

TOP FIVE 2012

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v DAI, 2012 SCC 5

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Facts

K.B., a 26-year-old woman with the intellectual development of a three-to six-year-old, was allegedly sexually assaulted repeatedly over a four-year period by D.A.I., her mother's partner. D.A.I. was criminally charged and a trial commenced.

During the trial, the Crown sought to call K.B. to testify about the alleged assaults. D.A.I. challenged her competence to give evidence, arguing that if she was unable to understand the importance of telling the truth, his right to a fair trial could be compromised.

Canada Evidence Act

16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

- (a) whether the person understands the nature of an oath or a solemn affirmation; and
- (b) whether the person is able to communicate the evidence.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

To demonstrate that K.B. was competent to testify, the Crown asked K.B. questions that showed she understood the difference between telling the truth and lying in specific situations. By contrast, the trial judge asked K.B. questions about the nature of truth, of moral and religious duties, and of the legal consequences of lying in court. K.B.'s response to many of the trial judge's questions was "I don't know." Although she could understand the difference between telling the truth and lies, she could not respond to more philosophical and abstract questions.

As a result, the trial judge found that K.B. did not understand her duty to speak the truth and ruled that she was therefore incompetent to testify. K.B. was consequently prohibited from giving evidence and D.A.I. was acquitted.

Procedural History

The Court of Appeal for Ontario affirmed the trial judge's decision to prohibit K.B. from testifying. The Crown appealed to the Supreme Court of Canada (SCC) seeking a new trial on the basis that K.B.'s testimony should have been included in the evidence.

Issues

What level of scrutiny does the *Act* permit judges to use when determining whether a potential witnesses' competence has been challenged for reasons of intellectual disability?

What are the consequences of relying on too low or high of a standard?

Decision

In a majority decision (6-3) the SCC ruled that the appeal should be allowed and a new trial ordered.

Ratio

The SCC examined what criteria courts should consider when deciding whether individuals with intellectual disabilities are competent to testify or submit evidence in court. Per the SCC's interpretation of the *Canada Evidence Act*, an adult witness with intellectual disabilities can testify provided they can communicate the evidence and promise to tell the truth. In particular, a witness' mere articulation that they promise to tell the truth is sufficient. A judge does not need to consider whether the witness understands abstract concepts about what a duty to tell the truth entails.

Reasons

The majority of the SCC ruled that the lower courts had erred in their interpretation of s. 16(1) and (3). It held that a plain reading of the *Act* indicates that even if an adult witness cannot understand the meaning of an oath or solemn affirmation, that person could still testify as long as they can communicate the evidence and promise to tell the truth. Moreover, s. 16(1) of the *Act* does not permit questions as sophisticated as those posed of K.B. by the trial judge. An adult with mental disabilities need not demonstrate an understanding of the truth in abstract terms, nor to show an understanding of moral and religious concepts that go along with truth telling.

The majority was concerned that if the standards to testify in court were set too high for adults with disabilities, it would permit violators to sexually abuse vulnerable people without punishment. On the other hand, the Court also attended to the rights of the accused, and found that the right to a fair trial is not necessarily violated by the admission of such evidence because a judge or a jury must weigh the testimony. It is their duty to carefully assess the evidence and the credibility of the witness. In other words, after hearing the witness testify, a judge or jury can decide whether or not they believe the witness' story.

Dissent

A minority of the SCC held that it is not sufficient for a mentally disabled witness to merely promise to tell the truth. Rather, the minority asserted that to be viewed as competent to testify, such a witness must be able to understand

the difference between the truth and a falsity along with the significance of testifying only the truth. The minority emphasized that the trial judge, after listening to K.B.'s responses to various simple questions, was persuaded that K.B. did not understand what a promise to tell the truth entailed and could not differentiate between a truth and a lie. The minority also stressed that K.B.'s inability to respond to simple questions could mean that her evidence could not be properly be challenged by the defence, which would in turn result in an unfair trial for D.A.I.

DISCUSSION

1. Why might victim testimony be particularly important in sexual abuse cases? Are many other kinds of evidence likely to be available in such cases?
2. Many people who do not have any diminished intellectual ability testify in trials every day. Should the same standard for understanding the truth apply?
3. Who do you believe is more likely to be deliberately misleading with their testimony: someone with an average intellectual ability or someone whose intellectual development is impeded?

4. Both the majority and dissenting judgments take into account two conflicting goals:
 - a. to bring justice to people of limited mental capacity; and
 - b. to ensure a fair trial for accused individuals in order to avoid wrongful convictions.

Which of these do you believe is a more important goal? Why?

5. Do you think the majority SCC decision struck the proper balance between these two considerations? How can the courts balance these goals?