



THE UPDATE

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CHARTER - VICTIM IMPACT STATEMENT - DISCLOSURE

R. v. Hoeving - September 13, 2007 ABQB 564 per Burrows, J:

Defence application for an order declaring s. 722.1 CC, which delays disclosure of a victim impact statement until after conviction, violates s. 7.

Held: s. 722.1 CC not violating s. 7 of the Charter.

Instructions given to victim completing an impact statement include the warning that they are not to include information about the crime. *Stinchcombe* not applying, as impact statements are in the possession of the Court, not the Crown. "A victim impact statement could conceivably be useful to an accused when deciding how to plead or whether to engage in plea bargaining discussions with the Crown. But an accused's right to make full answer and defence does not ensure perfect knowledge of everything of possible significance ... especially when the information in question is not possessed by the prosecutor either."

T. Engel - Defence Counsel

HEARSAY - VIDEOTAPED STATEMENT - ADMISSIBLE

R. v. Rombough - September 14, 2006 ABPC 262 per Kerby, PCJ:

Murder preliminary inquiry. Recanting Crown witness had provided a videotaped statement to police. Videotaped statement was not under oath and there was no special warning of penal consequences for lying. Crown sought to introduce statement as substantive evidence.

Held: Application granted.

Videotaped statement was voluntary and taken when the witness was sober and cooperative. "Because the greatest danger associated with hearsay evidence simply does not exist in the case of prior inconsistent statements because the witness is available for cross-examination reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of trustworthiness with respect to the two dangers of hearsay a reformed rule can realistically address: absence of oath and absence of demeanour evidence."

B. Beresh, P. Moreau -
Defence Counsel

IMPAIRED DRIVING - DRUG RECOGNITION EVIDENCE

R. v. Wood - July 30, 2007 ABQB 503 per Topolniski, J:

Appeal from impaired driving conviction. Impairment proven at trial through the evidence of a drug recognition expert. Expert established that accused was impaired by marijuana.

Held: Appeal allowed, new trial.

Drug recognition expert evidence not properly admitted by trial judge. Test for the admissibility of expert evidence as set out in *Mohan* [1994] 2 SCR 9 and *J.(J.L.)* [2000] 2 SCR 600, not met. Drug recognition evidence constitutes novel science, and is subject to special scrutiny. Scientific studies reviewed. "What is apparent ... is the fallibility of the DRE, which strikes at the heart of its reliability ... the evidence does not establish that the DRE protocol is capable of enabling an evaluator to accurately determine whether a person's ability to operate a motor vehicle is impaired by a drug." Authorities reviewed.

G. Johnson - Defence Counsel

**INFANTICIDE - MENS REA -
PROOF OF OFFENCE**

R. v. Effert - September 14, 2007
ABCA 284 per Hunt, Berger,
Slatter, JA - Trial Judge: Sirrs, J:

Appeal from conviction on charge of second degree murder. Young mother accused abandoned her new born child. Issue at trial was infanticide versus murder and questions of intent.

Held: Appeal allowed, new trial.

“It would be fair and proper to allow this appeal in light of what was described as evident concerns about whether the jury could have properly understood the issue of mens rea as it relates to the crime of infanticide, and the use of the expert evidence in this case.”

P. Royal - Defence Counsel

**SENTENCE - AGGRAVATED
ASSAULT - 6 YEAR SENTENCE**

R. v. Farah - September 24, 2007
ABCA 298 per Costigan, Marshall,
Bielby, JA - Trial Judge: Watson PCJ:

Defence appeal from 6 years and 3 months sentence imposed after accused pled guilty to offences including aggravated assault and confinement. Co-accused were drinking at complainant’s home and then announced that they were going to have sex with the complainant’s girlfriend who was sleeping upstairs. Complainant’s girlfriend was then sexually assaulted and complainant was stabbed a number of times as he attempted to intervene.

Held: Appeal dismissed.

Aspects of a home invasion were present. Offences properly described by trial judge as “horrific.” Sentence was within the proper range.

R. Cairns - Defence Counsel

**SPOUSAL PRIVILEGE -
VIDEOTAPED STATEMENT**

R. v. Rombough - September 14,
2006 ABPC 261 per Kerby, PCJ:

Murder preliminary inquiry. Crown witness provided a videotaped statement around the time of the offence. She then married one of the accused prior to the preliminary inquiry. Crown sought to introduce the videotaped statement for its truth.

Held: Statement admitted.

Necessity established by the marriage, as the witness became incompetent as against the accused and co-accused. Threshold reliability established, even though the marriage made cross-examination on the videotaped statement impossible. “A ‘circumstantial guarantee of trustworthiness’ does not require that reliability be established with absolute certainty.”

B. Beresh, P. Moreau -
Defence Counsel

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