

EVIDENCE IN A COMPLEX WORLD

by

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INTRODUCTION

I must begin by thanking you for that kind introduction. Patricia, I feel a little like the bishop who, after a particularly eulogistic introduction, said:

"I must remember to say a special prayer for you tonight," he told his introducer. "A prayer that you may be forgiven for stretching the truth so blatantly." And then he added, "And for myself for having enjoyed it so much."

Unfortunately judges do not have such a ready means as prayer for rewarding those who flatter them too much. If you think, Patricia, that that will get you a free win in the Supreme Court of Canada, you are doomed to disappointment.

Quite frankly, I stand here today in some trepidation. It has become fashionable not only to report publically whatever judges may happen to say, but to draw all sorts of inferences, a lot of which are too subtle for someone with my straight-forward bent of mind to ever have conceived, let alone endorsed. As a consequence I have taped across my telephone -- that being the usual means by which invitations to speak are conveyed -- the following warning borrowed from Lord Ackner, in bold black letters:

"As the mother whale said to the baby whale, "They can only shoot you when you're spouting."

For better or for worse, Eugene Meehan got to me before I found that one, and here I stand. But I can't blame others entirely. I must confess that I have long had something of a soft spot for the law of evidence, going back to my days as a law student. For that reason, as well as because of the importance of the law of evidence, it gives me great pleasure to be here today.

Une des raisons pour laquelle j'ai accepté de vous parler avec une telle alacrité, c'est le fait que vous ayiez décidé de vous pencher sur un de mes sujets favoris: la preuve. Ce sujet m'a toujours fasciné, aussi bien en tant que étudiante, avocate, professeur ou comme juge. Peut-être plus que n'importe quelle autre branche de droit, la preuve représente un défi autant théorique que pratique - Evidence needs theory with what works on a case by case basis. Et la preuve est aussi extrêmement importante. Le système judiciaire est aussi fort que les règles qui lui permettent de déterminer quelle preuve doit être acceptée, et quel poids doit être donné à cette preuve.

COMPLEXITY -- THE PROBLEM

If my comments today were to be given a title, it would be "Complexity and the Law of Evidence". Complexity is a feature of modern life, and hence of modern law. Nothing

is simple any more. Even things like raising our children or feeding ourselves -- something ordinary people of no particular learning seem to have been doing with some degree of success since time immemorial -- have become infinitely complicated -- complicated enough to require libraries of exposition and hosts of experts. Since the law is about life, our legal cases have also become complex.

Matters which were once simple to prove and simpler yet to resolve have now become the subject of lengthy and contradictory explanation and contention. This is the major problem, as I see it, with which the the judicial process in general and the law of evidence in particular must come to grips as we near the twenty-first century.

How does the problem of complexity manifest itself? Let me list three aspects of the matter which come immediately to mind.

1. Experts

Don't get me wrong. I like experts. But I must admit I laughed along with all the others when Justice Grange a conference I recently attended, quipped: "Experts are a necessary evil, but that doesn't mean you have to make them comfortable."

Experts are the natural concomitant of the modern age of complexity. We have experts on everything from building nuclear power plants to which parent should be granted

custody of a child. In British Columbia, we even had an expert in "falling down stairs." Plaintiff's counsel imported him all the way from Ireland. Every country has its expertise, I suppose.

We have experts not only on the substance of the lawsuit, but on the evidentiary process itself. Experts testify about the value of this or that witness's potential evidence. Courts occupy themselves with experts and statistical data on the likelihood that a child may lie. All of which may say much or little about the particular witness before the court. No doubt such evidence can be useful in particular cases, but we must guard against the danger of never-ending litigation. We must not succumb to the temptation of the perfect lawsuit, the barrister's dream -- one in which a witness testifies on the value of the previous witness's evidence, only to be followed by another witness who testifies that witnesses' credibility and so on, ad infinitum.

Sometimes when I contemplate the vast array of experts on every subject I am led, quite simply, to wonder. And I'm not the only one. This summer, riding the underground in London, I saw the following sign:

The ark was designed by an amateur; the Titanic was designed by an expert.

What is the task of an expert? Basically, it is to assist us in understanding, where understanding is dependant on particular knowledge or skill possessed by experts. It is, at

base, to clarify what, by reason of lack of comprehension, may otherwise be unclear. And it is a vital task. The truths that many of the problems courts now face simply cannot be understood or resolved without expert assistance.

