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Robert J. Currie *

The possibility of achieving what the position statement for this volume calls "culturally reflexive reasoning" rests not just on legal decision-makers being able to take culture into account, but more fundamentally on the idea of culture as a justiciable matter. I have commented elsewhere that there would appear to have been a "cultural turn" in the discourse of Canadian courts,[1] particularly as the law of evidence has been developing in a manner which allows decision-makers to both address cultural concerns and utilize actual manifestations of culture in rendering their findings.

This development, I submit, is both constitutional and egalitarian in origin. It is constitutional in that multiculturalism has been enshrined in the Canadian constitution,[2] making the accommodation of cultural diversity one of the foremost legal imperatives in the Canadian legal system. It was therefore inevitable that culture itself should begin to appear before the courts. It is also clear, however, that a more general pursuit of egalitarianism and a more sophisticated understanding of the differences between formal and substantive equality have led the courts to accept and consider evidence of culture where they might not have in the past.[3] There is a manifest realization that facts are not simply objective realities to be uncovered by litigation, but are constructed by the rules of evidence,[4] and that the process of constructing those facts can only be fair and accurate if it takes culture into account.

If "cultural evidence" is to play a part in litigation, a great deal depends on what kind of evidence it is, and what the decision-maker can do with it. Much cultural evidence is drawn from the social science disciplines and is given, in the form of testimony and written reports, by experts in those fields. The Supreme Court of Canada's jurisprudence on the admissibility of

* Thanks are due to John Rice, David Howes, and this article's anonymous peer reviewers.

1 See R.J. Currie, "The Contextualized Court: Litigating 'Culture' in Canada" (2005) 9 International Journal of Evidence & Proof, 73.

2 Specifically the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["the *Charter*"], section 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

3 This, too, is driven by the values enshrined in the *Charter*, particularly section 15. For an interesting portrayal of the courts as drivers of a pluralist and egalitarian agenda in the U.S. context, see Carlos Villarreal, "Culture in Lawmaking: A Chicano Perspective" (1991) 24 U.C. Davis L. Rev. 1193.

4 C. Boyle & M. MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Y.B. Access Just. 55 at 62.

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expert opinion[5] reflects a certain caution with regard to expert evidence, and this is particularly the case where a jury will be rendering the decision. The primary danger is that jurors, as laypeople unfamiliar with the expert's discipline, may "attorn" to the opinion of the expert rather than actually making the decision on facts, or be unduly influenced by the expert.[6]

These issues came before the Supreme Court of Nova Scotia squarely, and in a fascinating manner, in *Campbell* v. *Jones and Derrick* [*Decision on Admissibility of Expert Opinion*].[7] The setting was a racially-charged defamation case that pitted a Halifax, Nova Scotia police officer against two well-known public interest lawyers.[8] The decision under review here, however, was with regard to cultural evidence in the form of expert opinion on racism,[9] and whether the experts' reports and testimony were admissible for the jury's consideration. It is a fairly unique decision, and raises some interesting issues around when and how juries (as opposed to judges) will be able to use social science evidence of culture. This comment will use the decision as a means to discuss some of these issues.[10]

Background: *Campbell* v. *Jones and Derrick*

The case out of which the admissibility decision arose was a controversial one that proceeded to the Nova Scotia Court of Appeal,[11] where a decision of the trial judge on a matter of law was overturned and the jury's verdict effectively nullified. In March of 1995, Halifax Regional Police Constable

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5 Stemming most recently from the reasons of Sopinka J. in *R.* v. *Mohan*, [1994] 2 S.C.R. 9. See generally J. Sopinka *et al*., *The Law of Evidence in Canada*, 2nd ed. (Markham, Ont.: Butterworths, 1999), c. 12 (and the Supplement thereto (Markham, Ont.: Lexis Nexis Butterworths, 2004) at 93-117); D. Paciocco & L. Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin, 2002), c. 6.

6 *R. v. D.(D.)*, [2000] 2 S.C.R. 275, at para. 53 ["*D.D.*"].

7 This decision of Moir J. of the Nova Scotia Supreme Court [hereinafter the "admissibility decision"] has not been reported in the Nova Scotia Reports or elsewhere in hard copy. It is available at [2001] N.S.J. No. 598 (QL); and online: CANLII <http://www.canlii.org/ns/cas/nssc/2001/2001nssc10061.html.

