"First Rate" Fact Finding: Reasonable Inferences in Criminal Trials: A Lecture in Honour of Ivan Cleveland Rand

Christine Boyle*

Naturally, I have given some thought as to how I can honour Ivan Rand in this lecture. I feel that I can make a connection in terms of substance. I hope to link his well-known focus on the rule of law to my subject of drawing reasonable inferences in criminal trials. Style is more of a challenge. I feel in my bones that Ivan Rand would not have cared for a PowerPoint presentation. As well, when he wrote a paper, delivered a judgment or gave a lecture, he produced a knowledgeable, structured analysis of a particular area of law such as fraud.[1] His judgments, scholarly papers, and lectures were not striking for digressions, frivolities, or soul-searching about choice of words. He did not indulge in the lengthy footnotes described by Chuck Zerby in his book *The Devil's Details*, as the "corridor where the scholar pops out of his office to stretch his legs and meeting colleagues, gossips, tells jokes, rants about politics and society, and feels free to offer opinions based on nothing but his prejudices and whims."[2] Rather, Rand was a practitioner of the art of the footnote as brief citation.

He was not *averse* to bold asides, such as the sweeping assertion in his article on fraud that fraud was present in almost every class of sport.[3] And it appears that he took pleasure in the collection of what might be called historical trivia, such as examples of "mischievous frauds" in the same article.[4] He referred to the existence of 2,000 "Van Dykes" when only 70 were painted by that artist.[5] Such observations or decorative illustrations were included in his text rather than his footnotes. In spite of my admiration for such flourishes as the 2,000 Van Dykes, I think it is fair to say that his sense of humour, personal opinion and interest in scholarly gossip were *implied* rather than explicit in his writing and lectures.

In contrast, my view is that the appropriate place for asides, trivia, and fooling around is generally the footnote. I like the relative freedom footnotes provide for

---

* Professor of Law, University of British Columbia. This lecture was delivered at the University of New Brunswick on 15 March 2007. The style of the original lecture has been retained as much as possible.

[1] See "Historical Basis of Fraud at Common Law" (1964) 3 W.L.R. 2.

[2] (New York: Simon and Schuster, 2002) at 84.

[3] *Supra* note 2 at 3.

[4] *Ibid.* at 2.

[5] *Ibid.* at 2.

lists, tangents, and quibbling. I like the scope for the self-indulgence of both quoting and taking issue with oneself and of sly digs at others. The footnote, oddly, is a written medium through which the author's voice can be more clearly heard than in the text. In spite of the fact that it is a stretch to make the connection, I propose to try to honour this "implied" aspect of Rand's scholarship by delivering this lecture in the form of verbal footnotes to my PowerPoint presentation.[6]

Let me turn then to the reference to "first rate" in my title. According to former Dean MacKay of the University of Western Ontario Faculty of Law, "first rate" was one of Ivan Rand's favourite expressions.[7] He applied it to anything special, such as a first rate blizzard or a first rate automobile accident. (I had some first rate turbulence flying here from Vancouver.) First rate fact finding in the form of reasonable inferences is particularly important in criminal trials, where freedom, reputation and the safety of the public are at stake. A concern in the critical literature on the law of evidence is that fact finders should carefully examine and tailor the inferences they may draw and not base factual findings on off-the-peg stereotypes. For example, sexual assault trials have attracted particular concern about stereotypical reasoning. There has been a good deal of feminist engagement with inferences in that context. In my own work, for instance, I have focused on the drawing of inferences of consent from prior sexual history.[8]

I am not going to denounce the stereotyping of women in sexual assault trials today. In fact, I am going to indulge in stereotyping myself and tell you a story about an Irishman. (My defence is that we are close to St. Patrick's Day.) This particular Irishman went out drinking one night. He drank heartily. He came home with two small bottles of whiskey in his back pockets. As he came in his front door he fell backwards and broke both bottles. He pulled down his pants and, looking in the hall mirror, he saw many small cuts to his bottom. He stumbled around looking for Band-Aids, and, using the hall mirror, he applied them to all the cuts he could see. In the morning, his wife, a charming Irishwoman, said to him in her candid fashion:

> "You got drunk again last night."
>
> He replied, "What makes you say that, sweetheart?"
>
> She said, "Well, it could be the noise you made coming in the door. It could be this bloody, broken glass on the floor. It could be the smell of whiskey. But really it's all those Band-Aids on the hall mirror."

Justice Rand, like the Irishman's wife, was familiar with the process of drawing "reasonable inferences" from evidence.

