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"I'm Not Dead Yet" – Monty Python
Rules of Evidence Make a Comeback in Civil Cases

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Counsel litigating civil cases know that the rules of evidence tend to be applied less strictly in civil, as compared to criminal, matters. Some counsel go as far as to urge, and some judges agree, that virtually anything may be admitted in civil matters. Non-compliance with the rules of evidence is then considered as relevant to weight only. On motions, affidavits replete with opinion and argument are sometimes sworn by fact witnesses, or even by counsel, under the justification of merely setting out "the background". In the lead up to trial, judges urge counsel to agree on joint books of documents, which then are entered as exhibits, sometimes without specification as to whether each document is admissible and, if so, for what purpose.

A practical approach to admissibility is of course necessary for the due functioning of the justice system. An already stretched system would collapse if counsel were to object as a matter of course to every document or were to refuse to cooperate in compiling joint books. However, Ontario courts, in three recent cases, have emphasized that pragmatism does not justify disregarding important rules of evidence.

In *Girao v Cunningham*, the court was seized of an appeal in an automobile accident case. As the Court of Appeal noted:

> On the eve of trial, the defence dropped a massive and selectively redacted 16 volume "Joint Trial Brief" on the appellant, who has substantial difficulty with the English language, something of which the defence was well aware. The content of the Brief can be summarized as falling into several categories: medical records, notes, and reports; employment, educational, and tax records; and documents relating to the collision and insurance claims. The Brief became the basis of the trial record in an unfair way that was inconsistent with the trial practice directions of this court.[2]

The trial judge's approach, it would appear, "was to simply accept all the volumes" and to mark them as numbered exhibits.[3] On appeal, it became apparent that many of the documents in the brief ought not to have been admitted.

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[1] The views I express in this article are mine alone. I am not in any way speaking for the Ministry of the Attorney General. I am grateful for the assistance of student-at-law Kevin Szeto of the Crown Law Office, Civil.

[2] 2020 ONSC 260 at para. 21.

[3] *Id.* at para. 29.

The Court recognized that "[i]t is quite usual in civil actions for counsel to prepare an agreed trial document brief containing documents that are admitted as authentic and admissible". However, because it is not unusual "for counsel to differ on the precise basis on which a document in the brief is being tendered or whether it was to have been included" […], "it is the trial judge's responsibility to get the requisite clarity when the documents are made exhibits, especially concerning a document's hearsay content".[4]

The Court went on to provide a useful guide to counsel and trial courts, holding that "[c]ounsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes":

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?

2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?

3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?

4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?

5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?

6. Does any party object to a document in the document book, if it has not been prepared jointly? [5]

[4] *Id*. at paras. 25-26. Citing *1162740 Ontario Ltd. v. Pingue*, 2017 ONCA 52, 135 O.R. (3d) 792 at para. 40.

[5] *Id*. at para. 33.

The Court also pointed out that:

> It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.[6]

And finally, the Court noted that problems arise "because the parties have not turned their minds to the issues in sufficient detail before the document book is tendered as an exhibit. This must change as a matter of ordinary civil trial practice".[7]

Bruno v. Dacosta was another case in which a joint brief was admitted into evidence without sufficient analysis. The Court of Appeal, after addressing the grounds of appeal, discussed this issue under the heading "Some Trial Practice Notes". The Court noted that: "[t]here were errors made in the admission and use of the joint document book that further frustrated appellate review and that should not happen in other cases" and that, although the Court had released the *Girao* decision, "… this situation presents an opportunity for further reflection on trial practice".[8]

The Court began that reflection by emphasizing that "[t]he most obvious point, which nonetheless bears emphasis, is that any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence".[9]

At trial, the parties had agreed as follows:

> The documents contained in the Joint Document Brief are relevant, authentic and the dates of the documents are accurately reflected on their face. Neither of the parties are to be considered as having accepted the truth of the contents of all of the documents. Further, both parties reserve their rights to challenge what is stated in the documents, lead further evidence which may or may not be inconsistent with the documents and argue as to the interpretation and weight to be given to the documents.[10]

With respect to that agreement, the Court of Appeal held:

> This agreement was not helpful to the trial judge because of its ambiguity, which he should have probed immediately and carefully with some obvious questions,

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[6] *Id*. at para. 34.

[7] *Id*. at para. 35. Counsel should also have regard to the important discussion in the case about the differences between s. 35 and s. 52 *Evidence Act* notices. See para. 42-48 of the decision.

