IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Anderson v. Canada (Attorney General)*, 2015 NLTD(G) 186
Date: December 16, 2015
Docket: 200701T4955CCP

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION** *(DISCONTINUED)*	SECOND THIRD PARTY

- AND -

Docket: 200701T5423CCP

BETWEEN:	**TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION** *(DISCONTINUED)*	SECOND THIRD PARTY

- AND –

Docket: 200801T0844CCP

BETWEEN:	**ROSINA HOLWELL AND REX HOLWELL**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION** *(DISCONTINUED)*	SECOND THIRD PARTY

- AND –

Docket: 200801T0845CCP

BETWEEN:	**SARAH ASIVAK AND JAMES ASIVAK**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)** *(DISCONTINUED)*	THIRD THIRD PARTY

- AND -

Docket: 200801T0846CCP

BETWEEN:	**EDGAR LUCY AND DOMINIC DICKMAN**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)** *(DISCONTINUED)*	THIRD THIRD PARTY

Before: Justice Robert P. Stack

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: December 14, 2015

Summary: The Plaintiffs applied to have a professor of Social Work qualified to provide expert witness testimony on the following subjects:

- the effects of institutionalization on children's social functioning and development; and
- how exposure to the above, or threats thereof, affect a child's social functioning.

It was held that the proposed evidence is relevant and necessary and that the professor is a properly qualified expert. It was held, however, that the Report is based on science being used for a novel purpose, and that the Plaintiffs did not meet the burden on them of establishing the threshold reliability of the underlying science. Consequently, it was held that the Report is not admissible and that the professor may not provide opinion evidence to the Court.

Appearances:

Kirk Baert and Celeste Poltak	Appearing on behalf of the Plaintiffs
Jonathan Tarlton, Mark Freeman and Melissa Grant	Appearing on behalf of the Attorney General of Canada

Authorities Cited:

CASES CONSIDERED: R. v. Mohan, [1994] 2 S.C.R. 9; **White Burgess Langille Inman v. Abbott and Haliburton Co.**, 2015 SCC 23; **R. v. D.D.**, 2000 SCC 43; **R. v. Graat**, [1980] 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429 (Ont. C.A.), aff'd at [1982] 2 S.C.R. 819 (S.C.C.); **Brake-Patten v. Gallant**, 2012 NLCA 23; **Mustapha v. Culligan of Canada Ltd.**, [2006] 275 D.L.R. (4th) 473, 218 O.A.C. 271 (Ont. C.A.), aff'd at **Mustapha v. Culligan of Canada Ltd.**, 2008 SCC 27; **Page v. Smith**, [1996] A.C.155, [1995] 2 W.L.R. 644 (Eng. H.L.).

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.

TEXTS CONSIDERED: Sopinka, et al, *Law of Evidence in Canada*, Third Edition, (Markham: LexisNexis, 2009).

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION

[1] The Plaintiffs seek to have Professor Dennis Kimberley qualified to provide expert witness testimony in the following areas:

1) the effects of institutionalization on children's social functioning and development; and
2) how exposure to the above, or threats thereof, affect a child's social functioning.

[2] Professor Kimberley has prepared a report titled *An Analysis of Likely Common Impacts of Being Placed in, and Residing in, What Where* [sic] *Identified as "Residential Schools" or "Indian Residential Schools" – Primarily Designed for Aboriginal Children and Youth* (the "Report"). Before he can do so he must be accepted by the court as a witness capable of proving relevant and necessary opinion evidence.

[3] There are five class actions before me. Class members attended schools, dormitories or orphanages (collectively, the "Facilities") from 1949 until 1980 in what is now the Province of Newfoundland and Labrador. The representative plaintiffs have sued the Attorney General of Canada ("Canada") claiming that by its purpose, operation or management of the Facilities it breached a fiduciary duty owed to the students of the Facilities to protect them from actionable physical or mental harm. In addition, the Plaintiffs are seeking an award of aggregate damages pursuant to s. 29 of the *Class Actions Act*, S.N.L. 2001, c. C-18. It is in this latter regard that the Plaintiffs say that the testimony of Dr. Kimberley is relevant and necessary.

