help in overcoming the same problem. Both men came through like champions and became successes. Of the horse, the less said the better.

Of the many outstanding events of His Lordship's life there is one that typifies all of the qualities I have mentioned. In 1971 the inmates of Kingston Penitentiary rioted, took hostages, and made demands that perceived grievances be remedied. The inmates demanded their remedies and immunity from prosecution, or the hostages would be harmed. The authorities demanded that the inmates surrender and deliver up the hostages, or they would storm the prison. The reply of the inmates was that if the armed forces surrounding the prison moved in, the hostages would be the first to die.

A citizens' committee was formed, hoping to assist in the crisis. There was one man the inmates requested to head that committee, one man they knew they could trust and they knew the authorities would respect. Through the correctional services, they requested Arthur Martin.

He dropped everything he was doing and rushed to Kingston to do his duty. Not a word was said about payment, and none was ever paid. He entered the prison with no assurance that he would not be taken hostage and subsequently killed if no resolution resulted. He was loyal to the inmates in his efforts to resolve their grievances and loyal to the prison authorities to achieve a solution without further bloodshed.

His main concern was that a nasty situation be resolved without the killing of hostages or inmates. After days and nights of meeting with correctional authorities and inmates, a result was ultimately achieved. The riot ended and the hostages were released. He assured the inmates responsible that they would be properly represented if charged. When charges were laid, he personally prevailed on senior members of the criminal bar to undertake the defence.

My Lords, a man may be measured by how those who know him speak of him, and the breadth of the spectrum of those people. In the life of Justice Martin, that spectrum includes, on the one hand, the Chief Justice of the United States Supreme Court, with whom I suspect he had a quiet drink and conversation in his chambers in Washington; and, on the other hand, an aging Irish farm manager with whom His Lordship had a quiet scotch and a homey talk at his kitchen table. When speaking of His Lordship, both of these men used the same words. Both referred to him as "my very good friend Arthur."

F E A T U R E

Thin-Skull Claims: Recovery for Accident Neurosis

Hillel David

Those of us whose practice involves personal-injury claims have seen a large increase in "accident neurosis" claims in the past several years. These are claims in which the plaintiff's complaints are significantly more serious than the objective physiological injuries (if any) that occur. In many such claims, the complaints are so unusual as to warrant the description "bizarre."[1] In one case, the word "grotesque" was used.[2] Such claims are now attracting very substantial damage awards.[3] The fundamental nature of the accident-neurosis claim—as a type of "thin-skull" claim—has been recognized and commented upon in some cases, but few commentators have gone on to consider or apply the principle involving the standard of evidence that ought to be required to prove such claims and that flows naturally from this categorization. Other matters, including evidentiary, damage assessment, and policy considerations in the context of an accident-neurosis claim, are considered as well in this article.

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Accident Neurosis as a Type of Thin-Skull Claim

The unusual reaction of the accident-neurosis plaintiff is what makes him or her a thin-skull plaintiff. Very few persons have the sort of complaints made by such plaintiffs after their involvement in minor accidents that cause few or no physical injuries. It has been said that "there is no difference in principle between an egg-shell skull and an egg-shell personality...."[4] Other cases have commented on the fact that this is the type of case that falls within the principle that the wrongdoer must take his victim as he finds him,[5] and that the accident neurosis claim is a type of thin-skull claim.[6] In one case, it was even termed an "unusual type of thin skull,"[7] indicating that it is a rarity among rarities.

The Requirement for Stricter Proof in Certain Circumstances

It is trite to say that the standard of proof required in civil cases is proof on a balance of probabilities. In some circumstances, however, the degree of proof required is higher. Perhaps a more accurate way of putting it is to say that proof with a greater probative value than would otherwise be necessary is demand-

ed. There was controversy for a time on the question whether the standard of proof required in such cases constituted a third standard, somewhere between the ordinary civil standard and that required in criminal prosecutions. It is now settled, however, that there is no third standard; rather, the civil standard applies, subject to the principle that circumstances may make it more difficult to satisfy that standard, by creating a demand for evidence having greater probative value.[8]

The circumstances that demand such evidence have been classified into two groups: allegations of a serious nature, and allegations that are inherently improbable. It is arguable that the latter constitutes the only true basis for the requirement for stricter proof, because it is, in large part, the foundation of the former. It is also valid to say, however, that another part of that foundation is the disinclination to make a finding involving a determination of moral turpitude in the absence of convincing evidence, apart entirely from the unlikelihood of the truth of the allegation. That observation is not relevant for the purposes of the issue here being considered.

