R. v. Harper, 2002 YKSC 15

Date: 20020314
Docket: S.C. No. 00-00593D
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

THOMAS MOSES HARPER

RULING ON *VOIR DIRES* OF MR. JUSTICE R.S. VEALE

INTRODUCTION

[1] Thomas Harper is charged with sexually assaulting the complainant on November 18, 2000. The complainant suffers from a severe and disabling form of multiple sclerosis, which affects her both mentally and physically.

[2] The Crown has applied to have certain out-of-court statements, made by the complainant to care workers and an RCMP constable, admitted into evidence under what is now called the principled approach to the admission of hearsay.

[3] According to the principled approach to the admission of hearsay for the proof of its contents, the out-of-court statements must be both necessary and reliable. This

application brings into focus the tension between the right of the accused to a fair trial and the equality right of the mentally and physically disabled to be heard.

BACKGROUND

[4] The Crown has presented evidence about the medical condition of the complainant from Dr. Anzarut, her treating neurologist who specializes in multiple sclerosis. Dr. Macdonald, the treating physician of the complainant has also testified.

[5] The medical evidence was presented in a *voir dire* to determine whether the complainant would suffer trauma from testifying at a capacity hearing. The experts did not address specific memory issues related to the out-of-court statements of the complainant that are now in issue.

[6] The complainant suffered a severe attack in 1994 after the birth of her second child. She was diagnosed with multiple sclerosis. The attack left her in a fetal position with spasticity of her upper and lower limbs. She was blind and unable to talk. She survived only with the insertion of feeding tubes.

[7] Over time, she has recovered to some extent. At one time she could walk only with a walker and assistance. Since at least the date of this charge, she has been unable to walk and is confined to a wheelchair or her bed. She is incontinent and her eyesight is extremely poor. Dr. Anzarut describes her condition as chronic multiple sclerosis with progressive deterioration.

[8] He describes her as having been terribly affected by the disease. He says the complainant has no memory that she can rely on, except for some remote memory. Dr.

Anzarut testified that she has diffuse brain damage which has affected her ability to remember things from one day to the next. She is childlike in her behaviour and, at times, completely uninhibited. Dr. Anzarut finds her totally unreliable in giving answers when he examines her. He obtains her case history from her parents and care workers but he acknowledges that he examines her in his hospital clinic rather than at Macaulay Lodge, a familiar environment where she might fare better. He also suggested that the complainant does better with her mental status at Dr. Macdonald's office, a more familiar place than his clinic. Despite all of this, I observed that the complainant hears and speaks well.

[9] Both Dr. Anzarut and Dr. Macdonald said that testifying in court would cause the complainant to become bewildered, agitated and confused. However, Dr. Anzarut said that there would be no risk to her physical health and her reaction would be emotional without causing harm, such as a relapse. He was of the opinion that she could have a temporary emotional and physical reaction but with no lasting effect. Dr. Macdonald was of a similar opinion, although she said there could be potential risk of harm. However, Dr. Macdonald said that potential risk would be lessened if she gave her evidence at Macaulay Lodge, where she resides. She implied that the complainant would be more comfortable in that environment with her caretakers. Dr. Macdonald said that when the complainant is out of her routine and controlled environment, her functioning deteriorates.

[10] I ruled that the complainant could testify at Macaulay Lodge based on the expert evidence. An inquiry was held to determine her capacity to observe, recollect and

communicate and I ruled that she was capable to give evidence. Her trial evidence was also heard at Macaulay Lodge.

THE TRIAL EVIDENCE OF THE COMPLAINANT

[11] I am going to begin with the complainant's evidence at the inquiry into her capacity to observe, recollect and communicate. The questions at this inquiry do not touch upon the alleged offence, but rather on other subjects to test her capacity. The threshold for capacity to testify is a low one.

[12] The complainant remembered the names of her parents, her children, where she lived and the name of Dr. Macdonald. She remembered the year was 2002 but she could not give the day or the month. She remembered going to the police station. She could not remember what she did on the previous weekend. She understood well and spoke clearly, without obvious trauma.

