

**NATIONAL SEWER PIPE
CONSOLIDATED HEARINGS BOARD**

September 30, 1988

CONSOLIDATED HEARINGS BOARD

IN THE MATTER OF an application by the Town of Milton for an Order allowing the Town of Milton to call further evidence immediately following the application relative to observations in a test pit at proposed Site "D", Milton, by Nicholas Eyles, Ph.D. a Quaternary geologist.

LAW

1. Before judgment has been delivered, a trier of fact has a wide discretion to permit further evidence to be adduced, either for his own satisfaction or where the interest of justice requires it. The discretion is exercised by trial judges in many different situations and for different reasons. }

The Law of Evidence in Civil Cases by Sopinka and Lederman at p. 541

2. A tribunal should avoid the strictness and formality of court procedures. }

Administrative Law and Practice by Reid and David, at p. 75.

3. Before judgment has been delivered, the trier of fact is in the best position to decide whether further evidence should be allowed. The trier of fact may consider the actual evidence which is proposed to be adduced, in order to decide whether such evidence should be admitted. //

Scott v. Cook, [1970] 2 O.R. (2d) 769 (H.C.J.) at pp. 770-771

Hengab Investments Ltd. v. Vicenti (1981), 24 C.P.C. 192 at p. 197 (Ont. Cty. Ct.)

Ont. Motor Sales Ltd. v. Steeves, [1959] O.W.N. 205 (Ont. C.A.)

THE LAW
OF
EVIDENCE
IN
CIVIL CASES

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CHAPTER 8

Reopening Trial and Leading Evidence on Appeal

A. REOPENING TRIAL

There are three stages after the evidence has been completed during which an application to adduce fresh evidence can be made:

- (1) After the evidence has been completed but before reasons for judgment have been delivered;
- (2) After reasons for judgment have been delivered but before judgment has been entered;
- (3) After judgment has been entered.

With respect to stages (1) and (2), there is no difference in the test to be applied. The trial judge has a wide discretion to permit further evidence to be adduced, either for his own satisfaction or where the interest of justice requires it.¹ The discretion is exercised by trial judges in many different situations and for different reasons. A common ground on which such evidence is admitted is that a party has been misled by the other party's case.² In *Devins v. Hannah*³ the trial judge, who had reserved judgment, permitted a party to call a witness who was known to the party at the time of the trial but unavailable. No application for an adjournment had been made. An application was made, however, after judgment had been reserved. The trial judge's order reopening the trial was reversed on appeal. An

¹*Sunny Isle Farms Ltd. v. Mayhew* (1972), 27 D.L.R. (3d) 323; *Woodworth v. Gagne and Gagne*, [1935] 3 W.W.R. 49, at pp. 49-50.

²*Barker v. Furlong*, [1891] 2 Ch.D. 172, at p. 184.

³[1921] 3 W.W.R. 350.

inadvertent omission, however, to prove an essential fact due to an error of counsel, was considered a valid ground for reopening the trial to allow the fact to be proved.⁴

After judgment has been entered, the discretion of the trial judge is circumscribed by well recognized rules. Except in the case of fraud or surprise, the evidence must be newly discovered evidence which reasonable diligence could not have discovered⁵ during the trial, and it must be of such a character that it would have formed a determining factor in the result.⁶ In *Gass v. Childs*,⁷ Ritchie J.A. stated the test as follows:

"In order to justify either the reception of fresh evidence or the ordering of a new trial the three conditions set out hereunder must be fulfilled:

- '1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.'

The second requirement set out by Ritchie J.A. is a compromise between two lines of authority. In *Brown v. Dean*⁸ Loreburn L.C. stated the test as follows: "...it must at least be such as is presumably to be believed, and if believed would be conclusive."

Lord Shaw, however, doubted that the evidence was required to meet so stringent a test. In his opinion:⁹ "It is possible to figure cases in which it might be so gravely material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the jury in giving its decision." On the other hand, in *Hosking v. Terry*¹⁰ the Privy Council considered the

⁴*Ontario Motor Sales Ltd. v. Steeves*, [1959] O.W.N. 205; and see Rules of Practice and Procedure of the Supreme Court of Ontario, R.R.O. 1970, Reg. 545, R. 256.

⁵*Glatt v. Glatt*, [1937] S.C.R. 347, [1937] 1 D.L.R. 794, at p. 795.

⁶*Hosking v. Terry* (1862), 15 Moo. P.C. 493, at pp. 503-504, 15 E.R. 581; *McGuire v. Haugh et al.*, [1934] O.R. 9, [1934] 1 D.L.R. 534; *Clayton et al. v. British American Securities Ltd.*, [1934] 3 W.W.R. 275; *Hip Foong Hong v. H. Neotia & Co.*, [1918] A.C. 888, at p. 894.

⁷(1958), 43 M.P.R. 87, at p. 93.

⁸[1910] A.C. 373, at p. 374.

⁹*Ibid.*, at p. 376.

¹⁰(1862), 15 Moo. P.C. 493, at pp. 503-504.

test was met if the evidence "might probably have altered the judgment".¹¹ In *Hip Foong Hong v. H. Neotia & Co.*,¹² Lord Buckmaster appears to have adopted the middle ground when he stated that the evidence must be such that it would "have formed a determining factor in the result".

This test is not, however, to be applied in its full vigour to summary statutory proceedings such as, for instance, affiliation proceedings in which there is an element of public interest. Accordingly, in an affiliation proceeding the Appellate Division of the Alberta Supreme Court would have reopened the case to allow new evidence to be introduced, notwithstanding that it might have been discovered with due diligence, if the court had not come to the conclusion that the failure to adduce the evidence was a tactical decision.¹³

B. LEADING EVIDENCE ON APPEAL

In the Court of Appeal and in the Supreme Court of Canada, admission of new evidence is governed by the rules and by statute. For instance, Ontario R. 234 provides as follows:

- (1) On all appeals, or hearings in the nature of appeals, and on all motions for a new trial, the court or judge appealed to has all the powers as to amendment and otherwise of the court, judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the court or judge appealed to, or as may be directed.
- (2) Such further evidence may be given without special leave as to matters that have occurred after the date of the judgment, order or decision from which the appeal is brought.
- (3) Upon appeals from a judgment at the trial, such further evidence, except as mentioned in subrule 2, shall be admitted on special grounds only, and not without leave of the court.