There are numerous authorities for the first proposition, and some descriptive statements are the following:[9]

> Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.[10]

> ...like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject matter. In proportion as the offence is grave, so ought the proof to be clear.[11]

> ...the civil standard of proof on the balance of probabilities is a "flexible" one and...the graver the issue involved, the higher is the degree of probability which the court should require.[12]

> Juries are invited and expected to exercise their common sense on problems of proof and credibility. The ordinary direction on how to determine the credibility of witnesses, having regard to memory, self-interest, opportunity to observe, etc., is largely one of common sense. Similarly, a proposition that the degree of probability required in a civil case must vary according to the gravity of the allegation is one of common sense, which a juror representing the community would instinctively or intuitively apprehend.[13]

So also with the second proposition there are supporting authorities. Two descriptive statements are:[14]

> The degree of proof required to establish a fact varies according to the probability of the fact. Where the fact asserted is improbable, a high and convincing degree of proof is required.[15]

> The more unlikely or improbable the allegation required to be proved, the more cogent is the evidence required to overcome the unlikelihood or improbability.[16]

The interconnection of the two bases for the principle in question may be gathered from the following statement:

> It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris L.J. says, the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.[17]

Examples of the situations or circumstances in which stricter proof has been demanded are: an allegation that a claimant under a will killed the deceased;[18] a petition for divorce on the ground of adultery;[19] an allegation that an employee stole a vehicle or goods in a claim under an insurance policy;[20] an allegation of arson in a claim under a fire policy;[21] an allegation of breach of condition in an insurance policy, amounting to crime;[22] an allegation that leave to enter a country was obtained by fraud;[23] a firefighter charged with corrupt practice before a disciplinary board;[24] a claim for the rectification of a written instrument.[25]

The manner of proof required in cases in which stricter proof is demanded has been described variously as: cogent evidence;[26] proof of a more cogent character;[27] cogent or clear and convincing evidence;[28] a high standard of proof;[29] a high degree of probability;[30] a high and convincing degree of proof;[31] strong, irrefragible evidence;[32] strong, distinct, and satisfactory evidence;[33] clear and unequivocal proof;[34] strict, satisfactory, and conclusive proof;[35] exactness of proof.[36]

The following statement by Buckley L.J. is, to some degree, enlightening:

> I think that the use of a variety of formulations to express the degree of certainty with which a particular fact must be established in civil proceedings is not very helpful and may, indeed, be confusing. The requisite degree of cogency of proof will vary with the nature of the facts to be established in the circumstances of the case. I would say that in civil proceedings a fact must be proved with that degree of certainty which justice requires in the cir-

cumstances of the particular case. In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others.[37]

This is a statement of a general nature, analogous to that often made when cases are distinguished, to the effect that each decision rests upon its own particular facts. It does help in pointing out the flexibility of the civil standard of proof,[38] but it fails to highlight the necessity for proof with greater probative value than is required in the ordinary case in those circumstances in which that is demanded.

Application of the Principle to Accident-Neurosis Claims

All thin-skull claims are, by definition, claims involving damage or injuries that are unusual or unexpected consequences of the wrongful act or omission. They are, therefore, unlikely consequences. That unlikelihood ought to trigger the principle that cogent and convincing evidence

(the formulation that will be used hereafter, there being no settled formulation) is required to satisfy the civil standard of balance of probabilities. The more unlikely the allegation, the more cogent and convincing the supporting evidence must be.

Accident-neurosis claims are seen as a variety of the thin-skull genus. In other types of thin-skull claim, there is usually no difficulty in presenting cogent and convincing evidence that the damage or injury is genuine and that it was caused by the wrongful act or omission. The reason is that there is scientific evidence on point. Examples are: a burn causing cancer where the plaintiff had a pre-malignant condition;[39] a substantially aggravated injury where the plaintiff was a hemophiliac;[40] a prick of a finger causing an infection that resulted in the deterioration of an eye that had been subject to ulcers;[41] a strain causing a hernia in an area of congenital weakness;[42] frostbite suffered while driving in England;[43] encephalitis or toxic reaction occurring after an injection of anti-tetanus serum;[44] a coronary attack following a near accident in which the plaintiff had a pre-existing but symptomless cardiac condition.[45]

The accident-neurosis claim, however, presents a different picture. The "scientific" evidence led to support such claims consists of the evidence of psychiatrists and psychologists, which hardly deserves that appellation. Nor is it accurate to say that the opinions of such witnesses constitute cogent and convincing evidence on the issue of genuineness of the complaints.

The Role of the Expert Witness

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult.[46]

Their duty is to furnish the judge

or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.[47]

The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from, proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received.[48]

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion and the opinion more often than not will be based on second-hand evidence. This is especially true of the opinions of psychiatrists.[49]

The fact that the opinion is not necessarily accurate does not make it inadmissible; that is simply a matter that must be guarded against.[50] There must also be guarding against human fallibility fortified with the mystique of science.[51] The trier of fact furthermore must keep in mind that the second-hand evidence on which the expert relies in forming an opinion is not proved by the expert, but rather must separately be proved:

> The evidence of a physician stating what a patient told him about his symptoms is not evidence as to the existence of the symptoms.[52]
>
> Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.[53]

The Evidence of Psychiatrists and Psychologists

Psychiatrists and psychologists are recognized as experts entitled to give opinion evidence,[54] although the warning has been given that psychologists ought not to give evidence that is within the province of the medical profession,[55] and that "jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life."[56]

