

NOTES

EVIDENCE CHALLENGING CREDIBILITY

In his book, *The Art of Cross-Examination*,¹ Francis L. Wellman proclaims with reference to cross-examination of a witness:

“... as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.”

In recent years, however, the legal profession has realized that there is a limitation to what can be accomplished by cross-examination. In modern times the field of psychiatry has developed considerably. Moreover, devices such as the polygraph have been invented to test the reliability of a witness. In these circumstances I propose to analyze the law to see how far our Courts will permit a party to adduce evidence challenging the credibility of a witness apart from cross-examination of him.

The general rule often stated by the texts is stated thus by *Phipson on Evidence*:²

“Independent evidence may also be given that an adversary’s witness bears such a general reputation for untruthfulness (or, perhaps, for moral turpitude generally) that he is unworthy of credit upon his oath. In theory, it seems, such evidence should relate to general reputation only, and not express the mere opinion of the impeaching witness; but in practice the question may be shortened thus: “from your knowledge of the witness would you believe him on his oath?” The impeaching witness, cannot, in direct examination give particular instances of the other’s falsehood or dishonesty, since no man is supposed to come prepared to defend all the acts of his life. But, upon cross-examination, he may be asked as to his means of knowledge of the other witness, his feelings of hostility towards him, or whether, in spite of bad character in other respects, the impeached witness has not preserved his reputation for truth; and the answers to these questions cannot be contradicted. The impeaching witness should come from a locality of the other, and not be a stranger sent expressly to learn the latter’s reputation.”

Strictly applying this rule, therefore, evidence led to attack the credibility of a witness called by the other side must be restricted to evidence of general reputation. Opinion as to the untruthfulness of a witness cannot be based upon individual experience.

Despite this statement from *Phipson* it seems clear from the cases that what was stated as one rule is really two separate rules. First, a witness may be asked as to the truthfulness of an opposing witness based on the opposing witness’ general reputation

1. Page 27, (Collier Edition 1962; first published 1903).

2. 10th edition, page 604, “Law Reform - Lessons from the British Experience.”
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in the community. Second, an individual may be asked his opinion as to the truthfulness of an opposite witness but he may not give reasons in examination in chief, although in cross-examination it is open to the opposing side to hang himself or his client by asking the reasons. The second facet is actually a shortened version of a mid-way question, "From your knowledge of the general reputation of the witness would you believe him on his oath?"

The rule quoted from *Phipson* bears the approval of the English Court of Criminal Appeal in the case of *R. v. Gunewardene*.³

In the *Gunewardene* case the Appellant was convicted of the manslaughter of a woman who died after an operation had been performed on her to procure an abortion. The operation was performed by one Mrs. H., who was charged with the Appellant and was also convicted. The case for the Crown was that the Appellant was an accessory before the fact because after the deceased woman had visited his surgery he had driven her to the house where Mrs. H. carried out the illegal operation. In his defence the Appellant denied the charge and pleaded an alibi. It was proposed to call for the defence a doctor to prove that a brother of Mrs. H. who had given evidence for the prosecution which was highly prejudicial to the Appellant, ought not to be believed on his oath because he was suffering from a mental defect.

Hilbery J. rejected the evidence. On appeal the Court per Lord Goddard C. J. agreed. Lord Goddard approved the rule in similar terms to that quoted from *Phipson*.²

His Lordship approved the rule stated in this manner based on the policy consideration that an issue would at once arise whether the facts on which the witness based his opinion were true or otherwise.

"The issue before the Court in a criminal trial is simply whether or not the prisoner has committed the offence with which he is charged. The Court cannot at the same time have to try the question whether or not certain facts spoken to with regard to a witness are true or not, nor would there be any means of obtaining the opinion of the jury on that question."⁴

The *Gunewardene* case has now been overruled by the House of Lords in the case of *Toohy v. Metropolitan Police Commissioner*.⁵

3. (1951) 2 All E.R. 290.

4. at page 294.

5. (1965) 1 All E.R. 506.

