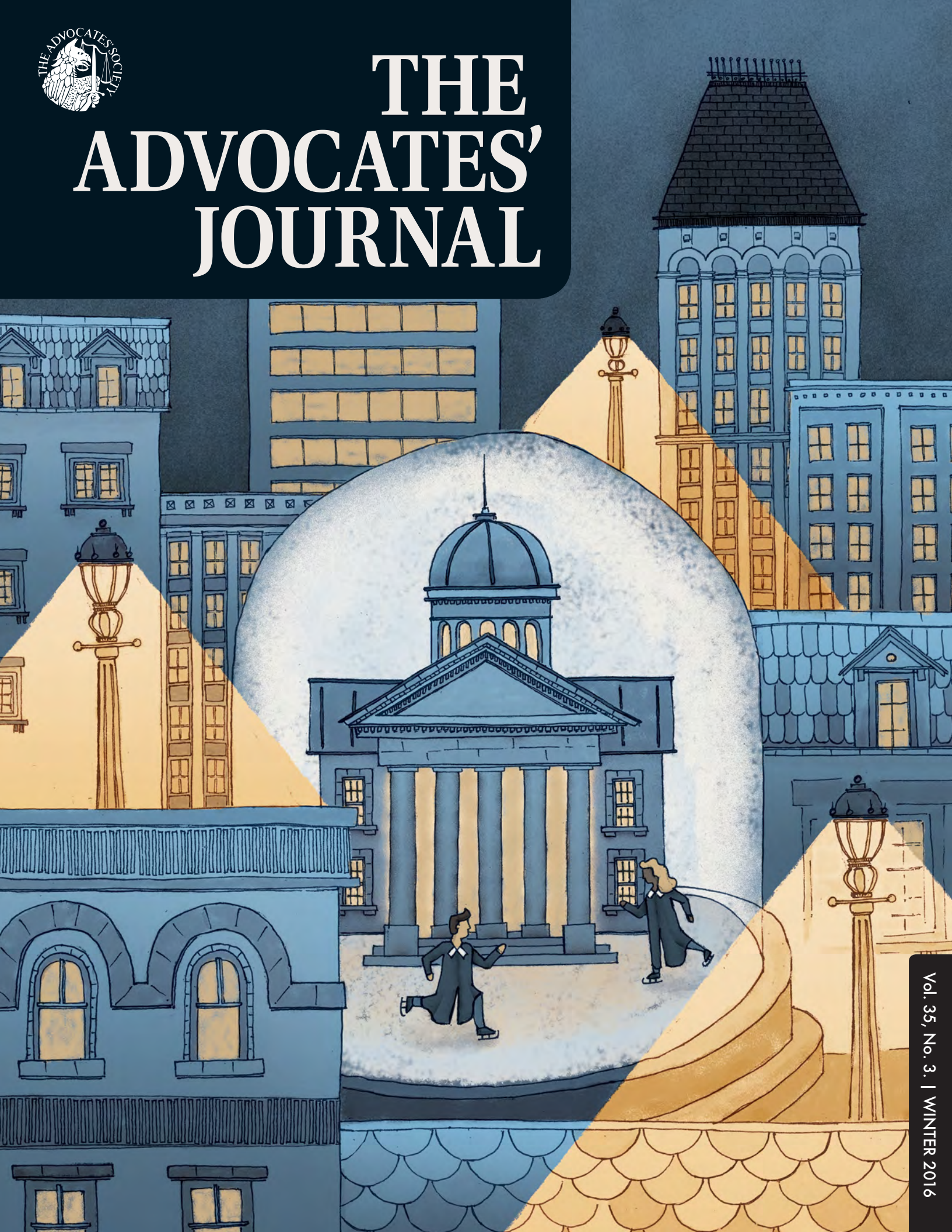
THE ADVOCATES' JOURNAL



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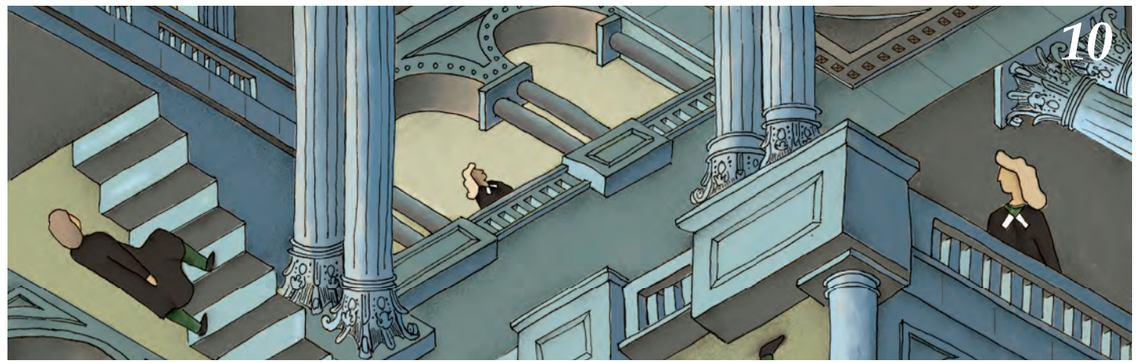

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Form and function:

The beauty of the factum

Stephen Grant, LSM

The future is already here – it's just not very evenly distributed.
~William Gibson

A friend of mine told me about his latest obsession – baseball gloves. But not just any glove: specifically the Wilson A2000. He recently sent me a photo of about 20 of the 40 he's collected so far. I can well understand his fixation.

Some objects are perfect, timeless. Have we ever improved on the paper clip, the stapler, barbed wire, even? We have, of course, improved the mousetrap to make it less cruel – less bloody, anyway – but many things retain their immutable quality. For example, the Movado watch – black face, no numerals and a dot at the 12 position – has a place of design excellence in the Museum of Modern Art in New York. It's now commercially known as the "Museum Watch." Photographer Edward Steichen called its design "the only truly original and beautiful one for such an object."

Just so with the Wilson A2000. When Wilson introduced this glove in 1957, my jaw dropped. I had never seen something that more closely combined aesthetic and function, although I couldn't have articulated that view at the time. It was a breathtakingly radical departure from what had come before, even as I look back on it 60 years later. As its design evolved, it became still more appealing to the eye and fitting for its purpose.

Bear in mind, I am discussing "two pieces of leather designed to prevent injury" that morphed into "a tool of the [multi-million-dollar] trade whose evolution through the 21st century can essentially be brought back to three cornerstone gloves: the Bill Doak glove, the Rawlings XPG and the Wilson A2000." (Chris Silva, "The Fascinating History of the Baseball Glove," *ThePostGame*, July 12, 2011.)

I craved a Wilson A2000 at ages 10 and 11, even 16, but whatever its price, I couldn't afford it (not to mention I wasn't even remotely a decent-enough baseball player to warrant owning one). Even in my late 20s, the price seemed out of reach. Although I can't really throw a baseball anymore (and neither can my friend), a few years ago I bought a beautiful black Wilson A2000 in Florida. Some fantasies never fade. (See photo.)

As Justice John Laskin once said in these pages, we can "forget the windup and make the pitch." Specifically, we can now craft legal argument in the factum with ingenuity and verve. As with the Wilson A2000, we have the same integration of form and function.

What of the factum? Even its etymology as a form of written submission – an adjunct to oral advocacy – is shrouded in uncertainty. In his "History of Factums" (2014, *Alberta Law Review*, 51:4, 71), Justice J.E. Côté of Alberta suggests the word is of French (rather than Latin) origin, actually meaning "pamphlet." He also notes that "Ontario did not allow factums until 1972. Indeed for many years before then the Ontario Rule expressly forbade a factum!"

That the factum has become more important in advocacy is beyond doubt, given the ever-increasing time limits, particularly in the Court of Appeal and motions courts. There were, in fact, two 1998 Rules amendments that turned factums from stilted statements ("This is an appeal from the decision of ...") into the advocacy tool they've become. These were the addition of the overview section (credited to Justice Paul Perell, then on the Rules Secretariat) and the addition of "argument" to the "concise statement of law." By these tweaks – just as we have transformed the civil justice system from one of documentary and evidentiary ambush into one of full and timely disclosure – we have replaced legal aridity with the power of persuasion. What the Wilson A2000 achieved for pitching and fielding, the factum has done for the advancement of one's case.

Now if we could only reduce the page limit to a firm maximum of, say, 10 or 20 pages ...

***

We have a number of riveting pieces for your enjoyment in this issue. Among fascinating thoughts on opinion evidence, standard of review, and the "Moneyball" question, we have a short story and some book reviews. Baseball having ended more than a month ago, we can enjoy the repose of winter with the *Journal* in hand.

John Adair
John Adair is a partner at *Adair Barristers*. On the (rare) occasions when he is wrong, he makes up for it by an unshakeable belief that he is, and was, right.

Frank Addario
Frank Addario is a principal of *Addario Law Group* and leads the firm's criminal, quasi-criminal and investigations practice. Most of his clients come to the government's attention because of some kind of misunderstanding.

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Marie Clemens is an associate lawyer with *Nelligan O'Brien Payne LLP* in Ottawa. Her practice has an emphasis on insurance defence including accident benefits, together with commercial litigation, professional liability and personal injury. Marie is a certified yoga instructor and has presented Mindfulness programs at the University of Ottawa, Faculty of Law, and elsewhere.

Prof. Adam Dodek, LSM
Adam Dodek, LSM is a law professor at the University of Ottawa. He is the co-founder of the Faculty of Law's Public Law Group and the Vice-President of the Canadian Association of Legal Ethics (CALE). At age 12, he played all-star baseball for Little Mountain in Vancouver, but he has never been confused with Brad Pitt.

Richard Halpern
Richard Halpern is a medical malpractice lawyer in Toronto. His practice focuses primarily on birth trauma cases.

The Honourable Joseph W. Quinn
The Honourable Joseph W. Quinn took an early retirement from the Ontario Superior Court of Justice in May 2016, having achieved his lifelong goal of sustained mediocrity.

Scott Rollwagen
Scott Rollwagen is the research partner at *Lenczner Slaght Royce Smith Griffin LLP* in Toronto. He takes life one complicated problem at a time. And drinks too much coffee.

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Greg Temelini is a partner at *Wright Temelini LLP* in Toronto, practising civil, commercial and appellate litigation, and regulatory defence. He is originally from Sault Ste. Marie, a fact he somehow manages to work into every conversation. Greg is counting the days until the start of the baseball season.

The Honourable Warren K. Winkler, O.C., O.Ont., Q.C.
Warren Winkler is a mediator/arbitrator at Arbitration Place, a former Chief Justice of Ontario, an Officer of the Order of Canada, a dog lover and squire of Markdale, Ontario, and a life-long friend of Marty Teplitsky.

THE ADVOCATES' JOURNAL
SUBMISSION GUIDELINES

- Content: We value articles about advocacy and advocates that are topical and crackle with currency.
- File format: We accept submissions only in Microsoft Word format.
- Length: Although we appreciate concision, there is no maximum or minimum length for *Journal* articles. The majority of our articles are between 1,500 and 3,500 words (excluding notes), but we will consider articles outside this range.
- Notes: We prefer articles without notes, but whether to include notes is at the author's discretion. (All direct quotations should be referenced, however, whether in the body of the article or in notes.) If you include notes with your submission, we prefer endnotes to footnotes. When reviewing notes after completing the final draft, double-check that cross-references ("*ibid.*," "*supra*") haven't changed because of late additions or deletions of text.
- Citation format: We do not insist on a particular citation style. If you include citations, we trust that you will ensure they are accurate, complete, current and internally consistent. In particular, check that citations to Internet sources refer to web addresses that are valid as of the date of the submission. If a cited web address is no longer valid, we expect you to make note of this in the citation.

Thank you,

Stephen Grant,
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Aaron Dantowitz,
Managing Editor

Sonia Holiad,
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Why good judgment comes first

John Adair

I recently interviewed young lawyers for a position with our firm. I asked all the applicants what quality they believe is the most important for a successful litigator. It is, admittedly, a bit of an unfair question, both because there probably is no "most" important quality and because it is so difficult for anyone who has not spent any considerable amount of time doing this job to answer that question. However, posing the question caused me to revisit my own thoughts on the subject.

I have long heard my father say that judgment is the single-most important quality for a good litigator. I now believe that I can adopt that answer based on my own thinking and experience. There are of course many other options, and no doubt a compelling case can be made for a number of them. This is not a question that admits of a "right" answer. But in this space I want to defend my answer by (1) explaining how I got to it, and what "judgment" means; (2) explaining why, to me, judgment is so important in the context of today's litigation landscape; and (3), considering what, to me, is the critical question that follows from my answer: whether we can "learn" better judgment. My effort starts with a podcast about California resident Larry Williams.

What I mean by judgment

I am probably well behind the times, but I started listening to podcasts about 12 months ago, and I'm hooked. The variety and quality of podcasts has surprised me. One podcast I enjoy is *Planet Money*, produced by National Public Radio. (*Planet Money* is, in my view, a misnomer, because it does not generally deal with finances.) Episode #685 tells the story of Larry Williams, who found himself asking whether he really did have a legal obligation to pay income taxes in the United States, or whether perhaps there was a legal argument that would overcome this obligation. Larry's was an ambitious task given that income taxes are considered such an ironclad obligation that they are listed together with death as one of only two certainties in life.

The story goes like this. Larry and some friends were camping in the mountains of New Mexico in the mid-1980s. One night around the campfire, one of them asked: "Do you really have to pay your income taxes?" These are sophisticated businessmen, and it was a serious question (or at least a question posed in a serious manner). Some members of the group claimed there were people who had found legal ways not to pay income tax. Larry, who seems to have been earning a fairly substantial income, felt that the government was collecting far too much in taxes, and he took up the question with interest.

One of the men sitting around the campfire was a lawyer, Jim Knowles. Jim had never studied the issue, but he had an understandable gut reaction: He told his group they were talking nonsense – everyone has to pay taxes. Larry's response was to ask Jim to look into it. Jim brushed Larry off ("Sure, I'll look into it"). Larry didn't hear back for a while, until he received a call one day from Jim. Jim explained that he was reasonably confident he had found a lacuna in the income tax code and that Larry, and anyone else, didn't actually have a legal obligation to pay income tax.

Jim's conclusion after researching the issue carefully was that tax can be levied only on income paid *by* the federal government and, in any event, is applicable only to citizens of the United States. Larry, by renouncing his citizenship, could avoid the obligation.

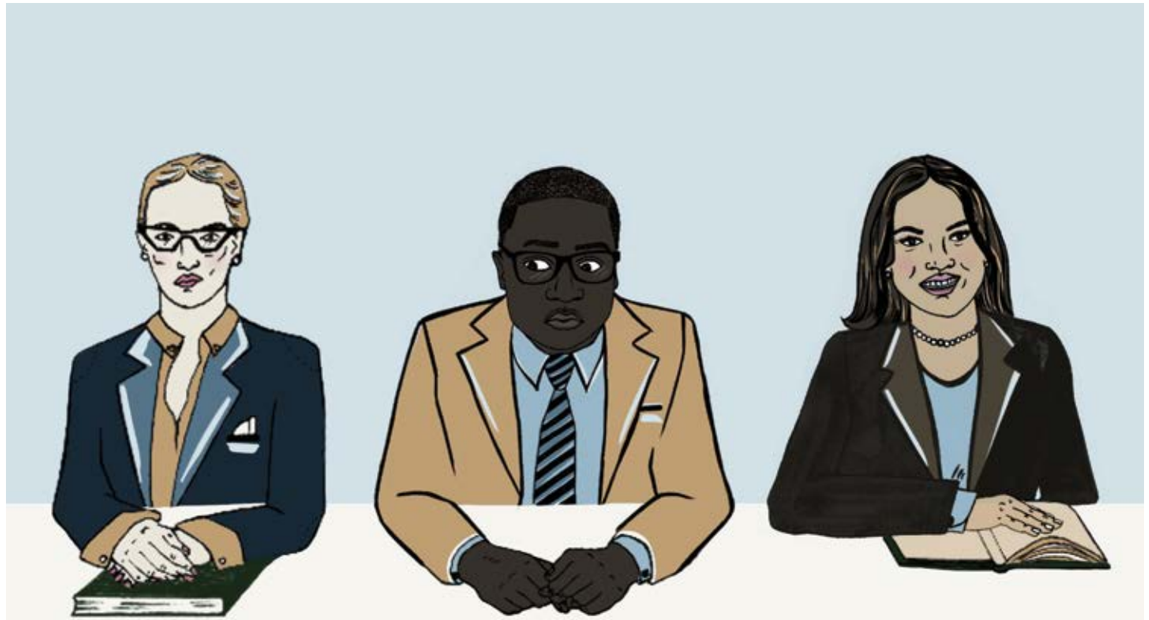
Larry was thrilled with this advice. From the interview of Larry, it's clear he genuinely believed the advice because Jim "is a lawyer" – he has the credibility of having gone to law school and practised as an attorney for more than 30 years.

Larry decided to rely on Jim's arguments and stop paying taxes. He didn't hide this decision from the government. Instead, he wrote to the state and federal governments and declared himself a "sovereign citizen." He also set up a trust, routing all his income through it so that it was not "his" income (a curious move given that his premise was that *he* was not obliged to pay income tax at all).

The IRS did not get around to Larry for three or four years. When it did, however, the consequences were severe and the IRS pursued him vigorously. Without getting into all the details, Larry ended up a fugitive living in Australia and was ultimately brought back to California by two US Marshals, an experience Larry clearly did not enjoy. The upshot of the legal proceedings was that Larry did not go to jail, but he did have to pay all the back taxes, plus substantial interest and penalties.

What Larry (or, rather, Jim) can teach us

Larry's story is not really, for my purposes, Larry's. It is Jim's. From the interview clips in the podcast, Jim sounds like an intelligent guy. He also had what I consider to be the only rational gut reaction to the campfire question: There is no way on earth that any court would accept a legal argument that a person in the United States does not have to pay income tax (leaving aside foreign citizens who may have the benefit of various tax treaties).



What is so interesting to me is that Jim fell into a trap that can too often catch us as litigators: He was asked to develop an argument to support a position and, somewhere during that process, he lost sight of whether the position had any hope of succeeding. (It plainly did not.) Jim used his skills as a lawyer to undertake careful research, and then he creatively came up with arguments that were consistent with the text of the legal authorities. But he abandoned his good judgment in the form of his initial reaction.

Jim's story to me highlights why judgment is the most important quality we possess as litigators. To explain, let me start by stating what I understand "judgment" to be in the context of a litigation practice.

What is "judgment"?

I understand judgment to be the act of considering the facts, determining what position your client should take to achieve the most successful outcome possible and then identifying the argument most likely to persuade the court to achieve that outcome. In litigation, judgment is manifest in almost everything we do. But in my view, it's most apparent when we undertake the specific task of trying to determine what a court is likely to do with the dispute (whether that means a larger dispute between the parties at a trial; or a more narrow interlocutory dispute such as over whether certain documents must be produced).

Judgment understood in this way is different from *advocacy*. The former is, at a general level, about deciding what position to take and what will persuade a court to accept that position, while the latter consists of the skills necessary to make that argument effectively. Excellence in advocacy therefore requires mastery of the essential skills with which we are all familiar: cross-examination, persuasive writing, knowledge of the rules of evidence, etc. However, as explained below, excellent advocacy cannot overcome poor judgment.

