

Decision of the Appeal Division**Number: 2000-1857****Date: November 22, 2000****Panel: Laura Bradbury****Subject: Criminal Injury Compensation Act – Use of Polygraph Evidence**

CRIMINAL INJURIES (VICTIM OF CRIME) (EVIDENCE) – Applicant seeking compensation for sexual abuse – Board found insufficient evidence that a criminal act had occurred on basis that alleged offender had passed a polygraph test – Polygraph results no longer in police records – Appeal committee found applicant credible but relied on polygraph evidence – Whether the evidence supports a finding that the applicant was a victim of crime – Polygraph test results inadmissible in civil and criminal courts – Applicant's direct evidence carries more weight than suspect's claim that he passed the polygraph test – Applicant was a victim of crime and entitled to compensation.

Decisions: R. v. Oickle, [2000] 2 S.C.R. 3

Criminal Injury Compensation Act – Use of Polygraph Evidence [C.I.C.A. review (app. comt.)]
Appeal Division Decision No. 2000-1857

17 *Workers' Compensation Reporter* [513]

Introduction

- (1) The applicant applied for compensation on October 22, 1993 as a victim of crime under the *Criminal Injury Compensation Act* (the Act). The applicant requested compensation for two incidents of sexual abuse which she said had been carried out by her friend's father in 1973 or 1974 when the applicant was eight or nine years old.
- (2) In decisions dated March 21, 1994 and September 7, 1994 the Criminal Injury Section of the Workers' Compensation Board (the Board) concluded there was insufficient evidence to find that the applicant was a victim of crime within the meaning of the Act. The Board noted that the applicant's abuse allegation was investigated by the police in 1974 and 1975 and the alleged offender had passed a polygraph examination (lie detector test). The Board stated that since no criminal charges were laid in 1975, it was reasonable to assume there was insufficient evidence that a criminal act had occurred. The Board also pointed out there was no independent corroborating evidence in support of the applicant's allegations.
- (3) The applicant applied to the appeal committee. In its decision dated May 22, 1996 the appeal committee made the following findings:
 - a. The applicant "was entirely credible and consistent in her recollection of what occurred to her as a child".

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- b. The appeal committee accepted that the polygraph testing undertaken on the suspect in 1974 or 1975 was “sufficiently sophisticated that on the balance of probabilities, it is unlikely that a person who was lying would be able to skew the results. To say that does not mean that it could not happen, rather it simply means that on a balance of probabilities, the chances are most unlikely that a false negative would occur in these circumstances”.
- (4) The evidence about the reliability of polygraph testing in 1974 or 1975 was obtained after the hearing from the R.C.M.P. but was not provided to the applicant or her representative. The appeal committee concluded that since the polygraph testing indicated the suspect did not commit an offense, there was insufficient evidence to find the applicant was a victim or crime under the Act.
- (5) In my decision dated January 20, 1999, I granted the applicant leave to further review the findings of the appeal committee. Leave was granted on the basis that the appeal committee’s failure to disclose the information from the R.C.M.P. to the applicant was a breach of the rules of natural justice.
- (6) The applicant was given an opportunity to provide further submissions on the merits of the review. In her letter dated February 11, 1999, the applicant’s representative advised that no further submissions would be provided but the representative asked the Appeal Division to consider carefully the submissions to the appeal committee dated March 20, 1998.
- (7) The Ministry of Attorney General’s Victim Services Branch was given an opportunity to make submissions on the further review but they chose not to participate.

Issue(s)

- (8) Was the applicant a victim of crime in 1973 or 1974 as defined by the *Criminal Injury Compensation Act*? The Act defines a victim of crime as a person injured in the province of B.C. by an act or omission of another resulting from the commission of a scheduled criminal offense. In 1973 and 1974 the offense of sexual assault on a female under the age of 14 was a scheduled criminal offense. The question I must decide is whether the evidence supports a finding, on a balance of probabilities, that the applicant was a victim of that crime.

Facts and Evidence

- (9) The applicant’s evidence, as reported in her 1993 statement to the police and at the appeal committee hearing, is that when she was eight or nine years old she went to three sleepovers at her friend’s house in the same townhouse complex. On the first occasion, the friend’s father came into the room where the girls were sleeping, went to the applicant’s bed, lifted her nightgown, fondled her and put his fingers into her vagina. The applicant pretended to be asleep until pain caused her to cry. The father left the room at that point.