La tâche des experts est de clarifier et simplifier. Parfois ils réussissent. Mais parfois ils semblent compliquer les choses. Notre droit a traversé une période d'accroissement du témoignage expert. Si on regarde un peu en arrière, on peut constater qu'on a eu tendance à minimiser les règles anciennes - ces règles visent à garder la preuve par experts dans des limites strictes. Par exemple, la règle concernant la qualité d'expert; les points qu'il peut aborder; même l'idée confirmée pendant les siècles, que le témoignage d'un expert ne vaut pas plus que les faits sur lesquels il se base.

After several decades of expansion of the rules concerning expert evidence, one may detect, in more recent years, the beginning of a more cautious view. For example, in *Phillion v. The Queen*, [1978] 1 S.C.R. 18¹, the Supreme Court of Canada called a halt to polygraph evidence, judging that it would remain unproven and could harm the truth-finding process as much or more than it might assist it. And occasionally, in latter years, one encounters the phenomenon of a trial judge actually declining to receive expert evidence. (The Irish falling down the stairs expert never got to testify in B.C.). The legal profession may never agree that law, like General Geoff's war, is too important to be waged by the generals, and throw out the experts altogether. Nor should it; jest aside, experts are,

¹ *Phillion v. R.* [1978] 1 S.C.R. 18

in the proper case, essential to the proper functioning of a modern tribunal. But judges and lawyers are now asking the right questions. Can this expert really help get at the truth or resolve this dispute? In our complex world, expert assistance is essential to dispute resolution. The problem is to devise rules and procedures which ensure that it is used to best effect.

2. Quantity

If the need for special expertise on difficult questions is the first problem the law of evidence faces as a result of the growing complexity of modern society, the second is quantity. This is largely a function of the ease with which matters can now be committed to paper or circuit or microchip. Once committed to paper, the paper must be retained, catalogued and filed. And once retained, catalogued and filed, it must be produced for the lawsuit if there is any tangential, hypothetical possibility it might touch on any tangential, hypothetical issue in the law suit. The result is litigation which itself risks becoming tangential and hypothetical, as the real trees (quite literally) are lost in a forest (I was going to say blizzard but I mustn't mix my metaphors) of paper.

The result can be endless examination for discovery. The result can be courtrooms lined with books crammed full of papers. The result can be that we need computers and experts to keep track of it all. The judicial process itself can come to require expert management often beyond the technical ken of the judge herself.

3. Making Social Choices

The third way the complexity of modern life manifests itself on trial system of which the law of evidence is part is substantive rather than procedural. The Charter has imposed on the legal system the need to decide difficult policy issues. In addition, litigants seem more and more to look to the courts for the solution - or at least some part of the solution - to complex problems whose character is not only legal, but moral and political too like when life begins, when the criminal process must yield to individual rights, and what this country owes its aboriginal people, to name only three.

These are complex, incredibly difficult questions. They take the trial process and the law of evidence into a new realm. A system developed to deal with the criminal trial and the garden variety civil dispute -- trust, contract or tort -- about property and money now must grapple with complex social and philosophical issues. The solution usually applied is to call on the experts and marshal the facts or quasi-facts. And experts and "facts" there are without end on questions like when life begins or whether a particular law which offends a right guaranteed by the Charter is "reasonable and demonstrably justified in a free and democratic society".

I believe we must have facts and access to expertise in order to answer complex questions of social policy. We must ensure that the court is in a position to understand the basic value choices involved and the implications of deciding one way or the other. But at

a certain point -- the point where the basic choice is understood and its probable consequences predicted -- more facts and more opinions become redundant fodder in a never ending battle between the litigants. I recall the eminent American litigator Archibald Cox being asked at a conference what he thought of the Brandeis brief "Much better for the judge to simply go into the library and look it up," he said. While personally I would be loath to trust my bibliographic skills to lead me in the right direction, I took Mr. Cox's point.

What Do We Do About the Problems?

Before getting to the solutions, let me talk for a moment about two things that hamper our ability to meet the challenges with the complexity of modern society imposes on litigation process - (1) the patchwork state of our rules of evidence; and (2) the limited of our resources, economic and temporal.

