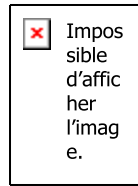


**Canadian Human
Rights Tribunal**



CANADA

**Tribunal canadien des
droits de la personne**

BETWEEN:

AMANDA DAY

Complainant

- and -

**DEPARTMENT OF NATIONAL DEFENCE
AND MICHAEL HORTIE**

Respondents

REASONS FOR DECISION

MEMBER: Dr. Paul Groarke

2003 CHRT 16

2003/04/04

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[1] The following is my second ruling on the question of competence, which originally arose in the course of the Complainant's evidence-in-chief. I have attached the previous ruling as Appendix A. In the course of that ruling, I expressed misgivings as to the Complainant's ability to testify and stated that her participation in the process should be monitored. A number of additional concerns arose during cross-examination. I subsequently allowed the Respondents to renew their application for a finding that the Complainant was not capable of testifying.

I. IS THE COMPLAINANT CAPABLE OF TESTIFYING?

[2] The original application was renewed on the basis of a number of remarks that were made during the early stages of cross-examination. The Respondents have provided me with part of the recent transcript, which has been marked as an exhibit in the voir dire. Counsel have highlighted the passages that concern them and submit that it would be a mistake to continue. They have taken the position from the outset of the hearing that the Complainant's allegations are the product of a psychological disorder.

[3] I have attached some of the more telling references in Appendix B, along with an excerpt in which the Complainant describes her condition during the period when she was allegedly harassed. The most troubling evidence is that the Complainant is convinced that other people have implanted thoughts or phrases in her mind. She believes that this was happening during the period of the alleged harassment. It has also happened more recently. The general idea appears to be that people have implanted subliminal suggestions in her mind, which she is compelled to obey. The Complainant accordingly believes that she has been programmed to act in certain ways.

[4] This includes the making of statements that have no obvious connection to the circumstances in which they have been said. The Complainant has testified that she said "I see Helter Skelter" when she saw a picture of a naked woman in the dockyard. She states that she made this statement because someone by the name of Robin had said that she would do so, years before the complaint arose. She was also

programmed to say “I have AIDS”, when she was found to be HIV negative, and “oink, oink, get it” in circumstances that can only be described as bizarre. The same person, who she referred to as “Rotten Robin”, also told her that she was to turn herself into a mental institution at some point in time. The story is confused, but this is related to the fact that she agreed to help someone who was a prostitute.

[5] The problem is that these kinds of remarks extend to the subject matter of the complaints before me. The Complainant testified that at one point, at least, she believed that God was telling her to make the complaint. She is also convinced that the individual Respondent programmed her to hear certain frequencies and play a popular song on the guitar, without having to learn it. Some of her remarks are less benign. The Complainant stated on two occasions that the Respondent may have programmed her to harm herself or commit suicide. She also stated that the Respondent has been programmed. Since she is aware of this programming, she feels that she is in the best position to cross-examine him.

[6] This only sets out the some of the more troubling aspects of the testimony. The Respondents have expressed other concerns. There is evidence of her dissociating on the stand and losing contact with reality, whatever view is taken of her psychological state. Her conduct on and off the witness stand has been erratic and emotional. There are any number of troubling incidents before me, all of which attest to the difficulty that the Complainant has experienced in the hearing. Some of this behaviour is described in my earlier ruling on competence.

[7] The Respondents have submitted that the Complainant cannot meet the criteria set out by Dubin, J.A. in *R. v. Hawke* (1975) 7 O.R. (2d) 145. There seem to be two branches to the test in the jurisprudence. A witness cannot give evidence if the Tribunal is satisfied that either

- 1) her current psychological state, or
- 2) her psychological state at the time of the events in question

prevents her from giving testimony that could be relied upon by a reasonable trier of fact. This is ultimately a legal and not a psychological question. It is the Tribunal that is in the best position to judge the probative quality of the evidence before it. The most significant consideration in a case like the one before me will normally be the conduct of the witness on the stand.

[8] I permitted the Complainant to give her evidence in chief, in spite of the difficulties that she was experiencing on the stand. Some of her evidence was intelligible and reasonably lucid. Some of her more recent testimony, however, has no apparent basis in reality. Although the Complainant has stated that she “reality tests” herself, she is unwilling to consider the possibility that the disordered perceptions that I have described are the product of a psychological condition. In the words of counsel, she will not accept any reality other than her own.

[9] The Complainant is unable to discern the difference between her disordered perceptions and reality. This inability goes back to the period of the alleged harassment. The problem lies in separating the more reliable parts of the Complainant’s evidence from the less reliable. This is exactly the kind of situation, it seems to me, where a judge would be forced to declare a mistrial, if this kind of evidence went before a jury. There comes a point where a Tribunal can no longer ascertain the accuracy of a witness’ testimony.

[10] I believe that the circumstances before me are more than enough to set aside the usual presumption that a witness is competent. I am satisfied on a balance of probabilities that the Complainant’s testimony fails both branches of the legal test. It would be manifestly unreasonable to make decisions on the basis of her testimony. I do not believe that a trier of fact could safely rely on her evidence, in rendering a decision against the Respondents. It follows that the testimony of the Complainant is not admissible in the proceedings before me.

II. IS THE COMPLAINANT CAPABLE OF PROSECUTING THE CASE?

[11] I think it is only fair to say that the Complainant's participation in the present process is fraught with difficulty. The Respondents have argued that she does not have the psychological capacity to prosecute the case. Counsel was unable to provide me with any caselaw on the subject and I have already indicated on the record that this kind of finding comes uncomfortably close to a finding that an individual is not competent in the more general legal sense. This goes well beyond my role. I have neither the authority nor the inclination to express an opinion on the question whether the Complainant is competent in the larger sense. I am nevertheless satisfied, in spite of my concerns, that I have the ancillary authority to determine whether she is capable of participating in the hearing.

[12] It is important to be cautious. As I understand it, the law only requires that a person instructing counsel have a basic grasp of the decisions that need to be made in the course of the legal process. I have already suggested to counsel that a Tribunal can only intervene in the clearest cases, when a party loses the ability to make the most fundamental decisions regarding the management of the case. The question whether a party is capable of participating in a legal proceeding is usually decided by determining whether she is capable of instructing counsel. It is the ability and condition of the Complainant that must be examined in this context, rather than the difficulty of the proceedings. Individuals have the right to represent themselves, even where they have little of the training that would normally be required, in dealing with the issues before a Tribunal.

[13] The real problem before me is a practical one, since it is the Complainant that has carriage of the case. I realize that the case before me would be difficult for any Complainant, particularly without the advantage of counsel. The Complainant's difficulties go beyond such ordinary concerns, however. The Complainant has difficulty restraining herself when her emotions are engaged and has often been disruptive. I do not believe that she has the emotional and psychological resources to participate normally in the process, whatever accommodation I can give her. It would be a mistake to be too rigid in these matters,

but the decorum and integrity of the process need to be respected. This has a real bearing on the fairness of the process.

[14] A party cannot avail itself of the benefits of the legal process and reject the authority of the body with the responsibility for deciding the case. The Complainant has been disruptive and apparently feels that there is a concerted effort to deprive her of her rights. She is quick to interrupt counsel and accuse the other parties of misusing the process. When she realized that I was likely to rule against her on the present application, she turned her attention to the Tribunal. Rather than appear for the last day of the hearing, she took the view, in correspondence with the Registry Officer, that the Tribunal had set out to publicly humiliate her. This can only be taken as another manifestation of her psychological condition. Although the Complainant often exhibits the indicia of an ordinary person, there is an irrational side to her behaviour which continually interferes with her ability to participate in the process.

[15] Similar issues have been dealt with in the criminal courts, though there are significant differences between the two processes. The judgement of the Supreme Court in *R. v. Whittle* [1994] 2 S.C.R. 914 deals incidentally with the fitness of an accused to stand trial. It holds, at p. 933, that an accused only requires a “limited cognitive capacity to understand the process”. Although this sets the threshold very low, it accepts the relevant provision in the *Criminal Code*, which poses the question whether the accused is able to “conduct a defence” or instruct counsel to do so. The judgement suggests that a party must be able to make a choice, and I would go further and state that it must be a meaningful choice. A party whose choices are entirely arbitrary is not capable of participating in the legal process.

[16] As a general principle, it seems unlikely that a person who is incapable of testifying because she suffers from an existing disorder would be able to make the kind of decisions necessary to instruct counsel. I say this because a person who testifies as a witness need only provide a trustworthy narrative of select events. This does not require an ability to make decisions regarding the conduct of the case. I cannot say whether the decision in *Whittle* throws this into question. It nevertheless seems to me that a party must

have some appreciation of the consequences of the decisions that need to be made in prosecuting the matter. In the present case, for example, the Complainant requested an order that the public guardian divulge its records regarding a recent application to have her committed. She appeared unable, however, to recognize that such an application might disclose information that would assist the Respondents, either on the question of competence or the merits of the case.