8 *Campbell* v. *Jones and Derrick* (2002), 209 N.S.R. (2d) 81 (N.S.C.A.) [the "Court of Appeal decision"], leave to appeal denied [2002] S.C.C.A. No. 543.

9 I am making what I recognize to be a large, and somewhat instinctive, leap in describing racism as a "cultural" issue, though I think it is highly arguable. Culture and race are, of course, overlapping but not interchangeable. However, one need not conflate culture and race to accept that racism is a manifestation of cultural interplay. Since racism was a relevant issue in this case, as in many others, then it is defensible to describe the evidence thereon as "cultural." I am also mindful of the "emergence of a widely accepted approach to culture in anthropology that dismisses its value as a category of 'thing', as a noun that can be identified, described, compared with others (…) and by extension, decided upon in courts." (R. Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18 Can J. L. Soc. 1 at 1). For a view that the death of "culture" as an anthropological concept has been highly exaggerated, see M. Sahlins, "'Sentimental Pessimism' and Ethnographic Experience, Or, Why Culture is not a Disappearing 'Object'" in L. Daston, ed., *Biographies of Scientific Objects* (Chicago: University of Chicago Press, 2000), at 58-202.

10 Parts of this paper are drawn, with amplification, from my earlier brief review of the decision in "The Balancing Act: Recent Developments in Civil Evidence" (2003) 28:4 *Nova Scotia Law News* 80.

11 The Court of Appeal reversed a trial decision of Moir J., reported at (2001) 197 N.S.R. (2d) 212 (S.C.). This summary of the facts of the case is drawn from the Court of Appeal decision, paras. 3-20.

Carol Campbell answered a call from St. Patrick's Alexander School in Halifax, which has a predominantly Black student population. In the course of investigating a theft of $10.00, Campbell, who is White, conducted searches of three Black girls that involved at least partial removal of their clothing. The girls were not given a *Charter* caution, nor were their parents or guardians contacted.[12]

Parents and guardians of the girls retained solicitors B.A. "Rocky" Jones and Anne Derrick to act on their behalf in a complaint under the *Police Act*[13] about Campbell's conduct. Jones and Derrick were well-known lawyers in Nova Scotia; both had histories of public interest advocacy, and both were outspoken on discrimination and other forms of oppression. On April 5, 1995, Jones and Derrick held a press conference, at which they made statements to the effect that both race and socio-economic class motivated Campbell's searches. Jones, in particular, stated "(…) there's no doubt whatsoever in my mind that this would not have happened to white children (…). [B]ecause these children are in a community that is basically poor, the school authorities and the police felt that they could trample on their constitutional rights."[14]

Campbell brought an action in defamation against Jones and Derrick, as well as several of the media outlets which had reported on the press conference.[15] She alleged that the statements made by the defendants were defamatory in that they carried innuendo to the effect that she: was a racist; was motivated by racism; and discriminated in the conduct of her duties on the bases of race, economic status and social status. The matter proceeded to a jury trial before Moir J. of the Nova Scotia Supreme Court in April-May of 2001. While the jury found that Campbell had been defamed by the defendants, the Court of Appeal ultimately ruled that Jones and Derrick had been covered by the defence of "qualified privilege" when they made the statements, and overturned the jury's damages award of $240,000.00.

The Admissibility Decision

As part of their defence, the defendants wished to introduce expert reports by Dr. Wanda Thomas Bernard, a sociologist, and Dr. Frances Henry, a social anthropologist. Both offered opinions regarding the existence of systemic racism in Canadian society and specifically within police departments, including examples of alleged racism emanating from Halifax's police force. Notably, both provided specific opinions on the facts that gave rise to the case. Bernard, for example, stated that a similar incident involving "white youth (…) would likely be handled in a totally different way."[16] Henry opined that "it is highly likely that the behaviour of this

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12 Campbell later acknowledged the impropriety of these actions and was disciplined.

13 R.S.N.S. 1989, c. 348 (repealed; repeal not proclaimed in force as of May 4, 2005).

14 Court of Appeal judgment, para. 15. They also read letters authored by themselves and some of the girls' parents, to similar effect.