[13] Her trial evidence was much more troublesome. I will cover it in some detail as it bears on the issue of necessity. She was still able to hear and speak clearly without trauma and often had questions for her examiners. When asked how old she was, she gave her age as 26 and asked, "Am I wrong?" At her capacity inquiry she said she was 37 and her birth date was January 20, 1968. She knew she lived at Macaulay Lodge but she did not know for how long or when she first came to live there. When asked what floor of the two-floor lodge we were on, she said, "On the third floor. Is that right? Second? First?" She said her room number was 13 and that she had always been in that room. She then remembered that she had been upstairs and guessed that the room number was 21. She did not remember that her room number at the time of the offence

was 34. She did not know when she moved from Room 34 and could not remember her present room number, which she had previously said was 13.

[14] When asked by the Crown if something happened in the room she was living in before, she replied, “Nothing happened in that room.” She said we were in the year 2003. She could not remember something important happening in the year 2000. She had difficulty distinguishing between winter and spring. It is important to note that the Crown was limited to asking open-ended questions rather than leading questions.

[15] She could not remember something happening to her at Macaulay Lodge. She did remember going to the police station quite a while ago but not why. She said she knew someone named Thomas who visited her. When asked, “Did he ever visit you?” she answered, “I don’t know.” When asked when she last saw Thomas, she answered, “I don’t know, either.” She knew that Thomas was native and that his mother lived in the building.

[16] When cross-examined, and leading questions were asked, the complainant was asked if she remembered Thomas doing something to her that she didn’t like. She replied, “He had sex with me.” I set out what followed:

> Q And do you remember talking to people about that?
>
> A I talked to my mom about it.
>
> Q Do you remember talking to some of the staff about it?
>
> A Probably.
>
> Q Do you remember talking to police officers about it?
>
> A Mm-hmm.

Q Do you remember a police officer coming to Macaulay Lodge here to talk to you about that?

A Probably.

Q Do you remember telling that police officer that you had asked Thomas to have sex with you?

A (No audible response)

Q Would there have been any reason that you could think of why you might have said that?

A I don't know.

Q. Okay.

[17] The Crown approached the issue again:

Q The gentleman asked you if you remember Thomas doing something that you didn't like, and you said, "He had sex with me."

A Like, forced me to have sex with him.

Q Why didn't you like it?

A I don't remember.

Q And how did he force you?

A Hmm?

Q How did he force you?

A He never forced me at all.

Q And –

A How old is he?

Q I don't know. Do you know when it is that he – do you know when this happened?

A When it happened? It was a while ago. What did you write down?

Q "While ago." And do you remember how it happened or what happened?

A I don't know.

Q Did you want to have sex with him?

A Yeah, sure.

OUT-OF-COURT STATEMENTS OF THE COMPLAINANT

[18] I will refer to the out-of-court statements of the complainant by their *voir dire* number, as that is how examination in chief and cross-examination were referenced. I will discuss the *voir dires* in the chronological order that the complainant made the out-of-court statements. *Voir dire* number 1 refers to the medical evidence which by agreement of counsel will be treated as trial evidence. I have previously ruled that the out-of-court statement of *voir dire* number 7 is inadmissible.

[19] With the exception of *voir dire* number 6, all the out-of-court statements were made at Macaulay Lodge, which is a 50-bed continuing care residence. The residents range from 19 year old stroke victims to elderly patients with dementia. The lodge is a two-story building with an elevator.

***VOIR DIRE* NUMBER 2 (Statements made to Donna Organ and Pam Phillipsen on November 18, 2000 between 3:00 and 3:30 p.m.)**

[20] This was the statement made by the complainant initially to Donna Organ, a licensed practical nurse on duty at the time. She had just come on shift at 3:00 p.m. and was in the chart room listening to a taped report of the previous shift.