I turn first to the complex and sometimes illogical matrix of common law rules, statutory rules and judicial discretion that comprise the law of evidence. This is the tool which we possess to meet the tremendous challenges of the complexity of modern litigation. Don't get me wrong. I love the law of evidence in all its intricacy and historical anomaly. Having through a long painful process over long anxious years more or less come to some degree of understanding of the individual rules and how they all fit together, I, like many other lawyers feel a proprietary interest in the law of evidence as it stands. More important, I think that on the whole the rules work well. But I am forced from time to time to

acknowledge that a particular 18th or 19th century rule is not very well suited to modern practice, or that the interface between a common law rule and a statutory provision is illogical and awkward.

Le second problème est celui-ci. La société n'a pas de ressources illimitées à consacrer à un litige. On ne peut pas déposer au dossier tous les documents imaginables. On ne peut pas interroger et contre-interroger tous les témoins ad infinitum. Si on le faisait, on risquerait ainsi de dépenser plus de temps et plus d'argent que ne le vaut le litige en réalité! When criminal cases become too complex and too long, the public cost of prosecution (and usually defence as well, paid through legal aid), the strain on all involved, and the time required become so great as to sometimes threaten the whole process. The same may be said of civil cases, where the private sector shares the cost with the public.

So we see that the task of dealing with the complexities of modern litigation is complicated by rules that sometimes seem outmoded and by the limited resources in terms of time and money which can be devoted to litigation and dispute resolution.

How, in these difficult circumstances, can the law of evidence come to grips with the complexity of the modern world and modern litigation?

First, I think we -- judges and lawyers alike -- must constantly bear in mind the goals of our system. We must take a purposive approach to the law of evidence, just as we have

to the Charter. The purpose of the justice system is not to provide intellectual diversion to judges or to provide fodder for the ever-ready judicial cannon. Nor is it to furnish lawyers with interminable cases calculated to ensure long years of regular billings. The goals of the litigation process are to get at the truth and the proper verdict, and, in the civil context, to resolve disputes. When we are deciding what evidence to call or what evidence to allow, these goals should always be foremost in our mind. Getting at the truth is not the equivalent of letting everything in. Some types of facts may, depending on the circumstances, divert the jury from the real issues and mislead it into giving the wrong verdict. Similarly in complex civil suits, calling evidence on issues that are really nothing but red herrings can pervert the process and lead the judge down the wrong alley. In assessing the admissibility of evidence the following questions, suggested to me by a judge of great experience, may be useful. Will it help? Will it hurt? To put it in more legalistic jargon: Does the evidence have real value and if so, does that value outweigh any prejudice it may cause?

Second, we must view the process globally, and ensure that we master the process, rather than letting it master us. We, as lawyers and judges, are officers of the court, and it is our responsibility to ensure that the decisions we urge or make serve the best interests of the judicial process. The process is not there to serve us; we are there to serve the process. This attitude will lead us to simplify, unify, attempt to establish a more coherent evidentiary process. It will take us beyond this particular rule or that one, and encourage us to think of the law of evidence as a related body of rules which is there for one purpose

and one purpose only -- to ensure fair, expeditious trials and dispute resolution.

This brings me to my third point -- the need to coordinate. When we take a more purposive and global view of the law of evidence, we cannot but conclude that if we are to adapt it to meet the complexities of modern society, we must coordinate the efforts of lawyers and judges in the common law arena and of legislators in the governmental arena. Ideally, judge-made common law rules and statutory rules should mesh to form one unified, coherent and internally consistent system. Our courts have taken important steps to bring the rules of evidence closer to the realities of modern trial process. *Ares v. Venner*², *Slavutych v. Baker*³, *Barrett*⁴, *Lavallee*⁵ and *Khan*⁶ are but a few of the decisions inspired by this goal. But the courts can go only so far. Much of our law of evidence is statutory and must be dealt with by Parliament and the Legislatures. At one point, we in Canada considered introduction of a comprehensive evidence code. Without entering on that debate, let me at least suggest that a coordinated, forward-looking approach to the adjustment and reform of the law of evidence is required if our judicial system is to meet the demands of our complex modern society.

² *Ares v. Venner*, [1970] S.C.R. 608

³ *Slavutych v. Baker*, [1976] 1 S.C.R. 254

⁴ *Barrett v. R.* (unreported; S.C.C. File #20704)

⁵ *R. v. Lavallee*, [1990] 1 S.C.R. 852

⁶ *R. v. Khan*, [1990] 2 S.C.R. 531