

HER MAJESTY THE QUEEN

-v-

G.D.D.

DECISION

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on June 11, 2008.

PLEASE NOTE THERE IS A PUBLICATION BAN RESPECTING THE IDENTITY OF THE COMPLAINANT, THE IDENTITY OF THE FAMILY MEMBERS OF THE COMPLAINANT, THE IDENTITY OF THE ACCUSED AND THE IDENTITY OF THE FAMILY MEMBERS OF THE ACCUSED.

HEARD BEFORE: The Honourable Justice J. M. Davison

PLACE HEARD: Halifax, Nova Scotia

DATES HEARD: February 13, 14, 15, 16 and 17, 1995 November 6 and 7, 1995

DECISION RENDERED: November 24, 1995

REASONS RENDERED: December 11, 1995

COUNSEL:

C. Nicholson for the crown
D. Murray for the defendant

Davison, J.

The accused stands charged of five counts involving sexual misconduct against E.J.C.. The accused is the stepfather of E.J.C..

The counts and the relevant sections of the **Code** are as follows:

The first count is:

That he at or near [...], in the County of Halifax, in the Province of Nova Scotia, between the 1st day of June, 1964 and the 1st day of January, 1968, did unlawfully commit an act of gross indecency with E.J.D., contrary to section 149 of the Criminal Code R.S.C. 1953-54, as amended;

Section 149 reads as follows:

149. Every one who commits an act of gross indecency with another person is guilty of an indictable offence.

The second count reads:

And further at the same time and place aforesaid, with intent thereby to enable himself to commit an indictable offence did unlawfully attempt to render E.J.D. incapable of resistance by suffocating E.J.D. with a pillow, contrary to section 218(a) of the Criminal Code R.S.C. 1953-54 as amended;

Section 218 (a) reads as follows:

218. Every one who, with intent to enable or assist himself or another person to commit an indictable offence,

(a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated a choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance ...

is guilty of an indictable offence

The third count reads:

And further at the same time and place aforesaid, did unlawfully have sexual intercourse with E.J.D., a female person, not his wife, and under the age of fourteen years, contrary to section 138(1) of the Criminal Code R.S.C. 1953-54, as amended;

Section 138.(1) reads:

138. (1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and

(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence ...

The fourth count reads as follows:

And further at the same time and place aforesaid, did unlawfully commit buggery with E.J.D., contrary to section 147 of the Criminal Code R.S.C. 1953-54, as amended;

Section 147. reads:

147. Every one who commits buggery or bestiality is guilty of an indictable offence ...

The fifth count reads:

And further at or near [name of place changed] and in the County of Cumberland, Province of Nova Scotia, between December 10, 1958 and December 11, 1959, did indecently assault E.J.D., a female person, contrary to section 141 of the Criminal Code R.S.C. 1953-54 as amended.

Section 141. reads:

141. (1) Every one who indecently assaults a female person is guilty of an indictable offence ...

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

The complainant is 41 years of age and lives in [name of place changed], British Columbia. She married K.C. in 1972 and has two boys who are approximately 22 and 18 years of age. The alleged offences by her stepfather were said to have taken place in two family homes - one on [name of place changed] in Cumberland County and one on [street name changed] in the City of Halifax.

The complainant has a brother, W. who is 3 years younger, and a sister, P. who is approximately 10 years younger than the complainant. A brother, G.A.D. died in November of 1994.

E.J.C. described her stepfather as the disciplinarian in the family, that he was frequently drunk and the children of the family lived in fear of him. Her mother did not drink but there were frequent fights between her mother and her stepfather.

She described the first incident of sexual abuse as occurring at [name of place changed] when she was five years of age. There was fighting between her mother and her stepfather. He was drunk and her mother did not want to sleep with him. Her stepfather went to the spare room and called to E.J.C.. She says that her mother did not want her to go to her stepfather, but she was afraid and she went to the spare room. Her stepfather started to touch her vagina and to kiss her. She was on the bed and he got on top and put his penis between her legs and tried to have sex. She said she could not breathe. He complied with her request to get off her.

The next morning she heard her parents arguing about the incident and she believed that her mother threatened her father that he was "not to do that again". She said she cannot recall the conversation after all of these years.

The family lived at [name of place changed] until E.J.C. was ten years of age at which time they moved to Halifax. Shortly after they moved she said her stepfather came to her room and took off his clothes. She started to yell for

her mother and he put his hand and a pillow over her face and got on top of her. She said she was able to breathe to the side by turning her head. He applied pressure. She experienced pain and passed out and when she revived she was gasping for breath. She said her stepfather said I will be back and if you do not co-operate I will kill the family starting with your baby sister. E.J.C. testified that she felt he would carry out these threats. She wanted to tell her family of these threats, which were serious threats. She said she believed he would carry out the threats if she told the family of the threats.