In the *Toohy* case, Toohy and two other men were charged with assaulting with intent to rob M., a youth of seventeen, in the dark, in an alleyway. M. was the main witness for the prosecution and gave evidence that the Appellant dragged him into the alleyway and there assaulted him and searched his pockets. There was also prosecution evidence from two witnesses that they found M. in the alleyway surrounded by the three accused, in a very distressed and hysterical condition and with his clothes dishevelled. The defence was that M. appeared to have been drinking and was behaving strangely, laughing and joking, and seemed incapable of taking care of himself, and the three accused had decided to take him home. While the Appellant was relieving himself in the alleyway M. had bumped into him from behind, had banged himself against a wall, and had become hysterical, saying that he had been hit and that the accused was after his money; the accused had held his arm and had taken him up the alleyway to calm him. M. was examined at the Police Station by the police surgeon who gave evidence for the defence that there were no bruises or signs of injury, that he smelled of alcohol, and that throughout the examination he was weeping and in an hysterical state, unable to reply sensibly to any questions and that at the end of the examination had flopped down on the floor.

The defence tried to lead the evidence of the surgeon as to his opinion on the part alcohol played in M.'s hysteria and whether M. was more prone to hysteria than a normal person. The Learned Trial Judge, relying on the *Gunewardene* case held the evidence to be inadmissible.

Lord Pearce delivered the judgment of the House of Lords. He held that the *Gunewardene* case erred in applying the older cases as a guide to the admissibility of medical evidence concerning illness or abnormality affecting the mind of a witness and reducing his capacity to give reliable evidence.

"This unreliability may have two aspects either separate from one another or acting jointly to create confusion. The witness may, through his mental trouble, derive a fanciful or untrue picture from events while they are actually occurring, or he may have a fanciful or untrue recollection of them which distorts his evidence at the time when he is giving it."⁶

Without wanting to minimize the policy consideration which restricts the number of issues put to a jury in a case, his Lordship felt that there was a more important consideration involved in this problem.

"Human evidence shares the frailties of those who give it. It is subject to many cross currents such as partiality, prejudice, self-

6. at page 511.

interest and above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give evidence of something which he believed that he had seen at a distance of 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.

It is obviously in the interest of justice that such evidence should be available. The only argument that I can see against its admission is that there might be a conflict between the doctors and that there would then be a trial within a trial, but such cases would be rare. And if they arose, they would not create any insuperable difficulty, since there are many cases in practice where a trial within a trial is achieved without difficulty. And in such a case as this (unlike the issues relating to confessions) there would not be the inconvenience of having to exclude the jury, since the dispute would be for their use and their instruction.⁷

Thus the Court acknowledges that there is a limitation to what can effectively be done by cross-examination. In the interests of justice the jury ought to have the assistance of men skilled in the field of mental disabilities.

This case bears an important weakness in that Crown Counsel made no attempt to support the validity in law of the *Gunewardene* case.

It is important to note that this case goes no further than to permit medical evidence as to mental defect of the witness.

Three Canadian cases illustrate a tendency to follow the *Gunewardene* case. These cases, however, were decided before *Toohy*.

The first is *Regina v. Kyselka*,⁸ a decision of The Ontario Court of Appeal delivered by Porter C.J.O. The accused was convicted of rape of a girl aged sixteen who was mentally retarded. The Crown led the evidence of a psychiatrist who gave evidence to the effect that the complainant had an I.Q. of under 60 with a mental age of between 10 and 11 years, and that she was not imaginative enough to concoct stories. The Court held that this evidence was improperly admitted.

7. at page 512.

8. (1962) O.W.N. 160.

Chief Justice Porter stated:⁹

"While the credit of any witness may be impeached by the opposite party: *R v. Gunewardene*, supra, there is no warrant or authority for such oath helping as occurred in the circumstances of this case reminiscent as it is of the method before the Norman Conquest by which a Defendant in a civil suit or an accused person proved his case by calling witnesses to swear that the oath of the party was true. If this sort of evidence were admissible in the case of either party no limit could be placed on the number of witnesses who could be called to testify about the credibility of witnesses as to facts. It would tend to produce, regardless of the number of such character witnesses who were called, undue confusion in the minds of the jury by directing their attention away from the real issues and the controversy would become so intricate that truth would more likely to remain hidden than be discovered."

