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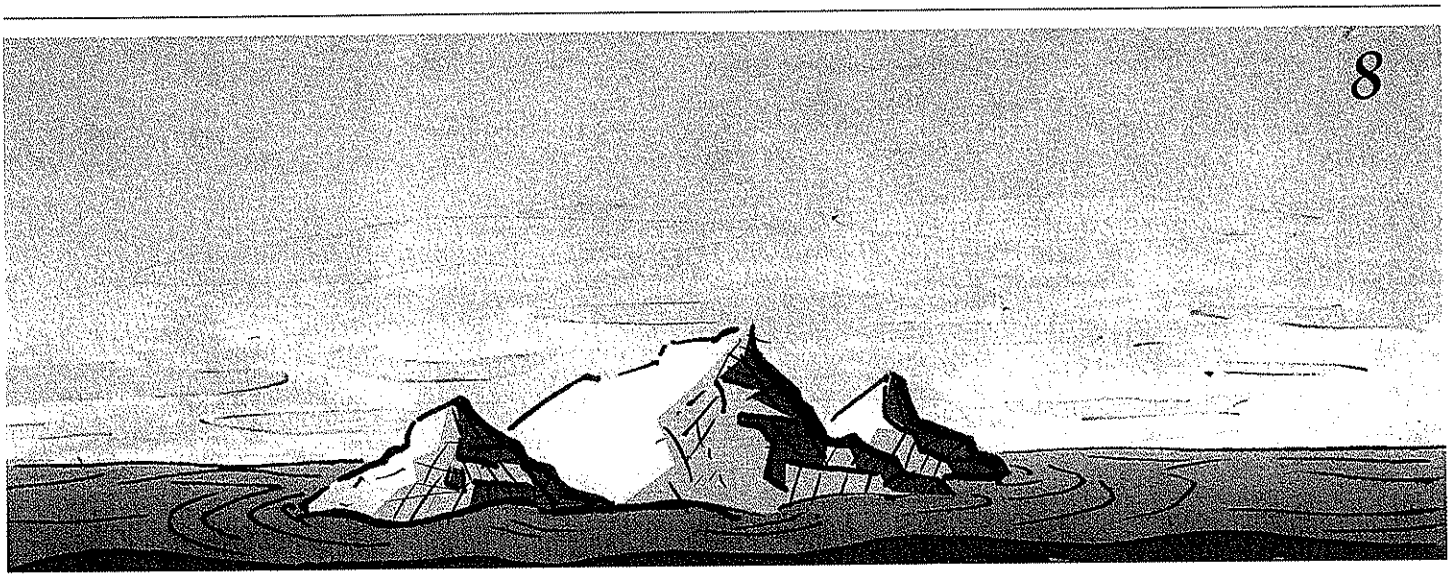


Doubt, difficult cases and the Canadian way

Frank Addario

Does the reasonable doubt standard work in difficult cases? A recent American case got me thinking. A teenaged girl, Elizabeth Coast, accused her neighbour, a fellow named Montgomery, of sexually molesting her several years earlier. There was no corroborating physical evidence and no other witnesses. Montgomery denied touching her under oath. After a one-day trial, he was convicted. The trial judge said:

> I have tried many of these cases and most of them generally involve family whereas the alleged victim has a motive sometimes to falsify their testimony. This is where you have a stepbrother or a stepfather, at some point they are afraid to tell their mother or close relatives ex cetera [*sic*]. But I have to look at this case today. What did the alleged victim at this point, in this case Elizabeth Coast, have to gain by coming in here six years later and saying to the court that this man did the acts that he's been charged with? I see no motive whatsoever.
>
> She at the time was 10 years old and too many times I've heard over and over, even in some cases of admission, where the child – I was afraid. I didn't want to tell. I was scared. I was embarrassed. I was afraid of what would happen to me if I reported this.
>
> Mr. Montgomery, at this point in his life, may be the nicest person you ever want to meet. But sometimes at younger ages, and even old, we do stupid things that wasn't intended at the time and that's what I think happened in this case.
>
> I think the defendant is guilty and I find him guilty as charged.[1]