THE LAW AND ANALYSIS

[4] The parties agree that the factors for the admission of expert evidence remain as stated by the Supreme Court of Canada in **R. v. Mohan**, [1994] 2 S.C.R. 9. At page 20, Sopinka, J., writing for the Court said:

> Admission of expert evidence depends on the application of the following criteria:
> (a) Relevance;
> (b) Necessity in assisting the trier of fact;
> (c) The absence of any exclusionary rule;
> (d) A properly qualified expert.

[5] Earlier this year, the Supreme Court gave further guidance on the approach required of a judge faced with an application to qualify a potential expert witness. At paras. 23 and 24 of **White Burgess Langille Inman v. Abbott and Haliburton Co.**, 2015 SCC 23, Cromwell, J. held:

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement.
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> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka, J. spoke of the "reliability versus effect factor". while in *J.-L.J.*, Binnie, J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion". Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence".
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> [Citations omitted.]

[6] Following the approach outlined above, I am satisfied that the proposed evidence of Dr. Kimberley is relevant and necessary. I find, however, that the Report is based on science used for a novel purpose and that the Plaintiffs have not met the burden on them of establishing the reliability of the underlying science for that purpose. I conclude as a result that the Report is not admissible and that Dr. Kimberley may not provide opinion evidence as requested by the Plaintiffs.

[7] Let us look at the above factors in turn.

(A) Relevance

[8] If at the end of the trial I find that Canada breached a fiduciary duty owed to the class members to protect them from actionable physical or mental harm, I am then to determine if I can make an aggregate assessment of the damages suffered by the class members. The Plaintiffs assert that Dr. Kimberley's evidence speaks directly to the availability of aggregate damages. In the Report Dr. Kimberley addresses "the range of common, repeated and anticipated impacts on children…, especially in aboriginal contexts" of attendance at residential school.

[9] Canada says that the Report is based on assumptions: it assumes the schools were so-called "total institutions", and it assumes all of the class members will show similar harms to a student that will presumably have to be chosen from among the class members and assessed by someone as somehow representative of the group. According to Canada, what the Court needs to decide is: are the actual class members here so similar that their alleged actionable harms can be assessed in the aggregate? It says that Dr. Kimberley does not and cannot answer that question. In sum, asserts Canada, his purported analogous evidence from his experience with people who are not involved with the actions and who did not attend the Facilities is not relevant and should not be accepted by the Court.

[10] I disagree with Canada. Its concerns go to the reliability and effect of the Report, not its relevance. Evidence is *prima facie* admissible if so related to a fact in issue that it tends to establish that fact. Here, the opinions of Dr. Kimberley, if

accepted and if supported by the other evidence in the case, could establish common harm that would support an aggregate award of damages. The Report is relevant and is therefore *prima facie* admissible.

(B) Necessity in Assisting the Trier of Fact

[11] The necessity component of the admissibility test ought not be judged by too strict a standard; the requirement is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury" (**Mohan** at para. 23). It must, however, be more than merely helpful (**R. v. D.D.**, 2000 SCC 43 at para. 21).

[12] According to the Plaintiffs, the Report is necessary for the Court to understand:

1) the impact on children from being placed outside family care;
2) how children react to and express themselves as a result of experiencing trauma, including common patterns or symptoms that emerge and can be taken from such reactions and expressions;
3) how loss of cultural and traditional family environments commonly compound risk, harm, and developmental damage to children and youths;
4) common vicarious impacts of institutionalized sexual or physical abuse on children who do not recall or report that abuse, and possible reasons for such; and
5) the way in which threats of, or exposure to, violence or abuse generally impact children.