E.J.C. said that later that week her stepfather came back and put his hand over her face. He said he would not smother her if she co-operated. He wanted her to perform oral sex. He sat on the bed in his underwear and she said she did not want to do what he asked, but she did put her mouth over his penis. He told her what to do, and he ejaculated in her mouth.

When the family moved to Halifax they returned to [name of place changed] on weekends and for summer holidays. When E.J.C. was asked whether there were any other incidents which occurred during those times at [name of place changed], she answered by saying: "I have a feeling that they did because I was really intent on getting that tent --- it would have been a bit harder for him to do it down there, my bedroom didn't have a door on it --- I remember the first incident, but it's ... I'm just really not that clear on if he did it then".

E.J.C. said that he performed sexual intercourse on her frequently and described it as occurring every week continuing until she was about 13 years of age. The incidents took place in her bedroom. She was affected emotionally, and she cried a lot. She described her stepfather as being drunk all the time and being violent with his wife and children.

The acts of intercourse continued until the complainant started her menstrual cycle. On the last occasion, she told her stepfather she was concerned that she would get pregnant and he suggested condoms. When she said she did not trust condoms he turned her over and started to have anal intercourse. She became angry and told him to leave and not return. Except for occasions when he attempted to touch her breasts, there was no further sexual activity between them.

The complainant described the emotional effects the acts had upon her. At one point she contemplated suicide to the point where she went to the kitchen for a knife, but was unable to stab herself and superficially cut her wrists. She decided that she would not kill herself and tried to forget the incidents.

The complainant says she has always remembered the incident at [name of place changed] when she was five years old but the other abuses which occurred when she was between the ages of 10 to 13, were only recalled by her in 1990 and 1991.

Since her move to British Columbia she has not seen much of her parents. She returned home, after the birth of her first son, in 1983 for a visit. Her parents came to British Columbia in 1986. There was another visit by her parents in 1990 at which time, her father took her young son for a walk. She panicked and followed them.

At this time she was becoming depressed and her family doctor put her on a waiting list to see a psychiatrist, Dr. Hutt. By the time she saw her, she was not able to advise what portions of the sexual abuse she remembered. About this time she was also having marital problems. She described her husband as an angry person. She said she also had problems with her son, D.. She went to a Stephen Sharpe who is a therapist and psychologist and he helped her with respect to her marriage.

During her therapy she had difficulty talking about the sexual abuse. She recalls incidents of legs shaking and hand grabbing which were the first memories of sexual abuse. She was overwhelmed by the memories. She saw Mr. Sharpe probably until the end of November, 1990. She speaks about wanting to get the matter over with and wanted to obtain a complete picture. She said that she was not comfortable with Mr. Sharpe who suggested hypnosis. He said that she would be able to come out of the hypnosis at any time she chose. She tried on two occasions, but immediately chose to come out of the hypnosis.

When she was questioned about her memory as far as her sessions with Mr. Sharpe were concerned, she realized that she had left home at 18 and that the events could not have happened later than that. Mr. Sharpe suggested when she has a memory she should write it down and she wrote in a scribbler which she called her pain book. When she had memories she was overwhelmed by them. She was told that she should read books and she read **Toxic Parents** and **Courage To Heal**, together with other books.

She said that when she was seeing Mr. Sharpe near the end of October, 1990 she had a lot of memories and this interfered with her job. She was overwhelmed by the memories and they were very powerful and emotional. She could see her stepfather on top of her and could see her legs shaking.

She became depressed in November and December of 1990. In a limited fashion she started to come out of the depression after Christmas. She went to a concern known as N.W.C. where she was assisted by a therapist.

By February of 1991 she felt strong enough to confront her stepfather. She phoned him and asked if he knew why she was calling and he said he thought he did. She mentioned that she had therapy and he said he was very sorry and that she should send him the bill. He blamed her brother, G.A. Jr. who, he stated, wanted to cause trouble. He said that he did not want the complainant to hate her mother and hold it against her. The complainant reminded him of the first incident at [name of place changed] and he said that she deserved a better life. She said she responded to him angrily about his comments about her brother and told him that it was he that was abusing her. She said "it was you and not G.A. Jr. who fucked me". He said did I do that? She said "yes" and "what the hell did he think they were talking about?" She asked why were you apologizing? and he said he did not know. She took him back to the first incident at [name of place changed] and he admitted that her mother was angry with him over that. He said he had paid for what he had done by being an alcoholic. She said to him did you hate me or why did you do it and he replied he could not say why he did it.

