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# How Much Independent Judicial Research Is Appropriate?

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It is generally accepted that judges can conduct research beyond the materials provided by counsel. One cannot argue, for instance, that we are limited to case precedents submitted by counsel or that we cannot conduct our own legal research.[1] However, what if the research is not of a strictly legal nature? What if we are not satisfied with the evidence presented? How far can we go in examining exhibits and drawing conclusions from them? These are different and more difficult questions that have caused debate in Canada and the United States because in "an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties."[2] As will be seen, in certain instances, independent research or examination of exhibits can both raise a reasonable apprehension of bias and prevent an accused person from making full answer and defence.

## EXAMINATION OF EXHIBITS

When an exhibit is entered, we can examine it. No doubt we can draw inferences from the exhibit.[3] A "trial judge is not a mere observer in a criminal trial."[4] However, how far can we go in such examinations before we become a witness?

An interesting illustration of this point can be found in the Supreme Court of Canada's decision in *R. v. Nikolovski*.[5] In *Nikolovski*, the Supreme Court of Canada affirmed a conviction for robbery based solely on the trial judge's comparison of the person depicted in a crime-in-progress video with the accused who was sitting in the courtroom. There was no other identification evidence, and the store clerk was unable to identify the accused. The majority of the Supreme Court held that "it was certainly open to the trial judge to conclude that the accused before her was the person depicted on the tape."[6] However, two dissenting justices suggested that "the difficulty with the majority's reasoning is that the judge's observations [were] entirely untested by cross-examination."[7] Applying *Nikolovski*, it was held in *R. v. Benson* that a conviction should be upheld though the trial judge "relied on the recognition evidence of the complainant and his own supporting observations in making his decision on the appellant's guilt."[8] Similarly, in *R. v. Gyles*, it was held that in convicting the accused, the trial judge properly "relied on her comparison of the appellant's voice when he testified in court with the voice heard on the tape recording [entered as an exhibit] in coming to her conclusion that it was the appellant's voice on the tape recording."[9]

An example of a trial judge going too far in examining exhibits can be found in *R. v. Bornyk*.[10] In *Bornyk*, the accused was charged with the offence of break and entry. The key evidence against him was a fingerprint found inside the house. The Crown called an expert fingerprint examiner, who testified that the fingerprint had been deposited in the house by the accused. After reserving judgment, the trial judge sent counsel four articles critical of the accuracy of fingerprint analysis. After hearing further submissions, the trial judge entered an acquittal. In doing so he referred to the articles he had produced and his own comparison of the known print with the latent print.

The Crown appealed from the acquittal. The appeal raised two issues:

> (1) whether the trial judge erred "in relying upon independently researched literature that was not properly introduced by either party, not tested in evidence, and not put to the fingerprint witness"; and
> (2) whether the trial judge erred "by engaging in his own unguided comparison of the latent print and known print."[11]

The appeal was allowed and a new trial ordered. The British Columbia Court of Appeal noted that it "is basic to trial work that a judge may only rely upon the evidence presented at trial, except where judicial notice may be taken."[12] The Court of Appeal indicated that it was "apparent from the excerpts found in the reasons for judgment and the descriptive titles of the articles uncovered by the judge that the articles are discussions on the subject of fingerprint analysis, including opinion. As articles commenting on forensic science, their contents are not matters of which the judge could take judicial notice. It is thus axiomatic that it was not open to the judge to embark on his independent investigation."[13]

**Footnotes**

1. See *R. v. P.S.*, 2015 NBCA 74, ¶ 33 (Can. N.B.).
2. See *Imperial Oil v. Jacques*, [2014] 3 S.C.R. 287, ¶ 25 (Can.).
3. See *Agar v. Weber*, 2014 BCCA 297, 2014 CarswellBC 2129, ¶ 38 (Can. B.C.).
4. See *R. v. Brijeski*, 40 M.V.R. (3d) 251, 1999 CarswellOnt 675, ¶ 3 (Can. Ont.).
5. [1996] 3 S.C.R. 1197 (Can.).
6. *Id.* ¶ 33.
7. *Id.* ¶ 57.
8. 2015 ONCA 827, 2015 CarswellOnt 18304, ¶ 18 (Can. Ont.) (emphasis added).
9. 27 M.P.L.R. (4th) 193, 2005 CarswellOnt 7422, ¶ 13 (Can. Ont.).
10. 2015 BCCA 28, 2015 CarswellBC 126 (Can. B.C.).
11. *Id.* ¶ 6.
12. *Id.* ¶ 8.
13. *Id.* ¶ 10.