---

[6] For the purpose of publication, footnotes have been added to the "footnotes" in the text. The PowerPoint slides are indicated in bold.

[7] R.S. MacKay, "In Memoriam Ivan Cleveland Rand" (1969) 8 West. Ont. L. Rev. at v.

[8] See "Sexual Assault in Abusive Relationships: Common Sense about Sexual History" (1996) 19 Dal. L. J. 223.

What the jury "must do is draw their conclusions from the evidence submitted to them or the reasonable inferences arising from it."

Chow Bew v. The Queen[9]

In the murder case of *Chow Bew,* he refers to the impropriety of a judge urging a jury to engage in speculation. The jury (or fact finders more generally) should only draw reasonable inferences.

In jury trials it is the jurors who decide whether to draw inferences. However, judges often try to influence the jury and not always in the direction of promoting first rate fact finding. In order not to cast aspersions on any of Justice Rand's judicial colleagues who are present, I draw my examples from English trials.

Jeremy Thorpe was the leader of the Liberal Party in the United Kingdom from 1967-1976. His political career ended after he was charged with incitement and conspiracy to murder of an alleged lover, Norman Scott. At his jury trial, the Old Bailey judge described Mr. Scott as follows:

> You will remember him well—a hysterical, warped personality...He is a crook...He is a fraud. He is a sponger. He is whiner. He is a parasite. But of course he could still be telling the truth. It is a question of belief...I am not expressing any opinion.[10]

The jury acquitted.[11] This summing up was famously satirized by Peter Cook in an Amnesty benefit show, *The Secret Policeman's Ball*, in a piece that became known as *Entirely a Matter for You.*[12]

A contrasting example is from a defamation case, albeit one ultimately leading to a conviction for perjury. British politician and writer Jeffrey Archer sued the *Daily Star*, which had published an allegation that he had paid money to a prostitute for sex. Justice Caulfield famously said to the jury.

> Remember Mary Archer [his wife] in the witness-box? Your vision of her will probably never disappear. Has she elegance? Has she fragrance? Would she have, without the strain of this trial, radiance? How would she appeal? Has she a happy married life? Has she been able to enjoy, rather than endure, her husband Jeffrey?...Is he in need of cold, unloving, rubber-

---

[9] [1955] 2 D.L.R. (2d) 294 (S.C.C.), Rand J.

[10] Auberon Waugh, *The Last Word An Eye-Witness Account of the Trial of Jeremy Thorpe* (London: Michael Joseph, 1980) at 223-25.

[11] Don Stuart, annotation to *R. v. Lawes* (2006), 37 C.R. (6th) 301 (Ont. C.A.).

[12] Peter Cook, *Entirely a Matter for You*, online: phespirit.info <http://www.phespirit.info/pictures/heroes/p008_info.htm>.

> insulated sex in a seedy hotel round about quarter to one after an evening at the Caprice?[13]

The jury was thus invited to draw an inference that a man with a "fragrant wife" would not have sex with a prostitute. The jury awarded Archer 500,000 pounds in damages. Jeffrey Archer was later convicted on a charge of perjury arising out of his testimony at the defamation trial.

The question of how to assess whether inferences that a man who stuck Band-Aids on a mirror was intoxicated, that a man whom a judge thinks is a scoundrel is lying, and that a person with a fragrant spouse would not pay for sex after a night at the Caprice are reasonable is the subject of my remarks this evening.

Relevance—the basic concept of the law of evidence

Inferences cannot be drawn from irrelevant evidence

- **Rationality**
- **Fairness**
- **Equality**
- **Economy**

"Circumstantial evidence serves as a basis from which the trier of fact may make reasonable inferences about a matter in issue."[14]

Reasonable inferences are drawn from relevant circumstantial evidence. In other words, to say that evidence is irrelevant is to say that one can draw no reasonable inference from it. It would be irrational, unfair, inegalitarian, and inefficient in terms of judicial economy to base inferences on irrelevant information.

There are many examples of Canadian courts addressing issues of whether particular information can appropriately be used as the basis of an inference in criminal trials. An uncontroversial example relating to proof of *mens rea* is that a fact finder may draw an inference of intention from conduct. Here are some other examples demonstrating the use of the footnote as a list that would otherwise interrupt the flow of the text.

Generally, negative inferences cannot be drawn from the decision of an accused

---

[13] Evan Whitton, *Serial Liars: How Lawyers Get the Money and Get the Criminals Off* (Glebe, NSW: Lulu Press, 2005) at 25.