15 The actions against the media organizations were settled well before the trial (Court of Appeal judgment, para. 13).

16 Admissibility decision, *supra* note 7 at para. 22.

officer was motivated by a degree of racism and stereotypic thinking which involves a presumption of guilt."[17] The Plaintiff applied to have the reports excluded on the basis that they did not meet the criteria for the admissibility of expert opinion set out by the Supreme Court of Canada in *Mohan*.[18]

For the purpose of reviewing the admissibility decision, it is important to clarify the jury's exact role at trial. In any jury trial, whether civil or criminal, the jury functions as "trier of fact." This means that it must hear the evidence which the trial judge (as "trier of law") decides is admissible, and make a decision as to what actually happened, i.e. what the facts of the case are. The scope of the facts which must be decided by the jury is to a great extent shaped by the nature of the case and the pleadings. For example, if a Plaintiff in a motor vehicle case sues the defendant in negligence, then the jury must decide, *inter alia*, whether the defendant operated her car in a manner consistent with a reasonable standard of care. Compliance with the standard of care, then, is one of the factual issues which must be resolved before the substantive law can be applied.

In *Campbell*, the defendants had pleaded a number of defences to the allegation of defamation, including justification,[19] qualified privilege[20] and fair comment.[21] As Justice Moir noted, this meant that a number of factual issues were before the jury, among them truth of the publication, truth of the facts stated in support of the comments, honest belief and fairness of the comments, and malice.[22] All of these, then, were part of the jurors' fact-finding; they had to decide whether the comments were true, whether the defendants had honest belief in the truth of their comments, and so on. The defendants wished to adduce the expert opinions in order to help the jury render its decision on the facts, and Justice Moir was tasked with deciding whether they should be permitted to do so.

Justice Moir began by reviewing the Supreme Court's jurisprudence on the admissibility of expert opinion, focussing in particular on the two

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17 *Ibid*. at para. 25.

18 *Supra* note 5. Normally such a motion would be made during the trial, and the judge would exclude the jury while making his/her legal ruling as to the admissibility of the expert report. These reports were the subject of a pre-trial motion by agreement of the parties, "in order to convenience one of the experts" (admissibility decision, *supra* note 7 at para. 1).

19 That the comments were not defamatory because they were true; see R.E. Brown, *The Law of Defamation in Canada*, 2nd ed. (Scarborough, Ont.: Thomson, 1994), vol. 2, c. 10.

20 That the defendants were not liable, even if the comments were defamatory, because they were made in the discharge of some public or private duty to make such remarks; see Brown, *ibid*., c. 13. While it is beyond the scope of this article, the Court of Appeal majority decision basically rested on qualified privilege, which the Court found applied to protect the defendants.

21 That the defendants were not liable, even if the comments were defamatory, because they were comments on a matter of public interest; see Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Thomson/Carswell, 2003) at 704-10.

22 Admissibility decision, *supra* note 7 at para. 25. The question of whether the defendants had been malicious in making the remarks was an issue because a finding of malice overcomes certain defences, such as qualified privilege and fair comment; see Brown, *supra* note 19 at 1047-50 (qualified privilege) and 1005-08 (fair comment).

primary criteria arising from *Mohan*: relevance and necessity.[23] On the key criterion of relevance, he noted that the inquiry is not simply whether the evidence is logically relevant to the case, but whether admitting it is "worth what it costs:"

> The second branch of the relevancy [criterion] requires inquiries into the probative value versus prejudicial effect of the opinion, the amount of trial time admission would cost versus the value of the evidence, and the misleading potential of the opinion versus its reliability.[24]

His Lordship also indicated that he was alive to the guidance the Court offered in *Mohan* with regard to the "ultimate question" (otherwise known as the "ultimate issue rule") as "an important guide"[25] to his decision. While opinion could be offered to help the jury in rendering its decision, it should be subject to special scrutiny the closer it approached simply providing answers to the actual questions the jury itself was supposed to answer.[26] Finally, the dangers associated with expert evidence outlined by Major J. in *D.D.* were invoked, in particular the possibility of juror abdication of fact-finding in attorning to the expert's opinion; the potential that counsel will not be able to cross-examine the expert effectively; the amount of hearsay often contained in expert opinion which could require special jury instructions; and consumption of time and resources.[27]

