Si l'éthique pouvait contribuer à la manifestation de la vérité

What if Ethics Could Contribute to the Demonstration of Truth

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Pour enchaîner sur certains sujets qui ont été discutés ces derniers jours et sans donc me retirer du triangle « Science, Vérité et Droit », j'ai choisi de traiter de la question suivante : doit-on encore aujourd'hui, particulièrement dans les affaires criminelles, tolérer que notre système de justice permette aux experts de venir débattre de la vérité comme des adversaires et ainsi compromettre, plus souvent qu'autrement, leur objectivité et leur indépendance? D'où la question : et si l'éthique pouvait contribuer à la manifestation de la vérité?

Pour ma part, et ce sera l'objet de mon propos, j'estime qu'une réforme s'impose afin d'assurer que le cadre procédural puisse favoriser la démonstration de la vérité scientifique dans le respect des règles d'éthique.

What if ethics could contribute to the demonstration of truth and in our context, of the scientific truth? Already, in 1972, the Honourable Antoine Rivard, then a member of the Court of Appeal of Quebec, and a former defence counsel, in a paper discussing the "co-operation" in the search for truth, published in the famous Redbook edited by Salhany and Carter[1] observed:

> « La recherche de la vérité devant la Cour d'assises, comme d'ailleurs devant toutes les Cours, est aussi dangereusement

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1 R.E. Shalhany & R.J. Carter, eds., *Studies in Canadian Evidence* (Toronto: Buttherworths, 1972).

> compliquée par la procédure fixée par nos lois concernant la preuve faite par des témoins experts. […] La procédure actuelle conduit souvent à la confusion sinon à l'absurde. […] Qui va décider de ce problème de la science médicale qui divise les savants? La réponse est simple, tout absurde qu'elle soit. Ce seront les ignorants qui décideront de cette question sur laquelle on a permis l'audition des experts parce que les juges et les jurés n'en connaissaient pas les éléments de base. »

Et le juge Rivard de noter, c'était en 1972 : « Il est bon d'ajouter que cette procédure donne lieu à des exhibitions de science disgracieuses d'où trop souvent ni la médecine, ni la vérité, ni la justice ne sortent glorieuses. » « Très modestement, concluait-il, j'exprime l'opinion que sur ce point nos lois devraient être changées, les questions d'ordre scientifique devraient être décidées par ceux-là même qui ont compétence pour les connaître. »

Without necessarily endorsing the totality of those propositions, I pause here to ask myself if, in 1972, Justice Rivard was wrong in his premise? If not, have things changed since? I suggest that not only nothing has been done in that regard but the situation has worsened. Suffice to refer (1) to the miscarriages of justice which have been revealed in Canada since and (2) the proliferation of questionable experts before the Courts. On October 5, 2000, in *R*. v. *D.D.*,[2] a judgment of the Supreme Court of Canada, Justice Major in his majority opinion, after having underlined that modern litigation has introduced a proliferation of expert opinions of questionable value, spoke of the dangers of expert evidence: "Although not biased in a dishonest sense, these witnesses frequently move from the impartiality generally associated with professionals to advocate in the case." And he added: "In some notable instances, it has been recognized that this lack of independence and impartiality can contribute to miscarriages of justice", referring here to the infamous *Morin*[3] case which was the subject of the Kaufman Report in 1998.[4] In his report, Commissioner Kaufman concluded that the contribution of the Centre of Forensic Sciences to Morin's wrongful arrest, prosecution and conviction was substantial. The irony is that ultimately science saved Morin on account of the DNA evidence that finally showed that he was innocent. There has always been a danger that forensic

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2 *R*. v. *D.D.*, [2000] 2 S.C.R. 275.

3 *R*. v. *Morin*, [1988] 2 S.C.R. 345.

4 *The Commission on Proceedings Involving Guy Paul Morin (Kaufman Report),* vol. 1, Toronto, Ministry of the Attorney General, 1998.

experts feel that they have become a part of the team attempting to assemble incriminating evidence, that they cease to be able to cast a sufficiently critical eye over their work.[5] In Stockdale's colourful metaphor, "Forensic scientists who run with the hounds cannot be expected to give a savaged fox the kiss of life."[6]

