

The Ins And Outs Of Evidence In Civil Institutional Liability Cases

Allan Maclure and Marsha Gay, Department of Justice, Canada¹
Mark R. Frederick and Hilary I.J. Clark, Miller Thomson LLP

INTRODUCTION

This paper will explore the key areas in the law of evidence as they pertain to institutional liability for sexual assault.

Part I will provide a definition of evidence and outline the unique standard of proof in civil sexual assault cases. This will facilitate an understanding of what can and should be disclosed to opposing parties through the production of documents and in the examination for discovery process. The production of documents by non-parties will also be addressed and practical information will be provided to assist both plaintiffs and defendants in obtaining the relevant productions. Since certain categories of evidence are protected from disclosure, Part I will present some of the limits of disclosure, particularly with respect to solicitor and client privilege.

In Part II a review of the implied or deemed undertaking rule will be presented. By way of background, the foundational common law implied undertaking rule will be set out. This will be followed by an overview of the codified rule under the *Rules of Civil Procedure*² and a presentation of the relevant case law.

Part III will examine some practical issues concerning evidence at trial such as the admission of photographs, discovery transcripts, hearsay and *de bene esse* evidence.

Part IV will address the use and admissibility of similar fact evidence in civil cases. Particular focus will be placed on situations of known or repeat offenders in civil sexual abuse cases. The legal test will be set out, highlighted by an examination of a recent institutional liability case involving sexual and physical abuse of students.

¹ This paper was prepared for presentation at the Canadian Institute conference on Institutional Liability for Sexual Assault and Abuse, Toronto, February 2007. The content of this paper represents the research and views of the authors and are not necessarily the views or position of the Government of Canada.

² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

PART I: DEFINITION AND DISCLOSURE OF EVIDENCE

Evidence Defined

The Supreme Court of Canada accepted the following definition of evidence in *Gould v. Yukon Order of Pioneers Dawson Lodge No. 1*³:

The evidence of a fact is that which tends to prove it--something which may satisfy an inquirer of the fact's existence.

A more fulsome definition is found in *Children's Aid Society of London & Middlesex v. M.A.*⁴, where Campbell J. provides:

"Evidence" is defined inter alia in Black's Law Dictionary, 6th ed. as "that probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue", and includes "all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved".

The goals of the law of evidence are to assist in the search for truth, to improve the efficiency of the trial process, to provide for the fairness of that trial process and to prevent the unfair bolstering of one party's evidence.

Standard Of Proof

Numerous cases have established that a higher evidentiary standard is necessary when there are allegations of a criminal nature, such as allegations of physical and sexual abuse. The courts have held that because of the seriousness of these allegations and the gravity of the consequences, such allegations should be proven on a standard of "high probability" commensurate with the occasion. (See *Continental Assurance Company v. Dalton Cartage Ltd*⁵ as cited in *Blackwater v. Plint*⁶ and *M.B. v. British Columbia*⁷).

³ 100 D.L.R. (4th) 596 (Y.T.C.A.), affirmed (1996), 133 D.L.R. (4th) 449 (S.C.C.).

⁴ [1998] O.J. No. 2530, 1998 Carswell Ont 3228 (Ont. Gen. Div.)

⁵ (1982), 131 D.L.R.(3d) 559 at 563 (S.C.C.)

⁶ [2001] B.C.J. 1446 at paras.10 to 13 (B.C.S.C.); varied, (2003), 21 B.C.L.R. (4th) 1 (C.A.); aff'd [2005] 3 S.C.R.3,

⁷ [2001] B.C.J. No. 586 at para. 25 (B.C.C.A.), [2003] 2 S.C.R. 477 (appealed on other grounds)

Other cases have used the “clear and cogent” standard as the applicable standard of proof for allegations of sexual and physical abuse in civil proceedings. (See *B.G. et al. v. Her Majesty the Queen in Right of the Province of British Columbia*⁸; *Gorman v. Tyhurst*⁹; *Otter v. MacDougall et al.*¹⁰; *Curran v. MacDougall and HMTQ*¹¹ and *H.L. v. Canada (Attorney General)*¹² at para. 137)

The considerable delay between the time of the alleged events and the trial in many institutional assault cases also contributes to the need for a higher evidentiary standard. Lord Denning’s pronouncement in *Bater v. Bater*¹³ has been cited in Ontario courts as support for the higher requisite standard in such cases:

In criminal cases the charge must be proved beyond a reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous so ought the proof be clear. So also in civil cases. The case may be proved by a preponderance of probabilities, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

In *Grdic Estate v. Petranovic*¹⁴ the Ontario Superior Court, relying on *Bater, supra*, held that since sexual assault cases are criminal in nature, there must be “clear and cogent evidence” before making a finding of sexual touching. The seriousness of the allegations and the lack of corroboration as required by s.13 of the *Ontario Evidence Act* were the basis set out for the higher standard. Section 13 of the *Ontario Evidence Act* requires that in an action by or against a deceased person, a living person’s evidence must be corroborated by some other material evidence.¹⁵

⁸ [2003] BCSC 1890

⁹ (2003), 13 B.C.L.R. (4th) 81 (B.C.C.A.)

¹⁰ 2006 BCSC 1536

¹¹ 2006 BCSC 933

¹² [2005] 1 S.C.R. 401

¹³ [1950] 2 All Eng. Rep. 458 at 459.

¹⁴ 2004 CanLII 53113 (ON S.C.)

¹⁵ *Evidence Act*, R.S.O. 1990, c. E.23

Many institutional liability claims for sexual assault tend to have a historic element. As the Court in *Otter supra* recognized, historic abuse claims present unique evidentiary challenges since “generally there is no longer any objectively verifiable evidence of the assault.”¹⁶ (See also *Blackwater (BCSC) supra* at para. 337.) However, the difficulty in proving the case due to the passage of time does not affect the standard of proof. The allegations still require clear and cogent proof.

One should be aware of this higher standard when seeking productions and disclosure under Rules 30 and 31 of the *Rules of Civil Procedure* and also when considering the use and admissibility of similar fact evidence. While a court may accept a plaintiff’s evidence on its own, a plaintiff’s uncorroborated or unconfirmed allegations will likely be considered by the courts with great caution given the seriousness of the allegations and the often historic nature of the claims.¹⁷

Rules Governing Disclosure Of Evidence

In the foundational and frequently cited case of *Riddick v. Thames Board Mills*,¹⁸ Lord Denning clearly establishes the policy rationale for documentary disclosure. He states at p. 687:

The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest in discovering the truth, i.e. in making full disclosure.

In Ontario, the disclosure of documentary evidence is primarily governed by Rules 30 (documentary evidence) and 31 (examination for discovery) of the Rules. As was noted by the Court of Appeal in *Landolfi v. Fargione*¹⁹, the current Rules not only expanded the scope of discovery captured under Rule 30, but also the scope of informational discovery (the information available to examining counsel in the examination for discovery process). These

¹⁶ *Supra*, note 7 at para.15

¹⁷ *Blackwater v. Plint*, [2005] 3 S.C.R. 3 at para. 16

¹⁸ [1977] 3 All ER 677 (C.A.)

¹⁹ 2006, CanLII 9692 (Ont. C.A.) at para. 69.

broadened discovery rights are intended to prevent “litigation by ambush” and to encourage full and timely disclosure. (See also *Ceci v. Bonk* (1992), 7 O.R. (3d) 381 (C.A.) at 383-84.)