[21] The complainant's emergency bell, which was located in her bathroom, was ringing shortly after 3:00 p.m. The emergency bells can be heard throughout the building.

[22] Donna Organ took the stairs to the second floor to reach the complainant in Room 34. She had to unlock the door to the complainant's room, which was unusual as she usually left the door ajar. The complainant was sitting in her wheelchair dressed in a shirt and a pair of panties. She said, "I just got fucked by a native guy – that Thomas guy." Donna Organ testified that these were the exact words of the complainant.

[23] Donna Organ knew the complainant was referring to Thomas Harper who was sitting down the hallway by the elevator. She described the complainant as upset and shaking, in a manner more than her usual tremor.

[24] Donna Organ left the room to take Thomas Harper downstairs and returned within five minutes. She entered the complainant's room with Pamela Phillipsen, a registered nurse, who was a staff nurse at the lodge. The complainant repeated in the presence of Donna Organ and Pamela Phillipsen that a native guy fucked her. Donna Organ testified that she asked the complainant if she wanted it to happen and the complainant said that she didn't want it to happen and that she had been sleeping. Donna Organ could not remember this latter portion of the complainant's response word for word and was paraphrasing.

[25] Pamela Phillipsen paraphrased what she heard from the complainant. She testified that she asked the complainant if the sexual intercourse had happened. The complainant confirmed that it had. The complainant, in response to her questions, said that she did not invite Thomas Harper into her room and that she was not willing to have sex with him.

[26] Pamela Phillipsen confirmed that the complainant was really shaking, more so than her usual condition. The complainant asked for a cigarette and was taken downstairs.

[27] Donna Organ observed a wet incontinence pad on the floor and pants and panties on the bed. The whole room smelled strongly of alcohol and she opened the window to let fresh air in. The complainant did not smell of alcohol but Thomas Harper did smell of alcohol.

[28] Pamela Phillipsen described the complainant's room as being in disarray.

[29] Donna Organ testified that Lori O'Donnell was present with Pamela Phillipsen and the complainant. Neither Pamela Phillipsen nor Lori O'Donnell confirmed this. Donna Organ completed a nursing chart record for November 18, 2000. She was not cross-examined on the contents of her nursing chart record.

[30] Donna Organ and Pamela Phillipsen confirmed that the complainant's routine was to go to bed for a sleep at 1:00 p.m. with a draw sheet over her. The complainant would sleep until 4:00 p.m. or 5:00 p.m.

***VOIR DIRE* NUMBER 4 (Complainant's statement to Lori O'Donnell on November 18, 2000 between 3:00 – 3:30 p.m.)**

[31] Lori O'Donnell is a licensed practical nurse, who was starting her shift at 3:00 p.m. on November 18, 2000. She answered the complainant's emergency bell first and found the door to her room locked. She did not enter the room until after Donna Organ had unlocked the door, entered and then left the room to bring Pamela Phillipsen.

[32] She testified that the complainant said to her, “A native guy fucked me.” O’Donnell asked if she invited him in and the complainant said, “No, there wasn’t much I could do.” She had a look of disgust on her face, but was not upset.

[33] Lori O’Donnell said that the complainant was flushed and shaky. Her pad was on the bed with discharge and pubic hair. Her pants and panties were also on the bed and the room smelled of alcohol, which was not from the complainant.

[34] Lori O’Donnell was only there for two minutes and left when Donna Organ returned with Pamela Phillipsen. She observed Thomas Harper before he was taken away and said he appeared to be intoxicated and smelled of alcohol.

***VOIR DIRE* NUMBER 5 (Statement made to Elaine Senkpiel on November 18, 2000 between 4:30 and 4:55 p.m.)**

[35] Elaine Senkpiel is a registered social worker. She works at both the Thompson Centre and Macaulay Lodge. She has been at Macaulay Lodge for six years and has been the complainant’s social worker since 1995. She has seen the complainant informally on a weekly basis and formally as required.

