EVIDENCE IN THE FUTURE

PERRY MEYER*

Montreal

Trying to predict the future is always a dangerous occupation. Nevertheless, it seems to be a worthwhile exercise to take a look at current trends in the law of evidence and the trial process, and to envisage the significance of present developments and their meaning for the future, both on a short term and on a long term basis. Some tendencies are already clearly present while others are of a far more speculative character, and may or may not come to fruition. In addition, some of the actual or possible trends with respect to evidentiary techniques and the proof of facts carry with them certain grave dangers whose impact is hard to assess. The present article will attempt to deal briefly with some of these matters, as they affect both civil and criminal trials, as the kind of speculation involved here concerns both civil and criminal rules of evidence and proof.

In discussing the future of the law of evidence, it is useful to bear constantly in mind what Professor C. Perelman of Brussels has called the conflict that exists between the values of "Truth" and "Justice". The goal of the fact-finding process is too often assumed to be simply truth, in some objective sense. This is especially true, at least in theory, where the inquisitorial procedure prevails, namely, on the continent of Europe, and especially in the Soviet Union. (In practice, however, we know that so-called "objective truth" is often a mask for purely political goals, some of which are hardly commendable from our point of view. However, at least in theory, the idea of scientific proof of objective facts does constitute the basis of at least one view of the trial process.) To the value of truth, one can oppose the value of justice, namely, the existence of other values which we desire to protect, sometimes at the expense of absolute scientific and objective truth. For example, we may wish to bar wire tapping because we place the value of privacy at a higher level than that of ascertaining whether or not a particular conversation took place. We may bar the admissibility of a confession, not because we believe it to be untrue, but because it was obtained through duress, and we do not wish confessions to

* Perry Meyer, of the Faculty of Law, McGill University, Montreal.

be obtained in this manner. In the United States, a doctrine has grown called "the fruit of the poisoned tree", which even denies the admissibility of objectively valid evidence obtained as the result of a confession which does not meet the required conditions. Thus, in the United States, an accused who is interrogated illegally, and whose confession is inadmissible, may in the confession provide the police with information which leads them to the murder weapon and the corpse, and they might very well be able to obtain a conviction on the basis of ballistics evidence, the fingerprints of the accused, and similar proof, without having to introduce the confession at all in court. However, in order to protect fundamental human rights of an accused, the American courts will not permit the introduction of any of this evidence, so that a man who is known to be guilty will be allowed to go free because of the conduct of the police. This is a classic example of the prevalence of the value of justice over the value of truth in the trial process.[1] Other examples would include cases of professional secrecy, where a privilege is given to the doctor or the priest who need not respond to questions relating to matters revealed to him confidentially, even if this means denying the court access to truth, always to maintain the value of privacy and enhance the relationship between the professional and his patient or client. A similar privilege exists in most jurisdictions with regard to communications on a confidential basis between husband and wife, where the marital relationship is considered to be more important than the obtaining of evidence which will lead to the greater likelihood of the courts ascertaining the objective facts in a particular case.

When we discuss the future of the law of evidence, we must bear in mind two opposing tendencies. On the one hand, there is a discernible trend towards the liberalization of the rules of evidence, which become more informal, and at the same time the development of new techniques for ascertaining the objective scientific truth. Thus, an emphasis on the value of truth leads to the elimination of restrictions on the kinds of proof which may be offered, and the development of new kinds of evidentiary techniques which may constitute infringements of privacy. On the other hand, there is an opposing tendency in current developments which is based on the value of justice, and which leads to the imposition of new restrictions on the kinds of evidence which are admissible, so that certain values other than scientific and objective truth may be protected, even at the expense of denying the court access to certain types of information. These two contradictory trends are

[1] In the Halacha, or Hebrew law, confessions were *totally* inadmissible, no matter how voluntary they might appear to be, because of the dangers inherent in their acceptance: some kind of subtle pressure or coercion, the role of guilt, masochism or other factors.

evident at the present time in current developments in the law of evidence, and they may even be exacerbated in the future to the point where a genuine conflict may develop in certain areas which may be exceedingly difficult to resolve, when one has to decide which value is of more importance in a particular kind of situation.