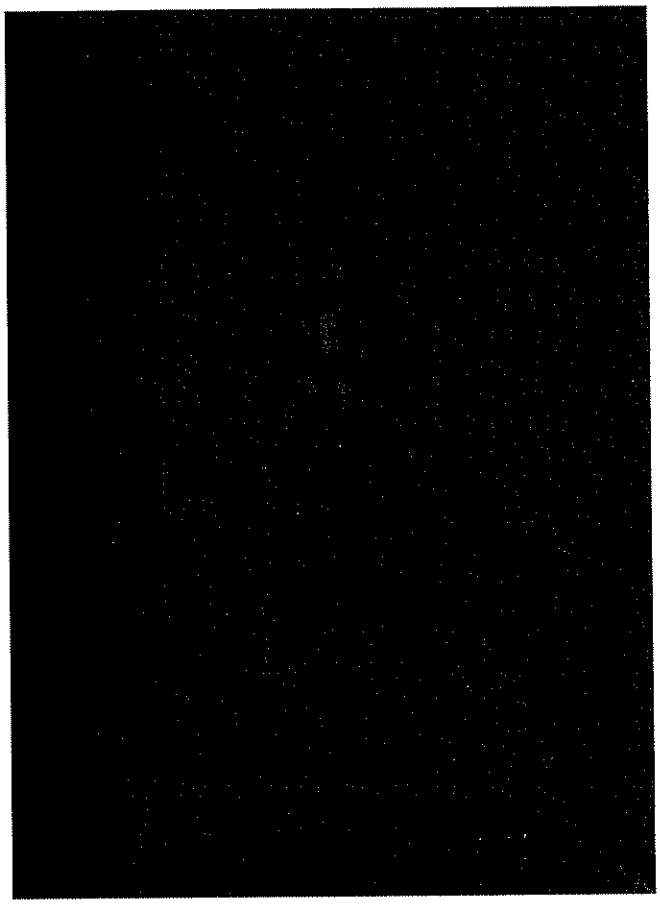
Montgomery was sentenced to 45 years' imprisonment, the majority of which was suspended.

A little over three years later, Coast came forward to say she made up the story. After consulting counsel and getting a *Miranda* warning, Coast confessed to fabrication. She was arrested for perjury and later convicted. In setting aside Montgomery's convictions, the Virginia Court of Appeal described why Coast had made the false allegation:

> Coast explained that immediately before she accused Montgomery, her mother caught her looking at "sex stories" on the Internet. Out of fear of her mother, Coast said that she was looking at inappropriate material because she had been molested when she was ten years old. After she reluctantly named Montgomery as her attacker, the lie snowballed. Coast felt like she could not admit that the assault never happened.[2]

At Montgomery's trial, Coast testified she did not initially tell anyone about the assault because she thought her parents "would get mad" and she was "really embarrassed."[3] She said she came forward seven years later because she thought she saw Montgomery at a Wal-Mart. The trial judge thought Coast was more credible than Montgomery because she had "no motive whatsoever" to lie, but her recantation proved this reasoning incorrect.

Cases like Montgomery's are ubiquitous. The trial judge could no doubt speak for many of his colleagues in describing single-witness sexual assault cases involving minors as a staple of the criminal court docket. The situation is similar in Canada.

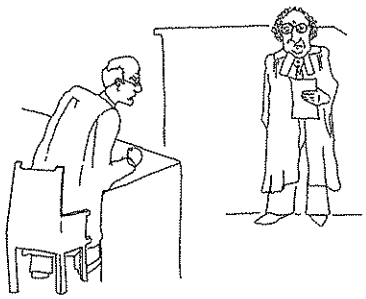


After a recent high-profile trial in Toronto leading to the sexual-assault acquittal of two doctors on failure-of-proof grounds, the prosecutor was quoted as saying that as more women come forward with this kind of complaint, "the overwhelming tide of awareness will change the way that judges see this kind of offence."[4] Translation: the ubiquity of a social problem can fill the gap where the evidence falls short of proving guilt. Montgomery's trial judge would have endorsed the sentiment.

In Canada, the guiding rule is that judges are not meant to figure out what happened. They are directed to ask only "What has been proved?" The law requires them to set aside the popular belief that the justice system can solve the pervasive problem of sexual assault.