[36] She was called at home by Pamela Phillipsen shortly after 4:00 p.m. and arrived at Macaulay Lodge at 4:30 p.m.

[37] The complainant was sitting in her wheelchair near the entrance when Elaine Senkpiel arrived. When she arrived the complainant said, “So glad you’re here.” She described the complainant as tremulous and shaking all over, unlike her normal spasms, which she described as discrete movements.

[38] Ms. Senkpiel asked the complainant if she would like to talk and asked her how her day was. The complainant replied, “That Thomas.” The complainant said that she was in her room lying on her bed half asleep. Thomas came in without knocking. He had been drinking. He pulled down his pants and removed her clothes and feminine pad. The complainant said, “He pumped his dink against my bum” and put his hand inside her.

[39] Elaine Senkpiel asked the complainant if she wanted to have sex with Thomas. She said, “No,” and that she didn’t like First Nation people. When asked if she was scared or hurt, she replied, “No.”

[40] Ms. Senkpiel described the complainant’s voice as having a nervous edge. There was no hesitation or gaps between questions and answers. She described the words used by the complainant as her exact words, which she put on her chart that evening. She was not cross-examined on her chart notes.

***VOIR DIRE* NUMBER 8 (Statement made by complainant to Cst. Maisonneuve on November 18, 2000 at 4:50 p.m.)**

[41] Constable Elaine Maisonneuve responded to a call from Macaulay Lodge received at 3:38 p.m. on November 18, 2000. She was briefed and taken to the complainant’s room where she took photographs. She then proceeded to meet the complainant at 4:50 p.m. in Elaine Senkpiel’s office. Her notes of the conversation were recorded in her notebook at 5:45 p.m.

[42] The complainant said to Cst. Maisonneuve that she was lying in bed with a blanket over top of her when Thomas entered her room. He took the blanket off her, took off his clothes, and she took off her own clothes. She said Thomas was soft and floppy and tried to put his dink inside her. She said she didn't want to have sex. He was pumping up and down and moaning. She didn't think he ejaculated. She could smell alcohol on his breath. He was always nice to her but not when he was intoxicated. She rang the emergency bell but did not recall asking him to leave. Cst. Maisonneuve recalled the complainant reported saying, "You'd better fucking get off," to the accused. She was trying to sleep at the time.

[43] Cst. Maisonneuve said the conversation took 15 minutes. She recalls that some of the information from the complainant was volunteered and some was from answers to her questions. Cst. Maisonneuve cannot tell which information arose from questions as opposed to being volunteered. There were some gaps of five seconds between questions and answers.

[44] Elaine Senkpiel was present for this conversation between the complainant and Cst. Maisonneuve. However, she did not take notes of the conversation and has no recall of content of the conversation.

***VOIR DIRE* NUMBER 3 (Audio taped statement of the complainant taken by Cst. Maisonneuve in the presence of Donna Organ at Macaulay Lodge at 9:01 p.m.)**

[45] Cst. Maisonneuve, after attending Whitehorse General Hospital with the complainant, took a statement recorded by audiotape. The transcript, with some handwritten amendments agreed to be correct by Crown and defence, was filed as an

exhibit. Cst. Maisonneuve took the statement and Donna Organ was also permitted to ask questions. I will not repeat the statement word for word in its entirety. It told a different story. The complainant said, “We started kissing” and later, “I said that we should have sex together.”

[46] She confirmed that they had sex and as he weighs quite a bit, she said, “I told him I should actually go on top of you.”

[47] After the intercourse, she said he went for her breasts. After that she couldn’t remember what happened and said, “I really don’t know. My M.S.”

[48] Donna Organ then asked the complainant directly if she remembered telling her, “I was just fucked by a native man.” The complainant answered, “That isn’t true” and later, “I didn’t mean that at all.”

[49] The answers of the complainant became less responsive to further leading questions until the statement was ended at 9:14 p.m.

[50] Cst. Maisonneuve described the complainant as calm but tired during the questioning. The gaps between the questions and answers were longer than in the statement of the complainant to Cst. Maisonneuve in Elaine Senkpiel’s office.

