



Litigation Strategy: How not to Discredit a Witness

Jessica McGaw v. Sobeys Capital Inc., 2023 ONSC 6279 (CanLII)

In an unusual case, a strategy to discredit a witness by comparing them to Charles Manson resulted in a mistrial. The Plaintiff, Ms. McGaw, alleged that she was wrongfully dismissed by her employer, Sobeys. Amongst other things, Ms. McGaw sought punitive damages due to her treatment while she was employed by Sobeys. Ms. McGaw alleged that another employee had fabricated false allegations against her, and then coerced the other employees to gang up against her.

Sobeys brought a key witness – the alleged “ringleader” of the bullying. While the witness was on the stand giving evidence, counsel for Ms. McGaw were seen to be huddling together and laughing between themselves. They were pulling up images of Charles Manson, the infamous serial killer, on their computer. They were laughing at their belief that the witness bore a physical resemblance to Charles Manson.

This incident occurred within sight of the jury box. One of the jurors promptly reported the incident to the judge.

The judge found that there was no option but to discharge the jury, as plaintiff counsel’s actions could have led to a reasonable apprehension of bias.

Counsel for the plaintiff claimed that comparing the witness to Charles Manson was part of their litigation strategy, and that they were allowed to prepare to present the plaintiff’s case. Counsel claimed that the image of Charles Manson that they had been examining was in fact subject to litigation privilege. Evidently, the images supported a litigation strategy in which plaintiff counsel would prove that “the witness’ appearance was viewed negatively by his co-workers and that his demeanour was considered to be ‘weird’”. This was meant to discredit the witness in the eyes of the jury.

The judge found that this was not an appropriate litigation strategy:

[24] This is a wrongful dismissal action. The physical appearance of any witness was not a material issue for trial. It is inconceivable that searching and calling up an image of Charles Manson on counsel’s computer while a material witness was giving evidence was obtained



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with the dominant purpose of advancing this litigation on behalf of the Plaintiff.

The images of Charles Manson were not considered to be part of the plaintiff's litigation strategy and were not subject to litigation privilege.

The judge declared a mistrial, as the impact of these images on the jury could not be limited by the judge's instruction.

This case provides an important lesson. Witnesses cannot be discredited by virtue of their appearance alone, whether or not they look like Charles Manson.

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