Why judgment comes first

So why do I say that judgment is the most important quality a good litigator can possess? What elevates judgment above hard work, intelligence, determination and advocacy skills? For me, judgment is paramount simply because those other attributes do not do the client much good in the absence of the ability to exercise sound judgment in formulating the client's position. Paul Pape, for whom I had the pleasure of working for a few years, is fond of saying: "We're lawyers, not magicians." What that "Pape-ism" means to me is that we can be excellent advocates, but excellence will not turn a loser into a winner. Although I suspect this point is obvious to any intelligent lawyer who thinks it through, the problem is that it is far too easy for us to jump right into advocating for the client's position. I suspect that this tendency happens for a variety of reasons, including that we are prone to believe we are being paid to advocate, and because we put so much of ourselves into the advocacy that we become "married" to our clients' positions and fail to see the warts on those positions.

The current litigation landscape is such that our clients are, probably unconsciously, placing a premium on judgment. Judges are doing so, too, though much more consciously. For clients, the premium on judgment is seen in the rejection of the hourly rate billing model. Clients now routinely demand alternative-fee arrangements (AFAs) that are predicated on value billing. Clients increasingly don't care how long it takes us to draft a factum, and they don't want to pay for our time. What they will pay for, I believe,

is good judgment because good judgment means they are getting quality insight into the likely outcome of litigation and are getting someone who can achieve that outcome efficiently (for example, by making the one or two arguments that have a real chance of success, rather than the nine arguments that come to mind). That, to me, is the "value" at the heart of any notion of "value billing."

Judges also demand judgment from counsel. They see too many motions, too many briefs and too many pages of written submissions. Counsel who have the judgment to cut through that and advance the one or two arguments which really need to be made will benefit greatly. Counsel who do not have it will see their clients suffer.

Can we "learn" good judgment?

Regardless of whether you agree that good judgment is the most important skill a litigator can possess, there is no doubting that it is a significant and important attribute. Recognizing that, one can reasonably wonder whether we can improve our judgment, or whether it is simply an innate skill dished out in heaping amounts at birth to the likes of Earl Cherniak and Alan Lenczner. Is it akin to the ability to recognize the difference between a 96 mph fastball and an 82 mph change-up right out of the pitcher's hand, genetically bestowed upon great hitters such as Ted Williams?

I do believe that good judgment involves an innate grasp of human nature and notions of fairness, and to that extent cannot therefore be "learned." However, I also believe that we can learn to *improve* our judgment as litigators, probably significantly so. Perhaps this is nothing more than putting ourselves in the best position to succeed in exercising our judgment. The concluding section of this article is dedicated to a discussion of three ways in which we might approach that exercise.

What really happened here?

The first essential task seems to me to be obtaining from your client and other available sources the best understanding of "what really happened here." This lesson is another thing I learned from Paul Pape, though I don't believe he used that particular phrase to describe what he was doing. Paul is the best lawyer I have seen at interviewing the client to understand the facts. What makes Paul so good is that he never takes the client's words at face value; instead, he constantly cross-examines the client. Paul has a remarkable ability to grasp quickly what was really motivating the players in the client's story, including, most importantly, the client. All these skills help him determine the key question in any case – "What really happened here?"– and develop a theory of the case that is consistent with the answer to that question.

Although most of us will never be as good as Paul at interviewing the client or witnesses, it is fundamentally important when conducting the initial interview with our clients that we listen critically to their stories, cross-examine them as much as necessary without any regard to their "feelings" or reaction, and determine not what the client wants us to believe happened but what a judge is likely to conclude happened. That will put us in a position to be best able to exercise the innate part of good judgment.

Be objective

We must also ask ourselves what a judge is likely to think about the parties and the circumstances and use the answer as the basis for our advice to our clients. Our clients are generally not paying us to advocate their position regardless of the merits (though there are, of course, rare cases of principle in which our clients are doing precisely that). Rather, they want genuine insight into what will happen if the dispute goes to court, whether that be the overall dispute or an interlocutory skirmish. It is simply too expensive these days to have a full-day motion about documentary production and refusals, or the adequacy of pleadings, to be wasting such resources on arguments that, while made effectively, never had a chance. I suspect that well over half of such motions should never have been brought.

To exercise good judgment, we must be more than cheerleaders, and even more than advocates. We must be objective and honest with our clients. It is helpful in that regard to run the situation or issue by our colleagues. Give them the *Coles Notes* version of the situation and ask them for their gut reaction. This approach is particularly important because, despite our best efforts (or perhaps because of them), we are too quickly sucked into our client's position and how we can shine that up and pursue it as effectively as possible.

Learn from your mistakes

I hate this particular way of developing better judgment. I hate it because it makes me think about the mistakes of judgment I have made that cost my clients. We have all lost cases, but there are a few losses where you look back and realize you had it all wrong from the start. Not that you were unprepared for court, or misunderstood the applicable law. It's that you simply should have known from the start that your client would not succeed in court. This is usually because of the equities. Each outcome, whether by settlement or hearing, provides an opportunity for critical analysis of what advice we gave the client at the outset, what the outcome was, and why and where (if at all) our judgment could have been better.

Conclusion

I do believe that good judgment is to a certain degree innate. However, there is a reason why experience is so valuable in any profession – including, especially, litigation. Lawyers who have seen thousands of cases unfold are in a better position to predict the outcome of the next case. We can expedite that process to some extent by working hard to develop better judgment and, thereby, serve our clients more effectively.

Raising the bar:

The culture shift within our justice system

Marie T. Clemens

In a series of decisions released over the past few years at all levels of the courts, it has become increasingly clear that it is no longer business as usual in the civil justice system. In sharp rebukes to the tactical procedures that trial counsel use, courts have consistently emphasized the need to engage in a "culture shift" to ensure ready and affordable access to justice for their clients.

This article discusses the culture shift that the courts are promoting, with a particular emphasis on the evolving requirements in the context of the Ontario *Rules of Civil Procedure* together with the consequences for failing to comply with the new direction that the courts have embraced.

The culture shift: Promoting efficient, affordable and proportionate access to our courts

It is clear that our courts have taken notice of the decision of the Supreme Court of Canada in *Hryniak v. Mauldin* ("*Hryniak*"),[1] which articulated the need for a "culture shift" in the traditional approach to civil litigation. The case demonstrated a willingness by the judiciary to take action in the face of pervasive issues confronting the justice system. It has been recognized that Canadians who are attempting to enforce their legal rights are facing far too many obstacles, and Karakatsanis J. clearly summarized the Supreme Court's approach to such issues when she stated that "there is recognition that a culture

shift is required in order to create an environment promoting timely and affordable access to the civil justice system."[2]

The Supreme Court's decision and reasoning in *Hryniak* certainly has not gone unnoticed. Released in 2014, *Hryniak* has been cited on CanLII hundreds of times, and though the decision concerned the interpretation of a certain aspect of the Ontario *Rules of Civil Procedure*,[3] a significant portion of these citations are from jurisdictions outside the province. The case has also generated a great deal of commentary and analysis by the broader legal community, some of whom have bemoaned the seemingly inevitable death of the trial, though most have celebrated the Supreme Court's focus on ensuring that access to justice is both cost-effective and more timely. Beyond the many well-intentioned commissions and reports which have considered the very real issue of access to justice, it is clear that Karakatsanis J.'s emphasis on promoting the principles of proportionality, timeliness and affordability have resonated throughout the legal world.

The decision in *Hryniak* dealt primarily with the expanded powers available to courts for summary judgment, which had been made available under modifications to the *Rules*. Although *Hryniak* has become closely associated with the role of summary judgment in achieving just outcomes, the court made it clear that this objective is merely one opportunity available to courts to address the increasingly expensive and complex system of civil justice and achieve a more accurate reflection of the modern legal reality. As Karakatsanis J. noted, the decision in *Hryniak* "concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice."[4] Although the decision has most often been cited in the context of motions for summary judgment, an increasing number of cases have heeded the call for a culture shift and applied the reasoning to a broader range of decisions. This article will examine some of these decisions, with a particular focus on those relating to increasingly broad requirements surrounding orders for costs, motions for an adjournment and continued disclosure obligations.

The culture shift: Orders for costs – *Saleh v. Nebel*

The revised approach to traditional models of civil litigation is on full display in the decision in *Saleh v. Nebel* ("*Saleh*"),[5] which concerned an order for costs arising from an unsuccessful action for damages following a motor vehicle accident. In an endorsement that was more than twice as long as the reasons for decision at trial, Myers J. denied the successful defendant his costs of the action, pointing to the discretionary nature of a costs award and the conduct of the defendant's counsel at trial as a justification for withholding an award to which he was otherwise entitled.

The endorsement outlined the facts of the case, which involved a straightforward personal injury claim in which the plaintiff had been awarded $30,000 for damages. However, after the application of a statutory deductible, this award was reduced to zero. The defence was also successful in bringing a threshold motion in which the court held that "the plaintiff's claim did not meet the threshold of seriousness required to overcome the statutory immunity provided in section 267.5(5)(b) of the *Insurance Act*."[6] As a result, the court stated that the defence had been successful in the action for cost purposes, and that it would have fixed the costs at approximately $100,000 under what it referred to as "the normative approach"[7] based on the outcome.

> **"The civil justice system in Ontario is broken. It does not fulfil the goals of providing efficient, affordable, proportionate access to courts for the fair resolution of civil cases."[8]**

This was not the approach that the court was inclined to take, having regard to the issues facing the civil justice system which seem to have been epitomized by the conduct of defence counsel. Myers J. cited *Hryniak* and the culture shift endorsed by the Supreme Court as a basis for abandoning the "normative approach" that would have seen an award of costs, stating: "The civil justice system in Ontario is broken. It does not fulfil the goals of providing efficient, affordable, proportionate access to courts for the fair resolution of civil cases."[8]

Myers J. detailed the comprehensive trial management order that had been made at a pre-trial conference and which required counsel to take a number of steps before trial, including the provision of updated medical and financial reports, among other undertakings. As Myers J. noted, many of these steps required communication and co-operation among counsel to ensure an expeditious trial and with the purpose and expectation of helping to "reduce the length and costs of the trial by requiring pre-trial coordination among counsel."[9]

In detailing the conduct of the defendant's counsel both in the lead-up to and during trial, it is clear that the court felt this expectation was sorely misplaced. The conduct that attracted the court's ire included the expressed intention of the defence to require the plaintiff to prove the authenticity and admissibility of every document that the plaintiff proposed to put into evidence, noting that such evidentiary requirements are often waived unless there is reason to question the authenticity of the business records. Furthermore, the court noted that, in contravention of the trial management order, updated medical reports were still being exchanged just before the trial, and that the defendant's counsel delivered a new report "a couple of days into the trial"[10] which put forward a new theory of the case and almost resulted in a mistrial.

The court thus came to the conclusion that, "[w]hile it is ultimately true that this case was finished in 8 trial days, the point is that it never should have been scheduled for that long."[11] In a scathing critique of defence counsel's apparent inability to comply with directions and procedural orders made by the court, but which also stands as a general commentary on the state of civil litigation, the court stated:

> Playing uncivil, tactical, inappropriate, old-school, trial by ambush games like: threatening to require proof of obviously valid records, holding back important documents until the last second, failing to fulfil undertakings until the eve of trial, delivering new expert's reports during the trial, saying untrue things to counsel opposite (whether knowingly or not), failing to prepare examinations in advance to "wing it" at trial, refusing to agree to the admissibility of relevant documents while requiring changes to be made to irrelevant ones, refusing to share costs of joint expenses, refusing to cooperate on court ordered process matters, are all wrongful. Most of these things have been considered unprofessional sharp practice and inappropriate for decades.[12]

Ultimately, Myers J. found that, as a result of defence counsel's conduct, it was appropriate to exercise the court's discretion in denying the successful defendant his substantial costs in the action, noting that, as a result, "the defendant is being deprived of a $100,000 costs award to which it would otherwise have presumptively been entitled."[13]

The culture shift: Motions to adjourn trial – *Letang v. Hertz Canada Limited*

Another example of a court making use of *Hryniak* to justify an overhauled approach to the traditional trial model is that of *Letang v. Hertz Canada Limited*,[14] which involved a defence motion to adjourn a trial that was scheduled to begin the following week.

In that case, the plaintiffs had issued a statement of claim seeking roughly $3.5 million in damages, alleging that the defendants, Hertz Canada Limited and associated companies, had failed to enter into a franchise relationship despite the existence of written agreements requiring them to do so. About a month before the scheduled trial date, at the suggestion of the pre-trial conference judge and in the hopes of fostering settlement, the plaintiffs produced an additional 465 pages of back-up financial documentation to support their claims for damages. The documents revealed a number of errors that had been made in calculating damages, as a result of which the plaintiffs' existing claim was increased by approximately $120,000.

The defendants sought to adjourn the trial to allow greater opportunity for examination of the documents and further discovery, but were opposed in this request by the plaintiffs, who made their witness available for examination and even offered to waive the additional entitlement to damages to avoid further delay of the start of trial. Unable to obtain the plaintiffs' consent, the defendants delivered a three-volume motion record on Christmas Eve seeking adjournment of the trial. The motion was dismissed by Myers J., who stated that the defendants had not properly focused their energies on reviewing the documents or seeking the opinion or input of their experts after receiving the new documents before the holidays.

The court pointed out that the defendants had more than a month to ask their expert to do "a day or two of work allocating and adding up expenses."[15] Myers J. chastised the defendants for failing to arrange to have their experts made available in the lead-up to trial and, instead, doing "what counsel steeped in the traditional Toronto motions culture do – they served a big, thick motion and waited for their adjournment."[16]

Decisions such as those in *Letang* are emblematic of the "culture shift" that was espoused by the Supreme Court in *Hryniak*, as Myers J. made clear when he stated that the motion for adjournment "raises questions such as 'What are the goals of the civil justice system?' and 'When is enough, enough?'"[17] Myers J. went on to note that "[t]he civil justice system is based upon the fundamental value that the process of adjudication must be fair and just"[18] and, citing *Hryniak*, held that such a process "is illusory unless it is also accessible – proportionate, timely and affordable."[19] In a searing critique of tactics of delay which characterized the civil litigation process, Myers J. stated:

> Proportionality requires a balancing. In this case, the fair and just result is to get on to trial next week. The defendants will have their full opportunity to undermine the plaintiffs' financial evidence and credibility at trial. The defendants have had more than enough time to engage in a romp through financial back-up documents. There is minimal or no gain available by taking another 90 days compared to the harm of delay. Justice delayed is justice denied. The courts and the profession cannot implement a culture shift by continuing to operate on a "business as usual" basis. Courts and counsel must recognize that delay is itself a disease that eats away at the justice and justness of the system… Delay at all stages should be recognized as a serious form of prejudice that undermines affordability and proportionality and rots the uncompromisable goals of fairness and justice.[20]

The culture shift: Disclosure obligations – *Iannarella v. Corbett* and *Landolfi v. Fargione*

The Court of Appeal for Ontario has also weighed in on the culture shift, providing new insights into the requirements surrounding disclosure in civil litigation, which the court made clear should be undertaken with the ultimate goal of fostering settlement ensuring expedient access to justice. Any meaningful discussion on civil litigation, especially the pre-trial and post-trial obligations regarding discovery, must make reference to the *Rules of Civil Procedure*.

The pertinent rule concerning discovery is Rule 30: "Discovery of Documents," which the *Rules* make clear applies to media such as sound recordings, video-tape, film and photographs. Disclosure of such documentary evidence is governed by Rule 30.02, which states:

> 30.02(1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

In conjunction with this disclosure requirement is an accompanying obligation to produce an affidavit of documents, pursuant to Rule 30.03, which states:

> 30.03(1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the

full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

In *Iannarella v. Corbett* ("*Iannarella*"),[21] the Court of Appeal for Ontario dealt with a personal injury case in which damages were claimed following a motor vehicle accident. At trial, the jury had found that the defendant, Corbett, had not been negligent when he rear-ended the plaintiff's vehicle. However, the Court of Appeal found that the trial judge had erred in his instructions to the jury, and it substituted a finding of liability. More significantly, although the jury had also come to a conclusion on the quantum of damages at trial, had liability been established, the court found that "a series of rulings resulted in a trial by ambush, contrary to the letter and the spirit of the *Rules of Civil Procedure*."[22] These rulings and the court's analysis of the new trial culture with regard to discovery serve as a lesson to trial counsel on the shift being promoted by the courts, and the resulting expectations concerning their conduct.

The issue confronting the Court of Appeal in *Iannarella* was defence counsel's use at trial of video surveillance that had not been disclosed to the plaintiff. Surveillance had been conducted on multiple occasions after the start of litigation, and at trial it was used to cross-examine the plaintiff, despite the fact that its existence had not been disclosed in an affidavit of documents and no particulars had been provided. The Court of Appeal stated that disclosure obligations under the *Rules* were ongoing, even after discovery, stating that "[g]iven the interests of fairness and the objectives of efficiency and settlement, the court expects the parties to comply fully and rigorously with the disclosure and production obligations under the *Rules*."[23]

Defence counsel had relied on the decision in *Landolfi v. Fargione*[24] for the proposition that, where an opposing party had elected not to engage the benefit of the *Rules*, specifically through waiving its right to pre-trial informational discovery, it could not then seek to resist the use of evidence that may have been uncovered on the ground of inadequate disclosure. According to the Court of Appeal, drawing comfort from this principle was "misplaced," and the court expressed its displeasure with the tactics that had been used at trial, noting the ongoing promotion of a culture shift and citing, with approval, the decision of Howden J. in *Beland v. Hill*[25] who, in reference to the role of discovery in the civil litigation process, held that "the discovery rules are to be read in a manner to discourage tactics and encourage full and timely disclosure in order to encourage early settlement and reduce court costs."[26] The Court of Appeal went on to note that

> the surveillance evidence can only serve to encourage settlement if it is disclosed in the affidavit of documents and the opposing party has the opportunity to seek particulars at examination for discovery. Here, for example, the appellants did not accept a substantial settlement offer; perhaps they would have accepted it, thus avoiding a lengthy and costly trial, had the respondents properly disclosed their surveillance evidence.[27]

As part of this disclosure obligation, the Court of Appeal also noted that "[t]he obligation to provide an affidavit of documents, which includes listing privileged surveillance in the accompanying 'Schedule B,' is mandatory."[28]

The Court of Appeal also made specific reference to the decision of the Supreme Court in *Hryniak* to justify its decision on what might be termed "enhanced disclosure requirements." As part of the effort to make the trial process more timely and affordable, it was noted that "waiver of a party's strict rights can play an important role in expediting cases."[29] The decision in *Iannarella* should not be taken to mean that a party cannot waive its right to discovery, or an affidavit of documents, in cases where such waiver makes good economic sense. However, the Court of Appeal made sure to note that "an effective waiver should be express, rather than implied solely from the fact that the matter was set down for trial, as appears to have happened in this case."[30]

