News

Sherrin: Repetition does not bolster credibility

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noon. She left to prepare dinner for her teenage daughter, Angel Laplante, who lived with her, but returned to Mackenzie's apartment at about 10 or 11 that evening, and eventually fell asleep on his makeshift cot.

When she woke up and told him she wanted to go home, she testified, an argument ensued and Mackenzie "went ballistic," punching her in the head, choking her, and preventing her from leaving. She said she eventually escaped and returned to her apartment, naked and without her belongings. According to police testimony, when they arrived at the apartment in response to a 911 call from her older daughter, Ethier was initially reluctant to speak to them because Mackenzie had made death threats, telling them instead she had fallen and hit a doorknob. However, she later gave them a statement.

Mackenzie argued on appeal that the convictions were flawed because the trial judge relied on inadmissible evidence from one of the police officers to confirm that the complainant's testimony met the Crown's standard of proof. Counsel for the appellant also claimed that the judge relied too much on the testimony of various witnesses about what the complainant said to them about the cause of her injuries shortly after her return home from the appellant's apartment.

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> **Lee Stuesser**
> Lakehead University law

In his written decision in *R. v. Mackenzie* [2011] O.J. No. 5216, Justice Lalonde specifically stated that the evidence of lead investigator Joshua Pulfer "is to be given a lot of weight." Pulfer told the court that Ethier's demeanour when he saw her within an hour of her return home was "consistent with someone who was physically assaulted, confined and threatened with death." He added that marks on Ethier's thighs could not have been made by her, that the marks on her neck were consistent with someone who had been choked, and that he was certain fear had caused her initial lack of co-operation with the police.

The Appeal Court concluded the trial judge was correct in trying to confirm the complainant's testimony, and said much of Pulfer's evidence was admissible as narrative. But the police officer was not a medical or forensic evidence expert, it added, and was not qualified to draw conclusions about Ethier's demeanour or the marks on her neck or thighs. The decision also notes that his testimony went beyond the "compendious statement of facts" exception for lay evidence.

"The trial judge gave too much credence to the police officer's opinion," said Stuesser. "It's a good reminder to just get the facts."

Stuesser said the decision has some parallels with *R. v. Graat* [1982] S.C.J. No. 102, the Supreme Court's leading decision on lay opinion which "reminded us that just because they're police officers, let's not give their opinion increased weight," he noted.

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> **Christopher Sherrin**
> Western University law

The Appeal Court also said the trial judge relied on the daughters' testimony, admitted as part of the "res gestae" —a collection of exceptions to the hearsay rule. In fact, the decision notes, they were prior consistent statements, which are considered a form of hearsay and therefore considered unreliable, irrelevant, and lacking probative value. "The basic theory is that saying the same thing on multiple occasions does not make the statement any more credible," said Christopher Sherrin, a law professor at Western University in London. Ont. who specializes in criminal law and procedure, evidence, and the *Charter*. "The trial judge is not allowed to rely on consistency to confirm the credibility of the complainant."

Sherrin said it's understandable why Crown counsel wanted to introduce the evidence.

"It's an example of evidence that seems helpful on the surface," he said. "But you have to take the extra step and make sure the person who is giving that evidence is qualified to give it. If you scratch below the surface, you realize there are real problems with its reliability."

The case also points to the challenges of keeping track of the admissibility of evidence, added Sherrin. A piece of evidence may be admissible for one purpose, he said, and not admissible for another.

Ontario provincial employees lose in clash over anonymity

CHRISTOPHER GULY

Ontario's Court of Appeal has held that provincial government employee names cited via a request for access to personal records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) cannot be withheld unless a specific threshold is met.

In *Ontario (Minister of Community and Social Services) v. John Doe* [2015] O.J. No. 727, Associate Chief Justice Alexandra Hoy and Justices Katherine van Rensburg and David Brown upheld a lower court ruling that public servant names must be identified if the disclosure — as outlined in FIPPA — would not "reasonably be expected to endanger the life or physical safety" or "seriously threaten the safety or health" of government employees.

The appellants, including the Ministry of Community and Social Services and the Ontario Public Service Employees Union (OPSEU), challenged a divisional court decision dismissing their application for an order setting aside another order made by an Information and Privacy Commissioner (IPC) of Ontario adjudicator. That order required the ministry to disclose records, including the full names of some Family Responsibility Office (FRO) employees, to an individual who had requested personal information from the office responsible for enforcing court orders involving child and spousal support arising from family law proceedings.

Korte

The requester alleged the FRO had mismanaged his file and sought to discover the cause by obtaining documents, including correspondence and internal records, some of which contained FRO employee names. IPC adjudicator Steve Faughnan concluded the ministry was not entitled to rely on the FIPPA provisions to redact the names, a ruling the divisional court found to be reasonable. (Faughnan also found that the FRO employees' job function didn't require anonymity, as is the case with police officers often working undercover or in plainclothes assignment).

The appellants argued that a 2000 grievance health-and-safety settlement addressing employee full-name disclosure gave FRO employees the option of publicly revealing only their first name and employee identification number. The appellants also contended that the IPC only considered whether the requester himself could reasonably be expected to pose a risk to FRO employees (not whether he could also disseminate their names) and that FIPPA section 47.1, which addresses disclosure of information to an individual, should be considered as "disclosure to the world," resulting in a generalized risk to employees as a result.

However, the appeal court noted that between 2002 and 2006, FRO employees received only 24 documented threats out of an estimated 2.988 million phone calls.

There was no evidence that the employees, whose names were going to be disclosed, had been threatened, or that the requester posed any threat to employees, or that he would circulate their names after obtaining his records.

IPC counsel Lawren Murray, who argued the appeal, said the risk of harm resulting from disclosure must extend "well beyond the mere possibility," as the Supreme Court of Canada affirmed in two rulings. In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [2014] S.C.J. No. 31, the Supreme Court of Canada referred to a finding in its earlier ruling in *Merck Frosst Canada Ltd. v. Canada (Health)* [2012] S.C.J. No. 3, and held that the "could reasonably be expected to" standard in FIPPA provides "a middle ground between that which is probable and that which is merely possible."

Catherine Korte, a partner with McCague Borlack in Toronto who practises privacy law, said the test to determine disclosure, as advanced in *Merck*, is a "reasonable expectation of probable harm," and that the appellants in *John Doe* failed to meet that burden.

"The possibility of harm can't be based on feared, fanciful, imaginary or contrived harm," she said.

Murray said *John Doe* is consistent with FIPPA s. 2.3 in which personal information doesn't include the name and title of someone in a business, professional or official capacity, and that civil servants "can't remain anonymous absent evidence of a health or safety threat that goes well beyond a mere possibility."