While the law of evidence has basically remained unchanged for a comparatively lengthy period of time, certain short term changes have already begun to take place which clearly indicate that this area of law is participating, at least to some extent, in the rapid changes that are occurring and will occur even more as time goes on, in a great many areas of law. In the short term, the clearest discernible tendency is the elimination of exclusionary rules of evidence, which seem to be gradually disappearing in many different legal systems. Many of these exclusionary rules have origins going back to the sixteenth or seventeenth centuries, and originate in an era when there was a distinct fear that witnesses would perjure themselves and lie under oath in order to obtain advantages for themselves. In order to prevent and minimize the impact of this kind of behaviour, the Statute of Frauds was adopted in England which made testimony inadmissible in many kinds of cases, and required a writing in these instances. A parallel development took place almost contemporaneously in France, where it was enacted that testimony was to be the exception, and that in general a writing would be required to make evidence in any case unless testimony was specifically permitted. These rules in the common and civil law systems have lasted right down to our day, but for the first time we are now seeing substantial modifications of them. The Statute of Frauds seems to be on its way out in many common law jurisdictions, and has already gone to its eternal rest in England. The Province of Quebec, which up to now has been blessed (or cursed) with evidentiary rules in its Civil Code which provide that in civil matters both the restrictions of the common law and of the civil law apply, may shortly see drastic revisions and eliminations of these exclusionary rules which have had a cumulative impact in Quebec because of the dual nature of its legal system. It is conceivable that in the near future Quebec will no longer distinguish between civil and commercial matters, and will allow testimony in all cases, whereas at the present time the Statute of Frauds still applies in commercial cases, and in most civil cases, with some exceptions (for instance, damage actions), a writing is generally necessary.

Other exclusionary rules of evidence are likely to go the same way as those which require the existence of a writing. The hearsay rule is a prime example, and may become as extinct as the dinosaur if current trends continue. The Court of Appeal in Quebec has already drastically reduced the impact of the hearsay rule in

civil cases, and has held that where the best available evidence in a case is hearsay, then, in accordance with the best evidence rule, the hearsay evidence is admissible. In common law jurisdictions, the trend seems to be to enlarge the exceptions to the hearsay rule in order to gradually weaken its impact and to permit more and more instances of hearsay as admissible evidence. One can only commend these developments and urge courts and legislatures to go even further.

It must be remembered that the hearsay rule, like many others, grew out of the jury trial, and the lack of confidence in lay persons to weigh evidence properly, and to determine what probative force, if any, to give to admissible evidence. Today, with a much better informed public, and also better trained and more competent judges in whom one can have considerably more confidence than in the past, it becomes extremely important to distinguish *admissibility* of evidence from the *weight* to be given to such evidence. If we have confidence in the particular decision-maker in a case, we should have no hesitation to admit evidence which was previously held to be inadmissible, and assume that the judge will have sufficient skill and intelligence to decide whether any particular evidence, which is admissible, should be given any weight, and if so, how much weight to give to it. In most cases where the hearsay rule or other exclusionary rules are justifiable, the same results would obtain if the evidence were admitted, and the judge then came to the conclusion, in weighing the facts, that he would give little or no weight to such evidence because of its tenuous and secondary nature. However, the existence of a rule which excludes hearsay or other evidence may prevent an intelligent decision-maker from giving proper weight to evidence which could have considerable value in determining a case, because the evidence is simply not before him and he must disregard it. In this case, therefore, I believe that the value of truth would seem to dictate that the elimination of the hearsay rule and other exclusionary rules is eminently desirable and necessary, and further the value of justice would also concur and would in no way be opposed to the same changes in the law of evidence.