This rule is similar to the English rule¹⁴ and exists in other provinces.¹⁵ Except for matters which have occurred after the date of the judgment, the rule requires that special grounds be shown before the evidence is received.

¹¹This test was recently approved in *Becker Milk Co. Ltd. et al. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554, at p. 557.

¹²[1918] A.C. 888, at p. 894.

¹³*Re Smolak and Necula* (1974), 39 D.L.R. (3d) 730 (Alta. C.A.).

¹⁴*McCann v. Shepherd and another*, [1973] 2 All E.R. 881.

¹⁵See for instance New Brunswick Rules of Court Order 58, R. 4.

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ADMINISTRATIVE LAW AND PRACTICE

**SECOND
EDITION**

Robert F. Reid

A Justice of the Supreme Court of Ontario

Hillel David

B.A., B.C.L., LL.B.

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**TORONTO
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extrinsic evidence of intention to be considered only to construe an ambiguity.¹⁴⁷

A provision authorizing a land titles registrar to cancel a registration if it appeared to him that it had been obtained in error or by fraud did not permit him to receive evidence tendered by interested persons. His enquiry was only to be on his own motion and was restricted to his own records.¹⁴⁸ Similarly, a clear discretion to grant a licence, unless there is "good reason to the contrary", may be wrongly exercised if based on inadequate evidence.¹⁴⁹

APART FROM STATUTE; THE COURT RULES APPLIED

What is the significance of the presence or absence of statutory provisions? It has been suggested that a tribunal is bound by the rules of legal evidence except so far as statute exempts it.¹⁵⁰ The court rules have been applied to the hearings of a tribunal by the tribunal itself.¹⁵¹ Arbitrators have been held to be subject to the court rules, unless otherwise agreed,¹⁵² and an award of compensation for expropriation was set aside when based on hearsay.¹⁵³

APART FROM STATUTE; THE COURT RULES NOT APPLIED

The proceedings of a number of tribunals have been held not to be subject to the court rules. For this reason, hearsay has been admitted.¹⁵⁴

¹⁴⁷ *R. v. Barber; ex p. Warehousemen and Miscellaneous Drivers' Union*, [1967] 2 O.R. 541; affd, 68 D.L.R. (2d) 682 (C.A.).

¹⁴⁸ *Heller v. Registrar, Vancouver Land Registration Dist. and Heller*, [1963] S.C.R. 229, 38 D.L.R. (2d) 1.

¹⁴⁹ *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219.

¹⁵⁰ *Clark v. Chutorian; Clark v. Orloff* (1952), 5 W.W.R. (N.S.) 207, at p. 210; affd [1955] 2 D.L.R. 472 (Man. C.A.).

¹⁵¹ By the Registrar of Trade Marks, in opposition proceedings; no reasons given: *Wonder Bakeries Ltd. v. Ottawa Domestic Provisions Ltd.* (1956), 26 C.P.R., Sec. II, at p. 24.

¹⁵² It was held that the rules should not apply "so strictly" as in a court of law: *Re McCain and City of St. John* (1965), 47 D.L.R. (2d) 164, 50 M.P.R. 363 (N.B.C.A.). To the same effect, see *Re Bondi and Toronto* (1968), 66 D.L.R. (2d) 66 (Ont. C.A.), where the official arbitrator was held to be entitled to admit the evidence of a witness concerning documents examined by him in a registry office. This concept that some tribunals are "not so strictly bound", adds a befuddling variant to the present relatively simple issue: do the court rules apply or not? Is any real compromise possible?

¹⁵³ *Re Vancouver and Walsh* (1961), 27 D.L.R. (2d) 234 (B.C.).

¹⁵⁴ Telegram admitted before a public inquiry: *Re Huston* (1922), 52 O.L.R. 444 (C.A.).

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However, hearsay may not be admissible even though the court rules of evidence are held not to apply,¹⁵⁵ or not to apply with their usual strictness.¹⁵⁶

Where the Lieutenant-Governor in Council was authorized to make grants on "reasonable proof", it was held that the reception of hearsay evidence was not incompatible with the judicial character of the inquiry.¹⁵⁷ The Privy Council held broadly that the Lieutenant-Governor in Council was not bound by the "technical rules of British Columbia law touching the reception of hearsay evidence" without giving any reasons for this conclusion.¹⁵⁸

There is no single code which, apart from statute, governs the question whether the court rules do or do not apply. Various grounds may be assigned. Explicit justification is not always considered necessary. Thus, it has been said simply to be "common knowledge" that such a statutory tribunal—a real-estate board—"is not held to the observance of the rules of evidence applied in courts".¹⁵⁹ The nature of the function has been called in aid. The exercise of quasi-judicial functions has been held to be subject to the court rules,¹⁶⁰ but "administrative" functions have been held to be free of the rules.¹⁶¹

The mere fact that a tribunal may not be subject to the court rules does not necessarily make it free of all restraints in regard to evidence. If its functions are quasi-judicial a tribunal may well be guilty of a denial of

See the same general rule applied to a public inquiry in *Re York County Children's Aid Society*, [1934] O.W.N. 418 (C.A.).

¹⁵⁵ *Moxon v. Minister of Pensions*, [1945] 2 All E.R. 124; a "quasi-judicial" proceeding.

¹⁵⁶ *Re McCain*, *supra*, n. 152.