[14] Richard O. Lempert, Samuel R. Gross & James S. Liebman, *A Modern Approach to Evidence*, 3d ed. (St. Paul: West Group, 2000) at 205-06.

not to testify. But that decision may weaken an alibi. It is not generally appropriate to draw an inference about consent or credibility from the sexual history of a complainant in a sexual assault trial. However, the fact that such a complainant has not written about the alleged assault in her diary may be relevant to credibility. Knowledge of the privilege against self-incrimination does not yield an inference in relation to truthfulness one way or the other. Evidence of poverty has been held not to be relevant to motive to commit profit-oriented crime. The fact that an accused did not go to the police with a story he presents as a defence at trial may or may not be relevant to credibility.

> **It is commonly said that the determination of relevance depends on common sense and human experience.**
>
> **"There is a principle—not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence...which forbids receiving anything irrelevant, not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience."[15]**

How does one know whether one can draw an inference? Apart from cases on which the courts have already pronounced, and unless there is available empirical research, one needs to draw on common sense.

I mention the above quote from Thayer not because it advances my argument, but because of his Harvard connection with Ivan Rand. James B. Thayer (1831-1902) was a Harvard law professor, although he died before Rand took his law degree there. He was a leading evidence theorist who favoured an extension of judicial discretion and a simplification of the law of evidence. He is best known for the book from which this quote comes—*A Preliminary Treatise on Evidence at the Common Law*. John Henry Wigmore (1863-1943), a student of Thayer, and also a graduate of Harvard, built on his ideas, producing an eleven volume treatise, now titled *Evidence in Trials at Common Law*. The work of Thayer and Wigmore is still influential in Canada. In particular, scholars interested in the drawing of inferences rely heavily on Wigmore's work, although there has been feminist criticism of his ideas about sexual assault, such as the notion that complainants should be subjected to psychiatric examination. In other words, during his legal education, Ivan Rand breathed an air infused with enduring evidence scholarship, still being applied and criticized today.

---

[15] James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little Brown, 1898) at 264.

But does the law provide a test of relevance?

Canadian cases sometimes use the language of logic and the assessment of probabilities to provide such a test.

"To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue"...As a consequence, there is no minimum probative value required for evidence to be relevant."[16]

However, the use of common sense requires some structure. Canadian case law occasionally refers to the determination of relevance through the logical assessment of probabilities, as illustrated in this quote from the Supreme Court of Canada decision in *Arp*.

It is not my purpose to engage in a discussion of theories of probability such as Bayes's Theorem, but I think some general comments may illustrate the relegation of interesting, yet peripheral information to a footnote. Using the approach of assessing probabilities, to be relevant a piece of information does not have to make a material fact more probable than not, still less to prove it conclusively. Thus in order to hold that evidence of Band-Aids on the mirror is relevant to the issue of whether a person accused of being intoxicated actually was intoxicated, it does not have to be more probable than not that intoxicated people stick Band-Aids on mirrors. Perhaps only a very tiny proportion of intoxicated people stick Band-Aids on mirrors. It just needs to be more likely that Band-Aids will be stuck on mirrors if the accused were drunk than if he were not drunk.

"In a criminal trial, if a particular item of evidence is as likely to be found if the defendant is guilty as it is if he is innocent, the evidence is logically irrelevant on the issue of the defendant's guilt."[17]

Take the circumstantial evidence that an accused person had a motive to kill. It is clear that evidence that a person charged with murder took out an insurance policy on the deceased is relevant to whether he actually killed the deceased. In terms of probabilities, one does not have to think that having a motive to kill makes it more probable than not that one killed. However, it is a matter of common sense to think that someone with a motive is more likely to kill than someone without a motive. Evidence of motive is relevant evidence from which a negative inference of guilt may be drawn. It is not a determinative inference—it may in a particular case be a very weak inference indeed.

---

[16] *R. v. Arp*, [1998] 3 S.C.R. 339 at para. 38.

[17] Lempert, Gross & Liebman, *supra* note 15 at 231.

Because we don't have research on the connection between motive and actually killing, we have to use our common sense. We also have to use our common sense to assess the strength of the inference. Do people with a motive to kill always, often, sometimes or rarely act on that motive?

1. **Relevance—pose the comparison of probabilities question.**

2. **Examine common sense assumptions critically before slotting them into that question.**

3. **Address concerns about misuse via discretion to exclude prejudicial evidence or warnings.**

In a world that is both legally tidy and critically engaged with the dangers of wrongful convictions and acquittals, this might be the structure we would use with respect to inferences. The law would require the assessment of probabilities in some sort of rational fashion. Because we lack certain information, fact finders should be very careful to critically examine the common sense assumptions they are making, both in terms of assessing relevance and deciding how strong or weak the inference is. In cases where there is real concern about unreasonable inferences being drawn or reasonable inferences being given too much weight, judicial warnings can be given or prejudicial evidence excluded altogether. But the world is not so tidy.

