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Family

'Bric-à-brac' from Internet doesn't count as admissible evidence | Gene C. Colman

By **Gene C. Colman**

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(April 12, 2023, 9:48 AM EDT) -- A recent decision by the Ontario Court of Appeal, *J.N. v. C.G.* [2023] O.J. No. 561, and two others by Ontario divisional courts (*Spencer v. Spencer* [2023] O.J. No. 1158 and *A.V. v. C.V.* [2023] O.J. No. 1147), confirm that only admissible evidence should sway judges in family law cases, not questionable bric-à-brac from the Internet.

It does not matter if the information is "thought-provoking." If it is hearsay evidence, it should fall either within the list of exceptions delineated in the *Evidence Act* or in one of the established common law exceptions to the hearsay rule.

Hearsay evidence is any statement, either written or oral, that is made out of court by a third person and is presented to prove the truth of that out of court assertion.

Hearsay evidence should be presumptively inadmissible because it cannot be tested through cross-examination. While statements based upon third-party information might technically be allowed under Ontario's *Family Law Rules*, I maintain that such hearsay ought to be avoided like COVID-19. The above-mentioned three recent appellate decisions tend to support my view.

Section 25 of the Ontario *Evidence Act* tells us what sort of published hearsay is admissible: "Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be published by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession with the Queen's dominions, shall be admitted in evidence to prove the contents thereof."

J.N. v. C.G.

In *J.N. v. C.G.*, the Ontario Court of Appeal harshly criticized the very highly respected legal scholar Superior Court Justice Alex Pazaratz. This case involved a separated couple and their three children. The two youngest lived with the mother and she and the children opposed receiving the COVID vaccine. Relying on published advice from the government, the father wanted vaccinations, so he brought a motion asking the court to grant him the exclusive decision-making authority with respect to the vaccination issue.

Justice Pazaratz had surprisingly dismissed the father's 2022 motion, finding that COVID vaccination was not in these children's best interests. Justice Pazaratz was basically holding that you can't rely upon government pronouncements because government has a history of doing bad things while you can and should rely upon unsubstantiated, non-peer-reviewed nonsense from the Internet.

Justice Pazaratz quite strangely went down a very nasty rabbit hole when he should have, as a very first step, been determining the admissibility of Internet dribble. Instead, Justice Pazaratz delved into

social/political philosophizing: he startled legal observers with comments like these:

> Pro-vaccine parents have consistently (and effectively) attempted to frame the issue as a contest between reputable government experts versus a lunatic fringe consisting of conspiracy theorists, and socially reprehensible extremists. This was absolutely the wrong case to attempt that strategy. The professional materials filed by the mother were actually more informative and more *thought-provoking* than the somewhat repetitive and narrow government materials filed by the father. [See *J.N. v. C.G.*, [2022] O.J. No. 793, emphasis added]

Who would have known that "informative" and thought-provoking" were legal tests for admissibility of evidence?

The Court of Appeal flatly rejected such an absurd analysis, as it well should have.

Evidence laws should be followed

The appeal judgment correctly states:

> The motion judge erred in failing to conduct any meaningful review of the appellant's authorities, *or the laws of evidence*, in favour of the respondent's *questionable and unreliable internet printouts with no independent indicia of reliability or expertis*e. This was a palpable and overriding error. [*J.N. v. C.G*. [2023] O.J. No. 561, emphasis added.]

It added, "The information relied upon by the respondent was *nothing but something someone wrote and published on the Internet*, without any independent indicia of reliability or expertise, which, even if admissible, should have been afforded no weight at all."

The appellate court's castigation of the venerable Justice Pazaratz recalls for me that huge icon and outstanding family law scholar, Justice Henry Vogelsang, who in 1990 when sitting in the lowly Provincial Court (as it was then called), criticized the Ontario family law bar for indiscriminately just attaching letters and what-not to affidavits and calling that "evidence."

