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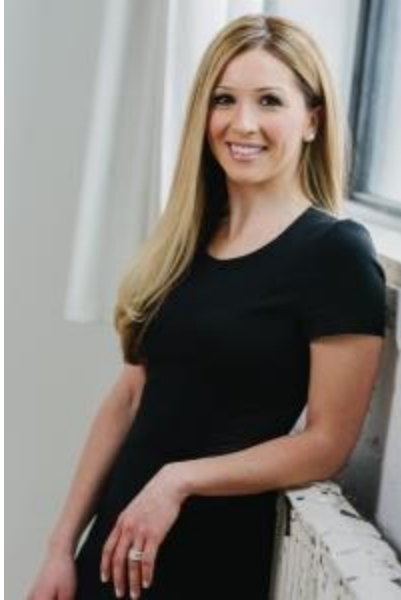
Criminal



Testimony of officers who face allegations poses challenge for lawyers

Thursday, September 07, 2017 @ 03:52 PM | By Terry Davidson

Criminal defence lawyer Tina Kaye has some tough questions for Toronto Police Const. Michael Theriault.



Tina Kaye, Tina Kaye Law

But Kaye, of Tina Kaye Law, may be very limited in what she can ask during her potential upcoming courtroom cross-examination of Theriault, who in May 2016 arrested and charged Kaye's client with impaired driving and is set to take the stand in the client's trial.

What will be in Kaye's crosshairs is the officer's credibility, as Theriault, himself, was charged late last year with some hefty criminal offences, including an allegation he misled police.

Theriault stands charged with aggravated assault and assault with a weapon after he allegedly beat 19-year-old Dafonte Miller while off duty in Whitby on Dec. 28, 2016. Theriault was also charged with mischief after he allegedly misled investigators handling the Miller incident.

But Theriault's cross-examination could be a tough go for Kaye, who said Friday that the questions she will be able to ask him about his charges in the Miller incident will be up to the judge presiding over her client's trial.

Kaye said police officers, given their power and authority, should be held to a higher standard, and that officers who take the stand should be able to be questioned about past suspected misconduct, and not just in circumstances where they have been formally charged.

"It is certainly something the officer [Theriault] should be asked about," said Kaye. "If this were any other civilian witness and it came to our knowledge that they were charged with a theft, for example, it is certainly something I'd cross-examine on because it is an alleged crime of dishonesty and I think it's important, and it does go to a witness' credibility. In my view, officers shouldn't be any more shielded than anybody else in the public with respect to that type of cross-examination."

Police officers who are called to testify but face allegations, themselves, present courtroom complications when it comes to questioning them about those alleged incidents, said Kaye. And like some other lawyers, she wants the Ontario Court of Appeal to revisit the issue and "permit broader questioning of

officers, especially when it comes to allegations of dishonesty.”

“Judges will make findings in any given case about an officer’s credibility and I think we should be permitted to be able to ask questions of that officer if we encounter them [as to] what happened in a prior matter,” said Kaye, adding that the current situation is “unfair in a process where we are looking for fairness and the truth.”



Daniel Brown, Daniel Brown Law

Toronto defence lawyer Daniel Brown, of Daniel Brown Law, paints a complicated picture.

“Certainly the instances where police are charged with crimes of dishonesty are few and far between, but when it happens it is a significant occurrence because our courts rely on the credibility of police officers to substantiate many criminal charges,” said Brown.

As an example of how complicated and limiting it can get for cross-examining lawyers, Brown cited recent news reports about a judge who threw out an armed robbery charge from 2012 after she found the arresting York Regional Police officers beat the suspect at the station and then attempted to cover it up.

The fact that those officers have not charged criminally or formally disciplined by their force means their actions would not be able to be questioned by lawyers in a subsequent court case in which the officers were involved.

“Our courts have said those findings would have no probative value in a subsequent court case unless those officers were charged criminally or disciplined internally for their behaviour,” said Brown, who, like Kaye, called this an issue that should be revisited by the Ontario Court of Appeal, who Brown says set the rules back in 1999 with *Regina v. Ghorvei* [1999] O.J. No. 3241.

“It’s clearly a problem because what we’ve seen over the last five years ... are numerous examples where police officers were found to have engaged in this type of misconduct, where judges have declared on a balance of probabilities that they have given false or misleading evidence in court, and our highest court in Ontario has said this has no probative value in subsequent cases, and that just defies common sense.” Criminal defence lawyer Tina Kaye has some tough questions for Toronto Police Const. Michael Theriault.