VOIR DIRE **NUMBER 6 (Statement made by complainant to Cst. Maisonneuve at Whitehorse R.C.M.P. Detachment, with Elaine Senkpiel present on November 19, 2000 at 6:37 p.m. to 6:51 p.m.)**

[51] The statement of the complainant was video and audio taped. A transcript, with handwritten amendments agreed to by counsel, was filed as an exhibit. The bulk of the questioning was done by Cst. Maisonneuve with some questioning by Elaine Senkpiel.

[52] The first open-ended question about what happened between the complainant was answered as follows:

> I was having a nap in my room, I was laying in my bed and my eyes were closed and all that stuff and all of a sudden Thomas was there like right in front of my eyes. I thought ah, fuck. I couldn't believe this was happening you know. Jesus. You know, I said, "What the hell do you want?" and he goes "I just love you". He said it to me, I said "No you don't". He goes "Yes I do". I couldn't believe he actually said that to me. I don't really like Thomas at all. You know. So any ways he started having sex with me. He took my pants off and he took his pants off, which I thought "Fuck, I ain't doing this". It's just gross.

[53] The gist of this statement is that the complainant did not want him in her room and found him quite disgusting.

THE LAW

[54] The general rule against hearsay, as it applies in this case, is that oral statements made out-of-court are not admissible to establish the truth of their contents. However, the common law has produced a number of exceptions to the hearsay rule usually referred to as the traditional hearsay exceptions. One of those exceptions to the hearsay rule is often referred to as the *res gestae* exception. Under this exception an out-of-court statement, made spontaneously or contemporaneously connected to the act in question, may be admitted for the purpose of establishing the truth of the matters stated.

[55] In recent cases (See *R. v. Starr,* [2000] 2 S.C.R. 144 and *R. v. Khan*, [1990] 2 S.C.R. 531) the Supreme Court of Canada has adopted the principled approach to the admission of hearsay so long as it was necessary and reliable. Iacobucci J., speaking for the majority, put it this way in *Starr*, supra at para. 200:

> In *Khan, Smith*, and subsequent cases, this Court allowed the admission of hearsay not fitting within an established exception where it was sufficiently reliable and necessary to address the traditional hearsay dangers. However, this concern for reliability and necessity should be no less present when the hearsay is sought to be introduced under an established exception. This is particularly true in the criminal context given the "fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted": … It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.

[56] Although the Supreme Court was split in *Starr*, supra, based on the application of the principled approach to the facts of that case, there is some basic agreement on the general principles. The Chief Justice, in dissent, set out a useful guide at para. 2:

> In my view, the following principles govern the admissibility of hearsay evidence:
>
> 1. Hearsay evidence is admissible if it falls under an exception to the hearsay rule;
>
> 2. The exceptions can be interpreted and reviewed as required to conform to the values of necessity and reliability that justify exceptions to the hearsay rule;
>
> 3. Where the evidence is admissible under an exception to the hearsay rule, the judge may still refuse to admit the evidence if its prejudicial effect outweighs its probative value;

> 4. Where evidence is not admissible under an exception to the hearsay rule, the judge may admit it provided that necessity and reliability are established.

[57] The result is that if an out-of-court statement was admissible under a traditional exception, but does not meet the necessity and reliability test, the principled approach prevails and the statement would not be admitted.

[58] I note that in *Starr*, supra, Iacobucci J. dealt with the test of reliability first and necessity second. The Chief Justice preferred to deal with necessity first and reliability second. In my view, nothing turns on the order.

[59] In this case, because of the mental and physical disabilities of the complainant, I will deal with necessity first and reliability second.

[60] *Khan*, supra, was a major turning point in the application of the tests of necessity and reliability to permit the admission into evidence of statements made by children to others about sexual abuse.