Mes amis du Québec se souviendront peut-être de l'enquête du coroner tenue à la Malbaie en 1985, relative à cette affaire où l'un des manifestants qui fut arrêté lors d'une démonstration en faveur des grévistes du Manoir Richelieu, décéda au poste de la Sûreté du Québec. Une autopsie sur la cause du décès fut pratiquée par le pathologiste du Québec; non satisfaite des résultats, la C.S.N., en accord avec la famille de la victime, fit appel aux services d'un pathologiste d'Ottawa. Selon ce dernier, des coups mortels avaient été portés à la tête de la victime, ce qui déclencha un tollé dans les jours suivants. Le Procureur général du Québec se vit contraint d'ordonner une enquête publique, avec les conséquences que l'on connaît tant pour les personnes concernées que pour tous les intervenants. Or, voilà que le pathologiste, responsable en quelque sorte de ce branle-bas de combat, informa le coroner, peu de temps avant l'audition, qu'il commençait à douter de son expertise. Dans la recherche ultime de la vérité, le coroner fit exhumer le cadavre de la victime et convoqua du même coup les autres pathologistes retenus par chacune des parties. Le constat fut unanime : on ne pouvait pas relever de traces de coups sur la tête de la victime. Le pathologiste avait vu ce que son client avait peut-être souhaité qu'il voie.

The *New Yorker Magazine*[7] published a profile of a psychiatrist, Dr Park Diaz, described as the virtuoso State star expert in forensic medicine. He was quoted as saying of his mission, "My duty is to find the truth as best as I can." He also said that he agrees to testify for the State under two conditions: that he be paid $3 000 a day to cover travel expenses, $250 an hour and that he be given full access of the evidence beforehand. I can only think of how Dr Diaz tries to mesmerize his audience to justify his fee. In many instances, judge or juries are invited to evaluate scientific evidence by reference to scientifically irrelevant criteria such as the expert's physical appearance, accent or communication skills. A beauty contest, rather than a solemn trial of fact. But should it be the price of truth?

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5 P. Robert, "Forensic Science Evidence After Runciman", (1994) C.L.R. 780.

6 *Id.*, p. 784.

7 May 16, 1994.

Ce souci de l'expert de bien performer me fait penser à une scène d'un roman de Balzac, *Le Colonel Chabert*[8]. L'avoué Derville, qui vient d'entendre le récit de cet officier disparu, passé pour mort, qui revient au pays dans l'espoir de reprendre son bien et sa femme vivant avec un autre homme, et qui a tellement attendri Derville que ce dernier lui a avancé une somme d'argent, confie à son jeune clerc :

> « Je viens d'entendre une histoire qui me coûtera peut-être vingt-cinq louis. Si je suis volé, je ne regretterai pas mon argent, j'aurai vu le plus habile comédien de notre époque. »

Certes, le système judiciaire expose l'expert à compromettre son objectivité et son indépendance, mais les avocats doivent aussi assumer leurs responsabilités à cet égard, ce qui soulève la problématique de l'éthique de l'avocat : « Si je t'en dis tant, que dis-tu et diras-tu la même chose si je t'en dis plus? » On a ici qu'à se rappeler le deuxième procès des frères Ménendez[9] en Californie, où l'avocate de la défense s'est retrouvée sur la sellette après que son expert eût affirmé, en contre-interrogatoire, que l'avocate lui avait demandé de ne pas référer à certains écrits remis par les inculpés.

In the Rochester trial[10], which was a case of a serial murder held a few years ago, a man by the name of Shaw Cross was charged with the bizarre murders of 11 women committed in the 1990s. In support of an insanity defence, a nationally known psychiatrist, professor at N.Y.U., was called at trial. After several days of her testimony, the expert wrote to the trial judge, complaining that the defence counsel failed to pursue her opinion that important neurological evidence should have been called and suggesting as well other improprieties committed, in her opinion, by defence lawyers. When defence lawyers became aware of their expert's letter, they began an attack on the witness, but were unsuccessful in trying to get a mistrial because of what they called a "sabotage" of their expert.

Whether we postulate that the trial process is an unqualified search for truth or, as I rather put it, a search for proof to get to the truth with the best evidence available, the truth-seeking function of the trial process remains essential to maintain the intellectual and moral integrity of the

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8 Honoré de BALZAC, *Le Colonel Chabert*, Paris, Grand Caractère, 2000.

9 *People* v. *Menendez*, N° BA06880, 1995 WL 597781, at 44 Cal. Super. Ct., October 11, 1995.

10 *New York Times*, New York, December 15, 1990.

system. In this context, adversarial procedure has been designed and still is seen as a powerful tool to establish a fair and open system to promote the truth-seeking function of the trial process. But, the courtroom is not a laboratory. Instead of waiting for the experts or inviting them to give us what I call "the instant truth" what if instead of compelling experts to become partisans and adversaries, we would try to improve the relationship between truth and justice?

Our present system takes too much distance from the scientific truth in organizing an oratory duel between people who should not be so confronted. Experts are implicated in partisan interests that are anti-ethical to their commitment to scientific objectivity. Forensic science evidence, by definition, simply means, "science applied to the interests of justice."