The Court of Appeal concluded that the trial judge "stepped beyond his proper neutral role and into the fray. In doing so, he compromised the appearance of judicial independence essential to a fair trial. While he sought submissions on the material he had located, by the very act of his self-directed research, in the words of Justice Doherty in *R. v. Hamilton* (2004), 189 O.A.C. 90, 241 D.L.R. (4th) 490 at para. 71, he assumed the multi-faceted role of 'advocate, witness and judge.'"[14]

The Court of Appeal also concluded that the trial judge erred in "conducting his own analysis of the fingerprints":

> [T]he judge also erred by conducting his own analysis of the fingerprints, absent the assistance of the expert witness. The very point of having an expert witness in a technical area, here fingerprint analysis, is that the specialized field requires elucidation in order for the court to form a correct judgment: *Kelliher (Village) v. Smith*, [1931] S.C.R. 672; *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419. While it may be desirable that a judge personally observe the similarities and differences between the latent point and known point, such examination should be guided by a witness so as to avoid the trier of fact forming a view contrary to an explanation that may be available if only the chance were provided to proffer it.[15]

A recent example from New Zealand constitutes another example of a judge going too far. In *Garrett-Phillips v. R.*, the accused pleaded guilty to a charge of wounding with intent to cause grievous bodily harm.[16] The accused had stabbed the victim at a tavern and used a knife he had brought to the tavern with him. At the sentence hearing, evidence was presented to refute the suggestion that the stabbing had been premeditated. This evidence indicated that, earlier in the day, the accused had been paua fishing at Opunake, that the knife he had with him at the tavern had been used for paua shucking, and that, as he had not changed his clothes afterwards, that knife was still in his pocket when he went to the tavern.

The sentencing judge rejected this evidence. One of the grounds upon which he did so was that he had personally "consulted tide charts for Opunake on the day in question." The sentencing judge concluded based upon his assessment of the charts that "the alleged paua fishing would have occurred at full-tide. The judge did not, therefore, accept that Garrett-Phillips would have been wearing the same clothes in the tavern as he had worn whilst fishing for paua. Further, the judge did not consider the knife to be the sort of knife that would be used for paua fishing.

On appeal, the New Zealand Court of Appeal upheld the sentence imposed but indicated that "it was unwise of the Judge to have consulted factual material that was not in evidence before him."[17]

But how far should such restrictions go? Surely we are not limited solely to judicial notice. Can we not use our experience and knowledge of local conditions without evidence having been presented? Consider the decision in *R. v. Smarch*.[18] In *Smarch*, the accused was convicted of the offence of sexual assault. The trial judge refused to impose a "long term supervision order" because he concluded "that suitable, high-intensity treatment programs were not available in the Yukon."[19]

The Yukon Court of Appeal held that the foundation for the sentence was based "on an absence of evidence, which is an error in law. There was no evidence before the judge regarding programs that could adequately supervise Mr. Smarch in the community; rather, the judge based his conclusion that such programs were available on his own knowledge and experience. This is not enough."[20]

So it would appear that though we can view exhibited video tapes or photographs and reach our own conclusions without becoming "advocate, witness and judge," we must be cautious in examining other types of evidence. The line of demarcation appears to involve, in part, whether expert explanation of the relevance and meaning of the evidence is necessary and whether it requires an examination that might be impacted by cross-examination.

## THE INTERNET

The Internet allows for an unprecedented ease of worldwide legal research. However, it also allows for non-legal research, and this is where judges can fall into error.