In considering claims for accident

neurosis, it is crucial to bear in mind that there is a significant difference between the diagnosis of, for example, a broken limb, and a disorder in which the symptoms are subjective:[57]

> The determination of the validity and the extent of a claim for traumatic neurosis is largely dependent upon the accuracy of the history given by the claimant and his family....[58]

> I view [the plaintiff's] evidence with respect to his complaints as crucial in a case of this kind where the subjective complaints of the plaintiff are a most significant factor in determining the extent of injury, and such exaggeration can materially, and in this case, I conclude, did materially mislead the treating physician.[59]

Thus, the first matter of caution to be kept in mind regarding the evidence of these experts is that it is largely based on the self-serving statements of the plaintiff,[60] and unless the truth of those statements is independently proved by cogent and convincing evidence, the opinions expressed by these witnesses carry virtually no weight. Admissibility does not incorporate probative value.[61] Put another way, the evidence of such witnesses is dependent upon, rather than confirmatory of, the truthfulness of the plaintiff's allegations and complaints.[62] The expertise of these witnesses is not that of determining credibility,[63] but rather of diagnosing and treating conditions they assume to be genuine.

A symptom often pointed to in such cases as constituting an objective sign that confirms the plaintiff's subjective complaints is muscle spasm. Evidence given in a recent decision, and apparently accepted, indicates that "voluntary spasm," a deliberate tightening of the muscles, is indistinguishable from spasm caused by a true injury.[64]

The second cautionary matter regarding the evidence of psychiatrists and psychologists involves the "scientific" nature of their conclusions and opinions.

Evidence that may be characterized as speculative has very little, if any, probative value.[65] In considering whether electroconvulsive therapy causes brain damage, it was said in one case that the evidence put before the court was either speculation or possibilities.[66] Is the evidence of a psychiatrist or psychologist, particularly regarding the genuineness of the complaints and prognosis, any more convincing? The comment has been made that medicine is far from an exact science,[67] and this is all the more true for psychiatry and psychology. In 1911, the "mysterious relationship" between the nervous system and the body was described as an "abstract subject which...has baffled the scientists for ages."[68] More recently, a decision referred to testimony that psychological testing for neurosis can be manipulated by the patient.[69]

Lord Bridge said that "psychiatric science is far from being an exact science,"[70] but that "for too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility. Now, I venture to hope, that attitude has quite disappeared."[71] With respect, the suspicion (although certainly not any hostility), was well warranted, at least in so far as evidence relating to genuineness and prognosis is concerned.

It is open to question whether psychiatry can be considered a science at all.[72] Objective verifiability of the conclusions and opinions of psychiatrists and psychologists is noticeable by its absence. There is furthermore literature in the field itself that seriously questions the existence of any particular expertise on the part of such persons to detect malingering,[73] or to distinguish between genuine and simulated amnesia in criminal cases[74] (memory problems are a complaint regularly made in accident-neurosis claims). In the matter of the genuineness of complaints, at least, common sense and the normal tests of credibility are far more important considerations than the opinions of such "experts."[75]

If the plaintiff's complaints are genuine, the psychiatrist and psychologist have the expertise to diagnose the nature and extent of the condition and to recommend treatment for it. They do not, however, have any expertise on the initial issue of genuineness, and it is unlikely that their opinion as to prognosis is much more than speculation.

Apart from the above, a third cautionary matter should be kept in mind: the absence of impartial objectivity that all too often characterizes the evidence given by such specialists.[76] It has been said by a distinguished law professor at Stanford that "psychiatric testimony is so unreliable and up for sale to the highest bidder that it is a national scandal."[77] The appearance of the same small group of psychiatrists and psychologists in court on behalf of plaintiffs (and defendants[78]) is a disturbing confirmation of the manner in which counsel "work up" this type of claim, using witnesses who are, in effect, "hired guns." This unfortunate impression is bolstered by the rule, at least in Ontario, that the plaintiff need not disclose the report, or even the name, of a non-treating specialist, which effectively condones specialist-shopping.[79]

A fourth cautionary matter—that uncontradicted or uniform evidence, including that of experts, need not necessarily be accepted—is discussed below.

The Evidence of the Plaintiff, His Family, and Others

Apart from the evidence of psychiatrists, psychologists, and the plaintiff himself, the evidence led to support a claim for accident neurosis is usually that which shows a "before and after" picture. Normally this is achieved via the testimony of family, friends, neighbours, and co-workers, or some combination thereof.

The evidence of the plaintiff often can be demonstrated to be exaggerated. Rather than counting this against the plaintiff's credibility,[80] however, judges often accept the explanation that this is merely a symptom of the condition. But this places the cart before the horse. Unless the plaintiff has proved, to the required standard, that he or she

does not appreciate the difference between truth and exaggeration, the latter should be viewed as detracting from the probative value of the plaintiff's evidence. Similarly, a plaintiff who "has moved from physician to physician for no apparent reason"[81] ought to be accorded lower credibility.