Ultimately, Justice Moir ruled that the vast majority of both reports had to be excluded. This was on two primary bases: (1) the general, societal scope of the experts' disciplines could not reliably assist jury fact-finding regarding the behaviour of individuals; and (2) the experts offered opinions on matters too close to the very questions of fact which the jury had to decide. With regard to the Bernard report, His Lordship found further grounds for exclusion on the basis that it contained commentary on the law, giving rise to "an additional danger of confusion between the role of the court and the role of the witness;"[28] and that it contained a great deal of hearsay on the irrelevant issue of interaction between the Halifax police force and the Black community.[29] However, general background information on systemic racism contained in both reports was admitted, though with the admonition that neither report was to refer to police, "not even by way of illustrating examples."[30]

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23 The other two criteria are: absence of any exclusionary rule that would otherwise bar the opinion; and that the expert must be properly qualified to give evidence in the field.

24 Admissibility decision, *supra* note 7 at para. 8.

25 *Ibid*. at para. 9.

26 This is so because "when the opinion deals with an ultimate issue that traditionally falls within the province of the jury (…), the danger that the reception of the expert evidence will have a disproportionate effect on the outcome of the trial is heightened" (Sopinka *et al*., Supplement, *supra* note 5 at 114).

27 Admissibility decision, *supra* note 7 at para. 11, quoting *D.D.*, *supra* note 6.

28 *Ibid*. at para. 28.

29 This issue had been ruled irrelevant in an earlier Chambers hearing in the case; *Campbell* v. *Jones and Derrick* (1998), 168 N.S.R. (2d) 1 (S.C.).

30 Admissibility decision, *supra* note 7 at para. 40.

Analysis

Expert opinion in civil trials is often fairly pedestrian fare, with contentious issues generally arising from arid disagreements about whether actuarial assumptions are valid or whether the testimony of a medical specialist exceeds his/her area of expertise. In this case, Moir J. was faced with a more interesting question: can findings produced within well-known and accepted fields of academic inquiry be appropriate for use as expert opinion evidence in a jury trial, where those fields are what might be called "pure" social science?

Judicial use of social science evidence is, of course, nothing new. Canadian appellate courts have, in recent years, increasingly used social science research to contextualize fact situations and ensure that decision-making is guided by up-to-date literature on the matters before the court.[31] In *Campbell* the defendants were able to point to recent cases where social science evidence regarding systemic racism in Canadian society was used by judges to help their decision-making where racial issues were engaged.[32] In *R.* v. *Parks*, for example, the court ruled that the accused was entitled to challenge jurors for cause, based in part on social science evidence indicating that there was systemic racism in Toronto, which raised the possibility of juror bias.[33]

However, Justice Moir focussed on the distinct nature of the function for which the opinions were being adduced, namely fact-finding by a jury. Appellate courts make use of social science evidence by taking *judicial notice* of it, i.e. admitting the research into evidence as being factual without the requirement of it being proven by either party to the litigation.[34] Moir J. was compelled to distinguish the manner in which social science evidence had been used in those cases from the manner in which the defendants sought to use it in the case before him, remarking "that expert evidence was not expert evidence adduced at trial. Rather, the appellate courts and the Supreme Court of Canada are free to develop legal policy in light of opinions expressed by experts in fields outside law."[35] In this case, the jury was acting as fact-finder and not entitled to "take notice" of anything, but had to rely on the evidence adduced by the parties to satisfy itself as to what the facts were.

Moir J. thus found that this called for closer scrutiny of the nature of the opinion evidence at the admissibility stage. The problem was clearly not whether the jury should be entitled to appreciate the context in which the

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31 See C. L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L. Rev. 551. See also *R.* v. *R.D.S.*, [1997] 3 S.C.R. 484, which was cited by Moir J. at para. 17. For a thorough canvass, see R. Delisle, D. Stuart & D. Tanovich, *Evidence: Principles and Problems*, 7th ed. (Toronto: Thomson, 2004) at 251-85.

32 *Supra* note 7 at para. 14-19, citing *inter alia R.* v. *Parks* (1993), 84 C.C.C. (3d) 352 (Ont. C.A.) and *R.* v. *Williams* (1998), 124 C.C.C. (3d) 481 (S.C.C.).