[17] The Complainant has already found it difficult to give her evidence-in-chief. We have only begun her cross-examination, after a month of hearing, and have not come anywhere near the material allegations. I do not want to speculate as to the difficulties that she will experience when counsel endeavours to test her evidence regarding the rather lurid sexual allegations that have come before me. I do not believe that it is feasible to embark on such an endeavour, however, and believe that it would be a mistake to take the process any further. Nor do I believe that the Complainant is capable of cross-examining the individual Respondent in a proper manner and feel obliged to say that there are real dangers in allowing her to do so. I am concerned that she has other reasons for seeking such a confrontation, which have more to do with her psychological fixations than the purposes of the hearing process.

[18] In the circumstances, I am satisfied on a balance of probabilities that the Complainant is incapable of participating in the process or instructing counsel to represent her interests. I do not believe that she can make the decisions that are required in prosecuting the case. I am also concerned that her failure to make meaningful decisions will lead her to act in a way that causes her serious and irreparable harm, legally, emotionally and psychologically. I think the report of Dr. Kaplan, which was entered as an exhibit in the *voir dire*, deserves serious consideration in this context.

III. DISMISSAL

[19] There is no way of going forward with the hearing at this point in time. There may nevertheless be a number of ways of resolving the present situation. I have raised the possibility, for example, of a mistrial. The essential choice, however, is between adjourning the matter and dismissing the complaints. In theory, at least, the matter could be adjourned *sine die*, with the idea that another hearing could be held, if the Complainant becomes competent in the future. This would be more feasible if the complaints were of recent origin.

[20] In my view, the present case has already been delayed for too long. While the Respondents share some of the responsibility for the delay, at least before the Tribunal, I think that justice lies in bringing the matter to a close. It is time to bring this long and painful process to a close. I am particularly concerned about the individual Respondent, who has had to live with these allegations, in one way or the other, for eight or nine years. Many of the allegations are extravagant and extremely embarrassing. They include allegations of rape and sexual misconduct with children. The Respondents have argued from the beginning that they are entirely without substance. There have been a number of investigations and I do not believe it would serve the interests of justice to return to the case in two or three years, only to restart the process. As the Complainant herself observed, the present process has already exhausted substantial public resources.

[21] One of the complaints before me deals with the presence of pornography at the dockyard. This raised institutional issues that concern me. As a practical matter, however, I do not feel that it is possible to sever this complaint from the other complaints. Although the matter is less pressing for the corporate Respondent, there is no doubt that matters like the one before me can only have a demoralizing effect on employees. All three complaints have touched the lives of individual officers and employees, who want to be free of the Complainant's allegations. In the military context, I also think that the corporate self-esteem of the Respondent deserves some measure of protection. The present case has a scandalous side, which reaches out beyond those who have been directly affected by the investigation and the hearing.

[22] The Complainant has already had the benefit of a lengthy hearing. She has been given every reasonable opportunity to present evidence and in a qualified sense, at least, I think the Respondents have been under jeopardy. I seem to have the reverse of the situation in the courts, where a request for an adjournment is rejected and a party is called upon to present its case. If it fails to do so, the opposing party is entitled to a decision on the merits. Here there is a failure to present evidence, followed at least constructively by a request for an adjournment. I am nonetheless of the view that the fundamental logic of the two situations is the same. Since it would be unfair to adjourn the case, and I have rejected such a possibility, I think the Respondents are entitled to a dismissal. The rules against double jeopardy should apply in both circumstances.

[23] One of the virtues of the legal process is its finality. Once a complaint is substantiated or dismissed, the issue of liability is closed. The Tribunal is *functus* and the matter is *res judicata*. If the Tribunal has erred, the parties may seek judicial review. Otherwise, the parties must abide by the results. This is one of the benefits of any court or Tribunal process. At some point, people must move on with their lives.

IV. BAN ON PUBLICATION

[24] There are two other matters that need to be addressed. The first is that I see no compelling reason to maintain the ban on publication of these proceedings. The mere fact that the allegations are offensive is not sufficient to justify a ban on publication. Mr. Hortie may take the dismissal of the complaint as a vindication of his position and anyone who recites the allegations is obliged to respect the fact that the complaint has been dismissed. If they misrepresent the matter, or fail to respect the truth, Mr. Hortie and others have the usual remedies.

[25] The public and the press are entitled to review the Tribunal process and the results in particular cases. Freedom of expression requires some freedom of communication. This is a fundamental part of our system and adds to the justice of the process.

[26] Although I am concerned about the disclosure of personal information relating to the Complainant, the Complainant has requested that the publication ban be lifted. In spite of my finding that she is not competent to represent herself, I feel obliged to take her views into account. She is firmly of the view that a public airing of the matter is important.

V. PRIVATE RECORDS

[27] The Respondents are in possession of an extensive amount of personal information concerning Ms. Day. This information includes medical and psychological records, which go into areas of inquiry that are normally outside legal scrutiny. There is the report of Dr. Williams, for example, which was made when the Complainant was committed to the Eric Martin Pavilion in November 2000, against her will. This report sets out the Complainant's precarious emotional and psychological state at the time in considerable detail. The Respondents are also in possession of the notes made by the Complainant in preparing a lengthy account of what occurred. Dr. Kaplan, the expert witness who testified for the Respondents, has similar material in his possession.

[28] This is information that would normally be kept within the private sanctum and would not be released to other parties. The material was released because the Respondents had put the Complainant's general psychological state into issue in the hearing. This provided the basis of their defence. The complaint has now been dismissed, however, these issues have no more life in them. I do not see why the other parties would be entitled to retain this information without compelling reasons. None have been advanced.

[29] The Complainant understandably objects to these documents remaining in the possession of the other parties. In my view, her request is a reasonable one. The Supreme Court has recognized that claims of privacy in this area have some constitutional significance. This information is entitled to the same protection as our innermost thoughts. There is no reason for third parties to review such personal information after the hearing has been completed, whether by accident or design.

[30] The Respondents have nevertheless expressed a concern that these documents may be destroyed. This is a concern because the Complainant has already stated that she intends to pursue the matter in other forums. She has also stated that she would have destroyed her notes if she had known that they would be disclosed. There are other ways of dealing with these concerns, however. In the circumstances, I think the matter can be dealt with by providing the material to the Tribunal, on the understanding that the material will be kept under seal. If the material is required in the future, the Respondents can apply to the Tribunal for an order to disclose it.

VI. A FINAL REMARK

[31] I realize the Complainant will be disappointed and perhaps angry with these results. She appears to feel that the entire process has betrayed her. Some of this is a product of her experience on the witness stand. She feels that she has been asked to tell the truth, only to be punished for speaking openly about her psychological experiences. I understand her feelings in this regard, but there is nothing I can say, other than to commend her for speaking candidly. This does not have any bearing on the result.

[32] There are limits to the legal process and there are situations where it is simply impossible to proceed. There is nevertheless a positive side to the present hearing. Although there were many difficulties with the process, the most important aspect of the matter may be that the Complainant completed her evidence-in-chief, even if that testimony was ultimately rendered inadmissible. Life is imperfect but there is a

real sense in which she has had her day in court. This is important enough to justify the process. There is nothing more that I can say.

VII. RULING

[33] I am satisfied on a balance of probabilities that the Complainant is incapable of testifying. I am also satisfied that she is incapable of making meaningful decisions regarding the conduct and progress of her case. She does not have the capacity to participate in the hearing. I want it to be clear on the public record that I have serious concerns for her well-being if the process continues.

[34] In the circumstances, I am satisfied that the Complainant has had an ample opportunity to present her case, insofar as that is possible. There is no evidence before me to substantiate her allegations and the complaints are dismissed.

[35] The ban on publication is hereby lifted. The medical and psychological records pertaining to the Complainant, along with the personal notes, may be held for six months from the expiry of any period of review or subsequent appeal. This should be more than sufficient to review the files. If the Respondents wish to provide the Tribunal with a copy of the relevant material, it will be kept under seal. The other copies in the possession of the Respondents are to be destroyed. I would appreciate a letter from counsel, confirming that each of the Respondents have complied with this direction. I will retain the jurisdiction to vary this aspect of my order, should other circumstances arise.

Dr. Paul Groarke

OTTAWA, Ontario
April 4, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NOS.: T627/1501 and T628/1601

STYLE OF CAUSE: Amanda Day v. Department of National Defence and Michael Hortie

RULING OF THE TRIBUNAL DATED: April 4, 2003

APPEARANCES:

Amanda Day On her own behalf

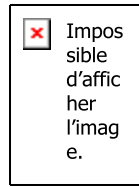
Joyce Thayer For Department of National Defence

J. David Houston For Michael Hortie

APPENDIX A

RULING ON CAPACITY

**Canadian Human
Rights Tribunal**



CANADA

**Tribunal canadien des
droits de la personne**

BETWEEN:

AMANDA DAY

Complainant

- and -

**DEPARTMENT OF NATIONAL DEFENCE
AND MICHAEL HORTIE**

Respondents

RULING ON CAPACITY

MEMBER: Dr. Paul Groarke

2003 CHRT 13
2003/03/12

I. THE APPLICATION BEFORE ME

[1] The following are my reasons on the application of the Respondents for a ruling that the Complainant is not competent to testify in these proceedings. I prefer to phrase this as a question of capacity, and avoid the pejorative associations of the word featured in the caselaw. There is a second question that has arisen in this context, which is whether the Complainant is capable of representing herself. In the circumstances of the case, I do not believe that it would be in the interests of the parties to interrupt the process in order to prepare extensive reasons. I nevertheless feel obliged to issue written reasons before proceeding further.