The examination for discovery is key, not only for allowing parties to know the case against them and to obtain the necessary evidence, but also later on in the trial process. For example, as per Rule 31.11 of the *Rules of Civil Procedure*, a party may read parts of the examination transcript into evidence in order to impeach a witness at trial. As such, production of all the relevant documents will not only be essential to allowing counsel to prepare an effective examination for discovery, but may also have an impact at trial in any number of ways.

Disclosure Of Each Party’s Documents

Rule 30.02 sets out which documents must be disclosed prior to an examination for discovery. It states: every document relating 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, whether or not privilege is claimed in respect of the document. [Emphasis added]

It should be noted that, as per Rule 30.01 documents requiring disclosure are not limited to written materials. They also include sound recordings, videotapes, film, photographs, charts, graphs, maps, plans, surveys, books of account, data and information in electronic form.

The documents which a party is required to disclose must be listed and described in an affidavit, as per Rule 30.03. The affidavit will have three separate schedules: Schedule A containing relevant documents the party does not object to producing; Schedule B containing relevant documents over which the party claims privilege; and Schedule C containing relevant documents that were formerly, but are no longer in the party’s possession, control and power. This affidavit of documents must be served on every other party within ten days after the close of pleadings.

It may, at times, be difficult to discern whether a document is in the “power” of a particular party. Rule 30.01 (1) provides some guidance on this issue by stating that “ a document shall be

deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled".

For example, in *Parr v. Butkovich*²⁰ the plaintiff in a personal injury case claimed damages for the effects of injuries on his education. Since he could give permission to obtain documents by virtue of section 266(2) of the *Education Act*, the documents were considered to be in his "power" to produce under Rule 30.02. Carruthers J. directed the plaintiff to give permission for the release of the documents, stating that by being "able by his written permission to allow for records of the type in question to be produced is to my mind tantamount to saying that those records are within the plaintiff's 'custody or power'²¹.

If relevant documents have not been produced they can be requested by bringing a motion for a further and better affidavit. Evidence elicited at the examination may require further productions by way of undertakings under Rule 31.06(1). This rule obliges a person to answer any proper question relating to any matter in issue in the action, including questions on information that is evidence.

Production Of Documents By Non-Parties

Documents not found to fall under the purview of Rule 30.01, such as documents from third parties, may be acquired by way of a Rule 30.10 motion. According to the Court of Appeal in *S.L. v. N.B.*²², the rule recognizes that productions by non-parties are not a routine part of the discovery process. This is evidenced by the onus Rule 30.10 places on the moving party to demonstrate that the two components of the Rule have been satisfied, namely a) the documents are relevant to a material issue in the litigation; and b) it would be unfair to require the party seeking the documents to proceed to trial without the productions. In other words, fairness dictates that the non-party be compelled to produce the material.

²⁰ (1978), 20 O.R. (2d) 491

²¹ Ibid. cited in *D.N. v. Kawartha* (2005) CanLII 25891 (ON. S.C.) at para. 21

²² (2005), 252 D.L.R. (4th) 508

The factors to be considered under Rule 30.10 (1) (b) in determining whether it would be unfair not to order production are set out in *Ontario (Attorney General) v. Stavro*²³ as follows:

- 1) the importance of the documents in the litigation;
- 2) whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness;
- 3) whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
- 4) the position of the non-parties with respect to production;
- 5) the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties; and
- 6) the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have a interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

As Morden J.A. states in *Lowe v. Motolanez*²⁴, the test for relevancy in Rule 30.10 (1)(a) is higher than that for production from an opposing party in rule 30.02. Rule 30.10 (b) also has the requirement of fairness for the moving party that does not exist in Rule 30.02. For these reasons, the non-party is not put to the same inconvenience or “trouble” it would face if it were a party to the action. He adds that a non party is asked to expend the effort and expense of providing the information as part of its civic duty, akin to the position of a witness who has relevant evidence to give at trial.

Master Dash noted, however, in *D.N. v. Kawartha*²⁵ that Rule 30.10 only authorizes the court to order a non-party to produce documents that are “not privileged.” Production of a minor’s school records was sought by way of a 30.10 motion, but those records were protected by a statutory privilege by virtue of s. 266(2) of the *Education Act*. In ordering that the records be produced, Master Dash held that the court must weigh the competing privacy interests in the privileged documents with the public interest of resolving the litigation. It was also noted that, had the minor been a party defendant the court could have ordered (through his litigation guardian) consent to the release of the student record pursuant to Rule 30.02.

²³ (1995), 26 O.R.(3d) 39 (C.A.) at p.48

²⁴ (1996), 30 O.R. (3d) 408 (Ont. C.A.)

²⁵ (2005) CanLII 25891 (ON. S.C.) at para.10

Types of Documents Which May Be Sought Under Rules 30 and 31

Institutional sexual abuse and assault cases may require considerable documentary productions from plaintiffs, defendants and third parties. If a loss of opportunity and/or a loss of past and future income claim is being advanced, for example, the plaintiff's educational records may be required in addition to employment and tax records. The production of social assistance records may also be of considerable importance for various reasons. Notably, the Supreme Court of Canada in *M.B. v. British Columbia supra*²⁶ held that social assistance payments should be deducted from awards for lost past and future earning capacity.

Similarly, a criminal record could be relevant for both plaintiffs and defendants in certain institutional liability cases. For example, in *H.L. v. Canada (Attorney General) supra* the Supreme Court of Canada recently reduced a plaintiff's loss of past earning award to reflect the time the plaintiff had spent in incarceration. The Supreme Court considered that the trial judge had made a palpable and overriding error in finding that the sexual assault on the plaintiff caused his loss of income due to imprisonment. It added that such a finding is both contrary to judicial policy and unsupported by the evidence.

The Supreme Court of Canada held that none of the plaintiff's periods of incarceration were related to alcohol. It then concluded that the chain of causation linking the plaintiff's sexual abuse to his loss of income while incarcerated was interrupted by his intervening criminal conduct. Otherwise stated, the plaintiff's lack of gainful employment during his times in jail was caused by his imprisonment, not by his alcoholism; and his imprisonment resulted from his criminal conduct, not from the sexual abuse suffered nor from the alcoholism it was found to have induced.²⁷

Appendix A provides a list of documents that, if relevant, could be requested under Rules 30 or 31 as well as some practical contact information that may facilitate both plaintiff and defence counsel's acquisition of such documents.

²⁶ [2003] 2 S.C.R. 477 (at para. 137 to 143)

²⁷ The Court added that "an award of this type, if available in any circumstances, must be justified by exceptional considerations of a compelling nature and supported by clear and cogent evidence of causation." (at para.137)

Solicitor And Client Privilege

Rule 30.02(2) and Rule 30.04 provide that, if requested, a party must produce for inspection every document listed in the affidavit, with the exception of privileged documents.

As per Rule 30.04(6), the court may inspect the document to determine the validity of the claim of privilege. The party seeking the disqualification of the evidence must serve a notice of motion and an affidavit setting out the nature of the documents, the reasons for the claim of solicitor and client privilege, the relevance of the evidence and any potential prejudice.

The waiver of solicitor and client privilege over legal advice is only done if the party puts the legal advice in issue. If the party has not put the legal advice in issue then the privilege is maintained. For example, in *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*²⁸ the privilege was lost once the evidence was produced without claiming privilege, the party claiming privilege was cross-examined on it and it was made an exhibit. The documents were released on consent and any privilege that had attached to the documents was found to have been waived.

A party may come into possession of its opponent's privileged documents, either through inadvertence, through intentional wrongdoing or by solicitors who have access to privileged documents moving or merging firms. However, even absent any bad faith or egregious conduct, *MacDonald Estate v. Martin*²⁹ "makes it clear that prejudice will be presumed to flow from an opponent's access to relevant solicitor and client confidences."³⁰ The court then has a variety of remedies open to it in such circumstances, one of the most severe being the removal of the solicitor or counsel from the record.