[13] All of these matters are outside the experience and knowledge of a judge or jury. Thus, I do not agree with Canada that I am capable of assessing whether the alleged harms suffered by the class members are similar and consistent enough throughout to allow for an assessment of aggregate damages. Canada takes the position that Dr. Kimberley has no particular knowledge or evidence of the Facilities or of the class members and their particular circumstances. Canada says

that the Report lacks the required scientific and statistical basis to accomplish the Plaintiffs' ambitions. These, however, are matters to be considered when assessing the reliability of the scientific foundation for the Report, not for determining whether the opinions of Dr. Kimberley would otherwise be necessary.

[14] It remains too soon in the trial to determine whether the Plaintiffs can establish the evidentiary basis for an aggregate award of damages. They concede that individualized claims by class members of physical and sexual abuse are not appropriate for an aggregate award of damages. Yet, they say, there were common harms suffered by all of the class members that align with the opinions of Dr. Kimberley. They say that the Report is necessary to establish a threshold level of aggregate damages. I agree that if I am to find aggregate damages to be available here, the evidence of the type that is being proffered by Dr. Kimberley would be necessary to extrapolate from the known results of residence at other "total institutions" to the effects of residence at the Facilities.

[15] The purpose of the present application is to determine whether Dr. Kimberley should be permitted to provide opinion evidence to the Court. I find that his opinion, if otherwise admissible, would be necessary to assist the Court in assessing whether aggregate damages are available to the Plaintiffs.

(C) The Absence of Any Exclusionary Rule

"Ultimate question"

[16] Canada asserts the Report should not be admitted because it purports to answer a legal question and, in so doing, attempts to usurp the role of the Court by addressing the "ultimate issue" before the Court on the question of aggregate damages. The "ultimate issue" prohibition, however, is now "regarded as having been virtually abandoned or rejected" (**R. v. Graat**, [1980] 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429 (Ont. C.A.), at 39, aff'd at [1982] 2 S.C.R. 819 (S.C.C.)). As noted by Sopinka, Lederman and Bryant, "there is no longer an absolute rule barring such testimony" (Sopinka, Lederman & Bryant, *Law of Evidence in*

Canada, 3d ed. (Markham: LexisNexis, 2009), at p. 826). The trier of fact has the power to accept or reject the evidence and courts, especially when sitting without juries, can independently rule upon matters within or without the experience and knowledge of the court without being improperly swayed by the opinions of experts.

[17] Instead of an absolute "ultimate issue" prohibition, the criteria of relevance and necessity are strictly applied (**Mohan)**. I have already determined that the evidence of Dr. Kimberley meets the relevance and necessity tests. But, as was stated in **Mohan**:

> …[E]expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

[18] Let us proceed, therefore, to determine if the opinion is based upon novel science, or uses science for a novel purpose.

Novel Purpose

[19] Here the opinions of Dr. Kimberley closely approach the ultimate issue of the factual component of causation. Therefore, if they are based on novel science, or least on science being used for a novel purpose, then the Plaintiffs have the burden of establishing the reliability of the underlying science for that purpose. He is asking the Court to find that the experiences of the class members at the Facilities caused a common set or range of mental trauma that I can infer for the purpose of assessing aggregate damages without any of the class members being individually assessed.

[20] The Plaintiffs have pointed to no cases where the theories upon which Dr. Kimberley relies have been utilized by a court to resolve the factual component of the causation issue before the court. This, say the Plaintiffs, is because these are the first institutional abuse class actions to go to trial. Although I am satisfied that the theory is not new (having, as I understand from the evidence adduced on the **Mohan** application in respect of Dr. Enns, been first formulated in 1961), I find that its intended use to establish causation in these cases amounts to a novel purpose.

Reliability

[21] Where the expert evidence advances a novel scientific theory, **White** requires the judge, as part of her gatekeeper function, to assess the reliability of the underlying science of the theory. The Plaintiffs argue, however, that the issue of the reliability of the underlying science goes to weight and not to admissibility. For this proposition they rely on the decision of the Court of Appeal in **Brake-Patten v. Gallant**, 2012 NLCA 23, where it says at paras. 89 to 92:

> The assessment of ultimate reliability [of expert evidence] cannot take place at the admissibility stage. To attempt to decide the ultimate reliability of expert evidence at the admissibility stage would be akin to making a final decision before knowing all the facts. … A court needs to hear the whole of this evidence from the expert in order to fairly evaluate its reliability. Moreover, the ultimate reliability of the expert evidence cannot be fully and fairly determined if it is considered in isolation from the other trial evidence. It is only when the court considers and measures the impugned evidence in relation to the other trial evidence that its pertinence to the points in issue can be decided and its overall worth to the court can be ascertained and appreciated.

