

# Guest Lecture # 2

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Occupation:

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## Forensic Science and Criminal Law

Very hard to translate differences between fields of forensics and Law to then ensure that the jury themselves (who more are more than likely not aware of either field) understands all the facts to lead to a fair decision.

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Talking Points:

Work experience in the department of justice reviewing wrongful convictions:

- Causes of wrongful convictions
    - Bad science
    - Forensic Impacts on wrongful rulings
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## Criminal Conviction Review Group

Today: Criminal Code section 696.1 Applications for Ministerial Review - Miscarriages of justice

- An application review on the grounds of miscarriage of justice may be made by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender and whose rights of judicial review or appeal with respect to the conviction or findings have been exhausted.
  - So while someone may or may not have committed a murder, the matter of fact was that they did not get a fair trial
  - There is an obligation to present all evidence to the defendant/accused in order to enable them to mount a full defense for themselves
  - Not traditionally definitive proof of a wrongful conviction, it is lumped together within Canada.

It is the minister of justice who gets to act as an attorney general with a neutral and unbiased stance rather than a political stance.

- You cannot simply run to the minister of justice right after a false conviction. It is only an option once all of one's basic rights are all used up.

696.4:

- Making a decision, the Minister of Justice shall take into account all matters that are relevant including:
  - Whether the application is supported by new matters of significance that were not considered by the course

- The relevance and reliability of information that is presented in connection with application
- An application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

If the group finds that there is indeed a miscarriage of justice in any way, the Minister of Justice can simply remove the initial charge from existence and do a retrial or take it to the court of appeal to determine if there can be a new trial. Considering how this would occur on cases that were over 30 years old, it would lead to the prosecution staying their case.

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## Why do people look for factual innocence?

There isn't enough time to be able to gather all evidence, so they simply look to determine who **WASN'T** involved with a crime.

### Case 1

Early 1990's, a 6 year old girl was strangled in her sleep.

1. No signs of entry
2. Protective dog

2 confessions were obtained. Everything was turned over except for the confession from the alternative suspect which led to the original suspect being suspected as the actual perpetrator of the crime.

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## Causes of wrongful convictions

- Mistaken eye witness testimony
- False confessions
- Sting operations - Mr. Big
- Tunnel vision, discrimination, police misconduct, ineffective assistance of counsel, witness lying, jail house informants, prosecutorial misconduct, etc.
- Fault forensic evidence

### Example of memories altering cases:

- US case
- Early 1980s
- Young woman who was assaulted in her own home
- Went on to proceed to memorize every little detail of her assailant to ensure that next time she sees him that he would be behind bars.
- A lineup was done and accused one of the men on the lineup
- Fast forward 11 years:
  - DNA test on semen was done and it came out as a negative match
- Was shown an image of the actual perpetrator and turns out she didn't even recognize him.

### Example 2:

- Man was beating a woman on the side of the road
- Isolated area and the man was saw by an elderly couple who stopped by and approached the scene

- Couple decide to drive away to call 9-1-1 and then come back to the man gone and the woman passed.
- A statement was given, man was arrested later that day for a different reason
- Line up was conducted:
  - Man says none of them
  - Woman picks someone completely different
- Woman's blood was on the assailants car

**False Confessions:** Youtube video of police officer who went through a confession and provided a false confession. Proceeded to make it his life's mission to counteract this due to how brutal interrogation could be.

**Mr.Big Operations:** Created by the RCMP in the 1980s where an officer would go undercover in order to gain incriminating information.

- Has led to suspect leading them to their crime
- Has also led to false convictions
- Can watch the first 2 episodes of confession tapes
- Law changed in 2014 to add parameters to ensure that a confession can be admissible in court (a.k.a needs information that would link to a forensic report or some kind of hard evidence)

#### **Names on the slides:**

1. Steven Truscott
2. Guy Paul Morin
3. David Milgaard

These are men who provided the biggest false convictions in Canada

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## Forensic evidence and the law

- Forensic evidence is circumstantial evidence
  - Circumstantial evidence requires the trier of the fact to make inferences
  - A case purely based on circumstantial evidence requires the guilty of the accused to be the only reasonable inference

In order for a jury to accuse someone based on circumstantial evidence, the accusation will be made SOLELY on a reasonable conclusion based on the circumstances that are being put together.

