Canadian Human Rights Tribunal	CANADA	Tribunal canadien des droits de la personne

BETWEEN:

AMANDA DAY

Complainant

- and -

DEPARTMENT OF NATIONAL DEFENCE

AND MICHAEL HORTIE

Respondents

RULING ON CAPACITY

MEMBER: Dr. Paul Groarke

2003 CHRT 13
2003/03/12

I. THE APPLICATION BEFORE ME

[1] The following are my reasons on the application of the Respondents for a ruling that the Complainant is not competent to testify in these proceedings. I prefer to phrase this as a question of capacity, and avoid the pejorative associations of the word featured in the caselaw. There is a second question that has arisen in this context, which is whether the Complainant is capable of representing herself. In the circumstances of the case, I do not believe that it would be in the interests of the parties to interrupt the process in order to prepare extensive reasons. I nevertheless feel obliged to issue written reasons before proceeding further.

[2] Before dealing with the background to the application, I would comment that the second question might seem to require a higher degree of capacity, since a party who is competent to proceed must be capable of participating in the conduct of the process. This would normally appear to present a higher standard than the capacity to give probative evidence, which need only be sufficient to assist the trier of fact. The usual logic of the situation seems to be reversed, however, in the circumstances before me. That is because the Complainant's primary difficulty, as Ms. Thayer submitted, is in reciting the sexual allegations at the core of the complaint. This is undoubtedly the most difficult aspect of the matter from a legal perspective.

[3] Although I have focussed more directly on the first question, which relates to the Complainant's ability to testify, the reality is that there is a general concern for her psychological condition that goes to all aspects of the case. I want to reassure the Complainant that, in my view, the other parties have acted out of respect for the integrity of the process and with a keen concern for the Complainant's well-being. There is nothing improper in the application: on the contrary, I think it would have been inappropriate to proceed without canvassing these issues. This holds true, whatever my ruling on the application.

II. GENERAL BACKGROUND OF THE CASE

[4] I should state at the outset that the present case seems to have a troubled history. There is no escaping the fact that the psychological history of the Complainant is relevant to the present proceedings. The medical record, which has not been independently proven, indicates that she has been committed in the past. There is no point in hiding this fact: it does not necessarily speak to the Complainant's present circumstances and as far as I am aware, there is no suggestion from counsel that she is incompetent in the larger legal sense. This merely provides the background to the present application and illustrates, along with the rest of the medical and psychological record, that there are reasons for concern.

[5] Although I am not privy to the events that may have transpired before the hearing, the Complainant has indicated on a number of occasions that the Human Rights Commission and the other parties sought an order declaring her incompetent. I am not exaggerating when I say that she feels that there was something like a conspiracy to have her committed. I do not know the full details of the matter, but there is enough on the Tribunal file to suggest that there are reasons for the Complainant's suspicions. This is not intended as a criticism: this has been a difficult matter for everyone involved with it, and I merely feel obliged to set out the larger set of circumstances behind the present application.

[6] The Complainant inevitably feels that any earlier efforts to have her declared incompetent were merely a convenient way of disposing of the present inquiry. It follows that she is extremely suspicious of the present attempt by the other parties to question her capacity to participate in the hearing. She believes that it is beneficial to her psychological well-being to continue and there is at least some medical evidence that supports such a contention. This raises issues that go beyond the scope of my authority, however, and the Complainant's legal position is that she has a right to proceed. This includes the right to testify and present her account of what occurred. I have warned her that she will be subject to a full and searching cross-examination, which will undoubtedly raise painful memories and prove emotionally difficult. This does not dissuade her.

III. BACKGROUND OF THE PRESENT APPLICATION

[7] There is no question that the application has been properly and responsibly made. The Complainant displayed erratic behaviour in giving her evidence in chief. This consisted of contorted facial expressions, inappropriate pauses, a pronounced shaking of her head, a raising of her arms and the adoption of various postures, all of which presented a departure from the normal presentation of viva voce evidence. I mention these attributes of her testimony because they are not apparent on the face of the record. The Complainant also used expletives, began sobbing, would occasionally raise her voice or adopt a theatrical and mocking tone, and was unable to continue on a number of occasions. The most difficult aspect of her evidence, from the perspective of managing the case, is that she found it difficult, even impossible, to confine herself to the narrative of events that led to the present complaint. She constantly went into other matters, occasionally in a manner that seems strange and even bizarre, to anyone with a developed sense of relevance.

