

EXPERT EVIDENCE

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Likewise, in a recent decision of the Nova Scotia Court of Appeal, Saunders J.A. discussed the important role of the search for the truth in the adversarial process:²⁵

All trials are important. They must not be rushed. One must not allow the careful, logical and sometimes awkward and painstaking search for the truth to be sacrificed on the altar of speed and efficiency...

Canadian and American courts appear to be responding to the call for public confidence in the justice system by emphasizing the search for the truth.²⁶ Absent the search for the truth, the cynics who describe the justice system as a duel dignified by the trial process have it right. The search for the truth must be balanced with the need for a definite and peaceful resolution of disputes in an impartial and fair system.²⁷

The values of the civil justice system differ from those of the criminal justice system, which include presumption of innocence, the accused's right to a full defence, procedural and substantive safeguards from wrongful prosecution and conviction, deterrence, rehabilitation, victim's rights and accountability for harm. While central to the criminal justice system, these values are not present in the civil justice system. The civil justice system is to be an accessible system where accuracy is balanced with fairness and efficiency. The values in both systems are to be balanced in such a manner so as to foster public confidence in the administration of justice.

II. ADMISSIBILITY OF EVIDENCE

(a) Admissibility versus Use

The rules regarding admissibility of evidence relate to whether proffered testimony can be properly put before and considered by the trier of fact.²⁸ Although most rules of evidence deal with the admissibility of evidence,²⁹ there are some rules regarding its use. The rules regarding use relate to the way admitted evidence can be used by the trier of fact. In

²⁵ *Morrissey v. Zwicker*, [2001] N.S.J. No. 126, 2001 NSCA 56 at paras. 25 and 29.

²⁶ In a June 2004 speech, McLachlin C.J. observed that although the ability to find the truth was not absolute, it is important: "To be sure that the judge or jury gets at the truth has been the prime concern of the justice system for years." See The Right Honourable Beverley McLachlin, "Judging in a Democratic State" (Paper presented at the Sixth Templeton Lecture on Democracy, 3 June 2004), available online at: <http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/DemocraticState_e.asp>.

²⁷ S. Schiff, *Evidence in the Litigation Process*, 3rd ed. (Toronto: Carswell, 1988) at 10.

²⁸ D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999) at 2.

²⁹ *Ibid.*

most circumstances, it is sufficient to say that the trier of fact is to apply common sense to decide what use to make of evidence in coming to its finding of fact:³⁰

Although fewer in number, there are also rules relating to the way that evidence is used. In most cases, the trier of fact is simply entitled to apply common sense and human experience to decide whether the evidence is credible and to determine what use, if any, to make of evidence in coming to its findings of fact. Yet, in other cases, important limits are imposed.

The important limits to the application of common sense and human experience include corroboration rules, burdens of proof and presumptions.³¹

(b) Probative Value versus Prejudicial Effects

In general, evidence is admissible where it is: (1) relevant to a material issue, and (2) not subject to exclusion under any other rule of law or policy.³² Logically relevant evidence can be excluded "not only if its probative weight is 'trifling', but whenever its prejudicial effect would be out of proportion to its true evidential value".³³

Sopinka, Lederman and Bryant describe probative value as "the extent to which the evidence will prove a fact in issue for which it is tendered...[which] may also depend upon the reliability of the evidence".³⁴ They describe prejudicial effects as evidence that "involves an inordinate amount of time which is not commensurate with its value, or, if it is misleading".³⁵

In *R. v. Mohan*, the principal Supreme Court of Canada decision regarding the admissibility of expert evidence, Sopinka J. considered

³⁰ *Ibid.*, at 6.

³¹ *Ibid.*, at 7.

³² J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 23.

³³ *Ibid.*, at 32. See also D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999) at 17-26.

³⁴ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 32.

³⁵ *Ibid.*, at 33. Prejudicial effects of expert evidence are cited in *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 at paras. 18, 19 and 45, rev'g [1992] O.J. No. 743, 8 O.R. (3d) 173 (C.A.); and *R. v. D. (D.)*, [2000] S.C.J. No. 44, 2000 SCC 43 at paras. 48-56. The *R. v. Mohan* dangers were cited in *Drumonde v. Moniz*, [1997] O.J. No. 4812, 14 R.P.R. (3d) 199 (C.A.) at para. 17. The *R. v. D. (D.)* dangers were cited in *Mayfield v. Mayfield*, [2001] O.J. No. 2212, 18 R.F.L. (5th) 328 (S.C.J.) at paras. 37-38. The dangers were also noted in D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Butterworths, 1999) at 169.

whether the probative value and prejudicial effect assessment was an aspect of relevance or a general exclusionary rule. Although he included it as an aspect of relevance, Sopinka J. stated that it was “more properly regarded as a general exclusionary rule” and reasoned that the effect was the same regardless of whether the assessment was an aspect of relevance or a general exclusionary rule.³⁶ While this is no doubt the case in relation to decisions to admit or exclude evidence, judges might analyze and explain differently their reasons for those decisions depending on whether prejudicial effect is considered as part of relevance or a separate general exclusionary rule.