Conclusion

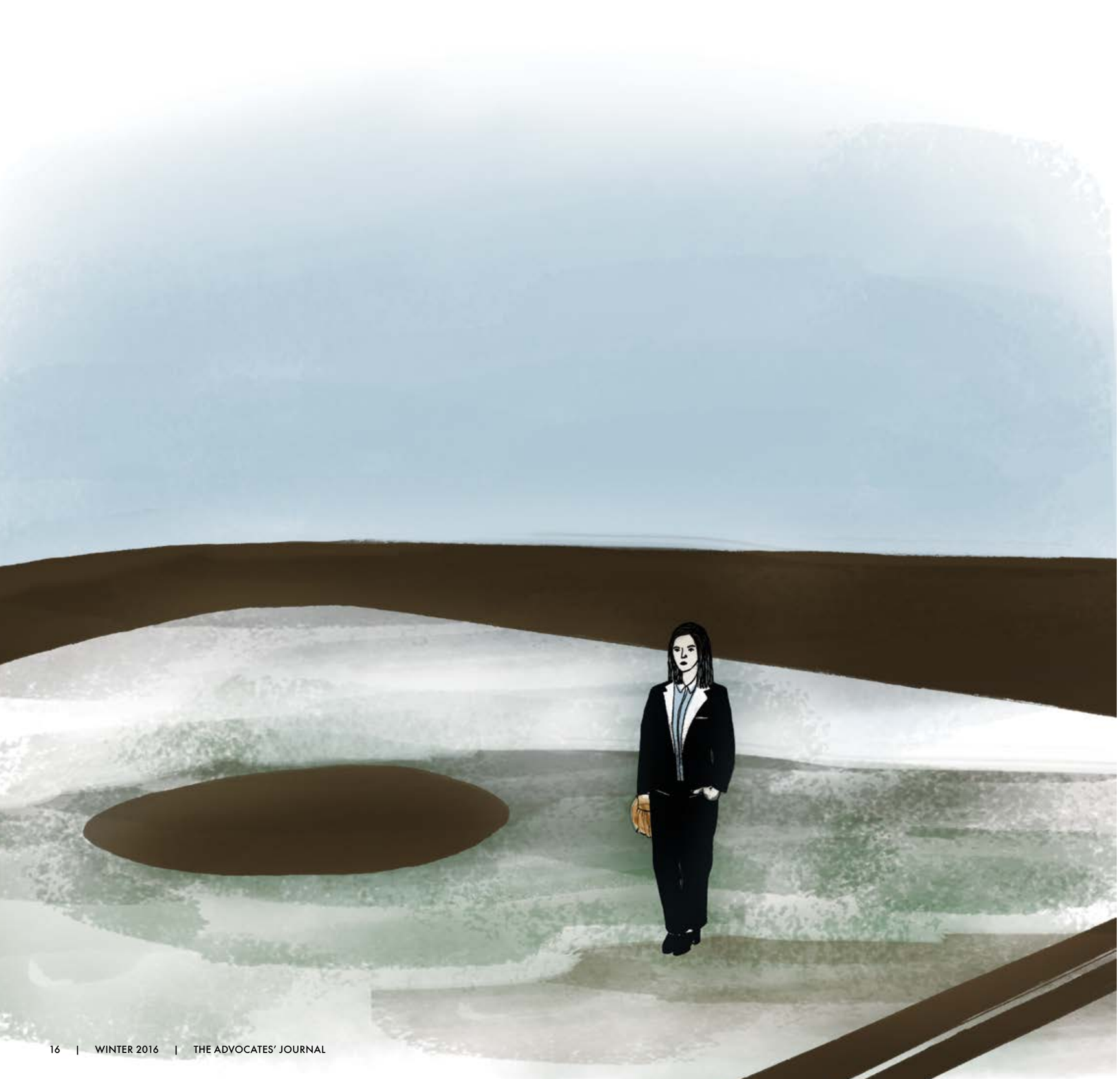
A number of lessons emerge from these cases. It is clear that the *Rules* should be read in a manner that encourages ongoing and full disclosure, with a focus on achieving settlement, where possible. Although a trial may often be unavoidable, counsel should consider that the courts will not look favourably on tactical decisions that may have had the effect of resolving matters outside the courtroom.

Recent decisions make it clear that there will be consequences for non-compliance, including the possibility of cost consequences, even for successful litigants. The Court of Appeal for Ontario has endorsed the Supreme Court's call for a culture shift in civil litigation and has specifically applied this position to disclosure obligations in the civil litigation process, noting that there is an ongoing disclosure obligation. Although the decision in *Iannarella* was specific to the disclosure and use of surveillance evidence, it can be seen as evidence of a broader trend that encourages co-operation among counsel to avoid recourse to the courts whenever possible.

Although trial may still be inevitable, it seems that courts are less willing to act as a mediator between parties who are not able to reach consensus on non-contentious issues. Trial counsel and parties to an action should be mindful that the culture shift promoted by the courts is ongoing.

Notes

1. *Hryniak v Mauldin*, 2014 SCC 7.
2. *Ibid* at para 2.
3. *Rules of Civil Procedure*, RRO 1990, Reg 194.
4. *Supra* note 1 at para 23.
5. *Saleh v Nebel*, 2015 ONSC 3680.
6. *Ibid* at para 1.
7. *Ibid* at para 20.
8. *Ibid* at para 21.
9. *Ibid* at para 26.
10. *Ibid* at para 32.
11. *Ibid* at para 106.
12. *Ibid*.
13. *Ibid* at para 108.
14. *Letang v Hertz Canada Limited*, 2015 ONSC 72.
15. *Ibid* at para 15.
16. *Ibid* at para 16.
17. *Ibid* at para 9.
18. *Ibid* at para 11.
19. *Ibid* at para 18.
20. *Ibid* at para 19.
21. *Iannarella v Corbett*, 2015 ONCA 110.
22. *Ibid* at para 2.
23. *Ibid* at para 46.
24. *Landolfi v Fargione* (2006), 2006 CanLII 9692 (ONCA).
25. *Beland v Hill*, 2012 ONSC 4855.
26. *Ibid* at para 50.
27. *Supra* note 21 at para 45.
28. *Ibid* at para 52.
29. *Ibid* at para 53.
30. *Ibid*.



Asking ourselves the

Moneyball question about expert evidence

Prof. Adam Dodek, LSM

This article is based on the J. Donald Mawhinney Lectureship in Professional Ethics delivered by Prof. Dodek at the University of British Columbia in 2016.

Brad Pitt in the courtroom

Lawyers love baseball. This shouldn't be a surprise. Baseball is a game that is full of tradition and rules, and it's very slow. Whoops! I meant "slow to change." Baseball has also become more protracted and more expensive over time. Just like litigation.

In the movie *Moneyball*, Brad Pitt stars as Oakland Athletics general manager Billy Beane, a contrarian who takes on baseball's conventional wisdom and wins.[1] The movie – based on the best-selling book by Michael Lewis[2] – is about how the low-budget Oakland A's were able to compete with big-budget, free-spending teams such as the New York Yankees and the Boston Red Sox by challenging long-held sacred cows of baseball and instead employing an analytical, evidence-based approach. *Moneyball* changed how baseball players are evaluated and spawned the whole analytics industry in sports. It has also become a popular business school case study that is applied to many different subject areas.[3]

We can also apply *Moneyball* to the use of expert witnesses in Canada. One baseball writer said that the core message of *Moneyball* is an intellectual one, a philosophical challenge: "If we weren't already doing it this way, is this how we would do it?"[4] Canadian legal consultant Jordan Furlong picked up on this observation immediately and wrote an article that every managing partner, law school dean, law society bencher and senior manager should read. It was called "Ask Yourself the Moneyball Question."[5] Furlong asserted

that every law practice should be asking itself the Moneyball question. He was right. And so should every law school, every law society and every government department.

We should also be asking the Moneyball question about the administration of justice and our court system. My point here is that if we ask ourselves the Moneyball question about expert testimony, there is no way we would construct the current system that we have. Here is why.

The special nature of the expert witness

The expert witness is a special type of witness. The expert is the only type of witness who is permitted as a matter of course to offer an opinion. Not only are experts allowed to offer their opinion, their opinion is the *raison d'être* for their testimony. Expert witnesses are permitted to offer their opinion for two reasons: first, because they have a special type of expertise or knowledge that is beyond the grasp of the trier of fact – whether that trier of fact is a judge or a jury; and second, because they have a duty to assist the court.

That duty to assist the court has existed for decades under the common law and was codified in the English case known by the colourful title of the ship involved – *The Ikarian Reefer*.[6] In 2015, the Supreme Court explicitly adopted and emphasized certain of the *Ikarian Reefer* duties in *White Burgess Langille Inman v. Abbott and Haliburton Co.*[7] These are:

> 1. Expert evidence presented to the Court should be, and should be seen to be, *the independent product of the expert uninfluenced as to form or content by the exigencies of litigation* . . . .
> 2. An expert witness should provide independent assistance to the Court by way of *objective unbiased opinion* in relation to matters within his [or her] expertise . . . . An expert witness in the High Court should never assume the role of an advocate.[8]

To recap: We demand that experts be independent of the parties and that they provide their objective unbiased opinion. Experts cannot have their testimony influenced by the exigencies of litigation, nor can they assume the role of advocate. These are the goals or the purposes of expert evidence.

Let us now ask ourselves the Moneyball question, slightly rephrased: How would we go about attempting to achieve these objectives if we weren't doing things the way we are currently doing them?

If we are being honest, we would acknowledge that there is no way that we would set up the system we currently have where the parties (a) recruit the prospective expert witness; (b) instruct them; (c) prepare them; and (d) remunerate them. These factors create an insurmountable conflict of interest between the expert's duty to his or her "client" and duty to the court.

Collectively, these elements stack the deck against having an expert who is independent, objective and impartial. The last thing counsel want is an expert who has these qualities. Counsel will retain only an expert who will support their client's cause. And rightly so. Consequently, litigation privilege has buried communications and reports from many experts who turned out to be independent, objective and impartial – unless their independent, objective and impartial opinion aligned with the client's position. In which case, those expert reports are okay.

No code of conduct is likely to be able to address the biggest problem with expert evidence: adversarial bias.

Regime change or just rule change?

Defenders of the status quo – including the Supreme Court of Canada – point to rules of court that require experts to acknowledge their duties.[9] For example, Ontario's Form 53 requires experts to acknowledge their duty, *inter alia*, to provide opinion evidence "that is fair, objective and non-partisan," and to acknowledge that their duties prevail over any obligation they may owe to a party on whose behalf they are engaged.

Such rules and acknowledgements are necessary, but they are not sufficient. In fact, they are deficient in several ways. First, at least with Ontario's Form 53, the acknowledgement need not be signed until after the expert completes his or her report. It must be included with the expert's report. This is too late in the process. An acknowledgement of the expert's duties should be required when the expert is retained. Second, there is nothing that requires lawyers to explain these duties to the expert. There is thus a risk that Form 53 becomes just another standard form among the many we are required to sign in our day-to-day lives. This leads to the third and final problem with such forms: They are not self-executing – their mere existence does not necessarily change behaviour.

More than 20 years ago, Gavin MacKenzie wrote a law review article entitled "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession."[10] MacKenzie took the title of his work from a statement that an American law professor had made to the effect that the American Bar Association's canons of legal ethics were about as much use to a lawyer in a courtroom as a Valentine's card would be to a heart surgeon in the operating room.[11] Granted this analogy is extreme. However, the point is that codes of conduct have limited effect on the conduct that they purport to regulate.

The scourge of adversarial bias

No code of conduct is likely to be able to address the biggest problem with expert evidence: adversarial bias. As my former colleague (now) Mr. Justice David Paciocco has written, "Without question, the most pernicious and common form of partiality related to expert witnesses is 'adversarial bias,' an umbrella term that catches all of the pressures that are inherent in a litigation model where the parties select and call the expert witnesses."[12]

Adversarial bias includes *association bias*, "the natural bias to do something serviceable for those who employ you and adequately remunerate you … the litany of conscious and unconscious pressures on experts to work in the interests of those they are associated with in litigation."[13] It also includes *confirmation bias*, "the unconscious tendency of those who desire a particular outcome to search for things that support that outcome and to ignore or reinterpret contradictory information."[14]

We are all too familiar with both these problems from the Inquiry into Forensic Pediatric Pathology in Ontario (the Goudge Inquiry). Dr. Charles Smith – the head pediatric forensic pathologist at the Hospital for Sick Children in Toronto – was implicated in more than a dozen questionable cases, some of which resulted in wrongful convictions. Smith was doubly biased: He displayed association bias by thinking it was his duty to help the Crown convict, and confirmation bias through the culture of "think dirty" when a child died without explanation.

The problem of adversarial bias was identified by judges more than 170 years ago, although they didn't call it that. More recently, it has been confirmed by scientific studies. In an 1843 case, Lord Campbell commented:

> I do not mean to throw any reflection on [the expert witness]. I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion that I have entertained that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked …[15]

Lord Campbell suggested that if the expert had been a witness in a different case and was asked his opinion, he would have provided a "totally different account of it." This suggestion is cynical and perhaps unduly harsh, but it reflects a widely held perception of the expert witness.

And then there is Sir George Jessel. Many will be familiar with Sir George, Master of the Rolls, from his seminal statement on solicitor-client privilege in *Anderson v. Bank of British Columbia* (1876).[16] We continue to treat his words in that case as the gospel. However, forsaken as heresy is his caution against expert evidence three years earlier in *Lord Abinger v. Ashton* (1873).[17]

Sir George was more polite than Lord Campbell. The Master of the Rolls stated that it was natural for an expert, however honest he may be, to be biased in favour of the person employing him. He complained that the courts "constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."[18] These warnings have been largely ignored for two centuries.

The pathology of the common law

Adversarial bias is a pathological problem of the common law. Virtually every report over the past two decades dealing with civil justice reform in every common-law jurisdiction mentions the problem of expert witnesses and adversarial bias. A study of American lawyers and judges conducted by the American Judicial Center found that American lawyers and judges believed that adversarial bias was "the single most important problem with expert evidence" in US courts.[19]

Adversarial bias is so much of a phenomenon that it has attracted the attention of social scientists. Studies done in the United States found strong evidence of allegiance, even where the "pull" of allegiance was relatively weak: minimal interaction with retaining lawyers (15 minutes), and minimal remuneration. Controlled studies have shown "strong evidence" of what researchers term "an allegiance effect" among some forensic experts.[20]

We are left with a very problematic paradox. Trials are exercises based on evidence. However, when it comes to how we run trials and how we administer justice in this country, we ignore the very strong evidence of bias.

So what should we do?

Solutions

If we want experts who are independent, objective and unbiased, we should tether them to an institution that is independent, objective and unbiased rather than to counsel who are dependent, non-objective and biased in favour of their clients (as they are required to be). We should rely more on court-appointed experts. Rules in most jurisdictions allow this but they are used infrequently – no doubt because of cultural resistance both from judges and from lawyers.

If we want experts who are independent, objective and unbiased, we should provide training for experts in being independent, objective and unbiased. Simply passing a rule and making experts sign an acknowledgement form will not magically make them independent, objective and unbiased. We should provide for certification and accreditation of experts, as the UK does with the Academy of Experts and the Expert Witness Institute.

What about the issue of payment?

If we were being really principled, we might say that experts should be paid like jurors. Maybe they should not be paid at all – like experts (including some law professors) who appear before parliamentary committees. After all, there is only one other witness who is paid for giving testimony – the confidential informant – and we don't think very highly of that witness's reliability. Alternatively, the court could set a tariff for expert fees as it does for other court-annexed matters.

The public policy rationale that allows some expert witnesses to earn extremely lucrative income under the auspices of a publicly funded judicial system is not apparent to me.

Conclusion

If we asked ourselves how best to do things, we would come up with a variety of options. But it is highly unlikely that we would come up with the current system for experts. Change is hard, but the greatest hurdle is our willingness to confront our own biases about the legal system. If we start to do that, we will have taken the first step into the batter's box and we will be ready for the pitch.

Notes

1. *Moneyball* (Sony, 2011). See IMDB, "*Moneyball*," online: imdb.com/title/tt1210166
2. Michael Lewis, *Moneyball: The Art of Winning an Unfair Game* (New York: Norton, 2003).
3. See eg Frances X Frei, Dennis Campbell and Eliot Sherman, Harvard Business Review, Case Study: Moneyball (A): What Are You Paying For? (August 2005) *Harvard Business Review*, online: hbr.org/product/Moneyball--A---What-Are-Y/an/606025-PDF-ENG. See also "Moneyball for Government," online: moneyballforgov.com/app/uploads/2014/10/Case-Studies.pdf
4. Mike Cormack, "Moneyball Movie: Q&A with Rob Neyer" Sportnets.ca (September 5, 2011), online: sportsnet.ca/baseball/mlb/moneyball-neyer
5. Jordan Furlong, "Ask Yourself the Moneyball Question" *Attorney at Work* (September 19, 2011), online: attorneyatwork.com/the-moneyball-question
6. *National Justice Compania Naviera SA v Prudential Assurance Co.*, [1993] 2 Lloyd's Rep 68, rev'd [1995] 1 Lloyd's Rep 455; cited with approval in *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 27.
7. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23.
8. *Ibid* at para 27 (emphasis and editing by Supreme Court of Canada).
9. See eg Ontario, Rules of Civil Procedure, RRO 1990, Reg 194, r 53.03(2.1)(7).
10. Gavin MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" (1994) 34 Alb LRev 859.
11. *Ibid* quoting MH Freedman, *Lawyers' Ethics in an Adversary System* (New York: Bobbs-Merrill, 1975), vii.
12. David M Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34 Queen's LJ 565 at para 12.
13. *Ibid* at para 16.
14. *Ibid* at para 17.
15. *Ibid* at 715.
16. *Anderson v Bank of British Columbia* (1876), 2 Ch D 644 (CA).
17. *Lord Abinger v Ashton*, (1873) LR 17 Eq 358.
18. *Ibid* at 374.
19. Carol Krafka et al, "Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials Psychology," (2002) 8:3 Public Policy, and Law 309 reprinted by Federal Judicial Center, online: fjc.gov/public/pdf.nsf/lookup/judattex.pdf/$file/judattex.pdf
20. See Daniel C Murrie et al, "Are Forensic Experts Biased by the Side That Retained Them?" (2013) 24 Psychological Science 1889.

Standard of review:

Ongoing chaos or a path to order?

Greg Temelini

I'll admit something to you as long as you agree not to pass it along. I am a bit of a nerd when it comes to law. When it comes to standard of review, I am a full-on nerd.

So that's why I found the Supreme Court's decision in *Wilson v. Atomic Energy of Canada Ltd.*[1] so fascinating. It's a decision that came out in mid-July – absolutely the best time to release intriguing decisions on standard of review. There is nothing better than sitting on a beach in 40 degree weather with a cold recreational beverage of your choosing and contemplating the state of Canadian administrative law.

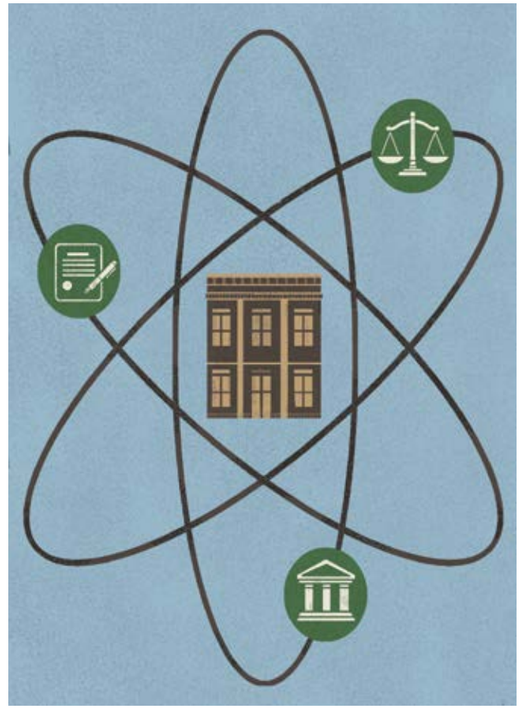
The headlines generated by the *Atomic Energy* decision were about the interpretation of the *Canada Labour Code* ("*Code*"). Specifically, the big issue was whether non-unionized employees in federally regulated industries can legally be dismissed without cause so long as reasonable pay in lieu of notice is provided – an important and interesting issue to be sure.

The part of the case that did not prompt sound bites on the national news concerned the real divisions in the Supreme Court about the standard of review of administrative tribunal decisions.