[8] I accept, as counsel has submitted, that the Complainant's behaviour deteriorated as she gave evidence and eventually culminated in what I have described on the record as a "screaming fit", which happened when she found herself unable to describe one of the alleged incidents of sexual harassment. I think this can best be described as formless screaming: there were no words, as far as I could determine, and to a lay person, at least, the Complainant cried inconsolably, like an infant. The Tribunal officer immediately called for order and I left the hearing room, though it is clear that she fell to the floor, "writhing", in the words of counsel and remained there until after the room was cleared. Dr. Kaplan, a psychologist for the Respondents, advised the Tribunal Officer to phone 911, a suggestion that was carried out. This should not be interpreted as a comment on the nature of what occurred, which became a source of controversy between the parties.

[9] One of the security officers, Ms. Dennis, remained in the hearing room and later testified as to what occurred. Her testimony was measured and careful evidence, and I accept her account of events. The only point that I feel obliged to clarify is that the hearing was not resumed in the absence of the Complainant. This was never a consideration, though the situation might have transpired differently if Ms. Day had been

hospitalized. In my view, the matter was handled with the right degree of concern for the well-being of the Complainant and the need to protect the propriety of the process. After the Complainant had recovered, the hearing was briefly resumed, and the Complainant indicated that she wished to continue with her evidence. The other parties understandably requested a recess. The Complainant became visibly angry in response to the submissions of counsel, and I felt it was best to adjourn until the following day, at which time the Respondents brought the present application.

[10] I want to be fair. There is a sense in which this puts the matter in the worst light. I should make it clear that the Complainant is an intelligent person who often speaks lucidly and has a real appreciation of the nature and purpose of the present proceedings. She has given coherent testimony that would support the complaints. One of the problems is that she is not familiar with the practices in formal legal proceedings, and like many lay people, does not distinguish between a formal and informal venue. As a result, her manner and language is often inappropriate. She is unrepresented, which has added to her difficulties, and often seems overwhelmed by the minutiae of the evidence. Having said that, and made allowances for her lack of familiarity with legal proceedings, her psychological frailty, and her many interruptions, she appears to understand the process and has some rough ability to conduct her case and present evidence. There is no doubt that this has placed enormous demands on the patience of counsel, and myself, but that is another matter, which goes more to the issue of accommodation.

[11] After the application was made, I entered into a voir dire for the purpose of deciding the question of competence. The Respondents called Dr. Kaplan, a clinical psychologist, who was in attendance during the hearing. Dr. Kaplan was qualified as an expert and expressed serious reservations about proceeding. He was of the opinion that the Complainant suffers from a paranoid personality disorder, which makes her perception of events inherently unreliable. He also testified that, in his view, the Complainant had gone into a psychotic state while testifying. Dr. Kaplan also prepared a written report, which has been entered as an exhibit in the voir dire. Ms. Thayer placed considerable reliance on his view that the Complainant was having psychotic episodes at the time that she was experiencing the alleged sexual harassment. The cases suggest that

this is a major consideration, but this goes to the merits of the case, and the evidence is far from clear at this point in time.

[12] The Complainant called Ms. Dennis in reply, along with two experts, who were duly qualified. Her therapist also appeared at the hearing, though she did not testify. The evidence of Dr. Hunter, a medical doctor with expertise in Post Traumatic Stress Disorder, was essentially that Ms. Day's behaviour was consistent with such a diagnosis. The other expert witness, Dr. Malcolm, a clinical psychologist, adopted much the same position. Dr. Malcolm has treated the Complainant in the past and was consulted by the Complainant prior to the beginning of the proceedings. Mr. Houston objected vigorously to the fact that Dr. Hunter and Dr. Malcolm believed that it would be an injustice to deprive the Complainant of her right to proceed. These opinions were well intentioned and reflected their view that it would be better for the Complainant to proceed, psychologically. The question of justice is entirely within the keeping of the Tribunal, however, and well outside the scope of expert evidence.