However, case law does not consistently state or apply a test of the logical assessment of probabilities:

- **Some cases contain language suggesting that if evidence is not conclusive it is not relevant at all, e.g. *Shearing* ("Why assume that a diary devoted to "mundane" entries would *necessarily* report on episodes of...abuse.")[18]**

- **Reluctance to speculate, e.g. *Portillo* (shoes which may have made prints near the scene of a crime found near the accused's apartment—too speculative)[19]**

- **Merger of policy considerations with relevance, e.g. *Turcotte* (relevance analysis of accused's failure to respond to police questions prior to detention mingled with right to silence analysis)[20]**

Examples can be found where the courts use an approach other than the logical

[18] (2002), 2 C.R. (6th) 213 (S.C.C.).

[19] (2003), 17 C.R. (6th) 362 (Ont. C.A.).

[20] (2005), 31 C.R. (6th) 197 (S.C.C.).

assessment of probabilities. For example, in the Supreme Court of Canada decision in *Turcotte*, the Court based its conclusion that a person's non-response to police questions prior to him being a suspect was irrelevant more on his right to silence than an assessment of probabilities. One can even find cases where it appears to be thought that if evidence is not conclusive it is not relevant at all. I will return to this later.

At the moment, I am concerned that discussion of the legal test for relevance is not really appropriate for a lecture made up of footnotes, so I want to continue the discussion of reasonable inferences by turning to a particular judgment of Justice Rand.

A Case Study—*R. v. MacDonald*[21]

In this case, Justice Rand delivered a minority concurring judgment dismissing the appeal of Donald (known as Mickey) MacDonald from his conviction of robbery and kidnapping. Mickey MacDonald was represented by Miss Vera Parsons, KC, who was called to the Bar in 1924 and became Ontario's first woman criminal defence lawyer.[22] She is honoured through the Vera L. Parsons prize for Criminal Procedure in the Ontario Bar Admissions course.

How did Ivan Rand come to consider the case of Mickey MacDonald? Early in the morning of 13 December 1943 a truck containing thousands of dollars worth of liquor was seized by a gang of men, one of whom was armed with an automatic pistol. The driver of the truck, George Butcher, was forcibly confined in the car and the truck was taken to the barn of a riding school called The Lazy L. Ranch, about a mile south of Weston, near Toronto. (Weston is significant as the birthplace of Thomas H. Kemsley, later to become my husband.) An arrangement had been made with the owner of this riding school, James Shorting, to rent his barn to store "a few cases of Christmas liquor". The plan to store the liquor did not go well; as the Court of Appeal judgment mentions that the heavily loaded truck fell through the floor of the barn and got stuck there. Apparently, Shorting later contacted the police to let them know the truck and liquor were in his barn.

George Butcher, the driver, was set free about 9.00 a.m. Later the same day, around lunch time, the police found the gang subsequently proved to have participated in the crime, at Mickey MacDonald's apartment (as well as bootleggers). This led to the charges of robbery and kidnapping. At trial, Shorting and a stable boy identified Mickey as one of the people who unloaded the truck. Mickey claimed to have been somewhere else at the time—the gang had just shown up at his apartment and had not even mentioned the stolen liquor. His defence was unsuccessful and he was convicted.

---

[21] [1947] S.C.R. 90.

[22] Christopher Moore, *The Ontario Legal Alphabet*, online: Christopher Moore, Canadian Historian and writer <http://www.christophermoore.ca/legalalphabet.htm>.

The appeal to the Supreme Court of Canada had partly to do with whether the jury had been adequately warned that corroboration would be desirable with respect to the identification evidence of Shorting and the stable boy. These two may have been accomplices, and the law at that time required that the jury be warned of the danger of convicting on the basis of accomplice evidence in the absence of corroboration. This in turn led to the question of what could be corroboration. There were two facts that the Court thought could be evidence corroborating the identification of Mickey.

The inferences in *MacDonald*

1. A negative inference from association?

2. A negative inference from exculpatory lies?

The Court was unanimous in dismissing the appeal and finding that corroboration could be found *both* in the discovery of the gang in Mickey MacDonald's apartment *and* in his improbable testimony about the lack of discussion of the stolen liquor.

