



# What's New in HR Law

## Debunked Myths About Sexual Assault Have No Place in Fact-Finding Exercises

December 19, 2019

### **BOTTOM LINE**

Most seasoned workplace investigators will agree that sexual harassment and assault allegations are some of the most challenging to investigate. Among other complicating factors, there are seldom witnesses to these alleged incidents. As such, investigation findings commonly hinge on assessments of the complainant and respondent's credibility, and the inherent reliability of their respective stories.

Although the standard of proof applied in the context of a workplace investigation (i.e. the balance of probabilities) is different than that applied in the context of a criminal proceeding (i.e. proof beyond a reasonable doubt), the art of making credibility assessments and weighing available evidence is much the same.

The Court of Appeal for Ontario's recent decision in the criminal case of *R. v. Lacombe* serves as a cautionary tale to all fact-finders – including workplace investigators – that reliance on discredited myths and stereotypes, masqueraded as “common sense”, will result in flawed decision-making.

### **Factual Background**

In *Lacombe*, the Respondent was charged with sexually assaulting a fellow tenant in his residential complex. The Complainant alleged that the Respondent touched her sexually without her consent on two separate evenings. The Respondent testified that their sexual contact was consensual and not as extensive as claimed.

At trial, the Respondent was found not guilty. In reaching this conclusion, the trial judge was troubled by the Complainant's credibility and the reliability of her evidence.

The trial judge found it significant that on both evenings in question: (i) the Complainant was dressed immodestly and was not wearing a bra or underwear; (ii) the Complainant engaged the Respondent when he French kissed her – she kissed him back and did not tell him to stop; (iii) the alleged assaults continued for a considerable period of time during which the Complainant did not leave or remove herself; and (iv) the Complainant did not immediately report the incidents to friends, staff, or the police. The trial judge also found it significant that the Complainant voluntarily accompanied the Respondent on the second evening, notwithstanding that the Respondent allegedly assaulted her the night before.

The trial judge relied on these findings to acquit the Respondent.

### **Court of Appeal Finds Improper Reliance on Discredited Myths and Stereotypes**

The trial decision was ultimately set aside by the Court of Appeal for Ontario. The Court held that the trial judge improperly placed significant reliance on discredited myths and stereotypes when assessing the Complainant's credibility.

#### **Myth #1: A person consents to sexual contact by dressing immodestly**

The Court confirmed that it was improper to consider the Complainant's dress when assessing her credibility and reliability. A person's dress does not signify consent, nor does it justify assaultive behavior.

#### **Myth #2: A sexual assault victim will immediately report the assault**

The Court confirmed that it was unacceptable to rely on the stereotypical views that complainants usually report sexual aggression, or that the lack of immediate reporting reflects either absence of assaultive or non-consensual behaviour. The Court confirmed that delayed reporting, on its own, is not determinative of whether a sexual interaction was consensual.

#### **Myth #3: A sexual assault victim will always remove themselves from the situation**

The trial judge found it significant that the Complainant kissed the Respondent on both evenings, and that she did not leave. However, the trial judge seemingly gave no weight to the Complainant's evidence that she told the Respondent to stop, and that she was scared that if she tried to leave the Respondent would hit her. The Court explained that a complainant's fear does not need to be either reasonable or communicated to the accused in order for consent to be vitiated. The Court emphasized that there is no rule that dictates how victims of assault should behave.

#### **Myth #4: Stereotypes are grounded in logic and common sense**

When assessing the Complainant's credibility, the trial judge stated he was simply applying "common sense" and "life experience"; which led him to conclude that the Complainant would have conducted herself differently if she had in fact been assaulted. The Court ruled that the

trial judge’s decision reflected flawed reasoning based on discredited stereotypes and myths, which have “no place in a rational and just system of law”.

## Check the Box

Credibility assessments are a common challenge that employers face when conducting workplace investigations. *Lacombe* serves as a striking reminder that while there are a number of legitimate techniques that can be utilized when tackling challenging credibility issues, reliance on debunked myths is not one of them. Rather, to determine credibility an objective assessment of which party’s version of events is most reasonable in the circumstances must be undertaken. Improper reliance on stereotypes will not only undermine an investigation’s fact-finding function, it may also result in the imposition of significant liability for the failure to conduct an appropriate investigation.

## Decision Details

Name of Case: *R. v. Lacombe*

Citation: 2019 ONCA 938

Date: November 28, 2019

## Need more information?

For additional information or advice on conducting workplace investigations, please contact Anthony Panacci at 416-408-5568, or your regular lawyer at the firm.



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