[13] The Respondents also attacked the reliability of the testimony of Dr. Hunter and Dr. Malcolm, on the basis that they were poorly apprised of the circumstances before me. They also argued, understandably, that Dr. Kaplan was in a better position to provide an informed opinion as to the Complainant's behaviour on the witness stand. I think there is some merit to these submissions, which may affect the weight of the testimony but does not negate it. I think it is important, in this context, to appreciate that the Respondents have the burden of satisfying me that the Complainant is incapable of testifying. There is no obligation on the Complainant to prove any positive assertion of fact. The evidence that she called on the voir dire was only called to offset the evidence of the Respondents and the experts were not tendered to prove her competence.

[14] I am left with a disagreement between the experts as to the exact nature of the situation that confronts me. I do not propose to enter into the details of this disagreement, though there was a more specific dispute as to what occurred when she began screaming. Dr. Kaplan was of the view that the Complainant was rapidly "decompensating". This terminology was the subject of some discussion. The experts on the other side were more

inclined to believe that she had experienced a flashback or "abreaction", in which she was reliving the traumatic events in question. There was also a suggestion that she was dissociating. I do not propose to settle the dispute: whatever view is adopted, it is evident that the Complainant was not functioning rationally for the duration of the episode.

[15] I cannot make a medical or psychological diagnosis, but there are many reasons to believe that she suffers from paranoia in some general sense. I was advised by Dr. Hunter and Dr. Malcolm that this could be a manifestation of the "hypervigilance" associated with Post Traumatic Stress Disorder. I accept that that she is liable to "dissociate" on the witness stand and may be in danger of losing contact with reality. She does not trust counsel, has difficulty restraining her emotions, and often loses her way on the witness stand. Some of this must be attributed to the fact that the allegations before me are extremely personal and would be difficult for any litigant. Dr. Hunter testified that Ms. Day had an underlying "vulnerability" that makes them all the more trying for someone in her position. All of this presents a challenge for the conduct of the inquiry.

IV. THE LEGAL BASIS OF THE APPLICATION

[16] The cases hold that it is the business of a judge to decide whether a witness is capable of testifying. It is the business of the jury to weigh the evidence. See: *R. Harbuz* [1979] 2 W.W.R. 105 and *Steinberg v. The King* (1931) 56 C.C.C. 9 (S.C.C.). As a result, the question should be dealt with at the earliest possible opportunity, in order to avoid the possibility of a mistrial. These concerns do not arise in the situation before me. The caselaw recognizes, moreover, that the question can be considered at a later point, if concerns arise during the course of a witness' testimony.

[17] The law operates on the presumption that a witness has the capacity to testify. This does not require advanced abilities. The same observation can be applied to the question whether a party is capable of conducting its case, which only requires an ability to make basic personal decisions. The Respondents have accepted that they have an obligation to demonstrate, presumably on a balance of probabilities, that the Complainant

is incapable of testifying. They rely principally on *R. v. Hawke* (1975) 7 O.R. (2d) 145 (Ont. C.A.), which is instructive on the general issue. They have also referred me to Sopinka's Law of Evidence in Canada (2d), at §13.10 *et. seq*., which provides a very brief account of the law.

[18] The court in *Hawke* uses the antique and now unsettling language of Wigmore, at §i492, in holding that a witness is only disqualified from testifying if "the derangement or defect" is such as to undermine the witness' ability to give trustworthy evidence on "the specific subject of the testimony". The fact that the Complainant may have a psychological condition or paranoid personality disorder, or may be suffering from Post Traumatic Stress Disorder, does not prevent her from testifying. I do not know if a test has been enunciated in the caselaw, but the question is whether a trier of fact can properly and safely consider the evidence, in making a determination of the facts. The use of the word "trustworthy" is easily misinterpreted and the issue is not whether her testimony should be believed. It is whether it is capable of being believed.