33 See the review of this caselaw in Currie, "The Contextualized Court" *supra* note 1.

34 See generally Sopinka *et al*., *supra* note 5 at 1055-68; Paciocco & Stuesser, *supra* note 5 at 376-86.

35 Admissibility decision, *supra* note 7 at para. 14.

facts had arisen, and they were in fact provided with such background in the ultimate decision. Rather, how deeply into their fact-finding exercise would the expert opinion be permitted to penetrate? In this regard, Moir J. was most concerned with whether the fields of sociology and social anthropology were suitable for helping the jury to decide on specific facts—in the defamation setting. Because of the nature of the decisions the jurors had to make, they were called upon in part to figure out what had motivated a specific person (Constable Campbell), on a particular day, during a particular activity; whether the defendants were, in fact, correct when they linked her actions to racism and classism.

Excluding the "Specific" Opinions

What appeared to trouble His Lordship the most (and correctly, in my view) was that the experts purported to be able to explain individual motivation by way of their scholarship in the fields of sociology and social anthropology. In the result, he brought the "reliability" portion of the *Mohan* relevance criterion down with full force on the reports. While the qualifications of Drs. Bernard and Henry to provide opinions within their respective fields were not questioned, the Court agreed with submissions by the Plaintiff that the fields themselves "lack the precision and specificity which characterizes a science like chemistry or an area of technical expertise like engineering."[36] As a result, he found that it was impermissible to engage the jury in "reasoning from the generalizations of social science to the specifics of Constable Campbell in a court of law."[37] Referring specifically to the Henry report, His Lordship stated:

> In addition to the danger that the trier of fact will substitute the opinion of a highly respected expert for their own, the report, taken as a whole, suggests for the jurors to reason as Dr. Henry has done; that is, to allow generalization about police and generalization about members of the Black community to determine specific issues of fact. It is that aspect of the *Mohan* cost/benefit analysis, the aspect of misleading potential versus reliability, that is most prominent in my conclusion that Dr. Henry's opinions are inadmissible.[38]

Justice Moir's logic is attractive. As the learned authors of *The Law of Evidence in Canada* have written, the Supreme Court's goal in *Mohan* was to "[articulate] criteria and their underlying rationale to screen out those experts or fields of expertise which are reliable and are necessary for the assistance of the fact finder from those which are misleading *and incompatible for use in the courtroom.*"[39] The expert opinion rules are often used to exclude "junk science," i.e. new and potentially questionable

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36 *Ibid*., quoting approvingly from the Plaintiff's brief.
37 *Ibid*. at para. 26.
38 *Ibid*.
39 Sopinka *et al*., *supra* note 5 at 633 [emphasis added].

scientific techniques.[40] It seems sound to posit that they must also be used to keep out evidence emanating from disciplines which, while they are fundamentally sound by themselves, do not avail of sufficient predictive power to explain certain kinds of factual questions—such as the ones with which the jury was presented in *Campbell*. While fully appropriate for establishing social context/framework for appellate decisions, disciplines like sociology and social anthropology were equally inappropriate for use by jurors in deciding what had motivated Constable Campbell in her specific actions.[41]

While it can be accepted that reports and opinions used as social framework evidence can be "too general to be determinative guides to appropriate action in particular situations,"[42] however, one is left thinking of babies and bathwater, particularly considering the plight of the jurors. While the jury had not been empanelled at the time of the application, given the predominantly White population of Nova Scotia it was not at all unlikely that the jurors would themselves be White.[43] Thus, there was likely to be little knowledge of or experience with racism and its manifestations. While it was open to the jury to conclude that Constable Campbell was a racist or had been acting in a discriminatory manner, they would have to do so based on the remainder of the evidence. Without the social science opinions, they were left with simply their own assessments of the witnesses, how they comported themselves on the stand, and the extent to which the jurors

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[40] See generally D. Paciocco, "Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence" (1994) 27 C.R. (4th) 302; *R.* v. *J.(J.-L.)*, [2000] 2 S.C.R. 600.

