

Dispelling Myths in Sexual Assault Trials through Expert Evidence: What is Allowed after *R. v. D.D.*?

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Summary:

The Supreme Court in *R. v. D.D.* excluded the admissibility of expert evidence with respect to delayed disclosure in sexual assault. It clearly established the principle that there is no inviolable rule as to how victims of sexual assault will behave. Subsequently, this has *not* been interpreted to limit expert evidence with respect to other rape myths. Even delayed disclosure itself, if part of a pattern or mix of factors, has been held to be the proper object of expert testimony since *R. v., D.D.*

R.v. D.D. and subsequent cases have emphasized the case specific nature of the *Mohan* test for admissibility of expert evidence. Due to the variable level of understanding among judges and the public across different communities, such case specific flexibility is important: a finder of fact cannot be expected to understand myths and stereotypes in the same way in every Canadian community, or even in every case. Courts have held since *R. v. D.D.* that realities and circumstances outside of the ordinary experience of a particular community from which the finder of fact is drawn may allow expert evidence to be introduced. This includes sexual assault-related circumstances like repeated and protracted assaults, continuance of relationship with the abuser, recantations and inconsistencies in youths' disclosures, or the demeanour of the complainant post-assault or during testimony. Post-*R. v. D.D.* cases have taken the opportunity to comment that substantial misinformation about sexual assault still is widely held, and expert evidence still needed.

Latitude for sociological background to be introduced has been afforded in cases requiring the assessment of the impact of systemic discrimination. Jury selection and defamation cases related to anti-Black racism are examples. The introduction of expert evidence with respect to systemic social and cultural myths and stereotypes about sexual assault and victims is supported, and is useful in undermining broadly negative yet vaguely defined credibility attacks on complainants, based on a "mosaic" of stereotypical beliefs.

In practice, even after *R.v. D.D.*, the use of experts to dispel erroneous beliefs about delayed disclosure combined with continued relationships with abusers, recantations and other factors continues widely and is not often challenged.

In *R. v. D.D.* [2000] 2 S.C.R. 275, the Supreme Court of Canada interprets the *Mohan* rules regarding the admissibility of expert evidence, in the context of the sexual assault of a child. The Court was deeply divided (4 to 3), with Chief Justice McLachlin writing a strong dissent.

Mohan (*R. v. Mohan*, [1994 CanLII 80 \(S.C.C.\)](#), [1994] 2 S.C.R. 9) requires that four criteria be met for expert evidence to be admissible:

relevance

necessity

the lack of any other exclusionary rule

a properly qualified expert

Further, even where these requirements are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value¹.

What *D.D.* turns on, and what will be determinative in many sexual assault cases when considering expert evidence, is the interpretation of "necessity." At paras. 47 and 57 respectively, the majority in *D.D.* quotes with approval the following:

[E]xpert evidence must be necessary in order to allow the fact finder: (1) to appreciate the facts due to their technical nature, or; (2) to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge.

(J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 620, citing *Mohan, supra*, at p. 23.)

* * *

...only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert evidence be helpful before we will be prepared to run these risks. That sets too low a standard. It must be necessary.

(D. Paciocco, *Expert Evidence: Where Are We Now? Where Are We Going?* (1998), at pp. 16-17.)

It is this second ground of necessity, "to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge," that is most relevant to the introduction of expert evidence to dispel myths and stereotypes about sexual assault. What do "ordinary" persons hold in their mind with respect to sexual assault?; how much will be myths and stereotypes, and how much will reflect a modern and accurate understanding of the realities of gendered behaviour and sexual assault? What is needed to prevent wrong conclusions by the finder of fact?

The majority in *R. v. D.D.* distills one underlying principle from the expert evidence tendered in that case: that in "cases of child sexual abuse, the timing of the disclosure, standing alone,

¹ The appellant in *Tayebi, discussed below*, argued that the trial judge abdicated his role as finder of fact because of prejudice caused by the expert evidence, as shown in phrases of the judge referring to the complainant as fitting "into Dr. Yuille's description." The BC Court of Appeal disagreed, holding that, in looking at the totality of the judge's decision, he did not abdicate his fact-finding role in favour of the expert, and that in general this concern is more relevant to juries than judges. This supports a view that expert evidence in sexual assault cases will more easily meet the *Mohan* test with respect to weighing prejudicial effect when before a judge alone.

signifies nothing. Not all victims of child sexual abuse will disclose the abuse immediately. It depends upon the circumstances of the particular victim." (at para. 59). With respect to this principle, the majority ruled that the expert evidence failed the *Mohan* requirement of necessity:

I find surprising the suggestion that a Canadian jury or judge alone would be incapable of understanding this simple fact. I cannot identify any technical quality to this evidence that necessitates expert opinion. (at para. 59)

Instead of expert evidence with respect to the timing of a disclosure of child sexual abuse, a simple jury instruction would have sufficed.