An example can be found in *R. v. C.D.H.*[21] In *C.D.H.*, the accused was acquitted of the offence of sexual assault. The trial judge had conducted his own Internet research on the website "Match.com" after it had been referred to in the evidence. The Ontario Court of Appeal held that the trial judge's conduct contravened the "basic principle that judges and jurors must make their judicial decisions based only on the evidence presented in court on the record."[22]

The Ontario Court of Appeal also concluded "that the circumstances we have outlined gave rise to a reasonable apprehension of bias."[23]

In the United States, the decision in *Rowe v. Gibson*[24] nicely illustrates the problem because of the existence of a dissent.

In *Rowe*, a prisoner sued a prison and its staff in relation to medical treatment. The suit was dismissed but reversed on appeal by the United States Court of Appeals for the Seventh Circuit. The nature of the disagreement between the judges was described by one of the judges as follows:

> A disagreement about the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research.[25]

14. *Id.* ¶ 11.
15. *Id.* ¶ 18.
16. [2015] NZCA 563 (N.Z.).
17. *Id.* ¶ 27.
18. 2015 YKCA 13, 2015 CarswellYukon 51 (Can. Yukon).
19. *Id.* ¶ 43.
20. *Id.* ¶ 54.
21. 2015 ONCA 102, 2015 CarswellOnt 4194 (Can. Ont.).
22. *Id.* ¶ 14.
23. *Id.*
24. 798 F.3d 622 (7th Cir. 2015).
25. *Id.* at 635 (Rovner, J., concurring).

In an opinion dissenting in part, Judge David F. Hamilton took umbrage at his colleagues' use of the Internet:

> The ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts. . . . The majority's approach turns the court from a neutral decision-maker into an advocate for one side. The majority also offers no meaningful guidance as to how it expects other judges to carry out such factual research and what standards should apply when they do so. Under the majority's approach, the factual record will never be truly closed. This invites endless expansion of the record and repetition in litigation as parties contend and decide that more and more information should have been considered.[26]

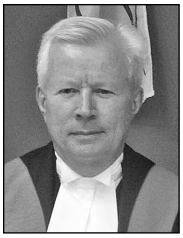
However, Judge Richard A. Posner, writing for the majority, suggested that modern trial judges are not "like the English judges of yore":

> In citing even highly reputable medical websites in support of our conclusion that summary judgment was premature we may be thought to be "going outside the record" in an improper sense. It may be said that judges should confine their role to choosing between the evidentiary presentations of the opposing parties, much like referees of athletic events. But judges and their law clerks often conduct research on cases, and it is not always research confined to pure issues of law, without disclosure to the parties. We are not like the English judges of yore, who under the rule of "orality" were not permitted to have law clerks or other staff, or libraries, or even to deliberate—at the end of the oral argument in an appeal the judges would state their views seriatim as to the proper outcome of the appeal.[27]

## CONCLUSION

The decision in *Smarch* might have been different if the trial judge had raised his concern about a lack of treatment programs and asked for submissions or evidence. In *R. v. Turpin*, for instance, the Ontario Court of Appeal held that if a trial judge, in examining an exhibit, concludes it contradicts *viva voce* evidence on a point not raised, the trial judge should "advise the parties and offer an opportunity to have the trial reopened."[28] Such an approach might generally be wise. A criminal trial is after all not really a search for the truth. It constitutes "an independent testing of facts to the required legal standard in order to determine if facts have been proven beyond a reasonable doubt."[29]

Though a request for further submissions based upon an examination of presented evidence may answer the problem of judges becoming their own witnesses, there appears to be no answer to a judge becoming her or his own witness by examining such evidence as fingerprints. Similarly, the competing views expressed by the judges in *Rowe* simply cannot be reconciled. The majority opinion proposes a wide scope for judicial evidence-gathering unencumbered by disclosure or the benefits of advocacy.



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26. *Id.* at 638, 641 (Hamilton, J., dissenting in part).
27. *Id.* at 628.
28. 2011 ONCA 193, 2011 CarswellOnt 1497, ¶ 36 (Can. Ont.).
29. See Keith D. Kilback & Michael D. Tochor, *Searching for Truth But Missing the Point*, 40 ALTA. L. REV. 333, 333 (2002).



**Answers to Crossword**
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