[2] Before dealing with the background to the application, I would comment that the second question might seem to require a higher degree of capacity, since a party who is competent to proceed must be capable of participating in the conduct of the process. This would normally appear to present a higher standard than the capacity to give probative evidence, which need only be sufficient to assist the trier of fact. The usual logic of the situation seems to be reversed, however, in the circumstances before me. That is because the Complainant's primary difficulty, as Ms. Thayer submitted, is in reciting the sexual allegations at the core of the complaint. This is undoubtedly the most difficult aspect of the matter from a legal perspective.

[3] Although I have focussed more directly on the first question, which relates to the Complainant's ability to testify, the reality is that there is a general concern for her psychological condition that goes to all aspects of the case. I want to reassure the Complainant that, in my view, the other parties have acted out of respect for the integrity of the process and with a keen concern for the Complainant's well-being. There is nothing improper in the application: on the contrary, I think it would have been inappropriate to proceed without canvassing these issues. This holds true, whatever my ruling on the application.

II. GENERAL BACKGROUND OF THE CASE

[4] I should state at the outset that the present case seems to have a troubled history. There is no escaping the fact that the psychological history of the Complainant is relevant to the present proceedings. The medical record, which has not been independently proven, indicates that she has been committed in the past. There is no point in hiding this fact: it does not necessarily speak to the Complainant's present circumstances and as far as I am aware, there is no suggestion from counsel that she is incompetent in the larger legal sense. This merely provides the background to the present application and illustrates, along with the rest of the medical and psychological record, that there are reasons for concern.

[5] Although I am not privy to the events that may have transpired before the hearing, the Complainant has indicated on a number of occasions that the Human Rights Commission and the other parties sought an order declaring her incompetent. I am not exaggerating when I say that she feels that there was something like a conspiracy to have her committed. I do not know the full details of the matter, but there is enough on the Tribunal file to suggest that there are reasons for the Complainant's suspicions. This is not intended as a criticism: this has been a difficult matter for everyone involved with it, and I merely feel obliged to set out the larger set of circumstances behind the present application.

[6] The Complainant inevitably feels that any earlier efforts to have her declared incompetent were merely a convenient way of disposing of the present inquiry. It follows that she is extremely suspicious of the present attempt by the other parties to question her capacity to participate in the hearing. She believes that it is beneficial to her psychological well-being to continue and there is at least some medical evidence that supports such a contention. This raises issues that go beyond the scope of my authority, however, and the Complainant's legal position is that she has a right to proceed. This includes the right to testify and present her account of what occurred. I have warned her that she will be subject to a full and searching cross-examination, which will undoubtedly raise painful memories and prove emotionally difficult. This does not dissuade her.

III. BACKGROUND OF THE PRESENT APPLICATION

[7] There is no question that the application has been properly and responsibly made. The Complainant displayed erratic behaviour in giving her evidence in chief. This consisted of contorted facial expressions, inappropriate pauses, a pronounced shaking of her head, a raising of her arms and the adoption of various postures, all of which presented a departure from the normal presentation of viva voce evidence. I mention these attributes of her testimony because they are not apparent on the face of the record. The Complainant also used expletives, began sobbing, would occasionally raise her voice or adopt a theatrical and mocking tone, and was unable to continue on a number of occasions. The most difficult aspect of her evidence, from the perspective of managing the case, is that she found it difficult, even impossible, to confine herself to the narrative of events that led to the present complaint. She constantly went into other matters, occasionally in a manner that seems strange and even bizarre, to anyone with a developed sense of relevance.

[8] I accept, as counsel has submitted, that the Complainant's behaviour deteriorated as she gave evidence and eventually culminated in what I have described on the record as a "screaming fit", which happened when she found herself unable to describe one of the alleged incidents of sexual harassment. I think this can best be described as formless screaming: there were no words, as far as I could determine, and to a lay person, at least, the Complainant cried inconsolably, like an infant. The Tribunal officer immediately called for order and I left the hearing room, though it is clear that she fell to the floor, "writhing", in the words of counsel and remained there until after the room was cleared. Dr. Kaplan, a psychologist for the Respondents, advised the Tribunal Officer to phone 911, a suggestion that was carried out. This should not be interpreted as a comment on the nature of what occurred, which became a source of controversy between the parties.

[9] One of the security officers, Ms. Dennis, remained in the hearing room and later testified as to what occurred. Her testimony was measured and careful evidence, and I accept her account of events. The only

point that I feel obliged to clarify is that the hearing was not resumed in the absence of the Complainant. This was never a consideration, though the situation might have transpired differently if Ms. Day had been hospitalized. In my view, the matter was handled with the right degree of concern for the well-being of the Complainant and the need to protect the propriety of the process. After the Complainant had recovered, the hearing was briefly resumed, and the Complainant indicated that she wished to continue with her evidence. The other parties understandably requested a recess. The Complainant became visibly angry in response to the submissions of counsel, and I felt it was best to adjourn until the following day, at which time the Respondents brought the present application.

[10] I want to be fair. There is a sense in which this puts the matter in the worst light. I should make it clear that the Complainant is an intelligent person who often speaks lucidly and has a real appreciation of the nature and purpose of the present proceedings. She has given coherent testimony that would support the complaints. One of the problems is that she is not familiar with the practices in formal legal proceedings, and like many lay people, does not distinguish between a formal and informal venue. As a result, her manner and language is often inappropriate. She is unrepresented, which has added to her difficulties, and often seems overwhelmed by the minutiae of the evidence. Having said that, and made allowances for her lack of familiarity with legal proceedings, her psychological frailty, and her many interruptions, she appears to understand the process and has some rough ability to conduct her case and present evidence. There is no doubt that this has placed enormous demands on the patience of counsel, and myself, but that is another matter, which goes more to the issue of accommodation.

[11] After the application was made, I entered into a voir dire for the purpose of deciding the question of competence. The Respondents called Dr. Kaplan, a clinical psychologist, who was in attendance during the hearing. Dr. Kaplan was qualified as an expert and expressed serious reservations about proceeding. He was of the opinion that the Complainant suffers from a paranoid personality disorder, which makes her perception of events inherently unreliable. He also testified that, in his view, the Complainant had gone into a psychotic state while testifying. Dr. Kaplan also prepared a written report, which has been entered as an exhibit in the voir dire. Ms. Thayer placed considerable reliance on his view that the Complainant was

having psychotic episodes at the time that she was experiencing the alleged sexual harassment. The cases suggest that this is a major consideration, but this goes to the merits of the case, and the evidence is far from clear at this point in time.

[12] The Complainant called Ms. Dennis in reply, along with two experts, who were duly qualified. Her therapist also appeared at the hearing, though she did not testify. The evidence of Dr. Hunter, a medical doctor with expertise in Post Traumatic Stress Disorder, was essentially that Ms. Day's behaviour was consistent with such a diagnosis. The other expert witness, Dr. Malcolm, a clinical psychologist, adopted much the same position. Dr. Malcolm has treated the Complainant in the past and was consulted by the Complainant prior to the beginning of the proceedings. Mr. Houston objected vigorously to the fact that Dr. Hunter and Dr. Malcolm believed that it would be an injustice to deprive the Complainant of her right to proceed. These opinions were well intentioned and reflected their view that it would be better for the Complainant to proceed, psychologically. The question of justice is entirely within the keeping of the Tribunal, however, and well outside the scope of expert evidence.

[13] The Respondents also attacked the reliability of the testimony of Dr. Hunter and Dr. Malcolm, on the basis that they were poorly apprised of the circumstances before me. They also argued, understandably, that Dr. Kaplan was in a better position to provide an informed opinion as to the Complainant's behaviour on the witness stand. I think there is some merit to these submissions, which may affect the weight of the testimony but does not negate it. I think it is important, in this context, to appreciate that the Respondents have the burden of satisfying me that the Complainant is incapable of testifying. There is no obligation on the Complainant to prove any positive assertion of fact. The evidence that she called on the voir dire was only called to offset the evidence of the Respondents and the experts were not tendered to prove her competence.

[14] I am left with a disagreement between the experts as to the exact nature of the situation that confronts me. I do not propose to enter into the details of this disagreement, though there was a more specific dispute as to what occurred when she began screaming. Dr. Kaplan was of the view that the

Complainant was rapidly “decompensating”. This terminology was the subject of some discussion. The experts on the other side were more inclined to believe that she had experienced a flashback or “abreaction”, in which she was reliving the traumatic events in question. There was also a suggestion that she was dissociating. I do not propose to settle the dispute: whatever view is adopted, it is evident that the Complainant was not functioning rationally for the duration of the episode.