This view is based on the existence of the provision in the Criminal Code which specifically abrogates the historic requirement that a contemporaneous complaint is required for a sexual assault charge to proceed². Major J. for the majority then cites case law that indicates that the doctrine of recent complaint must not bear on credibility:

The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse: R. v. M. (P.S.) 1992 CanLII 2785 (ON C.A.), (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at pp. 408-9; R. v. T.E.M. (1996), 187 A.R. 273 (C.A.). [at para. 63]

Major J. concludes:

69 *The doctrine of recent complaint as a principle of law did not exist in Canada at the time of the trial. The expert evidence supported the wisdom of having abolished that principle. There was no basis for the exercise of the trial judge's discretion to permit expert evidence that supported the correctness of the change in our law.*

70 *As a result, the expert evidence led in this case, as disclosed by the trial record, was not capable and did not meet the second requirement of necessity in the Mohan analysis. If a proper jury instruction had been given, there was no possibility that the jury would have been unable to grasp the concept because of its technical nature, there being none in this case.*

² Criminal Code

PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION

Assaults

Rules respecting recent complaint abrogated

275. The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1, 155 and 159, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

R.S., 1985, c. C-46, s. 275; R.S., 1985, c. 19 (3rd Supp.), s. 11; 2002, c. 13, s. 12.

There was no possibility that the jury would reach an erroneous conclusion if not assisted by the expert.

McLachlin C.J.'s strong dissent highlights a number of problems with this approach. First, McLachlin C.J. takes a very different view with respect to juries' "common sense" knowledge of sexual abuse. With respect to necessity:

[T]here was an ample foundation for the trial judge's conclusion that Dr. Marshall's evidence went beyond the ordinary knowledge and expertise of the jury. Based on his knowledge of the relevant scientific literature, Dr. Marshall was able to present insights into why a child might not report incidents of sexual abuse promptly. Those insights might not be within the knowledge of the ordinary juror. Appellate courts have upheld numerous decisions in which trial judges have admitted expert evidence on delayed disclosure to assist the trier of fact in child sexual abuse cases: see, e.g., C. (G.), supra; R. v. Mair 1998 CanLII 1659 (ON C.A.), (1998), 122 C.C.C. (3d) 563 (Ont. C.A.); R. v. T. (D.B.) 1994 CanLII 929 (ON C.A.), (1994), 89 C.C.C. (3d) 466 (Ont. C.A.); R. v. C. (R.A.) reflex, (1990), 57 C.C.C. (3d) 522 (B.C.C.A.). These decisions indicate that there is still a significant perceived need for explanation of children's reactions to abuse, as it may be outside the knowledge and experience of ordinary people.

Dr. Marshall testified, in essence, that contrary to what the ordinary juror might assume, there is no "normal" child response. Some abused children complain immediately, others wait for a period of time, and some never disclose the abuse. Thus the timing of the complaint, he testified, does not help to diagnose whether it is true or fabricated. He also outlined the factors that may lead to delay in disclosure, such as fear of reprisal, lack of understanding, fear of disrupting the family, the nature of the child's relationship with the abuser, and the nature of the abuse. Some of these explanations might have occurred to ordinary jurors as a matter of experience and common sense, but some might not have been apparent to them without expert assistance.[at paras. 24 and 25, emphasis added]

Thus, she recognizes that the state of knowledge of sexual assault dynamics in Canada is at best, inconsistent. Where understanding is in flux, and a culture's awareness of a particular matter is both growing in sophistication and yet still subject to primitive beliefs, as with sexual assault, it is inappropriate to establish broad rules covering whole areas of knowledge with respect to the necessity of expert evidence.

The defence in *R. v. D.D.* argued that expert evidence in behavioural science was not necessary to explain "normal" human behaviour such as the range of children's reactions described above. McLachlin C.J. rejects this argument, refusing to diminish the case-specific, flexible test for necessity set out in *Mohan*, by limiting expert evidence in behavioural science in this way. She explicitly rejects the idea that psychologists may testify on abnormal behaviour only (an approach with obvious inherent problems). This issue is not specifically addressed by the

majority, and remains a valuable analysis against a differential, more limited scope of evidence of behavioural science experts, as opposed to other experts.

Furthermore, she states that expert evidence should not be disallowed for broad categories, such as timely disclosure, but rather should be left to trial judges to determine the necessity of its presentation in particular cases. (This emphasis on the case specific nature of the necessity test in *Mohan* has been applied in sexual assault cases even after the majority's decision in *R. v. D.D.*, and are discussed below).

McLachlin C.J. also rejects the defense's second argument: that since the child herself explained the reasons for her delay, expert evidence was not necessary. At para. 29:

The fact that the complainant testifies does not preclude the trial judge from admitting other evidence on the issue. The defence having put the reason for delay in question by suggesting that it showed that the incidents had not occurred, it was open to the trial judge to permit the prosecution to respond with evidence of other possibilities. In so far as the expert provided information and insights that went beyond the complainant's testimony and the ordinary juror's knowledge, it might well have been required to assist the jury in properly assessing her credibility. Dr. Marshall's evidence did not simply repeat the complainant's evidence. He went further, positing that such explanations are common among child abuse victims. Furthermore, the current scientific consensus is that the truth or falsity of such an allegation cannot be determined on the basis of its timing. This was a subject that the child could not and did not attempt to address.

This issue is not addressed by the majority, and Chief Justice McLachlin's comments remain of value in future cases should defense arguments against expert evidence be raised on the basis that a complainant has already offered explanations for her behaviour.

