

Carroll v. Trump: Lessons For Investigations Of Historic Claims Of Sexual Abuse



We have had mandates to investigate allegations of sexual abuse that occurred many years ago. As we point out to clients who wish to retain us, beyond the complexities of every case of this kind, most notably that there is usually no direct evidence of the event having transpired, “historic” cases present unique challenges: Witnesses may no longer be available, documents may have been destroyed, and memories inevitably fade.

However, what we have learned through experience is that these cases are not impossible to investigate.

The result of *Carroll v. Trump* is not only a personal vindication for a victim of sexual abuse against a very powerful man; it also provides interesting lessons as to how an investigator might look for relevant evidence in a historical case.

Consider these examples:

Confidant Witnesses

Two friends of Ms. Carroll gave evidence at trial. While they did not see the events themselves, these confidants could recall, years later, what Ms. Carroll told them, where they were when they had these conversations, their own reactions, as well as that of Ms. Carroll.

In our practice, we will often interview confidant-type witnesses such as Ms. Carroll’s friends, because they can provide helpful information relevant to the complainant’s credibility. For example, they can confirm that the complainant told them about the abuse at a certain time, they can tell you how the complainant described it, and what their emotional state was at the time. The evidence of these types of witnesses can also be relevant where a respondent alleges that the complainant has fabricated their allegations in the years since the assault. The most persuasive confidant evidence will be that of individuals who were confided in almost immediately after the event occurred (for example, in Trump’s case, Ms. Carroll confided in one of her friends minutes after the attack occurred, and the other friend a day or two after the attack).

The Victim Herself

One of the most compelling aspects of Ms. Carroll's case was that the jury was prepared to accept her evidence, notwithstanding some gaps in it. She could not, for example, recall the date of the incident. Instead, the jury focused on the part of the narrative that clearly remained with her – the sexual abuse in the dressing room. Ms. Carroll was able to recall details including how she got there and why, what Mr. Trump did to her, and the pain that she felt. The jury, quite correctly, did not find her inability to name a date or exact time of year relevant, or undermining of the reliability of the key elements of her testimony. Moreover, the jury accepted the impact the abuse had on her over the years, notwithstanding her appearance as a high functioning person. This is a reflection of the quality of Ms. Carroll's own testimony and how it was used so effectively at trial.

This mirrors our own approach. When we interview complainants, we are not looking for perfect recall, and often, there are gaps in the evidence. If an investigator is trauma informed, they will understand that there can be legitimate gaps in a person's memory because of the way trauma impacts memory recall. These gaps do not necessarily undermine the credibility of a person's story, and indeed, they can be consistent with the person having experienced a traumatic event. And, if it is part of an investigator's mandate to consider the impact of the conduct on a complainant, the trial is a great reminder that people can be harmed in many ways, and the impact needs to be explored with an open mind, as the damage to a complainant may not be obvious. Investigators should be alive to asking the following questions of complainants: "How did the conduct make you feel?" , "What was going through your mind when...?", or "What can't you forget?"

The Other Women

Ms. Carroll was able to use the evidence of two other women who said that they had been sexually assaulted by Mr. Trump, to advance her case. The testimony of these women, coupled with the ubiquitous "Access Hollywood" tape, helped jurors see that Mr. Trump had a propensity for the behaviour he was accused of, and quite capable of it.

In our practice as well, there are times when we may rely on similar fact evidence when making our findings. As a caveat, as an investigator, proceed cautiously here because a misuse of this type of evidence has the potential to be unfair to the respondent. The investigator will need to be satisfied that the incidents considered are sufficiently close in fact to be considered "similar," and that the respondent has an opportunity to respond to the similar fact evidence, among other things.

No Trump

While portions of Mr. Trump's deposition were put into evidence, he declined to testify at the trial himself. Mr. Trump's failure to attend was in stark contrast to the three days Ms. Carroll was on the stand, under oath, telling her own story.

There is a parallel in a workplace investigation, when a respondent declines to be interviewed. In those cases, as in the Trump case, we are left with the evidence of the complainant and any other sources of evidence (confidant, similar fact evidence, etc.). We can still make findings if the evidence we have before us is sufficiently reliable to meet the balance of probabilities standard that we use in workplace investigations.

The Expert Witness

Some of the jurors may have begun the trial influenced by myths and stereotypes about victims of sexual abuse, for example, that victims always scream and resist, or that because the event is so traumatic, it is perfectly inscribed in the victim's memory. They may have thought that a truthful victim should have fought back in some way, and that the victim can remember every detail, and be able to recite, with exact precision, what occurred to them and when.

To combat these beliefs, Ms. Carroll's legal team deployed an expert witness, a psychologist well versed in trauma, to help explain why people who have been sexually abused may react differently than the stereotypes and myths predict. The psychologist was also able to explain the long-term impact the sexual abuse had on Ms. Carroll.

Workplace investigators are not likely to interview an expert witness. However, if you are investigating these types of cases, you need to be familiar with many of the concepts this psychologist explored on the stand. It is imperative that an investigator conducting these types of investigations be familiar with the myths and stereotypes about sexual assault victims, to ensure that their questions to the parties and assessments of the evidence do not perpetuate these myths.

Concluding Thoughts

As detailed above, there are many lessons that workplace investigators can take away from the *Carroll v. Trump* decision. Conducting sexual misconduct investigations, particularly those involving historical allegations, is challenging. Investigators who undertake this work must be trauma-informed, must have a strong grasp of assessing credibility, and must be aware of all potentially relevant sources of evidence. Employing these skills effectively ensures that the best evidence is collected, which ultimately leads to a fairer investigation process for both the complainant and the respondent.

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