

Prepared for presentation to the *Conference of Ontario Boards and Agencies COBA 2000 - Toronto - November 16, 2000.*

FACT-FINDING: A judicial perspective

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The author gratefully acknowledges the work of The Honourable Gerald Seniuk, Provincial Court of Saskatchewan, and Dr. John Yuille, University of British Columbia, who have written and lectured substantially on this subject.

Judge Seniuk and the author have been involved for several years in a program known as “The Saskatchewan Judges’ Project”, which is an analytical model to study “fact-finding” in the context of a criminal trial. The Project is based on a model for analyzing and assessing evidence known as the *Credit Model of Analysis*, which was developed in its theoretical form by Judge Seniuk and refined by thinkers in other disciplines. The format of the program is to have the audience view a video tape of the evidence in a simulated criminal trial and to have the individual participants decide the case (conviction or acquittal) as a judge sitting alone. The results are then analyzed and formally discussed in a uniform way.

The writer and other judges from the Provincial Court of Saskatchewan, have conducted dozens of such sessions throughout Canada, from 1991 to the present. The research is ongoing and Judge Seniuk is endeavoring to establish a “chair” for the project at the University of Saskatchewan, Saskatoon.

The content of this paper draws extensively on the ideology presented in several articles written by Judge Seniuk, or co-authored by others:

1. *Judicial Fact-finding and a Theory of Credit*, (1992) 56 Saskatchewan Law Review, p. 79 (Judge Gerald Seniuk);
2. *Judicial Fact-Finding and Contradictory Witnesses*, (1994) 37 Criminal Law Quarterly, p. 70 (Judge Gerald Seniuk);
3. *Fact Finding and the Judiciary*, (1996) - unpublished. (Judge Gerald Seniuk and Dr. John Yuille);

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4. *Two Puzzles of Juridical Proof*, (1997) 76 Canadian Bar Review, p. 65 (Professor Ronald Allen & Judge Gerald Seniuk).

Fact Finding - What is at stake?

Adjudicative fact-finding is an uncertain process and the discretionary nature of the process creates a high risk for injustice. When a single judge or adjudicator is called upon to make decisions as to the facts in any matter, the potential for error is always present. This is so because the process of giving weight and deference to testimonial accounts involves many vagaries and poorly understood criteria. Added to that reality is the necessarily subjective nature of the decision-making process. Each adjudicator brings her/his own encumbrances and perspectives to the hearing - his or her own biases, world views, preconceptions, and perhaps entrenched stereotypical opinions as to certain classes of witnesses. These factors bear on the adjudicator's subjective opinion as to the weight and value of evidence in the hearing process.² The risk of error in assessing witness evidence is enhanced when the evidence contradicts the evidence of other witnesses in the matter. "In these cases certainty in fact-finding is rarely possible; it is one word against another, and the justness of the decision depends on the good judgment of the trier of fact and his or her skill in avoiding fact-finding pitfalls."³

The danger of making the wrong decision in a contest between competing oral claims not only jeopardizes the justice of the individual case but also puts at risk the notion that adjudicative determination of facts is the surest method of achieving fairness in our system. The uncertainty of 'found facts' is a recognized legal reality. In part it is an enhanced appreciation of this knowledge which has given sway to the development of alternate methods of dispute resolution.

Our society expects adjudicators invested with statutory powers to resolve disputes in a rational

² In this context the focus of discussion will be on oral evidence of witnesses and the analysis of their statements.

³ Seniuk, *Judicial Fact Finding and Contradictory Witnesses*.

way. “To achieve rationality dispute resolution must address two pertinent aspects of decision making: foundation and reliability. Foundation reflects the rational and/or factual grounds for a decision; reliability reflects the capacity, given the same foundation, to regularly produce the same decision.”⁴ Foundation entails the ability to articulate reasons for a decision, whereas reliability requires that similar fact scenarios will produce similar and even predictable results. These are sound criteria for any discussion of ‘fair hearing’. The problem we propose to examine in this seminar is that human factors may produce decisions along a wide spectrum, from skewed results to indefinable wisdom. Our objective will be to determine if the process can be refined to produce a safer result.

Fact or Fiction?: The black hole

The process of arriving at a decision in any adjudicative process is a cognitive search for truth, guided by the rudder of proof. The process of proof requires the adjudicator to carefully consider all the admissible evidence, weigh that evidence together, determine what is factual, identify the governing principles and standards and come to a decision within the boundaries of those considerations. The trick in this process is to make the correct call as to what the facts are. As mentioned, this is often a matter of supposition as opposed to logic and reason. The fact-finding component of the process is often indeterminate. It is an example of imperfect procedural justice that cannot guarantee a right answer. In effect, there is a large element of mystery to the process - a black hole in the middle of the trial process that no-one understands very well. Ron J. Delisle, of Queens University, a respected professor on the law of evidence, states⁵:

“When a judge seeks to reach a conclusion of fact from the evidence of witnesses he discriminates as to weight and cogency. Jerome Frank referred to this exercise as ‘fact discretion’. A witness describes a past event. On analysis the witness is stating his present recall of what he then believed he saw. The trier of fact observes the demeanor of the witness, sees her tested on cross-examination, and expresses his opinion regarding the correctness of the witness’s belief. We have

⁴ Seniuk, *Fact-Finding and the Judiciary*, p. 3.