The dissent also rejects the defence's argument that a jury instruction would have sufficed to dispel erroneous beliefs that would lead to wrong inferences with respect to timely disclosure:

In this case, it is suggested that the trial judge could have told the jury that children who suffer sexual abuse do not always complain at the first opportunity and that the jury should not automatically infer from delay in disclosure that the events did not take place and the complainant fabricated them. It is questionable whether such a warning would have served as a complete substitute for the expert evidence. The expert testified not only that many children do not report abuse immediately, but also went on to discuss the reasons why children may delay, based on the scientific literature. This additional information might reasonably have assisted the jury in deciding what, if anything, to infer from the delay, in a way that the proposed direction by the trial judge would not. If so, the evidence remained necessary.[at para. 31]

McLachlin identifies as significant that the expert evidence discussed reasons for delay in general, in child sexual abuse cases. Although the majority reached a different conclusion in this

case, McLachlin's highlighting of the value of background given by experts, as opposed to simple jury instruction, remains significant. This is in part because of the nature of the jury instruction approved in *R. v. D.D.* which has led to diverging interpretations of the meaning of *R. v. D.D.* altogether, with respect to its significance in identifying myths and stereotypes. The jury instruction approved by the majority is described:

65 *A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.*

There is a mixed message in this instruction: on one hand, it is a step forward in affirming very clearly that there is no "inviolable rule" about how survivors behave, that reasons for delayed reporting are myriad, and that delay in and of itself means nothing as to complainant credibility. However, the Court uses troubling phrases in reference to the proper significance of delay: it is "simply one circumstance to consider in the factual mosaic of a case" and "standing alone" will not give rise to adverse inference.

This phrasing muddies the impact considerably, and complicates the meaning of *R.v. D.D.* regarding expert evidence. The Court seems to be saying that delay is still relevant to credibility as part of a "mosaic" of circumstances. It is unclear as to how delay in isolation is different from delay as part of a scenario. Delay will *always* be present in a setting of other factors - so how *R. v. D.D.* is restricting the use of myths and stereotypes is rather limited: it only stands for the principle that delay in isolation cannot serve as the basis for credibility conclusions. Delay as part of a "mosaic of factors" however, may still form the basis of decisionmaking on credibility. Unfortunately, this has allowed courts inclined to use delay in combination with other factors (arguably also myths and stereotypes) in credibility assessments to do so, with a pat on the head from the Supreme Court via *R. v. D.D.*³.

This failing of the majority to reject the relevance of delay when it is set among other circumstances, may be good news however, for Crown latitude to introduce expert evidence. If the expert is not testifying merely as to delayed reporting, but to myriad factors related to post-assault behaviours, then expert testimony on delay as part of the "mosaic" should still be allowed.

³ See for example, *R. v. O'Donnell* (2008) (NSSC); *R. v. K. V.* (2003), 176 C.C.C. (3d) 41 (2003), 18 C.R. (6th) 258 • (2003), 173 O.A.C. 19 (Ont. C.A.); *R. v. Crampton*, 2004 CanLII 4770 (ON C.A.) (2004), 188 O.A.C. 357

This is significant because, of course, post-assault patterns of behaviour never break down neatly into delay and other factors. What instead may be presented by the defence is an overall picture, employing a variety of myths and stereotypes, including and inextricably linked with delay, to attack credibility. Examples include survivors not showing emotional reactions immediately post-assault, continuance of a façade of normality in the relationship with the accused for a long or short period (including displays of affection toward the accused, inviting accused to family events, etc.), that fabrication is likely to be involved when custody and access issues are being contested, that first disclosure to a boyfriend after a delay is more likely to indicate fabrication, that not writing about abuse in a contemporaneous diary indicates that the abuse never happened, etc. Given that *R. v. D.D.*'s jury instruction (which is to replace the use of expert evidence) is phrased to emphasize that delay *standing alone* cannot give rise to adverse inference, the door should still be open to expert evidence to dispel erroneous adverse inference from a set of circumstances (the "mosaic of factors") which includes delay among others.

After *R. v. D.D.*, how have courts been gatekeeping with respect to expert evidence in sexual assault trials? First, courts have sometimes seized on the case-specific nature of the *Mohan* analysis to give wide latitude to allow expert evidence in sexual assault trials. Second, two provincial courts of appeal explicitly have upheld the admissibility of expert evidence, even when it touches on delayed disclosure, when an overall pattern of behaviour is being described.

In weighing the *Mohan* requirements, part of the *D.D.* dissent referring to the case-specific nature of the *Mohan* test has been a reference point for lower courts, even outside of the sexual assault context⁴. That the weighing process with respect to necessity is case specific, with latitude granted to the trial judge, was expanded upon by the minority in *D.(D.)* in this way:

"Taking into account the other evidence, the issues and her knowledge of the jury, the trial judge determines what are the live issues in the trial and whether the evidence will be necessary to enable the jury to dispose of them. The point was well put in *R. v. F.(D.S.)* [1999 CanLII 3704 \(ON C.A.\)](#), (1999), 43 O.R.(3d) 609 at p. 625 (C.A.)...:

The trial judge has the advantage of hearing the evidence in issue, observing the jury and being able to appreciate the dynamics of the particular trial...[T]he trial judge may also be in a better position to determine what may come within the normal experience of the average juror in the community in which the case is being tried.

The trial judge may be in the best position to determine whether the probative value of the evidence is outweighed by its prejudicial effect on the trial. The trial judge knows the issues, the evidence and the jury and is charged with the ultimate responsibility of running a fair trial.

⁴ See for example *R. v. Myers*, 2003 CanLII 36796 (ON S.C.)