The case spawned four sets of reasons. It's always enjoyable when the Supreme Court offers us four sets of reasons. It's like playing a game of Where's Waldo to find out who won and what part of which decision creates binding law.

In *Atomic Energy*, the Supreme Court reviewed a decision of the Federal Court of Appeal which had overturned a decision of an adjudicator under the *Code*. The adjudicator interpreted the "unjust dismissal" provisions of the *Code* to mean that a non-unionized federally regulated employee cannot be dismissed without cause merely by providing reasonable pay in lieu of notice. The dismissed employee is entitled to other remedial options akin to those that a unionized employee enjoys, including the possibility of reinstatement. I will leave it to others to parse this significant ruling and the long history that led to the adjudicator's interpretation.

Instead, I will take you briefly through the four sets of reasons, focusing primarily on standard of review issues.



#1 – "Let's have a frank chat about standard of review" by Abella J.

Part of Abella J.'s reasons, the part necessary to decide the issue, attracted the majority of the court. Abella J. held that the standard of review of the adjudicator's decision was reasonableness and upheld the adjudicator's decision as reasonable.

For my purpose, Abella J.'s reasons are interesting and important for the *obiter dicta*. Abella J. took the opportunity in this case to critically consider the *Dunsmuir* framework and ask whether it could be simplified. She made absolutely clear that she was only beginning a conversation and that her "proposal [was] not intended in any way to be comprehensive, definitive, or binding" (para. 19).

Stopping there, I find Abella J.'s approach, to start a conversation, reflects a refreshing openness about the evolution of law. The approach recognizes that law does not simply flow, fully formed, from the minds of geniuses. It is not pre-ordained or blatantly obvious. Abella J. is inviting all the bright minds out there to consider an issue that has bedevilled the courts for a long time.

There are some who might view this as a sign of weakness – perhaps even as an admission that law is not principled and is simply driven by the whims of individual judges. As you might have guessed, I disagree. I don't think injecting some honesty and reality into the process can ever be a bad thing. It makes the legal system more transparent and legitimate.

Abella J. recognized that the *Dunsmuir* decision, which did away with patent unreasonableness, "has not proven to be the runway to simplicity the court had hoped it would be. In fact, the terminological

battles over which of the three standards of review should apply have been replaced by those over the application of the remaining two [correctness and reasonableness]" (para. 25). Abella J. acknowledged the criticism about "inconsistency and confusion in how the standards have been applied" (para. 27).

This echoes, albeit to a lesser degree, the assessment of Stratas J.A. of the Federal Court of Appeal, who wrote a provocative article imploring the Supreme Court to offer some guidance on the administrative law standard of review. In one of his most quote-worthy lines, Stratas J.A. summed up the state of administrative law: "Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."[2] Interestingly, Stratas J.A. authored the decision of the Federal Court of Appeal in *Atomic Energy* with which the majority of the Supreme Court disagreed.

In many ways, the conversation Abella J. invited is more important than the prescription offered. The invitation represents a recognition that we don't have it right, that the arguments focus on the wrong things and that, if you have an idea, Abella J. is looking to hear it.

Having come this far, I would be remiss if I didn't at least tell you Abella J.'s solution. She proposed a single standard of review: reasonableness. The analysis would focus on "whether the outcome falls within a range of defensible outcomes" (para. 33). In rare instances, there might be only one defensible outcome whereas in most others, there can be more than one defensible outcome.

#2 – "Thank you Abella J., but we are not quite ready yet" by McLachlin C.J. and Karakatsanis, Wagner and Gascon JJ.
The chief justice, joined by three members of the court, sided with Abella J. on the main issues. That's the boring part. What did they think of Abella J.'s conversation and her proposal? "We appreciate Justice Abella's efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability" (para. 70). However, they were not prepared to endorse any proposal to revise the *Dunsmuir* framework "at this time" (para. 70).

These reasons do not say "never." They simply say, "not now." To quote Jim Carrey's character in the movie *Dumb and Dumber*, "So you're telling me there's a chance."

#3 – "We're all good, thanks" by Cromwell J.
Cromwell J. joined with Abella J. on the disposition of the appeal, but stated clearly that "our standard of review jurisprudence does not need yet another overhaul and … as a result, I respectfully disagree with the approach that Justice Abella develops in *obiter*" (para. 72). I don't think Cromwell J.'s position needs any further elucidation. Cromwell J. has since retired from the Supreme Court.

#4 – "No thanks, and you've got it all wrong" by Côté and Brown JJ. (and joined in by Moldaver J.)
It is safe to say that this set of reasons (the dissent) is totally at odds with those of Abella J. on virtually all issues. There was even disagreement over the standard of review which the dissenting justices determined to be correctness.

The primary justification for the correctness standard was the fact of conflicting interpretations of the "unjust dismissal" provisions of the *Code* over the years. The dissenters determined that they were required to resolve the disagreement: "We believe, therefore, that where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate" (para. 89). And the dissent determined that the adjudicator was incorrect.

On the issue of a rethink of the *Dunsmuir* framework, the dissenting justices were not receptive:

"We note Abella J.'s proposed revisions to the standard of review, expressly made in *obiter dicta*. While we appreciate the constructive spirit in which they are proposed, and while we harbour concerns about their merits, we prefer to confine any statement regarding what is already the subject of a peripatetic body of jurisprudence to a judicial pronouncement" (para. 78).

Where does *Atomic Energy* leave us?
We are no further ahead on a simplified and understandable standard of review framework than before *Atomic Energy*. If you are keeping score, using the *Dunsmuir* framework, six justices found that reasonableness was the appropriate standard and that the adjudicator's decision was reasonable; and three justices held that correctness was the standard and the adjudicator's decision was incorrect. One justice wants to start a conversation on standard of review, four are not ready quite yet to have that conversation and the remaining four (one of whom has retired) are not interested in a conversation.

The benefit, as I see it, lies in the chaos that *Atomic Energy* reveals. The *Dunsmuir* framework is not being applied in a consistent manner, and *Atomic Energy* underscores that reality. We can hope, as the saying goes, out of the chaos will come order.

Notes

1. *Wilson v Atomic Energy of Canada Ltd* 2016 SCC 29.
2. Stratas, David, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (February 17, 2016). Online: Social Science Research Network, ssrn.com/abstract=2733751 or dx.doi.org/10.2139/ssrn.2733751 at 1.

The unsettling truth about settling

The Honourable Joseph W. Quinn

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Overture
How do you become a talented trial lawyer?

You become a good golfer by playing golf regularly. You become a proficient pianist by playing the piano frequently. You become a skilled skier by skiing often. You become … If you tell me that you know where I am going with this, I will cease using these annoying alliterative references.

Experientia docet [experience teaches].[1]

So, you settle all your cases
Do you settle all your cases? Why? Is it because you have had a fortuitous run of excellent pre-trial and settlement conferences? Really? Is it because opposing counsel consistently have been reasonable and obliging? Lucky you. Is it because you have a fear of, or at least an anxiety toward, trials? Oops. Have I touched a nerve?

If you settle all your cases prior to trial, some of your clients are not enjoying the outcome they deserve. Settling every case is not a virtue. A bank loans manager who boasted a zero percent default rate would be fired for not taking sufficient risks.

Litigation is all about risks: They must be assessed, reassessed, managed and, occasionally, taken.

If you have not had a trial in, say, five years, do you advise a new client, "I will be happy to take your case, but I must tell you that my parking privileges at the courthouse have been revoked for lack of use"? How fast and how far would you run if the surgeon you consulted announced that he or she had not seen the inside of an operating room in five years?

Furthermore, if you settle all of your cases, you are damag-

ing your reputation.

When I would ask my trial coordinator, "What do I have for Monday, and is preparatory reading required?" she would often reply, "It is a three-day trial, but Mr./Ms. X is on for the plaintiff and he/she always settles, so do not bother with any preparation." Do you want this to be your professional epitaph? Surely you do not aspire to be a litigation-lightweight.

You cannot call yourself a trial lawyer unless you do some trials. I recall an occasion in my law practice when I would not settle a particular family case. The other lawyer was miffed and said, "Why won't you settle? I settle all of my cases." I replied, "Good for you. Perhaps you should be a social worker."[2]

Are you gun shy?

For a senior lawyer with an established reputation for trying cases, a prolonged absence from the courtroom does not equate with reluctance or inability to do a trial. However, young lawyers without a track record of trials can quickly become gun shy. If you do not draw your gun on a regular basis in your early years as counsel, when you do, you will be shooting blanks.[3]

Should your trial experiences be ones for which you are ill equipped, the effect on you will be traumatizing and, perhaps, permanent. You will be both scarred and scared. Therefore, you *must* get trial experience. But how? I will get back to you on that in a moment.

The broccoli imperative

Trials are like broccoli. Regular consumption is necessary to develop a tolerance.[4]

Mirror, mirror on the wall

I once acted for the owner of an auto body repair shop that was destroyed by fire. His insurance company refused to pay, suspecting arson because the premises were heavily mortgaged and he was having financial difficulties. The action ambled through the usual stages and, on the Friday before the Monday on which our jury trial was to begin, I received a telephone call from counsel for the insurer with an offer. Had the offer been proffered a year earlier it might have been marginally acceptable; but not three days before trial. I was angry – but I also was embarrassed. What was there about me that led the other lawyer to think I would cave at this late date? Had I developed a reputation for being a settler of cases?

I reviewed with my client the risks associated with the situation, and I added one factoid: If we went to trial, and were unsuccessful, I would not charge a fee.[5] He instructed me to reject the offer. I was pleased. No, I was thrilled. Insurance counsel was stunned. Counsel even telephoned the lawyer who represented the first mortgagee, urging the lawyer to apply some pressure. (The settlement offer would have paid out the first mortgage.)

We were successful at trial for the full amount of the claim and, in addition, the jury awarded $50,000 in punitive damages.

I mentioned earlier that litigation involves assessing, reassessing and managing risks. Sometimes you, as counsel, must be prepared to take risks. Had I convinced my client to settle for the amount offered (and, I suppose, I could have subtly coerced him into doing so), I would not have been able to look in a mirror.[6]

Gut check

For a litigator, the gut is your most important organ. It will tell you whether you are selling out your client by way of an unreasonable settlement. In trial work, given the choice between guts and brains, I choose the former. Guts and hard work trump brains.[7]

A trial is a trial is a trial

Whether you are in Small Claims Court, the Ontario Court of Justice or the Superior Court of Justice, all non-jury trials are pretty much the same: They have issues, and they have evidence in the form of witnesses and documents. Issues are defined and argued. Witnesses are examined. Documents are proved and tendered to the court. In other words, a trial is a trial is a trial; the stakes are the only distinguishing feature.

All trials offer valuable experience.[8]

Get trial experience by solving the trial equation

A trial can be reduced to an equation:

Trial = time + solicitor-and-client costs + party-and-party costs

You can eliminate the solicitor-and-client costs of a trial by waiving your fees.

The spectre of party-and-party costs in a trial can almost be eliminated where the opposing litigant is self-represented.

That leaves "*time*." You have an abundance of time. You are young. You do not need sleep.

The more that you can neutralize the risks associated with the right side of this equation, the more likely you will be able to reduce the left side to a takeable risk.

How do you get trial experience? In my opinion, there are two main options:[9]

1. Family trials frequently involve self-represented litigants. (In fact, it was the epidemic of self-represented litigants that drove me to an early retirement.) I think they offer the best path for anyone seeking courtroom experience. Self-represented opposing parties present a low costs downside. Also, family cases typically have modest disbursements.
2. Take trials in Small Claims Court. They are relatively low risk as far as costs are concerned (particularly where the other side is self-represented and you waive your fees) and are a valuable forum for the novice litigator.

The other options are ones that are commonly touted and I mention them for completeness, but without enthusiasm:

1. If you are part of a firm with a litigation department, presumably you will be given the opportunity to act as junior co-counsel.
2. Do *pro bono* work for a legal clinic or organization in your community. Frankly, however, I think that if you are going to do *pro bono* work, it – in the first instance – should be for your own clients, where you are able to pick the specific beneficiary of your generosity as well as the subject matter of the litigation to be undertaken.
3. Motions are not a waste of time for inexperienced counsel. I am overstating the point slightly, but contested motions are trials without the witnesses. A morning spent sitting in motions court will expose you to many types of on-your-feet advocacy.

Taking trials without charging fees will have immediate financial drawbacks, but the long-term benefits to your career are incalculable.

Finale

Without the ability to competently and comfortably conduct a trial when needed, you are destined to become a salt lick in the field of law; and a mere condiment for the big dogs.[10] At that point, your only recourse will be to seek an appointment to the bench. It worked for me.

Notes

1. Tacitus, *Histories*, Book 5, chapter 6.
2. Do I hear chants of, "Unkind, unkind, unkind"?
3. If I had an editor, this sentence would have been redlined for deletion.
4. Again, if I had an editor …
5. Remember, I was angry.
6. As I get older, I find it difficult to look in a mirror at any time. However, that is a different issue.
7. Imagine, in 2016, using "trump" and "brains" in the same sentence.
8. Even contested motions provide some transferable lessons.
9. Apart from stealing something or breaching a few contracts and then representing yourself in the ensuing litigation.
10. Once more, the editor thing.

The so-called opinion evidence rule

Richard C. Halpern

Long ago, *Wigmore* referred to the rule governing the admissibility of expert testimony at trial as the "so-called opinion evidence rule" because, the author said, "there is no instance in which the use of a mere catchword has caused so much error of principle and vice of policy."[1] Error and vice continue to this day. It is my contention that a comprehensive appreciation for the historical foundation of this rule is necessary to address the errors of principle, perpetuated by the case law, and vice of policy, perpetuated in some rules of civil procedure. Simply put, the rule is poorly understood. Appreciating the historical foundation of the rule will also lead both lawyers and judges to a better understanding of the role of litigation experts in the adversarial system and the scope of permissible interaction between lawyers and experts.

What is the rule?

There is no comprehensive statement of the "so-called" opinion evidence rule in Canadian case law. As *Wigmore* pointed out, "[t]he so-called opinion rule is in its scope much narrower than the term 'opinion'; it deals with opinion in a special sense only."[2] In this sense, the rule is not intended to exclude "opinion evidence" generally, but rather applies only to a subset of "opinion" evidence – that offered from witnesses engaged specifically to help the trier of fact with technical or scientific matters beyond the knowledge of the trier of fact. Thus, the rule is intended to apply only to litigation experts and not participant experts, as those terms were described by Justice Simmons in the recent Court of Appeal decision in *Westerhof v. Gee*.[3]

No single Canadian case offers a complete statement of the rule. To cobble together a firm understanding of the rule, in my view, one needs to consider four pivotal cases together – two from the Court of Appeal for Ontario, and two from the Supreme Court of Canada. From the Court of Appeal for Ontario the cases are *Moore v. Getahun*[4] and *Westerhof v. Gee*. The Supreme Court of Canada cases are *R. v. Mohan*[5] and *White Burgess v. Abbott*.[6]

The starting proposition is that it is not now the rule, nor has it ever been, that there is a general exclusion to witnesses testifying as to their opinions. A misapprehension that the rule is designed to exclude all opinions, subject to certain exceptions, has led to the folly in trying to distinguish between "opinion" and "fact" – an impossible task. Many courts have mistakenly referred to the role of a witness as one to recite the facts, from which the trier of fact must then opine on the meaning and significance of the facts. Indeed, this error has been perpetuated recently by the Supreme Court of Canada in *White Burgess* in the following passages:

> Witnesses are to testify to the facts which they perceive, not as to the inferences – that is, opinions – that they drew from them.[7]

The court went on to say:

> Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge.[8]

With due respect, this statement is, at a minimum, incomplete. The court should have provided a more comprehensive, and therefore more accurate, statement of the rule, describing its somewhat narrower application. The failure to do so is, again, the consequence of not having due regard to the antecedents of the rule. Taking these two quotes from *White Burgess* together inevitably leads to confusion about the rule. The distinction between strangers to the dispute and those with personal knowledge or observations is crucial to the application of the rule. Witnesses, in general, are not limited to the "facts." This notion led to the errors made by the Ontario Divisional Court in *Westerhof*,[9] later corrected by the Court of Appeal for Ontario. The rule does not apply to witnesses, with or without expertise, who testify as to their opinion while observing or participating in the events giving rise to the matters in issue.[10]

From such pronouncements has come confusion about the application of the opinion evidence rule and the spawning of rules of civil procedure designed to address expert bias, partisanship and potentially misleading expert testimony – what has been referred to as the "dangers" of opinion evidence.

While we may call the rule the "Opinion Evidence Rule," the admissibility of such evidence does not depend on any distinction between fact and opinion at all. Rather, the rule is concerned with the need to hear ready-made conclusions, from skilled strangers to the matters in issue, where it is required to assist the trier of fact in making fair inferences, conclusions and deductions from the facts.

In all respects, the rule is really one of common sense. Generally the trier of fact should not hear from witnesses offering their own conclusions without any personal knowledge or observations of the matters in issue because such witnesses are simply not competent to testify. They offer nothing that will advance the inquiry of the trier of fact, so hearing their evidence is a waste of time. These witnesses can be in no better position to express an opinion than is the trier of fact and, therefore, should not be heard.

There are, however, situations where the trier of fact is unable to arrive at a just conclusion based on hearing the facts; where to do so requires some special degree of skill, training or education. It is the "skilled stranger" that has necessarily spawned the opinion evidence rule. Where the evidence is such that the ability to render a just and fair verdict depends on special skill or knowledge, it follows that the trier of fact needs to hear from the skilled witness, otherwise a stranger to the case, to reach the proper verdict. Thus, though litigation experts have no personal knowledge about the circumstances of the litigation, the need to have their skilled perspective provides an exception to a rule that excludes evidence from strangers altogether. It is important to understand that, historically, the testimony of witnesses unknowledgeable about the case was not excluded because they were offering opinion evidence, but rather excluded because their opinions could not advance the matter. It follows, as stated earlier, that the exclusionary rule applies only to these witnesses.

The Supreme Court of Canada in *Mohan* (citing *R. v. Abbey*) stated:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary."[11]

Some authors and case law promote the notion that testimony that goes to the "ultimate issue" or that "usurps" the function of the trier of fact is inadmissible. This, too, in my view reflects a fundamental misunderstanding of the rule. Long ago, *Wigmore* called for the repudiation of this theory,[12] yet it continues to be perpetuated in our courts. Litigation experts are routinely called to offer inferences and conclusions that the trier of fact must decide. Such testimony should not be objectionable on some notion that it might usurp the function of the trier of fact. The trier of fact is free to reject the evidence. The idea that a trier of fact might be so swayed by the credentials of the expert witness is to give little credit to the intelligence of the trier of fact or the ability of the adversarial system to tease out those inferences or conclusions that are not adequately supported by the facts.

Again from *Wigmore*:

> The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too broad. It is too broad, because, *even when the very point in issue is to be spoken to, the jury should have help if it is needed*. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue.[13] [Emphasis added.]