[19] I feel obliged to add that my primary duty is to protect the integrity of the legal process. Although witnesses may occasionally break down, emotionally, there is a certain level of probity that is necessary to conduct a fair hearing. The legal and evidentiary process calls for a relatively calm and dispassionate assessment of the facts in a given case, and the purpose of the hearing must be respected. I have a fundamental obligation to maintain the level of decorum in the hearing that is necessary to maintain the integrity of the process. This is an indispensable attribute of the legal system and guarantees the justice and fairness of the proceeding.

[20] The trier of fact must also be able to follow and evaluate the testimony. It must be open to intelligent inspection. The evidence must be presented in some kind of logical and coherent manner, which is capable of rational construction. There may be additional concerns in the immediate case, which relate to the obligation of a tribunal to intervene when the process endangers the psychological well-being of the Complainant. This goes directly to the capacity of the Complainant to present her case, however, and is a secondary concern.

V. THE COMPLAINANT'S ABILITY TO TESTIFY

[21] The parties have come a considerable distance in discharging their burden to establish the Complainant is incapable of testifying. I have real misgivings about continuing, and doubts about whether the Complainant can participate in the hearing in a meaningful and informed manner. I am particularly concerned about whether she can deal with the rigours of cross-examination, which will have to be faced. I have allowed the Complainant considerable latitude in putting in her evidence-in-chief, but the Respondents are entitled to confront her with the details of the case in cross-examination and I see no way of sparing her from such an exercise.

[22] Ms. Thayer submitted that Ms. Day exhibited a lack of understanding of the proceedings and made inaccurate statements of fact from the beginning of the hearing. She gave clear examples, in her estimation, of delusional thinking. There is no doubt that the Complainant's ability to recall events accurately and testify has already been brought into question. Ms. Thayer submitted that there are two major issues that have repeatedly initiated inappropriate behaviour and breaks with reality. The first is the alleged harassment. The second is her mental well-being. The Respondents accept that Ms. Day can give accurate and even compelling evidence. But that ability deteriorates rapidly when she has to deal with the events at the heart of the case. As a result, her evidence becomes untrustworthy when she deals with the essential allegations of fact.

[23] I share the concerns of counsel. It is manifest that the Complainant's previous breakdown was triggered by her recounting of the details of her allegations. In spite of this, I am unwilling to stop the testimony at this point. It has not been established that she cannot provide a meaningful narrative of the events that led to the filing of the complaints. One of the features of the case is that it is the demands of the process that has created the conditions that led to the Complainant's breakdown. The situation is not static and the real concern is that the process of testifying may precipitate a more pronounced and prolonged breakdown. I realize that the situation is perilous for the Complainant and that counsel are not happy with the possibility that she may have a more serious episode under the strain of their questioning. This is a matter of speculation,

however, and I am not satisfied that we have reached the point where I can find that she is unable to testify.

[24] The question of capacity only arises when the cognitive abilities of the witness are fundamentally impaired. The psychiatric testimony in *Hawke,* for example, established that the witness in question was hallucinating on the stand. She was also accompanied, in her mind, by a little girl called Delores. This companion was, in the words of the witness, at p. 160, *supra*, "in my head telling me to say things that would put me in jail and get tommy off". I have evidence before me that the present complainant has at least been dissociating on the stand, and that she may be moving in and out of reality. There is evidence of psychotic episodes in the past. But there is nothing of these proportions in the situation that comes before me.

[25] As I have indicated, the Respondents have also submitted that the Complainant's psychological condition at the time when she was allegedly harassed renders her incapable of providing evidence that meets the necessary probative standard. This submission is premature, however, and relies upon a variety of factors, such as the diagnosis of her condition. Although the Complainant's testimony comes with many imperfections, the Respondents have not established the evidentiary basis for such a finding. The evidence of Dr. Kaplan was contested by the other psychological witnesses and is at least open to argument. There may be reasons to be concerned with this aspect of the testimony, but the more immediate concern is with the Complainant's present condition.