Another aspect of the trial process which has been in a state of change for some time is that which relates to the respective roles of judge and lawyers, particularly in the adversary system which exists throughout Canada and in the common law world, as compared with the inquisitorial systems. In the past, it was always felt that the role of the judge should be a passive one, that the conduct of the trial was primarily in the hands of the lawyers, and that it was up to them to object to illegal evidence, to bring forward evidence on behalf of their clients, and generally to see to the development of their cases. The judge's function was felt to

be best served by acting as an impartial arbiter without intervening in the unfolding trial himself, or at least keeping his interventions to an absolute minimum. I recall being told by one distinguished Canadian lawyer in the not too distant past of a case in which the plaintiff had completed his proof but had neglected to bring forward evidence with regard to one essential fact without which his case must fail. Upon his declaring to the court that his proof was closed, the judge turned to his opponent and asked if the latter had any motion to make, whereupon the attorney for the defendent moved that the action be dismissed for lack of sufficient proof, and the judge immediately proceeded to grant the motion. No one would expect this kind of conduct of a judge any longer, and it is clear that the court has a duty, in the interests of justice as well as truth, to intervene where necessary in order to point out gaps in the proof, and even to bring in proof which one or other lawyer has forgotten or has not considered necessary. We now believe more and more that the court has a duty to protect parties from the errors or omissions of their own attorneys, and that cases should not be won or lost on the basis of a lawyer's skill, but on the basis of the strength or weakness of the case. Of course there is a danger inherent in an active participation of the court, namely, that to participate is to show an interest or bias in those areas in which one does participate, and therefore the danger of partiality on the part of a judge becomes more likely; at least, this is the traditional argument made by lawyers trained in the adversary system. To some extent, these fears of common lawyers are borne out by the experience in some of the civilian countries of Europe where the inquisitorial system is in force and where the judge is an active participant and in fact the principal interrogator of witnesses. (It is only in comparatively recent times that the lawyers in inquisitorial systems have been given status before the courts and been permitted to question the witnesses themselves and to cross-examine.) On the basis of current trends, then, it seems likely that we will see a continued evolution of the adversary approach in the direction of the inquisitorial model, and an increased recognition of the desirability of having the judge himself participate in the fact finding process. Considering the fact that the inquisitorial systems have also been moving more and more in the direction of the adversary approach of the common law world, it may not be far-fetched to forecast an eventual convergence, and it may become increasingly difficult to distinguish adversary from inquisitorial procedure at all at some time in the future.

We have thus far been discussing currently discernible trends and short term developments which are also likely to continue on a long term basis. At this point I should like to look at some other

possible long term developments, which are barely discernible at the present time, although some of them are the subject of experimentation in a number of different jurisdictions.

One of the problems that has always confounded judges and lawyers is the question of credibility. It is often extremely difficult to decide whether a witness is telling the truth or not about some or all of the facts which are in issue. When two witnesses contradict each other it is often of the greatest importance for the court to determine which of them is telling the truth, and sometimes it may even be that the witnesses on both sides are biased and are giving versions which are either deliberately or unconsciously deviations from the objective facts. The value of truth requires that this problem be solved, and clearly in any case where the facts are in issue, it is of the utmost importance in order to satisfy the value of justice that the court arrive at a proper determination of the facts. Even if the most advanced and satisfactory rules of law are applied to facts which have been incorrectly determined, injustice is the inevitable result. There is nothing so unjust as the condemnation of an innocent man, condemned for a crime he did not commit; this strikes us much more forcibly than a case in which the issue is whether technically, as a question of law, a particular act does or does not constitute a crime. In a civil case involving responsibility for an automobile accident, there can be nothing more unjust than the condemnation of a defendant to pay damages because he was exceeding the speed limit, when in fact he was not exceeding the speed limit at all, and the determination of facts is based on the perjured testimony of the opposite party. How can these factual problems be resolved? At present we rely exclusively on the skill of the lawyers in examination and cross-examination, and the skill, intelligence and common sense of the judge, who, we hope, will intuitively know whether a witness is truthful or not. But surely there must be more scientific and objectively valid methods of distinguishing truth from falsehood.

A number of methods have been suggested, and are even partially in use in some jurisdictions, to solve the dilemma we have just discussed. Let us examine some of these and see whether we can distinguish their positive and negative features, and whether they can offer us any hope for the future.