¹⁵⁷ *Wilson v. Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202, at p. 213, 91 L.J.P.C. 21, 61 D.L.R. 1, 28 C.R.C. 296. If the term "judicial" is to have any legal or grammatical meaning, this is a paradox; acceptable only in the light of the status of the tribunal itself. It is another example of how unsatisfactory are statutes that do not state whether tests are to be subjective or objective. "Reasonable" to whom? is the question that propelled this case, and others like it, through the courts. For some of the English experience, see *Liversidge v. Anderson*, [1942] A.C. 206, test held "subjective", and the subsequent recantation in *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66, 66 T.L.R. 214, 94 Sol. Jo. 516, [1950] 2 W.W.R. 927 (P.C.).

¹⁵⁸ *Wilson v. Esquimalt*, *ibid*.

¹⁵⁹ *Seaside Real Estate Ltd. v. Halifax Dartmouth Real Estate Bd.* (1964), 44 D.L.R. (2d) 248, 50 M.P.R. 60 (N.S.C.A.), the tribunal was "judicial".

¹⁶⁰ *Moxon v. Minister of Pensions*, *supra*, n. 155.

¹⁶¹ *Re Foremost Const. Co. Ltd. and Registrar of Companies* (1967), 61 D.L.R. (2d) 528, 60 W.W.R. 302 (Sask.), Registrar of Companies cancelling a licence; *Pure Spring v. M.N.R.*, [1946] Ex. C.R. 471, [1947] 1 D.L.R. 501; *In R. v. Metro. Police Commr.; ex p. Parker*, [1953] 2 All E.R. 717, [1953] 1 W.L.R. 1150, freedom from rules of evidence meant no right to call a witness.

natural justice through an improper admission of evidence,¹⁶² or by violating such a fundamental rule as that preventing evidence being taken *after* a hearing.¹⁶³ Relevant evidence coming into existence after the hearing is admissible before an appellate tribunal or on judicial review,¹⁶⁴ and evidence which becomes known after the presentation of a grievance for adjudication is admissible if relevant to any issue of fact that must be determined on a reasonably arguable view of the case put forward by either party.¹⁶⁵

This is a reflection in the sphere of evidence of the court's general attitude to tribunal procedure, *i.e.*, to avoid the strictness and formality of court procedures but ensure a basic standard of fairness. The mere violation of an evidential rule may be nothing as such. It is not the error of form but the error of substance that counts. Thus where a tribunal has acted on inadmissible evidence, and the remaining evidence was insufficient to support its decision, its order striking a barrister off the rolls was set aside.¹⁶⁶ If an error of law on the record¹⁶⁷ or a denial of natural justice results, or a loss of jurisdiction, its effect would be to nullify the proceedings. It follows that an improper admission or rejection of evidence is not a ground for *certiorari* or prohibition unless it constitutes a violation of a fundamental principle of justice¹⁶⁸ or a denial of natural justice or a loss of jurisdiction,¹⁶⁹ nor will *mandamus* lie.¹⁷⁰ Nor may parties to a labour arbitration apply to the court on a special case every time an issue over the admissibility of evidence arises.¹⁷¹

¹⁶² *Re Halifax-Dartmouth Real Estate Bd.; ex p. Seaside Real Estate Ltd.* (1964), 44 D.L.R. (2d) 248, 50 M.P.R. 60 (N.S.C.A.).

¹⁶³ *Volkswagen Northern Ltd. v. Bd. of Industrial Relations* (1964), 49 W.W.R. 574 (Alta.).

¹⁶⁴ *Re Bd. of Governors of Scarborough General Hospital and Schiller* (1973), 2 O.R. (2d) 324, 42 D.L.R. (3d) 668; (1974), 4 O.R. (2d) 201, 47 D.L.R. (3d) 485; (1975), 9 O.R. (2d) 648, 61 D.L.R. (3d) 416.

¹⁶⁵ *Re McKendry*, [1973] F.C. 126, 35 D.L.R. (3d) 305 (C.A.).

¹⁶⁶ *Re a Barrister*, [1954] 1 D.L.R. 814 (N.B.C.A.).

¹⁶⁷ *In re Arbitration between Int'l Woodworkers and Passmore Lumber* (1964), 46 W.W.R. 593 (B.C.); *Re Civic Employees Union and Metro. Toronto*, [1962] O.R. 970, 34 D.L.R. (2d) 711 (C.A.), consideration of extraneous evidence where no ambiguity.

¹⁶⁸ *Young v. Johnson* (1961), 27 D.L.R. (2d) 402, 34 W.W.R. 385 (Man. C.A.).

¹⁶⁹ *See R. v. Reville; ex p. United Steelworkers* (1968), 68 D.L.R. (2d) 213, at p. 216, where a board of arbitration resorted to extrinsic evidence in the absence of an ambiguity in the collective agreement, and see *Re Civic Employees Union and Metro. Toronto*, *supra*, n. 167 and see generally, Chapter 11, Scope and Nature of Judicial Review, for other examples of the consequence of error in dealing with evidence.

¹⁷⁰ *R. ex rel. Oil, Chemical & Atomic Workers' Union v. Nicol* (1965), 52 W.W.R. 434 (Sask. C.A.).

¹⁷¹ *Re Westeel Products Ltd. and United Steelworkers of America* (1964), 47 W.W.R.



[HIGH COURT OF JUSTICE]

Scott et al. v. Cook et al.

GRANT, J.

13TH JANUARY 1970.

Trial — Reopening trial to adduce further evidence — Onus on applicant to show probability of effect on result — Motor vehicle collision — Issue as to whether lamps lighted — Evidence of previously unknown witnesses.

On an application to the trial Judge to receive further evidence after reasons have been delivered, but before entry of judgment, the applicant must show that the evidence he seeks to adduce is such that if it had been presented at trial, it would probably have changed the result and the evidence could not have been obtained by reasonable diligence before the trial. Where the action arises out of the collision of plaintiff's motor vehicle with the tractor and trailer of defendant, where there was conflicting evidence as to whether the lamps on the tractor and trailer were properly lighted and where the basis of judgment is that they were, evidence of additional witnesses to the effect that the lamps were unlighted at a point 10 miles from the scene of the collision does not discharge the onus. Knowledge of the existence of such a factual situation at a point so far removed from the scene of the collision would not alter the decision already given.