[26] It became apparent during the voir dire that the experts have a different view as to the merits of the case. The experts for Ms. Day seem to believe that she was sexually harassed and feel that it is the sexual harassment that provided the traumatic event in the Post Traumatic Stress Disorder that her experts diagnosed. The position on the other side is equally stark, however: it is that Ms. Day suffered from a paranoid personality disorder and merely believed that she was being harassed. Her perceptions have no connection to reality, on this view, and were the product of a psychological disorder. If the latter view is adopted, and the test of the courts is adopted, her evidence is so

inherently unreliable that it would be dangerous to put it before a jury. The problem is that this asks me to rule on the merits of the case, in deciding the questions put before me on the voir dire.

[27] Although I do not believe that we have reached the point where I can intervene, I believe that the present situation needs to be monitored. If the testimony of the Complainant continues to deteriorate, or it becomes impossible to conduct a proper hearing, it may be necessary to return to the question of capacity.

V. THE COMPLAINANT'S ABILITY TO PRESENT HER CASE

[28] I have not been able to review the law with regard to the question whether the Complainant is capable of representing herself. The test may be whether she is capable of instructing counsel. This is not a decisive issue at this time, however, and I merely wish to address the concerns that the Respondents have raised with respect to the well-being of the Complainant. The experts who testified on the voir dire disagreed as to the long-term effect of Ms. Day's participation in the hearing. Dr. Hunter and Dr. Malcolm felt that it was essential, psychologically, that Ms. Day have an opportunity to see the matter through to its logical end. This may be incidental to the purpose of a hearing. I nonetheless feel that Ms. Day has a fundamental right to present her case and that the therapeutic effect of doing so is a valid consideration, in examining the rights of a complainant.

[29] I am not as convinced as Dr. Hunter and Dr. Malcolm as to the benefit of the Complainant's participation in the hearing, and I share some of the concerns expressed by Dr. Kaplan. I do not believe, however, that it would be appropriate to intervene in the interests of the Complainant unless we reach a position where she becomes incompetent in the larger sense and cannot make decisions for herself. Up until that point, the Complainant is the only one who can decide what is in her best interests. She may make choices that run demonstrably against her interests. But that is true of anyone in society and it would be quite wrong, in my view, to treat her as a dependent. This goes directly to the legal question of dignity, which requires that tribunals and courts allow litigants to make their own decisions, however discomfiting that may be.

[30] This is a matter of general policy. When I asked Ms. Day whether she was capable of proceeding, she was unequivocal. She feels that she can continue and advise me that she knows how to ask for help. As far as I can determine, she understands her obligations as a witness, is capable of communicating her thoughts and is generally grounded in reality. She also recognizes the need to ascertain whether her perceptions are accurate and well founded. She agreed, on my questioning, that she should not "swear" in the hearing room and that she is obliged to respect the other participants in the hearing. Whether she can live up to this is another matter.

[31] The Complainant is a party to these proceedings and a finding of incapacity will probably deprive her of her right to have the complaint heard by the Tribunal. At this point, at least, I am not prepared to deprive her of that opportunity. The law of human rights is based on the dignity of the person, which requires that a tribunal respect the personal autonomy of those who come before it. This is a fundamental aspect of being a person and guarantees our freedoms. There are hazards in proceeding, and at some point, it may be necessary to intervene. But at this point, the Complainant has the ultimate responsibility for deciding whether she wishes to proceed. We have not reached the point where I can interfere with that decision.

VI. RULING

[32] I am accordingly of the view that the Complainant is capable of testifying at this point in time and can represent herself. I nevertheless have real concerns about whether she will be able to complete her case. In the circumstances, I think it is premature to rule on the application. It seems more appropriate to close the voir dire and return to the hearing, on the clear understanding that the matter may be reopened on application by the parties.

[33] My reading of the law, such as it is, suggests that the evidence on the voir dire may be relevant on issues like credibility and should be applied to the hearing as a whole. I would, however, invite submissions from the parties on the matter. There is also an issue of accommodation that requires consideration.

Dr. Paul Groarke

OTTAWA, Ontario

March 12, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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Amanda Day	On her own behalf
Joyce Thayer	For Department of National Defence
J. David Houston	For Michael Hortie