For these reasons appellate courts owe deference to decisions of trial judges to admit or reject expert evidence: *F. (D.S.)*, *supra*; *R. v. B. (C.R.)*, 1990 CanLII 142 (S.C.C.), [1990] 1 S.C.R. 717. See also *R. v. K. (A.)* 1999 CanLII 3793 (ON C.A.), (1999), 45 O.R. (3d) 641 (C.A.); *R. v. Villamar*, [1999] O.J. No. 1923 (QL) (C.A.), and *R. v. C. (G.)* 1996 CanLII 6634 (NL C.A.), (1996), 110 C.C.C. (3d) 233 (Nfld. C.A.). This does not preclude appellate review. Where the record clearly does not support a finding of admissibility on the basis of the *Mohan* criteria, the Court of Appeal may rule that the evidence should not have been admitted. However, the case-specific nature of the inquiry means that an appellate court cannot lay down in advance broad rules that particular categories of expert evidence are always inadmissible. Such a categorical approach would undermine *Mohan's* requirement of a case-by-case analysis of the four applicable criteria.

This means that, with the exception of delayed disclosure standing alone, no particular myth or stereotype is immunized from counteracting by expert evidence. The decision regarding the *Mohan* criteria is to be case-specific and it is certainly open to the Crown to argue that expert testimony is needed. This may be because ordinary persons in their particular community are not conversant with the realities of sexual violence which run counter to myths and stereotypes, including any common ones that may be listed in cases such as *Osolin*, *Seaboyer* and *Ewanchuk*, particularly if the nature of the assault(s) is considered unusual or not conforming to stereotypical expectations .

That the exclusion of expert evidence in sexual assault cases is limited by *D.D.* only with respect to delayed disclosure, is held by the BC Court of Appeal in *R. Tayebi*⁵. To illustrate the type of expert evidence upheld as admissible, the trial judge in *Tayebi* accepted the following:

(44) Dr. Yuille testified that children who have been sexually assaulted will usually know the assailant, remember what happened, i.e., the sexual act, and where it occurred. However, they may not remember peripheral matters, such as clothing, furniture and so on, if they are not remarkable. For example, if the assailant was wearing women's clothing, that is something that he would remember. He may not remember the colour of an object in a room.

...

[47] ... Most of his answers were those which the court might expect from a 12 year old who has undergone a traumatic assault. He seemed to fit well what I would describe as Dr. Yuille's model of a sexually assaulted youth. I do not believe that he would be capable of fabricating, and then maintaining his evidence. In any event I believed him.

...

[185] ... Many of the answers he gave were those which might be expected of a 15 year old giving evidence about an unpleasant, traumatic event,

⁵ (2001), 161 C.C.C. (3d) 197 • (2001), 48 C.R. (5th) 354

which happened to him when he was 12 years of age. The[y] were consistent with the positive views of Dr. Yuille.

...

[200] ... He also referred to Dr. Yuille' evidence that sexually abused children focus on memories of the core details rather than peripheral matters; that this is particularly so where there is anal penetration. He also noted other observations of Dr. Yuille, such as the fact that delayed disclosure is the norm in child sexual abuse cases, and that trouble sleeping, sleeping with the lights on, being guarded towards the Accused, and so on, are consistent post-sexual abuse conduct. I observe that both Complainants seemingly fit into Dr. Yuille's description of a sexually abused child.

In *Tayebi*, then, a pattern of behaviour, inclusive of delayed disclosure was not excluded from expert evidence.

The Ontario Court of Appeal has also ruled that patterns of behaviour, inclusive of delayed disclosures, are still properly the subject of expert evidence, post-*R. v. D.D.* In *R. v. Talbot*⁶, the defense attacked a psychologist's testimony regarding the not unusual pattern of a young person's delayed disclosures, inconsistencies and recantations and continued relationships with abusers, based on *R. v. D.(D)*. The Court of Appeal decided the appellant failed in that attack:

[39] Despite the holding in D (.D.) I would not give effect to the appellant's submission for two reasons. First, the expert evidence in D. (D.) differed materially from Dr. Chamberlain's evidence in this case. The expert evidence in D. (D.) related only to the significance of delay in disclosing sexual abuse allegations. As summarized by Major J., that expert testified that "the timing of disclosure, standing alone, signifies nothing", at p. 64. [Emphasis added.] And the reason that delayed disclosure means nothing in and of itself is that, as a matter of law, no adverse inference can be drawn from a complainant's delay in disclosing the allegations.

** *

[40] Because this principle forms a recognized part of Canadian law, one can easily understand why the Supreme Court found that the information offered by the expert in D. (D.) should have gone to the jury in the form of an instruction from the trial judge. No expert evidence was needed to establish that the delay in the complainant's disclosure did not by itself impair her credibility. The jury was not permitted to draw an adverse inference from this

(2002), 161 C.C.C. (3d) 256 • (2002), 1 C.R. (6th) 396 • (2002), 155 O.A.C. 41

URL:

<http://www.canlii.org/en/on/onca/doc/2002/2002canlii23584/2002canlii23584.html>

delay as a matter of law and the trial judge should have instructed them accordingly.

[41] The present case is very different. Instead of dealing with the relevance of delayed disclosure “standing alone”, Dr. Chamberlain testified to patterns of disclosure among sexual abuse victims, patterns that include not only delays in disclosure but also inconsistencies in disclosure and recantations. Although no adverse inference can be drawn from the mere fact that disclosure is delayed, the same cannot be said for inconsistent disclosures or recantations. Indeed, prior inconsistent statements are typically highly damaging to a complainant’s credibility.