[*Bauz v. Registrar of Motor Vehicles*, [1950] O.W.N. 386; *Marchyshyn et al. v. Fane Auto Works Ltd. et al.*, [1932] 4 D.L.R. 618, [1932] 3 W.W.R. 232; *Clayton v. British American Securities Ltd. et al.*, [1935] 1 D.L.R. 432, 49 B.C.R. 28, [1934] 3 W.W.R. 257, *reft to*]

APPLICATION to reopen the trial of an action to permit further evidence to be adduced and to permit cross-examination of previous witnesses.

Douglas K. Laidlaw, Q.C., for plaintiffs, applicants.

Brendan O'Brien, Q.C., for defendants, respondents.

GRANT, J.:—This is an application by the plaintiffs to reopen the trial of this action and permit them to adduce further evidence in support of their claims and to permit cross-examination of witnesses who may have already given evidence to the extent that it may be necessary and convenient arising out of such further evidence if permitted to be adduced.

The plaintiffs' claim arises out of a motor vehicle collision which occurred on October 5, 1967, when a motor vehicle driven by the plaintiff Frederick John Scott collided with the rear of a truck hauling a platform-type trailer. Both vehicles were proceeding in the same direction. It was dark at the time of such mishap. The plaintiffs claim that the defendants' vehicle was being operated at the time without lighted lamps

not allowed.

on the rear thereof and that the same was stopped on the highway.

The case came on for trial without a jury before me on May 21 and 22, 1969. I delivered reasons for judgment on June 2nd dismissing the action but formal judgment has not been entered. On July 4th counsel for the plaintiffs notified the defendants, as well as myself, of the discovery of new evidence which they desired to have admitted and enclosed with such notice the affidavit of the plaintiffs' solicitor, Donald John MacLennan, sworn on June 26th.

The basis of the judgment was that the defendants' vehicle was not stopped as alleged and that all lights on the front of such truck were fully lighted as well as those on the rear of the trailer. The one exception to this was that the glass in the right-rear lamp of the trailer was broken at the time so that it showed a white instead of a red light, but that the remainder of the lamps and reflectors at the rear which gave or reflected light were sufficient warning to anyone approaching from the rear.

Mr. MacLennan in the affidavit filed in support of the application states he was retained a few days after the collision and he did everything possible to discover the names and addresses of any witnesses who might have some knowledge of the relevant facts and circumstances but had no knowledge of the witnesses now proposed to be called until June 14th, some 12 days after judgment had been made public. Mr. MacLennan has not been cross-examined on such affidavit. Counsel for the respondents indicates that he prefers not to challenge the statements above recited from such affidavit. He asks rather that I dispose of the motion on the basis that it is not evidence of such a character that should now be admitted in the circumstances.

The evidence now proposed to be adduced is that on the night of the collision between the hours of 7:30 and 7:45 George Whitby was driving a vehicle at a point about 10 miles by road from the scene of the accident in issue and at that time he met a tractor-trailer approaching from the east on which there was only one amber light lighted on the front of the said unit and that there were no lights lighted on the rear of the said vehicle whatsoever. A vehicle overtaking and passing the tractor-trailer had occupied the eastbound lane of the highway and thereby caused Whitby to bring his automobile to a full stop to avoid a head-on collision. This was the road over which the defendants had travelled immediately prior to such collision, and in such vehicle at the time

with George Whitby were Jack Treleaven and Harold Austin whom the plaintiffs wish to call as well. All such new witnesses live in or about Lucknow which is about 10 or 12 miles from the plaintiffs' residence. It is said that Whitby will say that the only light on the front of the tractor-trailer was a yellow light on the outside mirror of the driver's side and that he felt certain it was the defendant Cook's truck. Harold Austin and Jack Treleaven will say they recall meeting the tractor-trailer at about the point indicated and that Mr. Whitby drew the vehicle to their attention at that time. They recognized it as the defendant Cook's unit. All such proposed witnesses remember the night in question. The next day they heard of the collision and the death of Joseph Hall Scott resulting therefrom. They will say that at that time they recall discussing among themselves having met the Cook vehicle the previous night at about the point in question.

In deciding whether such testimony should now be admitted it is of some importance to recall what evidence in respect of such negligence was advanced by the plaintiffs at the trial. The plaintiff, Frederick John Scott, was the driver of the plaintiffs' vehicle which was proceeding northerly at the time and overtaking the Cook unit. He said he met a southbound vehicle about 100 ft. south of the scene of the collision and that the lights were dimmed on both vehicles as they met. He says there was no light on the back of the trailer. The plaintiff called as a witness one Mrs. Winifred Graham who was the driver of such southbound vehicle which had just met and passed the Cook truck and trailer and then met the Scott car. She thought that she met the Scott car about 400 ft. south of the Cook vehicle. She says she saw the Cook vehicle as she was coming southerly toward it and that it had a lot of lights on it. I thought she was referring to headlights rather than those at the rear of the trailer. She said the Cook vehicle was moving and that all lights went out on the Scott and Cook vehicles at the time of the crash. She stopped her vehicle and remained there until the police arrived.