> **"It was argued that the presence of these men, characterized by the circumstances indicated, was as consistent with innocence as with guilt; that either the gathering was mere coincidence or that the thieves might have made use of the apartment to arrange for disposing of the liquor without any previous knowledge on the part of the accused. Considering all of the evidence bearing upon it, including an adverse inference from disbelief in the improbable testimony of the accused, I am unable to treat the incident as being neutral in its probative effect; that a jury could find a balance of probability tending to connect him with the robbery seems to me to be perfectly clear..."[23]**

This extract from Justice Rand's decision shows he took the position that the gathering in the apartment soon after the crime and the accused's improbable testimony were relevant pieces of information from which reasonable inferences of guilt could be drawn. The last sentence relates to the particular issue of corroboration in that the court took the position that for evidence to be corroborative it had to impress the jury on a level of probability—the inference needed to be strong. But my focus is on inferences in general, and inferences in general can vary in weight from weak to strong. "A brick is not a wall."[24] There may be a very large gap between evidence and proof.

---

[23] [1947] S.C.R. 90, at 101, Rand J.

[24] John W. Strong, *McCormick on Evidence*, 5th ed. (Toronto: West Publishing, 1999) at §185.

I would like to examine each of the two inferences that caused Miss Vera Parsons to lose Mickey MacDonald's appeal.

> **"the presence of these men"—guilt by association? Compare *MacDonald* with *R.v. Ejiofor*[25]**
>
> **"There will be situations in which association with other drug dealers will be relevant to a fact in issue in the prosecution for the importation of narcotics....Crown counsel...conceded that evidence that Mr. [O] and Mr. [A] had been convicted of drug importation had no relevance..."**
>
> **"[C]ounsel for the respondent properly described [the impugned] line of questioning as suggesting guilt by association. It offends one of the most fundamental principles of the criminal law. People can only be convicted for what they do, not for the company they keep."[26]**

What is often referred to as "guilt by association" is a current concern in the context of investigations of possible terrorist activity and detentions based on security certificates. My focus is on criminal trials, but on a general level there may be concern, especially among groups fearing discrimination, that negative inferences may be drawn from associates. *Ejiofor* illustrates what is a typical judicial antipathy to guilt by association reasoning. Such antipathy is also reflected in substantive criminal law since mere presence at the scene of a crime does not make one a party to it. Mr. Ejiofor himself was a refugee claimant from Nigeria charged with importing cocaine. Part of the Crown's case was that within a few months of arriving in Canada, he became friends with three convicted drug importers. His evidence was that when he came to Canada, they were the three Africans that he met. "You know, when he [the first African he met] was talking to me it was as if I was talking to a brother of mine."[27]

Nevertheless, association may sometimes be relevant evidence of guilt. Given the great harm that can result from unreasonable inferences in this context, it is particularly important to ask how we can distinguish reasonable from unreasonable inferences.

Was there a reasonable negative inference to be drawn from the presence of the gang and bootleggers at Mickey MacDonald's apartment not long after the robbery? One may instinctively reject "birds of a feather flock together" reasoning, but part of the antipathy to guilt by association may be that the term is misleading. Justice Rand was not suggesting that Mickey MacDonald was *guilty* because he was associating with bad guys. The association was simply relevant information, which might be of

---

[25] (2002) 5 C.R. (6th) 197 (Ont. C.A.).

[26] *Ibid.* at paras. 7 and 8.

[27] *Ibid.* at para. 4.

very little weight. But was the gathering even a brick in the wall of proof?

Mickey MacDonald was found in the company of the robbers a matter of hours after the robbery. Is that association more probable on the hypothesis of guilt or innocence? Was a guilty person more likely to be in their company a short time after the offence than an innocent person? We need to examine some plausible view of how the world works in order to test the "reality hypothesis".[28] Common sense suggests that a group of people together shortly after an exciting event is more likely to be made up of the group involved in the exciting event than a mixture of people involved and not-involved. There might be a reasonable inference that people who join me for dinner tonight are more likely to have been to this lecture than people innocent of that charge. One might think that a gang of robbers is more likely to split up than stay together, but that is not the point. They may be quite unlikely to stay together, but they still might be more likely to remain on their own than meet up with non-gang members, given the danger of a slip of the tongue disclosing their recent activity, or the danger of someone observing their behaviour and demeanour. On the other hand, for recent refugees to mix with people from their own country seems as consistent with the hypothesis of innocence as with guilt. The fact that the compatriots turn out to be criminals is not the basis of a reasonable inference at trial.