In the Supreme Court's very recent decision of *Celanese Canada Inc. v. Murray Demolition Corp*³¹ Binnie J. set out the factors to be considered when determining whether a violation of the solicitor and client privilege warrants the removal of the acting counsel. In *Celanese*, an Anton Piller order was granted and executed for the search and seizure of numerous documents. The

²⁸ 16 C.P.C. (6th) 193 (Ont. Div. Ct)

²⁹ [1990] 3 S.C.R. 1235

³⁰ *Celanese Canada Inc. v. Murray Demolition Corp*[2006] S.C.J. No.35 (S.C.C.)

³¹ [2006] S.C.J. No.35 (S.C.C.)

documents included about 1,400 electronic documents thought to be relevant, but not then screened for potential solicitor and client privilege. Copies of the potentially privileged documents were then sent to opposing counsel. An order was requested to have this opposing counsel removed as counsel of record, disqualifying them from continuing to act.

The court held that there is no such thing as automatic disqualification and if a remedy short of removing the searching solicitor will cure the problem, then it should be considered. Binnie J. then outlined the following six factors for meeting the test for disqualification: 1) how the documents came into the possession of the plaintiff or its counsel; 2) what the plaintiff or its counsel did upon recognizing that the documents were potentially subject to solicitor and client privilege; 3) the extent of the review made of the privileged documents; 4) the contents of the solicitor and client communications and the degree to which they are prejudicial; 5) the stage of litigation; and 6) the potential effectiveness of a firewall or other precautionary steps to avoid mischief.

The Court first noted that the test requires consideration of the whole of the evidence. It then stated that the test for disqualification is met if the moving party shows a real risk that the opposing party will use information from the privileged documents to the prejudice of the party bringing the motion. The evidence will be disqualified if this prejudice cannot be overcome other than by disqualification.

Anton Piller Orders

As noted above, the documents in this case were seized pursuant to an Anton Piller order. Although Anton Piller orders were originally developed as an “exceptional remedy” in the context of trade secrets and intellectual property disputes, as Binnie J. points out, “such orders are now fairly routinely issued in ordinary civil disputes. They have, for example, been successfully sought not only in industrial espionage cases, but also in employment³² and matrimonial litigation.³³ As a result, it is foreseeable that such an order could be sought in institutional liability cases and it, therefore, merits specific mention here.

³² *Ridgewood v. Electric Ltd.*(1990) v. *Robbie* (2005), 74 O.R. (3d) 514 (S.C.J.) and *Netbored Inc. v. Avery Holdings Inc.*, [2005] F.C.J. No. 1723.

³³ *Neumeyer v. Neumeyer* (2005),47 B.C.L.R. (4th) 162

Anton Piller orders have been available in Canada for almost 30 years. As Binnie J. notes in *Celanese*, they “bear an uncomfortable resemblance to a private search warrant”. No notice is given to a party against whom the order is issued. The party to whom the order is directed usually first becomes aware of the order when it is served and executed, leaving them no opportunity to challenge the order or the evidence upon which it was granted. In fact, the party may not even be aware that a claim is pending.

The order then authorizes a private party, not a public institution, to insist on entrance to its opponent’s premises and conduct a search, seize and preserve evidence to further its claim. The only justification for such a “draconian order”, as Binnie J. so refers to it, is that “the plaintiff has a strong *prime facie* case and can demonstrate that on the facts, absent such an order, there is a real possibility that relevant evidence will be destroyed or otherwise made to disappear.”³⁴ As he sets out in *Celanese* at para. 35, the following four essential conditions must be met for the making of an Anton Piller order:

First, the plaintiff must demonstrate a strong *prime facie* case. Second, the damage to the plaintiff of the defendant’s alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

Parties against whom an Anton Piller order have been issued are protected by threefold safeguards: 1) a carefully drafted order identifying the materials to be seized and setting out safeguards to deal with privileged documents; 2) a vigilant and independent court-appointed supervising solicitor; and 3) responsible restraint on those executing the order with a focus on preserving, not exploiting the evidence. Binnie J. states that “under a properly executed Anton Piller order, the searching solicitors should be able to show with some precision what they have seized, what they have seen, who has seen it and the steps taken to contain the wrongful disclosure of confidences.”³⁵

³⁴ *Celanese Canada* at para. 1

³⁵ *Ibid* at paras. 1, 31 and 34

Use Of Privileged Documents At Trial

Rule 30.09 contemplates the production of privileged documents prior to trial for their eventual use as substantive evidence at trial. As such, if a party claims privilege over a document, it may not subsequently be used at trial unless 1) the claim of privilege has been abandoned with notice in writing; and 2) copies of the document have been provided to the other party at least 90 days prior to trial. (See *Giroux v. Lafrance* (1993), 19 C.P.C (3d) 12 Ont. Ct. (Gen. Div.)).

The rule, however, provides two exceptions to the procedural requirements of Rule 30.09: if the document is sought to be used for impeachment purposes or the trial judge otherwise grants leave to use the documents. Thus, if the Rule 30.09 production requirements of disclosure have not been met, the only way in which the party could use the document at trial would be to impeach a witness or with leave of the trial judge.

For example, in *Landolfi supra* the Court of Appeal was asked to consider the exclusion of defence video surveillance evidence sought to be used at trial for impeachment purposes. In seeking to use the video surveillance evidence, defence counsel relied on Rule 30.09. Since the videos had not been produced to plaintiffs' counsel prior to trial and no notice of abandonment of privilege had been delivered, the videos were not admissible as substantive evidence without leave of the trial judge and could only be used to challenge the credibility of the plaintiff's evidence.

The Court stated in *Landolfi* at para. 48 that the established test for the admission of evidence at trial rests on relevancy. It added that when evidence is tendered for impeachment purposes, it must be relevant to the credibility of a witness on a material matter. The value of the evidence in assessing credibility must also outweigh the potential prejudicial effect.

The Court also noted that the *Rules of Civil Procedure* distinguish between the documentary discovery contemplated in Rule 30 as set out above, and informational discovery as provided by Rule 31. It held that, where evidence is sought to be admitted for impeachment under Rule 30.09 and not as substantive evidence, no disclosure obligations are triggered. Hence, there was no obligation to disclose the full contents of the surveillance videos in order to use them at trial.

Citing *Ceci supra*, it acknowledged that Rule 30.09 is consistent with “the principle of full exchange of information at all stages of an action” and described the “important interplay between Rules 30.09, 31.06(1) and 30.03” as follows:

The [impeachment] exception [under Rule 30.09], in my view is a simple acknowledgment that a party, unable to anticipate everything that may be said by an opponent at trial, cannot be expected to relinquish privilege and give notice of documents on the mere chance that they may be used to impeach. Any suggestion of ambush being encouraged is dispelled by the necessary inclusion of the privileged document in the affidavit of documents, the ability of the opposite party to demand particulars of its contents on discovery, and the limited use of the privileged document at trial.

PART II: IMPLIED OR DEEMED UNDERTAKING RULE

Prior to codification as Rule 30.1.01, the deemed undertaking rule was known as the “implied undertaking” rule. The rule has its origins in common law and was developed to prevent the documents disclosed through a discovery in one proceeding from being used in another proceeding.

Riddick supra outlines the rationale for the implied undertaking rule. The plaintiff in that case had sued his employer for wrongful arrest and false imprisonment. As part of the discovery process, the employer produced an internal memorandum containing disparaging comments about the plaintiff employee. The action was settled, but the plaintiff later successfully sued the employer for defamation relating to the statements in the memorandum.