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- (10) A few weeks later, the applicant was invited for a second sleepover. During the night, the friend's father picked up the applicant and took her to his bedroom, laid the applicant on his bed and closed the door. Again, he lifted her nightgown, fondled her and put his fingers into her vagina. He then took her hand and made her stroke his penis. The applicant began to cry then and the man's older daughter came into the room. She asked "What's the matter with [the applicant]" and the man replied: "She wasn't feeling well but she's alright now."
 - (11) On both occasions, the applicant smelled liquor on the man's breath. And, on both occasions, the man prepared breakfast for the girls the next morning but said nothing about the incidents during the night.
 - (12) The applicant was invited for a third sleepover several weeks later. She went, but panicked when she got there. She said she wasn't feeling well and went home.
 - (13) The applicant's mother noticed around this time that something was wrong with her daughter. She told police in December 1993 that she asked her daughter what was wrong and the applicant "fell apart and started to cry." She told her mother some details of what had happened. The applicant's mother took her to their family doctor, Dr. B. Dr. B. spoke with the applicant and she was able to explain to him what happened.
 - (14) The Board contacted Dr. B. in 1994 for information about the visit. Dr. B. advised that he had no record of seeing the applicant twenty years earlier but advised the Board that his records could have been forwarded to the applicant's next doctor.
 - (15) The applicant's father contacted the police department in 1974 about the allegations. According to the applicant's mother, the suspect was interviewed by police and he took a polygraph test. The applicant's father was deceased when the applicant applied to the Board in 1993 so there is only her mother's recollection about the events in 1974.
 - (16) The police investigated again in 1993 when the applicant reported the incident to them as an adult. The applicant went to the police on October 16, 1993 about one week before she applied for criminal injury compensation.
 - (17) The police found that the record of the 1974/75 investigation no longer existed. The only information available was that Constable M. had conducted a polygraph examination of the suspect some time in the first four months of 1975. The results of the polygraph test were not available.
 - (18) In December 1993 the police contacted the suspect and interviewed him. The suspect stated that he insisted on the polygraph test in 1975 and that he had passed "with flying colours." He said the police officer apologized to him at the time "for putting me through all this nonsense." He stated that the events described by the applicant could not possibly have happened.
 - (19) The 1993 investigating officer contacted a friend of the applicant's. The friend agreed to send a letter outlining her recollection of information given to her by the applicant about the 1974 events. Once the police discontinued the investigation, after learning the suspect had passed a polygraph test, the police told the friend that her letter was not required. No other investigation was undertaken.

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- (20) The police file indicates that the 1993 investigation was concluded on the basis that the earlier investigation was “handled thoroughly at the time” and there was no additional information about the alleged incident.
- (21) The Board contacted the applicant’s counsellor as part of its investigation with respect to the criminal injuries matter. In a letter dated March 15, 1994 the counsellor wrote: “It is my impression that sexual abuse had occurred based on a number of indicators.” The counsellor reviewed the indicators which included the applicant’s history of drug and alcohol abuse; her inability to access her feelings; her defenses of denial and minimization; her need to control people and situations; and, the applicant’s genuineness and credibility about the incidents of the sexual abuse.

The Applicant’s Submissions

- (22) The applicant’s representative has provided detailed submissions which take issue with the appeal committee findings about the reliability of polygraph evidence. The representative referred to a decision of the Ontario District Court (*R. v. Doe* (1986), 31 C.C.C. (3d) 353) which reviewed expert evidence regarding the polygraph. The court concluded that the test was not infallible and that the test has a percentage of both false positive and false negative results. The representative also noted that current scoring methods (as reported by the R.C.M.P. to the appeal committee) may have resulted in the suspect’s results being found “inconclusive” by today’s standards. This point is relevant when considering the effect of the suspect’s polygraph result on the police decision not to proceed further with the investigation.

- (23) On the issue of the use of polygraph evidence in sexual abuse cases, the representative wrote:

Because the statements of the child and the accused are often the only evidence available to authorities to determine whether any abuse has occurred the use of a polygraph to determine such a matter is quite compelling. However, a recent article indicates that the use of the polygraph in alleged sexual abuse cases is still quite controversial. The author states that opponents of the polygraph question the overall reliability of the test and state that, at best, the polygraph will detect deception at rates better than chance. However, the test still produces high rates of false positives and false negatives.

