

(i) The Meaning of “Such Incitement is Likely to Lead to a Breach of the Peace”<sup>356</sup>

In *R. v. White*,<sup>357</sup> Macdonald J. broadly defined breach of the peace as a concept which is “open-ended and intended to embrace circumstances which may arise but which cannot be anticipated with precision”. He adopted the decision of the English Court of Appeal that:

... there is a breach of the peace whenever harm is actually done or is likely to be done to a person or, in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbances.<sup>358</sup>

This broad definition of breach of peace is implicit in *Rehberg* where a person was found guilty of inciting hatred by burning a cross near the home of a bi-racial couple and in *G. (M.)* where spray painting hateful messages on places of worship was held to be public incitement of hatred. It is reasonable to infer that these acts of hate resulted in an immediate breach of the peace for members of the identifiable group who feared for their safety and the safety of their children.

## ISSUE 27: WHAT ARE THE PERMISSIBLE USES AND DANGERS OF USING RELIGIOUS BELIEFS AS EVIDENCE IN A CRIMINAL TRIAL?

### a. *Relevance*

Evidence of an accused’s cultural and religious beliefs supporting a particular criminal act, such as murder, may provide evidence of motive for the crime; in *R. v. Humaid*<sup>359</sup> the Ontario Court of Appeal held:

If an accused relies on religious and cultural beliefs like those described by Dr. Ayoub to support a provocation defence, the trial judge must carefully instruct the jury as to the distinction between a homicide committed by one who has lost control and a homicide committed by one whose cultural and religious beliefs lead him to believe that homicide is an appropriate response to the perceived misconduct of the victim. Only the former engages the defence of provocation. The latter provides a motive for murder.<sup>360</sup>

### b. *Dangers*

Evidence of a witness’s religious beliefs may distract the trier of fact from the core issues and lead them to draw improper inferences based on prejudice or

<sup>356</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 319(1).

<sup>357</sup> *R. v. White*, [1994] O.J. No. 1766 at para. 18 (Ont. Gen. Div.) [*White*]

<sup>358</sup> *Ibid.*, at para. 17.

<sup>359</sup> [2006] O.J. No. 1507, 81 O.R. (3d) 456 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 232 (S.C.C.) [*Humaid*].

<sup>360</sup> *Ibid.*, at para. 86.

stereotyping. This is particularly true in cases where a witness holds minority religious views that are poorly understood, or even disliked, by the majority in society. Of course, the converse is also of serious concern: there is a risk that the witness who holds more mainstream, popularly understood beliefs is more likely to be held credible.<sup>361</sup> This is true whether the issue is framed in relation to the significance of the oath for the witness, or in some other manner.<sup>362</sup> For example, in *R. v. T. (A.)*<sup>363</sup> the Ontario Court of Appeal noted that the manner of the Crown's focus on the accused's religious beliefs was an invitation to convict the accused because of his religious beliefs:

This was no innocent metaphor. In the context of the evidence at trial and the other comments made by the Crown in closing, it is evident that he was calling the appellant a "Jesus nut." The Crown then asked the jurors to decline a "ride" on defence counsel's helicopter because the "Jesus nut" looked "a little loose". This was an invitation to convict the appellant because of his bizarre religious beliefs.<sup>364</sup>

***c. Should the Dangers of Using Religious Beliefs in a Criminal Trial be addressed at Trial?***

If a criminal lawyer is defending a person belonging to a minority faith which is not popular with the majority of Canadians, for example Islam, it may be necessary to expressly point out to the trial judge or jury the dangers of relying on religious beliefs as evidence in a criminal trial. For example, there is a real danger that in relation to some religious groups, such as Muslims, due to conscious or unconscious stereotypical beliefs, the triers of facts may simply convict accused persons because of their religious beliefs, especially when charged with offences consistent with the stereotypes. In an appropriate case, the trier of facts should be instructed on the relevance, dangers and potential errors of relying on religious beliefs in convicting accused persons. For example, on the facts of *T. (A.)*, the Ontario Court of Appeal indicated that:

Absent an instruction about the limited probative value of the appellant's religious beliefs and a clear admonition to ignore the prejudicial remarks by the Crown, it was highly possible that the jurors engaged in impermissible reasoning. There was a potentially straightforward path to conviction: the appellant was a crazy, religious zealot and thus the type of person who would commit this crime.<sup>365</sup>

The Crown occupies a special position in the prosecution of criminal offences, which excludes any notion of winning or losing and must always be characterized by moderation and impartiality.<sup>366</sup> Therefore, the Crown and

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<sup>361</sup> *R. v. Santhosh*, [2016] O.J. No. 5158, 2016 ONCA 731 at para. 40 (Ont. C.A.).

<sup>362</sup> *Ibid.*, at para. 54.

<sup>363</sup> [2015] O.J. No. 455, 2015 ONCA 65 (Ont. C.A.) [*T. (A.)*].

<sup>364</sup> *Ibid.*, at para. 35.

<sup>365</sup> *Ibid.*, at para. 40.

<sup>366</sup> *R. v. Boucher*, 1954 CarswellQue 14 at para. 26 (S.C.C.).

the defence may be able to agree on the limited value, if any, of the evidence of religious beliefs in a criminal trial.

However, in some circumstances, it may be that the defence wishes to rely on stereotypes, supported by expert evidence, to the benefit of the accused. In *Humaid*,<sup>367</sup> the accused killed his wife and wanted the court to accept that because of being Muslim whose culture and religion is male dominated and does not tolerate infidelity, upon suspecting his wife engaged in adultery, he was provoked into killing her. Therefore he was not guilty of first degree murder. Expert evidence was called to this effect. The Ontario Court of Appeal remarked:

The difficult problem, as I see it, is that the alleged beliefs which give the insult added gravity are premised on the notion that women are inferior to men and that violence against women is in some circumstances accepted, if not encouraged. These beliefs are antithetical to fundamental Canadian values, including gender equality. It is arguable that as a matter of criminal law policy, the “ordinary person” cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values. Criminal law may simply not accept that a belief system which is contrary to those fundamental values should somehow provide the basis for a partial defence to murder.<sup>368</sup>

It should be noted that the Ontario Court of Appeal, above, referred to the beliefs attributed to Muslims as “alleged beliefs”. This is positive because the Court of Appeal did not stereotype a billion Muslims into one kind of belief system.

### **ISSUE 28: COULD A PERSON VERBALLY ABUSING A MUSLIM WOMAN FOR WEARING A HIJAB BE CHARGED WITH CRIMINAL HARASSMENT OR MISCHIEF UNDER THE CRIMINAL CODE?**

The law on this issue is relevant to discriminatory verbal abuse on any prohibited ground.

Under existing law, a single act of discriminatory verbal abuse may qualify as criminal harassment. For example, in *R. v. Medeiros*,<sup>369</sup> the accused pleaded guilty to yelling at an unknown Muslim woman that “Muslims are terrorists” and “pigs”. Subsequently, the accused sought to strike that guilty plea, but the trial judge refused. He was sentenced to jail. He appealed on the basis that the admitted facts would not support the criminal harassment offence.<sup>370</sup> The Summary Appeal Court, however, disagreed and held that *the* random and hostile way the accused approached the complainant in a public park, the offensive content of his insulting and threatening language

<sup>367</sup> [2006] O.J. No. 1507 at para. 67, 81 O.R. (3d) 456 (Ont. C.A.).

<sup>368</sup> *Ibid.*, at para. 93.

<sup>369</sup> [2014] O.J. No. 5497, 2014 ONSC 6550 (Ont. S.C.J.) [*Medeiros*].

<sup>370</sup> *Ibid.*, at paras. 1, 28.