As was noted in Part I, the discovery process compels parties to disclose documents in his or her possession, even though they might be damaging to their case. The Court of Appeal in *Riddick* found that the documents compulsorily produced through discovery in the first action could not later be used against the employer in another. Lord Denning then outlined the principles of the implied undertaking rule in *Riddick* at p. 687:

The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one’s documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose.

The seminal implied undertaking case in Ontario, *Goodman v. Rossi*,³⁶ also involved a memorandum disclosed by the defendant in a wrongful dismissal suit. The plaintiff in the case also later tried to use in an action for defamation. The Court of Appeal in *Goodman* defined the law upon which the codified rule is based. Echoing Lord Denning, Morden A.C.J.O. (as he then was) stated the policy reason for the rule as the “recognition of the general right to privacy which a person has with respect to his or her documents”.

He believed it would be preferable for the Civil Rules Committee to consider making the implied undertaking rule part of the *Rules of Civil Procedure*. Setting out the purpose of the rule and policy rationale for this recommendation, Morden J.A stated in *Goodman* at p. 369:

The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right...A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery.

The codified, and hence, “deemed undertaking” rule is the result of Morden J.A.’s recommendation. Rule 30.1.01(3) states as follows:

(3) All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

However, the application of the rule is finite. The limits on its application are set out in subsection (1) and the exceptions in subsections (4) to (7). Rule 30.1.01 (1) states:

This Rule applies only to evidence and any information obtained from a documentary discovery under Rule 30; an examination for discovery under Rule 31; the inspection of property under Rule 32; a medical examination under Rule 33 or an examination for discovery by written questions under Rule 35.

The exceptions are as follows:

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

³⁶ (1995), 24 O.R. (3d) 359 (Ont. C.A.)

(5) Subrule (3) does not prohibit the use, for any purpose, of,

- (a) evidence that is filed with the court;
- (b) evidence that is given or referred to during a hearing;
- (c) information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).

In addition to the limits and exceptions noted above, subsection (8) provides the court with the discretion to find that the deemed undertaking rule does not apply. Rule 30.1.01 (8) states:

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

Rule 30.1.01(8) again echoed Morden A.C.J.O. in *Goodman* where Justice Morden provided the applicable test for granting relief from the implied undertaking rule as being:

one tolerating some injustice to the discovered party if it is outweighed by a greater injustice to the discovering party if he or she could not make use of the discovered documents.

In *Disher v. Kowal*³⁷, Swinton J. observed that, although the courts have been reluctant to grant relief from the rule under Rule 30.1.01 (8), they have done so in certain cases. She noted, for example, that the deemed undertaking rule may not apply to a situation where the information is to be used in similar or related proceedings involving the same parties to the action in which the information was disclosed.³⁸

However, the Ontario Superior Court in *Haines v. Provident Life Insurance Co.*³⁹ recently found that the deemed undertaking rule did not apply to third party proceedings involving different parties than those in the main action. Somers J. held that the proceedings were similar in every other respect and involved the same questions to be answered. Therefore, relief from the deemed

³⁷ [2001] 56 O.R. (3d) 329 (Ont.Sup.Ct.),

³⁸ *Ibid* at para. 14

³⁹ [2005] CanLII 13783 (ON S.C.)

undertaking rule may be granted, even if the subsequent action involves different parties. The court will examine the overall similarity and proximity to the initial action and third party proceedings when determining whether the deemed undertaking rule applies or does not under Rule 30.1.01 (8).

In *Perrin v. Beninger et al*⁴⁰ the Court held at para. 17 that “even considerations based on the public interest will often be insufficient to permit relief from the deemed undertaking rules.” The Court added that:

...*Linchris Homes*⁴¹ ...concluded that “[t]he public interest in investigating possible crimes is not *per se* a sufficient ground to relieve counsel of his or her implied undertaking to keep such information private”. Then too, in *Klassen v. College of Physicians and Surgeons of Ontario* ([2002] O.J. No. 4055 (S.C.J.)), Mesbur, J. held that the deemed undertaking rule protected information that might tend to suggest sexual abuse by a medical practitioner, even in the face of a statutory provision which renders it mandatory to report suspected abuse.

However, the British Columbia Court of Appeal in *Doucette v. Wee Watch Day Care Systems Inc.*⁴² posited the scenario of a civil action wherein the sexual abuse of a child was disclosed during an examination for discovery. It stated, at para. 53, that “[i]f the holding in *Perrin* is correct, it would mean that the implied undertaking would prevent disclosure of the abuse to the police or other statutory authority responsible for the welfare of children.” Kirkpatrick J.A. concluded that, at least in British Columbia, this could not be the correct expression of the scope of the implied undertaking.

Instead, the Court of Appeal in *Doucette* held that “the obligation of confidentiality does not extend to *bona fide* disclosure of criminal conduct.”⁴³ In that case, the plaintiff brought a civil action against the defendant for negligence and breach of contract. At the time the civil action was brought, there was also an ongoing criminal investigation of the defendant for the same alleged wrongs. The defendant was examined for discovery.

⁴⁰ [2004] O.J. No.2353 (S.C.J.)

⁴¹ 755568 *Ontario Ltd. v. Linchris Homes Ltd.* (1990), 1. O.R. (3d) 649 (Ont. Ct. Gen/Div.)

⁴² 2006 BCCA 262. leave to appeal granted January 25, 2007 as *Suzette F. Juman also known as Suzette McKenzie v. Jade Kathleen Ledenko Doucette, by her litigation guardian Greg Bertram, et al.* (B.C.) (31590)

⁴³ *Ibid* at para. 56

The defendant filed a motion seeking to restrict disclosure of her discovery transcript. The Attorney General of British Columbia subsequently filed a motion seeking to vary the implied undertaking to allow disclosure of the transcript to the police. The defendant argued that for the police to obtain the transcripts from the civil proceeding would violate her section 7, 11 and 13 *Charter* rights.

The Court of Appeal in *Doucette* held that the implied undertaking rule did not preclude the parties from disclosing the defendant's discovery evidence to the police, in good faith, in order to assist the police in their criminal investigation. It added that the rule also did not prevent non-parties, for example, the police or the Attorney General, from obtaining the discovery evidence by lawful investigative means such as subpoenas and search warrants.

The Supreme Court of Canada granted leave to appeal the *Doucette* decision on January 25, 2007 and will determine whether the implied undertaking of confidentiality prevents the discovery evidence obtained in a civil action from being disclosed to the police in a criminal investigation. If so, it will also determine whether the police can use their investigative powers to obtain discovery evidence otherwise protected by the implied undertaking rule. The Supreme Court is also being asked to determine whether the party's section 7 *Charter* rights are engaged if the discovery evidence is released to the police.

PART III: MATTERS OF EVIDENCE

The Deceased Witness – Getting Their Discovery Evidence In At Trial.

The general rule of evidence at common law, reflected in Rule 53.01(1) of the *Rules of Civil Procedure*, is that evidence at trial is to be given (in court by a witness) via oral testimony. Yet, the difficulty with any historical record case lies in the fact that there are few witnesses left to testify. One must then turn to the exceptions to Rule 53.01(1).

Rule 31.11 is one such exception. It was added to the *Rules of Civil Procedure* in 1985, at the same time that the discovery rules were amended to broaden the scope of discovery to allow

cross-examination of witnesses. Rule 31.11(6) allows transcripts from discovery to be read into or used in evidence at trial in circumstances where the person is unavailable (including where the person examined has died). The use of this evidence is at the discretion of the trial judge. Rule 31.11(7) lists the criteria under which the trial judge may grant leave:

- (a) the extent to which the person was cross-examined on the examination for discovery;
- (b) the importance of the evidence in the proceeding;
- (c) the general principle that evidence should be presented orally in court; and
- (d) any other relevant factor.