The plaintiffs also called one David Lackey who was also driving north and had passed the Cook unit about one-eighth of a mile to the south of the scene of the accident. He said such unit was moving at 20-25 m.p.h. and that although the front lights were lighted there were no lighted lamps at the rear of the tractor and he saw no reflectors upon the back of the trailer. I had given little weight to this young man's testimony. One of the reasons for this was that he was back to the scene of the collision that night while the investigating

officers were still there and did not report any of this information to them. The defendants' testimony was that they had checked all lights on their vehicle before leaving Wingham about 7 o'clock; at this time it was dusk when it was prudent to have lamps lighted on one's vehicle. They stopped their vehicle to examine the load on the trailer when they arrived at the Ripley Rd. about three miles south of the collision scene, and on both occasions they found all lamps lighted with no defects therein except as to the colour of the right-rear light as above described. It is to be noted that what Whitby and Treleaven say as to the lights on the front of the defendants' vehicle is entirely contrary to what Mrs. Graham and Lackey say as to such lights at the point of collision. Mrs. Graham states the headlights were on. In relation to this, counsel for the applicant submits that the wording of the affidavit in relation to Whitby's proposed evidence, namely, "that there was only one amber light lighted on the front of the said unit", does not exclude the aversion that the headlights were on. However, para. 6 of such affidavit alleges that Mr. Treleaven will say, "that the only light on the front of the tractor and trailer was a yellow light on the outside mirror on the driver's side". From reading the two of these quotations as to the evidence that such proposed witnesses would give, I would take it that what was meant was that both witnesses would say that there were no lights whatever lighted on the front of the tractor except a small amber or yellow light on the driver's side. This is not only contradictory of the evidence of Mrs. Graham and Lackey but is some indication of a change in the lights on the front of the vehicle from the time that they saw it some 10 miles back from the scene and the actual condition of lights at the scene of the accident. The discrepancy between the testimony given and that proposed to be given may be explained by the possibility that the driver of the truck may have turned on the headlights of his truck at the time of the incident referred to by Whitby or even at any other time thereafter and before the collision without recalling doing so.

It is the condition of the lights at the time of collision which is to be ascertained. Ordinarily evidence as to the same being unlighted 10 miles back from the scene would be of little probative value to this issue unless there was some other intervening testimony that made it probable they had been allowed to remain in such state until the mishap. If such proposed testimony had been tendered at the trial, I would have considered its value lay mostly in touching the credibility of

both defendants as to their statement as to the condition of the lights when they left Wingham. Even accepting it at full value, I would think it to be of little help for such purpose in view of the many possibilities that could have prevailed. I do not think it would cause me to doubt the testimony of the plaintiffs' witness, Mrs. Graham, as to the headlights being on at the time of collision. This would leave for consideration only what the proposed witnesses say as to the tail lights on the defendants' vehicle at the time of such meeting. I would find so little help in such factual situation at a point so far removed from the scene of collision that I am of opinion it would not cause me to alter the decision already given.

On an application to the trial Judge to receive further evidence after reasons for judgment have been delivered but before entry of judgment, he is not restrained by the strict rule that prevails on an application to the Court of Appeal for a new trial. In *Bauz v. Registrar of Motor Vehicles*, [1950] O.W.N. 386, at pp. 386-7, Wells, J., as he then was, adopted a requirement of admission, namely, "that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment" [see *Hosking et al. v. Terry et al.* (1862), 15 Moo. P.C.C. 493 at pp. 503-4].

In *Marchyshyn et al. v. Fane Auto Works Ltd. et al.*, [1932] 4 D.L.R. 618 at p. 620, [1932] 3 W.W.R. 232, McGillivray, J.A., ruled the same would not be admitted unless it could be established:

That the evidence proposed to be introduced (except where fraud, conspiracy or surprise are charged) is not merely corroborative of the evidence given on behalf of the applicant at trial but would have formed a determining factor in the result if it had been made part of the case before the trial Judge. *Robins v. Nat'l Trust Co.* (1925), 57 O.L.R. 46, at p. 59, affd [1927] 2 D.L.R. 97; *Hip Foong Hong v. H. Neotia & Co.*, [1918] A.C. 888, at pp. 893-4.

In *Clayton v. British American Securities Ltd. et al.*, [1935] 1 D.L.R. 432, 49 B.C.R. 28, [1934] 3 W.W.R. 257, the British Columbia Court of Appeal dealt at length with the problem. Therein Macdonald, J.A., stated at p. 440-1:

My view has always been that the trial Judge might resume the hearing of an action apart from rules until entry of judgment but as it was vigorously combatted I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of

* further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment — but before entry showing that the judgment was wrong and the trial Judge was convinced of its authenticity no lack of diligence by solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur. *

And continued:

There are reasons for rules governing the admission of evidence by an Appellate Court, not applicable to a trial Judge. Hearing new evidence is a departure from its usual procedure and it is fitting that departures in ordinary practice should be limited by rules to prevent abuse. Entry of judgment may be merely a formality but it is necessary that at some arbitrary point the jurisdiction of the trial Judge should end. A vested right of judgment is then obtained subject to a right to appeal and should not be lightly jeopardized. Before the gate is closed by entry a trial Judge is in a better position to exercise discretion apart from rules than an Appellate Court. He knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to new evidence offered. I may add that he might well be guided, although not bound, by the rules referred to. >

* It would appear from the preceding discussion that on an application to open up the proceedings made to the trial Judge on the grounds of newly discovered evidence, the applicant must show that the evidence he seeks to adduce is such that, if it had been presented at trial, it would probably have changed the result. On the other hand, a party seeking leave to introduce new or further evidence on appeal must show that the evidence is such that, if adduced, it would be *conclusive or practically conclusive* and not merely corroborative. In both instances the party must also prove that such evidence could not have been obtained by reasonable diligence before the trial.

test

It seems, therefore, that the rule pertaining to the right of a trial Judge to open up a case and consider new or fresh evidence after the close of the trial but before judgment is entered is less stringent than the principle governing an application to adduce new or further evidence before an appellate Court. While there is not too much indication in the authorities as to the reasons for such difference, the following is a brief resume of what the various Courts have said in this respect:

(1) The trial Judge should have unfettered discretion in this

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matter so as to ensure that a miscarriage of justice does not occur;

- (2) before entry of a judgment, the trial Judge is in a better position to exercise that discretion than is an appellate Court. The trial Judge knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to the new evidence offered;
- (3) the authorities indicate that a trial Judge can always reconsider his decision until the judgment is drawn up and entered;
- (4) the trial Judge is the one in the best position to judge the bearing of the new or further evidence upon the case in light of the evidence already heard;
- (5) once a litigant has obtained a judgment, he is entitled not to be deprived of it without very solid grounds.