In *LiSanti v. LiSanti*, [1990] O.J. No. 3092 (Ontario Provincial Court), Justice Vogelsang rang a cautionary bell that lawyers and judges have unfortunately frequently ignored for more than two decades now. The mother had put forward as an exhibit "a lengthy prose statement" that covered many aspects of the father's alleged abusive behaviour. Justice Vogelsang stated at paragraph 4:

> The allegations made in the exhibit are clearly stated to be hearsay. The tone is highly pejorative and prejudicial to the husband. The exhibit is not in affidavit form. No one swears as to the source of information outside his or her personal knowledge and deposes to a belief that the statements are true. Not the subject of an affidavit, no one can cross-examine on the statements or the source of the information.

Here is what I view as the key Justice Vogelsang points that should have reverberated throughout the family law system:

> [5] *There has been a disturbing tendency in recent months to attempt to incorporate, in motion material, renditions of statements allegedly made by parties or other sources without their inclusion in an affidavit. The rules, however, require evidence on a motion to be by way of affidavit*. The basis of that requirement is obvious. Without the possibility of testing an allegation through cross-examination, there is an incentive to swell the evidence freely with unsupported statements by persons not clearly identified and, therefore, safe from inquisition. That is the situation with this exhibit [emphasis added].
>
> [6] … It is not enough to characterize the requirement in the rules as a "general rule" only. *The fact that the statements made may possess some superficial relevance does not, in my view, transform inadmissible evidence into an acceptable form.* … The production of these statements in their present form is improper, greatly prejudicial and scandalous. It cannot be salvaged by resort to a plea concerning urgency or the demands of time. I will give them no consideration whatever in deciding this motion.

While *LiSanti* has been followed in many cases (most recently see *Nouri v. Watters*, [2022] O.J. No. 4143 at para. 113: "… a letter appended to an affidavit is not evidence"), I must bemoan the fact that throughout my 44 years of family law experience, I regret that family courts all too often ignore what Justice Vogelsang stated oh so wisely.

But let's turn back now to Justice Pazaratz. It should not have mattered to Justice Pazaratz which documents were more "thought-provoking." The evidence first and foremost has to be legally admissible. You cannot just take information from the Internet and willy-nilly splash that stuff across your affidavit, let alone be a judge and use it in your learned published reasons.

I also question why Justice Pazaratz felt the need to point out that the government has made mistakes in the past. In his reasons, under the heading, "Why should we be so reluctant to take judicial notice that the government is always right?" he listed a dozen historical missteps by the federal government, including the internment of Japanese Canadians in the Second World War and the residential school system. I did not know that s. 25 of the *Evidence Act* does not apply because the government is far from infallible — LOL.

When I first read Justice Pazaratz's decision, I said out loud to my colleagues at my firm, "This decision surely cannot stand." Had I been Justice Pazaratz's law professor and he wrote that legal analysis for my Evidence class, I would have given him a failing grade.

This is part one of a two-part series. See part two where we continue the discussion and examine two recent divisional court decisions.

Gene C. Colman, called to the Ontario bar in 1979, is the founder of the Gene C. Colman Family Law Centre.

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By **Gene C. Colman**

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(April 14, 2023, 3:00 PM EDT) -- In part one, we discussed a recent decision by the Ontario Court of Appeal, *J.N. v. C.G*. [2023] O.J. No. 561, and two others by Ontario divisional courts (*Spencer v. Spencer* [2023] O.J. No. 1158 and *A.V. v. C.V.* [2023] O.J. No. 1147), that confirm that only admissible evidence should sway judges in family law cases, not questionable bric-à-brac from the Internet.

Below we continue the discussion.

Examples were 'false equivalency'

I certainly agree that historical government errors are indeed serious stains on our history. But the Court of Appeal rightly called these examples "false equivalency". Just because the government has done terrible things in the past doesn't make s. 25 of the *Evidence Act* inapplicable.

While the Ontario *Family Law Rules* do indeed allow hearsay evidence in some situations, I maintain that a family law litigant ought to bring forward the best evidence that they can and hearsay is not best evidence. One should not hang their hat on hearsay save and except where that evidence comes under the rubric of a recognized exception to the hearsay rule or where there is no practical alternative. We should pay particular attention to ensure that whatever evidence we include in affidavits is admissible, for starters. Listen to Justice Henry Vogelsang!

