

CIAJ October 2 - 4, 2017

- **THE *CHARTER* CHALLENGE CONUNDRUM: THE CLASH OF RIGHTS AND VALUES AND THE CANADIAN CULTURAL MOSAIC**
 - **THE INTERSECTION OF POLICING, THE CRIMINAL JUSTICE SYSTEM AND CULTURAL DIVERSITY: How to Ensure a Representative Jury:**
 - Managing a jury trial where issues of culture and religion are at the forefront.

A Verdict on the Evidence

- “The accused is to be judged on the evidence and not on improper inferences arising from it. “
 - Lisa A. Silver “Unpacking *R v Barton*” (27 July, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/07/Blog_LS_Barton.pdf

A Verdict on the Evidence

- The law is now well settled that the use of myths and stereotypes has no place in the determination of credibility because such reasoning corrupts and distorts the trial process and may result in an unfair trial...
- *R. v. C.A.M.*, 2017 MBCA 70 at para. 50
[*C.A.M.*]

The Jury's Task

- to render a verdict based solely upon the evidence at trial and the instructions on the law given by the trial judge;
- prejudice has no role;
- model instructions incorporate this caution for the jury at the outset of the proceedings and in the final instructions.

Model Instructions

- Model jury instructions both at the outset and conclusion of the trial focus the jury's attention on the requirement to render a decision based solely on the evidence and to banish sympathy, prejudice and outside information.
- See CJC Model Instructions; CRIMJI (Canadian Criminal Jury Instructions).

Model Instructions - CJC Preliminary

- 3.6 Irrelevance of Prejudice and Sympathy
- Keep an open mind as the evidence is being presented. Do not be influenced by sympathy for or prejudice against anyone.
- 3.8 Conduct of Jury
- You must decide the case solely on the evidence you hear in the courtroom.

Model Instruction CJC Final

- 8.3 Prejudice and Sympathy
- You must consider the evidence and make your decision without sympathy, prejudice or fear. You must not be influenced by public opinion. Your duty as jurors is to assess the evidence impartially.
- 8.4 Outside Information
- The only information that you may consider is the evidence that has been put before you in the courtroom... Any other information about the case from outside the courtroom, is not evidence.

Gatekeeper Function

- Those instructions may not be sufficient. Stereotypes are frequently unconsciously held and acted upon.

Role of the Trial Judge

- Trial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury; *C.A.M.* at para. 51.

Role of the Trial Judge

- Nor is there any reasonable chance for jurors to discharge their duties impartially if trial judges fail to warn them about relying on improper myths and stereotypes when jurors have been implicitly or explicitly invited to do just that.
- *R. v. Barton*, 2017 ABCA 216 at para. 1
[*Barton*]

Gatekeeper Functions

- Relevance
- Probative / Prejudicial
- Mid-trial and limiting instructions
- Final Instructions

Barton

- Bradley Barton was charged with first degree murder of Cindy Gladue. Ms. Gladue was found dead in the bathtub in a hotel room occupied by Mr. Barton.
The jury found Mr. Barton guilty of manslaughter. The Crown appealed.

Relevance

- In the course of the trial Ms. Gladue was repeatedly described by both Crown and defence counsel as a prostitute and as a “native girl” or “native woman”.
- There was no analysis of relevance or probative/prejudicial with respect to these matters and no s. 276 analysis.
- No mid-trial instruction about the permissible and impermissible uses of such evidence was given.
- “Narrative” is not enough.

Gage v. Reid, [1917] O.J. No. 153

- False imprisonment civil case
- new trial ordered
- ..., a defendant, sued for false imprisonment, was allowed to give evidence, wholly irrelevant to the issue, that the plaintiff was a subject of a nation then and now at war with Great Britain, and, based upon that evidence, counsel for the defendant was permitted to urge the jury to assess the plaintiff's damages because of his nationality, at little or nothing.

Gage

- There is no sort of excuse for the introduction of such evidence, and it could have had no purpose but that of an unjust discrimination because of the man's nationality: a thing so obviously inexcusable that it is surprising to me that there should be any attempt to excuse it, not to speak of attempting to justify it. It was just as bad as attempting to influence a jury to disregard their duty and their oath of office, in denying justice to any one on account of his creed or colour; and in its effect was worse in this case, because it was so easy to stir up the animosities of the jury against an alien enemy, whilst it might have been difficult, if not impossible, on account of colour or creed.

Mid-Trial Instruction

- If such evidence is introduced a mid-trial instruction should be considered.
- A limiting instruction should describe the evidence and both permitted and prohibited uses.

