

"Because I Say So" - A Reminder Of What Should Not Exist In Any Justice System

Posting Date: 20-Dec 2012

A recent NBC News documentary on the popular "Dateline" television program aired the story of Ryan Ferguson, a young man who was convicted of murder by a jury that had no objective evidence to rely on, but chose to believe the words of two witnesses who claimed that Ryan was a murderer. Those two witnesses subsequently recanted their stories, however a request for a re-trial was denied by the hearing judge. While many commenters were outraged by this outcome it reflects the very real problems with what courts come to believe, not only in the U.S. justice system.

As reported by Tonda MacCharles of the Toronto Star, in New Zealand a similar controversy has emerged as David Bain, who was wrongly convicted for the murders of his family in 1995, has now won the right to be compensated by the New Zealand government. This win was accomplished through the judgment provided by a retired judge of the Supreme Court of Canada, Justice Ian Binnie, who was hired to provide an objective and independent appraisal of the New Zealand government's actions. Not unexpectedly, Justice Binnie's report was strongly criticized by New Zealand's Justice Minister, Judith Collins and this has caused an uproar and Justice Binnie fired back claiming Collins' criticisms were politically motivated.

Whatever the true facts may be, the Toronto Star article reported an interesting comment made by Justice Binnie during his response to the New Zealand government's criticisms. He was reported to have said that New Zealand "has not had the wrenching experience Canada has had of probing wrongful convictions". It may be recalled that high profile Canadian wrongful convictions of Guy Paul Morin, David Milgaard and Donald Marshall, were overturned after many, many years. Why would the Canadian experience be such that these wrongful convictions occurred while it would appear, from Justice Binnie's comments, that similar events did not occur in New Zealand? It suggests that the courts in Canada, and in its Province of Ontario, are certainly no better at achieving justice than the U.S, or New Zealand.

We have made several references in previous news articles to the phrase that we coined "Because I Say So" - or BISS for short. We have stated that there should be no BISSing in any investigation, but that also applies to judgments of the courts.

It should not need repeating that investigations, their conclusions and the judgment of both must be based on objective fact. When there is a scarcity of objective fact the justice system has taken the position that whatever else remains can be used to judge someone's guilt or innocence. When objective facts do not exist what often remain are the statements of persons who witness, or claim to witness an event, or who claim to

have a particular expertise in interpreting the event. When the issues are of great importance, such as the murder, or accidental death, of a person, there is great pressure to reach a definite conclusion and to use witness information as the sole basis for reaching a verdict. When that verdict is delivered the justice system is obliged to provide a basis for that verdict and this is where BISS has its finest hour. It happened because Witness X says it happened. It happened because Lawyer X presented an eloquent depiction of how it happened. It happened because Expert X is a leading authority and he/she says it happened. It happened because Judge X has the power and last word to say it happened. It happened because certain influential persons in a jury claimed that there was no other explanation except that it happened.

We think it is necessary to remind the reader of the definition of dogma and dogmatic argument. Webster defines dogma as follows:

"Dogma...that which seems true. A settled opinion or belief; a tenet; an opinion or doctrine received from authority, as opposed to one obtained from experience or demonstration..."

Webster defines dogmatic as:

"dogmatic...Pertaining to a dogma or dogmas; having the character of a dogma, disposed to assert opinions with overbearing or arrogance; dictatorial, arrogant, authoritative..."

We should not need to be reminded that we live in the 21st Century where great technological advances are changing our society at an unprecedented rate. We can explore the surface of the planets, develop sophisticated robots and computers, and create incredible games, movies and animations for our entertainment. Yet, when it matters most, when it comes to assuring that our fellow beings receive justice at a point when they could be sent to a life-time of prison or death, we predominantly and utterly fail. We rely on medieval practices of argument amongst persons whose sole employment is not to deliver truth, but to package lies into something that looks like truth. We believe in a system that rewards the most intelligent but sly individuals to twist the facts in front of another individual who used to perform those same magician's tricks. And we expect that in this atmosphere justice will prevail. Why would we be surprised that, in too many instances, it does not?

For the lucky, groups of legal angels who stand to gain nothing, take on the task of untying those enormous knots, working for free, for a higher purpose. These are the true heroes of our society as they provide hope for those who have none by conducting objective analysis and reopening cases that were improperly concluded.

At this point we want to specifically point out the self-less work of an association in our country of Canada called the "Association in Defence of the Wrongly Convicted". They define their role as follows:

"The Association in Defence of the Wrongly Convicted is a non-profit organization dedicated to identifying, advocating for, and exonerating individuals convicted of a

crime that they did not commit and to preventing such injustices in the future through education and reform."

Unfortunately it would appear that this group does not have the resources to tackle the volumes of incidents where their services are needed. They appear to focus their work on the most important cases of murder where someone may be jailed for life or, in some jurisdictions, committed to death. In the field of traffic injuries and fatalities such associations just do not exist - perhaps because the consequences to the accused are less.