Reasoning through a particular inference, even using what feels like a logical approach to the assessment of probabilities, reveals how much guess-work is involved, and how care is needed to avoid generalizations along the lines of birds of a feather flock together. Nevertheless, I am inclined to think that the Supreme Court of Canada, including Justice Rand, was correct in finding that the gathering could be the basis for a reasonable inference that Mickey was guilty of *something*. I am not so sure how strong the inference could be with respect to robbery and kidnapping given the presence of bootleggers. The gathering was arguably neutral on whether Mickey was a robber or bootlegger.

> **"adverse inference from disbelief in the improbable testimony of the accused"**
>
> **Is disbelieved testimony relevant to guilt?**
>
> **What is chain of reasoning?**
>
> **1. I do not (or the jury may not) believe the accused's testimony. (Disbelief should not be based on an assumption of guilt.)**
>
> **2. The accused is lying.**
>
> **3. I infer a sense of guilt from the fact that the accused lied.**

[28] Lempert, Gross & Liebman, *supra* note 15 at 207.

4. I infer guilt from a sense of guilt.

Turning to the second inference, what about the "improbable" testimony that the robbers did not mention the liquor? This point invites reflection on how we draw inferences. I see three features to this second inference:

> **1. One cannot infer a lack of credibility on the basis of an assumption of guilt;**
>
> **2. Inferential chains require particular scrutiny as they are only as strong as their weakest link—there is a danger that fact finders will leap to a negative inference based on one of the stronger links and neglect the weakest link;**
>
> **3. There is a danger of circular reasoning in drawing an inference of guilt from disbelieved testimony.**

Let's look at the chain of reasoning. First, the disbelief in Mickey's evidence that the gang did not mention the liquor is a common sense inference. If fact finders think that people who have just stolen liquor and are with people who could buy it from them would talk about it then they will be inclined to find evidence of silence improbable. I think the testimony that the robbers did not mention the liquor is logically relevant defence evidence as it's more consistent with the hypothesis of innocence than guilt. My common sense tells me that robbers who have joined up with people not associated with the robbery are likely to be trying quite hard not to mention the robbery. Since I think the evidence is plausible, I don't agree that it was capable of being corroborative evidence of guilt. I wonder if a jury that drew this inference would be assuming guilt in assessing credibility along the lines of doubting the evidence of accused persons because they have a motive to lie. As a matter of common sense, it is quite improbable that the gang would not have been discussing the robbery if only members of the gang were present.

However, I can also see that it is implausible that robbers would meet with buyers and *also* with innocent persons thus inhibiting discussion of a sale. Innocent people are less likely to be included in such a scenario than guilty people. It would be open to the jury to disbelieve the evidence of non-discussion and not count it as evidence of innocence.

The question would then become whether an inference of guilt can be drawn from lying? This involves two well-known steps—inferring a sense of guilt from lying and inferring guilt from a sense of guilt. The first step is weak since people lie for all sorts of reasons—an innocent person, for instance, might not wish to incriminate his guilty friends.[29] The second inference is stronger. Thus the chain of

[29] But lying may be seen as more consistent with guilt than with innocence. See *R. v. Coutts* (1998), 126 C.C.C. (3d) 545 (Ont. C.A.) at para. 15, Doherty J.A. "This distinction between statements which are disbelieved and, therefore, rejected and those which can be found to be concocted and capable of

reasoning has been seen as quite dangerous. We are concerned about the jump from lying to guilt, fearing fact finders will make that leap too readily.

Lastly, we need to be alert for circular reasoning. Rand was addressing the question of whether lying could corroborate accomplice evidence. If an accomplice is disbelieved, then there is no need to look for corroboration. If the fact finder believes the accomplice, then he may look for corroboration. A fact finder cannot use belief in the accomplice testimony to disbelieve the accused and then count disbelief in the accused as corroborative of the accomplice. I think similar reasoning applies to use of disbelieved evidence to support identification.[30]

I am sure that both Mickey MacDonald and Vera Parsons would be interested to know that counting disbelieved evidence as independent evidence of guilt would be reversible error today. In the United Kingdom, juries must be given "Lucas" directions to look for independent evidence that the lie was a deliberate falsehood before it can be the basis of a negative inference.[31] I am not aware of a particular name for the direction in Canada, but that is consistent with the Canadian requirement for independent evidence before an inference of guilt can be drawn, with respect both to statements outside court and in testimony.

Logic (fact positivists)[32] v. Policy (feminists, criticial race theorists, etc.)

