THE ONTARIO COURT OF APPEAL POLISHES UP SOME BAD APPLES

Frank Addario* and Marcus Pratt**

R. v. Ghorvei is a disappointing decision in which the Ontario Court of Appeal has adopted an exceedingly limited approach to the defence cross-examination of police officers. Writing for the Court, Charron J.A. accepted the proposition that a Crown witness may be cross-examined about his or her discreditable conduct in an unrelated matter even though that conduct has not resulted in a criminal conviction. The Court held, however, that this rule did not extend to allowing a police witness to be cross-examined on the fact that he or she had been found to have lied under oath in a prior criminal proceeding. The Court reasoned that a prior judicial finding of dishonesty was not discreditable conduct but simply an opinion about unrelated testimony that could not be equated with a conviction; and, itself had no probative value. In limiting the use of this type of evidence, the Court has separated itself from much of the common law. It has also created an absolute exclusionary rule, where a discretion to exclude would have been sufficient.

1. Judicial findings are not simply opinions

The view expressed in *Ghorvei*, that a prior judicial finding that a police officer has lied under oath is a mere opinion with no probative value in other proceedings, creates the spectre of differential treatment of dishonest police officers and ordinary accused. *Ghorvei* gives a police witness absolute protection from cross-examination on prior judicial findings of investigative and testimonial misconduct. No such protection exists for accused persons who have been convicted in an unrelated proceeding. It is true, as the Court notes, that a prior conviction cannot be simply viewed as an opinion, in light of the burden of proof and presumption of innocence which apply in any criminal trial. However, simply because a prior judicial finding of misconduct did not follow a trial in which the officer was the defendant,

does not mean that it has no probative value. As the facts in *Ghorvei* show, it is often the trial judge's finding of credibility about police witnesses which serve as the basis for judgments about whether the police have acted illegally and whether, more generally, their evidence is believable. It is inaccurate to characterize these judgments, which often have profound effects on individual liberty, as irrelevant opinions with little intrinsic weight. Judicial opinions about police credibility daily define the contours of both the criminal law and the Constitution for litigants in criminal proceedings. The difference between the treatment of discredited police officers and convicted accused could have been ameliorated had the Court taken a less absolutist position on the potential probative value of such "opinions".

Moreover, *Ghorvei* is incompatible with other recent jurisprudence governing the admissibility of evidence regarding the character of Crown witnesses. For example, in Ontario a defendant can call evidence from a police colleague or even a neighbour to swear that the testifying officer has a reputation for dishonesty. Such an opinion is admissible on the basis that it is relevant evidence of a character trait; i.e. lack of veracity (See *R. v. Clarke* (1998), 129 C.C.C. (3d) 1 (Ont. C.A.)). But under *Ghorvei* one could not put before the same jury the opinion of an experienced trial Judge who had seen the officer testify in a solemn proceeding under oath.

The degree to which the administration of justice ordinarily respects a trial judge's finding of credibility is shown by appellate court deference to trial judges' findings of fact on matters of credibility. The Supreme Court of Canada has consistently held that in assessing the reasonableness of an accused's conviction, an appellate court must recognize the advantages afforded to trial judges as to whether witnesses have lied or told the truth in their testimony. An unfortunate result of *Ghorvei* is that it creates the appearance of unequal treatment between credibility findings made against Crown witnesses and those made against defence witnesses. When a trial judge disbelieves an accused, that finding is treated with great deference on an appeal from conviction; in contrast, when a trial judge

makes a credibility finding against a Crown witness in the course of registering an acquittal, *Ghorvei* requires that it be viewed as an irrelevant opinion. Again, the differential treatment could have been avoided had the Court not staked out such a rigid exclusionary rule.