I. *The Polygraph (or lie-detector).*

This instrument purports to measure certain bodily functions (respiration, pulse, and so on) and to determine, on the basis of anomalies during response to questions, whether a witness is telling the truth or not. The theory behind the instrument relies on the fact that someone who is lying is under emotional stress

and the graphs of the various bodily functions should suddenly deviate appreciably from their normal patterns at the moment that the witness consciously tells a falsehood, due to his guilt, anxiety, and emotional tension. There have been a number of cases reported which document the utility of this apparatus, and there is no doubt that in certain cases it has prevented injustice, by leading to freedom for the innocent or the conviction of the guilty. When confronted with a lie-detector test which indicates that they have not been telling the truth, suspects who have previously stuck to a denial have been known to suddenly reverse themselves and confess to their guilty behaviour in great detail. In other cases, lie-detector tests which have confirmed the innocence of the suspect have led to further police investigation and action which has resulted in the apprehension of the person actually guilty of the crime.

In spite of the foregoing there are a number of crucial objections to this procedure, at least in its present state of development. One is the dependence on an expert who allegedly knows how to read the complex graphs in question and whose opinions determine the truth or falsehood of the evidence of the person being tested. At the present time, the level of expertise in this field has not been shown to be sufficiently high to justify confidence in the lie-detector expert, although perhaps at some stage in the future, after further developments and refinements, we may be able to have more reliance on this particular technique. There is, in addition, the infringement of privacy involved in forcing an individual to take a lie-detector test when he does not wish to do so, and we are faced here with a possible denial of the value of justice as compared with that of truth. We must also consider the advisability of delegating the task of determining the credibility of the witness to a so-called expert, when all our present thinking is that the final determination should be in the hands of the ultimate decision-maker, namely, the judge. Finally, there is the crucial question of whether the technique is really universally applicable at all. It may well be that certain personality types, particularly sociopathic or psychopathic persons, may have completely undisturbed polygraph readings when they are lying through their teeth, whereas others may show abnormal readings due to heightened anxieties, masochistic tendencies, mental illness, or guilt feelings arising from other circumstances. The use of this technique, therefore, may lead us astray, and could lead to the conviction of the innocent or the freeing of the guilty, precisely the result we are trying to avoid. However, as a matter of pure speculation, it is possible that the day may come when this technique, or some analagous method, has been so refined that not only in criminal trials, but in civil trials as well, the expert will testify before the

court as to the truthfulness of a party or even a witness who is not directly involved in the case. Thus it may be that in future judges and courts will be entirely justified in relying on the opinion of such experts and basing their findings totally upon such opinions, just as they now do in technical matters relating to accounting or structural defects of buildings.

II. *Narcosis (or narco-analysis).*

This technique involves the administration of truth drugs or truth serums, such as sodium pentothal. Under the influence of these drugs the subject's inhibitions are supposedly broken down and he will tell the truth even if, when fully conscious, he would lie convincingly. If we could have complete reliance on the statements made by a person under the influence of a truth serum, there is no question that the value of truth would be served, but as to the value of justice, that is quite a different matter. The fundamental right to privacy of the person involved would surely be infringed by obliging him to submit to this procedure. There is also a question as to its accuracy, at least at the present time. There are well documented cases where the technique has been used with very favourable results, but there is also accumulated evidence that it does not always work. As in the case of the lie-detector, there seem to be individuals who even under the influence of a truth drug can continue to maintain their defenses and resist telling the truth. Worse, there seem to be other individuals who, because of their anxieties and guilt feelings which may arise from totally different matters than the particular crime of which they may be accused, will fantasize under the influence of the drug and involve themselves in imaginary guilty behaviour of which in fact they are not in the least guilty. Such drugs may also cause schizophrenic or psychotic behaviour, thus decreasing the likelihood of ascertaining objective truth and increasing the danger of convicting the innocent. There thus seem to be substantial grounds for rejecting the use of this technique, at least in the present state of the art. Again, one can foresee a day in the future when the technique may have been sufficiently refined to permit its use, perhaps only in severely restricted circumstances when it is so essential to know the truth that the value of privacy may have to be given short shrift. However, as a general rule, and in most circumstances, society may continue to reject the use of this kind of procedure on human and ethical grounds, even at the expense of denying the courts access to factual material which would enable the judge to make a proper determination of the facts in a particular case.