[61] The facts in *Khan*, supra, are that a four-year old child was found not to be competent to give unsworn evidence at trial. The trial judge also refused to admit the evidence of the mother that 15 minutes after being alone with the accused the child said, “He put his birdie in my mouth, shook it and peed.” The accused was acquitted and ultimately the Supreme Court of Canada set aside the acquittal and ordered a new trial.

[62] McLachlin J. (as she then was) said that the requirement of necessity would probably mean that in most cases the child would still be called to give evidence. She also said the following about the tests of reliability and necessity at page 546 - 547:

> The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as “reasonably necessary”. The inadmissibility of the child’s evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.
>
> The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.

[63] Further refinements of the principled approach are found in *Starr*, supra. Significantly, the Supreme Court has distinguished between threshold reliability and ultimate reliability. As stated by Iacobucci J. at para. 215:

> Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan, supra; Smith, supra),* or because there were safeguards in place such that a lie could be discovered.

[64] In this case, where the statements of the complainant are not always consistent, Iacobucci J. has provided further guidance at para. 217 as follows:

> At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability.

[65] It is important to note that *Khan,* supra, dealt with the evidence of a four-year old child at the time of trial. *Starr,* supra, dealt with adult witnesses who had no physical or mental impairments.

[66] *R. v. Pearson* (1994), 95 C.C.C. (3d) 365 (B.C.C.A.), however, is a case that has a greater factual similarity to this one. It also has a significant difference in that it preceded *Starr*, supra, and hence did not dwell on the distinction between threshold and ultimate reliability. In fact, in *Pearson*, supra, the trial decision focuses on ultimate reliability as I read it. However, the Court of Appeal decision focused on admissibility and has useful principles for cases where a complainant has mental and physical disabilities.

[67] In *Pearson*, supra, the complainant had both physical and mental handicaps and a mild speech impediment. His intellectual ability was markedly limited. His mother said

that he did not have difficulty remembering faces and he was able to identify the accused at trial and in a photographic line-up.

[68] The complainant was unable to give a coherent account of the sexual assault at trial and the trial judge admitted evidence from his mother about out-of-court statements that the complainant made to her about the identity of the accused and the offence. The first statement was “shortly after the events” while the complainant was being examined at a hospital. The second statement was made a week after the incident and the third was six weeks after the incident when he saw the accused again. None of the statements were the subject of a *voir dire*.

[69] The British Columbia Court of Appeal found that necessity and reliability were established and Taylor J. made this general comment at para. 36:

> We must, of course, ensure that those with mental and physical disabilities receive the equal protection of the law guaranteed to everyone by s. 15 of the *Canadian Charter of Rights and Freedoms*. This will sometimes require that their evidence be presented along with the evidence of others who are able to explain, support and supplement it, so that, to the extent that this is possible, the court will receive the account which the witness would have given had he or she not been disabled. But the evidence will, of course, still have to meet the high standard of proof always required when criminal charges are involved, because the liberty of the accused, and the importance of guarding against the injustice of convicting the innocent, require in these cases as much as any other a “solid foundation for a verdict of guilt”.

[70] Thus, the Court of Appeal made the distinction between threshold and ultimate reliability in the admissibility of out-of-court statements.

DISCUSSION

[71] I will consider the necessity issue first. The law does not require that a complainant is unable to testify so as to meet the necessity test. Rather, even when a witness testifies, the ability of the witness to present a coherent or complete story must be addressed.

[72] In this case, the complainant has chronic multiple sclerosis with progressive deterioration. Dr. Anzarut gave the opinion that she has no memory that she can rely on, except for some remote memory. He said that her diffuse brain damage affects her ability to remember things from one day to the next. He could not rely on her to give a reliable case history and relied upon her parents or care workers.

[73] From my observation the complainant hears and speaks well. She is intelligent but is limited by her capacity to remember and her uninhibited child-like behaviour. I note that there has been no evidence on the subject of her capacity to consent and the Crown has taken the position that she does have the capacity to consent.