[15] I cannot make a medical or psychological diagnosis, but there are many reasons to believe that she suffers from paranoia in some general sense. I was advised by Dr. Hunter and Dr. Malcolm that this could be a manifestation of the “hypervigilance” associated with Post Traumatic Stress Disorder. I accept that that she is liable to “dissociate” on the witness stand and may be in danger of losing contact with reality. She does not trust counsel, has difficulty restraining her emotions, and often loses her way on the witness stand. Some of this must be attributed to the fact that the allegations before me are extremely personal and would be difficult for any litigant. Dr. Hunter testified that Ms. Day had an underlying “vulnerability” that makes them all the more trying for someone in her position. All of this presents a challenge for the conduct of the inquiry.

IV. THE LEGAL BASIS OF THE APPLICATION

[16] The cases hold that it is the business of a judge to decide whether a witness is capable of testifying. It is the business of the jury to weigh the evidence. See: *R. Harbuz* [1979] 2 W.W.R. 105 and *Steinberg v. The King* (1931) 56 C.C.C. 9 (S.C.C.). As a result, the question should be dealt with at the earliest possible opportunity, in order to avoid the possibility of a mistrial. These concerns do not arise in the situation before me. The caselaw recognizes, moreover, that the question can be considered at a later point, if concerns arise during the course of a witness’ testimony.

[17] The law operates on the presumption that a witness has the capacity to testify. This does not require advanced abilities. The same observation can be applied to the question whether a party is capable

of conducting its case, which only requires an ability to make basic personal decisions. The Respondents have accepted that they have an obligation to demonstrate, presumably on a balance of probabilities, that the Complainant is incapable of testifying. They rely principally on *R. v. Hawke* (1975) 7 O.R. (2d) 145 (Ont. C.A.), which is instructive on the general issue. They have also referred me to Sopinka's Law of Evidence in Canada (2d), at §13.10 *et. seq.*, which provides a very brief account of the law.

[18] The court in *Hawke* uses the antique and now unsettling language of Wigmore, at §492, in holding that a witness is only disqualified from testifying if “the derangement or defect” is such as to undermine the witness’ ability to give trustworthy evidence on “the specific subject of the testimony”. The fact that the Complainant may have a psychological condition or paranoid personality disorder, or may be suffering from Post Traumatic Stress Disorder, does not prevent her from testifying. I do not know if a test has been enunciated in the caselaw, but the question is whether a trier of fact can properly and safely consider the evidence, in making a determination of the facts. The use of the word “trustworthy” is easily misinterpreted and the issue is not whether her testimony should be believed. It is whether it is capable of being believed.

[19] I feel obliged to add that my primary duty is to protect the integrity of the legal process. Although witnesses may occasionally break down, emotionally, there is a certain level of probity that is necessary to conduct a fair hearing. The legal and evidentiary process calls for a relatively calm and dispassionate assessment of the facts in a given case, and the purpose of the hearing must be respected. I have a fundamental obligation to maintain the level of decorum in the hearing that is necessary to maintain the integrity of the process. This is an indispensable attribute of the legal system and guarantees the justice and fairness of the proceeding.

[20] The trier of fact must also be able to follow and evaluate the testimony. It must be open to intelligent inspection. The evidence must be presented in some kind of logical and coherent manner, which is capable of rational construction. There may be additional concerns in the immediate case, which relate to the obligation of a tribunal to intervene when the process endangers the psychological well-being of the

Complainant. This goes directly to the capacity of the Complainant to present her case, however, and is a secondary concern.

V. THE COMPLAINANT'S ABILITY TO TESTIFY

[21] The parties have come a considerable distance in discharging their burden to establish the Complainant is incapable of testifying. I have real misgivings about continuing, and doubts about whether the Complainant can participate in the hearing in a meaningful and informed manner. I am particularly concerned about whether she can deal with the rigours of cross-examination, which will have to be faced. I have allowed the Complainant considerable latitude in putting in her evidence-in-chief, but the Respondents are entitled to confront her with the details of the case in cross-examination and I see no way of sparing her from such an exercise.

[22] Ms. Thayer submitted that Ms. Day exhibited a lack of understanding of the proceedings and made inaccurate statements of fact from the beginning of the hearing. She gave clear examples, in her estimation, of delusional thinking. There is no doubt that the Complainant's ability to recall events accurately and testify has already been brought into question. Ms. Thayer submitted that there are two major issues that have repeatedly initiated inappropriate behaviour and breaks with reality. The first is the alleged harassment. The second is her mental well-being. The Respondents accept that Ms. Day can give accurate and even compelling evidence. But that ability deteriorates rapidly when she has to deal with the events at the heart of the case. As a result, her evidence becomes untrustworthy when she deals with the essential allegations of fact.

[23] I share the concerns of counsel. It is manifest that the Complainant's previous breakdown was triggered by her recounting of the details of her allegations. In spite of this, I am unwilling to stop the testimony at this point. It has not been established that she cannot provide a meaningful narrative of the events that led to the filing of the complaints. One of the features of the case is that it is the demands of the process that has created the conditions that led to the Complainant's breakdown. The situation is not static

and the real concern is that the process of testifying may precipitate a more pronounced and prolonged breakdown. I realize that the situation is perilous for the Complainant and that counsel are not happy with the possibility that she may have a more serious episode under the strain of their questioning. This is a matter of speculation, however, and I am not satisfied that we have reached the point where I can find that she is unable to testify.

[24] The question of capacity only arises when the cognitive abilities of the witness are fundamentally impaired. The psychiatric testimony in *Hawke*, for example, established that the witness in question was hallucinating on the stand. She was also accompanied, in her mind, by a little girl called Delores. This companion was, in the words of the witness, at p. 160, *supra*, “in my head telling me to say things that would put me in jail and get tommy off”. I have evidence before me that the present complainant has at least been dissociating on the stand, and that she may be moving in and out of reality. There is evidence of psychotic episodes in the past. But there is nothing of these proportions in the situation that comes before me.

[25] As I have indicated, the Respondents have also submitted that the Complainant’s psychological condition at the time when she was allegedly harassed renders her incapable of providing evidence that meets the necessary probative standard. This submission is premature, however, and relies upon a variety of factors, such as the diagnosis of her condition. Although the Complainant’s testimony comes with many imperfections, the Respondents have not established the evidentiary basis for such a finding. The evidence of Dr. Kaplan was contested by the other psychological witnesses and is at least open to argument. There may be reasons to be concerned with this aspect of the testimony, but the more immediate concern is with the Complainant’s present condition.

[26] It became apparent during the voir dire that the experts have a different view as to the merits of the case. The experts for Ms. Day seem to believe that she was sexually harassed and feel that it is the sexual harassment that provided the traumatic event in the Post Traumatic Stress Disorder that her experts diagnosed. The position on the other side is equally stark, however: it is that Ms. Day suffered from a

paranoid personality disorder and merely believed that she was being harassed. Her perceptions have no connection to reality, on this view, and were the product of a psychological disorder. If the latter view is adopted, and the test of the courts is adopted, her evidence is so inherently unreliable that it would be dangerous to put it before a jury. The problem is that this asks me to rule on the merits of the case, in deciding the questions put before me on the voir dire.

[27] Although I do not believe that we have reached the point where I can intervene, I believe that the present situation needs to be monitored. If the testimony of the Complainant continues to deteriorate, or it becomes impossible to conduct a proper hearing, it may be necessary to return to the question of capacity.

V. THE COMPLAINANT'S ABILITY TO PRESENT HER CASE

[28] I have not been able to review the law with regard to the question whether the Complainant is capable of representing herself. The test may be whether she is capable of instructing counsel. This is not a decisive issue at this time, however, and I merely wish to address the concerns that the Respondents have raised with respect to the well-being of the Complainant. The experts who testified on the voir dire disagreed as to the long-term effect of Ms. Day's participation in the hearing. Dr. Hunter and Dr. Malcolm felt that it was essential, psychologically, that Ms. Day have an opportunity to see the matter through to its logical end. This may be incidental to the purpose of a hearing. I nonetheless feel that Ms. Day has a fundamental right to present her case and that the therapeutic effect of doing so is a valid consideration, in examining the rights of a complainant.

[29] I am not as convinced as Dr. Hunter and Dr. Malcolm as to the benefit of the Complainant's participation in the hearing, and I share some of the concerns expressed by Dr. Kaplan. I do not believe, however, that it would be appropriate to intervene in the interests of the Complainant unless we reach a position where she becomes incompetent in the larger sense and cannot make decisions for herself. Up until that point, the Complainant is the only one who can decide what is in her best interests. She may make

choices that run demonstrably against her interests. But that is true of anyone in society and it would be quite wrong, in my view, to treat her as a dependent. This goes directly to the legal question of dignity, which requires that tribunals and courts allow litigants to make their own decisions, however discomfiting that may be.