*[42] Thus, there is, quite rightly, no existing principle of law that would prevent a jury from drawing an adverse inference from inconsistent disclosures or recantations by a complainant. But the jury should be allowed to put these inconsistent disclosures and recantations in context. If, as Dr. Chamberlain testified, child victims of sexual abuse often make disclosures marked by delay, inconsistencies, and recantations, then expert evidence may be required to help the jury make an appropriate and informed determination of the complainant’s credibility. **Patterns of disclosure among sexual abuse victims do not form a part of the ordinary experience and knowledge of jurors. Expert evidence may well be necessary to help jurors draw the proper inferences, and I conclude that it was necessary in this case.***

Thus, in *Talbot*, the Ontario Court of Appeal makes clear that delayed disclosure, when it is part of a pattern of behaviour is still acceptable for expert evidence. In fact, the court makes the point that it is quite impossible to testify as to patterns of recantation, and inconsistencies in young sexual assault victims without addressing delayed disclosure as an inseparable part of the overall mosaic:

*[43] In the light of D. (D.), it might have seemed preferable for the trial judge to have dealt with the relevance of delay in a jury instruction, and for the Crown to have limited Dr. Chamberlain’s testimony to the patterns of disclosure involving inconsistencies and recantations. **Accepting, however, that Dr. Chamberlain’s evidence was necessary to help the jury understand the significance of the complainants’ inconsistent disclosures and recantations, to restrict him from offering an opinion on the relevance of delayed disclosure would be unworkable. Dr. Chamberlain’s evidence dealt with patterns of disclosure among sexual abuse victims; delays in disclosure form an integral part of those patterns.** Dr. Chamberlain’s testimony was properly admitted.*

The BC Court of Appeal provides further significant guidance regarding necessity in the 2003 *R. v. Meyn*⁷. It is valuable to review the facts in detail:

⁷ (2003), 176 C.C.C. (3d) 505

[4] The complainant testified that the sexual assaults began with fondling, while the family still lived in Vancouver. On the complainant's twelfth birthday, after the move to Maple Ridge, the appellant took her shopping, and then to a trailer which he kept in the Kitsilano area. The complainant testified to more aggressive and intimate physical contact in the trailer. She said that there were numerous subsequent trips to the trailer where the appellant engaged in similar conduct.

[5] When the complainant was in grade nine, the appellant signed her up for a modelling course. He persuaded her parents that it would be good for the complainant's self-esteem. The appellant paid for the modelling courses. He took the complainant shopping and bought her many new clothes. He photographed her in the new clothes, and he promoted her to clothing stores as a promising model.

[6] The complainant testified that after the modelling courses and shopping trips, the appellant almost always took her to his trailer where the sexual assaults were repeated.

[7] In June 1996 there was an incident at the complainant's home in which the appellant became angry with the complainant. She declined to go with him when he arrived unexpectedly. Although the appellant subsequently apologized for his angry outburst, the complainant thereafter avoided contact with him.

[8] The appellant then began focusing his attentions on the complainant's friend, Christine. He began to take Christine shopping. The complainant tried to dissuade her friend from contact with the appellant. She testified that eventually she phoned the appellant and told him to stop seeing Christine, otherwise she would tell her own parents that the appellant had molested her. There was no further contact between the complainant and the appellant after that phone call.

[9] Sometime in the next year, the complainant disclosed the sexual assaults to her friend Christine. Christine told her mother, who spoke to the complainant. The complainant's mother was advised and the complainant and her mother then went to the police.

A fact-finder who knew little about sexual assault might question the veracity of a complainant who continued to agree to contact with an abuser. A fact-finder who harboured myths and stereotypes about women's "manipulativeness" through false allegations could view the complainant's disclosures as part of a tactic to control a male, based on jealousy of the accused's attentions now being focused on her friend, and parlay that into reasonable doubt.

To counteract such perceptions the Crown in this case brought in a forensic psychologist who testified:

(Crown)Q. ...First of all, I want to sketch out a very basic hypothetical circumstance, a circumstance or a situation involving child sexual abuse that occurred over a number of years, where the abuser was an adult male and the victim a female child, just going from that simple, factual outline. In such a factual circumstance is it – can you say whether it's

common or uncommon for the association between the abuser and the victim to continue?

A. It's very common.

Q. Can you say whether it's common or uncommon for there to be a bond between the victim and the offender that includes positive elements?

A. Positive elements are definitely a frequent feature of such a long term interaction and, in fact, are one of the contributing factors to the continuation.

Q. I see. Turning now to behavioural consequences. Has there been any research into whether one can find a constellation of symptoms, of behaviour, from which one can conclude this person has been sexually abused?

A. This is something that we have been looking for and researching for, for years, to determine whether or not there's some predictable, expected, or normal or usual consequence to the victim, and the answer, at this point, is pretty clear, and that is that there is not. And there's a tremendous range of responses, from almost nothing to quite considerable distress in a victim, and no matter what the response is, there's nothing that is unique to child sexual abuse, that is, that the same problems can appear in people who have other difficulties in their life; so there's nothing that sexual abuse causes that's unique to sexual abuse or, if you like, diagnostic of sexual abuse.

Q. Now, that's – you're using the examples of difficulties, that may be apparent, that can be caused by other factors than sexual abuse. What about the absence of apparent difficulties; for example, the absence of problems with academic performance in school?

A. The absence of problems in victims of childhood sexual abuse is not uncommon at all and there's quite a bit understood of why this can occur. And one issue that's been looked at, for example, is academic performance, whether or not it is negatively impacted in someone who's been victimized sexually as a child. And the answer is there's no systemic relationship. Some children who are victimized, improve at school. Some stay the same. Some do worse. And so there's no systematic relationship, and the research is clear on this, no systematic relationship between school performance and childhood sexual abuse.