E.J.C. was asked why she was proceeding forward with the charge and she said she wanted to make sure other children were safe. In October of 1990 she wanted all of the family to know she had been sexually abused and she told her family including her brother, G.A. Jr.. E.J.C. did not report the incident to the police and the first time she knew that the police were involved, was when she received a telephone call from a police constable.

In cross-examination she said it was her belief that when she was conceived, it was a result of rape. She was told that when she was over 10 years of age.

She testified that her father was the only member of her family at her wedding.

She was asked some general questions about her memory. She had no recollection of her mother living in New Brunswick with G.A., Jr. She did not recall that before 1960 her father worked in a garage in [name of place changed]. She remembers telling G.S. that she was raped by an older man. She admits being separated from her husband in the 1970's but does not remember the dates. She did not recall a trip when she came back to Nova Scotia. She says that she had a number of other motor vehicle accidents, one around 1975 and another in November of 1988.

Excerpts from the medical notes state that "she is questioning the validity of her memories". She replied that she was having the memories but did not want to accept them because they were overwhelming and she did not want to go into them. Her pain book has entries indicating her difficulties with memory. She records "I look at pictures of when I was a child - I was downcast wouldn't look up - I wonder if he was raping me then". Again she noted on October 31, 1990 "I'm really having trouble with this. I just can't believe what happened to me. I'm beginning to doubt whether it really happened or if my mind is playing tricks on me". She wrote "I know he raped me and yet I can't consciously believe it happened. I'm struggling. I want to be hypnotized to prove it." She denies telling Sharpe that she had forgotten about the [name of place changed] incident until she was 16. When E.J.C. is faced with the question as to whether all the new memories started in August 1990 when the accused took her son for a walk, she said she had powerful memories after that.

E.J.C. is unsure if she read the whole of **Courage To Heal** but says she was reading it because she took courage from learning how other women coped. She said she always knew what happened was real but she just didn't want to consciously believe it. She was referred to a quote in **Courage To Heal** which is similar to the comment she made in a statement to the police.

Stephen Sharpe is a registered psychologist from [name of place changed], British Columbia. He first saw E.J.C. in June of 1989 for a family disfunction concerning her children and her husband. During her interview she stated that she believed she was overreacting to events in her family and further stated she had been sexually abused. Mr. Sharpe's notes state that she was "spanked and sexually abused once at a pre-school age". Mr. Sharpe goes on to say that later E.J.C. was having "trouble with memory and thought it was pre-school".

On October 12, 1990 E.J.C. attended upon Mr. Sharpe again and wanted to come to terms with "what she suspected was some abuse" by her stepfather. She was "unclear" as to what had gone on and wanted to discover what had happened.

Sharpe described the demeanour of E.J.C. during the interview. He said there was a "flat affect" and she had little emotion except at the end of the interview when she started crying. There were four separate interviews in 1989 and 1990 with E.J.C.. Mr. Sharpe described a "gradual expression of feeling but it was very small". My impression of E.J.C. during her testimony is similar to that expressed by Mr. Sharpe in that she was being factual but with little emotion and little indication of her feelings.

At a meeting on October 29, 1990 Mr. Sharpe said that the memories seemed to be returning and E.J.C. was in more distress. She was angry and said she had a "week of hell" and that her stepfather "must have molested me until I left home" and she seemed to be ashamed of her memories. It was Mr. Sharpe's view that E.J.C. wanted "things to come to a head quickly".

At their next meeting in November of 1990 the question of hypnotherapy arose. Hypnosis was tried but she was unable to focus her attention and the process was stopped.

On cross-examination Mr. Sharpe said that E.J.C. was not aware of her age at the time of the first abuse and that she had forgotten about it until she was 16 to 18 years of age. There was also indication in Mr. Sharpe's notes that E.J.C. had said her mother had been raped on two occasions following which she and her brother were born. It was the understanding of Mr. Sharpe that E.J.C. was identifying her stepfather as a person who raped her mother.

At the session which occurred on October 22, 1990 there was only a single memory available to E.J.C. which was said to be unclear, and she was not sure of the date of the abuse.

At the meeting on October 29, 1990 there was a new memory. It included being in a dark room and experiencing terror. It was at this time that she said "he must have molested me until I left home at 18".

Mr. Sharpe said that the assistance that E.J.C. needed at that point in time was the ability to discern exactly what had happened to her in childhood. It was clear that she did want things to come to a head quickly.

During the last sessions with E.J.C. in November of 1990, Mr. Sharpe began working with the idea of trying to assist the memory by developing associated feelings with body pain. E.J.C. at this session had mentioned a "secret place inside".

