




E.W. v. D.W. a.k.a. D.K., 2005 BCSC 890 (CanLII)

Print:  [PDF Format](#)
 Date: 2005-06-13
 Docket: E042718
 Parallel citations: 19 R.F.L. (6th) 228 • 50 B.C.L.R. (4th) 345
 URL: <http://www.canlii.org/en/bc/bcsc/doc/2005/2005bcsc890/2005bcsc890.html>
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***E.W. v. D.W. a.k.a. D.K.***,
2005 BCSC 890

Date: 20050613

Docket: E042718
Registry: Vancouver

Between:

E.W.

Plaintiff

And

D.W. a.k.a. D.K.

Defendant

Before: The Honourable Mr. Justice Scarth

Reasons for Ruling re

Admissibility of Polygraph Evidence

Counsel for the Plaintiff:

Madeleine M. Patton

Counsel for the Defendant:

Jonathan M. Lazar

Submissions heard:

June 6, 2005
Vancouver, B.C.

Ruling pronounced:

June 9, 2005
Vancouver, B.C.

[1] This is a family law proceeding. The critical issues in the case relate to the custody and guardianship of and access to the parties' 7 1/2 year old daughter. A factor which will make it difficult for the Court to resolve these issues is that the father, to whom I shall refer by the initials E.W., is alleged to have inappropriately behaved in a sexual manner toward the daughter, to use the somewhat generalized language found in the mother's pleading and counsel's opening to the Court at the trial. The father denies the allegations of inappropriate sexual behaviour.

[2] Mr. E.W. wishes to have entered into evidence the results of a polygraph test which he has taken. The mother, to whom I shall refer by the initials D.K., objects to production of the polygraph test operator as an expert witness and the admission of the report which sets out the results of the polygraph test. As well, the mother objects to evidence being led on the trial of the fact the father took a polygraph test. These issues regarding the admissibility of the polygraph evidence were argued at the outset of the trial and before any evidence was called. At the commencement of the proceedings on the fourth day of the trial I ruled that the polygraph evidence is inadmissible and stated reasons for this ruling would follow. These are my reasons for the ruling with respect to the admissibility of the polygraph evidence.

[3] The leading authority on the admissibility of polygraph evidence is *R. v. Béland*, 1987 CanLII 27 (S.C.C.), [1987] 2 S.C.R. 398. In that case Mr. Justice McIntyre, writing for himself and three other members (Dickson C.J., Beetz J. and Le Dain J.) of the Court constituted by seven members, held that in a criminal trial the results of a polygraph examination of an accused person are not admissible in evidence. In *Béland* the accused were charged with conspiracy to commit a robbery. At trial one of their accomplices testified for the Crown and gave evidence which directly implicated the accused. The accused chose to testify. They asserted the evidence of the accomplice was false and denied any participation in the alleged conspiracy. Following the completion of the evidence the accused sought to re-open their defence in order to permit each accused to take a polygraph examination and submit the results in evidence. The trial judge denied their application on the basis the results of such an examination were inadmissible in evidence.

[4] In writing for the majority of the Court Mr. Justice McIntyre gives four basic reasons for excluding the polygraph evidence in the *Béland* case: (1) it would offend the rule against oath-helping; (2) it would offend the rule against the admission of past out-of-court consistent statements by a witness; (3) it would offend the rule relating to character evidence; and (4) it would offend the expert evidence rule. At ¶ 18 Mr. Justice McIntyre states:

... it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses.

[5] I pause to note that it is my understanding Mr. E.W., the father, seeks to lead evidence of the polygraph in order to establish that he is telling the truth when he denies the allegations of sexual impropriety in relation to his daughter.

[6] At ¶ 17 Mr. Justice McIntyre emphasizes that the determination of the credibility of witnesses is a function of the trier of fact and not of an expert witness. He writes:

17 Here, the sole issue upon which the polygraph evidence is adduced is the credibility of the accused, an issue well within the experience of judges and juries and one in which no expert evidence is required. It is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence. This question has been the subject of a comment by Michael Abbell in "Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials" (1977), 15 *Am. Crim. L. Rev.* 29, who said, at p. 55:

Witness or defendant veracity has seldom been viewed a technical issue on which 'untrained' laymen are unqualified to reach intelligent determinations after being exposed to all of the evidence in a case. Indeed, it has been the traditional function of jurors in our system to apply their own daily experiences to the testimony and the other evidence presented to them to determine which witnesses are truthful. It is the jurors' own "expertise" in conducting their personal and business affairs which our judicial system has long regarded as making them specially qualified to make this determination.