[41] I am compelled to acknowledge, without making any attempt here to substantively address it, the tension between how *courts* construct humanities and social science disciplines—responding to the essentially forensic role imposed upon the courts by the adversarial system—and the extent to which those disciplines construct themselves. Courts are bound to subject evidence to a "standard of proof" as a means of constructing facts, which in civil matters requires the trier of fact to be convinced (as a function of logic) that something is true "on the balance of probabilities," i.e. that it is more likely than not. This is a significantly different exercise than the manner in which, say, anthropologists arrive at versions of "facts" within the parameters of their discipline. This can be compounded by the debates within the discipline itself over whether anthropological methodology is generative of "predictive power," as opposed to "interpretive power." As Clifford Geertz has written, "[t]he worry (…) has mostly to do with the question of whether researches which rely so heavily on the personal factor (…) can ever be sufficiently 'objective,' 'systematic,' 'reproducible,' 'cumulative,' 'predictive,' 'precise,' or 'testable' as to yield more than a collection of likely stories". See Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, NJ: Princeton Univ. Press, 2000) at 94). See also, by the same author, "Local Knowledge: Fact and Law in Comparative Perspective" in C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 167-234.

[42] R. Devlin & D. Pothier, "Redressing the Imbalances: Rethinking the Judicial Role After *R.* v. *R.D.S.*" (1999-2000) 31 Ottawa L.Rev. 1 at para. 94, per Devlin [footnotes omitted]. The author makes this remark with regard to *judicial* use of social framework evidence, and I would argue that it applies with even more force in a jury trial situation.

[43] This likelihood was anticipated by the defendants and accepted by the Court; see *supra* note 7 at paras. 32 and 37. In the end, at least five of the jurors were White, and none were of African descent (personal communication from J. Rice, co-counsel to the Plaintiff, August 23, 2004).

themselves assessed the facts and believed or disbelieved any account of what had happened.

One is sympathetic to the Defendants' desire to contextualize the fact situation for the jurors. They would, after all, not be asked to interpret medical data without help from a physician. Systemic racism is arguably best understood as a sociological or anthropological phenomenon, and it is probably asking a great deal of seven laypeople to make reasoned decisions on facts with such complex social overtones, without the assistance of an expert. This is, after all, the function of expert witnesses: to interpret the facts and provide the trier of fact with a "ready-made inference,"[44] one that the jurors themselves do not have the training to formulate. Moir J.'s implicit preference for the operation of disciplines rooted in the scientific method might be seen as taking sorely-needed arrows out of the jury's quiver.[45]

Yet it was not lack of concern for the jury's need for assistance that shaped Justice Moir's decision, but rather a clear concern that, as a means for stating with precision what motivated individual actions, the experts' disciplines were not up to the task.[46] In effect, the experts' reach exceeded their grasp. The best that could be attained was observation that general trends in the ways racism manifests itself in society may have been relevant to understanding Constable Campbell's actions, but questions of her personal motivations surely had to be left to other kinds of evidence. In terms of whether the defendants could reasonably have believed the truth of their comments, the opinions might have had slightly more reliability, but it was at this point where their potential to prejudice the jury's decision-making process came to a head. The danger was clearly there that the findings of the experts would overwhelm any factual analysis that the jury could have gone through on its own.[47]

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44 See the reasons of Dickson J. in *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42.

45 Yet it is not at all unusual. Courts and commentators often express discomfort regarding the admissibility of expert opinion which emanates from "non-scientific" disciplines. See, for example, the remarks of Finlayson J. in *R. v. McIntosh* (1997) 117 C.C.C. (3d) 385 (Ont. C.A.): "(…) before a witness can be permitted to testify as an expert, the court must be satisfied that the subject-matter of his or her expertise is a branch of study in psychology concerned with a connected body of demonstrated truths or with observed facts systematically classified and more or less connected together by a common hypothesis operating under the general laws" at para. 15. For similar views from U.S. courts, see *Jenson v. Eveleth Taconite Company*, 130 F.3d 1287 (8th Cir. 1997) at 1297; *Nations v. State*, 944 S.W. 2d 795 (Tex. Ct. App. 1997) at 800. See also J.G. Connell and R. Valladares, eds., *Cultural Issues in Criminal Defence* (New York: Juris, 2000) (Looseleaf), c. 8, "Using Cultural Experts;" and A. Gold, *Expert Evidence in Criminal Law: The Scientific Approach* (Toronto: Irwin, 2003), c. 9, "Science and Social Science Evidence," especially fn. 11 and accompanying text.

46 Though it is worth mentioning that Justice Moir made a brief *obiter* remark to the effect that he felt that the "necessity" criterion from *Mohan* would also have excluded the opinions, *supra* note 7 at para. 29.