For these reasons the motion to adduce further evidence referred to in the material will be dismissed with costs.

Application dismissed.

[YORK COUNTY COURT]

Tucker v. Moerman

STEEN, Co.Ct.J.

23RD JANUARY 1970.

Actions — Settlement — Enforcement of settlement — Facts not known at time of settlement.

Plaintiff and defendant agreed to settlement of plaintiff's action for damages for personal injuries arising out of a motor vehicle accident approximately a year earlier. At the time of the settlement plaintiff was aware of the recent onset of hearing difficulties. After the settlement, but before the transfer of funds and exchange of consents or releases, plaintiff obtained a medical opinion that his hearing difficulties could be linked to the accident. On an application for an order declaring the existence of a binding settlement, *held*, assuming a discretion to withhold assistance in carrying out a settlement, it should only be exercised where to enforce the settlement would inflict a hardship on the plaintiff so that in equity it should not be done. As plaintiff could have, but did not take the precaution of determining whether his hearing problem had any relation to the accident before authorizing his counsel to make settlement, and as the medical report did not indicate whether this was a probability or possibility and was somewhat vague and uncertain in its prognosis, it could not be concluded that the enforcement of the settlement would inflict a hardship on the plaintiff.



factor the Board may take into account in deciding where to draw the line.

I cannot say that the Board erred in the result of its disposition of this evidentiary question. In this context the *Brownell* and *St. John* cases, *supra*, are relevant.

I would therefore answer the specific question stated for the opinion of the Court in the affirmative because the question, as I understand it, requires an answer regarding the correctness of the grounds upon which the evidence was excluded. In that respect the Board erred. I have already said, however, that the evidence may be excluded on other grounds. The entire matter is therefore remitted to the Board for its determination of the question of whether Mr. Malcolm should or should not be required to produce the impugned evidence apart from the simple question of confidentiality.

In the circumstances, I do not think there should be any order for costs.

Case remitted to Board.

**HENGAB INVESTMENTS LTD. c.o.b. NEW CANADIANS
HARDWARE & BUILDING SUPPLIES CO.
v. VICENTE**

Ontario County Court [Judicial District of York],
Webb Co. Ct. J.

Judgment—November 18, 1981.

Trials — Conduct of trial — Additional evidence after hearing — Plaintiff failing to establish essential averment during trial — Judgment rendered for defendant but not entered — Whether trial should be re-opened to allow plaintiff to adduce additional evidence.

The plaintiff commenced an action upon an account for goods allegedly delivered to the defendant. At the conclusion of the plaintiff's case, the defendant sought a dismissal of the action upon the ground that the plaintiff had failed to prove delivery of the goods to the defendant. The action was dismissed. Prior to the entry of judgment, the plaintiff brought this application for an order permitting additional evidence to be adduced to establish delivery of the goods.

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Held—The application was granted and the plaintiff was given leave to offer further evidence. The evidence was available to the plaintiff at trial and was not adduced by reason of inadvertence. The principles to be applied in considering the re-opening of the trial in such cases are different than those where a party seeks to adduce newly discovered or fresh evidence on appeal.

Rule 256 should be applied to ensure that justice is properly meted out and a party not deprived of the benefit of litigation by reason of a readily cured deficiency of evidence inadvertently omitted. The trial Judge is better able to consider the cogency of the proposed evidence than is an appellate Court, as he knows what factors affected his decision.

not readily cured

Note

See *Blue Meadows Estates Ltd. v. Zipursky* (1978), 7 C.P.C. 51 (B.C. S.C.) for a similar case. Additional cases in which the issue is considered can be found in *Holmsted & Gale, R. 256 §§ 2 and 3*.

Cases considered

Bauz v. Reg. of Motor Vehicles, [1950] O.W.N. 386 — distinguished.

Billinkoff's Ltd. v. Mid West Const. (1969) Ltd., [1974] 2 W.W.R. 100 (Man. Co. Ct.) — referred to.

Blue Meadows Estates Ltd. v. Zipursky (1978), 7 C.P.C. 51 (B.C. S.C.) — referred to.

Demarco v. Ungaro (1979), 21 O.R. (2d) 673, 8 C.C.L.T. 207, 27 Chitty's L.J. 23, 95 D.L.R. (3d) 385 (H.C.) — distinguished.

Karpenko v. Paroian, Courey, Cohen & Houston (1980), 30 O.R. (2d) 776, 117 D.L.R. (3d) 383 (H.C.) — distinguished.

Ont. Motor Sales Ltd. v. Steeves, [1959] O.W.N. 205 (C.A.) — considered.

Scott v. Cook, [1970] 2 O.R. 769, 12 D.L.R. (3d) 113 — applied.

Rules considered

Ont. R. 256(1).

Canadian Abridgment (2nd) Classification

Trials, II, 6.

APPLICATION to permit plaintiff to adduce additional evidence after pronouncement of judgment but before entry.

W.R. Maxwell, Q.C., for plaintiff.

B.N. Signer and M.A. MacDonald, for defendant.

(No. 115240/79)

November 18, 1981. **WEBB CO. CT. J.** (orally):— This is an application for an order allowing the plaintiff to prove such facts material to its case pursuant to R. 256 of the Consolidated Rules of Practice of the Supreme Court of Ontario. Rule 256(1) provides as follows:

"256.—(1) Where, through accident or mistake or other cause, a party omits or fails to prove some fact material to his case, the judge may proceed with the trial, subject to such fact being afterwards proved at such time as the judge directs, and, if the case is being tried by a jury, the judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed, and, if not so proved, judgment shall be entered for the opposite party, unless the judge otherwise directs."

