the grounds that he had an honest but mistaken belief in consent. Only the first incident was the subject of the appeal.

The trial judge in *Rioux* had considered Rioux's testimony about events at the park to be uncontested because the complainant said she believed she was drugged and had amnesia related to what took place at the park.

No drugging was proved and Rioux was not charged with administering a noxious substance.

The Supreme Court ruled that treating memory loss as a lack of evidence was incorrect. They discussed the need for a judge to grapple with circumstantial evidence in such cases. At para 50:

> I agree with the majority in the Court of Appeal that the trial judge misapprehended and misapplied the law of evidence in the actus reus stage by requiring direct evidence from the complainant when the alleged assault occurred. He committed another error when he then also failed to consider the complainant's circumstantial evidence when addressing her subjective consent and when determining the appellant's guilt or innocence. His legal conclusions on these matters should have been based on the totality of the

> relevant, admissible, credible and reliable evidence over the full time, including the complainant's evidence about her state of mind and physical state before, during and after any sexual activity that took place, as well as any other relevant temporally connected circumstantial evidence.

The Court further clarified how circumstantial evidence should be considered at para 60:

> The law does not distinguish between circumstantial evidence and direct evidence in terms of weight or importance (Lederman, Fuerst and Stewart, at ¶2.94). Either type of evidence, or a combination of both, may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact. That said, in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, this Court set out the principles to follow where the Crown's case or an element of a criminal offence turns on circumstantial evidence. The inferences to be drawn from the circumstantial evidence depend on the nature of the evidence, the live issues and the theories of the parties. If after considering that evidence, satisfaction as to the existence of the elements of the offence is the only reasonable or rational inference, the trier of fact should draw the inference that the elements of the offence, and hence guilt, have been established beyond a reasonable doubt (see para. 41).

This case also dealt with the requirement that consent, being in the subjective mind of the complainant, must be contemporaneous to the impugned sexual activity. In cases, such as this, when the complainant was unable to give any direct evidence about her state of mind at the precise time of the sexual activity in the park, she was able to give circumstantial evidence about her physical state and experience of feeling drugged at the relevant time.

The Court then went on to clarify how a Court can deal with elements of a sexual assault offence when there is no direct evidence of the complainant's state of mind at paras 71-72:

> [71] The need for both subjective consent and a voluntary agreement contemporaneous with the sexual activity are cornerstone concepts for the offence of sexual assault. While central to *what* the Crown must prove, they do not prescribe or limit *how* they can be established. It is important not to conflate these substantive requirements with the principles of evidence governing their proof. For example, that subjective consent is personal to the complainant does not mean that only direct evidence from the complainant about her state of mind at that time can be relevant to subjective consent. Similarly, that subjective consent must exist at the

> time the sexual activity occurred does not mean that only evidence about that precise moment in time would be relevant to consent in fact or capacity to consent. [Emphasis in original]
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> [72] Triers of fact should not blur the object of proof and how it may be established. As stated by Professor Lisa Dufraimont:
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> > Subjectivity and contemporaneity are features of the absence of consent on the facts, which is the object of proof. They are not requirements limiting the evidence that goes to consent. One might, however, mistakenly conclude that if consent must be subjective and contemporaneous then the evidence that goes to consent must share those features.
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> > ("Myth, Inference and Evidence in Sexual Assault Trials" (2019), 44 *Queen's* L.J. 316, at p. 323)

This clarification also assists in determining the weight to be given to an accused's evidence about surrounding circumstantial events. Additionally, despite consent being subjective to the complainant's state of mind, it confirms that circumstantial evidence may be relevant to establishing subjective consent regardless of whether that evidence comes directly from the complainant or not. Though the accused cannot offer direct evidence about the complainant's subject consent, his evidence about circumstantial, surrounding events can be taken into consideration when assessing whether proof beyond a reasonable doubt has been established though an accused's ability to testify directly about the complainant's subjective state of mind is still subject to limitations; *Rioux* at para 74.