In addition, the author noted that because sex offenders often have personality disorders (they do not experience anxiety when they lie), engage in cognitive distortions (rationalization of their activities), may be desensitized to anxiety as a response to lying (due to patterns of lying over many years to cover their abusive acts), and believe their lies and distortions are the truth, there are reservations that the polygraph would not be able to detect any deception of the test subject.

Most importantly, this study confirmed that the results of polygraphs administered by police agencies were highly indicative of whether there would be a criminal prosecution. Specifically, if the accused passed the polygraph there was no prosecution. If the accused failed the polygraph, there was a greater likelihood that there would be a criminal prosecution, although charges were not always pursued.

- (24) The representative argued that the appeal committee erred by giving more weight to the result of the polygraph test than to any other evidence, including the applicant's credibility and her counsellor's letter.

Analysis and Reasons

- (25) The appeal committee acknowledged that the applicant was credible but accepted the polygraph result as evidence that there was insufficient proof of a crime. The appeal committee concluded that, as a result, the applicant was not entitled to compensation under the Act as a victim of a crime.
- (26) My concerns with the appeal committee's finding are twofold. First, polygraph test results are inadmissible as evidence, both in criminal trials and in civil court proceedings. In the recent Supreme Court of Canada decision of *R. v. Oickle* (2000 S.C.C. 38. File no. 26535), Mr. Justice Iacobucci writing for the majority reviewed the law on polygraph evidence and commented that: "As many sources have demonstrated, polygraphs are far from infallible . . . Similarly, this court recognized in *Béland* that the results of polygraph exams are sufficiently unreliable that they cannot be admitted in court."
- (27) The appeal committee, as an administrative tribunal, is not governed by the strict rules of evidence with respect to the admissibility of evidence as the courts are. However, an administrative tribunal must ensure that it does not rely on information that is inaccurate, unreliable or unfair. Tribunals must ask if the evidence before them is relevant to the issue and if it is reliable. Information may be relevant but not reliable because it is unlikely to be true. Based on the comments of the Supreme Court of Canada in the *Oickle* decision, I believe that the polygraph information in this case falls into the category of information that is unreliable evidence about whether or not a crime occurred.
- (28) There is the added concern in this case that we have only the suspect's statement that he, in fact, "passed" the polygraph test. The police file is missing and the only evidence the police had was that a polygraph test was administered in 1975. The results of the polygraph test are not in the police records. As well, the police did not do a complete investigation in 1993 – they discontinued the investigation after learning that a polygraph test had been administered in 1975. It is important to appreciate, as well, that the police assessed the polygraph information in light of the need to prove a crime occurred "beyond a reasonable doubt." The standard of proof in a criminal injuries matter is proof "on a balance of probabilities."

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- (29) My second concern about the appeal committee's decision relates to the weighing of evidence before it. The appeal committee accepted the polygraph information, which would be inadmissible in any court, and then used it as the definitive piece of evidence in deciding the applicant's appeal. The appeal committee relied on the polygraph information in the face of direct evidence from the applicant which the appeal committee found credible and which contradicts the polygraph information. In my judgment it was unreasonable to give greater weight to the suspect's information and to the R.C.M.P. information about the polygraph against the applicant's direct evidence of events and the other evidence available.
- (30) This is not a case where the applicant recalled memories of the abuse years after it occurred. She told her mother and her doctor at the time she alleged the events happened and there was a police investigation at the time. The applicant's mother recalls her daughter's information about the abuse and she recalls taking her daughter to the doctor's. The applicant's mother also reported to the police in 1993 that her daughter received psychological counselling for quite a long time after the alleged events. In addition, the applicant's counsellor stated in 1994 that she believed the applicant was a victim of abuse.
- (31) I consider that the applicant's evidence, her mother's information, and the counsellor's opinion carry more weight and is more relevant than the information from the suspect that he passed the polygraph test in 1975. As I stated earlier, polygraph tests are considered to be unreliable evidence about whether or not a criminal act occurred.
- (32) I am satisfied on the basis of the evidence before me that it is more likely than not the applicant was a victim of the crime of sexual assault on a female under the age of 14. She is therefore entitled to compensation under the Act.

Conclusion

- (33) In summary, I find that the applicant is a victim of crime in accordance with the Act. I refer the claim to the Criminal Injury Section to determine the amount of compensation the applicant is entitled to.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.