The evidence of family, friends, neighbours, and co-workers, presenting the "before and after" picture, is based on the plaintiff's own attitude, conduct, and complaints. As such, it is fairly analogous to the rule against past consistent statements, which precludes the elicitation from witnesses of past self-serving statements.[82] An exception to that rule, however, is the calling of such evidence to show physical, mental, or emotional condition.[83] Thus, while this type of evidence clearly is admissible, the fact that it rests on a self-serving foundation is a factor that ought to be considered in determining the weight accorded to it.

Another matter that deserves closer consideration than it has been given in many cases is the weight to be accorded to evidence that is uncontradicted or uniform, whether the evidence is expert or otherwise. Expert evidence must be weighed in the same way as any other evidence,[84] and merely because it is uncontradicted or uniform does not mean that it must be accepted or accorded any particular weight.[85] In one case, what was described as "cogent and unanimous psychiatric and psychological evidence" that was *against* the plaintiff was rejected, and the plaintiff was awarded a large judgment.[86] There is no reason why the reverse ought not to occur as well.

The evidence of family, friends, neighbours, and co-workers is usually uniform, and often uncontradicted as well. The means by which a defendant normally seeks to contradict such evidence is via surveillance evidence, but it is often difficult to obtain effective evidence of that nature. The fact that the plaintiff's evidence is then completely or substantially uncontradicted does not mean that such evidence must be accepted, or that it ought to be accorded any particular weight.[87] "Uncontroverted testimony need not be accepted as absolute verity, especially when that testimony is opposed to common knowledge or human experience, or is inherently improbable, unreasonable, or unworthy of belief."[88] The inherent improbability of the truth of the "before and after" picture in an accident-neurosis case has already been commented upon.

Cogent and Convincing Evidence in Accident-Neurosis Claims

For the reasons set out above, there ought to be a requirement for cogent and convincing evidence to prove the genuineness of the complaints in an accident-neurosis claim. The more unusual and unlikely the complaints in the context of the accident on which they are blamed, the more cogent and convincing ought the evidence to be in order to satisfy the required standard of proof. The matter of causal connection is also, of course, one that requires proof, but if the plaintiff presents satisfactory evidence as to genuineness, the temporal connection between the accident and the onset of symptoms will normally suffice on the issue of causation.[89] However, the issue of the acceleration of the condition will still remain. Until recently, no decision considered the link between the improbability of the allegations in this type of claim and the requirement for stricter proof that ought to result from it. A hint in that direction is contained in a 1911 decision:

> True it is, there is danger of simulation, and in some cases of possible self-deception, resulting in imaginary ailments and claims. But in any and all cases they must in the last analysis be reduced to questions of fact for the court and jury to determine. The danger from simulation or imaginary claims may call for the closest and most exhaustive examination....[90]

A much more recent statement, which comes closer to the rule suggested in this article, was made by McEachern C.J.S.C.:

> I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence—which could be just his own evidence if the surrounding circumstances are consistent—that his complaints of pain are true reflections of a continuing injury.[91]

While these statements go partway to the application of the rule regarding stricter proof in circumstances involving improbable allegations, the time has come to apply that rule fully to claims for accident neurosis, which fully fit the normal conditions for its application. It is time to disregard the decisions in which the proof of the genuineness of the plaintiff's complaints has been considered in the same way as complaints for a broken bone, and instead to "approach this claim with the degree of scepticism with which any trier of fact would approach it."[92]

While the evidence on the issue of the genuineness of complaints of the plaintiff and of his or her witnesses may satisfy the cogent and convincing test in some circumstances, it certainly ought not to be sufficient merely because it may be uncontradicted and uniform. The evidence of psychiatrists and psychologists ought to be given little or no weight on this matter. The mere recitation of complaints and the witnessing of self-serving attitudes and conduct should be viewed as being far from sufficient to satisfy the test. Furthermore, in view of the stricter proof required, evidence that tends to discredit the plaintiff generally or the genuineness of his or her complaints in particular ought to have greater effect than usual, because it will make it that much more difficult for the plaintiff to satisfy the heightened degree of proof required.

Difficulty in meeting the stricter proof required is not a ground for awarding judgment in the absence of that degree of proof.[93]

Acceleration of Condition

A negligent act that merely accelerates the onset of a condition that sooner or later would have occurred in any event leads to liability only for the damage suffered during the accelerated period.[94] Thus, if the plaintiff has satisfied the onus of proving that the complaints are genuine, a relevant question is whether he or she would have gone on to the condition complained of even had there been no accident. Common sense tells us that if a minor accident that causes little or no physical injury leads to serious symptoms that are emotionally or psychologically based, the likelihood is that the plaintiff would have suffered the same consequences from the ordinary stresses and strains of life.[95] The less serious the accident and physical injury, the more likely it is that the problems would have been experienced in any event.