## DNA

- It is a search/seizure - triggers protection under s.8 of the Charter of Rights and Freedoms ("Everyone has the right to be secure against unreasonable search or seizure")
- Excluded under Section 24(2)? Or allowed in as evidence under Section 1(Oakes proportionality test)

There are 4 possible ways to **LEGALLY** obtain DNA:

1. Consent
  - Voluntary
  - Informed
  - Specific purpose
  - Destruction - Criminal code

- 487.09(3) Bodily substances that are provided voluntarily by a person and the results of forensic DNA analysis shall be destroyed or, in the case of results in electronic form, access to those results shall be permanently removed, without delay after the results of that analysis establish that the bodily substance referred to was NOT FROM THAT PERSON.

## 2. Warrants for DNA

- Information for warrants to take bodily substances for forensic DNA analysis
- 487.05(1) A provincial court judge who on ex parte application made in a form is satisfied by information on oath (via affidavit) that there are reasonable grounds to believe:
  - that a designated offence has been committed
  - A bodily substance has been found or obtained
    - At the place where the offence was committed
    - On or within the body of the victim of the offence
    - On anything worn or carried by the victim at the time when the offence was committed
    - On or within the body of any person or thing or at any place associated

## 3. Common Law (very rare) - Search Incident to Arrest

- Exception: R.v Saeed 2016 SCC 24 - penile swab; complainant's DNA and destruction of evidence.
  - Does not generally allow for seizing DNA, dental imprints etc.
  - "Accused persons do not have a significant privacy interest in a complainant's DNA. The police may take a penile swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested. The reasonable grounds standard will prevent unjustified searches before they occur and will hold the police to a higher level of justification before they can take a penile swab. Whether reasonable grounds have been established will vary with the facts of each case. Relevant factors include the timing of the arrest in relation to the alleged offence, the nature of the allegations, and whether there is evidence that the substance being sought has already been destroyed. The potential for destruction or degradation of the complainant's DNA will always be a concern in this context."

## Admissibility of forensic evidence / expert witnesses

- Exception to general rule against opinion evidence
- Expert testimony will be allowed in court if the 4 steps of the Mohan test are met:
  1. relevance;
  2. necessity in assisting the trier of fact;
  3. absence of any exclusionary rule; and
  4. a properly qualified expert.

**Fun fact:** Polygraphy test is inadmissible but anything that comes after is admissible in court.

## Admissibility of novel scientific theory or techniques

- R.v.J.(J.) 2000 SCC 51
  - Judges as gatekeepers
- Test
  - (1) has it been tested;
  - (2) has it been subject to peer review and publication;
  - (3) what is the known or potential error rate / are there standards; and

- (4) has it been generally accepted in the scientific community
- R. v. Trochym 2007 SCC 6 (post-hypnosis evidence)

## Unqualified and biased experts

- Difficulties of working for a client
  - Neutrality, impartiality - examples of wrongful convictions (pathologists - Truscott, Mullins | Johnson, Shepherd)
- Dr. Charles Smit - pediatric forensic pathology, Sick Kids
  - 12 wrongful convictions
  - Gouge Inquiry - Inquiry into Pediatric Forensic Pathology in Ontario (2008)
    - Expert as advocate
    - Inadequately prepared expert
    - Overstated expertise of expert
    - Unscientific evidence
    - Unbalance evidence
    - Expert's attack on colleagues
    - Evidence beyond expert's expertise
    - Speculating expert / the misleading expert
    - The expert and casual language
- Motherisk lab, Sick Kids
  - 24,000 hair samples for drugs and alcohol, from over 16,000 different individuals, for child protection purposes.
  - Hair spray was detected on a lot of the hair cells due to the doctors not washing up the hair before testing, causing children to be sent to adoption under false pretenses about their mothers.
  - Dr. Gideon Koren

## Pattern matching forensics discredited

- Hair microscopy (looking at hair samples without testing them)
  - Driskell case
- Forensic Odontology (bite marks)
  - Error rates are of the highest in regards to any forensic practice within the USA.