An overriding concern of our system is to avoid convicting the innocent.[5] The important rule of proof beyond a reasonable doubt cannot be watered down without giving this concern a seat on the sidelines. Canadian law, explained famously in a Supreme Court of Canada case called *W(D)*,[6] does not tell judges how to approach

evidence. However, it insists on the crucial importance of ensuring that no reasonable doubt exists before making a finding of guilt. In *Montgomery*, the complainant's absence of apparent motive to lie should have been a neutral fact, not a makeweight for the prosecution. The defendant's "niceness" should have been a small but ornamental fact in his favour. The trial judge added both of these irrelevancies to the prosecution side of the scale.



Many people (both with and without legal training) struggle with the idea that a complainant would come forward with false allegations. *Why would she make it up?* Why, indeed? A criminal prosecution is grueling, time consuming and, for witnesses, often embarrassing. It is reasonable to assume that rational actors would not voluntarily submit to this ordeal. Yet this way of thinking sets the defendant up for failure. The assumption that no rational person would make a false allegation subtly shifts the onus to the defendant to prove that the complainant had a motive to do so.[7] This is often impossible. The motives for making a false complaint are limitless, and the chances of discovering the motive and introducing it into evidence low.

In *Montgomery*, for example, the defendant would have had to figure out that Coast had been caught looking at sex stories and needed a quick (albeit false) explanation to deflect attention away from herself. Montgomery was convicted because he did not have these detective and mind-reading skills.

Unquestionably a relaxed burden of proof would capture more guilty individuals. Those "probably" or "likely guilty" accused who eke out an acquittal under current Canadian law would be convicted and punished. But at what cost?

One law professor has referred to Justice Cory's reasons in *W(D)* as "the rapist's *Charter*."[8] This evidently reflects a belief that the justice system should sacrifice old principles to protect potential victims. Supporters of this approach tend to forget the enormous social and personal cost of a wrongful conviction. While Montgomery's trial judge might be seen as a cut-through-the-usual-protestations-of-innocence thinker, Montgomery would not have been convicted if his judge had given effect to the basic lesson of *W(D)*.

Of course we want to eliminate the sexual abuse of children. Of course we do not want judges (or anyone else in the legal system) to be an impediment. Myths and stereotypical thinking, long the currency of sexual assault trials, have to be vanquished. But is weakening the reasonable doubt protection a viable solution?

Proponents of preserving the rule in *W(D)*, of whom I am one, freely acknowledge that sexual violence is a widespread social problem. However, as with most social problems, it cannot be laundered and solved by running it through the criminal justice system. Sacrificing the Montgomerys of the world to show we are serious about eliminating child abuse (or sexual assault) creates another class of victims without attacking the core problem.

The truth is often murky and, in a trial, a partisan concept. The closest we get to the "truth" is the trial judge's fallible opinion about what happened. The trial judge's job is not to seek out truth but to evaluate the proof of the version advanced by the state, a vital distinction Montgomery's judge overlooked. Employing common-sense assumptions to fill the gap in order to resolve the "truth" issue is a poor proxy for traditional proof of criminal guilt.

Notes

1. Cited in *Montgomery v Commonwealth* (Va Ct App 20 December 2013) [*Montgomery*].
2. *Ibid.*
3. *Ibid.*
4. Quoted in Rosie DiManno, "Verdict deeply troubling for women", *The Toronto Star* (26 September 2014) A2, online: "Verdict in doctors' sex-assault case is disturbing news for many women", thestar.com <http://www.thestar.com/news/gta/2014/09/26/verdict_in_doctors_sexassault_case_is_disturbing_news_for_many_women_dimanno.html>.
5. *R v Oickle*, 2000 SCC 38 at para 36: "One of the overriding concerns of the criminal justice system is that the innocent must not be convicted"; see, for example, *R v Mills*, [1999] 3 SCR 668 at para 71; *R v Leipert*, [1997] 1 SCR 281 at para 4.
6. *R v W(D)*, [1991] 1 SCR 742 [*W(D)*].
7. Our case law holds that the defendant has no onus to demonstrate the complainant had a motive to fabricate. See, for example, *R v Batte* (2000), 145 CCC (3d) 449 (Ont CA). Absence of evidence of motive is not evidence of absence of motive, See for example, *R v White* (1996), 108 CCC (3d) 1 (Ont CA).
8. Jeremy Gans, "The *W.(D.)* Direction, Part II" (2000) 43 Crim LQ 345 at 370.