KNOWING, NOT KNOWING, AND DECIDING TO KNOW: JUDICIAL KNOWLEDGE AND THE FACT FINDING PROCESS

Justice Renee M. Pomerance

Superior Court of Justice – Ontario

Trial judge as Gatekeeper

Admissibility of evidence

- Facilitate search for truth;
- Ensure fairness of the process
- Prevent miscarriages of justice.

HIDDEN FACT FINDING

- Factual assumptions about how people behave.

And

- Factual assumptions about whether we know how people behave
  - Do we know ?
  - Do we need specialized knowledge?

COMMON SENSE OR EXPERT EVIDENCE?

- R.v. Mohan [1994] 2 SCR 9

- (1) Relevance
- (2) Necessity in assisting trier of fact
- (3) absence of any exclusionary rule and
- (4) a properly qualified expert

Necessity

- Necessity means more than merely helpful.
- **Only present when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts**
  - **– *R. v. D. (D.)* (2000), 148 C.C.C. (3d) 41 (S.C.C.)**

Human behaviour / credibility

- We are all “experts” on human behaviour
- But some matters of behaviour fall outside common knowledge or require correction of stereotypes e.g. *Lavallee*
- Difficult to distinguish between common knowledge and specialized knowledge in this context.

EXPERT EVIDENCE v. COMMON SENSE

- Mutually exclusive
- If a matter of common sense, expert evidence is not permitted
- If the subject of expert evidence, falls beyond the ken of common sense
- lines are difficult to draw
- Example: delayed disclosure in child sexual abuse cases

a) Delayed disclosure is *not* a matter of common sense

Not the proper subject of common sense/judicial notice

R.v.G.G.[1997] O.J. No.1501 (C.A.):

- "no court in Canada has gone as far as to state that a trial judge may take judicial notice of the fact that delay is common in cases of childhood sexual assault".

b) Delayed Disclosure *is* a matter of Common Sense

- **Not the proper subject of expert evidence**
- R.v.D.D. [1998] O.J. No. 4053 (C.A.) (aff'd by SCC):
- "In permitting Dr. Marshall to testify, the trial judge did a disservice to the jury. He underestimated its capacity to understand this behaviour and to make a judgment based on the jurors' collective knowledge of the behaviour of children and adults"

c) Delayed disclosure is well documented

- **judicial fact-finding based on literature**

- R.v L.(W.K.) [1991] 1 SCR 1091.

- “It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse”.

d) Delayed disclosure should be the subject of a jury charge

- R.v.D.D. (2000) 148 C..C.C. (3d) (S.C.C)

- **A jury instruction, in preference to expert opinion, where practicable, has advantages**. It saves time and expense. But of greater importance, it is given by an impartial judicial officer, and any risk of superfluous or prejudicial content is eliminated."

THE CATEGORIES OF KNOWLEDGE

1. **Common sense and experience**

   The things we know that we know

2. **Specialized expert knowledge**

   The things that we know that we do not know

3. **Judicial notice/judicial fact-finding**

   The things that we have decided to know

4. **Judicial Instruction**

   The things that we know that others should know

5. **Judicial Knowledge**

   The things that we just happen to know

COMMON SENSE:

THE THINGS THAT WE KNOW WE KNOW

COMMON SENSE: THE THINGS WE KNOW THAT WE KNOW

- “The space between the notes”
- The “hidden transcript” of law
- Folk wisdom experienced as simple truth
- The “uncanny ability to distinguish between the genuine and the specious”
  - Per Dickson C.J.; *R. v. Pappajohn,* [1980] 2 S.C.R. 120 at 156
- A crucial element in decision making
- Seen to contain a wisdom of its own

LIMITS ON COMMON SENSE

- Invisible until challenged
- Influenced by cultural, socio-economic and other factors

  “Common sense . . . is made of the prejudices of childhood, the idiosyncrasies of individual character and the opinion of the newspapers.”

  W. Somerset Maugham

SIMPLE TRUTHS?

- Absence makes the heart grow fonder
- Out of sight, out of mind
- A penny saved is a penny earned
- Penny wise pound foolish
- Haste makes waste
- He who hesitates is lost
- How do we account for shifting standards of common sense?

Examples of common sense

- “What a person remembers and how they are likely to remember and the manner in which the human memory works by reconstruction or suggestion or otherwise are everyday matters well within the knowledge of juries”
    - R.v.Fong [1981] Qd.R.90 at 95 (Q.C.C.A.)
- See also R.v.Perlett [2006] O.J. No.3498 (C.A.)
- R.v.M.(B.) (1998),130 C.C.C. (3d) 353 (C.A)

Examples of common sense

- Reference to script memory is a permissible common sense approach when dealing with testimony of children. (R.v. Gutierrez [1998] O.J. No.2032.