When the trial judge exercises his or her discretion to admit discovery evidence under Rule 31.11(7), one of the main factors influencing this discretion is that the opposing party has no opportunity to cross examine on the evidence. However, this danger is somewhat offset by the fact that the evidence was taken under oath and opposing counsel at the time of discovery will have had an opportunity to test the witness' evidence.

Aujla v. Hayes sets out the proper approach for allowing discovery evidence in at trial where a witness is deceased.⁴⁴ Hayes' and Aujla's vehicles collided as they were negotiating a curve. Each party asserted that the other had crossed the centre line, causing the accident. Hayes died of unrelated causes before the trial, and his counsel applied to the trial judge to have the transcript of his evidence given at discovery read into evidence.

The Court of Appeal in *Aujla* affirmed the trial judge's granting of leave based on the factors in Rule 31.11 (7). It held:

The discretion to grant leave to read into evidence all or part of the transcript of an examination for discovery is reposed, by the Rules, in the trial judge.... In his reasons for ruling at the outset of the trial, the trial judge canvassed the appropriate factors and specifically adverted to the caution that Hayes' discovery evidence was untested by cross-examination as to credibility. He repeated that caution in his reasons for judgment at the conclusion of the trial. In admitting Hayes' discovery into evidence, he made no error in principle and was not clearly wrong.⁴⁵

⁴⁴ (1997), 10 C.P.C. (4th) 167 (Ont. C.A.)

⁴⁵ *Ibid.* at para. 19.

In *TD Bank v. Leigh Investments Ltd. (Trustee of)*,⁴⁶ the court considered the Rule 31.11(7) criteria in determining whether to permit the use of responses to undertakings as well as discovery evidence at trial where the witness in question had died. Although counsel argued that undertakings were prepared with the assistance of counsel and were not subject to cross-examination, the court held that:

...while the undertaking answers may not have been cross-examined upon, counsel did have the opportunity to re-examine the witness once the answers had been received, and chose not to do so. The absence of cross examination is a factor to be considered when weighing all the evidence at trial.⁴⁷

The court found that there was no rule distinguishing between discovery evidence and answers to undertakings.

Death And The Hearsay Exceptions Of Evidence At Trial – How Can Statements Of The Dead Be Entered?

Traditionally, statements of the dead would be inadmissible in evidence, as they are clearly fraught with the typical hearsay dangers such as the inability to cross-examine and the inability of the trier of fact to assess credibility. The criminal law on hearsay exceptions is still quite strict, but the admissibility of hearsay evidence in civil matters is more lenient.

Other than in the case of a “dying declaration”, statements of the dead do not generally fall into any of the traditional hearsay exception categories.⁴⁸ Nevertheless, they can still be entered into evidence using the principled approach to hearsay evidence introduced in *R. v. Smith*.⁴⁹ Under the principled approach, the evidence must meet the tests of necessity and reliability. For the purposes of a deponent who is deceased, the necessity test has automatically been met (since there is no way they can testify at trial). Reliability then becomes the hurdle.

⁴⁶ (1998), 17 C.P.C. (4th) 388 (Ont. Gen.Div.)

⁴⁷ *Ibid.* at para. 16.

⁴⁸ The hearsay exception categories are as follows: admissions, declarations against interest, former testimony, business records, spontaneous statements, child abuse (per *R. v. Khan*), declarations about physical, mental or emotional state (present intention), and prior inconsistent statements.

⁴⁹ (1992), 94 D.L.R. (4th) 590 (S.C.C.)

While the court considers a number of factors with respect to reliability, the main concern is what is lost by the inability to cross examine the witness. The circumstances of the statement must substantially negate the possibility that the deponent was lying or mistaken.

The dangers inherent in introducing statements of the dead as evidence become clear when we consider *R. v. Wysochan*.⁵⁰ In that case, the court allowed evidence tendered by an individual who had spoken to the deceased prior to her death. The evidence had been tendered to exonerate her husband from her murder. The statements of the deceased that the Court allowed were “Stanley, help me out because there is a bullet in my body” and “Stanley, help me, I am too hot.” The real danger in admitting this evidence is what inferences are drawn from the words spoken by the deceased.

Critics of the court’s decision in *Wysochan* argue that the deceased was not subject to any conditions when making these statements, and particularly was not subject to cross-examination by the defence. Had the defence been given the opportunity, they could have cross examined on whether the deceased had actually seen who had held the gun, and could have assessed whether the statements entered into evidence were accurate communications of the deceased’s intended meaning.

In a more recent civil case for damages from a motor vehicle accident, *Colley v. Travellers Insurance Co.*,⁵¹ Colley applied to admit the report of the deceased Dr. Moore at trial. The fact that the doctor was dead allowed the evidence to meet the necessity branch, and the court went on to consider the issue of reliability. In order to admit the report, the court considered the fact that, not only would the doctor have had no motivation to lie, he had a professional duty to tell the truth. Dr. Moore’s opinions were important to the outcome of the trial as he had treated Ms. Colley at a crucial time in the possible development of her condition. Further, the extensive report outlined both the diagnosis of her ailments from the motor vehicle accident and the treatment she had received. A further component of the admissibility of the report was the fact that the treating psychiatrist was available at trial to be cross examined on Dr. Moore’s report.

⁵⁰ (1930), 54 C.C.C. 172 (Sask. C.A.)

⁵¹ [1998] N.S.J. No. 405 (S.C.)

The Ontario case of *Dodge v. Kaneff*⁵² is an unusual example of different methods of determining the admissibility of hearsay evidence in civil litigation. In this case, Mr. Dodge's widow sought to introduce evidence that, prior to her husband's death, Kaneff had entered into an oral agreement to increase Mr. Dodge's commission. She brought a motion prior to trial to determine the evidence's admissibility to ensure that she would be able to rely on it at trial. The motions judge decided that the introduction of the evidence was clearly necessary, as Mr. Dodge was deceased and unable to testify. The motions judge added that the trial judge could simply admit the hearsay and, if issues with reliability arose, give it less weight in determining whether there had been an oral agreement.

De Bene Esse Evidence – When And Why To Use It.?

Another example of the broader approach to trial evidence at trial that emerged from the 1985 revisions to the *Rules of Civil Procedure* is that evidence taken outside of trial can be admissible at trial. This involves the provisional examination of a witness taken out of court. Rule 36.01(1) provides that a party who intends to introduce the evidence of a person at trial may examine the person on oath or affirmation before trial for the purpose of having the testimony be tendered as evidence at trial. In order to be admissible, either leave of the court or consent of the parties is required.

Rule 36.01(2) sets out the factors the court is to take into account in exercising its discretion as to whether to admit the evidence:

- (a) the convenience of the person whom the party seeks to examine;
- (b) the possibility that the person will be unable to testify at trial by reason of death, infirmity or sickness;
- (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;
- (d) the expense of bringing the person to the trial;
- (e) whether the witness ought to give evidence in person at the trial; and

⁵² [2001] O.J. No. 1141 (S.C.J.)

(f) any other relevant consideration.

Rule 36.04(2) enables the use of a transcript or video taken out of court to be used at trial, as long as the procedures for examination, cross examination and re-examination set out in Rule 34 are carried out. It is highly desirable that the examination be videotaped if possible, in order to assist the trier of fact in assessing the witness' demeanour and credibility. Videotaped examinations offer a closer approximation to the actual attendance of the witness at trial.