[74] Her evidence at trial could only be described as an inconsistent and inadequate description of the event. This is not a criticism of the complainant, because she tried hard, but is simply unable to remember even the simplest details of the event.

[75] The complainant was unable to provide the court with a full account of the events of November 18, 2000. I can reach no other conclusion than it is necessary for the out-of-court statements of the complainant to be admitted into evidence to establish the

truth of their content. I do not at this stage of the trial make any finding on the truth of the content of the out-of-court statements of the complainant.

[76] I now turn to the issue of whether the out-of-court statements of the complainant meet the test of threshold reliability. I am not, at this stage, considering consistency or inconsistency of these statements with in-trial evidence. Rather, I am determining whether or not the statements meet the requirement that they not be fabricated or the result of the influence or fabrication of others.

[77] In this context, Dr. Anzarut implicitly recognized that the complainant has a short-term memory but has limited it to one day in the sense that her ability to remember events from one day to the next has been impaired. Dr. Anzarut also acknowledged that the complainant does better with her memory when she is in an environment that she is familiar with.

[78] Dr. Macdonald confirmed that the complainant functions better in a familiar environment with her care workers. This evidence supports the threshold reliability of the complainant's out-of-court statements to Donna Organ, Pam Phillipsen, Lori O'Donnell and Elaine Senkpiel in that they were made at Macaulay Lodge to care workers with whom she was familiar. These statements were also reasonably close to the time of the event although it is difficult to put a specific time on it. It definitely occurred prior to 3:00 p.m. but there is no evidence as to when the accused entered the building. However, I am of the view that the agitation of the complainant and her ringing of the emergency bell confirm that the alleged incident occurred in the hour preceding 3:00 p.m. It is more likely that the event occurred during the time immediately before the

shift change when the previous shift was preparing its report for the next shift. I have no doubt that these care workers are providing accurate information on what they were told by the complainant. I can find no reason for fabrication by either the complainant or the care workers. I order that the statements of *voir dires* number 2, 4 and 5 be admissible for the purpose of establishing the truth of their contents.

[79] With respect to *voir dires* number 8 and 3, which were the statements made to Cst. Maisonneuve at 4:50 p.m. and later that evening at 9:01 p.m., I find similar indicia of reliability. The statements were made at Macaulay Lodge to an RCMP constable whose presence would certainly lend a serious note to the occasion. Although somewhat further away from the event in time, it is my impression from the experts that some reliability arises from the fact that the statements were made in a comfortable and known surrounding with a care worker present on each occasion. The statements were not so far removed from the event in timing so as to destroy their reliability. I order the statements of *voir dires* number 8 and 3 to be admissible for the purpose of establishing the truth of their contents.

[80] *Voir dire* number 6 was a video and audio taped statement made by the complainant to Cst. Maisonneuve in the presence of Elaine Senkpiel on November 19, 2000 at 6:37 p.m. This statement is at the outer limits of memory retention for the complainant according to Dr. Anzarut. However, it does have aspects supporting threshold reliability in that it was made to a person in authority in the presence of a known caseworker. The location of the statement at the RCMP detachment would tend to cause confusion and agitation according to the medical evidence, but if that occurred, it was certainly not observable on the videotape. In fact, Elaine Senkpiel testified that

the condition of the complainant was noticeably improved from the previous day in that she appeared to understand the questions and was more comfortable and settled.

[81] In my view, it is appropriate to admit the video and audio taped statement of *voir dire* number 6 for the purpose of ensuring that the complainant's full story is before the court. It has sufficient threshold reliability. The *Charter* right to equality for the complainant should be respected, particularly at this threshold level. It would not serve the interests of justice to deny the complainant her day in court based upon her disabilities.

[82] In summary, I am ruling that the out-of-court statements of the complainant be admitted for the purpose of establishing the truth of their contents. This is not a ruling that I accept the statements as true because that task comes after all the trial evidence has been heard.

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Veale J.

Narissa Somji	For the Crown
Gordon Coffin and Fia Jampolsky	For the Defence