The next witness for the crown was Dr. Judith Mills. She obtained her doctor of medicine in 1987 and spent one year as a resident in psychiatry. She became a staff physician at the North End Clinic in Halifax where she developed a psychotherapy practice. She stated that approximately 25% of her practice dealt with persons involved with sexual trauma during which time she had occasions when she must deal with memory recollection.

She describes memory as a dynamic process. There is incoming stimuli which is registered at the level of consciousness and stored. The retrieval is an active process and the retrieval is effected by a person's current experience. It is

her opinion that normal memory is reconstructive but that traumatic memory encodes in a different part of the brain from perceptual sensory cues and it is not subject to the reconstructive process. She says that traumatic memory is "walled off" and remains unchanged by the present until the point of retrieval. The retrieval process is an active process and it involves an interplay between the person's inner psyche and external environment in which the persons are operating. The retrieval takes place in an atmosphere where there are internal and external cues or stimuli. She speaks of traumatic repressed memory which has a tendency not to be verbal but to be represented by images and sensory experiences. There is an unconscious resistance to the retrieval of that type of memory because of its association with anxiety and fear. Dr. Mills admits that this aspect of traumatic memory is a "focus of controversy within the profession". She says that there is a consensus that this area needs to be the subject of more careful study. Generally with respect to the studies of memory there is a divergence of opinions but it was her opinion that repression of traumatic memory does occur in some individuals and she says that traumatized individuals do experience repression of memory.

Mr. Nicholson for the crown asked Dr. Mills if she could comment on the difference between ordinary memory and repressed memory or traumatic memory and Dr. Mills said that she could not do that because the subject has not been sufficiently studied.

Dr. Mills said that most traumatologists agree that an essential component of recovery from childhood trauma is the integration of the traumatic memories. She calls it a situating and contextualizing memory where the therapist's job is to encourage and facilitate the patient's critical faculty to discern what is true. She describes the process as being a three phased process of healing and recovery. The first phase is initially coming to terms with the full dimensions of memory experience. The second phase is integrating with the trauma into the "psychic sense of self" and the third phase is a post integration phase which is a basic coming to terms with who the patient is as a whole person - how you make sense of your trauma and of your life's experiences and how you proceed through life from that point in time.

Mr. Murray, on behalf of the accused cross-examined Dr. Mills on the question of qualifications. It is clear that she is not a psychiatrist, which specialty requires a four year residency program and written and oral examinations. She describes herself as a psychotherapist and agreed that the Royal College of Physicians and Surgeons do not recognize general practitioners as psychotherapists. There is no course of study or examination to be a general psychotherapist.

Dr. Mills met with E.J.C. on two occasions in September of 1993 and reviewed various written material including medical reports and records. A report of Dr. Mills dated February 7, 1994 was filed and she points out that E.J.C. states that she has always remembered being sexually assaulted by her stepfather at age five but that the other incidents of sexual assault were not recalled until 1990. E.J.C. told her that in October of 1990 she "started to remember stuff" and that was the time when she saw an image of a hand stabbing with a knife when she was sitting on the edge of a bed shaking. Over the course of the next year she described memories which were intense. She read books on childhood abuse and recognized that her experiences fitted the descriptions of the flashbacks in the books. She particularly remembered the books "**Courage To Heal**" and "**Toxic Parents**".

In her report Dr. Mills described E.J.C. as speaking softly, coherently and in a "somewhat monotone voice". Dr. Mills assessed her as having experienced an acute exacerbation of chronic post traumatic stress disorder during August 1990 until mid 1991.

In her report Dr. Mills made various assessments including that the recall of repressed memories when her stepfather visited her is congruent with theories regarding ego state dependent learning and she says memories encoded at times of heightened emotionality are stored in a manner that restricts the process of retrieval to times where the same quality and intensity of emotion is experienced. Dr. Mills states that it has been suggested in literature that recall of traumatic events may occur at times of stability in the adult and that E.J.C., at the time of recall, had a new job and was happy.

Dr. Mills expressed the view in her report that E.J.C.'s ability to shift her attention away from abuse to pleasant thoughts and to a safe place inside her body is consistent with clinical descriptions of disassociation. Dr. Mills advised that, with respect to the false memory syndrome debate, there is agreement that repression of memory and a subsequent process of depression exists. That means that the experience of memory recall described by E.J.C. "is agreed to be possible". She also stated that most clinicians agree "that true and false memories can be experienced by the individuals with the same degree of certainty. True and false memories can be experienced equally, vividly and the individual subjective experience can feel no less real in either case". She says, in her report, that she has "no means to make a definitive assessment of E.J.C.'s credibility" but she does say that her information would indicate "there exists a clinical picture which appears congruent on the levels of her perceptual, cognitive, emotional and behavioral experiences, with a history of childhood abuse that she is alleging occurred".

