November 2012

mcmillan litigation bulletin

practical tips for trial

Proving a case at trial requires careful preparation. Having a clear plan that includes a list of all points that need to be proved and the evidence that will be required to prove them is an essential part of that preparation. While agreed statements of fact and joint documents books can simplify much of the proof, it is likely that there are several factual issues that will be hotly disputed, and will require formal proof at trial. There are a number of things counsel need to keep in mind in planning the conduct of the case. This note addresses one legal principle that can often simplify proof of a key fact through a document in the possession of the opposite party, and another principle that if forgotten can cause that party significant difficulty.

documents in possession doctrine

Both documentary and oral evidence are important in proving a case along with admissions obtained from the other party. While parties usually admit the authenticity of documents and do not require the majority of the other side's documents to be formally proved to focus trial time on major issues, in some cases, some documents can be contested requiring formal proof.

Proof of a private document to be entered into evidence requires proof of the signature of the person who signed it and proof of the authority of the person signing it where the document is being proved against an entity other than the person signing it, for example, a corporation.

The documents in possession doctrine is another element of the law of evidence that should be considered in the event formal proof of a document is necessary. This doctrine holds that documents which are, or have been, in the possession of a party will generally be admissible against that party as original evidence to show knowledge of their contents, a connection with or complicity in the transactions to which they relate, or a state of mind with reference thereto.[1] There is no limit on the type of document to which this doctrine may apply.

Mere possession creates a presumption that the possessor had knowledge of the contents. Tenuous connections between the origin of the document and its possessor, such as unanswered letters, go to weight not admissibility. However, the documents may be used to prove the truth of the contents contained in them if the party has recognized, adopted or acted on them.

If a responsible official of a corporation such as an officer or an employee acting in the course of employment is aware of the presence of the document in the corporate premises then possession constitutes knowledge by the corporation.

When proving facts, particularly concerning knowledge or state of mind, this doctrine can be very helpful.

a cross-examination need not be pleasant, but it must be fair

It is a fundamental principle of justice that a party is entitled to know the exact nature of the case they have to meet, and be afforded an opportunity to make full answer and defence. This principle manifests itself in what is often referred to as the rule in *Browne v Dunn*.[2]

If a party intends to prove that the evidence given by a witness is untrue, or to otherwise challenge the credibility of that witness, it is incumbent on the party to put the contradictory evidence to the witness in cross-examination and provide the witness with an

opportunity to explain it as best they can. For instance, in a personal injury case the plaintiff may testify that as a result of the accident they are no longer able to perform certain physical tasks, such as snow shovelling. If the defendant intends to prove that the plaintiff is able to do more than he is letting on, the defendant is required to put the contradictory evidence she intends to call to the plaintiff in some particularity. It is insufficient to refer to the effect of the evidence in a generalized or superficial way. If the evidence to be called is a document, the document must be put to the witness, and the contradiction with his evidence pointed out. If it is a photograph, the photograph should be shown to the witness who must be given an opportunity to explain it. While it is not always necessary to show a complete video to a witness, at a minimum the fact that there is a video should be put to the witness, along with a particularized description of what the video shows. Again, the witness must be given an opportunity to explain.[3]

The court has a discretion on how to deal with a failure to follow this practice. At a minimum, one ought to expect that the party whose witness' credibility has been challenged with evidence that was not put to that witness in cross-examination will be permitted to recall the witness or other evidence to provide an explanation for the apparent contradiction.[4] It may also be taken into account in assessing the costs to be awarded after trial.[5] In a worst case situation, the failure to challenge a witness by putting the contradictory evidence to them may cause the judge to give greater credibility to the witness because of the deliberate decision not to directly challenge that witness.[6]

By being too focused on getting in all the evidence listed in one's points to prove, it is easy to overlook the right of a witness to be treated fairly in cross-examination. In most cases the contradictory evidence will actually have much more impact when it is put to the witness who can muster no credible explanation for the contradiction between the evidence given in chief and the document, photograph or other evidence they have been shown. Even if the witness asserts that the oral evidence is correct, and

that the document is wrong, the judge clearly knows the question she must decide on that point. Most people dislike seeing another treated unfairly, and judges are no exception. If a cross-examining counsel leaves the impression that the witness has been tricked or abused, the apparent concessions obtained during cross-examination will not likely have the impact counsel was counting upon. On the other hand, if the judge feels that the witness has been given every chance to tell the truth, but would not, counsel's objective will have been achieved.

byDale Schlosser and Peter Wells

[1] Phipson on Evidence, 13 ed (London: Sweet & Maxwell, 1982) cited in *R v Famous Players* [1932] 3 DLR 791 (Ontario SC (High Court))

[2] *Browne v Dunn* (1893), 6 R. 67 (HL)

3 *Machado v Berlet* (1986), 57 OR (2d) 207 (HCJ) [***Machado***]

[4] *Machado*

[5] *Machado*

[6] *Kane v Law* 1991 CarswellOnt 1545 (Gen. Div.)

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a cautionary note