Examples of common sense

- Repressed and recovered memories?
- R.v. Francois [1994] 2 SCR 827 at 840:

  “ It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether they believed the complainant’s story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth”

  Per McLachlin J. (as she then was)

Frailties of eye-witness Identification

R.v.McIntosh: (1997) 117 C.C.C. (3d) 385 (Ont.C.A.)

- “This opinion evidence is directed to instructing the jury that all witnesses have problems in perception and recall with respect to what occurred during any given circumstance that is brief and stressful. Accordingly, Dr. Yarmey is not testifying to matters that are outside the normal experience of the trier of fact: he is reminding the jury of the normal experience”.

Competence to Testify

- R.v. Parrott 2001 SCC 3 at para. 57 , 59:
- “Whether a complainant is able to communicate the evidence in this braod sense is a matter on which a trial judge can (and invariably does) form his or her own opinion. …it is the very meat and potatoes of a trial court’s existence”
- “trial judges are able to assess such matters as childlike mental condition or poor ability to sustain questioning without expert assistance”

EXPERT EVIDENCE

THE THINGS THAT WE KNOW WE DO NOT KNOW

Costs and Benefits

- Expert evidence can foster accurate fact finding by providing the trier of fact with the tools necessary to assess the evidence; but
- Expert evidence can distort the fact finding process by overwhelming the trier of fact, or by causing it to abdicate its fact finding role.
- Gatekeeper must determine whether, in a given case, the benefits of admitting the evidence outweigh the dangers.

The Dangers of expert evidence

- Rule against oath helping
- Opinion may be based on facts not in evidence
- May consume inordinate time
- Expertise may attract disproportionate weight:
- **“Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.”**

Expert evidence on memory

- E.g. Operation of memory in young children
- “An explanation of the formation of childhood memory and features usually found in memories of childhood experience [is] capable of providing a jury with information that would be outside their usual knowledge and experience
  - R.v.J.H.; R.v.T.B. (deceased) [2005] EWCA Crim 1828

OTHER CASES ALLOWING EXPERT EVIDENCE ON MEMORY

- R. v. Semchuk, [2011] B.C.J. No. 2148 ; aff'd 2012 BCJ No. 2005 (C.A.)

- R.v.Bell [1997] N.W.T.J. No. 18 (C.A.)

- R. v. Wald (1989), 47 C.C.C. (3d) 315 (Alta. C.A.)

JUDICIAL NOTICE

THE THINGS WE KNOW THAT WE HAVE DECIDED WE KNOW

JUDICIAL NOTICE

- Informal judicial notice – common sense, common knowledge, experience

- Formal judicial notice – fact(s) clearly uncontroversial, notorious, beyond any reasonable dispute or debate, indisputable, generally accepted **or** capable of immediate and accurate demonstration by resort to accessible sources of indisputable accuracy

Adjudicative v. legislative facts/social context

- Less stringent standard where legislative/social facts
- Express direction by SCC to take judicial notice
- E.g. the existence of widespread racism against visible minority groups in Canada
- *R.,v. Williams* [1998] SCJ no. 49
- But there are limits: R.v.Spence [2005} SCJ No.74

EXPRESS DIRECTION

- *R. v. Ipeelee,* [2012] SCJ No.13:

  60 Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190***). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.***

Other forms of judicial notice

- Extra-judicial fact-finding based on academic or scientific literature
- E.g. **The factors leading to false confessions** (*R. v. Oickle,* [2000] SCJ No.38):

  "Ofshe & Leo (1997), supra, at p. 210, provide a useful taxonomy of false confessions. They suggest that there are five basic kinds: voluntary, stress-compliant, coerced-compliant, non-coerced-persuaded, and coerced-persuaded. Voluntary confessions ex hypothesi are not the product of police interrogation. It is therefore the other four types of false confessions that are of interest."

AB v. Bragg Communications, 2012 SCC 46: The Effects of Cyberbullying

- "Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities.
- Moreover, victims of bullying were almost twice as likely to report that they attempted suicide compared to young people who had not been bullied

ARE WE BOUND BY QUESTIONS OF FACT DETERMINED BY SCC?

- Are factual determinations as binding as legal pronouncements?
- Can they be re-litigated/tested?
- Is there any utility in re- litigating?
- Does it matter whether the subject of evidence or literature? (e.g. *Daviault*)
- Does social science become law if it appears in a judgment rather than a journal?

