

Civil Evidence: A Principled Tailoring of the Rules

CIAJ Conference: How Do We Know
What We Think We Know?

Toronto, October 2013

Lynn Smith

Civil and Criminal – Common Ground

- Formal hearings for the adjudication of rights under state authority
- Adversary system
- Serious consequences
- Credibility and reliability of witnesses are factors
- Conclusions of fact are binary
- Findings of fact receive deference
- Predictability promotes resolution of disputes

Civil and Criminal – Differences

Civil

- Neutral between parties
- Balance of probabilities
- *Charter* has little influence
- Remedies typically between parties
- Symmetrical information
- All witnesses compellable

Criminal

- Presumption of innocence
- Proof BRD
- *Charter* pervasive
- Deprivation of liberty/state-imposed penalty
- Asymmetrical information
- Accused and (sometimes) spouse non-compellable

Civil and Criminal – Differences

Civil

- Declining trials → low familiarity with rules
- Possible multiple issues
- Juries rare
- Competition from alternate procedures
- Typically parties are spending their own money

Criminal

- More trials, more familiarity with rules
- Single core issue
- Juries relatively common
- Little competition
- Typically at least one side is state-funded

Standard of proof

- *F.H. v. McDougall* 2008 SCC 53
 - Residential school sexual assault case
 - Should the criminal standard of proof apply in civil proceedings where criminal or morally blameworthy conduct is alleged?
 - Or should a heightened standard (between BP and BRD) apply?
 - Or should the civil standard be applied differently, requiring greater care in assessment of evidence?

F.H. v. McDougall

- Inappropriate to import *W.D.*
 1. “...the *W.D.* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with competing testimonial accounts.”
 2. In a civil case, providing the judge has not ignored evidence, finding the evidence of one party credible may be conclusive of the result because that evidence is inconsistent with that of the other party

F.H. v. McDougall

- Query whether the second reason provides a real distinction
 - The believed evidence of one witness in certain circumstances can meet the BRD standard in criminal cases
 - And the “either/or” fallacy has to be avoided in civil cases too

Character and Similar Fact Evidence

- All relevant evidence is admissible
 - Exception: character evidence is generally excluded (including evidence of discreditable conduct on other occasions)
 - Exception: similar fact evidence is admitted in some circumstances

R. v. Handy [2002] 2 S.C.R. 908

- Similar fact evidence may be admissible when the probative value of the evidence in relation to a specific issue outweighs prejudicial effect
- Factors bearing on probative value include:
 - Connectedness to the issue
 - Provenance
- Factors bearing on prejudicial effect include:
 - Moral prejudice
 - Reasoning prejudice

Transposition to civil proceedings

- Discussion in *Handy* of policy
 - Avoid distraction, prejudice, time wasting
 - Avoid rounding up the usual suspects
 - Promote rehabilitation
 - Difficulty of containment
- Applicable in civil context
 - Difficulty of containment, avoid distraction, prejudice, time wasting

Transposition to civil proceedings

- Rationale in civil cases more obscure
 - Relevance?
 - Need to restrain civil proceedings within manageable limits and prevent unfairness?
- Under principled approach:
 - What are the probative and prejudicial factors re specific evidence in a specific civil proceeding?

Character evidence – a final note

- When does exclusionary rule even apply in civil proceedings?
 - What should count as “discreditable”?

Conclusion

- Good reasons for holding onto the rules of evidence in civil proceedings
 - Essential boundary-setting device on the scope of trials
 - Predictability can promote settlement
 - Assist in truth-seeking and fairness
- Civil and criminal proceedings are different enough that those differences should be taken into account in interpreting and applying the rules of evidence
 - Principled approach permits this