⁵ R.J. Delisle, *Judicial Discretion in the Law of Evidence* [this is a paper resented by Professor Delisle to a judicial conference in 1988 - I am unaware if it has been published].

‘subjectivity piled on subjectivity’; guesses upon guesses. In this exercise, which is the best we can do, we trust in the judge to exercise his discretion in a sound manner and to discriminate wisely.”

It may be tempting to find security in the search for adjudicative wisdom in our own common sense. As valuable as ‘common sense’ can be, we have to recognize that it may be faulty, and especially if it is not informed, not balanced, and fraught with subjective impediments. “Common sense”, which may also be termed ‘practical wisdom’ or ‘practical reason’, is the *faculty of judgment*. This ‘faculty’ is drawn upon most strenuously when the ambiguities are greatest and when the criteria upon which judgment is based (the evidence in the case) seems to be in disarray. The orthodoxy of a fair hearing requires that the adjudicator is not permitted to invent impressions of the evidence in order to resolve ambiguities, but find rational bases for conclusions as to fact. This concept is different from drawing inferences, which will be discussed below.

An American legal writer, Anthony Kronman⁶, sees judgment as a complex phenomenon with two competing goals: sympathy and understanding of the competing litigants’ positions, and detachment from the interests of either side. The problem for us is that few of us have received any special training in the application of good common sense, or in the assessment of witness credibility, or in the assessment of evidence generally, nor in the evaluation of demeanor, or the use of probabilities, *et cetera*. The Honourable Brian Dickson, a former Chief Justice of the Supreme Court of Canada, said to try to find a rule which embodies and codifies common sense is a search for the impossible⁷. Nevertheless, we can develop analytical skills suited for the process of decision making which will help us avoid thinking errors and pitfalls. Part of the process to sound and wise judgment involves attempting rationality in our decisions together with a judicious application of intuition. There is an art and a science to judicial fact-finding. It has both an intuitive and a rational aspect. My objective in this seminar is to use dialogue to explore the ground between the intuitive and the rational, between the art

⁶ Kronman, “Living in the Law”, (1987) 54 Chicago Law Review 835

⁷ *Vetrovec v. R.* [1982] 1 S.C.R. 811.

and the science, and where possible to expand the boundaries of the rational.

Fact-finding Techniques

Our discussion of the techniques in fact-finding will be anything but complete. I make no pretence here of offering anything more than a logical, analytical model. It is certainly not exhaustive and may require modification. It is rather an attempt to identify skills in fact-finding which will have the effect of reducing the risk of error in the result. The Saskatchewan Judges' Project recognizes that there is a wide range of elements in a study of "fact-finding", including skills related to credibility assessment, witness-demeanor evidence, statement analysis, critical thinking skills, unconscious bias or prejudice, myths and stereotypical thinking, systemic discrimination, criteria of relevancy, models and methods of decision-making, personality traits and thinking preferences, expert evidence, new technologies, shifts in paradigms of proof and burdens of proof. I will attempt to give priority to only a few of these elements in this seminar.

The first objective in any fact-finding exercise should be to organize the principles of analysis. This discipline requires that the person making decisions as part of a tribunal process must initially identify the controlling principles in the case, then determine the facts. There is no doubt that experience in doing so is a great asset. If determining the issues and facts in a hearing is a skill, and I submit it is, it is honed with practice and application. It is useful, at some stage of the hearing, for the adjudicator to ask the self-directed question: "What are we trying to decide?" This is not a legal question, but a question of 'separating the wheat from the chaff' (if I may be forgiven a folksy Western saying). It is a question of examining the basis of the hearing. What is the adjudicator permitted to decide (under the governing statute), what is the adjudicator expected to decide, and what are the limits to the decision that can result? What are the real questions in issue in this particular hearing?

When it comes to the core issue of determining the 'truthfulness' of a witness's testimony, there is no code of rules and guidelines. Each adjudicator will have her/his own guidelines, and if we were

able to compare them we would likely find very similar results. One of the commonest methods of assessing credibility is to see how the account fits with the other facts in the case. This includes facts arrived at by inference and deduction, as well as from direct testimony. Some years ago Mr. Justice O'Halloran, of the British Columbia Court of Appeal, said in *Rex. v. Pressley* (1948), 94 C.C.C. 29 at p. 34:

“The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.”