[22] The foregoing passage from **Brake-Patten** does not assist the Plaintiffs. I interpret it as referring to a secondary stage assessment of reliability – of "ultimate reliability" - which is to take place following the trial as an assessment of the evidence as a whole. That exercise involves the trier of fact making a determination as to whether opinion evidence that has been admitted can be relied upon to ground the intended factual inference. That differs from the threshold reliability analysis espoused by Cromwell, J. in **White**. The initial assessment is of reliability of the science underlying the Report. If the opinion survives that examination and meets the other **Mohan** criteria, then at the end of the trial I, as

the trier of fact, must still determine whether it can be relied upon for the intended purposes. Any other interpretation of the passage from **Brake-Patten** would be offside the more recent decision of the Supreme Court of Canada in **White** which I am bound to follow.

[23] Consequently, I must determine whether the Plaintiffs have met the threshold requirement of establishing the reliability of the science underlying the Report. I have concluded that they have not done so. Notwithstanding that the Report has not been entered as an exhibit, I have been provided a copy for the purposes of this decision. It comprises 60 pages. Although long on conclusions, it is short on methodology. It contains not a single reference to the underlying science or literature upon which the opinions are based. Rather, the Report states, "I have reviewed and analyzed selected information and findings on **child-youth development processes and relatively <u>commonly anticipated or likely sets/ranges of impacts</u>**" (emphasis in the original). It seems to be based principally upon the experience of Dr. Kimberley and, less so, on his academic training. The version of Dr. Kimberley's *curriculum vitae* entered as an exhibit runs to 86 pages. Although it appears that the concept of "total institutions" and their effects upon residents have been known in the academic literature since the early 1960's, it was not a focus of Dr. Kimberley's academic courses of study. There is no question, however, that he is familiar with the area and has written and lectured on it, at least indirectly or as part of a broader topic. But there is nothing in the Report that leads credence to the suggestion that it should be relied upon for the novel purposes proposed by the Plaintiffs.

[24] While intuitively one may not be surprised to learn that there would be negative emotional effects upon many residents caused by the trauma associated with attendance at institutions such as the Facilities, the Report does not provide a theoretical, scientific or statistical basis upon which a baseline of harm can be reliably grounded. The Court operates in the realm of proof. To provide proof, an opinion must be based upon a reliable foundation. I have not been satisfied that such a foundation exists in this case.

[25] The test for admission of expert evidence distills into a cost/benefit analysis. The Court, as gatekeeper, must decide whether the benefit of the evidence is outweighed by its prejudice. The ready inferences offered by Dr. Kimberley are

inherently beneficial to the Plaintiff's position and could assist me as the trier of fact. But, the prejudices to the trial process caused by relying on an opinion based upon an unproven scientific foundation outweigh those benefits.

(D) A Properly Qualified Expert

[26] The expert evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify (**Mohan** at page 25).

[27] Dr. Kimberley holds a Ph.D. in Social Work from the University of Toronto, a Masters in Social Work from McGill University, and a B.A. in Psychology from Carleton University. He currently serves as a Professor at Memorial University of Newfoundland, and has taught classes pertaining to, among other topics, social work within aboriginal and child protection contexts. He has held numerous academic, administrative, and leadership positions with respect to social work and educational policy, including aboriginal social work programs.

