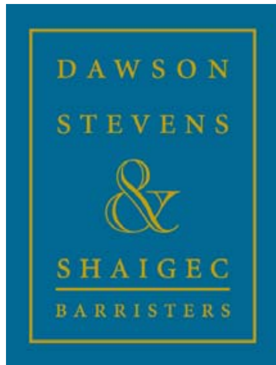

THE UPDATE

Issue #34 August 31, 2007

CHARTER - 7 - COSTS - DISCLOSURE BREACH

R. v. Manywounds - July 17, 2007 ABPC 202 per Mandamin, PCJ:

Two accused charged with assault. Crown failed to disclose evidence including a security videotape and police notes. The disclosure had never been provided to the Crown by the police. Crown withdrew the charges at trial. Costs application.

Held: $2000 in costs awarded.

"The law does not recognize, for the purpose of applications of this type, any division between the police and the prosecutor: a breach of the right to disclosure is the breach of the state": ***McKay*** [2003] AJ No. 807. An application for costs may be brought after acquittal or withdrawal of charges. Unacceptable degree of negligence found as per ***Robinson*** (1999), 142 CCC (3d) 303.

I. Pielecki - Defence Counsel

HEARSAY - 911 CALL - RECANTING WITNESS

R. v. Alyward - July 19, 2007 ABPC 206 per Sully, PCJ:

Aggravated assault trial. Crown sought to introduce hearsay statements from recanting complainant. Complainant testified that he had no memory of the incident. Hearsay primarily consisted of tapes of the complainant's 911 call.

Held: Evidence not admitted.

Evidence did not constitute res gestae. Res gestae requires that "the statement was made by a person so emotionally overpowered by a contemporaneous event that the possibility of concoction or distortion can be disregarded." Real hearsay danger given that cross-examination was impossible in view of complainant's claim of no memory. Complainant was intoxicated at the time of the 911 call. No evidence that complainant's memory was better at the time of the 911 call than at trial.

D. Vigen - Defence Counsel

IMPAIRED DRIVING - 10(B) - ABILITY TO EXERCISE RIGHT

R. v. Taralson - July 24, 2007 ABPC 204 per Creagh, PCJ:

Impaired driving trial. Accident. Accused's vehicle found upside down. Accused said "no" to wanting to call a lawyer. When the waiver was read the accused said "I don't know what to do." Accused then blurted out "Yes, I'm drunk."

Held: No 10(b) breach.

Accused's evidence that she had no recollection of the events accepted. However, where accused pleads lack of mental capacity, medical or expert evidence is generally required: ***Stone*** (1999), 134 CCC (3d) 353. The evidence "falls far short of establishing that her injuries, not her voluntary alcohol consumption, rendered her unable to appreciate and exercise her right to counsel ... Furthermore, the evidence does not suggest that she was unable to exercise the right."

R. Gillespie - Defence Counsel

IMPAIRED DRIVING - 254(2) - REASONABLE SUSPICION

R. v. Hnetka - July 20, 2007 ABPC 197 per Allen, PCJ:

Impaired driving trial. Issue as to whether arresting officer had the necessary reasonable suspicion to make a screening demand. Accused had watery eyes, but otherwise appeared normal. No odour of alcohol. When asked if he had anything to drink, accused stated "a while ago."

Held: Unlawful demand.

As per ***Gilroy*** (1987), 79 AR 318 (CA), the test is consumption alone, and not its amount or behaviour consequence. However, the word "suspicion" in 254 CC is modified by the word "reasonable." The accused's response "a while ago" was ambiguous in nature. "The officer choose not to ask any more questions. Thus, the officer had no real knowledge when the alcohol was consumed." Authorities reviewed.

M. Clancy - Defence Counsel

JURIES - CHARGE - JUDGE MUST REVIEW EVIDENCE

R. v. Smith - July 13, 2007 ABCA 237 per Fraser, CJA; Fruman, Martin, JA - Trial Judge: McIntyre, J:

Appeal from first degree murder conviction. Jury trial. Primary issue being trial judge's failure to review the evidence in his jury charge.

Held: Appeal dismissed.

Trial judge did err in not reviewing the evidence with the jury. "Under current law, a trial judge is required to review the evidence in the jury charge by tying the issues in dispute to the critical evidence relating to that issue ... The judge need not provide the jury with an oral replay of the evidence of each witness, but must relate the most important evidence to the key factual and legal issues ... The test is a functional one. The key question is whether the jury understands the legal issues at trial and how the material evidence relates to those issues." Error cured by 686(1)(b)(iii) CC. A review of the evidence would have operated to the accused's "detriment in light of the relative strength of the Crown's case."

P. Royal - Defence Counsel

SENTENCE - IMPAIRED CAUSING DEATH - CSO

R. v. Jackson - July 18, 2007 ABPC 198 per Bascom, PCJ:

Accuse pled guilty to impaired driving causing death. Accused crossed the centre line and collided with an oncoming semi-trailer. The collision caused the semi-trailer to veer into another vehicle, killing the driver of that vehicle. 28 year old accused, with a 2000 conviction for impaired driving. 105 mg%.

Held: 2 years less 1 day CSO.

Positive PSR. Accused's acceptance of responsibility and recognition of an alcohol problem satisfied court that she did not pose a risk to the safety of the community. Single prior impaired conviction did not disentitle accused from a conditional sentence. "The risk of re-offending must be assessed on the facts of each case having regard to the possible influence of conditions attached to the sentence": Watkinson (2001), AJ No. 394 (CA). Sentence included 15 months of house arrest. Authorities reviewed.

D. Macleod - Defence Counsel

Dawson Stevens & Shaigec

Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4

Tel: (780) 424-9058 Fax: (780) 425-0172

All updates can be found at: www.dsscrimlaw.com

By clicking on the heading of any of the cases in THE UPDATE, the reader will immediately be linked to the full text of the case.