Thus, the statement that an argument regarding acceleration is nothing more than speculation[96] is incorrect. If the condition is genuine, a more accurate view is that expressed by counsel for a plaintiff who was awarded substantial damages in a recent accident-neurosis decision. Counsel described it as a "classic thin-skulled plaintiff case" and said that the plaintiff was "a time bomb just waiting to be hit by another motorist and the slightest jolt produced a reaction out of all proportion to what you would expect."[97] A "time bomb" is one that is very likely to detonate in the foreseeable future. While acceleration has been considered in some of the decisions,[98] it deserves considerably more attention in all cases of this type, and common sense dictates that only in rare cases ought there not to be a substantial reduction in the award on this account.

The Contingency of Recovery

In assessing damages, future contingencies, whether positive or negative, ought to be considered unless they are no more than speculative or fanciful possibilities.[99] While it is impossible to prove when a plaintiff with an accident-neurosis condition will recover, if at all, the same may be said about the plaintiff's case. It is impossible for the plaintiff to prove that he or she will continue to suffer from a certain condition for any particular time, or for a lifetime.[100] Difficulty notwithstanding, the court must consider this as a serious contingency, or alternatively must carefully consider the plaintiff's evidence as to the duration of the condition. Anxiety that is essentially related to the outcome of the litigation, rather than to concern about the accident or injuries, is not compensable.[101]

Policy Considerations

It is contrary to public policy to permit the survivors of a person who commits suicide to benefit therefrom, unless the negligent act caused a serious mental condition that rendered suicide likely. It is the policy of the law to discourage actions in respect of suicides or attempted suicides.[102] Public policy is not immutable, and, "at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy."[103]

Seizing upon an accident as an excuse to avoid life's responsibilities ought not to be encouraged any more than suicide is encouraged. In other words, compensation ought not to be awarded in such cases.[104]

Summary

An accident-neurosis claim is a type of thin-skull claim. The improbability of the complaints alleged ought to lead to the requirement that the genuineness of the complaints be proved by cogent and convincing evidence. The more unlikely the complaints in the context of the accident and physical injuries, if any, the stricter ought the proof to be.

Psychiatrists and psychologists have no special expertise in determining the genuineness of complaints and their evidence ought to receive little, if any, weight on that issue. The evidence of the plaintiff, and that which shows a "before and after" picture, rests on a self-serving foundation. Even if such evidence is uncontradicted and uniform, it is far from enough in itself to satisfy the cogent and convincing evidence test, unless the credibility of the witnesses who present that evidence, and in particular that of the plaintiff, is clear.

If the plaintiff has satisfied the onus of proof regarding genuineness, the issue of the acceleration of his or her condition ought to be considered. The less serious the accident and the physical injuries, the more likely that the ordinary stresses and strains of life would have brought on the condition in any event. The contingency of recovery also ought to be given serious consideration, even though proof in that regard may be extremely difficult. Alternatively, the longevity of the plaintiff's condition deserves serious questioning, because proof of that matter is equally difficult.

As a matter of policy, damages ought not to be awarded to plaintiffs who seize on an accident as a means of avoiding life's responsibilities.

NOTES

1. As in *Marconato v. Franklin*, [1974] 6 W.W.R. 676 at 685; *Brice v. Brown*, [1984] 1 All E.R. 997 at 1002.
2. *Mazur v. Moody* (1987), 14 B.C.L.R. (2d)240 at 245, describing the plaintiff's level of exaggeration.
3. *Belovari v. Potma*, Ont. H.C., September 30, 1987, award of $345,350; *Graham v. Rourke*, Ont. H.C., January 5, 1988, award of $837,296.
4. *Malcolm v. Broadburst*, [1970] 3 All E.R. 508 at 511, followed in *Janiak v. Ippolito* (1985), 16 DLR(4th)1 at 7; and *Cotic v. Gray* (1981), 33 O.R. (2d)356 at 381, affirmed 1 D.L.R. (4th)187.
5. *Graham v. Rourke*, Ont. H.C., January 5, 1988; *Krahn v. Rawlings* (1977), 16 O.R.(2d)166 at 168.
6. *Cotic v. Gray* (1981), 33 O.R.(2d)356 at 384 and 387, affirmed 1 D.L.R. (4th)187; *Holland v. P.E.I. School Board* (1986), 59 N. & P.E.I.R. 6 at 13.
7. *Cotic v. Gray* (1981), 33 O.R.(2d)356 at 387, affirmed 1 D.L.R.(4th)187.
8. *Cross on Evidence*, 6th ed., at 148-149; *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 at 347, 362-363; *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 970 at 975; *Hanes v. Wawanesa Mutual Insurance Co.* (1963), 36 D.L.R.(2d)718 at 736; *Continental Insurance Co. v. Dalton Cartage Co.Ltd.* (1982), 131 D.L.R.

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(3d)559 at 563; *Derrington v. Dominion Insurance Corp.* (1962), 35 D.L.R.(2d)220 at 221, 222; *Khawaja v. Secretary of State*, [1983] 1 All E.R. 765 at 783, 784; *R. v. Hampshire County Council*, [1985] 1 All E.R. 599 at 608.