Where technical knowledge is needed by the trier of fact, and the expert is in a position to help with that technical knowledge, the evidence should be heard. The trier of fact needs help. Therefore, this type of "opinion" witness is permitted to testify only if the witness is going to help the trier of fact. It is from this fundamental underlying principle that the duties of expert witnesses are derived.[14] Rules of civil procedure that describe the need for experts to be impartial, unbiased, non-partisan and objective should be seen as mere codification of long-standing, but inadequately recognized, common-law duties.[15]

Other witnesses with expertise who have personal knowledge of the matters in issue, participant witnesses, will not have their evidence excluded by the rule; should not be expected to declare an over-riding duty to the court; and will be permitted to testify as to their opinions formed as part of the ordinary exercise of their skill while observing or participating in events.[16]

Safety from the "dangers" of opinion cases

Many cases have referred to the dangers of admitting expert evidence. Concerns are expressed about usurping the role of the trier of fact; the trier of fact being over-awed by highly credentialled experts; hired guns; junk science; distorted evidence dressed up in complicated jargon; having trial by expert rather than trial by judge (or judge and jury); and giving expert testimony more weight than it deserves. In *White Burgess*, the Supreme Court of Canada refers to the "well known" dangers of expert evidence.[17]

These putative "dangers" are substantially overstated and, in many situations, for all practical purposes, non-existent. Once again, support for this view is provided by the historical underlying rationale for the rule itself. If the evidence of the expert witness meets the threshold test for admissibility, then the potential dangers are of little or no consequence. In other words, if the trier of fact requires some help on technical matters to render a fair result, and if it has been established that the proposed witness is in a position to render that help, then the dangers are of little consequence. Some will argue that the court must still be on guard for those dangers, given the exalted position of some experts, but this inappropriately diminishes the function of our adversarial system in teasing out the truth. The fact is that rarely does expert testimony go unchallenged with like-qualified experts on the other side. In this way, through effective advocacy, the court ought to be presented with all points of view. Further, it is the role of the able advocate to put the expert testimony to the test and careful scrutiny through properly prepared cross-examination. Finally, in the context of hearing experts on both sides exposed to vigorous cross-examination, emphasis on the supposed "dangers" underestimates the ability of judges and juries to assess the case properly after having heard all the evidence.

Therefore, when the Supreme Court of

Canada comments that "the point is to preserve trial by judge, not devolve to trial by expert,"[18] the focus, in my respectful view, is misplaced. If the trial judge determines that the expert witness meets the first threshold test of admissibility, by definition the matter is not a trial by expert. A properly functioning adversarial system ought to ensure that the trier of fact is in a position to critically evaluate all the evidence, including the scientific or technical evidence.

Admissibility of opinions from strangers to the litigation

Admissibility of litigation expert testimony depends on getting over three hurdles before the evidence can be heard. First, the court must be satisfied that the witness is capable of complying with the duty to be fair, objective and non-partisan – what I will call the "initial threshold." Second, the testimony must meet the four-part test described in *Mohan*. Third, if the testimony passes the first two hurdles, the court must still be satisfied that the "benefit" of hearing the expert evidence outweighs the risks – what I will call the "risk/benefit assessment." This article will not cover the risk/benefit assessment (arguably a superfluous step).

The initial threshold is concerned with whether the proposed witness is "capable" of meeting the obligation to provide assistance to the court, or whether there is a sufficient degree of independence and impartiality that would permit the court to hear the testimony. In other words, if the witness, owing to bias, cannot reasonably be expected to "help" the trier of fact, then the evidence must not be heard. That is the fundamental historical principle underlying the rule itself. The case of *White Burgess* clearly establishes that this initial threshold sets a low bar for admissibility.[19]

An important observation to make from the initial threshold is that expert testimony which is not thought to have a sufficient degree of impartiality and independence does not get heard. It is a matter of admissibility and not a matter of weight. This is where the gate-keeping function of the judge comes in that will exclude evidence which cannot be expected to be helpful and, therefore, poses the "dangers" of expert testimony that some courts have cautioned to avoid. However, once this threshold is met, the "dangers" should no longer be considered a factor. If the evidence has the potential to help the trier of fact, it is then up to the trier of fact to decide the use to which the evidence is put.

To understand the initial threshold, we need to take a closer look at what it means to be fair, objective and non-partisan. Importantly, one should recognize that the duty to help the court is a duty that overrides, but does not displace, the duty the expert might have to the party who retained the expert. This notion must be considered in the context of the *Moore* case, describing the scope of permissible interaction between litigation experts and counsel.[20] It is the only way to derive a comprehensive understanding of the role of litigation experts and the admissibility of their testimony.

In defining the meaning of fair, objective, impartial, unbiased and independent, the Supreme Court is careful to note that these concepts must be applied "to the realities of adversary litigation."[21] My concern is that the Supreme Court has not done enough to guide counsel on how one should reconcile the expert's duty to the court with the realities of adversarial litigation. In my view, for one to better appreciate how the expert's duties and the adversarial system intersect, *White Burgess* ought to be read together with the Court of Appeal for Ontario decision in *Moore v. Getahun*. The realities of litigation are such that the expert's duty to the court does not preclude extensive consultations and strategizing with litigation experts. The litigation expert is being consulted and called to help prove the case of the retaining party. That is a reality which should not be perceived as an obstacle to impartiality.

"Independence" means that the expert opinion is the "product of the expert's independent judgment."[22] Without more, this definition is troubling. The test of independence must be qualified by an appreciation for the need for lawyers to interact with their experts on matters of both form and substance. Done ethically, such interactions should not be seen as undermining the expert's independence. The notion of independence should not be seen as requiring that the retaining party and the expert be independent. Rather, the word "independence" must be seen to apply to the opinion itself, only in the sense that, apart from the particular matters at stake in the litigation, the opinion is justifiable and reasonably capable of proof. If the opinion is formed in collaboration with or input from counsel, it does not mean the opinion is not independent in the sense it must be for admissibility purposes.

"Unbiased" means that the opinion "does not unfairly favour one party's position over another."[23] This explanation is straightforward and requires little analysis. Although trite, it must be observed that the expert testimony will always favour one party's interests over another's. It just can't do so unfairly.

Once the court has determined that the expert testimony meets the initial threshold for admissibility, the proposed evidence will be scrutinized under the four-part test described in *Mohan*. The *Mohan* criteria are:

1. relevance;
2. necessity in assisting the trier of fact;
3. the absence of an exclusionary rule; and
4. a properly qualified expert.[24]

The focus will be on necessity. A properly conducted analysis of the necessity of the expert testimony obviates any need to do a cost/benefit analysis. The necessity criterion can be broken down into the following propositions, all formulated from the historical foundations of the rule:

1. Where the trier of fact is able to reach appropriate inferences without expert guidance, the evidence of an expert is entirely superfluous.
2. Some evidence is too technical for the trier of fact to reach appropriate inferences.
3. Where the evidence is too technical for the trier of fact, it is necessary to obtain help from a skilled witness.
4. Where the evidence of a skilled witness ought to be admitted, that skilled witness is permitted to offer "ready-made" inferences for the trier of fact to consider.

Where the court is satisfied that the evidence is too technical for the trier of fact, it follows that inferences ought not to be made without the help of an expert. This, in my view, obviates any need for a risk/benefit analysis: Either the trier of fact needs the help, or the help is not needed. By definition, the required information is outside the experience of the trier of fact and, without the help, the trier of fact will be unable to fully appreciate the matters because of their technical nature[25] (as suggested by the third proposition). The evidence is "such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge."[26] Where this is the case, the risk/benefit analysis should be seen to be subsumed by the necessity criterion. Moreover, once the evidence is deemed necessary, the dangers cited earlier become largely irrelevant.

The fourth proposition allows the expert witness to offer what the court has described as "ready-made" inferences. These inferences will frequently be on the ultimate issues that the trier of fact is expected to determine. This is precisely why these experts are testifying. If the evidence is needed to allow a correct judgment to be formed, then the fact that the opinions touch on the ultimate issue to be determined is not an argument against the admissibility of the evidence. This, in my view, is an answer to the supposed "dangers" of expert testimony. The admission of the evidence has already established its value. Once admitted, the trier of fact is still free to reject it. The idea that the trier of fact may be overwhelmed by a highly credentialled witness delivering technical evidence must be addressed by the ways our adversarial system has for exposing the weaknesses of the testimony.

Know fundamentals of good advocacy

To conclude, a more precise understanding of the opinion evidence rule, based on first principles, will help lawyers and courts in the proper and consistent application of the rule. As well, lawyers and experts may better appreciate the permissible scope of interaction between them; and courts will better understand the criteria that apply to the admissibility of evidence from strangers to the litigation. Finally, the importance and effectiveness of the adversarial process need more prominent recognition as a balance to any perceived problems with litigation expert testimony. The right balance depends on good advocacy.

Notes

1. See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence*, vol 7 (Boston: Little, Brown, 1940; Chadbourn rev 1978) at 1, 14.
2. *Ibid* at 1.
3. *Westerhof v The Estate of William Gee and Kingsway General Insurance*, 2015 ONCA 206.
4. *Moore v Getahun*, 2015 ONCA 55.
5. *R v Mohan*, [1994] 2 SCR 9.
6. *White Burgess Langille Inman v Abbott and Haliburton Co*, [2015] 2 SCR 182 [*White Burgess*].
7. *Ibid* at para 14.
8. *Ibid* at para 15.
9. *Supra* note 3.
10. *Ibid* at para 62. See also *Marchand v Public General Hospital Society of Chatham* (2000), 51 OR (3d) 97 (ONCA) at paras 95, 96, 120.
11. *Supra* note 5 at 23.
12. *Supra* note 1 at 18.
13. *Supra* note 1 at 22.
14. Indeed the Supreme Court of Canada in *White Burgess* (*supra* note 6) confirmed at para 31 that "[m]any of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law."
15. See the comments of Justice Sharpe in *Moore v Getahun*, *supra* note 4.
16. *Supra* note 3 at para 62.
17. *Supra* note 6 at para 17.
18. *Ibid* at para 18.
19. *Ibid* at para 49.
20. *Supra* note 4 at paras 51–52, 55–66, 68, 73.
21. *Supra* note 6 at para 32.
22. *Ibid*.
23. *Ibid*.
24. *Supra* note 5 at 21.
25. *Ibid* at 23.
26. *Ibid*.

Unconstitutional limits on the free speech rights of

sexual assault complainants

Justin Safayeni

The author would like to thank Danielle Stone, whose insights were of great assistance in developing some of the arguments set out in this article.

In the media frenzy surrounding the *R. v. Ghomeshi*[1] trial, much ink was spilled on how the justice system deals with complainants[2] in sexual assault cases. One issue that did not receive attention, however, was the possibility that the then-unidentified complainants[3] would never be able to fully share with the world, in their own words, their version of what happened at trial, their experience with the justice system, and their time spent in the intense glare of the media spotlight. That is because, under the law as it currently stands, it is almost always the Crown who decides whether complainants in sexual assault trials can be identified while having their story published or broadcast. Even complainants who desperately want to speak out and be identified may nevertheless find themselves muzzled at the behest of the prosecutor.

This astonishing – and, I will argue, unconstitutional – result is a function of the antiquated publication ban regime in section 486.4(2) of the *Criminal Code*.[4]

Section 486.4(2) of the *Criminal Code*

As in most cases where section 486.4(2) applies, the ban for Ghomeshi's trial was issued at the request of the Crown under section 486.4(2)(b). That provision sets out that, for a number of specified offences, including sexual assault, a judge "shall" issue a publication ban "on application made by the victim, the prosecutor or any such witness [under the age of eighteen years]." The resulting publication ban is broad, directing that "any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way."[5] Unlike other statutory bans in the *Criminal Code*,[6] a section 486.4(2) ban does not automatically expire and remains in place indefinitely unless varied by court order.[7]

The scheme presents two significant difficulties.

First, if prosecutors apply for a section 486.4(2) ban, as they routinely do, the court *must* grant the order. There is no residual discretion. The views of the complainant whose identity is the very subject of the ban are irrelevant. Prosecutors need not consult or even advise complainants before applying for the ban, much less obtain their consent.

The second problem is that a publication ban issued under section 486.4(2) at the request of the Crown cannot be revoked or varied by complainants. Since these bans are indefinite in duration, a complainant who wants to be identified and speak out to the media about their experience remains beholden to the Crown in order to do so, even years after the trial is completed.

These concerns are not simply academic. As one court noted, "[t]here may be situations where the positions of the prosecutor and the complainant diverge …"[8] Prosecutors may have their own reasons for imposing a ban during and after court proceedings, despite a complainant's wishes.[9] For example, a ban may seem attractive if a complainant might have negative things to say about how they were treated during the trial process.[10] Or the ban may have been requested by the prosecutor at a pre-trial phase before even speaking to the complainant (e.g., a bail hearing) and simply continued throughout the proceedings and thereafter, without ever being seriously revisited.[11] Or a prosecutor may have sincere but misguided beliefs about the implications of the ban – for example, that it would deter others from coming forward with information about crimes.

Whatever a prosecutor's reasons for seeking and upholding the ban may be, the fact that it must be imposed and maintained under section 486.4(2), even if a complainant wishes to have his or her identity published or broadcast, severely restricts a complainant's ability to be heard in public and to exert agency over whether and how the complainant is "protected" during and after the court process. The result is not only shockingly unfair, but also unconstitutional. More specifically, these aspects of section 486.4(2) violate section 2(b) of the *Charter of Rights and Freedoms* and cannot be saved under section 1.

Bans imposed without the complainant's consent

There is no real debate that section 486.4(2) offends section 2(b) of the *Charter*. In *Canadian Newspapers Co. v. Canada (Attorney General)* ("*Canadian Newspapers*"),[12] the Supreme Court of Canada considered the constitutionality of the predecessor provision to section 486.4(2).[13] Both levels of court below concluded that the provision violated section 2(b).[14] The issue was conceded before the Supreme Court, but Lamer J., writing for a unanimous bench, nevertheless emphasized the point: "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom."[15]

The real question is whether section 486.4(2) can be saved under section 1 of the *Charter*. In *Canadian Newspapers*, the Supreme Court upheld the predecessor provision as a reasonable limit on section 2(b). But that case involved a ban sought by the complainant through her counsel – not by the prosecutor against the complainant's wishes.[16] The media argued that the court must retain a degree of discretion for the provision to pass constitutional muster. In rejecting this position, the court concluded that only a mandatory ban provided complainants with the necessary assurance that their identities would be protected, thereby serving the objective of encouraging the reporting of sexual offences.[17]

This logic may be sound in cases where the Crown's application for a publication ban reflects a complainant's request for anonymity, but it does not support requiring a publication ban on a complainant's identity against the individual's wishes. The important distinction between these scenarios was not lost on Lamer J., who noted that "the arguments invoked and successfully so under s. 1 in this case would not necessarily carry the day in a situation where the prosecutor was not acting on behalf of a complainant."[18]

Indeed, in a situation where the complainant wishes to be identified, the mandatory ban required by section 486.4(2) does not pass the *Oakes* test.[19] It is neither rationally connected to the objective identified in *Canadian Newspapers*, nor is it minimally impairing of section 2(b) rights.

The objective of encouraging the reporting of crime is best served by a mandatory ban if remaining unidentified accords with (or at least does not contradict) the complainant's wishes. No added benefit arises from forcing *all* complainants to have their identities concealed from publication. The fact that a particular complainant, in a particular case, may voluntarily opt out of having his or her identity subject to a publication ban cannot be presumed to discourage others from coming forward. Certainly, there is no evidence of such an impact. Anyone who wishes to report a sexual assault is still guaranteed the protection of a mandatory ban at trial if he or she so chooses. In some circumstances, a ban against a complainant's wishes may undermine the legislative objective: certain individuals may not come forward, knowing that a publication ban may preclude them from ever being able to tell their stories to the media, in their own words and using their own names.[20]

Section 486.4(2) also fails at the final balancing stage of *Oakes*. The deleterious effects of this provision on free-expression rights are significant. In *Canadian Newspapers*, Lamer J. characterized such effects as "minimal," noting that the predecessor provision "restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order."[21] Almost 30 years have passed since *Canadian Newspapers* was decided, and these rationales no longer apply (if they ever did). The reality today is that section 486.4(2) orders are requested by prosecutors and issued by courts so frequently that they are something approaching a *de facto* general publication ban. And in a world where court proceedings are being reported live with line-by-line updates, the ban puts journalists in the unworkable position of trying to instantly determine what falls within the nebulous category of "any information that could identify the victim or a witness." The inevitable result from the increased risk of journalists (inadvertently) offending the publication ban – something that appears to have occurred in the *R. v. Ghomeshi* case[22] – is a chilling effect on such live courtroom reporting.

Finally, the section 2(b) interests at stake are not just those of the media to gather and report news. Where a complainant who wishes to have his or her identity published or broadcast is subject to a mandatory section 486.4(2) ban, the complainant's own section 2(b) rights are also being infringed, as are the public's right to access information available in open court. Complainants may also have an interest in sharing their story publicly as part of their healing and recovery process. Unlike the facts in *Canadian Newspapers*, all these interests militate against a mandatory publication ban.

Bans maintained without the complainant's consent

A second unconstitutional aspect of section 486.4(2) is that it does not allow complainants to have publication bans imposed at the request of a prosecutor lifted without the Crown's consent, even years after a trial has concluded.

This unconstitutional consequence of section 486.4(2) was affirmed by the Supreme Court in *R. v. Adams*.[23] That case considered whether a trial judge had the authority to revoke a publication ban made under the predecessor provision to section 486.4(2), where that order was originally made on request of the Crown. (The trial judge had revoked the ban after dismissing all charges against the accused and finding that the complainant was a prostitute and a liar.[24]) The court held that no such power exists in section 486.4(2) or anywhere else in the *Criminal Code*, but went on to add that it is "not inconsistent with the interpretation of these subsections to hold that, whatever inherent power to reconsider resides in a court, survives."[25] According to the court, this inherent power includes a "general rule" that "any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed."[26]

The problem is that for publication bans made at the request of the prosecutor under section 486.4(2), the court held that a material change in circumstances requires that the prosecutor change his or her position.[27]

In other words, where the Crown requests a publication ban, complainants have no agency over whether that ban is revoked, unless the Crown consents.

In an interesting twist, the court found that the Crown's consent is a necessary, but not sufficient, condition for varying or lifting a ban.[28] This result is difficult to defend on a principled basis. Why should the test for revoking a section 486.4(2) ban give complainants the right *not* to have their identity published regardless of the Crown's position, yet remain beholden to the Crown when it comes to having their identity published?

No case since *Canadian Newspapers* has directly challenged the constitutionality of section 486.4(2).[29] Although *Adams* was a statutory interpretation case, the court held that the same reasons identified in *Canadian Newspapers* for having a mandatory ban also explained why the regime did not provide for the ban to be varied or revoked – namely, that both "would fail to provide the certainty that is necessary to encourage victims to come forward."[30] For the same reasons articulated above, this justification cannot pass constitutional muster where complainants themselves wish to have the ban revoked. Indeed, since *Adams* affirms that bans *can* be revoked pursuant to the court's inherent jurisdiction when the Crown consents, the "certainty" rationale from *Canadian Newspapers* is even less convincing to defend the lack of any revocation provisions in section 486.4(2) than it is in the *Canadian Newspapers* context. The section 2(b) infringement, however, is just as severe.

Conclusion

The Crown's ultimate control over a complainant's ability to have his or her identity published and broadcast under section 486.4(2) – both at first instance, and later by way of lifting an existing ban – is an unjustifiable infringement of the section 2(b) rights of both complainants and the media. Even taking the rationales identified in *Canadian Newspapers* and *Adams* at face value, complainants who wish to be identified should, at the very least, have an opportunity to have their position considered by the court as a relevant interest when determining whether to impose or lift a publication ban. There may well be situations where considerations weigh in favour of a publication ban being granted or maintained, even if complainants want their identity to be published or broadcast.[31] But to have that outcome imposed automatically in every case, upon nothing more than the request of the Crown, is neither fair to complainants, nor constitutionally acceptable.