Two divisional court cases

We now have two more recent appeal cases from the Ontario divisional court (both released simultaneously on March 14), where the court takes a deeper dive into the nature of the evidence that is admissible at interim motions — *Spencer v. Spencer* and *A.V. v. C.V.*

Both cases tell us that government-published edicts are admissible and reliable hearsay. Both cases rely upon the Ontario Court of Appeal chastisement of Justice Alex Pazaratz in *J.N. v. C.G.* In *A.V. v. C.V.* the divisional court stated:

> [6] … In accordance with the guidance provided by the Court of Appeal in *J.N. v. C.G.*, the motion judge in this case was correct to put weight on the Government of Canada's recommendation that children be vaccinated against COVID-19. Further, in the face of that regulatory approval, the motion judge was correct to put the onus on the mother to establish that the child should not be vaccinated.

It's now established beyond any doubt that motions judges can most certainly rely upon government pronouncements with respect to vaccinations and the onus of proof will fall on the objecting parent to displace that presumptive approach that government is always right.

To remove any doubt at all, *A.V. v. C.V.* addresses both admissibility and onus:

> [18] In short, government publications and recommendations may be admitted into evidence. Once admitted, regulatory approval of the vaccine places the onus on the objecting party to demonstrate that the child should not be vaccinated. The motion judge is to make this determination in the best interests of the child.

Earlier COVID school attendance case

My firm was involved in what was one of the early COVID school attendance cases. In *Zinati v. Spence* [2020] O.J. No. 3706, the father believed his daughter should continue online learning at the start of Grade 1 in September 2020 while the mother argued that the child should return to in-person learning.

In this March 2020 decision, the judge decided that government edicts as to the safety of its students in classrooms were to be followed, so the child should return to school.

The judgment cited a Superior Court of Quebec decision that noted it is not for the courts, "but rather for the competent government authorities, to assess the potential risks of contamination of the population during the pandemic, and to take the necessary measures to limit the spread of the virus [if] the government decides to permit primary education to resume, the court need not question that decision."

Conclusions

The above four Ontario decisions should put to rest any debate about students having to follow government edicts about going back to school during COVID or the necessity for COVID vaccinations. But more important for our analysis here is the proposition that s. 25 of the *Evidence Act* is still good law. "Thought provoking" hearsay derived from random internet sources does not constitute admissible evidence in Ontario.

There was no Internet in 1990 but we have thankfully come full circle back to what that legal sage, Justice Vogelsang, told us decades ago about evidence first and foremost having to be admissible in order to be considered. In 2023, is anyone listening?

Here are the lessons to be learned from what I would like to call the "Ontario courts' anti-Justice Pazaratz appellate trilogy:"

> 1. **Admissible**: Your motion evidence must first and foremost be admissible — i.e., it is direct evidence without hearsay; it is expert evidence; or it is evidence that comes within a recognized exception to the hearsay rule.
>
> 2. **Science**: You should not be obliged to relitigate basic accepted science. You are not obliged to prove through expert evidence that vaccines are good. Government has already announced publicly that they're good. Did anyone read s. 25 of the *Evidence Act*?
>
> 3. **Government publications**: You can refer to public government pronouncements; it's an exception to the hearsay rule. See s. 25 of the *Evidence Act*.
>
> 4. **Onus**: Once such evidence is admitted, the onus shifts to the vaccine adverse parent to prove his/her case based upon the particular child's best interests.
>
> 5. **Internet nonsense**: And you had best not use random Internet sources to try to prove your case. Such bric-à-brac just ain't admissible.

This is part two of a two-part series. Part one: 'Bric-à-brac' from Internet doesn't count as admissible evidence.

Gene C. Colman, called to the Ontario bar in 1979, is the founder of the Gene C. Colman Family Law Centre. The bolded and italicized portions of quotations are the author's.

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