R. v. Hamilton, [2004] O.J. No.3252 (C.A.)

- Limits on judicial fact-finding based on prior judicial experience and social context
- Findings of fact should not be based on judicial perceptions of social context (be it reference to personal knowledge or literature)
- rather should be based on *evidence viewed through the lens* of social context

JUDICIAL INSTRUCTION

THE THINGS THAT WE KNOW THAT OTHERS SHOULD KNOW

D. JUDICIAL NOTICE v. EXPERT EVIDENCE

- *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.) at 395 (leave to appeal denied *sub nom*. *R. v. McCarthy*, [1998] 1 S.C.R. xii) at para. 22-4):

> "This is not to say that **a reminder as to cross-racial identification is** not **appropriate** in a case where it is an issue. However, the argument that impresses me is that **such a reminder from the trial judge is more than adequate, especially when it is incorporated into the well established warnings in the standard jury charge on the frailties of identification evidence. Writings, such as those of Dr. Yarmey, are helpful in stimulating an ongoing evaluation of the problem of witness identification, but they should be used to update the judge's charge, not instruct the jury**. I think that there is a very real danger that such evidence would "distort the fact-finding process".

ISSUES OF FACT BECOME QUESTIONS OF LAW

1) The confidence level of an eye-witness' identification does not relate to the accuracy/reliability of the identification (*R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.) at 147)
2) There exists no presumption that all victims of sexual abuse will disclose the abuse immediately (*R. v. D.(D.)* (2000), 148 C.C.C. (3d) 41 (S.C.C.) at para. 59, 63)
3) An eye-witness is less likely to make an accurate identification where the circumstances involve a cross-racial identification (*R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.) at 395 (leave to appeal refused, *sub nom. R. v. McCarthy*, [1998] 1 S.

4) It is dangerous to accept the evidence of a jail-house informant without confirmatory evidence (*R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.) at 353-4 (leave to appeal denied [2004] S.C.C.A. No. 246))
5) Stress is a strong factor to consider in assessing the reliability of eye-witness identification (*R. v. White* (2003), 176 C.C.C. (3d) 1 (Ont. C.A.) at 11)
6) It may seem counterintuitive that people would confess to a crime they did not commit but this intuition is not always correct (*R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.) at 341)

HOW DO WE KEEP CURRENT?

- State of scientific knowledge is fluid
- How do we ensure that charge is accurate?
- Do we read the literature?
- Call an expert witness to be special advisor on the charge?
- Can we be appealed on a “question of science?”
- Will there be cases in which a litigant should have the right to call evidence - e.g. to counter ingrained stereotypes – when charge might not be enough?

JUDICIAL KNOWLEDGE: THE THINGS THAT WE HAPPEN TO KNOW

THE JUDICIAL PERSPECTIVE

- Personal perspective/ life experience

- Cardozo: "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."

- *R. v. S.(R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.)

OTHER SOURCES OF JUDICIAL KNOWLEDGE

- Information about a jurisdiction
- Findings in other cases
- Attendance at judicial education programs

- **Must we disclose our knowledge?**
- **Must we disabuse ourselves of it?**
- **Can we apply it?**

WHERE DOES ALL OF THIS LEAVE US?

- 1. factual assumptions permeate the process;
- 2. assumptions may or may not be valid (consider dissent)
- 3. empirical/expert evidence may improve fact finding
- 4. empirical/expert evidence may distort fact finding
- 5. empirical/expert evidence may be used in different ways.

CAN WE/SHOULD WE IMPROVE THE FACT FINDING PROCESS

- If social science rebuts our so called common sense assumptions, should we not correct it?
- Would it enhance the quality of justice?
- Might we avoid miscarriages of justice?
- Research Bd. Of British Psychological Society
  - Plea for introduction of expert evidence
  - “uninformed evaluations of memory lead to unreliable judgments”

On the other hand

- Risk that evidence will artificial bolster credibility or offend rule against oath-helping;
- Risk that jury might abdicate its duties; Might a frustrated jury seize upon the expert evidence as a convenient basis on which to decide?.
- Risk that nuances of scientific debate may be obscured
- Risk that common sense dressed up as science will attract superordinate weight.

Would our system survive such efforts to perfect it?

- Mohan:
- “there is also a concern inherent in the application of [the necessity] criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept”

Transparency

- Will never be universal consensus
- But we can strive to make fact finding more transparent
- Examine our assumptions about what we know and how we know it.
- Does the space between the notes add up to music, or a series of discordant notes**?**