Notes

1. 2016 ONCJ 155.
2. I use the term "complainant" throughout this article, rather than "victim" (which is the term used in the *Criminal Code*).
3. One of the three complainants did not wish to be covered by the ban, and her name was reported throughout the proceedings. Three weeks after Ghomeshi was acquitted, a second complainant requested that the publication ban over her identity be lifted, and the court granted that request.
4. RSC 1985, c C-46.
5. Section 486.4(1)(a). This includes information from public sources outside the court proceedings, if it could identify the complainant. See *R v Canadian Broadcasting Corp*, [1997] NWTR 67 [*CBC* (NWTSC)] at para 57, aff'd [1998] NWTJ No 156 (CA) [*CBC* (NWTCA)] at paras 10–11.
6. See eg sections 517(1), 539, 648(1).
7. *CBC* (NWTCA), *supra* note 5 at para 8.
8. *CBC* (NWTSC), *supra* note 5 at para 41.
9. *R v Canadian Broadcasting Corporation*, 2003 SKPC 87 [*CBC* (SKPC)] at paras 46–48, overturned on appeal 2004 SKQB 320 (but not on this point), application for leave to appeal dismissed (SKCA, Jan 8, 2007), application for leave to appeal dismissed [2007] SCCA No 110.
10. To be clear, section 486.4 does not preclude complainants from speaking to the media about these issues. However, without the ability to publish any information that could identify a complainant, the media's capacity to report on a complainant's experiences may be diminished. For example, the media would be unable to use a complainant's image on a television broadcast, and possibly even be unable to use a complainant's voice without some kind of modification.
11. See eg *CBC* (NWTSC), *supra* note 5 at paras 9–13.
12. [1988] 2 SCR 122 [*Canadian Newspapers*].
13. The predecessor provision of the *Code*, what was then section 442(3), read: "Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast."
14. See *Canadian Newspapers*, *supra* note 12 at 127–128.
15. *Ibid* at 129. This same position is reflected in subsequent Supreme Court decisions dealing with whether mandatory statutory publication bans violate section 2(b) of the *Charter*; see eg *Toronto Star Newspapers Ltd v Canada*, [2010] 1 SCR 721 at para 2.
16. *Canadian Newspapers*, *supra* note 12 at 125.
17. *Ibid* at 132.
18. *Ibid* at 135.
19. *R v Oakes*, [1986] 1 SCR 103.
20. See *CBC* (SKPC), *supra* note 9 at paras 25–36 and, in particular, at para 62.
21. *Canadian Newspapers*, *supra* note 12 at 133.
22. See @JesseBrown Twitter feed, posted 9:07 a.m. on Feb 9, 2016.
23. [1995] 4 SCR 707 [*Adams*].
24. *Ibid* at para 5.
25. *Ibid* at paras 26–28.
26. *Ibid* at para 30.
27. *Ibid* at paras 30–31.
28. *Ibid* at para 32.
29. In the context of contempt proceedings against a media party, one provincial court decision found certain aspects of the regime to be unconstitutional, but that decision was overturned on other grounds. See *CBC* (SKPC), *supra* note 9. In a more recent judgment, a provincial court held that s 486.4(2.2) – a similar mandatory publication ban provision dealing with the identities of young persons – was unconstitutional, as it failed to serve a pressing and substantial objective: *Her Majesty the Queen v Postmedia Network Inc et al*, 2016 SKPC 089.
30. *Adams*, *supra* note 23 at para 26.
31. For example, consider a scenario where publishing or broadcasting the identity of one complainant would tend to identify another complainant who does not wish to be identified.

Enforcement of exclusion clauses

in professional service contracts post-*Tercon*

Rebecca S. Studin

The author thanks Vanja Ginic, articling student, for her sage assistance.

Can liability for negligence be limited or excluded?

Disclaimers and clauses seeking to exclude or limit a professional's liability in performing services are frequently found in contracts for professional services. However, the court's willingness to enforce such disclaimers in actions for professional negligence is not automatic. This article examines the circumstances in which the court may permit a defendant who is a professional to exclude or limit his or her liability for negligence on the basis of such clauses, consider whether a professional's ability to rely on such clauses has changed in light of the Supreme Court of Canada's decision in *Tercon Contractors v. British Columbia (Minister of Transportation & Highways*) ("*Tercon*")[1] and provide drafting tips for the practitioner.

Exclusion clauses – general principles

As a general principle, exclusion clauses must be given their true and natural meaning.[2] They need to be read in light of the contract as a whole and not in isolation, in their commercial context,[3] with a view to determining the intention of the parties.[4] An exclusion clause is to be construed strictly against the party seeking to rely on it; if ambiguous, the clause will be interpreted *contra proferentem* against the drafter.[5]

If the contract by express provision protects a party from a result and the court believes the provision was intended to operate in the circumstances that have occurred, the provision must be given effect.[6] Parties are free to limit or waive the scope of common-law duties of negligence, an important principle in preserving individual liberty and commercial flexibility.[7]

However, the case law is rife with examples, both pre- and post-*Tercon*,[8] of the court declining to enforce such clauses where the professional has in fact been negligent.

Exclusion of negligence pre-*Tercon*

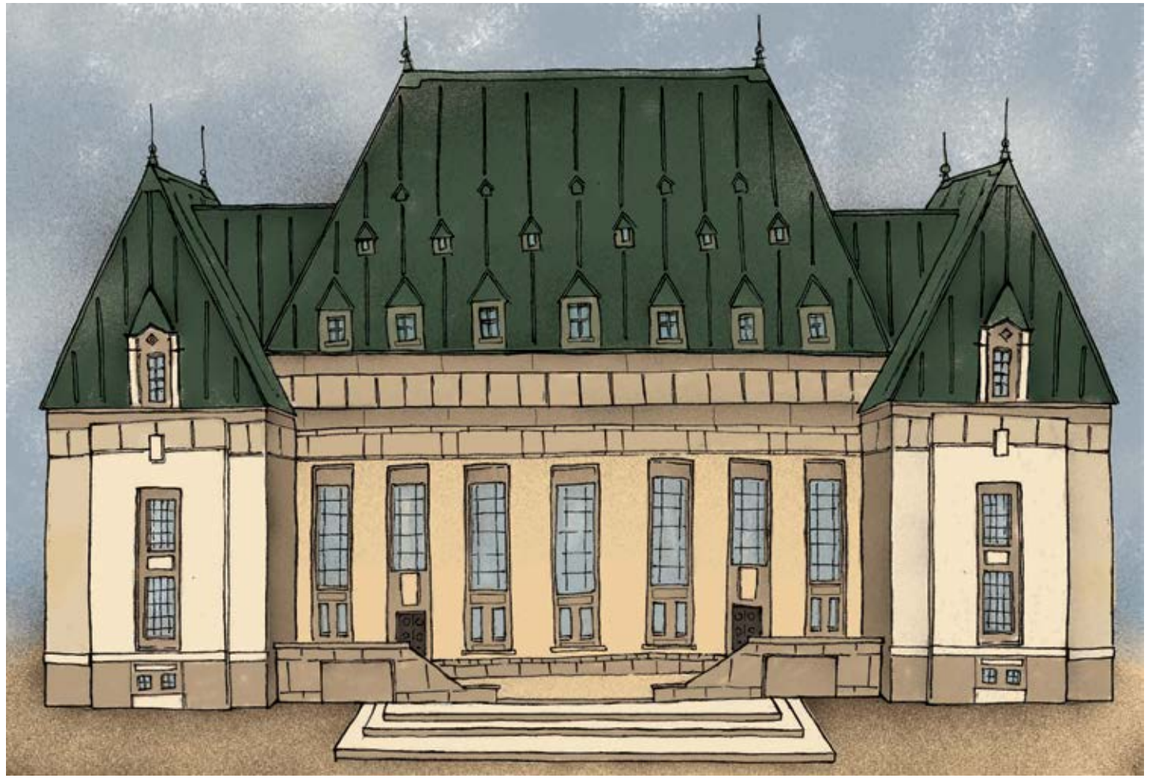
Gordon Shaw Concrete Products Ltd. v. Design Collaborative ("*Gordon Shaw*")[9] is an example of the court declining to enforce an exclusion clause. In that case, an architect was retained to design plans to build homes at a cost of $60,000 each. Ultimately, the cost of construction, in accordance with the plans, exceeded $100,000. As a result, the designs and specifications were of no use to the builder plaintiff. The defendant architect attempted to rely on the following exclusion clause to shield himself from negligence:

> [4.1] Evaluations of the Client's Project Budget, Estimates of Construction Cost, and Detailed Estimates of Construction Cost, if any, prepared by the Architect, represent the Architect's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect nor the Client has control over the cost of labour, materials, or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market, or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Project Budget proposed, established, or approved, by the Client, if any, or from any Estimate of Construction Cost or other cost estimate or evaluation prepared by the Architect.

The trial judge found that the architect was negligent in preparing the designs according to the cost estimate provided by the builder, and liability ensued. On appeal, the Nova Scotia Court of Appeal held that the architect was obliged to use his best judgment in preparing the estimate and therefore was under a duty to use reasonable care, skill and diligence to ascertain the cost of materials before submitting the estimates. Despite excluding a warranty on the accuracy of cost estimates, the exclusion clause failed to protect the architect because it did "not expressly exempt the appellant from negligence in the preparation of estimates or otherwise. In order to do so, the [exclusion clause] would have to be clear on its face that such was its reach and scope."[10]

The court reached a similar result in *Wexler v. Moffatt* ("*Moffatt*"),[11] in which the defendant accountant was retained to conduct a review engagement of a dental practice's accounts. The dentist began an action against the accountant after the accountant failed to detect evidence that the dentist's secretary had forged entries in the practice's accounting system and embezzled a considerable amount of money. The accountant attempted to rely on the engagement letter to show that his responsibilities did not extend beyond assessing the plausibility of the information provided, which did not disclose the thefts. The accountant relied on the disclaimer in the engagement letter, which stated: "We wish to emphasize that control over and responsibility for the prevention and detection of defalcations or other errors or omissions must rest with you."[12]

The court found that the accountant was negligent and was not protected by the disclaimer in the engagement letter.[13] The clause did not protect the defendant from liability for negligence as the terms of the engagement letter were silent on this issue and, as a result, the principle of *contra proferentem* applied.[14]



In *Bloor Italian Gifts Ltd. v. Dixon* ("*Bloor Italian*"),[15] the Court of Appeal for Ontario declined to give effect to an exclusion clause because the professional had been negligent. Here, the defendant was an accountant engaged to review the plaintiff's financial statements. In so doing, the accountant failed to notice a significant discrepancy in his client's unremitted sales tax, which had been underpaid in excess of $1.1 million. The contract between the parties contained an exclusion clause with language similar to the one at issue in *Moffatt*:

> [37] Although we will prepare or assist in preparing your financial statements, the statements will be your representations and you must accept responsibility for the fairness of such representations.
>
> ...
>
> We wish to emphasize that control over and responsibility for the prevention and detection of defalcations and other irregularities, errors and omissions must rest with you.

The Court of Appeal for Ontario found the accountant could rely on the clause only if he had met the requisite standard of care:

> [39] … In my view, the limitation clause comes into effect only if the accountant has conformed to the standards that are required in conducting a review engagement. The clause, on its face, does not excuse the accountant's negligence. It is instructive in this regard to read the exclusion clause together with the following passage from the accountants' comments, which also appear in the engagement letter between Dixon and Bloor Italian:
>
> ACCOUNTANTS' COMMENTS
>
> We have prepared the accompanying balance sheet as at (date) and the statement of income for the (period) then ended from the records of Bloor Italian Gifts Limited and from other information supplied to us by the company. *In order to prepare these financial statements we made a review consisting primarily of enquiry, comparison and discussion of such information*. However, in accordance with the terms of our engagement we have not performed an audit and consequently do not express an opinion on these financial statements. [Emphasis added.]
>
> [40] An accountant cannot escape his responsibility to make reasonable inquiries and comparisons and engage in a discussion of information provided by management by relying on the limitation that he is not responsible to prevent or detect error or fraud. The limitation clause is to the effect that it is not the accountant's responsibility to uncover errors or fraud. The clause does not negate the duty to see and report errors that would be evident to an accountant acting reasonably in the circumstances, and having detected them, to make the necessary inquiries of management … As Dixon failed to conform to the standards required in performing a review engagement, he cannot avail himself of the exclusion clause.

The professionals in each of the above cases were negligent. None of the exclusion clauses at issue shielded them from liability, although for differing reasons. The court's comments in *Moffatt* and *Gordon Shaw* suggest that an express exclusion of negligence in the exclusion clause may have succeeded in protecting the negligent auditors.[16] However, in *Bloor Italian* the court found the accountant could not rely on the protection of the exclusion clause because he failed to meet the standard of care, suggesting that even the express exclusion of negligence would not have been sufficient to shield the accountant from his negligence.

The *Tercon* analysis

In *Tercon*, Justice Binnie, writing for the dissent, set out a three-pronged test for determining the enforceability of an exclusion clause, which was accepted by Justice Cromwell in writing for the majority:[17]

> The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause ...
>
> The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract.[18] If the exclusion clause does not apply, there is obviously no need to proceed further with the analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties"… This second issue has to do with the contract formation, not the breach.[19]
>
> If the exclusion clause is valid, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.[20]

Although the cases discussed above predate *Tercon*, they have not been expressly overruled by that decision. Indeed, the court's analysis in these cases would seem to fit within the first stage of the *Tercon* analysis, which determines "whether as a matter of contractual interpretation the exclusion clause even applies to the circumstances established by the evidence."[21] As such, it does not appear that the application of *Tercon* would have resulted in a more consistent outcome in relation to enforceability of the exclusion clauses at issue in those cases.

Exclusion of negligence post-*Tercon*

There continues to be inconsistency in the post-*Tercon* jurisprudence on the issue of whether a claim for professional negligence can be defeated or limited by an exclusion clause where the professional has been found negligent.[22]

In *Felty v. Ernst & Young LLP* ("*Felty*"),[23] the plaintiff, Ms. Felty, an American citizen, sued Ernst & Young LLP ("*EY*") for negligence in relation to its advice on the US tax consequences of a proposed share transfer pursuant to a divorce settlement. EY erroneously advised Ms. Felty that her tax liability would be nil, when in fact the plaintiff's liability was assessed at more than $500,000.

EY conceded negligence and successfully relied on the exclusion clause in its standard form engagement letter, which was signed by the plaintiff and limited EY's liability to the $15,000 paid for the services rendered:

> (c) EY's total liability for any claim arising out of the performance of the Services, regardless of the form of the Claim, shall in no event exceed an amount equal to the total fees paid to EY for the services. This clause shall not limit EY's liability for death, personal injury or property damage caused by the negligent acts or omissions of EY and its partners and staff, or for loss or damage caused by their fraud or willful misconduct.[24]

The trial judge and the British Columbia Court of Appeal found that EY's liability for negligence was limited by the exclusion clause.

Regarding public policy, the Court of Appeal found there was nothing excluding the enforceability of such a clause under British Columbia's *Chartered Professional Accountants Act*.[25] Nor did the court agree that holding professionals to a higher degree of diligence was sufficiently contrary to public policy to decline enforcing the exclusion clause.[26] The provision of negligent tax advice was not sufficient to give rise to conduct "so reprehensible that it would be contrary to public interest to allow [the defendant] to avoid liability."[27]

Applying the *Tercon* analysis, the Court of Appeal held that the issue of unconscionability did not arise because the plaintiff had obtained legal advice before signing the retainer and chose to retain EY despite the availability of other accountants to provide the same service under less onerous limitation of liability terms.[28]

...although a standard analysis is now in place post-*Tercon*, there is no guarantee that a professional can successfully invoke a limitation of liability clause in all manner of claims.

Interestingly, the limitation of liability clause at issue made no express exclusion of negligence, but rather stated that liability applied to "*any claim* arising out of the performance of the Services, regardless of the form of the Claim." In contrast, the absence of an express exclusion of negligence proved fatal to the enforceability of the exclusion clause in *Moffatt* and *Gordon Shaw*. Neither the trial nor the appellate decision in *Felty* places any emphasis on whether the limitation of liability clause encompasses negligence, but instead focuses on the issue of agency and whether the plaintiff's lawyer had bound her client to the agreement. This suggests that the language used in the exclusion clause was broad enough to encompass negligence.[29]

In contrast, in *Livent Inc. (Receiver of) v. Deloitte & Touche*,[30] Deloitte & Touche was the auditor for Livent, a theatre company that perpetrated a far-reaching accounting fraud in the 1990s. Ernst and Young, as the special receiver for Livent following its collapse, sued Deloitte & Touche for breaching its duty of care and failing to detect the fraudulent activities of the company while auditing its financial statements. The standard engagement letter used by Deloitte & Touche, and accepted by Livent, contained the following clause:

> It should be noted that an audit conducted in accordance with generally accepted auditing standards is based on selective tests. Because detailed examination is not performed on all transactions, there is a risk that material fraud or error may exist but not be detected.

Justice Gans found the exclusion clause had no applicability in that case:

> Not that it was argued in that vein, but I do not believe that it is necessary for me to find that the caveat found in the standard engagement letter … acts in any way as a limiting or exclusionary clause relieving Deloitte of its contractual duty in respect of the detection and resolution of intentional misstatements.[31]

A further example of apparent inconsistency in the jurisprudence is the Alberta Court of Appeal decision in *Swift v. Eleven Eleven Architecture Inc.* ("*Swift*").[32] At issue in *Swift* was whether the exclusion clause shielded the engineer from negligence but not negligent misrepresentation. The plaintiffs were a married couple who purchased land to build a custom home. They engaged the defendant, an architectural firm, to design the home and entered into a contract that included a limitation of liability clause which limited the plaintiff's recovery against the defendant to $500,000 for claims arising solely and directly out of the defendant's duties and responsibilities. The clause at issue stated:

> [3.8.1] With respect to the provision of services by the Designer to the Client under this Agreement, the Client agrees that any and all claims which the Client has or hereafter may have against the Designer which arise solely and directly out of the Designer's duties and responsibilities pursuant to this Agreement (hereinafter referred to in this Article 3 as "claims"), whether such claims sound in contract or in tort, shall be limited to the amount of $500,000.

The defendant subcontracted an engineering firm to provide structural designs. Serious deficiencies were later discovered in the structural integrity of the home. The plaintiffs brought an action against the architect and the engineer, which resulted in a finding that the engineers negligently designed the home. Although the architect had not been negligent, the trial judge concluded that the architect was vicariously liable for the negligence of the engineer as its subcontractor. However, the trial judge enforced the exclusion clause and limited the damages payable to the plaintiffs to $500,000.

The Court of Appeal found that the trial judge had not adequately considered the claims for negligent misrepresentation and concluded that the engineer had negligently misrepresented that he had complied with his obligations under the contract. Negligent misrepresentation was not covered by the exclusion clause, which entitled the plaintiffs to recover damages in tort against the defendant beyond the $500,000 limited by the clause.[33]

Unlike in *Felty*, in which "any and all claims" were found to include negligence, in *Swift* the same words did not encompass negligent misrepresentation. And where in *Felty* the court rejected the plaintiff's public policy argument, in *Swift* it found that the negligent misrepresentation at issue – namely, the statement that the design complied with building code requirements – presented a real and substantial danger to its occupants that could not be shielded by the exclusion clause.[34]

Tips for professionals

As the jurisprudence shows, although a standard analysis is now in place post-*Tercon*, there is no guarantee that a professional can successfully invoke a limitation of liability clause in all manner of claims. There are, however, some guidelines that a professional can follow to attempt to limit exposure to liability, in terms of both the language used in the engagement letter and the manner in which that letter is executed.