I adopt these words, and I am therefore of the view that polygraph evidence aimed at supporting the credibility of the accused is not receivable as evidence in Canada.

[7] In *R. v. Phillion*, [1977 CanLII 23 \(S.C.C.\)](#), [1978] 1 S.C.R. 18, the Supreme Court of Canada in a case in which the accused elected not to testify ruled that polygraph evidence was not admissible in the circumstances of that case.

[8] As Madam Justice Wilson, writing in dissent for herself and Mr. Justice Lamer (as he then was) in *Béland* pointed out at ¶ 5, Mr. Justice Spence, writing for himself and Chief Justice Laskin in *Phillion* stated:

I reserve my view as to whether, under other circumstances, evidence given by an operator of a polygraph apparatus could ever be admissible. There may be circumstances where such evidence should be admitted but certainly the evidence proposed to be given by Mr. Reid [the polygraph expert] in this appeal was hearsay evidence of the worst self-serving type.

[9] Ms. Patton on behalf of Mr. E.W. submits that this case is one of those circumstances where polygraph evidence should be admitted.

[10] In support of this proposition Ms. Patton refers to three decisions of this Court: *Walden v. Walden*, [1987] B.C.J. No. 1205 (Robinson L.J.S.C.); *C. (R.M.) v. C. (J.R.)* [reflex](#), (1995), 12 R.F.L. (4th) 440 (Edwards J.); and *Gibb v. Pruzina*, [2005 BCSC 504 \(CanLII\)](#), 2005 BCSC 504 (Curtis J.).

[11] *Walden* was a case concerning a father's right to access to his two daughters. He sought to introduce evidence of two polygraph or lie detector tests taken by him over a two year period.

[12] The Honourable Judge Robinson (as he then was) admitted the evidence subject to production for cross-examination of the polygraph operator in each instance. In his oral reasons for this ruling Robinson L.J.S.C. recognized that in general polygraph evidence, particularly in criminal cases, has not been admitted because it is contrary to the rules regarding self-serving evidence and hearsay evidence if the accused does not testify, and contrary to the rule regarding the calling of an expert witness on the question of his credibility if he does testify. Robinson L.J.S.C. stated:

I am simply of the view that any evidence relative to credibility, if probative and relevant, should be admissible and in my judgment the result of a polygraph test, where the issue is alleged sexual abuse of children, and the person alleged to have committed the abuse has given evidence, the polygraph evidence should be admissible. I need not add that its weight is entirely a matter for the finder of fact.

[13] The ruling in *Walden* was given on March 24, 1987 and hence the decision of the Supreme Court of Canada in *R. v. Béland*, which was rendered on October 15, 1987, was not available to Robinson L.J.S.C.

[14] In *C. (R.M.) v. C. (J.R.)* the father sought to enforce access to his three-year- old daughter

pursuant to the terms of a separation agreement. The mother refused the father access on the ground he was sexually abusing the child. The father took a polygraph test which supported his denial of any sexual activity or interference with the child. In admitting the results of the polygraph test into evidence Mr. Justice Edwards wrote this at pp. 443-444:

8 At the commencement of the trial counsel for the father sought a ruling on the admissibility of polygraph evidence concerning the allegations of sexual abuse against the father. After hearing counsel I ordered that the report of the polygraph results be admitted in evidence subject to a determination of the weight to be given such evidence. That ruling was made in order to accommodate the polygraph operator and the financial means of the father to pay the operator standby time should the operator not be required to attend for cross-examination. In allowing the report into evidence I gave consideration to the following submissions.

9 Counsel for the father cited the case of *Walden v. Walden* (March 24, 1987), Doc. Kamloops 04818, Robison J. (B.C.S.C.).

Where the issue before the court is the alleged sexual abuse of a child all evidence that is probative and relevant ought to be admitted.

10 In addition the case of *D'S. v. D'S.* (August 15, 1986), Doc. Brampton 16/81, Allen Prov. J. (Ont. Fam. Ct.) is authority for the proposition that polygraph examinations may be admitted in civil cases involving allegations of sexual abuse. In *D'S.* the court noted that the evidence of a "past" polygraph test, while not conclusive on the issue, was relevant evidence.

11 In support of the application counsel for the father cited the dissenting judgments of Justices Lamer and Wilson in *R. c. Béland*, 1987 CanLII 27 (S.C.C.), [1987] 2 S.C.R. 398 [at pp. 433, 426, 424-425 and 420]:

The polygraph evidence is clearly relevant. I am not persuaded that it falls within any of the exclusionary rules ...