Part of the difficulty with the Mickey MacDonald inferences is how brief they are (albeit in a concurring judgment). It is not uncommon to find such brief conclusions on inferences and of course we do not see the jury process of examining potential inferences at all. Many errors can underlie inferences—errors of rationality, such as circular reasoning, or leaping too quickly through a chain of inferences, or errors of common sense, such as assumptions about the human behaviour of robbers, Nigerian refugee claimants, people who report crimes to police, and sexually active women. There may be errors of inclusion or exclusion of information as well as too much weight given to certain information.

How can we ensure that our inference drawing is first rate? Critics urging more attention to rationality could be called "fact positivists", to use the terminology of University of Strathclyde evidence scholar Donald Nicolson. I picture the fact

---

providing circumstantial evidence of guilt cannot be justified as a pure matter of logic. In many, if not most cases, the inference of concoction flows logically from the disbelief of an accused's statements or testimony."

[30] See *R.v. Goodway* (1994), 98 Cr. App. R. 11 (C.A.).

[31] *R.v. Lucas*, [1981] 1 Q.B. 720 (C.A.). See P. Roberts & A. Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2004) at 487.

[32] Donald Nicolson, "Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory" in Mary Childs & Louise Ellison, eds., *Feminist Perspectives on Evidence* (London: Cavendish Publishing, 2000) 13 at 16.

positivist as an evidence analyst with a broad interest in fact investigation and fact finding, a serious interest in probability theory, including in the mathematical representations of probabilities, who believes Canadian law has strayed off the firm ground of logic into the mushier yet dangerous ground of policy. From this perspective, our fact finding would become more first rate if we had a good grasp of probability theory, and avoided the temptation to mask policy as rationality. To overstate it somewhat, here policy may be seen as the enemy of rational fact finding. From such a positivist perspective, persons such as myself, who are critical of accepted inferences, are inhabitants of the realm of policy, or, even worse, of *balancing* the rights, for example, of rape victims against accused persons.

Other critics think our fact finding would improve if we paid more critical attention to our common sense assumptions. There may be fear in this camp that attention to a rational structure deflects attention from the common sense part of reasoning about inferences. Nicholson has argued that "fact positivism creates a form of closure that helps isolate the study and practice of fact finding from feminist challenge." Plus, "formal logic tends to be adopted by those content with the premises involved in a reasoning process."[33] I am inclined to agree. There is something about the combination of the hard sense of logic (capable of being expressed in mathematical formulae) with soft common sense, and soft critiques of common sense, which tends to insulate established inferences from critical inquiry.

Being relegated to the realm of policy is even worse. Openly rejecting an inference on the grounds of policy rather than irrationality is not an attractive proposition. Policy has a second class ring as compared to logic. Who wants to argue for an irrational approach to fact determination? Or to argue against rectitude of decision when the fate of an innocent person or a future victim is at stake? *Of course* I am in favour of rigorous rationality in the interests of avoiding wrongful convictions and acquittals.

> There we have the two worlds—one of focus on a logical structure of relevance determination and one of concern about discriminatory common sense both with respect to relevance and probative value. In the meantime, people are affected in very significant ways by fact finding in criminal trials. I want to start moving toward a conclusion by making the fairly obvious point that the drawing of inferences could be improved by attention to both. A focus on the logical structure of relevance determination needs to coexist with critical attention to common sense.

There is good reason for the current lack of clarity in the Canadian law on inferences. There is a real fear of "off the peg" reasoning, which may lead courts to put evidence that is relevant but of little probative value in the irrelevant category. People want to avoid stigmatizing individuals on the basis of generalizations or evidential hypotheses. However, assessing probabilities on the basis of common sense inevitably involves some level of generalization, as I hope I have illustrated. When we assess probabilities we cannot find facts on an individual basis. But generalizations are an uncomfortably close cousin of stereotypes. One often hears a refutation of a generalization on the point that it is not true of everyone in the group.

---

[33] *Ibid.* at 18.

Of course it is not. The fact that everyone found in the company of criminals is not a criminal does not make being found in the company of criminal's irrelevant information. But our fear of branding someone a criminal on that basis may make us prefer to reject that information rather than say that it provides a basis for a very weak inference. Relevance determinations may thus bear the burden of signaling a lack of confidence in assessing the weight of the inference.

Ironically, we may make errors in the other direction as well. A lack of attention to the steps in our reasoning might make us accept some inferences, such as guilt by association, too readily. I do not want to suggest that the only danger is *over*-scrupulousness about dangerous inferences.