[28] Dr. Kimberley has conducted research and authored many publications, dealing with, *inter alia*, aboriginal children at risk, failures in child protection in Newfoundland and Labrador, and the various harms and patterns related to forms of child abuse. Dr. Kimberley reports that courts in this Province have accepted him as a "properly qualified" expert pertaining to, *inter alia*, aboriginal child risk-need and placement, child abuse and neglect, child development concerns, parental capacity, sex offender risks, incest, custody access problems, parental alienation, sex offending, family violence, foster care, therapeutic foster care, and therapeutically supported adoption. He has never, however, been qualified in court to give expert opinion evidence in the nature of what is contained in the Report.

[29] Canada acknowledges that Dr. Kimberley has almost 50 years' experience as a social worker. But, says Canada, Mr. Kimberley is not a medical professional or psychiatrist capable of providing medical diagnoses of alleged physical or mental

harm. Therefore the Court should not permit Mr. Kimberley to opine on alleged diagnoses of harm or health symptoms, on a class-wide basis or otherwise.

[30] Canada says that to prove actionable harm, aggregate or otherwise, the Plaintiffs must provide medical evidence. Such medical evidence could include evidence of a major depressive disorder with associated phobia and anxiety. If such a psychiatric illness was debilitating and had a significant impact on an individual's life, it could qualify as a personal injury and may be compensable. For this proposition, Canada relies on the decision of the Ontario Court of Appeal in **Mustapha v. Culligan of Canada Ltd.**, [2006] 275 D.L.R. (4th) 473, 218 O.A.C. 271 (Ont. C.A.). Says Canada, Dr. Kimberley is not qualified to opine on this topic and should not be permitted to do so.

[31] I disagree with Canada. The true threshold for compensable mental harm was set much lower by the Supreme Court of Canada in its decision from the same case (**Mustapha v. Culligan of Canada Ltd.**, 2008 SCC 27). At paras. 8 and 9, Chief Justice McLachlin said for the court:

> [8] Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort. As Lord Lloyd said in *Page v. Smith*, [1996] 1 A.C. 155 (H.L.), at p. 188:
>
> > In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests in law. [Emphasis added.]
>
> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. **I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the**

> **ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.**
>
> [Emphasis added in paragraph 9.]

[32] It may well be that if I find that Canada has breached a fiduciary duty owed to the Plaintiffs, individual class members may be called upon to bring psychiatric or other medical evidence to prove damages arising from specific trauma. Yet, I am satisfied that there is some overlap among the professional disciplines of psychiatry, psychology and social work. Although it seems clear that only psychiatrists can diagnose mental illnesses, the other professions may make assessments of mental impairments. In this respect, social workers have often been permitted by courts to testify as to the effects of abuse on children or youth. I am satisfied that in the right case a social worker with the appropriate training and experience could provide an assessment of mental trauma as being sufficiently serious and prolonged so as to permit the Court to find a compensable injury.

[33] I am particularly cognizant of the quotation by McLachlin, C.J. from **Page v. Smith**, [1996] A.C.155, [1995] 2 W.L.R. 644 (Eng. H.L.), that "in an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded." The same, I would say, is true of the nature of mental harms. This is, as I stated above, the first institutional class action case to proceed to trial. At this stage of the proceeding, therefore, the Court would wish to retain as much flexibility as possible to permit the unique nature of the class action and the concept of aggregate damages to remain alive until all of the evidence has been adduced and final submissions have been made. Compensable injury in an institutional setting in 2015 may include harms that would not have qualified when **Page** or **Mustapha** were decided. At the same time, however, I agree with Canada that in taking this flexible approach I must still apply the **Mohan** factors with vigour. I have already addressed relevance and necessity. The underlying reliability of the science upon which Dr. Kimberley's has not been established to my satisfaction, however.

[34] At the stage of qualifying an expert to give evidence on possible threshold common experience harm, Dr. Kimberley's combination of training and experience ought to make him amply qualified to testify in this matter. My decision to exclude his evidence is not based upon his lack of qualification but on the failure of the Plaintiffs to establish the reliability of the underlying science for the purposes of this trial.

DISPOSITION

[35] Professor Dennis Kimberley may not provide expert witness testimony in this trial.

ROBERT P. STACK
Justice