It requires no legal training to appreciate and apply what the judge is saying in this case. We are asked to think about how the case ‘hangs together’, all the circumstances in the case being considered. These circumstances will include the adjudicator’s assessment of the ‘demeanor’ of the witness. Although ‘demeanor’ is considered to be one of the least reliable indicators of credibility, my experience is that judges will pay close attention to the witness for clues indicating honesty or dishonesty. Voice inflection, eye contact and comfort level with the witness are all matters that enter into our subconscious when we are assessing a witness. When we contemplate issues of belief and truth, we are really making a subliminal calculation of the trust we place in the individual. Again I quote from Judge Seniuk:

“When triers of fact believe any witness in whole or in part, that belief will be placed on trust in that witness, but trust is as much a cumulative experience as much as it is a calculation built upon pieces of evidence. Experiences of belief and trust are examples of...tacit knowledge. Tacit knowledge is contrasted with explicit knowledge, which is formally articulated (such as scientific or mathematical knowledge, or maps). Perhaps on occasion the reliance on a witness can be reduced to such explicit calculations, as in cases where there is independent and corroborative evidence and a strong motive to lie. But trusting a witness and believing in someone’s word is generally not based on that kind of knowledge.”⁸

The fair-minded adjudicator will recognize that she may possess a bias for a certain point of view, based entirely on her life experience, as opposed to what she hears in the evidence in the case. For

⁸ Allen & Seniuk, *Two Puzzles of Juridical Proof*, *supra*, at p. 77.

example, if the adjudicator harbors an instinct or belief that a tenant is more likely to be trustworthy than a landlord, or a member of one race or culture is more likely to respect the oath than another, such circumstances may well affect the ultimate “finding” of fact. The technician will claim that “facts are hard, brute, inescapable, awkward, and indisputable”⁹, however when evidence presented in a hearing is contested the resulting findings of fact based on such evidence is neither hard, inescapable nor indisputable. The results are “*findings*”, and as such they are what Judge Seniuk calls a “conceptual hybrid which, without criteria of evaluation to impose uniformity, can lead to reasonable disagreement.”¹⁰

Statement Analysis

Forensic psychologist, Dr. John Yuille, asserts that one of the surest methods of analysis to reveal deception is by ‘statement content analysis’. Based on research produced by the German psychologist, Udo Undeutsch, 19 criteria for examining statements have emerged. The criteria are based on a single assumption, that is that the description of real memories (i.e., memories of directly experienced events) is qualitatively different from the description of invented or coached memories. The criteria are as follows:

General Characteristics of the Allegation

1. Coherence.
2. Spontaneous Reproduction.
3. Sufficient Detail.

Specific Contents of the Allegation

4. Contextual Embedding.
5. Descriptions of Interactions.
6. Reproduction of Conversation.
7. Unexpected Complications during the Incident.
8. Unusual Details.

⁹ Allan R. White, *Truth* (Garden City: Doubleday, 1970) at 79.

¹⁰ *Supra*, note 4 at p.6.

Peculiarities of the Content

9. Peripheral Details.
10. Accurately Reported Details Misunderstood.
11. Related External Associations.
12. Accounts of Subjective Mental State.
13. Attribution of Perpetrator's Mental State.

Motivation Related Contents

14. Spontaneous Corrections.
15. Admitting Lack of Memory.
16. Raising Doubts about One's Own Testimony.
17. Self Deprecation.
18. Pardoning the Perpetrator.

Offense Specific Elements

19. Details Characteristic of the Act.

The research which developed these criteria stresses that the technique is intended to assess the validity of the particular statement in question, and not to assess the truthfulness of the speaker. Clearly, however, a high level of validity and a trustworthy statement will usually coincide. Moreover, the present use of the technique is most common in cases with the potential for criminal prosecution, such as sexual assault. Nevertheless, I have found the criteria accord very well with my assessments of credibility in a wide range of differing cases including both criminal and civil disputes.

Although the element of coherence is a necessary criterion for credibility, it is not particularly strong, as even invented stories are usually coherent. The single best indicator of credibility is spontaneity in the telling of the event. Dr. Yuille considers that if the account is not restricted to rigidity and an overly strict chronology, it represents a high level of accuracy. Real memories show a high degree of flexibility, whereas invented stories are less flexible. A concocted story is usually only rehearsed one way. The difficulty with spontaneity in the context of an account intended for a courtroom or tribunal is that it may have been retold in the witnesses mind several times, giving it a 'practiced' sound or cadence.

‘Contextual embedding’ is a reference to time and place. For example “I was just walking past the parking lot after my Yoga class when I saw my neighbor scratch the car”. Real experiences are typically mixed with other common occurrences. An invented story places a load on the memory, making it more difficult to include detail, particularly if the event is complex or protracted.