Additional Instruction

- This standard caution in the final instructions was not wrong in itself. But it was inadequate to counter the stigma and potential bias and prejudice that arose from the repeated references to Gladue as a "prostitute", "Native girl" and "Native woman". Those references implicitly invited the jury to bring to the fact-finding process discriminatory beliefs or biases about the sexual availability of Indigenous women and especially those who engage in sexual activity for payment. What was at play here, given the way in which the evidence unfolded, was the intersection of assumptions based on gender (woman), race (Aboriginal) and class (sex trade worker). We emphasize that we are not suggesting that counsel or the trial judge sought to insinuate improper thinking into the minds of this jury. Nevertheless, without a sufficient direction to the jury, the risk that this jury might simply have assumed that Barton's money bought Gladue's consent to whatever he wanted to do was very real, indeed inescapable. Add to this the likely risk that because Gladue was labelled a "Native" prostitute -- who was significantly intoxicated -- the jury would believe she was even more likely to have consented to whatever Barton did and was even less worthy of the law's protection. This is the very type of thinking that s 276 was introduced to eradicate.
- *Barton* at para. 128

Additional Instructions

- *Abdallah v. Snopek* (2008), 89 O.R. (3d) 771
- New trial ordered in a personal injury case before a jury where defence made an inflammatory closing, referring to the fact that the plaintiff was an immigrant, accused him of taking unfair advantage of the welfare system. Invited jury to speculate, playing on negative stereotype of the immigrant as a “leech on the system”.
- Irrelevant and prejudicial – should have been corrected by trial judge.

Special Issues - Credibility

- use of interpreter
- expert evidence

Model Jury Instructions - CJC

- What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.

Interpreter – *R. v. Tran*, [1994] 2 S.C.R. 951

- As a general rule, courts should appoint an interpreter when either of the following occurs:
 - (1) it becomes apparent to the judge that an accused is, for language reasons, having difficulty expressing him or herself or understanding the proceedings and that the assistance of an interpreter would be helpful; or
 - (2) an accused (or counsel for the accused) requests the services of an interpreter and the judge is of the opinion that the request is justified; at para. 48.

Tran - Standard of Interpretation

- continuous
- precise
- impartial
- competent
- contemporaneous

Jury Instructions

- The CJC model instructions include the following note:
- Where a witness is testifying through an interpreter, this instruction may be expanded to point out the particular difficulties in assessing such a witness's testimony.
- What should be said?

Implications for the Assessment of Credibility

... “ a judge ...

... must take into account the legitimate desire of any witness to express himself in the language he knows best, usually his mother tongue... [and] avoid imputing an ulterior motive to a witness who asks for an interpreter, even if the witness has some familiarity with the language used and could, in a general way, understand the proceedings.

This comment attests to the sensitivity required when assessing an accused's need for an interpreter, and to the fact that courts must not be too quick to draw adverse inferences where the claimant of the right has some facility with the language being used in the court.”

Tran at para. 53

Implications for Credibility Assessment

- in the determination of credibility a court should not microscopically examine translated testimony for inconsistencies...
 - Where evidence is received through the filter of a court interpreter transferring testimony from the source language of a witness to the target language of the proceedings, the court should not be too quick to devalue the witness's evidence on the basis of perceived inconsistencies: ...("... the courts have cautioned that interpreted evidence should not be examined microscopically for inconsistencies. The benefit of a doubt should be given to the witness ..."); ...("It is much more difficult to assess the credibility of evidence given through an interpreter"). *R. v. A.F.*, [2010] O.J. No. 4564.

Joint Trial by Jury

- *R. v. Oliynyk*, 2006 BCSC 85, provides useful guidance with respect to issues respecting the language rights of all accused in a joint trial by jury where some accused spoke French and elected to be tried in French and some accused were unilingual in English.

Plausibility

- Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides... The art of assessment involves examination of various factors such as the... whether the witness' testimony seems unreasonable, impossible, or unlikely... and the demeanour of a witness... Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time...
- *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 (internal citations omitted)

Plausibility

- What we consider to be plausible or reasonable in the circumstances is influenced by our life experience.
- In many cases the fact finder will be assisted by expert evidence about cultural mores within particular communities; see *R. v. Shafia*, 2016 ONCA 812 [*Shafia*].

Expert Evidence

- *R. v. Nuttall*, 2016 BCSC 1404
- Both accused were convicted of terrorist offences arising from planting explosive devices made from pressure cookers after an extensive undercover police investigation. In a subsequent hearing concerning abuse of process and entrapment, the court granted a stay.

Expert Evidence - *Nuttall*

In the course of the undercover operation police had given religious advice and discouraged the accused from consulting a spiritual advisor when the accused expressed doubts about the enterprise.

Dr. Omid Safi testified for the defence as an expert in the Islamic faith, the history of the Islamic faith, contemporary Islamic faith movements and Islamic extremism.

R. v. Boswell, 2011 ONCA 283

- expert evidence on the “code of silence” admitted as evidence of cultural values in the affected communities subject to safeguards:
 - 1. prohibited any reference to “gangs”;
 - 2. counsel negotiated and the judge approved, in advance the content of the evidence;
 - 3. expert could not opine on the credibility of witnesses;

Boswell

- 4. clear mid-trial instruction about the use of the evidence repeated in final instructions;
- 5. enforced during the testimony.

R. v. Sadiqi, [2009] O.J. No. 2974;
2013 ONCA 250

- expert opinion evidence relating to the relationship between culture, religion, patriarchy and violence against women in the Middle East and diasporas around the world, specifically as these issues relate to the phenomena known as honour killing.
- expert offered no opinion on the facts of the case.

Qualification and Scope

- The expert must be qualified to express the specific opinion proffered.
- The expert must be confined to express opinions within the scope of that qualification.
- There must be an evidentiary foundation to support the qualification and scope; see *R. v. Orr*, 2015 BCCA 88.
- Experts may not give anecdotal evidence; see *Shafia* at para. 243.