The professional must be explicit about the scope of the engagement and the extent to which the client is entitled to rely on the work product. The engagement letter should expressly specify the type of liability (e.g., tort, contract, negligent misrepresentation)

and the damages that are excluded or limited, the extent of the exclusion and whether the professional's liability will be several as opposed to joint and several. Furthermore, although some cases suggest that negligence should be expressly excluded, *Felty* has shown that "any and all claims" may suffice to preclude this cause of action.

There is divergence in the case law regarding whether there is an obligation to bring exclusionary language to the attention of the client. Generally speaking, parties will be bound by the agreements they sign, especially in the context of experienced and sophisticated commercial parties.[35] Moreover, unless the plaintiff is rushed, is pressured or has not had a full opportunity to read the terms of the contract, he or she will be treated in the same manner as someone who has read the contract.[36] The requisite level of diligence on the part of the professional in bringing the exclusion of liability clause to the client's attention depends on the sophistication of the client.

In light of the above, it is advisable to draw the client's attention to the exclusionary or limiting language or, at a minimum, to permit the client ample time to review the engagement and ask questions, especially when unsophisticated clients are signing standard form agreements. Always ensure that the engagement letter is signed before beginning work.

Establishing such a practice when entering into engagements with clients can provide a professional with a sound basis to claim the protection of an exclusion clause in the event things go wrong.

Notes

1. *Tercon Contractors v British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, 2010 CarswellBC 296 [*Tercon*]. The Supreme Court formulated a three-part test with respect to the enforceability of exclusion clauses.
2. *Hunter Engineering Co. v Syncrude Canada Ltd*, [1989] 1 SCR 426, 1989 CarswellBC 37 at para 160 (SCC) [*Hunter Engineering*].
3. *Tercon*, *supra* note 1 at para 69.
4. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, 1997 CarswellNfld 207 (SCC).
5. *Ibid* at para 114; *Tercon*, *supra* note 1 at para 62.
6. *Hunter Engineering*, *supra* note 2 at para 64
7. *BC Checo International Ltd v British Columbia Hydro & Power Authority* [1993] 1 SCR 12, 1993 CarswellBC 10 at para 15 (SCC).
8. Note that certain professions prohibit such exclusions for negligence by statute – see for example, s 65(3) of British Columbia's *Legal Profession Act*, SBC 1998, c 9; and s 22(1) of Ontario's *Solicitors Act*, RSO 1990, c S 15.
9. *Gordon Shaw Concrete Products Ltd v Design Collaborative Ltd* [1986] 72 NSR (2d) 133, 1986 CarswellNS 104 (CA).
10. *Ibid* at para 41.
11. *Wexler v Moffatt*, [1993] 38 ACWS (3d) 177, 1993 CarswellOnt 3647 (Ont Ct J Gen Div).
12. *Ibid* at para 11.
13. *Ibid* at para 62.
14. *Ibid* at para 43.
15. *Bloor Italian Gifts Ltd v Dixon*, [2000] 48 OR (3d) 760, 2000 CarswellOnt 1781 (CA).
16. Interestingly, while courts have held that professionals must be explicit in their exclusion of liability for negligence, it seems the same level of precision is not required where the professional seeks to disclaim the assumption of duty of care for negligent misrepresentation toward non-contractual third parties who may rely on that professional's advice. See the comments of Justice McLachlin (as she then was) in *Edgeworth Construction Ltd v N.D. Lea & Associates Ltd*, [1993] 3 SCR 206, 1993 CarswellBC 237 at para 11: "... the engineering firm ... could have taken measures to protect itself from the liability in question [to the third party contractor who relied on its design]. It could have placed a disclaimer of responsibility on the design document." See also *Wolverine Tube (Canada) Inc v Noranda Metal Industries Ltd*, [1994] 21 OR (3d) 264, 1994 CarswellOnt 162 (Ont Ct J Gen. Div), in which a negligent environmental engineer succeeded on a motion for summary judgment brought against him by a third party who relied on his flawed report when purchasing a property. The engineer relied on the disclaimer in the report stating that "any use which a third party makes of this report, or any reliance on or decisions made based on it, are the responsibility of such third parties." Justice Jennings stated at para 27: "In my opinion, it is precisely the 'disclaimer of responsibility' for which approval was given by McLachlin J. in *Edgeworth*. I have been invited by counsel for [the plaintiff] to consider that the language in the statement is not sufficiently broad to insulate Little from the negligence claimed here. *I do not think it is profitable to engage in an overly close scrutiny of the precise meaning of the words in the statement*" [emphasis added].
17. *Tercon*, *supra* note 1 at paras 121-1–123.
18. The first branch of the test applies the normal principles of contractual interpretation traditionally applied to this analysis, which are summarized above.
19. The second branch addresses unequal bargaining power between the parties and whether the clause exploits this unequal bargaining power.
20. To rely on public policy as a reason for declining to enforce an exclusion clause, the party seeking to avoid enforcement bears the onus of proving that the public policy concern at issue outweighs the strong public interest in the enforcement of contracts. For a public policy concern of this magnitude, it must amount to "[c]onduct approaching serious criminality or egregious fraud" (*Tercon*, *supra* note 1 at para 120), such as the intentional sale of adulterated baby formula and the reckless sale of toxic cooking oil (*Tercon*, at para 118).
21. *Tercon*, *supra* note 1 at para 122.
22. Where there has been no negligence on the part of the professional, it appears that a professional can enforce an exclusion clause, even on summary judgment. See for example the result in *Hiram Walker & Sons Limited v Shaw, Stone & Webster Canada LP, et al*, 2011 ONSC 6869, 2011 CarswellOnt 13105. In this case, while the parties agreed the engineer had not been negligent, the plaintiff attempted to argue that the exclusion clause ought not to be enforced on the basis of unconscionability or public policy. The court rejected these arguments.
23. *Felty v Ernst & Young LLP*, 2013 BCSC 815, 2013 CarswellBC 1215 at paras 190–203 and 252–258 [*Felty Trial*].
24. *Ibid* at para 237.
25. *Chartered Professional Accountants Act*, SBC 2015. Similarly, there is no such exclusion under Ontario's *Chartered Accountants Act*, RSO 2010, c 6 Sched C.
26. *Felty v Ernst & Young LLP*, 2015 BCCA 445, 2015 CarswellBC 3084 at para 51 [*Felty Appeal*].
27. *Ibid* at para 53.
28. *Felty Trial*, *supra* note 23 at para 258, discussed in *Felty Appeal*, *supra* note 26 at para 43.
29. Although earlier jurisprudence suggests that it is necessary to expressly exclude negligence, more recent decisions indicate that requiring the more specific use of the word "negligence" would be "unduly formalistic." See for example the result in *Dennis v Ontario Lottery and Gaming Corporation*, 2010 ONCJ 110, 2010 CarswellOnt 1947 at paras 94–69.
30. *Livent Inc (Receiver of) v Deloitte & Touche*, 2014 ONSC 2176, 2014 CarswellOnt 4365 [*Livent*], aff'd 2016 ONCA 11, 2016 CarswellOnt 122.
31. *Ibid* at para 243.
32. *Swift v Eleven Eleven Architecture Inc*, 2014 ABCA 49, 2014 CarswellAlta 153.
33. *Ibid* at para 52.
34. *Ibid* at para 57. Although *Tercon* was not applied by the Court of Appeal, it is likely that this analysis would fit within the third step of the *Tercon* test, where public policy concerns are addressed.
35. See for example *Karroll v Silver Mountain Resorts Ltd*, [1988] 33 BCLR (2d) 160, 1988 CarswellBC 439 at paras 14 and 21 (BC Sup Ct), and *Kalash v Carrier One Express Inc*, 2015 ONSC 5131, 2015 CarswellOnt 12427 paras 35–37.
36. *Fraser Jewellers (1982) Ltd v Dominion Electric Protection Co*, [1997] 34 OR (3d) 1, 1997 CarswellOnt 1894 at para 33 (CA).

Noise: A short story

by Martin Teplitsky, O.Ont., Q.C., LSM

Editor's note. Marty Teplitsky practised law in Ontario for more than 50 years. In his "spare" time, time truncated by a devastating and ultimately fatal illness, he had been working on a collection of short stories. These are charming vignettes, maybe some of them thinly disguised about his eventful life. As the *Journal's* tribute to this brilliant and generous man, we are delighted to publish "Noise" and an edited version of former Chief Justice Warren Winkler's poignant foreword to the collection of stories.

Foreword

The intersection of common sense and experience over time is wisdom. Few young people are truly wise. When I first met Marty and we became friends, more than four decades ago, his approach to life, even then as a young lawyer, was grounded in basic common sense. He was also immensely practical. His life experience , and Marty certainly gained plenty of this over his career, melded philosophically with his fundamental common sense. Marty became wise, very wise indeed.

There was another aspect to his make-up which must be mentioned in the context of this book. As Marty's career in the law developed, his reputation expanded exponentially. The legal profession saw Marty as an effective and pre-eminent counsel. That said, there was much more to him than his legal work. We have all come to recognize Marty's pronounced moral compass. His social conscience, moved by his endless energy, drove him in other directions. He devoted himself to the Lawyers Feed the Hungry program, which he was instrumental in establishing. He worked tirelessly, and anonymously, for other social causes. He wrote for legal journals. He wrote a book, *Making a Deal*, on negotiation and mediation. The result was a broad reputation for excellence, enjoyed not only in the legal profession but in society at large. To borrow a line from Tennyson, it could be said of Marty:

> I am become a name;
> For always roaming with a hungry heart
> Much have I seen and known; cities of men,
> And manners, climates, councils, governments,
> Myself not least, but honour'd of them all;

Marty became quite famous.

The short stories that comprise this wonderful little book are grounded in a philosophy of life and in the moral values and principles that Marty held dearly. The stories, and the underlying message found in each one, are not meant only for the intelligentsia. Marty was as at home on Main Street as he was on Bay Street. His message, in other words, is as apt for young people as for old; for the erudite, the sophisticated and urbane as for the everyday person. Many of the stories have at their genesis events, good or bad, fortunate or unfortunate, that affected ordinary people and changed their lives for better or for worse. At the very least, these events became embedded in their memories, perhaps for life. Everyone, rich or poor, advantaged or disadvantaged, can relate to and hopefully benefit from these life messages written in such a poignant fashion by a person who speaks from the heart and knows of which he speaks.

Storytelling is an age-old art that provides a means through which traditions are passed on from generation to generation – the Passover Seder is a good example. Storytelling was also a highly entertaining form of social interaction alloying one age group with another, connecting family members and knitting entire societies together. Storytelling is a strengthening experience. Unfortunately, in our modern times, it is becoming a lost art. This book reminds us of the days when storytellers were leaders in the community – people who were looked up to and who, through

their stories, became legends. They were people who passed on history and values.

In closing, I return to the words of Tennyson:

You and I are old;
Old age hath yet his honour and his toil;
Death closes all: but something ere the end,
Some work of noble note, may yet be done,
Not unbecoming men that strove with Gods.

This lovely book is Marty's "work of noble note." It is a fine tribute to a fine man.

The Honourable Warren K. Winkler, OC, O.Ont., Q.C.

Noise

Jack and his wife, Kate, are watching *Lincoln* at the Varsity theatre in Toronto. He is in his mid-70s, she her late 60s. Both are lawyers. Jack is not enjoying the film. He is distracted by someone behind him munching loudly on popcorn. To his left, another person, instead of blowing his nose, snorts it all in. Jack feels bombarded by ugly sounds. His nerves are jangling. He whispers to his wife: "They're driving me crazy. I can't stand it. I'll wait outside." Kate takes his hand, squeezes it gently and says soothingly: "It will stop soon. Watch the film." Jack tries deep breathing to distract himself. This seems to help. Eventually, the noises stop.

Jack first noticed his noise problem 55 years ago. His father loved horse racing. Actually, he loved gambling on horses. Jack and his dad had driven to Fort Erie for the afternoon thoroughbred races and then crossed over at Buffalo for the harness racing at Batavia. They then checked into a Holiday Inn. The Argos were playing in Calgary, so Jack stayed up to watch the game on television. His father was tired and turned in. Within a few minutes, Jack's father began to snore. Jack had never heard such cacophony. It came in steady waves, each building up to a crescendo and then starting all over again. His father's snoring was driving Jack insane. He could not drown out the sound, and he could not stand to hear it. He became agitated. Finally, not knowing how else to cope, Jack took his pillow and blanket into the washroom and lay down in the bathtub with the door closed. He could no longer hear the snoring. Thank God. After a while, he fell asleep. He never shared a room with his dad again, although they frequently travelled to Las Vegas on gambling trips.

Jack married at age 25. Kate did not snore. Snoring only became a problem again for Jack a decade later when Jack and his friend Albert decided to travel together to Israel. Albert had family in Haifa and had visited several times. This was Jack's first trip.

They landed at Ben Gurion Airport after an overnight flight during which Jack could not sleep, then rented a car and drove north to Haifa. Albert wanted to see family immediately. Jack was tired and wanted sleep. But he agreed to accommodate his friend. Around 10 p.m., they finally checked into the Dan Hotel, where Albert had reserved one room with twin beds. When the prospect of sleep finally came, Jack was horrified to discover that Albert snored just like his father. At least, this time, he knew what to do. Into the bathtub he went.

The following day they were scheduled to fly to Eilat. After the restless, uncomfortable night he had just spent, Jack was not taking any chances. He asked Albert if they had two rooms reserved. Albert said: "Don't worry, there are lots of rooms in Eilat. We don't need a reservation."

When they arrived in Eilat in the late afternoon, they could not find an empty hotel room at any of the major hotels. Jack wondered what he had gotten into. The trip was turning into a disaster. Frustrated and tired, they finally spotted a Red Sea Inn sign on the main street. It looked like a one-star hotel. The hotel had a tin roof and was wedged between an insurance agency and a travel agency. They entered the hotel and inquired about two rooms. The desk clerk reported that a reservation had just cancelled. There was one room available. They were welcome to it. Jack's heart sank. But it was better than no room at all, and he had a plan.

They paid and were led to a small, dark room with two beds and one window facing onto another building. There was a separate bathroom with a sink and toilet. Against one wall, in the centre of the room, opposite the beds, was a shower. There was no shower stall, only a curtain and a drain on the floor. Jack told Albert his plan. Jack would take a Valium and Albert would give Jack a five-minute head start before Albert went to asleep. The combination of the drug and the head start, hopefully, would have Jack asleep before the snoring began.

But Jack had not counted on a different noise. As the sun set, the tin roof began to vibrate with the sounds of many small animals accompanied by screeching. "What the hell is that?" Jack asked Albert. "It's just the cats screwing on the roof," Albert replied. Jack found the racket unbearable. The Valium did not help. He tried a second one. Before the drugs kicked in, Albert was snoring and the cats were still at it. Jack slept fitfully and awoke tired, miserable, depressed and ready to explode.

Their next stop was a guest house on a kibbutz in the Judean Hills north of Jerusalem.

It was a long drive, a distance of some 340 kilometres. They also wanted to stop at the Dead Sea for a short visit. They had to leave early, but Jack wasn`t going anywhere without a reservation for *two* rooms. He called the guest house. Two rooms were available. Two rooms were booked. Assured of his two-room reservation, off they went.

By the time they arrived at the guest house, it was dark. Jack was exhausted. They parked in the lot adjacent to the entrance and carried in their suitcases. At the front desk sat the night clerk – a middle-aged woman. Jack introduced himself, pulled out his credit card and referenced his reservation for two rooms.

The night clerk looked at Jack and Albert and said: "Where are the other two guests?" Jack replied: "There are only two of us." "Two people – one room. Four people – two rooms," she intoned. Not again, Jack thought. He looked at her, smiled as appealingly as he could and said: "Well, can't we pretend there are four people? I'm happy to pay for four." She reiterated: "Two people – one room. Four people – two rooms," and handed him one key.

Jack had heard stories about tough, hard-nosed Israelis, but this was ridiculous. He explained his problem about sleeping in the same room with Albert. She was unmoved. Jack whined that he had not slept in days and was at the end of his rope. She seemed uninterested. In a moment of inspiration fuelled by his panic over the prospect of another night with Albert, Jack said to her: *Rachmones* – the Hebrew and Yiddish word for "pity." Without another word, she handed Jack a second key.

In the 40 years that have elapsed since Jack was rescued by a plea for pity, his problems with sounds have worsened. The older he gets, the worse the problem becomes. He rarely goes to movies in Toronto. He prefers to watch Netflix at home. On airplanes, he is protected by Bose noise suppressors. Kate likes films and usually goes with friends. On vacation, Jack is more relaxed and better able to tolerate movie theatres. Restaurants also present many noise threats. There are soup "shlurpers" and "open-mouth" eaters. Trendy restaurants are addicted to playing loud music. Young people apparently like noise. Most restaurants won't turn the noise down. So, Jack also avoids restaurants. No great loss. Cooking is his hobby and restaurant food is largely mediocre.

And, it is not just snoring, shlurping of soup, sniffling or popcorn munching which make him feel crazed and out of control. Gum chewers who click their gum; heavy breathing, wheezing, non-stop tapping of fingers or feet and many other sounds, too numerous to mention, impair his enjoyment of life. As far as possible, Jack avoids people. Happily, Kate is perfect. No sounds he can't stand emanate from her. She is his best friend and he is safest in her company.

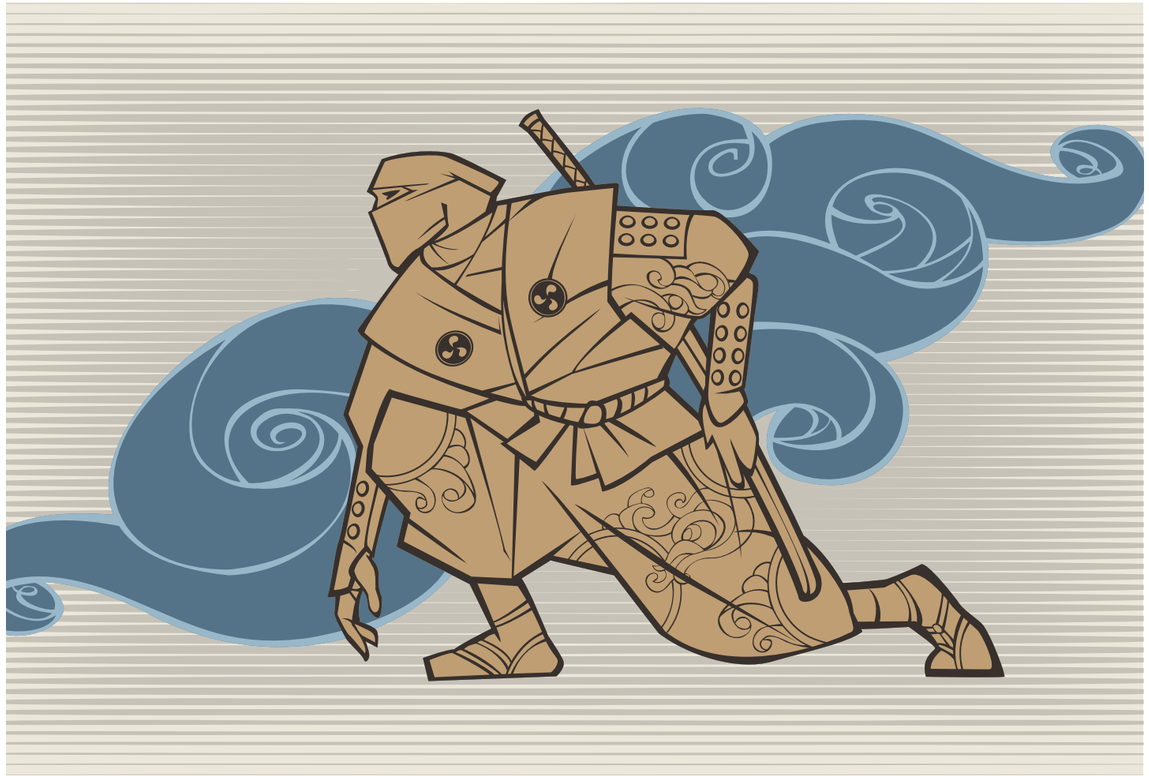
Jack's daughter tells him that he suffers from hyperacusis. It is a treatable condition, she advises. Although he is gratified to learn that his problem has a name and that he is not uniquely neurotic, Jack prefers coping through avoidance over struggling to find a cure.