The decision reinforces at para 85 that "a complainant's evidence is not to be treated as unreliable merely because of a memory loss or blackout." The decision did not directly deal with how a trial judge should assess a complainant's perception of being drugged when there is no evidence of a drug being administered but did say that the trial judge needed to make a determination on whether he found sufficient evidence of drugging.

In this case, circumstantial evidence included that the complainant was being carried to the accused's car "like a sack of potatoes" and was observed being carried in that manner by a municipal employee. The accused testified that the complainant had tripped on a rock and he was carrying her back to the car to practice "deadlifting" for his firefighter training. The accused testified that the complainant told the employee that she was fine and the complainant said the accused told her to say she was fine; *Rioux*, at para 16.

There was also external, circumstantial evidence that the complainant's mother

received an unexpected and incoherent phone call from the complainant during the time she spent in the park.

The main focus of the *Rioux* decision was to ensure that trial judges grapple with circumstantial evidence instead of treating memory loss as a void of evidence about the complainant's subjective state of mind and to not accept the accused's evidence as unchallenged or uncontradicted simply due to that memory loss.

This was a very close, split decision. The minority of the Supreme Court took issue with the judge's reasons being "parsed" and violating the presumption that the trial judge applied the law properly.

In regard to the issue of drugging, the minority pointed out that the trial judge had grappled with the absence of evidence of drugging and that the Crown at trial had admitted that they were not pursuing a finding that the complainant had been drugged.

Post-Offence Conduct By Accused

Three recent cases, *R. v. Townsend*, 2025 BCCA 459 , *R. v. J.A*, 2025 ONSC 4531 and *R. v. P.G.*, 2025 ONSC 7018 address what weight or inferences can be drawn from an accused's conduct after an alleged sexual assault, including a failure to deny allegations over text messages and the accused's seeming admission of sexual assault in post incident discussions.

In *Townsend*, the accused had exited his home after realizing the complainant had left and punched the exterior wall of his home. The Crown relied on this behaviour to infer consciousness of guilt as it was out of proportion to what the accused testified as the cause of his reaction. The accused said he suffered from anxiety and that, when he awoke to find the complainant was gone, he felt pain consistent with being hit in his groin and had discovered his XBox was missing. This perceived robbery was what caused him to punch the wall of his home.

The BC Court of Appeal determined that it was improper for the trial judge to use the accused's actions of punching his house wall as evidence of guilt because he failed to properly consider the alternative explanations. At para 60:

> In the circumstances of this case, the evidence that Mr. Townsend "was distraught after the alleged assault and was seen punching the house" was "too equivocal" to infer his guilt and there is no indication in the trial judge's

> reasons that he considered other reasonable inferences that might explain Mr. Townsend's conduct.

The Court of Appeal ordered a retrial.

In *J.A.*, the Crown submitted 112 pages of text messages between the complainant and accused from after the alleged sexual assault. Those messages were relied on by both the Crown and defence.

J.A. testified that he had discovered the complainant was cheating on him and that they had multiple discussions in person. He said that the complainant begged him to get back together with him, he responded by calling her a cheater and she replied that he was a rapist.

The text messages confirmed that J.A. was accusing the complainant of cheating on him and that the complainant was expressing desperation to get him to get back together with her. It was the accused who first contacted the police, afraid that the complainant would make a false allegation of sexual assault.

Though J.A. said that he denied the allegations while speaking in person with the complainant, the Crown took the position that the accused's failure to deny in text was an adoption of the truth of the allegation.

As stated in *J.A.* at para 68:

> Adoption by silence must be approached with caution. Not all people respond alike. An accused's reaction to statements about him may have different meanings. Responses, including silence, may be ambiguous. All relevant circumstances should be considered, including the social context, where appropriate. Other explanations must be considered: see *Gordon*, at paras. 47 and 53-55

J.A. had testified that they stopped sexual intercourse on the night of the allegation because the complainant expressed some pain during penetration. He said that any apologetic messages were relating to his concern that he had caused her some temporary pain. Beyond those apologies, J.A. testified that his failure to reply directly to the allegations of sexual assault were due to "in some messages he was being sarcastic, and in others he was being an "a-hole". He was responding emotionally to H.M.'s messages. He said that he was trying not to entertain her allegations of rape."