What strikes us, is the status of the justice system as it functions in the realm of civil litigation, where we are called in as experts to assist in the resolution of claims amongst the general society. Here we notice the lack of responsibility to document, collect, or preserve objective evidence. Our society greatly differentiates between whether we are injured or die by gun or knife versus by a similarly lethal weapon which is the automobile. We employ great police resources to gather evidence if a person were to use a knife to cause a minor surface injury to another being. Yet, we, our family, or our neighbours might be greatly injured or killed by an automobile but minimal efforts are employed by either police or insurance personnel to document and preserve the objective evidence.

If one were to speak to police on this issue, and we have on numerous occasions, there is the general belief that their role is to investigate issues where a "crime" has been committed. In Canada a crime is something that is enshrined in the Canadian Criminal Code. Police believe that events that do not fall into the definitions of the Criminal Code, are not their responsibility. We often hear the comment from police that "We are not here to do the work for insurance companies". In other words, insurance companies are left to gather and preserve the evidence that will be used to resolve matters under civil litigation.

But if you're not insured you are out of luck. You must privately retain your own lawyer and the expenses are simply impossible for most citizens to undertake. Heaven forbid that you should also become involved in a dispute with your insurer because again, you will be out of luck. Another hiring of a private lawyer with the usual expenses.

We are fully aware of what has been happening recently in Ontario because we have been retained by lawyers and insurers working both for plaintiff and defense sides. We are retained several years after the fact, mostly two years after an incident, when statements of claim have been issued or received. We are aware of the quality of the evidence that has been gathered and by whom, and we recognize how sadly lacking that activity has become. We see how everyone relies on the police to conduct their investigation and how everything is placed on hold until any charges resulting from the police investigation are cleared from the books. But we have already stated that it is the belief of police that it is not their responsibility to conduct work for civil litigation.

We also see that, those entities whose responsibility it is to document and preserve the evidence, outside of the police investigation, are not doing what they should be doing.

Accident sites should be examined by an expert as quickly as absolutely possible so that important evidence is not lost. Similarly, vehicles involved in a crash should be examined as quickly as absolutely possible. But not by an insurance adjuster or an investigator working for a legal firm, but by an expert with training and experience in the reconstruction of traffic accidents who understands what to look for and what needs to be documented and preserved.

Do you conduct an inspection when you send out a blind person to complete it? With no offense intended to the blind who can be perceptive in many ways, the point is that a person might as well be blind if they are not trained or do not possess the experience of recognizing evidence that must be documented and preserved. We see how frequently a set of general photographs have been taken of an accident site or vehicle and this is termed an "investigation". We say the documentation has been performed by a blind person because, in substance, that is what it is.

What has become common place is that investigations outside of the police have also become restricted. In part, the insane events of the terrorist attacks on September 11, 2001, have dramatically changed the face of North American society such that we have become paranoid, searching every drawer of life for something evil. This has had dramatic consequences for something so simple as the private investigation of a traffic accident. For many years previous to 9-11 we conducted a variety of inspections of collision sites and vehicles without disturbance. Now, it would appear that any time someone takes out a camera or video camera in public there is a swarm of concern that the documentation may be related to terrorism or some other criminal activity. But this is also the result from other changes in our society.

With advances in technology, criminals use activities that appear to be simple acts of everyday living to commit their crimes. Advances in digital photography and mobile phones allow pedophiles to take advantage of the vulnerable in our society. Scam artists use modern technology to spy on persons or to cheat them out of money. These activities have become more sophisticated and our society has been forced to restrict our daily activities and freedom. In this realm, investigation and documentation for civil litigants, has been pushed aside on the ladder of importance.

We used to be able to enter onto an inter-state style expressway such as Highway 401 in Southern Ontario to perform our investigations after the police had opened the road. That is no longer the case. Various permissions have to be obtained before anyone is able to step out of their vehicle on such a roadway. In fact, it is against the law and an expert hired to conduct such an investigation could theoretically be charged in Ontario for performing such an investigation.

It was not long ago that an expert retained by a lawyer or insurer could walk into a towing yard and conduct an examination of both vehicles involved in a head-on crash. That is no longer the case. Now the expert must be certain that permission has been granted "by the other side" before their vehicle is examined. The two vehicles may be sitting side-by-side in the towing yard but the expert cannot perform the examination of the other vehicle, and so that examination is not performed.

Witness information used to be provided by police without any permission required from the person who authored that statement. That is no longer the case. While that is to protect so-called personal information, it also prevents someone from defending him or herself when they cannot obtain the statement that is being used to convict them.