[30] This is a matter of general policy. When I asked Ms. Day whether she was capable of proceeding, she was unequivocal. She feels that she can continue and advise me that she knows how to ask for help. As far as I can determine, she understands her obligations as a witness, is capable of communicating her thoughts and is generally grounded in reality. She also recognizes the need to ascertain whether her perceptions are accurate and well founded. She agreed, on my questioning, that she should not “swear” in the hearing room and that she is obliged to respect the other participants in the hearing. Whether she can live up to this is another matter.

[31] The Complainant is a party to these proceedings and a finding of incapacity will probably deprive her of her right to have the complaint heard by the Tribunal. At this point, at least, I am not prepared to deprive her of that opportunity. The law of human rights is based on the dignity of the person, which requires that a tribunal respect the personal autonomy of those who come before it. This is a fundamental aspect of being a person and guarantees our freedoms. There are hazards in proceeding, and at some point, it may be necessary to intervene. But at this point, the Complainant has the ultimate responsibility for deciding whether she wishes to proceed. We have not reached the point where I can interfere with that decision.

VI. RULING

[32] I am accordingly of the view that the Complainant is capable of testifying at this point in time and can represent herself. I nevertheless have real concerns about whether she will be able to complete her case. In the circumstances, I think it is premature to rule on the application. It seems more appropriate to

close the voir dire and return to the hearing, on the clear understanding that the matter may be reopened on application by the parties.

[33] My reading of the law, such as it is, suggests that the evidence on the voir dire may be relevant on issues like credibility and should be applied to the hearing as a whole. I would, however, invite submissions from the parties on the matter. There is also an issue of accommodation that requires consideration.

Dr. Paul Groarke

OTTAWA, Ontario
March 12, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NOS.: T627/1501 and T628/1601

STYLE OF CAUSE: Amanda Day v. Department of National Defence and
Michael Hortie

RULING OF THE TRIBUNAL DATED: March 12, 2003

APPEARANCES:

Amanda Day On her own behalf

Joyce Thayer For Department of National Defence

J. David Houston For Michael Hortie

APPENDIX B

EXCERPTS FROM THE TRANSCRIPTS FOR MARCH 20 AND MARCH 21, 2003

**(The passages highlighted by Respondent counsel
have been underlined.)**

From pages 2949 to 2950:

CONTINUED BY MS. JOYCE THAYER:

Q: I think, Ms. Day, I would just like it if you would explain in general terms your other experience with hypnosis and we'll try to be sensitive, but if you can just give us a general idea. Perhaps I can assist you a bit.

Was it a scary experience for you?

A: No, it wasn't a scary experience for me at all. It was -- it was a very pleasant and calm experience. It's just that the person -- it's the subject matter of the issues around the -- it's the subject matter that was discussed around this kind of hypnosis thing with the other person that makes me feel a bit worried.

THE CHAIRPERSON: I'd like to know something about it. You don't have to say much, but just give me an idea of what the subject matter was.

(BRIEF PAUSE)

THE WITNESS: It has to do with the Hell's Angels. And there was a woman who got raped and she got into some trouble because the guy tried to kill her. And she went to the police and she couldn't get help and we were making a plan to help her.

THE CHAIRPERSON: And who were you afraid of, Ms. Day? Just so I know.

THE WITNESS: I'm --

(BRIEF PAUSE)

THE CHAIRPERSON: You take your time

THE WITNESS: Okay

(BRIEF PAUSE)

THE WITNESS: I'm afraid of the police.

(BRIEF PAUSE)

CONTINUED BY MS. JOYCE THAYER:

Q: Ms. Day, you've said it was a very calm and pleasurable experience, the hypnosis. And you explained that it came in the context of some fears you had about Hell's Angels and possible --

A: I don't have fears of Hell's Angels. I'm not afraid of Hell's Angels.

Q: You're not afraid of the Hell's Angels but the concerns that were being raised at the time related to the Hell's Angels, did it? Is that correct?

A: I am a Hell's Angel.

Q: You are a Hell's Angel? Now?

A: Yes.

Q: You're a member of the Hell's Angels?

A: Yes.

Q: How long have you been a member of the Hell's Angels?

A: For a long time.

Q: Were you a member of the Hell's Angels when you were with Mr. Hortie?

A: Not with Mr. Hortie but I've been a Hell's Angel for a long time.

Q: Then you were a Hell's Angel before you --

THE CHAIRPERSON: Can we ask Ms. Day what she means by that? What do you mean by that, Ms. Day?

THE WITNESS: My first time I was told I was a Hell's Angel I was about fifteen (15) years old. And my best friend's mom told my best friend to tell me that I was going to be a Hell's Angel.

THE CHAIRPERSON: What is a Hell's Angel?

THE WITNESS: Well, I've never been entirely sure, myself, but I think a Hell's Angel is somebody who's there to help somebody else when they get raped.

From pages 2963 to 2970:

THE CHAIRPERSON: I have no difficulty, Ms. Thayer, in you clarifying much more specifically why she was hypnotized.

MS. JOYCE THAYER: That's where I was going next.

CONTINUED BY MS. JOYCE THAYER:

Q: Well, if you're just having a conversation about agreeing whether killers and some poor prostitute who --

A: He didn't --

Q: -- who --

A: -- really --

Q: -- if I might suggest, Ms. Day, if you're discussing that and how you can assist someone who had been -- was potentially at risk in that manner, how did the hypnosis assist you in that particular exercise?

A: Well, what he did was he spoke to me very quietly and calmly and he spoke to me in pieces. He didn't tell me a story of what was happening, he just relayed to me --

Q: Hmm hmm.

A: -- pieces of information which I was later able to assimilate for myself and he just simply asked if -- if I knew that that person really, really needed help would I be willing to help her and I said yes and I -- we wanted to go out and help her that day but I was told to forget and so then I simply forgot and a lot of time went by until the pieces came back.

Q: So is what you're saying to me the manner in which he communicated to you was hypnotic? Is that what you're saying and you didn't recollect it until some later point in time?

A: Yes. Well, I was told to forget and it was disappointing at the time but I did forget.

Q: So when you say you were told to forget, that's what made you think you were being hypnotized? Is that correct?

A: No. Peter told me that Robin was like Ravine and that was why -- that's why I have a piece of information that says that my conversations with Robin -- big Robin have been hypnotic.

And in fact, now that I realize some of the things that I've been through in the last ten (10) years, is that I have responded and recalled my instructions from big Robin on -- on when I received the right stimulus, I recall certain things and I know what to say or I know what to do, but I don't necessarily -- when it happens at the time, I have no clue why I'm doing what I'm doing or why I'm saying what I'm saying

But then, later, when I'm able to remember further and go back to that point in time, then I realize that I've said what I said in response to certain stimuli because -- or I did what I did in response to certain stimuli, because I had those instructions.

And I've been operating on a -- from a subconscious level which leads me to understand that I have been hypnotised.

Q: So when you say you had those instructions, you believe that things that you do today are a result of hypnotic suggestions that were given to you while you were under hypnosis. Is that right?

A: Yes, that's right.

THE CHAIRPERSON: You can go further.

MS. JOYCE THAYER: Yes.

THE WITNESS: And I'd like to say that I'm very vulnerable to hypnosis. I would that say that for sure, if -- if somebody was looking for a subject to hypnotise, that I would be a perfect subject because at that -- I -- I am a good subject for hypnosis.

CONTINUED BY MS. JOYCE THAYER:

Q: Can you give me some examples of behaviour that you have come to recently recognize, or in the last little while, to recognize was induced by a hypnotic suggestion? Can you give us an example of something like that?

A: Yes, I can.

Q: Please do.

A: Well, I know one (1) very strange thing was, during the employer's internal investigation, the investigator asked me about the pornography I was complaining about on the protector.

And she said, well, what did you see? And I described -- well, first of all, I described what I saw when I saw the picture and the way that it made me felt (sic) was very strange.

And she said, well, what did you see, or something like that. And I -- and it came out of mouth, without me knowing why I was saying it, and I even scared -- scared myself because I didn't understand why I said what I said. And I thought people were going to think that I was crazy because of what I said.

Q: What did you say?

A: I said, I see Helter Skelter.

Q: And you, afterwards, understood that that was something that Robin had planted in your mind during the course of hypnosis?

A: Well, Robin gave me instructions and he said that if -- he said that I was going to see the picture. And he said I -- I would know -- I was going to figure out which one (1) it was. He said I will know it when I see it. And when I see it, I'm going to say, I see Helter Skelter.

First, he was out on the subject of movies and he says, what's the scariest movie you've ever seen? And I said, well, I -- I can't handle scary movies, I -- I saw The Exorcist but other than that, I haven't seen any scary movies, because I -- I don't enjoy them.

And he --

Q: I'm with you on that.

A: -- said, well, what's the scariest movie you've ever heard of? And I said, Helter Skelter. And then he said, well, I see Helter Skelter. And that was confusing for us. And I couldn't figure out -- I was like, well, yeah.

