Raising the Bar

Raising the Bar – Seventh Edition

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We are very pleased to bring you the final issue of Raising the Bar for 2013. We wish you all the best for the new year and we look forward to keeping you up to date on the latest legal developments in 2014.

In this issue, we *shine a light on* the law of relevance, providing you with a roadmap for maintaining a strong grasp on what is necessary to prove your case with an eye toward what is necessary to *win* your case.

We're also sharing with you cases that *you need to know* about, giving you the latest word on malicious prosecution and punitive damages claims, trial procedure and evidence, and the deemed undertaking rule.

In our *Did You Know* section, you will find out about motions that can occur *before* the commencement of proceedings.

We thank Jacqueline Luksha and Joshua Concessao for all of their hard work and contributions, which were essential to the publication of this issue.

As always, please feel free to let us know what *you* think about Raising the Bar. We're looking forward to hearing from you, and we hope that you enjoy the season. Happy reading!

Frank Cesario and Elisha Jamieson
Co-Editors

IN THIS ISSUE

PART 1 –– CASES YOU NEED TO KNOW ABOUT

Pate Estate v. Galway-Cavendish and Harvey (Township), 2013 ONCA 669 (CanLII)

The Ontario Court of Appeal recently considered the necessary elements of a claim for malicious prosecution and the appropriate measure for an award of punitive damages.

An employee had been dismissed for cause on suspicion of having committed a fraud. After his dismissal, the employer referred the details of the case to the police, who in turn commenced criminal proceedings. At the criminal trial, the employee was acquitted of all counts. The employee then commenced a claim against the employer for wrongful dismissal, malicious prosecution and reputational injuries.

The claim for malicious prosecution relied on the employer's failure to disclose exculpatory evidence to the police and on its attempts to pressure the police to lay charges. The employer argued that the test for malicious prosecution was not met since the police, not the employer, had initiated the criminal proceedings. In rejecting this position, the Court of Appeal held that the element of initiation can be satisfied where the defendant knowingly withholds from the police exculpatory information that the police could not be expected to find in all the circumstances.

The employee had also been awarded $550,000 in punitive damages at trial. This amount was reduced to $450,000 by a majority of the Court of Appeal. The majority emphasized that an award of punitive damages must not be considered in isolation. Regard must be given to the total compensatory damages already awarded with an eye to producing a sum which is rationally necessary to punish the defendant. In light of the punitive elements of the total compensation and costs already awarded here, the majority found that a lower amount of punitive damages would satisfy the objectives of retribution, deterrence, and denunciation. It thus affirmed that punitive damages will be given where the other damages awarded are inadequate to accomplish those objectives.

Vanderbeke v. O'Connor, 2013 ONCA 665 (CanLII)
The appellant was successful in a personal injury trial but argued for a new trial due to various alleged errors on the part of the trial judge. Among other things, the appellant argued the trial judge wrongfully allowed into evidence a prior statement of claim issued by the appellant against another party, which thereby subjected the appellant to "ridicule" during cross-examination and invited "emotional decisions by the jury based on irrelevant considerations."

In dismissing the appeal, the Court of Appeal noted the following:

- the discretion to admit the evidence rested with the trial judge;
- striking a jury only warrants appellate intervention where the discretion is exercised capriciously, arbitrarily or is based on incorrect or inapplicable principles of law; and

- a trial judge need not intervene in a cross-examination or provide a correcting instruction to the jury unless it is abusive, unduly repetitive or inflammatory, or if it delves into irrelevant matters.

The Court also addressed the appellant's assertion that the respondent had raised "improprieties" during closing arguments. It stated that unless a miscarriage of justice or a substantial wrong was shown to have occurred and in the absence of an objection at trial, a new trial would not be ordered.

Brome Financial Corporation Inc. v. Bank of Montreal, 2013 ONSC 6834 (CanLII)

The Ontario Superior Court provided some helpful guidance with respect to the deemed undertaking rule, which requires that the parties to an action will not use evidence or information obtained on discovery for any other purpose aside from the proceedings in which it was obtained.