The judge found that, despite not having directly denied the rape allegations, J.A. did text a number of things such as "Liek[sic] ur just filled with lies when does it end?" and his continuous assertions that the complainant is just mad because he caught her cheating on him. The Court thus regarded such exchanges as a form of rebuttal of her allegation of sexual assault.

The trial judge ultimately concluded that, due to credibility issues with both J.A. and the complainant, he could not find beyond a

reasonable doubt that a sexual assault had been committed.

The case of *P.G.* is a unique case involving two parties who were deeply religious and held firm beliefs about abstaining from pre-materital sex. The accused had made three independent written admissions that he sexually assaulted the complainant including admissions to third parties.

Despite the admissions, the trial judge acquitted P.G. based on findings that the accused was deeply affected by his religious beliefs and the admissions were made out of guilt for having violated his religious beliefs, not having violated the law in a way that equated to sexual assault.

P.G. and the complainant had both undertaken an oath to not have pre-marital sex but found themselves engaging in sexual intercourse in violation of their religious oaths.

At some point P.G. went to a religious counsellor and signed an agreement called a "Godly Conduct Agreement" and "completed a worksheet titled "Process of Repentance and Redemption""; *P.G.* at para 25.

The Agreement was designed to "ensure purity and health", address "unethical behaviour", define "forbidden acts" and create a guideline for "punishment" if the Agreement was not upheld. Both the complainant and accused signed the Agreement.

In assessing the meaning of the statements made by P.G. in his "Worksheet," the trial judge came to the following conclusion at para 127:

> The statements on the Worksheet do not amount to a confession to sexual assault. This was a document completed in the context of religious-based counselling, for an act that P.G. believed was a sin. Both M.D. and C.J. testified that in the context of their religious community, sex was sacred, to be shared between husband and wife. I find P.G.'s remorse for having broken his vow was genuine; I entirely accept that P.G. honestly believes he caused M.D. harm. and that was the basis for what would otherwise appear to be damning admissions on the Worksheet.

The decision in *P.G.* is an important reminder that statements and actions taken after an alleged sexual assault need to be carefully considered in the full context of who the complainant and accused were at the time and other reasons why they may have said or did specific things afterwards.

The trial judge declined to find that the actions and words of the accused amounted to an admission of sexual assault according to the law and, instead, were an expression of disappointment in his behaviour based on religious standards that both he and the complainant had undertaken to follow.

In addition, the trial judge found that there were credibility problems with some of the complainant's evidence regarding one of the alleged sexual assaults. She claimed that she was raped in her home on the day she signed the religious "Agreement" and later admitted in cross-examination that she had signed the agreement in the presence of a religious counsellor at another location.

Unreliability of Recovered Memory

In the recent decision of *R. v. A.B.*, 2025 ONSC 6359, Justice Rees concluded that the complainant's memories, recovered about a year after the alleged incident, were not reliable.

Events at the time of the sexual assault included the complainant awaking in a condition that indicated a sexual assault. The complainant was very confused, lacked memory and was told that he was probably "roofied." His cousin assisted in preserving the clothing that had been worn at the time and in getting an SAEK done at the hospital.

It was not until DNA testing returned showing the accused's DNA on the complainant's underwear that the complainant then claimed to recover some memories of being sexually assaulted by A.B. The memories began to return during therapy and the complainant asked his therapist how to discern between memories and dreams.

The trial judge took concern with tainting of the complainant's memories since the recovered memories only fully returned after being informed that A.B had been arrested.

In addition to the complainant's memories only being "recovered" after being told who was charged, the trial judge was concerned with both inaccurate memories that were exposed during trial from other witnesses, and what was described as "mutable" memory in connection to proximate events.