Q. From what you have said there is, just going back to the first question I had, then no correlation between a continued association between a child and an adult and the truth or falsehood of allegations of sexual abuse?

A. That's correct.

Q. And in this case you haven't interviewed either the complainant or the accused?

A. That's correct.

Q. And are not here to offer any opinion of the credibility of either side?

A. That's correct.

The trial judge in a *voir dire* had allowed the expert testimony, in part because of the number of assaults, which the judge saw as removing this case from what the ordinary finder of fact could be expected to know and understand about the victim/offender relationship. The trial judge noted:

... it would appear to me from the range of evidence discussed and sought to be admitted in a number of cases that there is a real possibility that there exists substantial misinformation about this subject. In my view, it meets the precondition of being necessary information for the jury.

The BC Court of Appeal agreed, stating:

[53] Expert evidence going directly to the issue of credibility is generally inadmissible because it offends the rule against oath-helping. However, the admission of expert evidence regarding human behaviour or psychological factors relevant to credibility is justified where the evidence goes beyond the ordinary experience of a lay person: R. v. Marquard 1993 CanLII 37 (S.C.C.), (1993), 85 C.C.C. (3d) 193 (S.C.C.); R. v. E.A.N. 2000 BCCA 61 (CanLII), (2000), 135 B.C.A.C. 154, 2000 BCCA 61.

[54] In R. v. Tayebi 2001 BCCA 697 (CanLII), (2001), 161 C.C.C. (3d) 197 (B.C.C.A.), 2001 BCCA 697, this court discussed D.(D.) at some length to demonstrate that the decision is not a ruling that all expert evidence on the behaviour of sexual assault victims is inadmissible. Rather, the necessity of such evidence turns on the specific features of a case. The important question is whether the evidence goes beyond the ordinary experience of a lay person.

[55] I am satisfied that the expert evidence met the requirement of necessity for the reasons given by the trial judge. The protracted nature of the sexual assaults alleged by the complainant in this case is an unusual feature. The expert evidence was necessary to ensure the jury did not draw misinformed common sense inferences from the dynamics of the relationship between the appellant and the complainant, and the behaviour of the complainant.[emphasis added]

So here, the BC Court of Appeal clarifies that *R. v. D.D.* is of very limited meaning with respect to the admissibility, in general, of expert evidence in sexual assault trials. The court here reaffirms one of the principles in fact stated in *R. v. D.D.*, that the decision to admit expert evidence will be specific to the circumstances. Necessity will turn on the specific features of a case. Here, the circumstance of the repeated assaults and continued relationship were enough to take the case

outside of what an ordinary juror could be expected to understand and use as the basis for correct inferences about credibility. Both the trial judge and the affirming court of appeal acknowledge "substantial misinformation" in the community with respect to victim/assailant dynamics in these circumstances.⁸

In *R. c. C.M.*⁹, the Quebec Superior Court emphasizes that, despite the caution prescribed by *Mohan* for the use of expert evidence, there is ample support for its use where human behaviour is involved. Citing two other Supreme Court cases (*Marquard* and *Lavallee*), and a text favoured by the Court, the decision contemplates latitude for human behavioural expert evidence:

[8] Justice McLachlin (as she then was) recognized in the case of *Marquard*, that experts can occasionally assist a jury in assessing credibility where there are features of a witness's evidence that go beyond the ability of a lay person to understand.

[9] She states:

"(...) there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact."^[2]

** *

[11] In the case of *Lavallé*, Justice Wilson recognised that there are circumstances where the average person may not have sufficient knowledge in human behaviour to draw an appropriate inference from facts in evidence.

[12] She states:

⁸ As an interesting aside, note that the defence in *Meyn* asserted that the expert's response in the following exchange with the defense was prejudicial:

CROSS-EXAMINATION BY MR. COOPER: Q: Just very briefly. I understand from my friend's last question, Dr. Yuille, that you're not, of course, intending in your testimony today, to offer any opinion as to whether the allegations that we've hearing about in this courtroom are true or false, are you?

A: No, I'm not.

Q: In fact, you have no such opinion, do you?

A: Not one that I would share with the court, no.

The defense asserted that this was tantamount to the expert telling the jury: "I believe the complainant but I am not allowed to tell the court that." The BC Court of Appeal dismissed this claim, noting that the trial judge gave careful instruction to the jury as to their exclusive status as finders of fact with respect to credibility, and instructed them in a 3-step process in how to do so.

⁹ 2007 QCCS 6241 (CanLII)

“The long-standing recognition that psychiatric or psychological testimony also falls within the realm of expert evidence is predicated on the realization that in some circumstances the average person may not have sufficient knowledge of or experience with human behaviour to draw an appropriate inference from the facts before him or her.”^[4]

[13] Finally, it is useful to refer to the following extract from professor Paciocco’s text entitled “*The Law of Evidence*”, on the possible usefulness of expert evidence to the trier of fact when assessing credibility:

“Recently, courts have taken a more generous view [of the general rule that a party may not present evidence solely to bolster the credibility of his or her own witness]. In some cases, factors relevant to the credibility of a witness are beyond the ordinary experience and understanding of lay triers of fact. Without the assistance of experts, lay triers of fact are apt to make erroneous assumptions about credibility. For example, lay persons may not appreciate that children cannot be expected to notice time and place the way that adults do, or that sexually abused children are prone to fantasize or to retract their allegations Or they may not appreciate that the professed inability to recall can be the result of hysterical amnesia. Where common experience does not provide the tools needed to assess the credibility of a witness, a party will be entitled to call an expert to provide that information, even though the testimony of the expert does nothing more than support the credibility of another witness.