> ***Roncarelli v. Duplessis***[34]
>
> **"[A]ction dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty would signalize the beginning of disintegration of the rule of law..."**[35]
>
> **Can the rule of law be strengthened with respect to fact finding?**

This quotation comes from Rand's famous judgment applying the rule of law to administrative decisions, discussed by David Dyzenhaus in his 2004 Rand lecture.[36]

The realm of inferences is also one where the individual is exposed to the risk of arbitrary likes and dislikes, to the over and under estimation of relevance, flowing from errors of both logic and common sense. Persons at risk of wrongful conviction or persons victimized after acquittals of the guilty are, in a sense, at risk of even greater harm than Mr. Roncarelli. He was subjected to "vocational outlawry" when he lost the liquor licence for his restaurant; convicted persons are more literally declared to be outlaws. How can the law protect such people from the luck of the draw with respect to fact finders? Multiple fact finders in the form of juries may assist to some extent, but most criminal trials are by judge alone. Here we are dependant on law rather than multiple common senses to protect the individual and society from arbitrary fact finding.

My last footnote relates to the possibility that a more Rand-like approach focusing on the rule of law could offer some protection and combine the concerns about both rationality and common sense assumptions. Ideally, I would like the law on inferences to be susceptible to the form of doctrinal exposition at which Ivan Rand was expert.

---

[34] [1959] S.C.R. 121.

[35] *Ibid.* at 142, Rand J.

[36] "The Deep Structure of *Roncarelli v. Duplessis*" (2004), 53 U.N.B.L.J. 111.

1. **Overarching doctrine of judicial impartiality.**

2. **Legislation and case law governing particular inferences, e.g. *Seaboyer*,[37] *Turcotte*, *Noble*[38] (re accused not testifying)**

3. **More conscious, and transparent, attention to logic.**

4. **More conscious, and transparent, attention to the common sense assumptions used in the assessment of probabilities.**

5. **The recognition that sometimes information just does not help one way or the other, because of lack of knowledge or equally plausible inferences.**

Indeed, there is quite a lot of law relating to the drawing of inferences. I think points one and two are pretty obvious and in a sense the easy part of subjecting inference drawing to the rule of law. It is not, however, the usual practice of Canadian lawyers and judges to spell out their assessment of the probabilities. David Dyzenhaus made the point that Roncarelli was fortunate in how transparent Duplessis was—there was a "record of unabashed government".Justice Rand was fairly typical in his conclusory statements about the two pieces of evidence I have discussed. Actually working through his reasoning and setting it out as part of the duty to give reasons would assist the Roncarellis of arbitrary fact determination. That is even more critical with respect to the common sense assumptions slotted into both the assessment of probabilities and the estimate of weight. The law relating to reasons could therefore be enhanced to address concern about arbitrary inferences.

Lastly, it is recognized in the case law that information may be too equivocal to be of use—knowledge of the privilege against self-incrimination or post-offence flight can fall into this category. Hypotheses may simply be too speculative to be helpful to the fact finder.

The drawing of inferences is too important to be seen as somehow extra-legal, beyond the control of the rule of law. When deciding whether or not someone is a criminal, our inferences need to be first rate.

---

[37] [1991] 2 S.C.R. 577.

[38] [1997] 1 S.C.R. 874.

gilbert mcgloan gillis

Barristers & Solicitors
22 King Street, Saint John, NB E2L 1G3
Telephone (506) 634-3600 Fax (506) 634-3612
Email: gmg@gmglaw.com
Web site: www.gmglaw.com

Partners

A. G. Warwick Gilbert, Q.C.
Rodney J. Gillis, Q.C.
David N. Rogers
J. Danie Roy
John C. Gillis

Associates

Hugh J. Flemming, Q.C.
Anne F. MacNeill
Claire B. N. Porter
Catherine A. Fawcett
John E. Bujold
Nancy J. Martel
Jillian E. Jordan

T. LOUIS McGLOAN, Q.C. (1896-1986)
ADRIAN B. GILBERT, Q.C. (1895-1986)
THOMAS L. McGLOAN, Q.C. (1931-2005)
DONALD M. GILLIS, Q.C. (1916-2006)

The lawyers at Gilbert McGloan Gillis are acknowledged leaders in Atlantic Canada. The firm has reached that pinnacle through the quality of its service to clients and its ability to adapt to meet new challenges - often going to where the clients are to meet them.

GMG has evolved a winning solution that pairs the traditional expertise, broad and specialized knowledge of the law, and the old fashioned sense of ethics acquired over 75 years of practice, with a cutting edge technological ability and understanding, intricate data management tools, virtuosity in the areas that are key to their clients and a deliberate decision to open up to other cultures.