The plaintiff was originally added as a third party to an action in which the defendant was suing a group of companies for fraud. In a motion brought by the defendant, the Court was asked to consider the extent to which the plaintiff had relied upon the defendant's productions in that suit in deciding to commence the action against the defendant. The plaintiff argued that the productions merely confirmed what it had already known about the defendant's activities. It further stated that it had already contemplated a claim against the defendant prior to the evidence obtained on discovery.

The Court found that the plaintiff had made some use of the productions from the first lawsuit in commencing the current claim against the defendant. It noted that the deemed undertaking rule did not specify the degree of "use" in assessing whether a breach of the rule would occur. It therefore found that the plaintiff had breached the deemed undertaking rule when it commenced the action which relied on the defendant's productions in the prior action.

However, notwithstanding the plaintiff's breach of that rule, the Court considered other factors and granted that part of the plaintiff's cross-motion allowing the plaintiff "to make use of the evidence and information disclosed by [the defendant] in its productions in the [earlier action] in the present action." The Court then awarded costs against the successful plaintiff, citing its failure "to seek dispensation from the deemed undertaking rule before using the evidence obtained" and its failure to disclose the existence of this action during the case management of the prior action.

PART 2 –– SHINE A LIGHT ON … …*RELEVANCE AND LITIGATION STRATEGY*

Relevance is at the core of every piece of litigation. Relevance dictates which facts must be proven in order to succeed on a claim or defence, and therefore dictates what evidence is necessary to succeed in court. Your theory of the case and your litigation strategy must be grounded in both the

facts and the law, and consequently you must fully understand relevance because it links the facts to the law.

Set out below is a practical view of relevance in discovery and at trial, to assist in successfully forging the links in the theory of your case.

***Defining Relevance*.** A fact is relevant if, "taken by itself or in connection with other facts it proves or renders probable the past, present, or future existence or non-existence of the other" fact.[1] The Supreme Court of Canada has held that "for one fact to be relevant to another, there must be a connection or nexus between the two" such that one has "real probative value with respect to the other."[2] Similarly, it has been suggested that assessing relevance "is an exercise in the application of experience and common sense."[3]

When Does Relevance Really Matter? Ultimately, relevance at trial will be determined by the trial judge, but it is important to have a clear understanding of relevance long before that point.

Understanding relevance is crucial in two stages of litigation: production/discovery and at trial. Historically, the definition of relevance was different in these two stages. Prior to January 2010, relevance during the production and discovery stage meant evidence which was "related to" rather than relevant to any matter in issue in the action. The test was "semblance of relevancy" and it provided for a wide latitude of evidence in discovery.[4]

By contrast, at trial the test for relevance is whether the evidence is logically probative of a fact requiring proof (i.e. a fact at issue). To be probative, the evidence must increase or decrease the probability that a fact is true.

In practice, this meant that a broad and liberal approach was taken to the requirement to disclose facts and documents of evidence at earlier stages in litigation and that the practical scope of relevance was not substantively dealt with until the parties put their minds to narrowing the scope of relevancy at trial.

***Concerns with semblance of relevance and changes to the law*.** However, even as early as 1989 there were concerns that the "semblance of relevancy" test might "open the door to totally indiscriminate questions … relating to any matter in issue."[5] One recent, and by no means unique, example demonstrates the point: in *L'Abbé v Allen-Vanguard Corp*[6], the parties were discussing the possibility of 80 days of discovery. After 2 ½ years, documentary production had not yet been completed.

For a time, the courts consistently dismissed these concerns, stating that any production or discovery questions must relate to relevant issues. However, these concerns persisted and in January 2010, the *Rules of Civil Procedure* were amended to narrow the test at the production and discovery stage to evidence *relevant* to, instead of *relating* to, any matter in issue in the action.

This change was intended to reduce costs and increase efficiency in the discovery process, thereby streamlining that process.

Practical Effects of the Change. The goal was that this January 2010 legislative amendment would inform the culture of litigation in Ontario. But has the change been effective?