The trial judge also had concerns about the complainant's fragmentary, and often incorrect, memories related to events before and after the alleged sexual assault in comparison to extensive details being given in relation to the recovered memories of the actual alleged assault. Some of these memories included testifying that the SANE nurse told him he probably "fucked himself with a stick". The trial judge accepted the nurses testimony that she never said that or any other disparaging remarks. Her examination notes corroborated the nurse's description of how the SANE exam was conducted.

In another case, *R. v. P.T.*, 2025 ONSC 6630, the trial judge was concerned with what the complainant described as "suppressed" memories in light of her subsequent vagueness, new details emerging at trial, and inconsistencies with the testimony of more reliable witnesses.

The judge was cautious about evidence related to the complainant's mental health issues but noted that concerns arose due to the complainant's testimony at the preliminary hearing "that the medication she was on helped her differentiate fantasy from reality. She denied this at trial but in my view, the disorder itself and the medication further implicate serious reliability concerns."

More specifically, at para 36 the trial judge stated:

> In addition, even on a more basic plane, the effects of dissociation and derealization as described by T.T. substantially affected her perceptions. In the context of the other challenges intrinsic to T.T.'s evidence, there is a reasonable possibility that the dissociation impacted her memories and may have allowed for false impressions to infiltrate her recollections.

The judge further clarified at para 38 that "the evidence of dissociation and derealization is a particularly poor foundation out of which reliable allegations are likely to emerge. Mostly likely, T.T. believes she was sexually abused by her father. I am far from sure of that. The risk here of unconscious confabulation is substantial."

P.T. was ultimately acquitted due to a combination of concerns with the complainant's evidence. The trial judge also rejected the application of *J.J.R.D* as he did not feel the complainant's testimony rose to the level of certainty required to ignore the exculpatory evidence.

The judge articulated caution and problems with applying *J.J.R.D* in cases that do not have external corroborating evidence such as the diary in J.J.R.D. saying at para 43:

> [43] But this then leads to a conundrum of a different kind. Under the proposed reasoning in *J.J.R.D.*, guilt can be found if the accused's evidence, despite having no obvious flaws, is rejected after a "considered and reasoned acceptance" of the contrary evidence given by the complainant. The necessary implication is that the complainant's evidence must be very powerful, virtually overwhelming. However, in a pure "she said, he said" credibility case in which the complainant and the accused both testify and start off as equals (*R. v. J.C.*, 2021 ONCA 131, 401 C.C.C. (3d) 433, at paras. 88-89), the scenario theorized in *J.J.R.D.* is problematic and in the practical realities of a trial, is difficult to

> achieve. As trial judges know well and as has been recognized by the Supreme Court, it is difficult and rare to find guilt in a pure credibility contest: *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 81. This is particularly true when there are no outward problems apparent in the accused's evidence.

These cases are good reminders that, though a delay in reporting does not undermine a complainant's credibility, the quality of historic memories must be carefully considered. This is especially true in cases where the memories were said to have been either repressed or suppressed then resurfaced in flashes, through engagement with therapists or other circumstances that may have influenced their recall of the events.

Determining "Position of Authority"

In a recent decision from the Ontario Court of Appeal, *R. v. J.B.,* 2026 ONCA 44, a new trial was ordered after it was found that the trial judge had not grappled with the evidence that the accused was no longer in a position of trust or authority over the two complainants at the time of their intimate encounters.

It was clarified that moral reprehensibility does not equate to criminal liability. At paras 58–59:

> [58] It is important in a case of this nature to distinguish between general morality and the criminal law. The criminal law does not exist to criminalize immorality: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 23. Although the two will frequently overlap, there are situations where the criminal law does not track with precision contraventions of societal moral norms.
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> [59] Here, there is no question that many would consider the appellant's conduct worthy of moral condemnation. Even the appellant, through counsel on appeal, is prepared to acknowledge, in hindsight, that his conduct in relation to M.D. and S.H. is worthy of societal condemnation – a man in his mid-30's having sexual relations with 16- and 17-year-old high school students. The question, though, is not whether he engaged in morally offensive conduct, a question that most would find easy to answer here. Rather, the question is whether he engaged in criminal conduct.