David Paciocco and Lee Stuesser consider probative value versus prejudicial effect as a separate exclusionary discretion.³⁷

It would seem to follow that in considering the exclusionary discretion, a judge must determine the value of the evidence based on the strength of the inferences, the credibility of the evidence where it is testimony, and the reliability of the evidence. The judge must then consider the costs presented by such evidence, including things as diverse as the practicalities of its presentation, the fairness to the parties and witnesses, and the potentially distorting effect the evidence can have on the outcome of the case...

So stated, this exclusionary power has the theoretical potential to render all other rules obsolete and to undermine the role of the trier of fact. In practice, courts exercise restraint in applying the discretion.

Since there is no minimum probative value, the probative value versus prejudicial effect is a balancing act. Logically relevant evidence may be excluded where the proposed evidence involves an inordinate amount of time that is not commensurate with its value or is misleading in the sense that its effect is out of proportion to its reliability.³⁸ In fact, all evidence is subject to this balancing act.

III. A “DISCERNIBLE TREND” IN ADMISSIBILITY

In 1993, L’Heureux-Dubé J. described a recent trend in the courts to remove barriers to the truth-seeking process in *R. v. Levogiannis*:³⁹

³⁶ *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 at para. 18, rev’g [1992] O.J. No. 743, 8 O.R. (3d) 173 (C.A.).

³⁷ D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999) at 31.

³⁸ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 33.

³⁹ [1993] S.C.J. No. 70, [1993] 4 S.C.R. 475 at para. 22.

One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time...[T]he recent trend in courts has been to remove barriers to the truth-seeking process. Recent Supreme Court of Canada decisions, ... by relaxing certain rules of evidence...have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.

Sopinka, Lederman and Bryant also observe that the Supreme Court of Canada has been very active in the past decade in “reshaping the law of evidence” by adopting “a flexible, principled case by case approach in which the competing policy interests at stake are weighed in the context of the circumstances of a particular case”.⁴⁰

One response to the trend towards a flexible, principled approach has been a call for guidance.⁴¹

The importance of certainty and the need for guidance have not been completely forgotten, however. In an effort to assist, appellate courts sometimes try to elaborate on the vague formulae that have been adopted. In the process, they provide more particularized criteria. The precedential value of these decisions is slowly giving structure to the broad standards of admissibility that have been developed...The omnipresent tension between ‘justice’ and certainty is being felt in the law of evidence and will inevitably pull it in different directions as its new rules mature.

Sopinka, Lederman and Bryant express similar concerns:⁴²

[W]ithout a set of technical rules determining admissibility, counsel will not know with certainty in advance whether a particular piece of evidence will be held admissible. Judges, similarly, will not be able to turn to any fixed rules and must regularly engage in a balancing and weighing exercise on an *ad hoc* basis...the tasks of counsel and judges alike will be more difficult.

At the same time as the trend towards the removal of barriers to the truth seeking process, a “discernible trend” towards the increased admissibility of evidence has also been seen.⁴³ A dramatic increase in the frequency and breadth of expert evidence in Canadian courts has also occurred during the same time.⁴⁴ It is this evidence which has been the

⁴⁰ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 6-7.

⁴¹ D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999) at 5.

⁴² J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 7.

⁴³ D. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999) at 3.

⁴⁴ In *R. v. J. (J.-L.)*, [2000] S.C.J. No. 52, 2000 SCC 51 at para. 25, the Court described a dramatic growth in the frequency with which experts have been called upon. Mark Freiman and Mark Berenblut note an “unprecedented expansion in the types of expert evidence being led” in our courts in their book, *The Litigator’s Guide to Expert Witnesses* (Aurora, Ont.:

subject of much criticism.⁴⁵ Peter Huber epitomizes the public criticism of experts in the justice system in *Galileo's Revenge: Junk Science in the Courtroom*.⁴⁶

The pursuit of the truth, the whole truth, and nothing but the truth has given way to reams of meaningless data, fearful speculation, and fantastic conjecture. Courts resound with elaborate, systematized, jargon-filled, serious-sounding deceptions that fully deserve the contemptuous label used by trial lawyers themselves: *junk science*.

Such criticisms must be considered within the context of the adversarial system. The objectives of accurate fact-finding in a speedy, just and inexpensive system require a delicate balancing act. Attitudes and expectations associated with the adversarial system and party control of witnesses are central to an analysis of the laws of expert evidence. Any sort of trend regarding the laws of expert evidence shows that the rules are not immutable.

Canada Law Book, 1997) at 1. In *R. v. D. (D.)*, [2000] S.C.J. No. 44, 2000 SCC 43, at para. 56, the Court said that there was a "proliferation of expert opinions of questionable value".

⁴⁵ See *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9, rev'g [1992] O.J. No. 743, 8 O.R. (3d) 173 (C.A.); *R. v. D. (D.)*, [2000] S.C.J. No. 44, 2000 SCC 43; and *R. v. J. (J.-L.)*, [2000] S.C.J. No. 52, 2000 SCC 51. The same concerns have been expressed in the American courts: See *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993).

⁴⁶ P.W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* (New York: BasicBooks, 1991) at 2.