9. See also *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 at 343, 350; *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 970 at 973, 974, and 976; *Bastable v. Bastable*, [1968] 3 All E.R. 701 at 704; *Hanes v. Wawanesa Mutual Insurance Co.* (1963), 36 D.L.R. (2d)718 at 732-734; *Continental Insurance Co. v. Dalton Cartage Company Ltd.* (1982), 131 D.L.R.(3d)559 at 563; *Derrington v. Dominion Insurance Corp.* (1962), 35 D.L.R.(2d)220 at 222, 223; *Smith v. Smith*, [1952] S.C.R. 312 at 326; *Khawaja v. Secretary of State*, [1983] 1 All E.R. 765 at 784, 792.
10. *Bater v. Bater*, [1950] 2 All E.R. 458, Denning L.J. at 459.
11. *Blyth v. Blyth*, [1966] 1 All E.R. 524, Lord Denning at 536. See also p. 541.
12. *R. v. Hampshire County Council*, [1985] 1 All E.R. 599, Slade L.J. at 608. See also p. 604.
13. *Tsalamatas v. Wawanesa Mutual Insurance Co. (No.2)* (1982), 141 D.L.R.(3d)322, Lacourciere J.A. at 325-326.
14. See also *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 All E.R.1077 at 1090; *Derrington v. Dominion Insurance Corp.* (1962), 35 D.L.R.(2d)220 at 226; *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 at 362.
15. Vol. 32A C.J.S., s. 1018, at 636-637.
16. *Karadimas v. Gibraltar General Insurance Co.*, [1978] I.L.R. 1-944, Martin J.A. at 924.
17. *Re Dellow's Will Trusts*, [1964] 1 W.L.R. 451, Ungoed-Thomas J. at 454-455.
18. *Ibid.*
19. *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336; *Blyth v. Blyth*, [1966] 1 All E.R. 524; *Smith v. Smith*, [1952] S.C.R. 312; *Preston-Jones v. Preston-Jones*, [1951] 1 All E.R. 124; *Bastable v. Bastable*, [1968] 3 All E.R. 701.
20. *Gobeil v. General Accident Assurance Co.* (1986), 76 N.B.R.(2d) 393; *Continental Insurance Co. v. Dalton Cartage Co.Ltd.* (1982), 131 D.L.R.(3d)559.
21. *Tsalamatas v. Wawanesa Mutual Insurance Co. (No.2)* (1982), 141 D.L.R.(3d)322; *Karadimas v. Gibraltar Insurance Co.*, [1978] I.L.R. 1-944.
22. *Derrington v. Dominion Insurance Corp.* (1962), 35 D.L.R.(2d)220; *Hanes v. Wawanesa Mutual Insurance Co.* (1963), 36 D.L.R.(2d)718.
23. *Khawaja v. Secretary of State*, [1983] 1 All E.R. 765.
24. *R. v. Hampshire County Council*, [1985] 1 All E.R. 599.
25. *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 All E.R. 1077.
26. *Blyth v. Blyth*, [1966] 1 All E.R. 524 at 539, 540.
27. *Hanes v. Wawanesa Mutual Insurance Co.* (1963), 36 D.L.R.(2d)718 at 733.
28. *Tsalamatas v. Wawanesa Mutual Insurance Co. (No.2)* (1982), 141 D.L.R.(3d)322 at 326.
29. *Bastable v. Bastable*, [1968] 3 All E.R. 701 at 704.
30. *Khawaja v. Secretary of State*, [1983] 1 All E.R. 765 at 784, 794.
31. Vol. 32A C.J.S., s. 1018, at 637.
32. *Cross on Evidence*, 6th ed., at 149.
33. *Ibid.*
34. *Ibid.*