2. Precluding cross-examination on prior adverse findings allows for litigation abuse

The Court's concern that prior judicial findings are not evidence, absent a factual basis for those findings, is reminiscent of the now-discredited reasoning in *Hollington v. F. Hewthorn & Co. Ltd.* with respect to the inadmissibility of prior judicial determinations in civil proceedings. The English Court of Appeal there held that one of the reasons that a criminal conviction is not admissible in a civil proceeding is because a civil court would have to review all the evidence that was before the criminal court before it could give any weight to the prior conviction. It is now generally recognized that *Hollington v. F. Hewthorn & Co. Ltd.* was wrongly decided, and is not the law in Ontario. In Sopinka's *Law of Evidence in Canada* the authors locate the 'injustice' of the *Hollington* rule in the fact that it allows convicted persons to benefit from their wrongdoing by continually denying the act in subsequent civil proceedings.

Similarly, in *Demeter v. British Pacific Life Ins. Co.*, Osler J. observed that the difficulty with the reasoning in *Hollington v. Hewthorn* is that it allows for the "unedifying spectacle" of litigants continuing to question judicial findings made against them in earlier proceedings. On this basis, he concluded that it was an abuse of process to allow a convicted murderer to deny criminal wrongdoing in his civil action for survivor benefits. Of importance, Demeter extended the rule beyond prior convictions to challenges to "subordinate" findings that may have formed the basis for the prior conviction. Osler, J.'s judgment was upheld by the Ontario Court of Appeal.

The contrast with *Ghorvei* could not be clearer. If a trial judge makes findings of fact in the course of a voir dire (eg. the accused is a 'compulsive liar') and relies on these findings to admit evidence upon which the accused is ultimately convicted, these 'subordinate findings' may be admissible in subsequent civil proceedings, and in fact may support a stay of all subsequent civil claims by the accused. In contrast, under *Ghorvei*, 'subordinate findings' of fact necessary to both the trial judge's determination of the admissibility of evidence and the accused's acquittal (i.e. the police officer is a compulsive liar) have no evidentiary value and are inadmissible in subsequent criminal proceedings, even for the limited purpose of cross-examination.

3. Cross-examination on prior judicial findings should be determined on a principled approach

On a doctrinal level, the Court's reasoning in *Ghorvei* is a stark departure from the recent trend in the law of evidence away from the rigid application of a priori rules to a more 'purposive and principled case by case approach'. The essence of the modern approach, as it is characterized by Charron J.A. herself in *R. v. B.(L.) v. G.(M.A.)*, *is that all evidence which is relevant to an issue at trial should be admitted unless on the particular facts of the case the probative value of the evidence is outweighed by its prejudicial effect.* A comparison between the rules-based approach in *Ghorvei* and the principled analysis of the admissibility of an accused's prior discreditable conduct in *B.(L.).* is particularly apt given the obvious analogy between the two classes of evidence. In fact, the question as to the admissibility of a police officer's discreditable conduct has been characterized as a kind of 'reverse similar fact argument'.

In *B.(L.).* Charron J.A. held that a trial judge should assess the strength of the proposed discreditable conduct evidence as part of balancing its probative value against its

prejudicial effect. Thus, an accused's discreditable conduct, which resulted in a criminal conviction, will have a high probative value, while other 'weaker or more questionable' evidence has less probative value. A trial judge should also analyze the degree of similarity in the proposed discreditable evidence and the alleged offence in order to determine the overall probative value of the discreditable conduct evidence. Importantly, however, in *B.(L.).* Charron J.A. emphasized that when assessing the probative value of the proposed discreditable conduct evidence, a trial judge cannot decide the veracity of the proposed evidence, since this is the function of the trier of fact.

The *B.(L.).* analysis of the admissibility of the accused's discreditable conduct can readily be applied to the question of whether a police officer may be cross-examined on prior findings of misconduct. For example, in assessing the probative value of the prior finding of misconduct a trial judge might look at the importance of the finding at the previous trial to the actual legal result reached in that case. Prior findings of credibility which were critical to the decision rendered would obviously be of higher probative value then those that may be viewed as irrelevant to the result. In addition, the degree to which the circumstances of the prior case are more or less similar to the circumstances of the case at bar will also affect the probative value of the proposed cross-examination. The fact that the issue in both trials revolves around an alleged illegal search by the police, as was the case in *Ghorvei*, tends to increase the probative value of a judicial finding that an officer involved in the earlier search was a 'compulsive liar'. On a principled approach, it would not be sufficient to conclude, as in *Ghorvei*, that the finding was simply a function of 'judicial intemperance'. Such a conclusion must be reserved for the trier of fact and should not be made by the trial judge in assessing probative value. On this analysis, cross-examining counsel should be permitted to suggest to the officer that he has previously been found to have given untruthful evidence in another proceeding; and, if this is denied, be allowed to prove the fact extrinsically.