At trial Dr. Mills was asked by crown counsel of the evidence she heard in court that was consistent with sexual trauma. The doctor stated that she could not speak to that but could speak to what was consistent with her presentation of post traumatic stress disorder. In that sense she said that she found the presentation of that which E.J.C. said with respect to her feelings, distress and interpersonal relationships were consistent to the stages of recovery of someone undergoing post traumatic stress disorder. The doctor defined post traumatic stress disorder as a diagnostic category that refers to a cluster of symptomology and behaviours in which there is an identifiable antecedent traumatic event. People who have experienced those events manifest identifiable emotional and psychological difficulties.

Dr. Mills was asked by crown counsel why E.J.C. was able to recall the incident which she said took place when she was five years of age but until 1990 was not able to recall incidents which took place between the ages of 10 and 13. The doctor replied that she did not know why there was a difference although E.J.C. gave her own explanation and the doctor commented that E.J.C.'s description of images and the process of making sense of those images has been consistent.

Dr. Mills felt that the book **Courage To Heal** could be a very detrimental book and it is not one that she uses except for certain selected parts of the book.

The opinion expressed to crown counsel in her direct examination was that E.J.C. has chronic post traumatic stress disorder with delayed onset and that she believes the post traumatic stress is a direct result of childhood trauma. The doctor opined that E.J.C.'s symptoms and the presentation of her symptoms correspond with people who have had a history of trauma including sexual trauma. In cross-examination she confirmed that they were consistent but not diagnostic. The clinical picture involved a person who had a triggering event when with her parents together with intrusive memories or flashbacks, inhibited recall and the experiencing of feelings. The content of the memories and the nature of her reaction to the content and all of the associated psychological components led to the diagnosis of post traumatic stress disorder. From that point in the evidence the following questions and answers took place:

- Q. And concluded that the trauma for the PTSD was, in fact, child sexual trauma?
- A. No.
- Q. No? All right. So that link is not there?

- A. No it's not.
- Q. All right.
- A. Those are things that are consistent with people who experience sexual trauma but it is not a link in the way that you are posing it to me.
- Q. Indeed, aren't there a multitude of other diagnosis that might include all of the factors that I have listed but with the trauma being something different than sexual abuse?
- A. Yes.
- Q. In particular, the trigger for the trauma involved could have been emotional and physical violence in her own marital relationship in the fall of 1990?
- A. I think that anything is possible and certainly within the realm of possibility.

The doctor said that family violence experienced as a child which was not sexual can constitute the trauma needed for post traumatic stress disorder.

In cross-examination, counsel for the accused put a hypothetical question to Dr. Mills. He set out a number of assumptions involving, for the most part, facts which relate directly to the experiences of E.J.C. as a child but in those assumptions there was no reference to sexual abuse. The question was whether that history was congruent with the symptoms of low self-esteem, unassertiveness, caretaking of others, young adult alcohol abuse, emotional constructions, feelings of powerlessness and disassociative experience. The doctor answered the question in the affirmative.

G.D.D. testified on his own behalf. He described his relationship with E.J.C. when she was a child as being "good", but that he had problems with G.A. Jr. He specifically denies the incident at the [name of place changed] home and after arguing with his wife calling E.J.C. to the spare room. He says that he was only in E.J.C.'s bedroom late at night on one occasion when he had been drinking and went into her room by mistake. He started to undress while sitting on the edge of the bed because he thought it was his own bedroom. He heard his wife call and he returned to his own bedroom. At this time E.J.C. would have been eight or nine years of age.

G.D.D. said that on the following morning there was a confrontation about that incident with his wife. His wife accused him of walking into E.J.C.'s room on the previous evening and he advised that it was a mistake and would not be repeated. His wife said "Well you could have raped that girl".

G.D.D. goes on to deny being with E.J.C. and pulling up her nightgown and attempting to have sex with her. He denied having any sexual interest in E.J.C..

G.D.D. admitted that the family was in "somewhat of a turmoil", that there was violence and that he struck his wife on a couple of occasions. He did admit that he consumed too much alcohol.

G.D.D. described a normal relationship with E.J.C. and spoke about teaching her how to drive and other normal parent and child activities. He was the one who consented to the marriage of E.J.C. to K.C.. He was the only one from the family invited to the wedding ceremony. He gave E.J.C. away at the wedding. After the wedding E.J.C. and her husband moved to British Columbia. He described the number of visits which took place and he even considered that a good relationship was maintained with his stepdaughter after the 1990 visit.

At about the time that G.A., Jr. separated from his wife the relationship between the accused and his son soured and the accused maintains that the charge against him was as a result of the influence of G.A., Jr. on his sister.