III. *Hypnosis.*

Many of the comments relating to narcosis are applicable to this

technique as well. Suggestible individuals who have been hypnotized may, like those to whom a truth serum has been administered, fantasize out of guilt or mental illness and, although innocent, wrap themselves in a cloak of plausible guilt. The general unreliability of the technique in the present state of the art, as well as the infringement of the fundamental rights of the individual concerned (although one must be suggestible in the first place in order to be hypnotized, and it is said that one cannot be hypnotized against his will) would seem to indicate the rejection of this technique, like narcosis, at least for the present.

IV. *The Use of Experts on Credibility.*

At the present time experts and assessors are often used by courts to determine matters within their field of expertise, and their reports to the courts are accepted as proof of the facts in question. Sometimes we are faced with court-appointed experts in accounting matters, or questions of building defects. At other times the experts may be part of the adversary process and may be testifying for both parties, as is usually the case with medical experts testifying about injuries and disability in automobile accident cases. We can, therefore, easily conceptualize the use of experts on questions relating to credibility of witnesses. Such experts might be clinical psychologists, psychiatrists, psychoanalysts, and so on. They could be court-appointed experts, or could operate in an adversary context, so that the court might be faced with two conflicting opinions with regard to the credibility of a particular witness. By observing the comportment of witnesses, their demeanor, their behaviour in court, or even their behaviour out of court, experts might be called upon to then give their opinion with regard to the credit to be given to the evidence of a particular witness, either in a given area, or generally. The courts might even permit such experts to administer certain kinds of tests to witnesses out of court, to interview such witnesses at length, perhaps in the context of a doctor-patient relationship, or to delve into the witnesses' backgrounds. The conclusion of such experts would then be very much in the same category, as far as admissibility is concerned, as the testimony of the polygraph expert with regard to the outcome of a lie-detector test, or as the evidence of the psychiatrist, doctor or hypnotist who administered a truth drug or hypnotized the particular party or witness and then gave evidence of the results of the narco-analysis or hypnosis. Therefore, the same kinds of objections would apply to this kind of expert testimony. The human mind is such a complex labyrinth that one cannot say that psychiatry, psychoanalysis, or psychology are as yet in anything but their infancy as sciences, and in many respects they are more

like arts. Probably the time is not yet ripe for as much confidence to be given to explorers of the human mind and their testimony as to their findings as we are presently prepared to give to men who explore the heavens, the atom, or the surface of the moon. Infringements of fundamental human rights, such as privacy, are also self-evident if this kind of expert testimony is admitted. Moreover, there is the problem of the delegation of decision-making power, for all that may really be happening if this technique is accepted would be the substitution, for the intuitive common sense of the judge, of the jargon and alleged scientific determination of the expert, who, in fact, may, in the last analysis, be relying on his intuition and common sense no less than the judge, although he is better able to mask it with the complexities of the terminology and perspectives of his own particular discipline. We can again say, I think, that while this technique may be envisaged for the distant future, it is not something which we should leap into at the first opportunity, unless and until much harder data are available.

It is interesting to note that in November, 1972, the results of a polygraph (lie-detector) test, one of the methods just discussed, were admitted in evidence for the first time in Canada, in a trial for non-capital murder in the province of Ontario. The defence had taken the position that this was basically the only means of determining the truth where several key exhibits had been lost, and where the accused had confessed to the police. The psychiatrist who administered the test gave evidence at the trial to the effect that the polygraph results indicated that the accused had lied in his confession. The same psychiatrist also administered sodium amytol to the accused, that is, employed narco-analysis as well. The psychiatrist also testified that persons with anti-social personalities, such as the accused, tended to lie to make themselves appear important, and that he personally would not believe anything they said without substantiating evidence such as the polygraph.[2]

V. *Judges as Experts.*

One can also envisage the appointment of judges or fact-finders with expert qualifications not presently possessed, or in-service acquisition of this kind of expertise. Judges themselves could, in theory, be as up-to-date with respect to scientific and accurate criteria and methods for determining credibility as any other profession or discipline. If a judge possesses sufficient expertise, due to his background and specialized training, to evaluate the reliability of witnesses without necessarily depending on psychologists

[2] See report in the Montreal Star, Tuesday, November 7th, 1972, p. B-7.

or psychiatrists for expert opinions, the latter could be dispensed with. Such a situation implies a considerable improvement in our present know-how, and that current criteria and techniques, to a great extent unreliable and obsolete, would be superseded.