The case law demonstrates that the change effectively provided a clear signal to the profession that "restraint should be exercised in the discovery process" and strengthened the objective that discovery be conducted with due regard to costs and efficiency.[7]

Practically speaking, the change has rendered the test for relevance at trial and at discovery indistinguishable.[8] The courts recognize that the concept of relevance has narrowed at the discovery and production stage. For example, there are a number of cases recognizing that evidence will not be relevant at discovery if it "may" or "could" be relevant to some line of inquiry or a material fact in issue.[9] Instead, relevance is assessed in reference to the material issues in a particular case, and in the context of all of the evidence and the positions of the parties in their pleadings.[10]

For example, in *Meuwissen v Perkin*[11], the Ontario Superior Court found that the Master had improperly applied the outdated and overbroad semblance of relevancy test for disclosure. The Court instead enforced the narrower concept of relevance in production and discovery. In that case, one party alleged breach of a fiduciary duty by a hospital, as shown by repetitive negligence. That party sought to require disclosure of expert reports and transcripts from other actions for negligence against the opposing party, which were not pleaded in the case. The Court therefore held that they were not relevant to the issues in the case.

Tools for managing the scope of relevant evidence. It is necessary to develop a working definition of relevance early on and to question any discovery or production requests that fall outside of its scope. Careful thought as to the practical ramifications of the rules of relevance is important to ensure that you can marshal the facts and evidence necessary to prove your case and guard against disproportionate production and discovery costs. This requires parties and their counsel to have a detailed and forward-looking understanding of the facts and evidence that meet the test for relevance and to stay close to those guideposts.

In addition to maintaining a rigorous view of relevance, the concept of proportionality is another essential tool in managing the scope of evidence. The principle of proportionality was also enshrined in the Rules in January 2010. Now, when deciding whether a party must answer a question or produce a document, a court considers the availability of the information, the overall volume of documents being produced and the time, expense, prejudice and interference such production would cause. Proportionality recognizes that litigation is time consuming and costly, and that, as a result, not every piece of relevant evidence should be deemed admissible without first considering its age, prejudice, availability, the progress of the action or the difficulties associated

with its production.[12]

As a litigant there are a few ways to ensure that you capitalize on the narrowed definition of relevance in the discovery process and on the concept of proportionality.

First, do not accept the other side's definition of relevance if it appears to be based on the old test of "semblance of relevancy".

Second, early in the litigation process, think about your theory of the case and how it will adapt and endure. This thinking will inform your pleadings, what evidence you must marshal to prove your theory and what strategy you will adopt in discovery, pre-trial and beyond. This will maximize the strengths of your case and will also save you time and money you might otherwise waste in producing documents which are ultimately irrelevant to the issues at trial.

Third, always consider the concept of proportionality. Does the case warrant the request being made? If not, say so and hold your ground.

Armed with, and informed by, the principles of relevance and proportionality, you will ensure that your case is focused and persuasive.

PART 3 –– DID YOU KNOW?

Did you know… … you can bring a motion before the commencement of proceedings? It's true. Rule 37.17 provides that "*In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith.*" This rule has been used, for example, to seek an interim injunction. If you have such a situation, please let us know. We can help.

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[1] Stephen, *A Digest of the Law of Evidence*, 12th ed. Art.1 as quoted in Sopinka, Lederman & Bryant *The Law of Evidence in Canada*, 3rd ed. (LexisNexis Canada, June 2009) at 51.

[2] *R v Cloutier* [1979] 2 S.C.R. 709.

[3] Sopinka, Lederman & Bryant, *supra*, at 51.

[4] *Kay v Posluns* [1989] O.J. No. 1914.

[5] *Ibid.*

[6] [2011] O.J. No. 2906.

[7] *Stewart v Kempster,* 2012 ONSC 7236 (CanLII).

[8] *Ontario v Rothmans Inc.* [2011] O.J. No. 1896 [*Rothmans*].

[9] *CIBC v Deloitte and Touche* [2013] O.J. No. 559 [*Deloitte*].

[10] *Jetport Inc. v Global Aerospace Underwriting Managers (Canada) Ltd*, 2013 ONSC 6380 (CanLII).

[11] [2013] O.J. No. 3117.

[12] *Rothmans and Deloitte.*