In *Wright v. Whiteside*⁵³ the court allowed the *de bene esse* evidence of a 77 year old witness to be taken by videotape before trial. In that case the witness was of frail health and had difficulty leaving the house. Although the witness expressed a preference for waiting until trial to give her evidence, the court found that the witness' age and health were strong considerations in favour of granting the order for *de bene esse* evidence. In so doing, it acknowledged the court's application in previous cases of "the rule of thumb related to age 70" and stated: "by reason of advanced age the witness may not survive until the trial, and this may be inferred where the witness is 70 years of age or more."

While in *Wright* the witness was considered frail as well as elderly, in the subsequent case of *White v. Weston*⁵⁴ the motion was granted for leave to take evidence before trial without any evidence on the motion as to the defendant's physical condition. In *White* the court held that by virtue of the defendant being 77 years old, "there is a risk that he would not be available in person at trial due to death, infirmity or sickness."

More recently, in *Ostrom v. McKinnon*, a defendant's fragile health and age made it unlikely that he would be able to testify at trial.⁵⁵ The trial judge held that these circumstances fell squarely within the purview of Rule 36.01(2)(b). The court allowed an application under that rule, requiring the *de bene esse* examination to be both videotaped and transcribed.

However, as per *Aviaco International Leasing Inc. v. Boeing Canada Inc.*⁵⁶ a party cannot invoke the provisions of Rule 36.01(2) to examine a witness *de bene esse* if it is not a witness they would otherwise have the right to call at trial. In *Aviaco* the plaintiffs brought a motion

⁵³ (1983), 40 O.R. (2d) 732 (H.C.J.)

⁵⁴ (1986), 14 C.P.C. (2d) 121 (H.C.J.)

⁵⁵ (1999), 46 C.P.C. (4th) 120, [1999] O.J. No. 4518 (S.C.J.).

⁵⁶ [2000] O.J. No. 2420 (S.C.J.)

seeking to examine the 79 year old defendant before trial. They argued that, due to the importance of the defendant's evidence, they had a right to call the defendant as an adverse party witness at trial under Rule 53.07. The plaintiffs then submitted that, given the defendant's advanced age and the crucial nature of his evidence, they were entitled to safeguard his evidence prior to trial through a *de bene esse* examination. The defendant opposed the motion, arguing that they had undertaken to produce the defendant at trial and, therefore, the plaintiff no longer had the right to call the defendant under Rule 53.07.

Nordheimer J. stated "the first requirement to be satisfied under Rule 36.01 is that the party seeking the order must be intending to introduce the evidence of the person to be examined, ie. it must be that person's witness."⁵⁷ He then went on to examine Rule 53.07. He noted the relevant subsection, Rule 53.07(4), which states that "[a] party may call a person referred to in subrule 1 [an adverse party] as a witness unless...(b) the adverse party or the adverse party's counsel undertakes to call the person as a witness." [emphasis added]

The plaintiff attempted to rely on *Ostrom supra* in support of their motion. However, Nordheimer J. in *Aviaco* found that *Ostrom* was not helpful on these facts since the party seeking to be examined in that case had not been an adverse party. He then concluded that "once the undertaking is given by the adverse party's counsel to call the person as a witness, there is no longer any right in the other party to call that person as a witness....Consequently, the plaintiffs cannot invoke the provisions of Rule 36.01 to examine the [defendant] before trial."⁵⁸

How To Introduce Photos Into Evidence

All of the four basic requirements for introducing documentary or demonstrative evidence at trial also apply to the introduction of photographic evidence:

- (a) The person seeking to introduce the photos must establish their relevance;
- (b) The person offering the evidence must establish the authenticity of the photos;
- (c) The trier of fact must be capable of gaining knowledge from the production of the object without some special level of expertise; and
- (d) The probative value of the evidence must outweigh its prejudicial effect.

⁵⁷ Ibid at para.40

⁵⁸ Ibid at para. 46

Ultimately, the trial judge has the discretion to determine whether a photo is admissible. In practice, the fourth factor of the probative value outweighing the prejudicial effect tends to be the most determinative in assessing admissibility. As was stated in *Ferenczy v. MCI Medical Clinics*,⁵⁹ *prima facie* relevant evidence is admissible, subject to a judge's discretion to exclude it where the probative value is outweighed by its prejudicial effect. This is the test for both criminal and civil cases: *R. v. Morris*, [1983] 2 S.C.R. 190.

In *R. v. Burke*,⁶⁰ a trial judge uncritically relied upon photographic evidence to identify an accused in a sexual assault case where the victims had been unable to correctly identify the accused in the photos. The accused's conviction on this basis was held to be unreasonable on appeal.

R. v. Creemer sets out three specific criteria for the admissibility of photographs into evidence. In order to be admissible, the photo must be: (a) accurate in truly representing the facts; (b) fair and absent any intention to mislead; and (c) verifiable on oath by a person capable of doing so.⁶¹ Verification of the photo must be carried out by a capable person who can comment on its accuracy and fairness, but this person does not necessarily need to be the photographer.⁶²

The following case law is illustrative of how these criteria are applied in court. In *Edmonton (City) v. Lovat Tunnel Equipment Inc.*,⁶³ a defendant's investigator took photographs that were then relied upon in an expert's rebuttal report. The investigator was permitted to testify to both the photos he had taken and to the photos taken by others, as to his knowledge of their contents. The trial judge held that the photos were admissible as real evidence, and not as hearsay. In this case, introduction was probably aided by the fact that the photographer himself was available to be cross examined on the accuracy of the photos, as well as on the other *Creemer* factors listed above.

In a more recent criminal case, *R. v. Schaeffler*,⁶⁴ the trial judge considered the admissibility of crime scene photos described as "grotesque" into evidence. The court held that the probative

⁵⁹ (2004), 70 O.R. (3d) 277

⁶⁰ (1996), 46 C.R. (4th) 195, 105 C.C.C. (3d) 205 (Nfld. T.D.)

⁶¹ (1968), 1 C.R.N.S. 146, 4 N.S.R. 1965-69 546 (N.S.C.A.)

⁶² *R. v. Smith* (1986), 71 N.S.R. (2d) 229 (N.S.C.A.)

⁶³ (2000), 262 A.R. 208 (Q.B.)

⁶⁴ (2002), 156 O.A.C. 105, [2002] O.J. No. 647 (C.A.)

evidentiary value of the photos outweighed any prejudicial effect that their introduction may have had as against the jury. His decision to allow the photos as evidence was upheld on appeal as being based on the appropriate legal test for the admissibility of photographs.

The trial judge in *Makura v. Weihmann* allowed the introduction of photos of the vehicle in question in an action for personal injury resulting from a motor vehicle accident.⁶⁵ The judge held that introducing the photos would not distort the fact-finding process, and that it was open to the plaintiff to rebut the photographic evidence of the minor damage to the car using a mechanic. Both the owner and the driver of the vehicle were shown the photographs and identified them sufficiently for them to be admissible, and the court held that ultimately, their probative value outweighed their prejudicial effect.

One of the prejudices that may arise from the introduction of photographic evidence is prejudice to the public interest. For example, in *McMahon v. Harvey (Township)*,⁶⁶ photographs were taken of an accident site to prove that repairs to the site had been carried out. These photos were held to be inadmissible on public interest grounds. The court found that the admission of photographs in this situation might lead individuals responsible for making necessary changes or repairs to an accident site to forbear from taking needed repair action in anticipation of litigation.

PART IV—SIMILAR FACT EVIDENCE

Recent decisions have noted the application in the civil context of the similar fact evidence rules initially established in the criminal law context. Criminal and civil law rely on the same laws of evidence. As such, the Ontario Court of Appeal stated in *Greenglass v. Rusonik* that “[t]he principles governing similar fact evidence have equal application to both civil and criminal proceedings.”⁶⁷

⁶⁵ (2005), 30 M.V.R. (5th) 61 (B.C.S.C.)