This practice is not without its limits. The modern rule against oath-helping prevents expert witnesses from offering the opinion that a particular witness is telling the truth. The expert can provide background information relevant to the credibility of a witness, but not information directly about the credibility of what a witness is saying.”^[5]

In *R. c. C.M.* the expert witness evidence was accepted because of the autistic accused's demeanour; the court anticipated that his demeanour, not conventionally associated with truth-telling, would lead to erroneous inferences. This is the very situation complainants face when their emotional presentation does not conform to stereotypes of how a "real" victim reacts, or does not conform to conventional notions of how truthful persons testify (e.g. complainants may appear "numbed out", or indifferent, angry, calm, or bitter and derisive, all of which may be taken at different times to undermine credibility in conventional terms¹⁰). The court here states:

It can be observed that M. is occasionally non-responsive to the interrogator’s questions, sometimes mute, never emotional, never protesting his innocence with vigour or passion, and this notwithstanding the astute abilities of the interrogator deployed to provoke responses. This

¹⁰ In a recent Nova Scotia case, the defence attacked the complainant in his closing argument based on her "inconsistent" demeanour: she cried during direct examination, but not during cross-examination! It's not clear whether a "real" victim would be expected to cry the entire time or not cry the entire time, or cry during cross-examination but not direct. (The accused was nevertheless convicted.)

comportment maybe linked to his retardation and autism, as referenced in Dr. Proulx's report (VD5-2) and her "will say" statement (VD5-1).

[16] Negative inferences as to his demeanour could be drawn by the jury, especially when considered in light of the gravity of the Plaza Glenwood offence. Given the particularities of M.'s profile, a "common sense" directive to assessing his credibility is not adequate in the circumstances.

[17] In other words, the jury is apt to come to a wrong conclusion about his demeanour, and ultimately his credibility, without the assistance of Dr. Proulx's expertise.

Although not a sexual assault case, the analysis in *R. v. C.M.* is easily transposed to that situation. This case's analysis is supportive of wider acceptance (i.e. it meets the necessity threshold set out in *Mohan*) for the introduction of evidence with respect to demeanor, from the human behaviour experts most needed to dispel myths and stereotypes related to sexual assault. Demeanour remains a big factor in judge's assessment of complainant's credibility, who unfortunately frequently equate an angry demeanour while testifying with an increased likelihood of fabrication¹¹.

In *R. v. White*¹², the Crown argued against the admission of expert evidence on memory in pre-school children. The expert was allowed by the Alberta Court of Queen's Bench:

[20] I am of the view that the evidence of Dr. Amundson, as it relates to the factors influencing the memories of pre-school children and the very high susceptibility of that age group to suggestion, is relevant to the considerations that come into play in considering the relevance and reliability of the statements of Ashley White. Rather than distorting the fact-finding process, it provides signposts to watch for in the child's environment when assessing her statements. His evidence does not usurp the function of the trier of fact to determine the ultimate reliability of the hearsay evidence.

[21] The expert evidence will also provide assistance in placing the child's traumatic emotional reactions in a meaningful framework, the expert having special knowledge and experience of circumstances that may give rise to anxiety or stress reactions, the types of events that can cause post-traumatic stress disorders in children, and situations in which children might disclose traumatic events. This evidence is useful in assessing the relevance of the child's statements to the issue of what events she may have witnessed and the weight to be attributed to her statements.

[22] The particular dangers associated with the utterances of pre-school children and their potential sources within the child's environment are of particular import in this case. I am not persuaded that a jury instruction

¹¹ See for example, *R. v. M.E.* 2007 CanLII 27022 (On. S.C.); *R. v. M.S.C.* 2007 CanLII 1874 (Ont SC). But also see *R. v. S.E.M.* 2005 SKQB 213 (CanLII) - 2005 - 05 -09, where judicial notice was taken that demeanour is no indicator at all of credibility.

¹² 2006 ABQB 886

would fully address the concern raised about the hearsay evidence of a young child. The difficulties associated with that evidence are not as evident as the frailties associated with eyewitness evidence noted in *Carter*, at para. 10 (citing *R. v. Low* 23 B.C.L.R. 207). McLachlin J. (as she then was) recognized the particular problems associated with evidence of children in *Marquard*, at para. 51. She pointed out (at para. 20) that juries should be cautioned about applying negative stereotypes to the evidence of children, yet noted (at para. 21) that juries must be warned in some circumstances about the weaknesses associated with evidence of children. She recognized that features of a witness's evidence which go beyond the ability of a lay person to understand may justify the reception of expert evidence and that this was particularly the case with the evidence of children: "... expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact." (para. 52)

Again citing *Marquard*, the court here permits the expert evidence in part because it "provides signposts to watch for in the child's environment when assessing her statements" and because it provides assistance "in placing the child's traumatic emotional reactions in a meaningful framework, the expert having special knowledge and experience of circumstances that may give rise to anxiety or stress reactions, the types of events that can cause post-traumatic stress disorders in children, and situations in which children might disclose traumatic events. "

Although accepting a defense expert here, it is easy to see how this reasoning supports the admission of Crown expert witnesses respecting children's behaviour around disclosures. A Crown expert could be used similarly to attest to such things as why the circumstances of family breakdown are often the point at which children and other survivors first feel able to make sexual abuse disclosures (a "signpost to watch for in the child's environment") as opposed to stereotypically assuming they are fabrications meant to bolster a custody claim, for example. By testifying in order to put a "child's emotional reactions in a meaningful framework" Crown experts can address such issues as why children may act perfectly "normal" after an assault, or engage in other emotional behaviours (such as continued affection for the abuser) which may seem counter for some finders of fact to the truth of the allegations.