In addition to the various techniques we have just described, there are of course a great many others that could be imagined or envisaged. With respect to all of these, what is required is a lot more fundamental research, using adequate experimental techniques, including appropriate laboratory conditions, random sampling, adequate methods of verification and cross-checking of experimental results. To provide a basis for further research we also need a great deal of imaginative speculation with regard to possible innovations, which can then be checked out. Only after devotion of considerable financial and human resources to such experimentation, and refinement of the crude methods now available, will we be in a position to advocate wide-scale adoption of new and radical evidentiary methods in the civil and criminal court room.

However, we may find that even in the absence of such research and experimentation (and unfortunately, at the present time, nothing like the financial and human resources required are being devoted or seem likely to be in the near future) there is inevitably going to be a certain amount of evolution and experimentation with regard to the form and content of the trial procedure as we now know it. Greater informality in the future seems likely, including a willingness to experiment on the part of the courts, who may be inclined to borrow from other areas of fact-finding, where a less rigid system exists, and where the decision-makers have not been hemmed in by a complex structure of rules and procedures which have grown up over a lengthy period of historical development. Thus, the courts may turn to such areas as labour arbitration, or the techniques used for certain kinds of scientific investigations, or those employed in administrative inquiries. But if this takes place, it is highly likely that there will always be a greater degree of formalism in the court system than there is in newer and less developed modes of fact-finding, where the consequences for society and the fundamental rights of human beings may not be at stake to the same extent. But in theory, at least, there is no reason why a judicial system should not permit a certain amount of experimentation and loosening of the tight rules of procedure and evidence, provided that the negative consequences of this are clearly anticipated and forestalled. New models may be constructed in the future, such as, for example, round table discussions between witnesses, parties, lawyers and judges, where the give and take between the various persons involved in the fact-finding procedure may result in a more precise determination of the truth, as compared with our present rigid methods of examina-

tion and cross-examination, where the sequences of questions and answers, and their permissible content, is so rigidly controlled for so many different reasons, some of which may still be valid, while others have no apparent purpose and have been sanctified only by their use through lengthy historical periods. Some areas of the law of evidence will obviously require more immediate action out of sheer necessity. For example, we need new rules to deal with the admissibility of computerized data where the traditional law is obviously inadequate to serve the needs of the new technology, and where traditional concepts relating to cross-examination or hearsay just cannot be fitted to the new problems. Other areas are not of the same obvious urgency, and immediate action, whether by courts or legislatures, is much less likely.

One caveat is important. Overoptimistic publicity about new techniques can quickly arouse the public's interest and enthusiasm. If hopes are raised concerning infallible fact-finding methods and these then prove unjustified, this may lead to premature disillusionment, at least in the short term. Nevertheless, optimism is certainly justified on a long-range basis, as long as it is tempered by a certain wariness and caution about the immediate future, as well as by the realization that absolute certainty and accuracy in fact-finding is an ideal, rather than an achievable goal.

We must always remember that the accuracy of the fact-finding process, and the rendering of justice on the basis of the true facts, as determined by the courts, is of tremendous importance to the structure of our society. The fabric of a democratic community is only strong to the extent that its authority and legitimacy are not being contested by large dissatisfied sections within that community. The courts have a fundamental role as one of the more important institutions on which the credibility and legitimacy of a democratic society depends. In this era of contestation it is of extreme importance that the courts perform their functions in a manner which satisfies the values of both truth and justice, insofar as is humanly possible. Wherever it can be demonstrated that improvement is needed, we must not hesitate to urge those changes and reforms which will improve the decision-making process in the courts from every point of view. The rules relating to the law of evidence and the fact-finding process in the courts, as well as those governing the procedure involved, constitute one of those areas which contribute to the overall impression that the public has of the administration of justice. It may well be that ongoing and forthcoming changes in these rules may play a crucial role in maintaining and enhancing a strong democratic society whose central concern is the search for human dignity.