⁶⁶ (1991), 2 C.P.C. (3d) 154 (Ont. Gen. Div.)

⁶⁷ [1983] O.J. No. 40 (Ont. C.A.) at para.42.

Pleading Similar Fact Evidence

Before reviewing the principles and rules governing similar fact evidence, it must first be established at what stage of the proceedings similar fact evidence may be introduced. Rule 25.06 (1) sets out the basis for a pleading: “every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved”. Yet, there has been some controversy in Ontario case law as to whether similar fact evidence may be pleaded in the statement of claim.⁶⁸ Thus, a brief note on this issue may be of assistance at this point.

*Garwood Financial Ltd. et al. v. Wallace et al.*⁶⁹ is the case often cited as first allowing the pleading of similar fact evidence. In *Garwood*, Epstein J. observed:

[there is a] practical tension created by the two propositions that a party is to plead material facts but not the evidence to prove them and that a party may plead any fact provable at trial...giving primacy to the latter proposition...by applying this resolution to similar fact evidence, I come to the conclusion that it is properly pleaded as long as the added complexity does not outweigh the potential probative value.⁷⁰

Several subsequent cases have cited *Garwood*, finding that pleading similar facts is appropriate if they are material to an issue in dispute and if the added complexity does not outweigh the probative value: *Ryndych v. Hamurak*⁷¹ and *Brodie v. Thomas Kernaghan & Co.*⁷²

Noting this trend in lower courts towards allowing the pleading of similar fact evidence, the Divisional Court in *Marani v. NesbittBurns Inc.*⁷³ reaffirmed the parameters set out in Rule 25.06 and stated that allegations of similar fact evidence should not be pleaded. The Court reiterated that to do so would “violate the requirements of Rule 25.06(1)”. It then concluded that

⁶⁸ F.P. Morrison and C.A. Wayland, *Brown v. Dunn and Similar Fact Evidence: Isles of Change in a Calm Civil Evidence Sea* in *Law Society of Upper Canada Special Lectures 2003: The Law Of Evidence*, at p.451

⁶⁹ (1997), 35 O.R. (3d) 280 Gen. Div.

⁷⁰ *Ibid* at p. 284

⁷¹ [1999] O.J. No. 4718

⁷² [2002] O.J. No. 1850 (S.C.J.)

⁷³ [2001] O.J. No. 364 (Div. Ct.)

“the rules for good reason forbid the pleading of evidence and we see no reason why it should not be enforced.”⁷⁴

Yet, in *Hodson v. Canadian Imperial Bank of Commerce*⁷⁵ the Divisional Court then subsequently allowed the plaintiff to plead allegations about the defendant’s similar conduct toward strangers to the action. In the *Law Society of Upper Canada Special Lectures 2003: The Law Of Evidence*⁷⁶, F.P. Morrison argues that the pleading was permitted to stand in *Hodson* because “it amounted to a pleading of material fact and not of similar fact evidence *per se*”. Thus, the distinction in *Hodson* was that, while the allegations constituted similar fact evidence, the allegations were also material facts relevant to the claim of punitive damages.⁷⁷

The recent endorsement of *City of Toronto v. MFP Financial Services Ltd. et al.*⁷⁸, noting the above comments by Morrison, provides a thorough examination of the conflicting case law on the issue. Master MacLeod contends that, while *Garwood* uses the phrase “pleading similar fact evidence”, it would be “a mistake to read the case as standing for the proposition that pleading similar facts permits a party to run roughshod over Rule 25.06(1).”⁷⁹ He states that it would also be an error to read *Marani* and other decisions as an absolute prohibition on pleading similar facts. He asserts that, in order to resolve the apparent confusion, one must distinguish between the admission of similar fact evidence at trial and the pleading of similar (or allegedly similar facts).

Master MacLeod concedes that the process of weeding out and excluding inappropriate similar facts may take place at different stages, one of which may be the pleading stage. He also notes the concern in previous judgments about the potential expansion of the discovery processes, stating that “[w]eighing complexity against probative value at the pleading stage must be informed by the impact of the pleadings on both the discovery and trial and by the purpose of the allegations.”⁸⁰

⁷⁴ F.P. Morrison at p. 44, citing [2001] O.J. No. 364, per O’Leary J. at p.1, para.2.

⁷⁵ [2001] O.J. No. 4378 (Div. Ct.)

⁷⁶ *Supra*, note 70

⁷⁷ *Ibid.*

⁷⁸ 2005 CanLII 45516 (ON S.C.)

⁷⁹ *Ibid* at para.20

⁸⁰ *Ibid* at para. 32

Taking all of the issues of previous decisions into consideration and adopting the principles considered by Master Egan in *Prism Data Services Ltd. v. Neopost Inc.*,⁸¹ Master MacLeod sets out in *City of Toronto* the following four factors to be considered when assessing the proper pleading of similar facts:

- 1) If similar facts will be material to a portion of the claim including punitive damages, they may be pleaded in order to give fair notice that they will form part of the discovery and will be part of the case at trial—see *Jamav. McDonalds Restaurants of Canada Ltd.* and *Hodson v. Canadian Imperial Bank of Commerce*, *supra* (If a system or scheme of conduct is alleged the past similar acts must have sufficient common features to constitute the system or scheme;
- 2) Similar facts that are mere evidence and are not in themselves material facts should not be pleaded as doing so offends Rule 25.06 (1)—see *Marani v. Nesbitt Burns Inc.* *supra*;
- 3) Similar facts that are not material and are irrelevant should be struck pursuant to Rule 25.11(b) as scandalous, frivolous or vexatious but even relevant similar facts may be struck out under Rule 25.11(a) if they will prejudice or delay the fair trial of the action—see *Brodie v. Thomas Kernaghan*, *supra* and *Doe v. Escobar* [2004] O.J. No.2760 (Master) (Similar acts are not probative if there is not a sufficient degree of similarity; the similarity must be provable without a prolonged inquiry although, inevitably, the litigation process will be lengthened to some extent as a result of proper similar fact allegations); and
- 4) Even in those cases where the similar facts are relevant and material, they should not be permitted if the added complexity arising from their pleading does not outweigh their potential probative value. (The added complexity should not lead to undue oppression or unfairness).⁸²

The Admissibility of Similar Fact Evidence At Trial

The “similar fact evidence rule” as it has developed in common law jurisdictions is, in fact, “an exception to an exception to a rule of evidence”. The general rule of evidence is that evidence that is relevant is admissible unless there is an exclusionary rule. The exception is that evidence which only goes toward character or a propensity to commit an offence or an act is inadmissible. As such, similar fact evidence is presumptively inadmissible because of the potential for

⁸¹ [2003] O.J. No.2994 (Master)

⁸² *Supra*, note 80 at para.30

prejudice. The similar fact rule is an exception to the exclusion and permits such evidence to be admitted only if its probative value outweighs its prejudicial value.⁸³

Two recent Supreme Court of Canada decisions represent the formulation of the rule on the admissibility of similar fact evidence in Canada: *R. v. Handy*⁸⁴ and *R. v. Shearing*.⁸⁵

In *Handy* the court held that evidence of other discreditable conduct may be admitted if the prosecution establishes on a balance of probabilities that the probative value of the evidence outweighs its potential prejudice. Similar fact evidence must be highly probative and requires a specific three part analysis by the trier of fact:

- 1) assessing the probative value of the evidence by considering:
 - a) the strength of the evidence and the potential for collusion;
 - b) the identification of the issues in question;
 - c) the similarities/differences between the facts and the previous conduct;
- 2) assessing the prejudicial effect of the evidence; and
- 3) weighing the probative value of the evidence against its prejudicial effect.