In *R. v. Tremblay*, the Alberta Court of Appeal accepted expert testimony as to partner abuse victims' responses. The defence, having raised the idea that a "real" victim would have left the accused, was precluded from arguing against Crown expert evidence to the contrary based on the idea that it is common knowledge that an abuse survivor does not necessarily respond in one way:

29 *The defence's cross-examination of one complainant made the very suggestions (e.g. that an abused woman would complain and move out) which the expert evidence rebutted. It ill lies in the mouth of the appellant to argue that the rebuttal was obvious common sense known to all. That would be a bad Catch-22.*

In *R. v. R.* (2004 MBQB 69 (CanLII)), the Manitoba Queens bench, in a case involving a stepfather's assaults beginning when the complainant was 10, takes note of three "common-sense" principles:

[At para 7:]

...firstly, it may be wrong to apply adult tests for credibility to the evidence of children;

secondly, there is no standard response by a victim following a sexual assault; and

thirdly, a victim may have difficulty recounting the details of an individual event in a series of similar, repeated events such as one particular sexual assault in a series of many sexual assaults.

The court here found the young complainant's credibility was sound, despite an inconsistent pattern of delayed disclosures and a continued relationship with the accused despite numerous assaults, as well as the suggestion of fabrication in attempted manipulation of her mother's relationship. Acceptance by courts of these principles as common-sense is surely a step forward, but does that then mean they are principles for which expert evidence is precluded, based on the idea that ordinary finders of fact would all partake of these common-sense principles? The prudent path is for the Crown to both assert these as accepted principles, but to take a case specific approach to analysing the need for expert evidence, which would not necessarily be precluded. The reality is that judges and jurors are in various stages of enlightenment when it comes to sexual assault, and the prospect of erroneous inferences is very much alive despite better rulings such as that in this Manitoba case.

In determining the admissibility of expert evidence to address levels of understanding that are in flux, we can borrow from rulings on expert evidence with respect to complex social and cultural patterns other than sexism. Paciocco and Stuesser *The Law of Evidence* (Toronto, 1999) state at p. 291:

In recent years, "social framework facts" have emerged as a third form of judicial notice. These facts are really a hybrid of adjudicative fact and legislative facts. They "refer to social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case." These are not "facts" in the true sense of the word; rather, they are general explanations about society or human behaviour. Usually experts are called to explain the relevant social condition.

Jury selection cases have supported the principle that sociological or anthropological opinions may be offered in court¹³. These dealt with challenges for cause, Black accused and anti-Black racism, and established the right of a Black accused to challenge for cause each member called from the jury panel. In *Campbell v. Jones*, the Nova Scotia Supreme Court stated with respect to sociologists' testimony regarding systemic racism:

¹³ *R. v. R.D.S.*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484 at paras. 125 and 126. The cases are *R. v. Parks* 1993 CanLII 38 (S.C.C.), (1993), 84 C.C.C. (3d) 352 (OCA), leave refused (1994), 175 N.R. 321n, *R. v. Wilson* (1996), 29 O.R. (3 d) 97 (OCA) and *R. v. Glasgow* (1996), 110 C.C.C. (3 d) 57 (OCA).

As to necessity, I accept the submissions on behalf of the defendants concerning the level of awareness among white people of anti-Black racism in systemic instances and in its undisclosed nature. I agree it is probable that all seven jurors will be white, and it is almost certain that most will be. Thus these opinions provide information "which is likely to be outside the experience and knowledge of a judge or jury". This is not information that, as far as I know, is subject to judicial notice at the trial level.

This is supportive of the admissibility of expert evidence as to the existence and prevalence of underlying sexist myths and stereotypes on which defence arguments may be resting, in sexual assault trials. This is relevant especially where there might be an objection to cross-examination based on rape myths. Some of these are enumerated in cases such as *Osolin* and *Seaboyer*. But when the cross-examination is based on one that is not listed in these cases, or has not received widespread attention, or is a "mosaic of factors" that converge in a complex way to foster sexist dismissal of complainant's testimony, an expert may be needed to show that the underlying basis for the argument is a rape myth. A good example is the contrast in understanding between the majority and L'Heureux-Dube's dissent in *R. v. Shearing*. There, a girl's contemporaneous diary was held relevant and reviewable for the absence of diary entries about the abuse. Justice L'Heureux-Dube saw this as nothing more than another form of inference based on delayed disclosure, and therefore irrelevant. The majority failed to see the underlying myth, and failed to weigh relevancy against the prejudice caused by this evidence due to the pervasiveness of rape myths. Expert evidence would be helpful in such a case as it could affirm L'Heureux-Dube's approach of making relevance (and prejudice) determinations against the background of pervasive systemic discrimination - which would limit cross-examination questioning.

In practice in Canada, experts continue to testify in sexual assault cases to dispel myths and stereotypes, and are infrequently challenged. Among reported cases post-*D.D.*, involving over a thousand sexual assault trials mentioning experts, very few were challenged. Particularly, the use of experts in child sexual abuse cases appears frequently, to explain patterns of recantations, inconsistencies, delayed disclosures and continued relationships with abusers.