35. *Smith v. Smith*, [1952] S.C.R. 312 at 325.
36. *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 at 363.
37. *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 All E.R. 1077 at 1085.
38. Also noted in the quotations at notes 10-13, *supra*.
39. *Smith v. Leech Brain and Co.Ltd.*, [1961] 3 All E.R. 1159.
40. *Bishop v. Arts and Letters Club of Toronto* (1978), 18 O.R.(2d)471.
41. *Warren v. Scruttons Ltd.*, [1962] 1 L1. L.R. 497.
42. *Burke v. John Paul and Co. Ltd.*, [1967] I.R. 277.
43. *Bradford v. Robinson Rentals Ltd.*, [1967] 1 W.L.R. 337. The issue was considered on a hypothetical basis — see p. 346.
44. *Robinson v. Post Office*, [1974] 2 All E.R. 737; *Winteringham v. Rae* (1965), 55 D.L.R.(2d)108.
45. *Galt v. British Railways Board* (1983), 133 New L.J. 870.
46. *R. v. Turner*, [1975] 1 All E.R. 70, Lawton L.J. at 74, followed in *R. v. Abbey* (1982), 138 D.L.R. (3d) 202 at 217 and *R. v. Beland*, [1987] 2 S.C.R. 398 at 415.
47. *R. v. Beland*, [1987] 2 S.C.R. 398 at 415, quoting from *Davie v. Magistrates of Edinburgh*, [1953] S.C. 34.
48. *Ibid.* See also *Young v. Young*, [1986] 1 W.W.R. 555 at 560.
49. *R. v. Abbey* (1982), 138 D.L.R.(3d)202, Dickson J. at 217.
50. *R. v. Beland*, [1987] 2 S.C.R. 398 at 416-417.
51. *Ibid.*, at 417-418 and 434; *R. v. Turner*, [1975] 1 All E.R. 70 at 74.
52. *R. v. Abbey* (1982), 138 D.L.R. (3d)202 at 220, quoting from *R. v. Perras*, [1972] 5 W.W.R. 183. See also *R. v. Turner*, [1975] 1 All E.R. 70 at 73.
53. *Ibid.*, Dickson J. at 220.
54. See, for example, *Wilband v. The Queen*, [1967] S.C.R. 14 at 21; *R. v. Turner*, [1975] 1 All E.R. 70 at 74; *R. v. Beland*, [1987] 2 S.C.R. 398 at 403.
55. *Sengbusch v. Priest* (1987), 14 B.C.L.R.(2d)26 at 37; *Lafond v. Windsor Airline* (1985), 11 O.A.C. 213 at 216.
56. *R. v. Turner*, [1975] 1 All E.R. 70, Lawton L.J. at 74, adopted in *Sengbusch v. Priest* (1987), 14 B.C.L.R.(2d)26 at 40 and referred to in *R. v. Beland*, [1987] 2 S.C.R. 398 at 429.
57. *Holland v. P.E.I. School Board* (1986), 59 N. & P.E.I.R. 6 at 22-23.
58. *Beddaoui v. Dennis*, Ont. C.A., June 4, 1987.
59. *Lovasz v. Disposal Services Ltd.*, Ont. D.C., December 16, 1982, affirmed Ont. C.A., February 22, 1984. See also *Leonard v. B.C. Hydro and Power Authority* (1964), 49 D.L.R. (2d)422; *Love v. Port of London Authority*, [1959] 2 L1. L.R. 541 at 545.
60. As to self-serving statements, see *R. v. Beland*, [1987] 2 S.C.R. 398 at 409-412.
61. See *R. v. Abbey* (1982), 138 D.L.R. (3d)202 at 217, quoting from *Wilband v. The Queen*, [1967] S.C.R. 14.
62. See *R. v. Turner*, [1975] 1 All E.R. 70 at 74.
63. As with a polygraph operator, whose expertise is in the interpretation of the machine's recordings, not the determination of the test