Police reports used to be available almost free-of-charge for the purpose of resolving a matter under civil litigation. That is no longer the case. Individual police forces have set up user fees where they charge thousands of dollars for their reports, even though their activities have already been paid for by citizens through their taxes. Police photographs charged at \$50 a piece are commonplace in Ontario. If a person in Ontario earning \$1000.00 per month must pay for 50 or 100 police photographs, must buy a police report for \$2500.00 and then must still pay for legal fees and the fees of any experts, can any reasonable person claim that we have universal access to justice in Ontario? Obviously important evidence will not be paid for and will not be available for evaluation.

When matters press toward trial, experts then prepare their reports based on bad evidence. If the site or vehicles have not been examined the reports must rely on whatever police have gathered. The incident may involve permanent injury to someone resulting in life-long incapacity however, if the incident did not immediately appear to be life-threatening then police will not call out an Accident Reconstruction unit and there will be minimal investigation performed with no photographs and at times, even no measurements. What quality of experts' reports can be expected from this lack of documentation and preservation of evidence?

Granted, with the advances of technology, expert analysis can perform considerably better than they did even ten years ago. Advances in digital scanning and photogrammetry can pull out details from photographs or old sites that could not be dreamed of only a few years ago. But this is not always the case. Generally, poor initial investigation leads to a waste of resources when experts have to conduct a variety of miracles to retrieve something that could have been done through an initial measurement or simple photograph on the date of the incident.

Poor investigation also leads experts to competing theories about how an event occurred and more time and resources are lost as experts file rebuttal reports back and forth, while lawyers rack up large fees in their negotiations. Poor investigation only makes lawyers rich, it helps no one else.

At trial opposing experts and lawyers can spin the facts so quickly that it can be a true challenge to catch something of substance that can be clearly understood. With the advancing complexity of our society experts become so focused in their activities and experience that only colleagues amongst them can clearly understand the meaning of their data and reports. It becomes increasingly more difficult for judges and, even more so, juries to get a firm grasp of the technical issues. When they cannot grasp the meaning of technical evidence some become dogmatic to hide that fact.

Perhaps the largest single failure of our justice system is that it relies on the word of experts who are retained under a conflict of interest. By virtue of being hired by one side

or the other the expert's testimony becomes compromised because no one can be certain whether the expert's words are being affected by their client relationship. This is not just a criticism of the private expert/ lawyer relationship but it also exists in those situations where experts are employed in police crime labs or any official position working for the government's prosecution.

In the Province Ontario, a well-publicized case involving a highly-regarded pediatric, pathologist, Dr. Charles Smith, high-lighted how reputation and a position of importance in a hospital setting allowed the Doctor to make subjective opinions/claims against persons which led to various convictions. The case was presented by many as the action of an incompetent and unethical individual, not characteristic of the profession as a whole.

However, a 2010 article published by Canadian Broadcasting Corporation (CBC) news commented:

"When it comes to autopsy reports, the field of pathology can be a subjective one. It's based on research and opinion, and it's especially controversial in Canada, where there is no formal training or certification process. Only a handful of practitioners in Ontario are entrusted with the job — and they've learned by doing."

In our opinion, the problem is not Dr. Charles Smith himself, it is a problem of relying on what he said because it was he who said it. There continue to be numerous situations where other doctors, engineers, or essentially any scientists or experts make comments and provide opinions that are subjective. They are believed because of who they are and not because anyone truly understands what they say, or can come to an informed belief that they are correct in what they say. It is not a problem with the individual. It is a problem with a system, the justice system, that fails to understand, or refuses to understand, that the practice is rampant across all fields. Not just in expert testimony, but in the actions of witnesses, in the actions of lawyers and in the judgments of judges and juries. There is no place for this type activity in the courtroom.

There are specific recommendations we can make in the field of expert opinion in which we operate our business. Whoever provides an expert opinion in court should be completely free of any conflicts of interest. That simply means that they should not have any interest in the outcome except fairness and the achievement of justice. This means that experts should not be retained by lawyers representing one side or the other. They should also not be employed in a police crime lab or similar group where their allegiance has to be maintained with police and the prosecution. This may mean that private individuals and their lawyers should be able to submit questions for evaluation along with prosecuting agencies anonymously so there is less likelihood that the outcome can be traced to the favour of one side or another.

Experts should be paid in a manner that does not leave them beholden to the persons or organizations who may be perceived to represent the prosecution, defence or plaintiff sides of an action or charge. Their services should be requested from a central agency that keeps the original requestor's identity anonymous until after the expert has

submitted a report. The experts' income or business success should also not be tied to the outcome that they provide in their reports and conclusions.

But the problem does not just rest with expert witnesses. The courts must demonstrate that they understand the meaning of dogma and that there is no place in the courtroom for beliefs based on "Because I Said So". In a properly functioning justice system dogma should not be more acceptable the louder it is spoken or because it has been disguised in marketable poetry. It should be rooted out for what it is. Witnesses should not be believed, just "because they say so". Judgments should also not be allowed to be made just "because judges or juries say so".

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