47 I would note that, in (mostly) concurring with this line of reasoning as it played out in this civil defamation case, I am deliberately avoiding engagement in the intense debate and extensive literature relating to the availability of a "culture defence" in criminal law. Perhaps it is sufficient to remark that stringent application of the *Mohan* criteria can produce salutary effects in that setting, among them avoiding the distortion of such an ultimately malleable concept as "culture" by the adversarial litigation process, in a manner

Admitting the "General" Opinions

Justice Moir's decision also demonstrates an admirably delicate balancing act. If both of the opinions had been excluded in their entirety, the result would have been an ironic application of *Mohan*: expert opinions excluded because the jury would find them too useful. The decision to allow in the general opinions regarding systemic racism was thus a fairly successful attempt to strike a balance between not leaving the jurors in an intellectual vacuum regarding systemic racism and ensuring that the opinions stayed within the sphere of fact-finding assistance for which pure social sciences may be appropriate.[48]

This latter part of the decision also reflects an interesting instance of judicial decision-making regarding which party wants to use what evidence. In admitting the experts' general material on systemic racism, Justice Moir noted that this background evidence was:

> logically relevant to assessing the motives of two advocates who put on the kind of press conference at issue in this case. Motive is relevant because of the plea of malice and because of the defence of fair comment (…) [the general opinions] provide some factual foundation as to the need for speech when racism appears without suggesting whether racism appeared in this instance.[49]

This is interesting, because part of the key to Justice Moir's findings on the specific opinions was that the fields of sociology and social anthropology did not have sufficient predictive power to reliably assess Constable Campbell's motives. "The need for speech when racism appears," however, went right to the heart of a factual issue concerning the defendants' behaviour. His Lordship did comment that the general opinions were more reliable, in the sense that they were "uncontroversial and accepted by high authority,"[50] but surely lack of controversy and acceptance by other courts did not make sociology and social anthropology any more acceptable for evaluating why Jones and Derrick acted as they did, any more than they were acceptable ways of evaluating Constable Campbell's actions. While admitting just the general material on systemic racism excluded any specific evaluation by the experts as to the defendants' actions, it must have been

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that "distances the subject of study by creating an unrecognizable 'other'," and "subordinate[s] members of the foreign culture through descriptive control" (Leti Volpp, "(Mis)identifying Culture: Asian Women and the 'Cultural Defense'" (1994) 17 Harv. Women's L.J. 57 at 62, as quoted in Jennifer Choi, "The Viability of a 'Cultural Defence' in Canada" (2003) 8 Can. Crim. L.R. 93 at 105). For excellent surveys of the "cultural defence" debate and its applicability in Canada, see the article by Choi, *ibid*., as well as Charmaine Wong, "Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada" (1999) 42 Crim. L.Q. 367.

48 On a more technical point, one element of Jones and Derrick's defence was that the remarks were not factual allegations directed at Campbell personally, but part of a general commentary regarding the manifestations of systemic racism. Deciding whether remarks are fact or commentary was a matter for the jury. In this light, the decision to admit the general opinions was entirely consistent with the *Mohan* relevance rationale. I am grateful to John Rice for this insight.

49 Admissibility decision, *supra* note 7 at para. 35-36.

50 *Ibid*. at para. 36, referring to *Parks* and other cases.

obvious that their counsel would attempt to use it in precisely this way, i.e. to prove facts regarding the defendants' motives. To my eye, this use of the evidence would go beyond "contextualizing the facts" and accomplish by stealth what the defendants were not permitted to do directly.

This apparent conflict may be explainable in two ways. First, it may reflect the highly technical nature of defamation law, and in particular the work the defendants wanted the evidence to do. Specifically, the general opinions were geared towards contextualizing what moved the defendants to speak and publish as they did; the social forces at play, their duties as solicitors, etc. While Justice Moir's statement that the general opinions "[were] not at the heart of what the jury must decide"[51] is somewhat dubious, the opinions would be more geared towards simple contextualization of the evidence on the defences mounted. The second explanation also focuses on the defendants: the primary concern motivating Justice Moir was how prejudicial the evidence would be. Since the defendants were offering the evidence, it would be less prejudicial to allow them to use the evidence in their own defence, as opposed to using it to effectively attack the Plaintiff. One often sees this distinction used in criminal law, where the rules of evidence are applied less restrictively to defence evidence than to Crown evidence.[52] In this civil case, it does seem to suggest a judicial "splitting the difference," though perhaps not inappropriately.