This motion arises out of an action which came on before me for trial on November 10, 1981. Basically, the action by the plaintiff is for the balance owing for goods and supplies sold to the defendant.

The defence submitted on behalf of the defendant was, in effect, twofold: Firstly, that such goods were not sold to the defendant but were sold to a limited company which was controlled by the defendant, and with one small exception, which the defendant admits owing. The defendant submits that all other goods and supplies were neither shipped to nor received by him.

At the end of the plaintiff's case, counsel for the defendant brought a motion for nonsuit, and, after hearing argument from both counsel on the motion, I reserved my decision and put counsel for the defendant to his election as to whether or nor he would adduce evidence on behalf of his client.

After due consideration, counsel for the defendant elected not to call evidence, and, after a review of the evidence called on behalf of the plaintiff, I gave oral reasons for judgment dismissing the plaintiff's action.

Subsequently, this motion was brought under R. 256, and in support of the motion is filed the affidavit of Howard W. Reininger, who acted as counsel for the plaintiff.

In essence, the affidavit is directed to the failure of counsel for the plaintiff, through inadvertence, accident, or mistake, to bring before the Court certain evidence which was available to him at the time, which, in counsel's opinion, would have established delivery of the goods in question to the defendant.

Secondly, as appears from para. 8, counsel also failed to adduce evidence, also available at the time, as to the total sum of the invoices identified by him, and which sum was the amount for which he was demanding payment.

A number of authorities, some of which I intend to refer to, have indicated that a trial Judge should exercise his or her discre-

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tion for the welfare of the administration of justice and admit such evidence by reopening the trial.

However, most, if not all, of these cases have been in circumstances which have not gone as far as this action has proceeded. However, it is agreed by counsel that the matter is still open for me to exercise my discretion as to whether or not the trial should be reopened because of the fact that a formal judgment has not as yet been settled, issued, or entered.

It goes without saying that sale and delivery of goods from the plaintiff to the defendant is an essential element of proof in an action such as this.

Counsel for the plaintiff has referred the Court, first of all, to a decision of the Court of Appeal for Ontario in *Ont. Motor Sales Ltd. v. Steeves*, [1959] O.W.N. 205. In that case, after the argument of a motion for nonsuit and while judgment on that motion was reserved, the plaintiff applied to the trial Judge for leave to adduce evidence showing the fact of registration of a statutory notice.

This application was refused by the trial Judge, saying, in essence, that the proof of registration not having been made and that being essential to support the plaintiff's case, the action necessarily failed. 

The trial Judge took the view that the evidence adduced by the plaintiff was fresh or new evidence, and, because it was available to the plaintiff before he closed the case, therefore, it should not, at a later date, be admitted to support an otherwise defective case. 

Laidlaw J.A., speaking for the Court, gave the following reasons for judgment at the conclusion of the argument:

"He said that the trial Judge ought to have applied Rule 257 [presently R. 256]. The omission to prove the fact of registration was an omission on the part of counsel which should not be attributed to the plaintiff so as to defeat the action. It was an omission that fell within the Rule and which might properly be cured. The fact sought to be proved did not touch the merits of the case although it was a fact that must be proved as part of the plaintiff's case, it did not appear to him that there would be any controversy or issue in respect of it. The trial Judge ought to have permitted the plaintiff to prove the fact of registration and if he had proceeded on the proper principle he would no doubt have granted leave. The plaintiff should be given leave to adduce evidence to prove the fact of registration. There should be a new trial upon terms that the plaintiff should pay the cost of the first trial in any event including the motion

to re-open the case. On those terms the appeal should be allowed with costs. Aylesworth, J.A., dissenting only on the question of costs in the Court of Appeal. He would have allowed the appeal without costs."

A second decision which counsel for the plaintiff has brought to my attention is a decision of the Supreme Court of British Columbia in *Blue Meadows Estates Ltd. v. Zipursky* (1978), 7 C.P.C. 51. The decision of the Court was delivered by Legg J., and I refer to an excerpt from that decision at p. 53 as follows:

"It is open to this Court to take additional evidence before judgment is entered. An application may be made to this Court to consider permitting the adducing of further evidence if such evidence would probably change the result of the trial and if the Justice of the case requires that it be admitted."

Counsel for the plaintiff has also referred the Court to a very helpful decision of the Manitoba County Court in *Billinkoff's Ltd. v. Mid West Const. (1969) Ltd.*, [1974] 2 W.W.R. 100. A quote from the headnote will suffice:

"Held, on a full review of the authorities and the relevant Rules of court, that leave should be given to re-open to permit the Dominion Bridge Company to adduce further evidence; the authorities were to the effect that until a judgment had been perfected by formal entry the trial Judge was not functus officio; he had a discretion, to be exercised judicially, to re-open a case to permit further evidence to be adduced if the ends of justice required it. A liberal approach should be adopted in the interpretation of Rules and procedures to the end that justice might be done. . . ."

A number of decisions were submitted by counsel on behalf of the defendant, illustrative of circumstances where the Court has taken a different approach. I propose to refer only to two of them. The first is a decision of Wells J., as he then was, in *Bauz v. Reg. of Motor Vehicles*, [1950] O.W.N. 386.

This decision, again, is referable to the reopening of trial after delivery of judgment but before entry on newly discovered evidence. In this case, the decision of Wells J. was not to exercise his discretion, and I distinguish this case on the basis of the fact that it concerned newly discovered evidence, which is not the case at Bar.

A second decision brought to the attention of the Court by counsel for the defendant is a decision of Grant J. in *Scott v. Cook*,

[1970] 2 O.R. 769, 12 D.L.R. (3d) 113. Well, here, again, this is a problem with respect to newly discovered evidence.