In a search for solutions to this issue, I have been influenced greatly by the British experience. You are probably familiar with the fact that forensic science and expert witness testimony were prominent in several miscarriages of justice which precipitated the appointment of a Royal Commission in 1991[11] presided by Viscount Runciman. The Commission was specifically enjoined to consider expert evidence by its terms of reference, on the basis of serious allegations of impropriety against forensic science experts of the same nature as those which I have previously identified in Canada.

In trying to promote a "modified adversarialism", the Commission has essentially proposed to improve the dialogue between prosecution and defence at the pre-trial stage so that scientific evidence should, as far as possible, be agreed before trial. This is not a novel idea and that was, in fact, Mr Justice Rivard's point and his comment made in 1972. But what is more innovative in the British recommendations are the modalities. Under the present law in England, and this goes back only to a few years ago, the accused has a duty to disclose before trial the expert evidence. I pause here to say that we have to expect that in Canada, it will be the law very soon: there is indeed before Parliament a bill to propose "compelling defence disclosure on expert evidence only."

The Runciman Commission proposes: (1) that whenever defence contemplates challenging scientific evidence produced by the prosecution, it should be required to give advance notice of its objection, (2) where both prosecution and defence experts were to be called as witnesses, that there be

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[11] Chairman Viscount Runciman of Doxford, *Report of the Royal Commission on Criminal Justice* (London: HMSO, 1993).

a pre-trial meeting to discuss their respective investigations and conclusions in order to identify areas of agreement and/or isolate divergence of opinions, (3) if disagreement, there would then be a preparatory hearing before the judge at which the parties would discuss "how best to clarify and if possible, narrow down the areas of dispute, possibly by agreeing to further scientific tests" and (4) the Commission recommended that the expert witnesses on both sides be required to meet on their own or with counsel in order to draw up a report of the scientific facts and their interpretation by both sides.

Those proposals are based on two "almost indisputable" propositions: (1) that the criminal trial is not the best forum for scientific disputation (in a civil trial, for policy reasons as well as for practical reasons, a trial can always be delayed to allow the court to examine in-depth a contested area); (2) that a lay jury is not well equipped to settle scientific disagreements between scientific experts.

This ideal of open, collaborative scientific investigation, requires a substantial change in the adversarial theorem in that the defence has to do more than to disclose its expert evidence, but is asked to disclose part of its case preparation or strategy. It remains to be seen in Canada, once it will be the law that defence has to disclose its expert evidence, if we are ready to go that far.

The second part of the Runciman recommendations concerns the trial itself and the presentation of the evidence. Interestingly, the Commission has expressed its lack of enthusiasm for court instructed experts and scientific assessors, especially in criminal law. There is a fear, and I think a reasonable fear, that the court experts elevated status might insulate their opinions from justified criticism. Moreover, the right of the defendant to prepare his or her case and more particularly the right to test the Crown's case would be compromised significantly within the court instructed expert system. But as the Commission concluded, the worse solution of all would be to have the experts sitting with the judge as an assessor. It was then recommended that where disagreements persist between the experts, the conventional rules should apply and prosecution and defence call their own experts at trial. Anything less would be an abdication of responsibility on the part of the criminal process and the professionals who run it. As to the argument that the jury system might not be the right forum to dispute the scientific issues, it was found that this argument should be dismissed. The Commission concluded that the overall aim in this area should be the objective presentation of expert evidence in a way which jurors, who are not themselves experts, can still reasonably be expected to follow.

To summarize these recommendations, you will have noticed that the substantial changes proposed concern the pre-trial stage that remains the best opportunity to try to decrease the number of unnecessary conflicts between experts.

Je considère ces propositions comme les éléments d'une réflexion plus globale à laquelle il importe que nous accordions toute l'importance qu'elle mérite. La nécessité de réforme dans le traitement de la preuve scientifique, dans la recherche de la vérité, particulièrement devant les instances pénales, n'est plus mise en doute. Il est quand même inquiétant, et c'est le constat formulé par la Cour suprême dans son jugement du 5 octobre dernier[12], qu'il soit maintenant reconnu que le manque d'indépendance et d'impartialité du témoin expert a contribué à des erreurs judiciaires. Pourtant, la seule crainte qu'il en fût ainsi fut dénoncé il y a fort longtemps, sans que l'on daigne agir. Pour conclure, c'est en acceptant que la recherche de la vérité s'inspire du principe de loyauté envers la profession de l'expert, donc en lui donnant un sens éthique, que nous pourrons encadrer le témoignage de l'expert dans le respect d'une objectivité vitale pour la sauvegarde des intérêts de la justice.

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12 *R*. c. *D.D*., précité, note 3.