The accused described the telephone call he received from E.J.C. on February 9, 1991. He said that E.J.C. suggested he take a phone in another room and then asked him if he knew why she was calling. The accused says he replied in the negative, but he said that he apologized if he had said anything to offend her. E.J.C. then said "Dad, since your last visit I have remembered that you sexually assaulted me". The accused then asked E.J.C. if her brother "had anything to do with this" and she said "no". She was taking therapy and that while under hypnosis it came out that the accused had sexually abused her. She said that her mother was a part of "this" to which the accused was said to have replied that her mother has been very good to her. The accused said that something happened in [name of place changed] and he describes to her the incident when he returned home in a drunken condition and entered the wrong bedroom. The accused testified E.J.C. stated that he "should shut his mouth" and that she said that he had intercourse with her and had anal intercourse with her until she was 13 years of age. The accused said he denied these allegations.

There was a second telephone call which the accused asked about her therapy and E.J.C. told him that it would involve three years and she wanted some registered retirement savings plans that the accused had. The accused said he would treat her in no different fashion than any of the other children.

There were specific denials enunciated by the accused. He denied having any sexual contact with E.J.C. at any time. He denied ever going into her bedroom and holding a pillow over her face. He denied putting his hands over her face. He denied exposing his penis to E.J.C. on any occasion and he denies oral sex with E.J.C..

The defence also called Isabella Cote of Toronto, Ontario who is a psychiatrist. She testified with respect to memory and the reconstructive process of memory together with influences on memory including the manner in which a person is questioned about an event. A patient can end up with a memory suggested to her by therapists, with biases. She spoke about the influence of certain books which the patients may read.

Dr. Cote spoke about certain psychiatric disorders which can affect memories such as post traumatic stress disorders and psychotic disorders and depressions.

Dr. Cote was in the courtroom at the time of the testimony of E.J.C.. Dr. Cote speaks about E.J.C. having two different kinds of memories. One memory was not forgotten which was the incident which was said to have taken place when she was age five. Secondly, there is recovered memories or delayed recall in memories and that is what is said to have happened with respect to the alleged incidents between the ages of 10 and 13. She had no recall of these memories for 24 years.

In dealing specifically with the memory which involves the event which was said to have taken place at age five, Dr. Cote points out to the discrepancies between what was said by the complainant at trial and what Mr. Sharpe said she told him.

Dr. Cote said that E.J.C. had a significant amount of symptoms at the time when she was recovering in 1990. She described being anxious, having insomnia, having low self-esteem at the time of the recovery. It is possible she had major depression episodes at the time of recovery and she was prescribed anti-depressant drugs. It appeared to Dr. Cote, from that which she heard and that which she read about the case, that E.J.C. tried to understand what brought about those symptoms and she attributed sexual abuse as being the cause of those symptoms. She referred to the pain book where she stated that the sexual abuse happened and that she now knows why she had such low

self-esteem. This connection between low self-esteem and sexual abuse could have been legitimate, but it was not necessarily a valid connection. She had to go into her past to look for those memories of abuse and Dr. Coté described E.J.C. as having "an agenda" which involved the search for the memories in order to explain why she was feeling the pain and difficulties at the time. Again Dr. Coté refers to the pain book which states that E.J.C. stated "I just wanted to remember everything and deal with it - very quickly and get it over with". She also said "I wanted to know more before I could use stronger words". Dr. Coté said that a patient going through an emotional crisis have very painful days to the point where they sometimes cannot function. They look for an explanation as to why they were feeling that way. There is a sense of urgency and a desire to get the explanation. They want to get better.

In addition, there are what could be described as the patient's own beliefs. She accepted as being true whatever came to her mind. She said at one point in her notes "She knew they were valid".

There was nothing inappropriate with that kind of agenda in the sense that it made her feel better and it made her come to grips with her experiences. Such an approach gives a framework to understand themselves in a better fashion. However it should be recognized that this type of agenda or these types of beliefs can affect the reconstruction process of the memory. At this point in time the patient has an idea about the source of her problems even if she does not have full memory. Therefore, she pursues it and it begins to make sense to her at the end when the memory is said to be fully constructed. The story has to flow and make sense to the individual.

Basically, Dr. Coté does not venture into the question whether the memories were accurate or inaccurate but she does say that she has many concerns about the memories and the manner in which they were retrieved.

Dr. Coté spoke about a complete picture of the first incident in Halifax took about eight months and was not in focus until May of 1991. In the course of her reconstruction she was filling in gaps over the period and getting more details of the incidents of sexual abuse. At the end of the picture it made sense to her, but we do not know what are the "bits and pieces" which were used to reconstruct the memory. Were they nightmares? Were they flashbacks from the post traumatic stress disorder? Were they based on reality? Were they fantasies or ideas and sensations? So in the end, opines Dr. Coté, she has a subjective experience that makes sense to her but may not necessarily be accurate.