The case of *B.G. et al. v. Her Majesty the Queen in Right of the Province of British Columbia supra*, (*B.G.*) provides an excellent example of the application of the rules of similar fact evidence to a civil case of institutional liability for sexual assault. The case involved eleven plaintiffs who were incarcerated at different times at the Provincial Brannan Lake Training School (“the School”) between 1955 and 1972. The various plaintiffs in the action were sent to the School between the ages of 12 and 17 and alleged historical physical and sexual abuse by both male and female staff.

In *B.G.* approximately twenty witnesses, many of whom were potential future litigants, presented evidence similar to the plaintiffs’ about the same staff members. In applying the *Handy* analysis, Justice Wong in *B.G.* stated that the probative value of the evidence lay in its ability to help refute or advance the issue of whether the events actually happened. He found that the similar fact evidence would be relevant to the allegations in this case because, if

⁸³ *Ibid* at para. 24

⁸⁴ [2002] 2 S.C.R. 908

⁸⁵ [2002] 3 S.C.R. 33

admissible and believed, it would show a pattern of behaviour of staff using their positions to sexually abuse the boys.

The Crown submitted that the critical issue in assessing the probative value of the evidence was the possibility of collusion. Justice Wong agreed, citing *Shearing*. In *Shearing*, the court found that collusion destroys the evidence's value and, therefore, destroys its basis for admissibility. Wong J. added, at para. 134, that collusion was not restricted to situations where witnesses invented a story in concert, but may also be present when there is an infected process.

In this case, he noted that a newspaper article in March 1994 and March 2000 about Brannan Lake law suits provided a contact number and fax of the former student bringing a claim. It also stated that the guards in the case had all since died. The article then noted that the damages awarded in another case involving a government facility were between \$175, 000 to \$300,000. Justice Wong found that, while the newspaper articles alone may have provided no more of an opportunity for contamination than is common to any highly public case, it was noteworthy that all of the plaintiffs' disclosures of abuse came after the first 1994 article had been published.

Further, he found that there was an additional level of contamination not common in most cases: the extensive contact the plaintiffs and witnesses had with each other in prison. Plus, through the prison contact, the plaintiffs and similar fact witnesses all saw the same counsellor. In at least one case it was the counsellor who raised the issue of the law suit with the plaintiff.

Justice Wong also had concerns about both the plaintiffs' and the similar fact witnesses' motivations for testifying. He concluded that the "whiff of profit" outlined in *Handy* was at least a partial motivation for their testimony. Fourteen of the similar fact witnesses had either initiated their own actions or had indicated that they intended to do so.

In conclusion, he held that the potential for financial gain, the newspaper articles and the constant contact between the witnesses and the plaintiffs in prison gave rise to an infected process and, thus, to collusion. Therefore, the similar fact evidence did not meet the test for admissibility and the allegations had to be proved without the witnesses' evidence of sexual impropriety at the School. However, he did allow the witnesses' evidence relating to the atmosphere and

operation of the institution for the limited purpose of establishing a context for the plaintiffs' allegations.

CONCLUSION

The scope and limits of disclosure, the admissibility of evidence and the impact of similar fact evidence are important elements which one must pay particular attention to when litigating institutional sexual abuse and assault claims. The implied undertaking rule may also play an important function, in the relevant context. Given that these cases often tend to have a historic component where many years have passed between the alleged abuse and the filing of the claim, *de bene esse* evidence may also be worthy of consideration, depending on the facts of the case. Nonetheless, throughout the litigation process one must remain cognizant of the higher evidentiary standard in civil sexual abuse and assault cases.

APPENDIX A

Secondary, post secondary and all other Education/Training Records:

1. All school records from schools attended (primary school, high school, college, university, technical school, up-grading courses).
2. Copies of certificates, apprenticeship papers, diplomas, degrees, or other credentials.

Contact Information:

- Contact the school or institution(s) attended, and request a copy of student record or transcript
- Fees may vary per institution.

Medical Records:

1. All treating physicians' clinical notes and records, public and private hospital records
2. Psychologists, chiropractors, physiotherapists and other specialists notes and records
3. Therapy and/or counselling notes and records (including) marital or family counselling records
4. Records and documentation relating to drug, alcohol and other addiction treatment programs; anger management programs
5. Decoded OHIP summaries and a list of medications should also be requested

Contact Information:

- Contact the facility where the plaintiff received treatment and request a copy of the medical records.
- Fees may vary.

Criminal Records:

1. A copy of the criminal record, for example a CPIC print-out.
2. Documents relating to criminal charges, convictions and/or time spent in jail or prison such as rehabilitation records

Contact Information:

- Correctional Service of Canada Sir Wilfred Laurier Building Access to Information & Privacy Coordinator 340 Laurier Ave. West, Ottawa, Ontario, K1A 0P9, Fax: (613) 995-4412, www.csc.scc.gc.ca.
- Complete the form under the *Privacy Act*: www.tbs-sct.gc.ca/gossog/forms/Accpri/Request-Frms_e.html. One may need to give the plaintiff's name, FPS# (finger print number) or date of birth.
- There is no fee for the criminal record information from the Correctional Service of Canada.
- Provincial, territorial, and/or municipal correctional facility records such as provincial criminal records or rehabilitation records can be obtained by contacting the relevant provincial, territorial or municipal correctional facility. The fee for this information may vary depending on the province and the facility.

Employment/Income (Tax Records, Social Assistance)

The following information will be required to substantiate any claims for income loss or loss of opportunity due to sexual assault:

1. Employment or personnel files from all past and present employers (including performance appraisals, any information regarding disciplinary action, salary details, attendances and termination);
2. Income Tax returns, Unemployment Insurance, Employment Insurance, General Welfare, Family Benefits, Disability, Old Age Security and Canada Pension benefits;
3. Copies of private insurers' disability files:

Income Tax Returns (with supporting documentation) and income information with respect to any unreported income

Contact Information:

- Canada Customs and Revenue Agency will provide T1 summaries upon request. One should call and speak with a representative and the plaintiff's social insurance number will be required to verify identification.
- English: 1-800-959-8281, French: 1-800-959-7383, www.cca-adrc.gc.ca. There is no fee for obtaining this information.

Old Age Security/ Canada Pension Plan:

Contact Information:

- 1-800-277-9914 www.hrdc.drhc.gc.ca/isp/, TDD/TTY: 1-800-255-4786.
- Speak with a representative to request a Letter of Benefits Received. Your SIN is needed to verify your identification.
- There is no fee for the Old Age Security and Canada Pension Plan information.

Employment Insurance:

Contact Information:

- English: 1-800-206-7218, French 1-800-803-6352, www.hrdc-drhc.gc.ca/ie-ae/.
- Speak with a representative to request a Letter of Benefits Received. You need your SIN or Telephone Access Code to verify your identification.

- No Fee.

Worker's Compensation payment information can be obtained by contacting the Workers' Compensation Board to make a request for the plaintiff's file:

Contact Information:

- Ontario: Workplace Safety and Insurance Board: 416-344-1000, 1-800-387-5540 (Canada), 1-800-387-0750 (Ontario), www.wsib.on.ca, call to make a request.
- There is no fee for the first request for Workplace Safety Insurance information requests.

Insurance Policies :

- If policies are unavailable, check-out line cards;
- If necessary, get broker to disclose.
- If necessary, try to get co-operation from brokers/agents to get access to their records.