Similarly in *Regina v. Burkart and Sawatsky*,¹⁰ an appeal from a conviction for rape, after the complainant had been interviewed by the police, she was taken for a physical examination to a doctor. The doctor gave evidence as to his finding respecting her physical condition. He then gave evidence as to her mental capacity and stated that her mental capacity would have to be classified as a very low normal. There followed an opinion that the complainant was not capable of making up her evidence. The Court through Culliton C. J. S. applying the *Kyselka* case held the evidence to be inadmissible and allowed the appeal.

The third case is *R. v. Steinberg*.¹¹ In a murder trial a prisoner who had been locked up with the accused gave evidence of a confession made by the accused to him. No objection was taken to his competency to give evidence by the defence. He was cross-examined at length by defence counsel who then tried to adduce the evidence of doctors,

"to suggest this witness was suffering from some form of mental unsoundness, and that he was of the type of mentality prone to invent stories, and to adhere to his fabrication, possibly believing them to be true, and that he was by reason of mental disorder, a witness upon whose statement no reliance could be placed."¹²

The Ontario Court of Appeal was shocked by such proposed evidence. Four Judges including Middleton J. A. held that such evidence is only admissible on a *voir dire* to test capacity of the witness to give evidence.

The Court, relying on the rule earlier stated, also rejected evidence of lies told by the witness in other instances.

This decision apparently bears the tacit approval of a unanimous Supreme Court, although the reasons dealt with issues other than this one.¹³

9. at page 163.

10. (1967) 45 C.R. 383.

11. (1931) 4 D.L.R. 8.

12. at page 34.

13. *R. v. Steinberg* (1931) 4 D.L.R. 40.

For those defence counsel who will applaud the *Toohey* case as the opening of a door to destroy the credibility of Crown witnesses, it is important to note that if *Toohey* becomes the law of Canada it is inevitable that the Crown would be permitted to tender similar evidence to impeach the credibility of defence witnesses.

It remains to be seen whether in fact the Courts in Canada will follow *Toohey* or stand by the *Gunewardene* decision. It further remains to be seen how far the English cases will go in developing the *Toohey* theme.

The *Toohey* case involved an opinion as to the mental state of a witness based upon personal examination. I pose for your consideration the question of whether the Court in the *Toohey* case would have allowed an opinion based merely on Courtroom observation of the witness by the doctor. Does the fact that there has been no personal examination affect the admissibility or merely the weight of the evidence?

I call to your attention the case of *The State v. Alger Hiss*. The State's case was based on the evidence of one Whittaker Chambers. The Defence led the evidence of a psychiatrist who gave evidence to the effect that from his courtroom observation of the witness he was of the opinion that the witness was a pathological liar and incapable of telling the truth. The Court admitted this evidence. Will the English Court applying *Toohey* go this far?

Will the English Court extend the rule set out in *Toohey* to civil cases? Or will the Court hold that the policy considerations involved in a criminal case based on the presumption of innocence etc. demand the admission of this evidence?

If the Court will permit an attack such as this upon an opposing witness, will the Courts permit a party to bolster the credibility of his witness in this manner?

Clearly the *Toohey* case merely lets in medical evidence. But why indeed should this kind of evidence be restricted to medical evidence? Surely evidence as to obvious lies by a witness should be admissible; this evidence is most important to put into a true light the reliability of a witness' evidence. Surely evidence of the results of a polygraph test can be useful to throw light on the issue of credibility. Surely the policy consideration which impelled the Court in the *Toohey* case will in time persuade the Court to open the door wide with regard to this rule. To repeat from *Toohey*:

"it is obviously in the interest of justice that such evidence should be available. The only argument that I can see against its admission is that there might be a conflict between the doctors and that there

would then be a trial within a trial; but such cases would be rare."¹⁴

Indeed the instances would be rare if the rule were extended. Also the extension of this rule would be another step forward to insure that the truth is established.

Indeed it is my submission that the *Toohey* case is merely another step in a gradual widening of the rule. At first the rule was strictly that a witness must speak of the prisoner's general reputation and not of particular facts known to the witness on which he bases his opinion. This rule was extended in the case of *R. v. Rowton*.¹⁵ The *Rowton* case is authority for the proposition that a witness called to impeach the credibility of previous witnesses can express an individual opinion and is not confined to giving evidence of the latter's general reputation. The matter is now taken one step further by the *Toohey* case. Medical evidence can now be led on the issue of the mental state of the witness. The final step remains that a witness should be permitted to state in chief, from his personal experience, the reasons why the evidence of a witness ought not to be accepted.