Prior to the sexual encounters, J.B. had volunteered to assist with directing the school play. One of the complainants had been an actor in that school play and both of the complainants aspired to get into acting as a

career. The accused was a prominent and respected member of the acting community in their town and both girls believed that he could help with their careers, though admitted that he had not lured them into a romantic relationship with that promise.

The Court of Appeal noted that parliament had not defined what "position of trust" encompassed and that it was the most difficult to determine in the list of factors which would negate consent in s. 153(1) of the *Criminal Code*.

Importantly, this decision clarifies that restraint must be applied in how "position of trust" is interpreted because "the stakes are high, and people need to know where the line is so that they have a chance of knowing when they are about to cross it."

Both complainants were of the age of consent when they entered into a sexual relationship with the accused and, though both aspired to be actors and he was an influential person, they did not testify that he used his status as part of a lure to entice them into a relationship with him and he was no longer involved with their high school at the time.

Age difference is not determinative of power and control but may be a contributing factor. The Court found that the evolution of the relationship is an important factor and may alter an accused's position of trust after they no longer assume that position in their relationship with the complainants.

In this case the Court of Appeal rejected that J.B.'s status was "in the eye of the beholder" and that, aside from the complainants' admiration of J.B's status in the local acting community, the Crown had to prove that he remained in a position of trust after leaving his volunteer role at their school.

In regard to the complainants' hope for romantic long-term relationships, evidence of romantic words and gestures, and the accused's "willingness" to engage in the relationships, the Court commented that these are all factors that exist in non-criminal relationships.

Finally, at para 94, the Court said that:

> the trial judge agreed with the defence that there was "little or no evidence of control, influence or persuasiveness". Although this was a factor that could suggest that the appellant was not in a position of trust at the relevant time, the trial judge never grappled with that finding or considered how the absence of evidence of control, influence or persuasion impacted his analysis as to whether there was a position of trust.

Do Hidden Cameras Vitiate Consent?

In the interesting case of *R. v. Aguilar-Lopez*, 2025 ONSC 6074, the trial was reopened and a mistrial declared after the accused presented new evidence in the form of videos taken of the sexual act that comprised the subject matter of the charge. The trial judge found that the videos were directly contradictory to his credibility findings and directly related to whether or not there had been consent to the sexual act.

The Crown argued that, because the videos were surreptitious, the videos themselves vitiated the complainant's consent and thus the conviction should stand.

The Supreme Court has previously declined to determine whether surreptitious videos vitiate consent or comprise vitiation by fraud when given the chance in *R. v. A.E.*, 2022 SCC 4. The law is not settled on whether the act of recording can, itself, transform consensual sexual activity to something that is non-consensual. Yet, in this instance, the recording exposed just how careful a Court must be in assessing credibility. The judge concluded that his credibility assessment was wrong given the real time evidence of the videos.

In an Ontario ruling, *R. v. Napper*, 2024 ONSC 5451, Justice Chozik offered an interpretation of the SCC rulings in *Hutchinson* and *Kirkpatrick* and determined that the Crown must prove both dishonesty and psychological harm to the complainant to vitiate consent.

The *Aguilar-Lopez* decision has not been appealed and a new trial was ordered.

Other Cases To Watch

Jordan Bilinski v. His Majesty the King
File # 42030
Crown appeal. Whether *Kirkpatrick* is an "unworkable precedent" regarding condom usage.

Celine Loyer, et al. v. His Majesty the King
File # 41610
Whether or not "body memories" are legitimate memories of sexual assault.

His Majesty the King v. A.M., et al.
File# 41528
Application of s.276 to human trafficking charges.

Matthew Berg v. His Majesty the King
File# 41980
Inconsistencies due to alcohol and drug use and how they affected the complainant's credibility.

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