The evidence is relevant to, but not determinative of, the credibility issue.

... polygraph evidence is adduced "solely for the purpose of bolstering a witness's credibility ...". It is introduced to provide evidence that the accused's physiological reactions are consistent with those of someone who is telling the truth; and

The polygraph operator ... has subjected the accused to a number tests. He reports on the results ... and gives his expert opinion as to whether the physiological reactions of the accused are similar to those of someone telling the truth. He is open to cross-examination on his technique, his assumptions, his interpretation of the data and the accuracy of the device. His evidence is only one of many factors the jury will consider when assessing the credibility of the accused.

[15] At p. 445 Edwards J. concludes:

18 It was clear to me by the end of Mr. Weller's evidence that the evidence should be taken as corroborative only and not as the absolute truth of the answers given to the questions relating to S. Accordingly the weight which I give to the polygraph evidence is qualified and although the evidence is relevant it would not by itself be a basis for

concluding on a balance of probabilities the truth of the answers.

[16] With the greatest of respect, and mindful of the rule of practice indicated by *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) at p. 592, I am of the opinion firstly that I am bound by the majority judgment in *Béland*. The foundation of Mr. Justice McIntyre's decision is that polygraph evidence, albeit in a criminal case, would be contrary to certain basic rules of evidence and hence is not admissible. Madam Justice Wilson, in a dissenting opinion, disagreed that those rules would be contravened if the polygraph evidence was admitted. Plainly, however, judges of this Court are bound by the majority decision of the Supreme Court of Canada. Secondly, I am of the view that the fact this is a civil case involving the alleged sexual interference with a child does not serve to distinguish it from the majority decision in *Béland*. Mr. Justice McIntyre was writing in the context of a criminal case without the involvement of a child or allegations of sexual abuse. But the rules of evidence upon which McIntyre J. based his decision apply equally in both types of proceedings. In particular, the issue of credibility is a matter for the trier of fact based upon his or her common sense and every day experience.

[17] The third case relied upon by Ms. Patton, *Gibb v. Pruzina*, was a custody case involving an allegation of sexual assault by the father upon his daughter. The father took a polygraph test. In accepting his denial of any sexual impropriety with his daughter Mr. Justice Curtis wrote at ¶ 21:

... Furthermore, Mr. Pruzina denied any improper conduct and I find no reason not to accept his denial. He spoke to the police, he took a polygraph test and he was anxious to have Dr. Angus investigate the matter at considerable expense to himself. In the circumstances, therefore, I find it improbable that he sexually assaulted his daughter.

[18] Neither *Gibb v. Pruzina*, nor *D'S. v. D'S.*, [1986] W.D.F.L. 2013 (Ont. Fam. Ct.) in which the Court accepted the evidence of a polygraph operator that the father in an access dispute passed the test, indicates whether the admissibility of the polygraph evidence was in issue or not.

[19] In light of the majority opinion of the Supreme Court of Canada in *Béland*, I am persuaded by the reasoning of Cook J. of the Unified Family Court of the Newfoundland and Labrador Supreme Court in *B.S. v. R.T.*, [2002] N.J. No. 42. The issue before Cook J. was whether the results of the father's polygraph examination should be admitted as part of the evidence at the hearing of a custody and access application. The father was alleged to have sexually abused his five year old son. Following a review of the authorities Cook J. held the polygraph evidence not to be admissible and stated at ¶ 37:

¶ 37 To allow polygraph evidence in the circumstances at hand would, in effect, take the credibility issue away from the trier of fact, a position not supported by the Supreme Court of Canada in *Phillion* and *Béland*.

[20] With the greatest of respect, I do not agree with the conclusion of Cook J. that the admission of polygraph evidence would in effect take the credibility issue away from the trier of fact. The cases in which it has been admitted permitted its admission on the basis it was a factor to be considered by the trier of fact in determining credibility and not an usurpation of the fact finder's role in that regard. Nonetheless, in considering that aspect of the matter, Mr. Justice McIntyre's words in *Béland* at ¶ 74-75 must be borne in mind:

¶ 74 ... where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence, and an opinion will not be received.

¶ 75 Here, the sole issue upon which the polygraph evidence is adduced is the credibility of the accused, an issue well within the experience of judges and juries and one in which no expert evidence is required. ...

[21] In the result I conclude that the polygraph evidence sought to be admitted by the plaintiff Mr. E.W. in this proceeding is inadmissible.

"W.B. Scarth, J."
The Honourable Mr. Justice W.B. Scarth

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