Dr. Coté expresses a concern about the question of hypnosis. Even though hypnosis did not take place it was referred to and mentioned by Mr. Sharpe as being an instrument which could get access to memory. Dr. Coté said

that memory by hypnosis is either accurate or inaccurate particularly considering the way questions are phrased because there is great suggestibility under those circumstances. E.J.C. made reference to watching a tape on hypnosis and Dr. Coté expressed the opinion that there is a link between using the tape and the aspect of remembering.

Other aspects of memory recall are present. She looked at pictures and was wondering whether her father was raping her at the time a picture was taken. Dr. Coté also had concerns about the body sensations as assistance in recalling memories of abuse. This is a concept by some people working in trauma that if one had symptoms in an area, such as the vagina, it was an indication that one had been raped but there was no evidence, according to Dr. Coté, to prove such a theory.

Dr. Coté referred to the book "**Courage To Heal**". In the pain book E.J.C. said she read a book and it made her feel saner. She noted that she had 90% of the symptoms that people have who are sexually abused but Dr. Coté says that because you have 90% of the symptoms does not mean that you have been sexually abused. Dr. Coté also said that reading about the experiences of other persons with sexual abuse validated her own experience and gave her confidence in her belief that she had been abused.

Dr. Coté also mentioned that at a period prior to the memories, if she had post traumatic stress disorder, there would be a reluctance to be around the perpetrator. Every time she saw him she could feel uncomfortable if she had the memories repressed. She could feel uneasy but not understanding why she felt uneasy. That type of feeling did not happen until the visit of her father to British Columbia.

Basically Dr. Coté says that she has no comment on the accuracy of the memories, but she does have concerns about the reliability of the memories by reason of how, where and why they came about.

From my observations of E.J.C. there is no reasonable doubt in my mind that she believes that she was sexually abused and she believes the details of the events she described took place between her and the accused. The issue in this case, in my view, is the reliability of the memories she had to describe the incidents.

The accused gave evidence on his own behalf. Justice Cory in **R. v. W.(D)**, [1991] 1 S.C.R. 742 gave directions to trial courts on the manner the evidence of the accused should be considered at p. 758:

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

There was nothing in the evidence of the accused or the manner in which the accused gave his evidence by which I could determine that I believed him. His evidence left me with suspicion.

Is the accused, according to law, guilty or not guilty of the crimes of which he stands charged? To determine the answer to that question it is not sufficient for me to consider and rule on the credibility of the witnesses. There is no doubt in my mind that E.J.C. believed the acts described by her were perpetrated upon her by the accused. E.J.C. was giving evidence she believed was truthful.

I am left to consider the third element of the directions of Cory, J. when I ask myself after examining the evidence if I am convinced beyond a reasonable doubt that the acts described by E.J.C. actually happened. I find the complainant believable by all aspects of testing credibility, but am I convinced beyond a reasonable doubt of the historical accuracy of her evidence? What is the reliability of the recall of E.J.C.?

To consider these questions the expert witnesses are of assistance to the court. The courts have recognized cases which have been referred to as "historical" sexual assault cases and have recognized the type of memory recall in young victims. In **R. v. Norman** (1994), 87 C.C.C. (3d) 153 (Ont. C.A.) at p. 171 the court stated that this recognition does not mean "that the trier of fact should not exercise caution" and also stated:

Expert evidence is of considerable value in these cases. The trier of fact is unlikely to be familiar with such phenomena as

the child abuse accommodation syndrome: . Without such assistance, the failure of the complainant to come forward with an allegation of a rape said to have occurred so many years ago might well be incomprehensible to the trier of fact. On the other hand, the knowledge that a psychiatric condition exists that could be responsible for the lack of memory does not relieve triers of fact of their responsibility to satisfy themselves whether the appellant committed the alleged criminal offence. The issue is not whether the complainant's memory was real or false, but whether the Crown has made out its case against the appellant beyond a reasonable doubt based on admissible evidence adduced at trial.

The court ordered a new trial and concluded at p. 174:

This is a case about a sexual assault that is said to have taken place a long time ago where the trier of fact should not expect that any memory of the event would be accurate. It is a case where the evidence should have been subjected to more careful scrutiny than it received.

There were several lay witnesses who testified including relatives of the complainant and the accused. In my opinion their evidence was of little assistance to me in answering the ultimate question and I turn to the evidence of the two main expert witnesses, Dr. Judith Mills and Dr. Isabella Coté. Both struck me as dedicated and informed professional people. Dr. Mills devotes a good portion of her time in her practice as a general medical practitioner to persons involved with sexual trauma. She does not have the extent of academic qualifications of Dr. Coté who is a psychiatrist.