Q: What about other things, Ms. Day?

THE CHAIRPERSON: When did Robin say that to you, Ms. Day?

THE WITNESS: We were in his library.

THE CHAIRPERSON: I mean in dates. How long ago?

THE WITNESS: Well, I can't remember if it was -- I think it was just after I came back from Thailand, so that was 1987, so, and it was long before -- it was just around the time that I'd met Peter, and it was a couple of years before we had Robin, so it must have been, I think, in 1987.

CONTINUED BY MS. JOYCE THAYER:

Q: Are there any other things that you can think of, besides your reaction to the picture, that were the result of hypnotic conditioning by Robin?

A: Anything else that I can think of that were conditioning?

Q: Well, your response that you later could link back to hypnotic suggestion?

A: Yeah, there's something else I'm supposed to do, and there's something -- there's...

(BRIEF PAUSE)

A: Yeah, there probably is, but without going from the beginning to the end, and going through it in detail with -- maybe with my therapist or something that I probably...

Q: But, there are other things you can --

THE CHAIRPERSON: Well, in what context, Ms. Day?

THE WITNESS: In what context?

THE CHAIRPERSON: Well, did things come up in the course of the sexual harassment, or the pornography as you just described? Were there other incidents like that? Where you found yourself saying something, or doing something? Because you felt Robin had told you to do so?

THE WITNESS: Oh yeah. Yeah, there was another thing, yeah, happened. Oh yeah. Yeah, Robin said -- okay, no -- yeah, I want to get it -- I was going to get a message, well, I got a message and it all had to do with the -- this -- my interpretation of the information that was relayed to me during that meeting, was that I would get a message, and when I got the message, I was supposed to get into a mental institute and tell doctors and nurses about the situation.

And, he said that for sure they were going to think that I was really crazy, and he said no matter what I had to go and do it -- or would I go and do it, and I said, yeah, for sure, I'm going to go.

And so it became very clear that at one (1) point, when I was having the psychosis, that I had to get to the hospital, and that I was dying, and I didn't understand what that was ab -- about totally, but I guess it also had to do with the fact that I had AIDS, which is something that goes back to when I was a Hell's Angel in -- in high school.

So, there's that, then these things that happened in high school, I have AIDS, and then there was -- I was dying, and that was Dr. Brox, and then there was the fact that I had to go to the hospital, and tell them where the -- tell them about that.

CONTINUED BY MS. JOYCE THAYER:

Q: Amanda, can I ask you about the AIDS? Do you have AIDS?

A: Well, what I'm supposed to say is my friend's standing here, and he says, my other friend over standing here, and another friend's here, and we're down in Balka (phonetic) creek, at the bridge, and ov -- behind the high school, we would go down there, and -- and people hang out there, and then I -- Matt's mom says I'm Hell's Angel, and Matt says I'm -- what I want you to do, is when you get this figured out, I want you to say, I have AIDS.

And our other friends' name is Adrian (phonetic) and so I'm supposed to say I have AIDS and then he says, well, Adrian, what do you say when she says that and then Adrian says, he wants to say that it's a song by Eric Clapton, Cocaine.

And I said, great, then you can be my alibi, and it's like a joke. And then -- and then we said, well, then what are you going to do? And he says, well, I'm going to go to my friend Kevin who's standing there.

And Kevin's -- and then -- and then he says, Kevin Duik (phonetic) is famous. And then Matt says, go -- okay, go -- now, go and talk to Berto (phonetic) on the bridge.

So I go over and talk to Berto on the bridge. And the problem is, his girlfriend is getting raped and she's being turned into a prostitute and it's something to do with school. And it's -- also, it's something to do with the drama class because the teacher in drama's telling me to act like a prostitute.

THE CHAIRPERSON: I'm having a hard time following you, Ms. Day. What are you talking about now?

THE WITNESS: These people got murdered later and we didn't understand this guy named Jay Kirk (phonetic) got murdered.

THE CHAIRPERSON: Let's take fifteen (15) minutes.

THE REGISTRAR: Order please.

From pages 2980 to 2983:

CONTINUED BY MS. JOYCE THAYER:

Q: Were they giving you suggestions when you were being hypnotized, were they giving you suggestions that you were to act on at a later date?

A: Well, you see, I told Peter about our day on the bridge, and that we had to go back, and we knew about Jay Kirk, and Tanya Van Tollenburg, but – and they got murdered, and Peter – and I told Peter what I knew about Jay Kirk, and Tanya Van Tollenburg, because I had been – they'd been in our school, and so, Robin knew that my – we had a history of mental illness in my family, and that I had – we had discussed, you know, potentially where we might be later in life, and our cynicisms around that.

And Robin suggested to me on that day, when I'm saying it was a hypnotic experience, or at least, it had that effect on me overall, it was that he said what he wanted me to do was get into a mental institute and start telling doctors and nurses all about it.

And he wanted, in specific, me to tell them --

THE CHAIRPERSON: Right, and did you follow through on that at a later point?

THE WITNESS: Yes, I definitely did, but I --

THE CHAIRPERSON: When?

THE WITNESS: -- I mean, I didn't know it was all -- what it was all about. I just knew that those were -- that was what I had to do, and I mean, subconsciously, I acted it out, but I acted out, I have AIDS, I am dying, from Dr. Brox, and -- and the things that Mr. Hortie had said to me were, and I want you to tell people that you're getting messages from other frequencies, and that you -- by the time this is, like, all the sexual harassment crap, when dockyard is over, you're going to be holding your head, and telling them that you're getting messages on different frequencies.

So, it was, I mean everything came -- all the stuff, all the instructions I got from different people came out, and while I hadn't been consciously aware of getting all these instructions from different people, I -- I methodically did what I was told to do, and I had no idea why I was doing it.

THE CHAIRPERSON: So, when --

THE WITNESS: I --

THE CHAIRPERSON: -- did you act out these suggestions, these commands, when did you act them out? All the way through?

THE WITNESS: Well, and the other thing I was supposed to say, this was from a Navy person, he said, if you want to get a message to me at Department of National Defence, I want you to say, Captain Kirk sent me in.

Now, that makes you sound like you're a total loony when you say something like that, like -- like Captain Kirk from Star Trek sent you in, like, you sound like you're --

THE CHAIRPERSON: Did you say that?

THE WITNESS: Yes, I -- I was saying that on the way to the hospital.

THE CHAIRPERSON: Because you had to say that?

THE WITNESS: Well, the guy from the Navy, he came down to our high school, and he was talking to us, and then he said, if you ever want to get a message to me at National Defence, to say Captain Kirk sent me in.

So, I was saying --

THE CHAIRPERSON: Was it your --

THE WITNESS: -- everything that people had told me to say. It was all true stuff that people told me to say when I was at -- when I was methodically doing all these instructions I was given, I looked like a total loony. But, at the same time, I was having -- I -- I think I was having difficulty, at that time, because my health deteriorated.

I hadn't slept for about -- like, three (3) or four (4) weeks --

From pages 2989 to 2991:

And so I was very calm and quiet. And then Dr. Schuldrop and the nurse were sitting there and they said -- they said something to me about Dr. Runtz. He said, is Dr. Runtz your psychologist? And I said, yes.

And then all of a sudden, without me even knowing, it just seemed to come out of my mouth, like it wasn't even me talking, but I said, yeah, oink, oink, get it? Like, not quite in that tone of voice, I said, oink, oink, get it?

And I was just, oh my God, I've just said something like -- and I hoped that they -- maybe they didn't notice that I'd said that. And I was freaking out because I thought, they're going to think that I'm crazy and they're going to keep me in here forever.

And I didn't know where the hell that came from and I was just trying to stay calm and hope that they didn't notice. And then the nurse said something like, I think there was a few words there, where did those come from?

And then the conversation got diverted somehow. But later I realized that I was supposed to say, oink, oink, get it, when I got in the hospital. But they'd had me drugged up so many times that, the information that I was supposed to tell them, they just kept filling me full of drugs and knocking me out that I couldn't tell them what I was supposed to tell them for going in there and -- but then I didn't even know, like, what it was about and why the hell I was supposed to tell them that.

Q: Who told you to tell them that?

A: Robin and Peter and -- and it was -- and it was -- they said it was really, really, really important and I was laughing at the time and going oh my god, like, get out of here, that's so stupid and Peter got really mad.

He said no, this is really important and Robin was getting really upset in the kitchen and he was yelling from the kitchen at Peter who was in a different room and I was in a different room.

We were all in different rooms of the house and that's why it was so weird and Robin was yelling from the kitchen saying this is really important and Peter is going, it is? Okay, okay, okay. I'll do it again.

So then he did it again. He goes "Oink, oink. Get it?" and he did that like four (4) or five (5) times and finally I just said okay, okay, okay, okay, I get it.

And so -- and then I just forgot about it but then when I ended up in the hospital I was sitting on the couch and then it came out of my mouth "Oink, oink. Get it." and it was just like, where the

hell did that come from? Like, and I didn't know, like, for about -- I didn't realize for honestly a couple years after that that was related to my meeting with Robin and Peter and I at that time.