Sometimes, he tries to understand why these sounds and loud noises bother him so much. It seems too complex. Maybe his misanthropy has caused his reaction to sounds or maybe the vice is versa. Jack is now too old to care.

At an age where Jack finds it easier to contemplate the past than to reflect upon his future, he is drawn to thinking about his life and his 50 years at the bar. He takes comfort in recalling the guest house desk clerk and his single-word appeal. *Rachmones.* Was this not his finest moment of advocacy?

In search of the ethical lawyer

Scott Rollwagen



Adam Dodek and Alice Woolley, editors: *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016)

A Japanese legend tells the story of a samurai who, charged with avenging the murder of his master at the hands of a rival warlord, tracks down and corners the culprit. As the samurai closes in, the terrified warlord spits in the samurai's face, whereupon the erstwhile avenger quietly sheathes his sword and walks away.

Duty required this response. Having sworn to avenge his master out of duty, the warlord's act transformed the samurai's ethical duty into its categorical opposite. Had he dispatched the warlord in that moment, his act would have been a personal one of anger, not revenge. The character of the samurai's act – its justice – depended on the samurai's ability to separate himself from it.

There is something familiar to our Western legal tradition in this story. Blind and dispassionate justice informs our Western concept of law. A new collection of essays edited by Adam Dodek and Alice Woolley illustrates, however, how difficult it can be to define justice solely in its neutral and dispassionate dimension. *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* explores legal professionalism and ethics from the point of view of the stories within and behind many ethical and professional dilemmas we all face. The editors describe their central premise as the "belief that the facts – people, circumstances, disputes, entities, culture and social structures – also matter in the consideration of ethical issues for the Canadian legal profession."

In developing their thesis they have produced an eclectic book whose scope ranges from the ethical dilemmas arising out of the *Smith v. Jones* case concerning expert testimony about imminent dangers posed by a criminal defence lawyer's client, to the struggles of Ken Murray in dealing with the Paul Bernardo tapes, to the tactical judgment calls in securing David Milgaard's freedom after his wrongful conviction. Notwithstanding its disparate authorship, the book maintains a steady and useful focus on the personal dimension of the ethical practice of law.

In some respects the essays are overtly biographical, such as Richard Devlin's thoughtful portrayal of the career of Burnley (Rocky) Jones, a Nova Scotia lawyer notable for his struggles in fighting racial inequality, culminating in his personal involvement as a defendant in a libel proceeding arising out of statements made in the course of his advocacy on behalf of three black schoolchildren who were strip-searched by a white police officer on their being detained at their school. Devlin's treatment of Jones' career effectively allows Jones' impressive achievements to speak for themselves, resisting easy generalizations while unmistakably demonstrating the inseparability of personal circumstance and personal engagement from the practice of law.

In a similar but more personal vein, David Asper's candid piece details his experiences as a member of the legal team securing David Milgaard's freedom after his wrongful conviction for murder. Few lawyers can claim to have directly contributed to remedying as unmistakable an injustice as that suffered by David Milgaard. It is likely that fewer still could have succeeded as Mr. Asper has in illustrating the real-life experience of doing so with all of its doubts, judgment calls and sometimes frustratingly perfect hindsight.

There are also striking and effective juxtapositions here, notably the ninth and tenth essays in the book, authored respectively by Alice Woolley and W. Brent Cotter. Mr. Cotter's essay concerns the life and career of Ian Scott, Q.C., a lion of the Ontario bar and accomplished advocate whose professionalism in serving as Ontario's attorney general exemplified that institution of civil government. Ms. Woolley's piece is a thoughtful and moving treatment of the shortened legal career of a friend. While Mr. Cotter focuses on a very public form of identity, Ms. Woolley reflects on how our professional life shapes us on a private and personal level. Her friend's shortened legal career illustrates many of the disappointments, injustices – and occasional triumphs – faced by a young woman finding, and then parting with, a place in big law. Ms. Woolley displays with unsentimental compassion the link between professional life, identity and meaning.

If there is a discursive core to this book it is Constance Backhouse's essay on "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives." It is a commendably blunt and explicit historical illustration of how some of the cherished incidents of legal professionalism operated – in many cases shamelessly and overtly – as barriers to the disadvantaged. These stories make it difficult to accept that the legal profession's austere and separate history somehow axiomatically justifies itself.

The editors of this book and the contributors to it are right to remind us of the importance of lived experiences and human stories when we debate the boundaries of professionalism. Experiences and personal stories can and must shape the law and its rules. But we should never lose sight of the need for boundaries and the need for the law as a distinct institution whose legitimacy is informed by, but is necessarily separate from, the identity and interests of those whose lives it affects.

There is arguably no greater illustration of the challenges involved in integrating the personal and ethical dimensions of professional life than the current debate about civility. This debate,

fittingly, is the subject-matter of Micah Rankin's concluding essay about the struggles of a small-town British Columbia lawyer who faced professional misconduct allegations arising out of an aggressive and sarcastic response sent to an Ontario lawyer in response to a demand letter asserting a questionable damages claim against the parents of a shoplifter.

Whether and to what extent professional misconduct proceedings were justified in the specific circumstances of that case should not obscure the debate concerning the appropriateness of sanctioning incivility at all – whether in or out of court. The supposed conflict between duties of resolute or zealous advocacy and duties of professionalism and civility really hinges on whether and how one draws the line between the personal and the professional dimensions of the practice of law.

If one regards the advocate primarily as a client's personal champion (or, to use the uncharitable term, a "mouthpiece"), then there is an inevitable conflict between an advocate's obligations of professionalism and civility and his or her obligations as an "advocate." If one thinks one can score points by hurling an insult, taunting or goading opposing counsel, or bullying an inexperienced opposing counsel, then a superordinate duty of advocacy – in the "mouthpiece" sense – will conflict with (and, presumably on this way of thinking, prevail over) an obligation to act with civility and courtesy.

But this definition of what it means to "advocate" is the key to the supposed conflict. If being professionals means not just that we advocate, but that we advocate in a certain way, there is no longer any necessary conflict. The principled debate becomes not whether there should be any limits, but what those limits should be.

The debate is a critically important one. Defining too narrowly what is fair game for an "advocate" risks placing one thumb on the scales of justice, defining as "uncivil" the advancing of unpopular or controversial points of view, and thereby suppressing what should be one of the advocate's primary responsibilities: to speak out against injustice. It seeks to exclude the personal at the expense of a professionalism that only serves to entrench the established order.

Defining too liberally what is fair game, however, may have broader and even more damaging systemic consequences. Law is at bottom the imposition of principle and structure on state power. Even civil disputes involve – however indirectly – the exercise of state power to enforce private claims. If the law has any business existing as a distinct institution, it is in delineating the legitimate boundaries of power. Given this, it may be justly said that obligations of civility are at their most acute when members of the bar deal with non-lawyers or with marginalized members of the legal community. Invective, insults and sarcasm can in such cases turn the law into an instrument for the entrenchment of power and privilege, and thereby undermine its legitimacy.

Apart even from these specific cases, when legal debate descends into insult and invective, the layperson can justly be forgiven for assuming that the debate is less about justice and principle and more about personal status. At that point the law has no legitimate claim to be the province of trained professionals. The layperson sees discreditable personal attacks, and may feel just as qualified to deploy them as those claiming the special status of lawyers. Or, worse, such a person sees petulant bullying and identifies the law with it. The absence of any semblance of professionalism transforms law into the unprincipled assertion of power.

Because the law is about power, there will always be the need to remain aware of law's personal dimension, but also to strive to bring it outside of the personal if it wishes to claim the legitimacy of being wielded not for personal motives, or for the benefit of the privileged, but for society as a whole. The complex subject of civility is thus a fitting one with which to conclude this collection of essays that remind us of the complex relationship between personal stories and professional life.

A crime reporter passes judgment

Frank Addario

Christie Blatchford, *Life Sentence: Stories from Four Decades of Court Reporting – or, How I Fell Out of Love with the Canadian Justice System (Especially Judges)* (Toronto: Doubleday Canada, 2016)

Legal journalism, at its best, conveys the complexity of an arrest, a court proceeding or a justice issue with an eye to the novel and the significant. It provides insight and perspective. Perhaps it even helps to right some wrongs.

The skill of the legal journalist lies in sifting through an onslaught of material, learning about developments, acquiring the best possible sources and presenting information in an accurate but compelling way.

At least, that's the model.

But in the spring of 1995, the art of Canadian court reporting reinvented itself as the double first-degree murder trial of Paul Bernardo unfolded in Toronto. The case was tailor-made for the media: sympathetic schoolgirl victims, suffering families, him and her evildoers, police negligence, video evidence and media-friendly victim lawyers. So widespread was the publicity about Bernardo and his ex-wife, Karla Homolka, virtually everyone in the country decided what happened *before* the trial started. Here, at least in my memory, is where legal journalism had its makeover.

It started with the assumption that, since Bernardo was so obviously guilty, the old rules of legal journalism – report on the evidence, let the jury or at least the reader decide – were out the window.

Enter Christie Blatchford, a gifted writer who, after stints at the *Globe and Mail* and the *Toronto Star*, was now a star writer for the *Toronto Sun*. She showcased in *Bernardo* the prototype of point-of-view court reporting. The line between opinion and reporting in her coverage of the trial was almost impossible to discern. The style was a smashing success and others on the legal affairs beat took it on. Taking their cue from Blatchford, reporters on subsequent cases were encouraged to criticize, sum up and judge ongoing court proceedings – often in flamboyant, extravagant terms, and even when the evidence was equivocal.

No longer reserved for the dark corner previously occupied by red-top journalists, the new normal was sensational and easy to devour. Seeing an opportunity, editors began substituting columnists for court reporters to cover high-profile legal proceedings. Not surprisingly, opinions became just as central to the story as the evidence in the courtroom. A few years ago, for example, a Toronto police officer was charged with murder. On the day after his first appearance in court, *National Post* readers were treated to the following report from the court, written by Christie Blatchford about Constable David Cavanagh:

> It may have been a while since I've done regular police beat work, but cops haven't changed. They are as capable of mistakes and screw-ups as the rest of us, but I have great difficulty imagining one, least of all one with Const. Cavanagh's reputation, forming the specific intention required to prove murder … I felt as terrible for him as I did for [the victim's] family on the other side of the room: As someone said the other day, bullets go two ways.

Is this reporting, editorializing, diary-writing – or a bit of each? On the day that article appeared, the *Post* had no other coverage of Constable Cavanagh's court appearance. And does it make a difference that the byline doesn't come with a caveat that this is not traditional court reporting but comment, or full comment, or whatever the *Post* calls it? Does anyone care anymore?

The answer, I would say, depends on whom you ask. The average newsreaders have never been to court. Their information about what goes on inside the courtroom is filtered by the media who attend. When legal journalists abandon the tradition of conveying what happened in court in favour of hobby horses or pre-judgment, the reader loses the ability to judge. However, if you like criminal

court as an entertainment spectacle that exists to confirm your own suspicions about bad human behaviour – by judges, lawyers, witnesses, defendants and even cops – the new school is for you. Who says the reader needs a verbatim account? If I can flick on my television for an exciting snippet of legal news, why can't I pick up my broadsheet for the same thing? What exactly is wrong with a reporter or columnist deciding the balance between fair trial rights and freedom of expression? These questions, interesting and bound to ruffle establishment feathers, are not seriously examined in *Life Sentence*, Blatchford's new quasi-autobiography. But her defence is pretty easy to advance: The old school of legal affairs writing was stodgy and grey. It promoted mystery rather than light about courts and how they work. Lawyers and judges are too self-interested to object credibly about how they are portrayed. In short, get over it.

Christie Blatchford is a good writer, to be sure. She has a knack for drawing the reader in. She also has a personal observation style, a "step out of the third person and tell them what it looks like" that gives her prose a compelling air of plain-spokenness. (In person, she is funny, smart, salty and assiduous about getting the facts straight. Everyone knows her as Christie, a tribute to her familiarity in the legal community.) She is a pioneer in insisting that court staff (notoriously stingy custodians of the open-courts principle) share exhibits with the media and respect its right to do its job.

On the other hand, she has long roots in sensational crime journalism. She can no more shed those habits than an aardvark can swear off ants. Read her for a few days in a row and you will come across artifacts of that past in one of her stories, the "gotcha" dark art of the tabloid. She cops to that in *Life Sentence*, admitting to having used the formula too many times to count. I often think of her as the unthinking person's thinking person, a journalist who takes easy targets – usually stupid defendants – describes their stupid acts in readable terms, ridicules their explanation … and presto! Case closed. Messy disorganized life explained. Some of her columns have the subtlety of a Jerry Springer show – sensationalism masquerading as the public interest.

Admittedly, there is more to this writer and her style. It takes a special talent to grasp what is happening in real time during a trial and, after four decades, Blatchford's got it. She has sat in more courtrooms and listened to more losing arguments than most trial lawyers I know. She often ferrets out the winning point in a case long before counsel articulates it. She does not brag about this skill, but it is on full display in *Life Sentence*. Centred on five notable cases she covered, the book showcases her trademark bluntness and suspicion of bureaucracy, elites and pomposity.

The book makes no attempt to defend or even explain Blatchford's style of court reporting. She writes instead about how she fell in and out of love with the Canadian justice system. One key takeaway is that she once loved us lawyers but now, not so much. Our "flowery horseshit praise" for one another, our "massive self-regard" and, most of all, our addiction to rules of evidence that distort the search for the truth all drive her nuts.

She reserves the pointiest tip of her pen for judges[1]. She mostly loathes them. Some of her criticisms resonate, especially if you are interested in how pomposity and oblivious arrogance (for instance, judge-itis) look to non-lawyers. But her generalization that most judges are self-involved and out of touch is a tad overstated. True, we like our judges to take the job, rather than themselves, seriously. But the job asks them to settle disputes civilians can't work out on their own. If there is a bit of reserve and ceremony with that, what else would you expect? If some judges get a little over-puffed, it does not mean *all* of them are "remarkably smug," Yet, after covering courts for 40 years, Blatchford comes away with that evidence-free conclusion. One exception is retired Justice Eugene Ewaschuk, whom she describes as smart and blunt. I find that particular crush a bit baffling. He may have been plain-spoken and quick-witted, but he was also error-prone. So her take on judges is idiosyncratic.

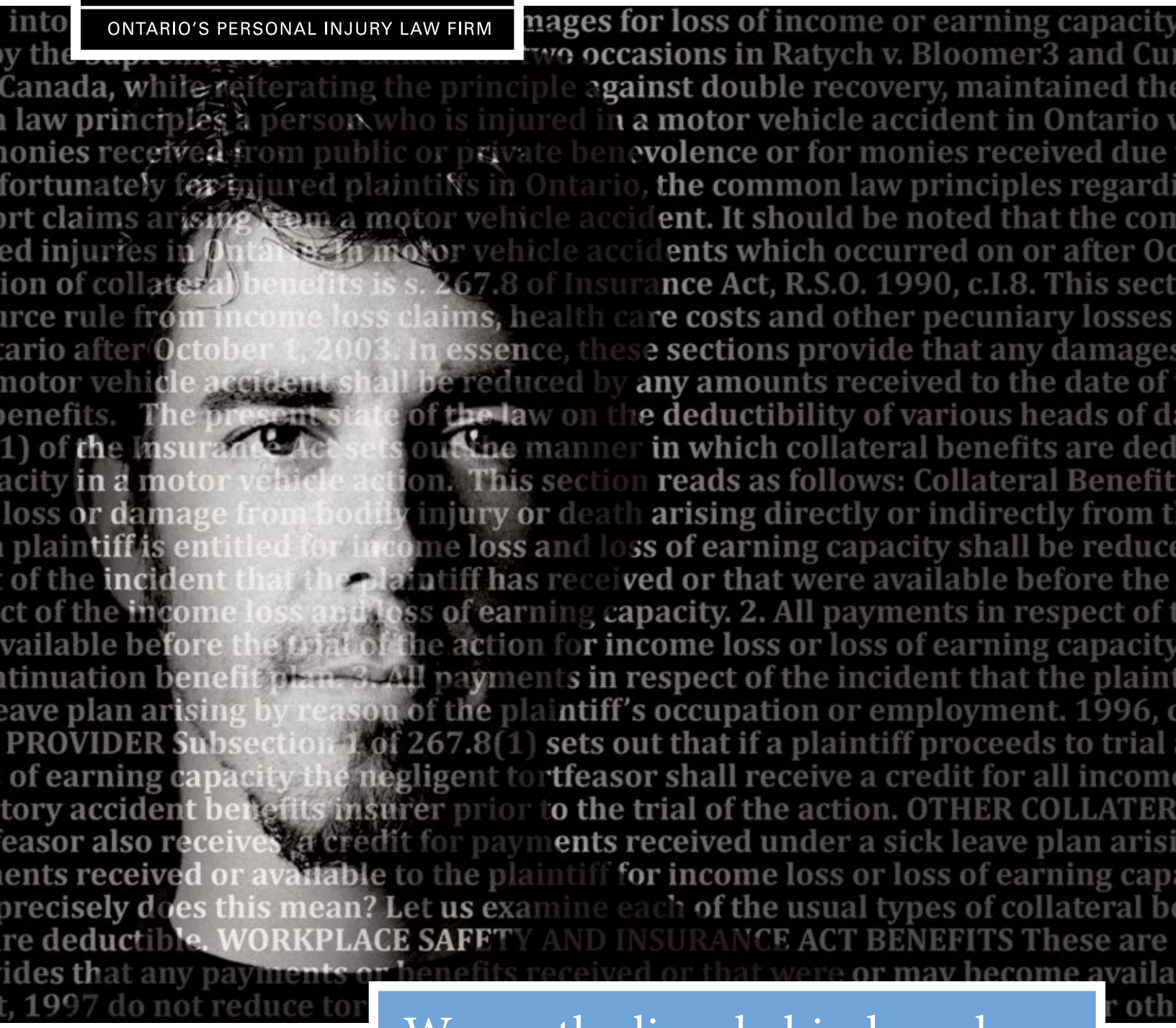
Which takes us back to a point I made earlier: If you like engaging writing about the Canadian courts, *Life Sentence* is a great collection of essays. But it ought to come with a warning label: highly opinionated, not always right and with the journalist as judge and jury.

Notes

1. I have also been on the receiving end of the pointy-tipped Blatchford pen; although disagreeable, it has always been fair.

Oatley Vigmond

ONTARIO'S PERSONAL INJURY LAW FIRM



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With over 40 years of litigation experience, Oatley Vigmond knows personal injury law. We've argued hundreds of cases, secured record settlements and have helped shape Canadian law. Yet for all our success in the courtroom, we have never lost sight of the fact that people come first. We are dedicated to serving clients across Ontario. Contact us at 1.844.487.9044 or oatleyvigmond.com.

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