Dr. Mills testified in considerable detail and I have reviewed her evidence earlier in these reasons. She states some aspects of traumatic memory is a focus of controversy in the medical profession but it was her opinion that repression of traumatic memory does occur in some individuals. My assessment as to the extent of the opinion of Dr. Mills (as it relates to the question before the court) is that E.J.C. has chronic post-traumatic stress disorder and to put it in the doctor's words "E.J.C. believes that the post-traumatic stress disorder is a direct result of childhood trauma. And she has the belief that she remembers sexual trauma ...". Dr. Mills, appropriately, makes no assessment of the credibility of E.J.C. but says the symptomology and behaviour is consistent with sexual abuse but it is also consistent with experiences the complainant had over the years exclusive of any acts of sexual abuse. In this respect she answered affirmatively to the hypothetical question put to her by defence counsel.

Dr. Isabella Coté, on several occasions, stated her opinion that she has concerns about the reliability of the memory of E.J.C.. She spoke of factors which effect the way memory is being recalled. There is the person's emotional state and the way she interprets the experiences. There is the manner a witness is being questioned about an event and the leading statements can distort memory. Some therapists have certain biases which can influence the complainant. Persons under hypnosis are more vulnerable to suggestions. There are certain books which are read and can implant suggestions of acts of abuse and both Dr. Mills and Dr. Coté had criticism of a book read by E.J.C. - **Courage To Heal**.

Dr. Coté said certain psychiatric disorders can effect memories including post-traumatic stress disorder and depression.

There were certain discrepancies between E.J.C.'s version of what happened to her at age five and what Mr. Sharpe said E.J.C. said to him about the incident. There appeared to be a difference in the age of the complainant at the time of the alleged offence. In 1989 she said she was abused but later stated she was not sure and that "her memory seems to be all right after ten". Dr. Coté thought it unclear whether E.J.C. always remembered that event.

Dr. Coté noted she had a significant amount of symptoms in 1990 when she was recovering from stress caused by marriage. It is suggested that she tried to understand what the symptoms were and attributed sexual abuse as the cause. It is suggested she had an agenda to find out why she had insomnia, low self-esteem and anxiety and she went to her past to explain them. There were notes in her pain book "I just wanted to remember everything and deal with it very quickly and get it over with". Dr. Coté explained that persons going through an emotional crisis have painful days and there is a sense of urgency for an explanation as to why they have certain symptoms. When a person gets an idea as to the source of the problem, said Dr. Coté, they go after it urgently so the story makes sense to the person.

Earlier in these reasons I dealt in detail with Dr. Coté's concerns. Memories in "bits and pieces" - what were their source? Are they fantasies? The pictures and body sensations are said to be of assistance in memory recall. There is no scientific evidence of body sensations influencing recall. The reading of "**Courage to Heal**" and other books and the fact that she found she had 90% of the symptoms of sexual abut. As stated, those symptoms can be created without sexual abuse.

In summary Dr. Coté's evidence deals with potential sources of unreliability in the evidence which could lead to inaccuracies in the memory of

E.J.C.. In my opinion consideration of Dr. Coté's evidence suggests a compromise in the historical accuracy of the memories. The evidence does not convince me beyond a reasonable doubt that the potential for distortion has been eliminated and it cannot be said that the memory is accurate.

E.J.C. has had many incidents of unhappiness. She had it stated to her she was conceived as a result of the rape of her mother. She grew up in a family where there was considerable family violence. She entered marriage at a youthful age and had trouble with her spouse and trouble with her son. She had medical problems, including her lungs and breathing problem. She was involved in a number of motor vehicle accidents, one of which involved the shaking of her leg.

Many of the complaints surfaced as part of her sexual assault memories. It is alleged by the defence that these problems, after she entered therapy, provided a method to synthesize her complications and attribute them to one source - sexual assault. It is alleged she strove to find an explanation for her problems. The accused says E.J.C. adopted therapy methods, including hypnosis, reading, body sensations, therapists and other means to reconstruct over time, with increased detail, what was the cause of her problems.

The evidence leaves me uncertain as to the accuracy of the memories of E.J.C.. There is evidence of potential distortion and I have reasonable doubt as to historical accuracy of the evidence of sexual assaults. I accept the evidence of Dr. Coté and share her concerns about the potential of inaccuracies in the memory of E.J.C..

Examining all of the evidence, I have a reasonable doubt about the guilt of the accused with respect to all of the counts in the indictment. The charges are dismissed.

J.

Halifax, Nova Scotia
December 11, 1995