So it was -- it was just like my brain just burps up stuff that's in there and I can't control it. It just comes out. It's real stuff and it's related to an event but I don't always know why it's coming out at the time.

From pages 2996 to 3000:

THE CHAIRPERSON: Did the same thing happen with Mr. Hortie?

THE WITNESS: Yeah. Oh yeah. He was totally giving me directions on what he wanted me to do, and he was using suggestion in order to manipulate my behaviour. There is no question.

THE CHAIRPERSON: I'd like to hear more about that.

MS. JOYCE THAYER: Yeah.

CONTINUED BY MS. JOYCE THAYER:

Q: Could you give us specific examples of that, Ms. Day? Things that you acted upon, because of suggestions that were given to you by Mr. Hortie?

A: Yeah. It's hard, because I'd have to, kind of, chase it around in my head for a bit.

Q: Well, I'll give you a minute, and just think about it.

A: I know that at one (1) point, he said to me that he knew that I was going through the harassment in the dockyard and he said that -- that he knew I was going to be really crying the blues over it and he said I was going to experience a lot of grief. And he said that I would likely be playing and singing a song which was -- it's a Beatles song -- I can't remember the words.

Little darling, it's all right. Just -- the sun will come out or something.

Q: And what was the context in which you would be singing that song?

A: He said the context of it would be that I would be having so much grief from the harassment that sooner or later I would find myself playing that song and grieving.

Q: Did that happen?

A: It did. I can finger pick that song perfectly and I can hardly even play the guitar.

Q: So that was a message that Mr. Hortie implanted in your mind that you acted on later?

A: Yeah. But I -- the funny thing about it was that I actually didn't realise why I was doing that and why I had achieved that until a couple of years after the fact -- that I was doing -- that I was playing that exact song and that I was able to finger pick and play that song because I can't finger pick and play any other songs other than the ones that my guitar teacher taught me when I was a teenager.

Q: What other types of things can you recall that Mr. Hortie implanted in your mind that you acted on later?

A: He said that there was probably going to be a situation where we didn't see each other for a long time or that we weren't going to be able to communicate together.

So, what he wanted me to do was to say the word credence, and that was going to be -- that was going to -- when -- in some situations where we weren't going to be able to talk to each other that I was going to say the word credence.

Q: Did that happen?

A: Well, yes, it did.

Q: Can you explain?

A: I was in a conference call with the Tribunal and I was hearing Mr. Hortie's voice in the conference call for the first time. I hadn't talked -- I hadn't heard Mr. Hortie on the phone or in person for quite a few years.

And all of a sudden I regurgitated the word credence, and there was talk about the medical -- the medical information and I said I'm not sure if that person has credence. And then I said -- I was having trouble saying my words and then I said, well, I think it's credentials or something. But then I realised after that, like, that I realised that I just regurgitated something.

Q: When did Mr. Hortie tell you that?

A: It was sometime when he said that we had to get to know each other on a very deep level. Then he had to share -- he -- I had to share personal information with him and he was giving me, kind of, this instruction about I was supposed to say the word credence.

THE CHAIRPERSON: Ms. Day, I wonder if I can come in here. Is it fair to say, Ms. Day, so that -- you were in your view you were programmed to say that? Can I put it that way?

THE WITNESS: Well, I think I -- I think I have a tendency to just about do whatever. Like -- like --

THE CHAIRPERSON: Just to help me out, just try and stay with --

THE WITNESS: Yes, I would say I was programmed. But like, I'm just telling you that I have a problem and I have a real tendency. Like, my teachers -- I've had situations in -- in the classroom where teachers ask questions and I can answer within three (3) seconds.

From page 3002:

Q: Let's not worry about those kinds of things. Let's worry about the things where [Mr. Hortie] actually programmed you to do things, Ms. Day.

So you said, some of the things he programmed you to do were sexual. Tell us about some of those things.

A: I don't think I want to. I know he said that -- he said that, by the time the experience was over, that I was going to be holding my head and telling people that I was hearing things on different frequencies.

From pages 3004 to 3006:

THE CHAIRPERSON: Are you saying you were doing what you were programmed to do on a conscious level?

THE WITNESS: I guess Mr. Hortie was basically programming me on a conscious level but he -- I mean, he was able to use these hypnotic suggestions to program me to do things subconsciously but as far as my psyche and my internal workings of my subconscious, he would have a very hard time to get control of that.

MS. JOYCE THAYER: Can we just --

THE CHAIRPERSON: No --

CONTINUED BY MS. JOYCE THAYER:

Q: You're talking about the difference between your conscious and your subconscious here and when you say that Mr. Hortie and other people programmed you, I take it you're saying they're programming your subconscious?

It's not something that you're aware of but later it happens and you think back and you retrieve it out of your subconscious memory? Is that right, Ms. Day?

A: Well, I'm almost wondering if, like, programming is a kind of strong way to say. I mean, it boils down to intent.

I have to be honest with you, I don't feel that, like, when my friends have suggested to me that they want me to remember certain key phrases or messages and things, that they're trying to do something harmful or hurt me, but I think that the way that Mr. Hortie is trying to use -- trying to use the hypnotic suggestions and to prog -- I'm saying that Mr. Hortie is very harmful and he is intentionally trying to manipulate me with that kind of -- with exactly that kind of --

Q: And --

A: -- suggestion and mental manipulation --

Q: And --

A: -- and I'm a person that I will -- I'm -- I'm -- I am a perfect target for a manipulator like that.

Q: So you're saying that he was able to implant in your subconscious things that you had to act on years later? For instance, when you blurted out the word credence in the course of the conference call?

A: Hmm hmm and holding my head and saying that I was getting information on different frequencies.

Q: When did you do that?

A: On my way to the hospital. I had called Kevin Duik to find out if he was famous and -- and then I was regurgitating all this stuff and that was one of the things that came out and later when I traced it back and I realized that that was -- it was -- the source of it was Mr. Hortie.

From pages 3018 to 3020:

CONTINUED CROSS-EXAMINATION BY MS. JOYCE THAYER:

Q: Ms. Day, when we left off yesterday we were talking about the fact that some of the things that you've done over the course of time has been as a result of suggestions that have been implanted in your subconscious by a number of different people.

And you've told us about suggestions that were implanted by Dr. Brox, by some of your friends when you were on the bridge, when you were age fifteen (15), by Robin who was the Hell's Angel and by Mr. Hortie.

Were there any other individuals that you can recall in your life, that have given you the same type of suggestions that you've eventually acted on, and had to reconstruct what happened?

A: Yes, there have.

Q: Could you tell us about those, please?

A: When I was a young child, my grandma and my aunt and my mother took me to a church in Calgary. And there was a whole bunch of kids there and we had to see a priest and the priest was talking to us and I was very young.

And he asked if there would be any volunteers, and I was one (1) of the kids that put up my hand. And he wrote my name down on a list. And he told us that what he wanted us to do is that if we knew where there was a very, very bad man, that we were going to be able to talk to God.

And what he wanted us to do was to look up at the window on the left, up in the church. And when we look up there, then we'll know that God is talking to us and that when we need to tell people where there is a really bad, bad man, that we can tell those people that God is talking to us and God is telling us what to do.

And he said that he wanted us to know that, something like, these things are very difficult but we needed to feel safe in ourselves that we -- that we could be a voice for God.

Q: And when did you act upon what you were told by the priest as a small child?

A: Well, I know that when I had my grievance hearing with Captain Blattman he didn't believe that I'd been sexually harassed and he started asking me all kinds of really, really, really stupid questions that were just really antagonizing.

And I remember that I was really scared that after they were going to think I was crazy because I remember looking up to the left and then looking at Captain Blattman and saying squarely to Captain Blattman, and because God is telling me to, because God was telling me to make the complaint.

But then, I think my union representative was a little bit disturbed about the fact that I'd said something like that and I was, kind of, disturbed about it myself. And I didn't -- it took me over a year to realize where that -- where that statement I had made was coming from because it was something that I was told to do when I was a very small child and I did it without thinking of it.

But when -- it made me look like I was crazy but when -- and then it took me a long time to figure out why I had said that God was telling me to tell them that.

From pages 3043 to 3047:

CONTINUED BY MS. JOYCE THAYER:

Q: Ms. Day, can you tell us about those situations where Mr. Hortie challenged your perceptions in a way that made you feel crazy?

A: Yeah. I mean, he did that on a day -- on a daily basis. I think every contact I had with Mr. Hortie was -- was manipulative to the extent that he -- he took my perception of the situation which was standing upright, as an analogy, and he took it and flipped it upside down and told me that it was actually this way, which was his way, and I mean, if I said something's white, he would say, no, that is black.

It was that -- it was that distinct.

Q: Did it make you feel crazy or question your own --

A: It put me in a situation where I was constantly having to reality test myself. I was constantly have -- I was in crisis all the time because my perception was upside down. I was going to work and going home. It was like -- it's like if -- it's as if I was walking around upside down and I was seeing the whole world upside down.