It is submitted that the reluctance of our Courts until now to permit medical evidence as to character is tied in with the attitude of the Courts in earlier days of medical history to distrust medical experts. The distrust is set out in Phipson's 9th edition and Taylor's 12th edition and is based on the 1843 *Tracy Peerage* decision.¹⁶ This view prevailed throughout the period of development of the rules as to character evidence, that is, the 19th and first half of the 20th Century. It prevailed in 1931 at the time of the *Steinberg* case.¹¹

Now that the attitude towards medical experts has changed (as shown by the Manitoba Court of Appeal decision in *R. v. More*,¹⁷ and Judson J.'s decision in the Supreme Court¹⁸) we can look forward to an adoption of the *Toohey* principal in Canada.

One word about lie detectors. Despite the many articles written by Professor Fred Inbau of North Western University and John E. Reid,¹⁹ lie detectors have far from won universal confidence. Perhaps in time when the tests are accepted as the testimony of medical experts is now accepted, polygraph results will be admitted in evidence and will play an important role in this field.

14. (1965) 1 All E.R. 512.

15. (1865) 31 L.J.M.C. 57.

16. (1843) 10 C.L. & F. 154.

17. (1963) 43 W.W.R. 30.

18. (1963) 3 C.C.C. 289.

19. *Lie-Detector Test Limitations*, vol. 2.

Journal of Forensic Sciences, No. 3, July 1957:

The Lie-Detector Technique: A Reliable and Valuable Investigative Aid, Vol. 50, American Bar Association Journal, No. 5, May 1964;

Lie Detection and Criminal Interrogation, 3rd edition, 1953.

It has long been thought that the rule with regard to challenging the credibility of a witness restricts a party to adducing evidence of general reputation. Doubt has been cast on this rule by the *Toohy* case. It is submitted that in light of the *Toohy* case it is now time to think over the purpose of the rule and give serious consideration to liberalising the rule.

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A CONJECTURE ON THE CANADIAN LAW OF TREASURE-TROVE

A novice in law can be somewhat dismayed to find a topic among his subjects which is not only rare in his native country but positively non-existent. Such was the case when this writer, to settle a controversy on the definition of treasure-trove, found that Canada has been without any cases on that subject for one hundred years.

In consequence, the novice decided to investigate further and in the process made a hypothetical finding (something he has been told no experienced judge will do except by necessity). This brief article, therefore, will deal with two main points: the definition of treasure-trove, with its numerous national variations, and the constitutional question arising out of the Canadian situation.

The modern definition was discussed in an English case in 1903,¹ the definition being an adaptation from Blackstone² and Coke.³ This definition,⁴ as was authoritatively pointed out by Cecil Emden in an excellent article in 1926,⁵ consists of four elements: the property must be gold or silver; it must have been hidden; in the ground or in a secret place; and the owner must be unknown.

According to common law, once it is established that a finding is treasure-trove,⁶ the property of the goods vests in the Crown. The reasons for this, though still somewhat doubtful, are explored

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1. *A.-G. v. British Museum Trustees* (1903) 2 Ch. 598.

2. 1 Bl. Comm. (14th ed.) pp. 295-6.

3. 3 Co. Inst. 132-3.

4. "Treasure Trove, is where any gold or silver, in coin, plate or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee, having the franchise of treasure trove". Farwell J. at page 608.

5. "The Law of Treasure Trove" 42 L.Q.R. 368.

6. In England, the Coroner has, since the statute 'De Donis Coronatoris' 4 Ed. I St. 2, the authority and duty to hold an inquest upon the notice of gold or silver being found, to ascertain whether or not it is treasure-trove. See *Boys' on Coroners* by C. R. Magone and E. R. Frankish (5th Ed.); and *Thurston, Coroners Practice*, and also see *A.-G. v. Moore* (1893) 1 Ch. 676 where besides ruling on the jurisdiction of the coroner, the judge applied Chitty's definition of treasure-trove which was almost exactly followed in *A.-G. v. British Museum Trustees* (Supra).