The first 5 of the listed criteria should be present in any *real* description. The remaining 14 need not be present, though they may be, and if so they can be an aid to credibility. I expect to expand somewhat on the categories during the seminar.

The Credit Model of Analysis (CMA)

This model is based on the so called ‘*Vetrovec*¹¹ warning’. That caution holds that as a matter of common sense, something in the nature of confirmatory evidence should be found before you rely upon the evidence of a witness whose testimony is central to proving the event, and whose credit (trustworthiness) may be suspect. In such a case, you should view the testimony of that witness with great caution, and it would be wise to look for other supporting evidence before relying on that evidence to convict an accused in a criminal case. Civil cases employ a lower standard of proof (balance of probabilities) and generally in such cases the party with the more plausible story wins. Nevertheless, the *Vetrovec* caution is a valuable tool which may be used to good purpose, even in cases where the standards of proof are relaxed.

In the context of the CMA workshop the term “credibility” concerns whether a witness is accurate, which involves questions of reliability primarily in such matters as powers of observation, eyesight, perception, memory, accuracy, emotional stability and the like. “Credit” relates to whether a witness is to be relied on to tell the truth. ‘Truth’ and ‘Accuracy’ are not necessarily the same in every case. A witness may render an “honest” account of what he/she believes to be the truth, but the account may be inaccurate or factually flawed. As always, the adjudicator must be alert to this

¹¹ *R. v. Vetrovec, supra.*

possibility.

The premise of the CMA is the presumption that each witness enters the courtroom with equal credit. There are no categories of witnesses which will impeach credit. However, the presumption is a fragile one and may be dislodged, or alternatively dislodged and restored as the hearing progresses. There are no automatic assumptions of unreliability. There must be an evidentiary basis upon which it would be reasonable to infer that the witness' evidence is, or may be, unreliable.

Of course, the premises of the Credit Model of Analysis and the techniques one develops for assessing credit and analyzing credibility are nothing more than tools. Whether the tools are used skillfully and judiciously is largely a measure of the person using them. The 'faculty of judgment' cannot be taught. We all know individuals in our respective professions who exercise judgment with great skill and wisdom, and others who do not. We expect, however, that there will be maintained certain minimum thresholds for fair judgment. The ever present requirement for the *appearance* of fairness and impartiality is best demonstrated by actual *indicia* of those laudable characteristics. The adjudicator's demonstrated interest in the proceedings, respect for the parties, willingness to listen and consider, and effort to provide reasoned opinions will go a long way in assuring the value of the hearing process. The process of fair-minded fact-finding cannot be quantified and packaged. There is no "kit" to use or follow. Nevertheless, a fair hearing is bounded by a clearly discernible safety rail. It cautions that certainty is virtually impossible, yet adjudicative and intellectual honesty can produce a fair result. The fact finder may be unable to make unconditional findings with confidence, however the tribunal should not deny its capacity for judgment. The mature and honest adjudicator will bring to bear his/her experience and appreciation of the thing to be decided, then will determine the relative plausibility of the stories advanced by the parties, and given the requisite burden of persuasion, make a determination that best accords with the preponderance of probabilities in the case. To try to make succinct the broad concepts that enter into any decision making process I cannot improve on what is said by my colleague, Judge Seniuk:

“Given the vastness of the canvass, any effort to reduce human decision making to a set of necessary and sufficient conditions is doomed to failure. The most we can expect is to have disinterested fact finders exercise judgment in light of their knowledge and experience in any unbiased fashion. In doing so the fact finders will of necessity rely on the active involvement of the parties in fashioning the issues to be decided at trial and indicating the range of disagreement over which decision must be made.”¹²

Conclusion

To make conclusions about the effect of evidence in a case requires a cognitive process. The first step is to consider all the admissible evidence in its entirety. The adjudicator must determine what evidence is believed and what is not. Evidence that is not believed is rejected and does not bear any weight in the analysis of what effect the evidence has, save that it may have the *practical* effect of enhancing contradictory evidence that is believed. Whether or not certain testimony is believed (as well as determining what weight will be given to testimony) will usually depend on how it accords with other evidence which finds favor with the adjudicator.

The adjudicator is called upon to make a decision based on the evidence presented, evidence which is often incomplete. Yet difficulties associated with fact-finding are more complicated than the lack of evidence or not having all the facts which could be known. They are more complex problems arising from the dynamics of human reasoning and the problems of proof. We must recognize that ‘decisions on the evidence’ emerge from human reasoning and that human reasoning in part is a product of one’s personal experience, one’s own cognitive filters.

Judgment involves deliberation and discernment. The use of tacit knowledge and intuition is also recognized as a component in decision making, though its application should always be tested by a process of self scrutiny in the decision maker. A careful balancing of these components, together with a studied application of intellectual honesty, will go a long way in assuring a fair result.

¹² *Supra*, note 8 at p.90.