THE CHAIRPERSON: Tell me --

THE WITNESS: It was --

THE CHAIRPERSON: Tell me more about --

THE WITNESS: It was totally --

THE CHAIRPERSON: -- this, Ms. Day.

THE WITNESS: -- confusing.

THE CHAIRPERSON: Ms. Day, I want to hear more about this. Can you give us examples?

THE WITNESS: Everything. Just everything.

CONTINUED BY MS. JOYCE THAYER:

Q: Well, just give us a specific example. I know that it was very persuasive but there must be some things that stand out as particularly challenging or that you just couldn't believe after you reality checked that he had suggested that?

A: Well, just the fact that – just the fact that he could touch my body without my permission was – flipped my reality upside down. Okay? The fact that he could physically touch me, shove his tongue in my mouth, put his penis into my body – into my mouth, into my vagina and into my bottom, the fact that he was allowed – he allowed himself to do those things against my will and without my permission and the fact that he could even just touch me. Like – like that was enough.

Q: What are you --

A: After a while it was just like this much of a touch was, like -- I felt like my whole body was on fire. Like, I felt like a burn victim. Even just -- and just anybody.

THE CHAIRPERSON: And you're touching yourself very lightly?

THE WITNESS: Anybody just even coming within my body space touching me like that felt like -- I felt like a burn victim.

THE CHAIRPERSON: What do you mean that it flipped your -- what was the term? Flipped your sense of reality?

CONTINUED BY MS. JOYCE THAYER:

Q: You said you felt like you were walking upside down all the time?

A: Yeah. It felt -- it -- the way -- the way my mind felt from what he was doing was that, like, I was -- my world used to be normal. I used to see -- like, I used to see people normally. Like you're

all upright but the way that my mind felt when Mr. Hortie was harassing me, I felt like I was seeing everything upside down. Like, that was how -- sorry for swearing. I'm not going to swear.

Q: Right.

THE CHAIRPERSON: Say what you want to say.

THE WITNESS: I felt so fucked up in my head because the way Mr. Hortie painted my perception of things and interpreted -- he interpreted all my perceptual data and told me what was happening in the work place and in my -- in my own personal life that I was reality testing myself --

THE CHAIRPERSON: And you're saying he had it all wrong?

THE WITNESS: He had it all -- he was telling me everything all upside down but that's the only way I can explain it to you.

THE CHAIRPERSON: Was it only Mr. Hortie or was it other people as well?

THE WITNESS: No, it was only Mr. Hortie. I mean, there were -- but then there were circumstantial things from people in the work place which supported what Mr. Hortie was telling me was happening to me.

THE CHAIRPERSON: So how did you deal with that? So you mean you --

THE WITNESS: It -- it has definitely in -- influenced me and it's -- it made me feel like I was completely unable to -- to get out of the situation. I felt trapped because there were circumstantial things which were _- that were very solid evidence that, in fact, I couldn't get help and that I had to conform to the conditions which were being placed on my employment.

THE CHAIRPERSON: Ms. Thayer, there's an important question and I think I should ask it. And I know this is difficult for you, Ms. Day. But did you not consider the possibility that the problem was in your mind?

THE WITNESS: Of course I considered the prob -- that the problem was in my mind, that's part of reality testing.

THE CHAIRPERSON: So, tell me --

THE WITNESS: Because all this stuff was happening and I -- I -- after awhile I got so messed up, that's a better word, I got so messed up that I -- like, I mean, I was getting messed up from the very beginning. Let's just say, I was getting really, really messed up from the very beginning.

But I got so severely messed up -- I got so severely messed up that I could just -- I was just -- I felt like I was a carcass. I felt like a dead body, I was completely numb. I mean, I was numb from the beginning, but I'm talking about really, really, really numb. Like -- like, I felt like I'd been injected with anaesthetics, I was so numb. I had no feelings. I had not one (1) iota of a feeling.

And that was by Sept -- like, October of '94, when I was back working in the shop in Building 190. I was just -- I was a dead body walking around.

THE CHAIRPERSON: And what happened, Ms. Day? Did it get better or worse?

THE WITNESS: Well, I just -- I thought, well, I'm going to go right out on a limb. And I told Rod Lundgren that I had to get to a psychologist and that I, you know, if they could -- if they could get a psychologist for me that I'd really appreciate it.

And I -- like, I'm really sorry but I'm obviously such -- I'm obviously, you know, I need a shrink right away because I am seriously a messed up person and I cannot function.

I mean, and I recognized that I -- that I was -- I mean I was like, flat. Normally, in a day, a person has -- like we go through a range of emotions. In -- in an hour you can have -- I don't know how many emotions you could experience, five (5) or six (6) significant emotions in an hour, just through your natural thoughts or whatever.

But, you know -- you know, you'd be up and down, up and down, up and down. But I was like, flat. I didn't feel anything. I was like a -- I was a dead body. And it was just like, you know, I am obviously so crazy because my -- I know I'm being harassed here, and I know all this stuff is happening but this guy is telling me things like, well, if anybody asks you about my problems, just tell them that we're going to get married, and things like that.

And then the threats and then -- and then, as I started talk -- as people were talking to me in the workplace, the physical threats, that he was going to hurt other people, or he was going to hurt me.

And I still didn't know where this gun was, you know. He's going to blow off his own head and he's going to do it in my house. This was all really scary stuff. And, yeah, I doubted -- I -- it's a -- I think it's a natural, healthy process. If you're not reality testing yourself, you -- if a person isn't reality testing themselves, then those are the kind of people that you see in the hospital.

And the fact that I was thinking of myself, that I might be crazy, I think that's an indication that I was really healthy. But I was really, really messed up. And I had to get -- and that's why I asked if I could go to see -- get a psychologist.

ADDITIONAL EXCERPT

From pages 3077 to 3080:

THE CHAIRPERSON: But what you need to address is your ability to give evidence. And the problem is that you said a number of things which make it quite clear that you have difficulty distinguishing between your perceptions and reality.

MS. AMANDA DAY: I don't think I --

THE CHAIRPERSON: And that those perceptions --

MS. AMANDA DAY: -- have problems distinguishing between my perceptions and reality. I think, it's clear that the employer has a hazing process, and it's clear that my perceptions were painted by Mr. Hortie. And clearly, when you open up the voir dire, and I understand that there are issues of competence and there are legal issues, which I don't understand.

But when people -- I mean, even when people are telling me that they feel that I'm paranoid and delusional, then it influences my perception to the point that I have to question myself, whether or not I am paranoid and delusional.

So it's like the Hydenberg (phonetic) uncertainty principle, you -- you can't measure one (1) thing and you can't be certain of the position of one (1) thing, when -- when you're trying to do something else.

And it becomes a very difficult situation to cope with. And I'm telling you that, my perception of reality is valid. And your perception of reality is yours. And yours is different and mine is different; that doesn't mean that mine is wrong or that I'm impaired.

THE CHAIRPERSON: I think I'm in the position where I have to assume that some of what you told us, happened in your mind rather than in reality.

MS. AMANDA DAY: Well, I think that definitely what this person -- what Mr. Hortie did to me, was to get my mind messed up in such a way that he was able to carry out these sexual abuse and sexual assaults and sexual harassment.

And that's clear, that there were several things said to me, and that he manip -- manipulated my perception and that he -- Mr. Hortie impaired my perception at the time.

But I'm telling you that, now, I'm aware that those things were happening and that I know why I was having so much difficulty. I'm not saying that I'm still having those problems now, which is fundamentally different from the fact that I'm aware of what was happening at the time, in retrospect.

(BRIEF PAUSE)

MS. AMANDA DAY: However, I, myself, I -- I'm left to question whether or not I'm still subject to influences of directions that I've been given by Mr. Hortie, suggestive suggestions. I'm not sure how suicidal I may be, I'm not sure how harmful I may be to myself.

THE CHAIRPERSON: I'm concerned about that, Ms. Day.

MS. AMANDA DAY: Yes, and I'm concerned about it, too. And when I went home yesterday, I started to be -- trying to think and trying to figure out what's, you know -- because I think that's the other thing that people like that do, is that they mess you up so much, they -- they can even, you know, kind of predict a future path for you.

And, I mean, he was telling me things like, the harassment was going to make me feel -- I was going to feel so, so, so much grief over the fact that I was being harassed by all these people. When he was the one (1) who was painting my perception and telling me that nobody liked me and nobody wanted to work with me.

So those are things that have been coming to fruition over the course of time, that I haven't understood. But they've been suggested to me by -- to me by Mr. Hortie. So I'm left to wonder, well, I don't know what else he planted in my mind.

THE CHAIRPERSON: Did you --

MS. AMANDA DAY: And whether or not I'm suicidal is another -- is another consideration for -- for a victim of this kind. If you have to consider, I suppose, that there -- that there is a serious danger that I may --

THE CHAIRPERSON: Did you talk to --

MS. AMANDA DAY: -- cause harm to myself -