4. Discretion to Disallow where Trial of Collateral Issues Inevitable

The Court in *Ghorvei* asserts that an absolute rule of exclusion is required to prevent the trial being dragged into time-consuming collateral issues about what may or may not have happened in another proceeding. But the risk of such prejudice is more apparent than real. A practice would undoubtedly develop in which the scope of such cross-examination would have to be mooted in advance with the trial judge. There is no reason why the ordinary balancing test, in which defence evidence may be excluded where the potential prejudicial effect of the evidence 'clearly and substantially' outweighs its probative value, would be inadequate to regulate such cross-examinations.

The English common law demonstrates that such a discretion can be given to judges without impairing the orderly progress of trials. A trial judge may allow a police officer to be cross-examined on his or her testimony in another proceeding where there is a clear inference from the acquittal that the jury rejected the evidence of the police officer. In *Edwards*, the English Court of Appeal described the discretion as follows:

> "This is an area where it is impossible and would be unwise to lay down hard and fast rules as to how the Court should exercise its discretion. The objective must be to present to the jury as far as possible a fair balanced picture of the witness's reliability, bearing in mind on the one hand the importance of eliciting facts which may show, if it be the case, that the police officer is not the truthful person he represents himself to be...."

The authors of *Cross on Evidence* explain that "if, on analysis of the earlier case, it appears that doubt as to the credibility of the police officer in a relevant respect accounted for the failure to prosecute successfully, then that may be put to the officer in cross-examination. Wigmore indicates that in the United States under the Federal Rules of Evidence and most state laws a similar discretion is provided to trial judges.

Conclusion

Ghorvei is a disheartening judgment. It does not discourage police investigative and testimonial impropriety. It calls into question a long line of authority holding that if evidence of an officer's prior misconduct, or even the misconduct of other officers, shows a pattern or system of misconduct on the part of the officer or his squad, the witness may be cross-examined on that evidence and his denial rebutted extrinsically.

Ghorvei will also have the inevitable effect of shielding judges and juries from the uncomfortable fact that police officers lie in criminal proceedings (the 'appalling vista' of police perjury as Lord Denning infamously put it in the *McIlkenny* case). Our appellate courts should not be timid in arming defence counsel with the required weapons to show that such perjury has occurred.

Ironically, three weeks after *Ghorvei* was released, the English Court of Appeal quashed as unsafe a conviction obtained by the efforts of a rogue and corrupt squad of police officers. In the course of its reasons, the Court used the *Edwards* criteria to admit evidence of "lamentable" and "outrageous" misconduct by members of the investigating agency. The Court left no doubt that it felt that cross-examination of the investigating officers on findings made against them in other cases would have been "devastating" to the prosecution and, accordingly, found the conviction to be unsafe. Under the *Ghorvei* test, this kind of police misconduct would be inadmissible.

The last decade will forever be remembered by this generation of criminal lawyers as one in which we discovered that wrongful convictions, constructed in part by police perjury, are far more widespread than anyone in the administration of justice had previously understood. The most recent Commission of Inquiry which examined one famous wrongful conviction recommended reformulating aspects of both criminal procedure and evidence law as a measure of prevention against future miscarriages of justice. In *Ghorvei*, the Court seems to have forgotten the lesson that these cases taught about the importance of

ensuring that rules of evidence be designed to serve not only the orderly trial goal, but also the more important goal of preventing miscarriages of justice.

* of Sack Goldblatt Mitchell

** Counsel, Research Facility - Legal Aid Ontario. The views are his own and do not necessarily reflect the position of Legal Aid Ontario