[8] 2020 ONCA 602 at paras. 53-54.

[9] *Id*. at para. 55.

[10] *Id*. at para. 56.

> among them: If a document is not challenged, is its hearsay content deemed to be admitted? If not "all" documents, then which?
>
> The approach taken by counsel and permitted by the trial judge only invited further contention, which inevitably emerged.[11]

The Court of Appeal condemned the lack of precision that accompanied the admission of the joint brief, in the most emphatic terms:

> This case highlights the deplorable tendency in civil cases of admitting evidence subject only to the weight to be afforded by the trial judge: "Seduced by this trend towards [evidentiary] flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight": *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2016 FCA 161, per Stratas J.A. at para. 83. This is legal heresy, as Stratas J.A. noted, citing *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 59. I agree with his trenchant comments.[12]

In another recent decision, *Polgampalage v. Devani*, Justice Myers made clear that evidentiary rigour should be brought to bear not only at trials, but on motions too.

> The Court was seized of a change of venue motion. In support of the motion, the plaintiff filed an affidavit from a law student at the plaintiff's firm. The affidavit contained opinion and argument as to the merits of the change of venue motion - the latter of which, the court held, "at best" belonged in a factum, not in an affidavit.[13] The affiant recited facts and events that could not have been within the affiant's knowledge, with no specification as to the source of the information. The affiant attached exhibits containing hearsay for the truth of the hearsay found therein. In key instances, the affiant used that most common means of obfuscation: the passive voice. As Justice Myers noted: "[w]hile things happened, I am not told who did them or for what purpose".[14]

Citing the Court of Appeal's decision in *Bruno*, Justice Myers made his views clear:

> I find it very disappointing that a principal allowed a student-at-law to swear and submit the affidavit that is before me. Closer supervision was required.
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> The pandemic has been a difficult time for everyone. I have special empathy for students and young lawyers who may be deprived of close contact with mentors

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[11] *Id.* at paras. 57-58.

[12] *Id.* at para. 65. As was the case in Girao, the Court also provided helpful clarification as to the proper scope of s. 35 notices: see paras. 61-62.

[13] 2021 ONSC 1157 at para. 34.

[14] *Id.* at para. 10.

> and senior peers to assist with their training. Partners, employers, and mentors may not even realize how much their juniors are suffering from the lack of ready access to more experienced colleagues whether for formal training, informal feedback, or even serendipitous educational opportunities that may arise from casual chats in office corridors.
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> But all students and lawyers also have independent duties to scrutinize with great care every word to which they put their names. During the pandemic in particular, juniors need to insist that they receive full instructions and that their work product is properly reviewed. As difficult as it may be at times, junior lawyers and students alike must guard against allowing employers, clients, or anyone to put their integrity or reputations at risk by inadequate instructions or releasing inadequately reviewed material under their names.[15]

No one, and no doubt judges least of all, enjoys having to slog through objections to affidavit evidence filed on motions. The temptation is to allow all affidavit evidence to be admitted, subject to argument about weight. That approach, however, can lead to added costs to the parties and to confusion at the argument of the motion itself.

For instance, a party files an affidavit addressing at length issues that are irrelevant to the motion and impermissibly arguing that certain inferences must be drawn from the facts. Assume that, were the court to comment adversely on the irrelevant issues, those comments could affect the respondent's position in the litigation going forward. The respondent faces a dilemma: should the respondent put faith in the court to accord no weight to the irrelevant evidence, or must the respondent hedge by reluctantly, and at considerable expense, filing responding evidence on the irrelevant issues? On cross, can the respondent confidently ignore those issues, or should the respondent cross-examine on them "just in case", perhaps turning a one-hour cross-examination into one that may last a full day or more? At trial, this dilemma would not arise as the irrelevant evidence would elicit an immediate objection and timely ruling. On motions, sometimes, an evidentiary objection and early ruling, while tedious for all concerned, is in the interests of justice.[16]

The Court of Appeal, and Justice Myers, are, by these decisions, reminding counsel and judges that the Court's gatekeeper function is not limited to criminal cases. Nor is it limited to trials. That reminder is welcome.

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[15] *Id.* at paras. 40-42.

[16] See, for example, *Guitierrez v. The Watchtower Bible and Tract Society of Canada*, 2019 ONSC 3069; *Holder v. Wray*, 2018 ONSC 6133; *Hunt v. Stassen*, 2019 ONSC 4466.