subject's credibility *per se*; *R. v. Beland*, [1987] 2 S.C.R. 398 at 404, quoting from *Phillion v. The Queen*, [1978] 1 S.C.R. 18.

64. *Millar v. Emerson* (1987), 5 A.C.W.S.(3d)304:1150 at 43-44.
65. See, for example, *George v. George*, [1950] O.R. 787 at 797; *Meunier v. Cloutier* (1984), 46 O.R.(2d)188 at 199; *Watkins v. Government of Manitoba*, [1987] 5 W.W.R. 193 at 220; *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 at 343.
66. *Re T and Board of Review* (1983), 44 O.R.(2d)153 at 162.
67. *Robson v. Ashworth* (1985), 33 C.C.L.T. 229 at 238, affirmed 40 C.C.L.T. 164.
68. *Toronto Railway Co. v. Toms* (1911), 44 S.C.R. 268 at 269-270.
69. *Beddaoui v. Dennis*, Ont. H.C., February 13, 1986, affirmed Ont. C.A., June 4, 1987.
70. *McLoughlin v. O'Brian*, [1983] A.C. 410 at 432.
71. *Ibid.*, at 433.
72. See the instructive article "The Expert in Court," by Anthony Kenny (1983), 99 L.Q.R. 197.
73. "Declarations versus Investigations: The Case for the Special Reasoning Abilities and Capabilities of the Expert Witness in Psychology/Psychiatry," by David Faust, [1985] *Journal of Psychiatry and Law* 33.
74. "Amnesia and Crime, How Much Do We Really Know?" by Daniel L. Schacter, March 1986 *American Psychologist* 286.
75. See *R. v. Turner*, [1975] 1 All E.R. 70 at 75, and in a different context, *Owners of S.S. Australia v. Owners of Cargo of S.S. Nautilus*, [1927] A.C. 145 at 150.
76. As in *Robson v. Ashworth* (1985), 33 C.C.L.T. 229 at 243-244, affirmed 40 C.C.L.T. 164.
77. Quoted in "The Expert in Court," by Anthony Kenny (1983), 99 L.Q.R. 197 at 214.
78. Although defendants can reasonably argue that they have no alternative but to call a specialist specifically to counteract the opinion of the plaintiff's specialist.
79. See the comments regarding "examiner-shopping" in *R. v. Beland*, [1987] 2 S.C.R. 398 at 411, 424.
80. See generally *R. v. Turner*, [1975] 1 All E.R. 70 at 74.
81. *Mazur v. Moody* (1987), 14 B.C.L.R. (2d)240 at 242. See also *Lovasz v. Disposal Services Ltd.*, Ont. D.C., December 16, 1982, affirmed Ont. C.A., February 22, 1984, where reference is made to a "plethora of expert opinion, both psychiatric and orthopedic"; *Millar v. Emerson* (1987), 5 A.C.W.S.(3d)304:1150, where the plaintiff saw eighteen doctors but was found not to have sustained any injury.
82. *R. v. Beland*, [1987] 2 S.C.R. 398 at 409-410.
83. *Ibid*, at 410-411.
84. *Shawinigan v. Naud*, [1929] 4 D.L.R. 57 at 59.
85. *R. v. Abbey* (1982), 138 D.L.R. (3d)202 at 218; *U.S. v. Groner* (1973), 479 F. 2d 577 at 584; *Johnson v. Fuller* (1983), 461 A. 2d 988 at 990.
86. *Kostopoulos v. Jesshope* (1985), 50 O.R.(2d)54, per Lacourciere J.A. dissenting at 66.
87. *Wigmore on Evidence*, s. 2034; 30 Am.Jur.2d, ss. 1083-1085. The author disagrees with the following statement in *Lee v. North York* (1986), 15 OAC 145 at 147: "where there is no contradictory evidence, not only should it not be rejected, it cannot be ignored."
88. *Re Estate of McCartney* (1983), 330 N.W. 2d 723 at 726-727.
89. On the issue of causal connection, see *Janiak v. Ippolito* (1985), 16 D.L.R.(4th) 1 at 7-8; *Marconato v. Franklin*, [1974] 6 W.W.R. 676; *Holland v. P.E.I. School Board* (1986), 59 N. & P.E.I.R. 6; *McFadden v. Martin* (1987), 5 A.C.W.S.(3d) 305:632; *Blackstock v. Foster*, [1958] S.R. (N.S.W.) 341.
90. *Toronto Railway Co. v. Toms* (1911), 44 S.C.R. 268, Davies J. at 276.
91. *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, followed in *McFadden v. Martin* (1987), 5 A.C.W.S. (3d)305:362 and *Millar v. Emerson* (1987), 5 A.C.W.S.(3d)304:1150. See also *Holland v. P.E.I. School Board* (1986), 59 N. & P.E.I.R. 6 at 10.
92. *Beddaoui v. Dennis*, Ont. C.A., June 4, 1987.
93. *Khawaja v. Secretary of State*, [1983] 1 All E.R. 765 at 784, 792.
94. *Peacock v. Mills* (1964), 50 W.W.R. 626 at 628. See also *Warren v. Scruttons Ltd.*, [1962] 1 L1. L.R. 497 at 502-503; *Meah v. McCreamer*, [1985] 1 All E.R. 367 at 383.
95. The admonition that the common law should be in accord with common sense has been sounded in numerous decisions: *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson and Co. Ltd.*, [1984] 3 All E.R. 529 at 534; *Tsalamatas v. Wawanesa Mutual Insurance Co. (No.2)* (1982), 141 D.L.R.(3d)322 at 325-326: *Royal Bank v. McArthur* (1985), 19 D.L.R.(4th) 762 at 766; *Emerson v. Emerson*, [1972] 3 O.R. 5 at 10; *The Wagon Mound (No.1)*, [1961] 1 All E.R. 404 at 415; *Trueman v. The King*, [1932] O.R. 703 at 708.
96. *Peacock v. Mills* (1964), 50 W.W.R. 626 at 629.
97. Counsel for the plaintiff in *Graham v. Rourke*, Ont. H.C., January 5, 1988, quoted in *Lawyers Weekly*, January 29, 1988.
98. *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 at 78-79; *Love v. Port of London Authority*, [1959] 2 L1. L.R. 541 at 546; *Lovasz v. Disposal Services Ltd.*, Ont. D.C., December 16, 1982, affirmed Ont. C.A., February 22, 1984; *Brice v. Brown*, [1984] 1 All E.R. 997 at 1007.
99. *Schrump v. Koot* (1977), 18 O.R. (2d)337.
100. *Brice v. Brown*, [1984] 1 All E.R. 997 at 1007.
101. *Lovasz v. Disposal Services Ltd.*, Ont. D.C., December 16, 1982, affirmed Ont. C.A., February 22, 1984. For a contrary and, it is suggested, incorrect view, see *Kovach v. Smith*, [1972] 4 W.W.R. 677 at 684-685.
102. *Robson v. Ashworth* (1985), 33 C.C.L.T. 229 at 250-252, affirmed 40 C.C.L.T. 164.
103. *McLoughlin v. O'Brian*, [1983] A.C. 410 at 420-421, 426-428.
104. *Leonard v. B.C. Hydro and Power Authority* (1964), 49 D.L.R.(2d)422 at 428-429.