At p. 774 [O.R.] of his reasons for judgment, Grant J. enunciates principles which are of assistance to the Court in the exercise of the discretion vested under R. 256. At pp. 774-75, the learned Judge said as follows:

"It seems, therefore, that the rule pertaining to the right of a trial Judge to open up a case and consider new or fresh evidence after the close of the trial but before judgment is entered is less stringent than the principle governing an application to adduce new or further evidence before an appellate Court. While there is not too much indication in the authorities as to the reasons for such difference, the following is a brief resume of what the various Courts have said in this respect:

- (1) The trial Judge should have unfettered discretion in this matter so as to ensure that a miscarriage of justice does not occur;
- (2) before entry of a judgment, the trial Judge is in a better position to exercise that discretion than is an appellate Court. The trial Judge knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to the new evidence offered;
- (3) the authorities indicate that a trial Judge can always reconsider his decision until the judgment is drawn up and entered;
- (4) the trial Judge is the one in the best position to judge the bearing of the new or further evidence upon the case in light of the evidence already heard;
- (5) once a litigant has obtained a judgment, he is entitled not to be deprived of it without very solid grounds."

In my view, these principles are equally applicable to existing evidence which counsel, through accident or mistake or other cause, omits or fails to prove a material fact in his case.

Counsel for the defendant also referred me to the decision of Krever J., in *Demarco v. Ungaro* (1979), 21 O.R. (2d) 673, 8 C.C.L.T. 207, 27 Chitty's L.J. 23, 95 D.L.R. (3d) 385 (H.C.) and *Karpenko v. Paroian, Courey, Cohen & Houston* (1980), 30 O.R. (2d) 776, 117 D.L.R. (3d) 383 (H.C.).

Both of these decisions deal with the question of the right of a client to bring an action against his counsel in negligence during the

conduct of a trial or in the settlement of an action prior to trial. Should I give effect to those decisions, the result, in my view, would be to virtually negate the provisions of R. 256.

After listening to the very able arguments of counsel and considering the material and the background to this action, I have come to the conclusion that I should allow the motion and permit counsel for the plaintiff to prove or attempt to prove the facts more particularly referred to in his affidavit in support of this motion. Accordingly, the application will be allowed.

[Discussion as to costs and further issues to be raised.]

Order to go in terms of notice of motion. Costs reserved to the conclusion of the trial.

[Discussion as to order of November 10, 1981.]

I think I should amend my endorsement. The endorsement reads: "Judgment to go dismissing this action." I will add in there, "save and except to the extent of the admission by the defendant of the sum of \$468.73 owing to the plaintiff."

Application granted.

COURT OF APPEAL.

LAIDLAW, AYLESWORTH AND
LEBEL, J.J.A.

22ND APRIL 1959.

ONT. MOTOR SALES LTD. v. STEEVES.

Practice — Trial — Plaintiff — Omission of evidence — Right to reopen case.

This was an appeal by the plaintiff from the judgment of Currey, C.C.J., 29th October 1958, dismissing the action.

The plaintiff sued to recover the balance due or deficiency owing after re-sale of a car seized and sold under a conditional sales contract. At the close of the plaintiff's case the defendant moved for a nonsuit on the ground that the plaintiff had failed to prove that the notice required by the Conditional Sales Act, R.S.O. 1950, c. 61, s. 8, had been mailed to the defendant by registered mail in accordance with the terms of the section. After the argument of the motion for nonsuit and while judgment on that motion was reserved, the plaintiff applied to the trial Judge for leave to adduce evidence showing the fact of registration of the statutory notice. The trial Judge refused the motion saying in substance, that the proof of registration not having been made, and that being essential to support the plaintiff's case, the action necessarily failed. He did not consider the merits of the case. He said the evidence sought to be adduced by the plaintiff was fresh or new evidence and because it was available to the plaintiff before he closed the case, therefore it should not at a subsequent date be admitted to support an otherwise defective case.

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R. J. Murphy, for the plaintiff, appellant.

D. R. Phillips, for the defendant.

Laidlaw, J.A., at the conclusion of the argument delivered the judgment of the Court. He said that the trial Judge ought to have applied Rule 257. The omission to prove the fact of registration was an omission on the part of counsel which should not be attributed to the plaintiff so as to defeat the action. It was an omission that fell within the Rule and which might properly be cured. The fact sought to be proved did not touch the merits of the case although it was a fact that must be proved as part of the plaintiff's case, it did not appear to him that there would be any controversy or issue in respect of it. The trial Judge ought to have permitted the plaintiff to prove the fact of registration and if he had proceeded on the proper principle he would no doubt have granted leave. The plaintiff should be given leave to adduce evi-

JULY 3, 1959

dence to prove the fact of registration. There should be a new trial upon terms that the plaintiff should pay the cost of the first trial in any event including the motion to re-open the case. On those terms the appeal should be allowed with costs. Aylesworth, J.A., dissenting only on the question of costs in the Court of Appeal. He would have allowed the appeal without costs.

Appeal allowed.

HIGH COURT OF JUSTICE.

GALE, J.

11TH MAY 1959.

BOLAND v. PAR-TEX FOUNDATION CO. LTD.

Costs — Taxation — Fees — Discretion of taxing officer — Interference with—
Objections — Review.

This was an appeal by the plaintiff from the certificate of a taxing officer taxing the costs of the action which was dismissed with costs.

Certain objections by both sides were taken to the procedure on the appeal but the Court rejected those objections and proceeded to deal with the appeal on the merits. The facts and circumstances in respect of each item objected to are fully set out in the note that follows.

The plaintiff in person.

N. H. Schipper, for the defendant.

Gale, J., delivered judgment at the conclusion of the argument.

He said that the points raised by the objections to the taxation, ten in number, would be disposed of in the order in which they appeared in that document.

(1) Boland complained that the acting taxing officer taxed \$20 as a fee and \$1 as a disbursement on a motion which was not proceeded with and for which there was no order. This objection was well founded and the certificate would be reduced by \$21. What happened apparently was this. In the course of his examination for discovery Boland declined to or did not produce certain documents and a motion was launched for the purpose of requiring him to do so. Before the motion was heard Boland voluntarily made available the documents sought by that procedure