Conclusion

Ultimately, Moir J.'s decision appears to be a sound and nuanced application of the law regarding admissibility of expert opinion. He carefully tailored the type and amount of expert evidence to be admitted, both to inform contextually the jury's fact-finding as fully as possible while at the same time minimizing the dangers associated with expert evidence. Paciocco and Stuesser have written: "for experts not purporting to rely on scientific propositions, reliability criteria appropriate to the area of expertise should be applied."[53] This decision represents at least an effort to develop exactly these kinds of reliability criteria, and perhaps necessarily to link them to the nature of the dispute before the court. The very thing that makes this decision interesting is what may limit its precedential value: that it was made in the context of a civil jury trial in a defamation case. One might expect a more inclusive approach to this kind of evidence before a human rights tribunal, for example, which is expected to actually remedy specific manifestations of systemic racism.[54]

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51 *Ibid.*

52 For a recent expression of this approach, see the remarks of Rosenberg J.A. in *R. v. Pollock* (2005) 23 C.R. (6th) 98 (Ont. C.A.) at para. 123 and authorities cited therein.

53 Paciocco & Stuesser, *supra* note 5 at 168.

54 As Moir J. noted (*supra* note 7 at para. 19), Dr. Henry herself had previously testified as to the racist content of telephone "hotline" messages by the Heritage Front in *Canadian Human Rights Commission v. The Heritage Front and other*, [1994] 1 F.C. 203 (F.C.T.D.).

The *Campbell* case does illustrate, however, that the admission of cultural evidence depends a great deal not only on the substantive law which applies, but on who the trier of fact will be. There is awareness that it is beneficial to ensure that the trier of fact has the tools to engage in culturally-reflexive reasoning in cases where cultural issues are engaged. This will be particularly significant where a jury is rendering decisions on facts, since the common law's historical faith in the "good faith" and "common sense" of jurors increasingly clashes with the recognition that the jurors themselves may have biases, assumptions or prejudices that might cause them to misunderstand or misinterpret the facts. In the absence of any sort of "cultural sensitivity training" for jurors,[55] expert opinion will be an excellent way of helping jurors to contextualize the facts—so long as the evidence itself remains subject to the rigour of the rules of evidence, with reliability screened and prejudice minimized.

Résumé

Au centre de toute considération de la « culture dans le domaine du droit » est la question si, et dans quelle mesure, la culture est justiciable, contestable et peut être introduite comme preuve devant les cours. Des experts des disciplines des sciences sociales et humaines sont souvent appelés à présenter ce genre de preuve. Alors que la Cour suprême du Canada a développé des critères pour évaluer la preuve par expertise, ceux-ci sont plus difficiles à appliquer lorsque la preuve présentée est de nature 'culturelle' plutôt que scientifique classique. Le souci de la probité de la preuve par expertise est accru dans les cas où un jury doit évaluer les faits. Ce texte commente une décision récente de la Cour suprême de la Nouvelle-Écosse, en matière de diffamation liée à des propos caractérisant un comportement de raciste, l'utilisant comme plate-forme pour discuter des enjeux particuliers soulevés par la preuve culturelle dans le domaine civil.

Abstract

Central to any consideration of "culture in the domain of the law" is whether and to what extent culture is justiciable, litigable, and subject to being adduced as evidence before courts and tribunals. Experts, usually from social science and humanities disciplines, will often be called upon to present this kind of evidence. While the Supreme Court of Canada has developed screening criteria for expert evidence, these criteria can be more difficult to apply when the evidence sought to be adduced is "cultural," as opposed to classically scientific. Concern for the reliability of the expert evidence is multiplied when a jury is acting as trier of fact. This comment reviews a recent decision of the Nova Scotia Supreme Court in a racially-charged defamation case, using it as a platform for discussing the unique issues that are raised when cultural evidence is sought to be adduced in civil matters.

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[55] The Canadian Judicial Council has recently begun a series of training programs for judges in what is termed "social context education;" see R. Cairns-Way, "What Is Social Context Education?" (1997) 10:3 National Judicial Institute 5.