When the appellate court takes fresh evidence in a civil case, should the court dispose of the case immediately or order a new trial?

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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Abstract

When the appellate court takes fresh evidence, which should the court select, either dispose of a case immediately at the appellate court or order a new trial at the trial court? Because the appellate court’s power of taking fresh evidence has been based on inconsistent ideas, historical development of the power does not suggest an answer. In practice, the appellate court tends to order a new trial based on the perception that the trial court is more suitable to evaluate evidence than the appellate court. However this perception is not well-grounded. Because the appellate judges are well capable of finding fact based on evidence; further, psychological studies demonstrate that observing the demeanor of a witness is not useful to evaluate credibility of a witness. To save expenses in cost and time imposed by conducting a new trial, this thesis insists that the appellate court should dispose of a case immediately.
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Chapter 1
Introduction

1 Introduction

In the Canadian civil judiciary system, a party has a right to appeal against a judgment or decision made by the trial court. The appellate court is allowed to receive fresh/new evidence based on a party’s petition. Since the purpose of fresh evidence is to attack fact findings of the court below, new findings of facts based on the fresh evidence are required. Which court should find fact based on the fresh evidence along with other evidence, the appellate court or the trial court? This thesis considers this question. After explaining the topic in more detail, this thesis makes four findings. First, based on the historical development of the acceptance of fresh evidence, it will be shown that the acceptance of fresh evidence by the appellate court has been somewhat inconsistent. Second, it would be demonstrated that, except where the issue on appeal is the amount of damages, the usual practice of the appellate court after taking fresh evidence is to order a new trial at the trial court as long as the fresh evidence is not decisive to decide a case; and that this practice is based on the idea that the trial court is more suitable to evaluate credibility of evidence than the appellate court. Third, it will be revealed that the suitability of the trial court for evaluation of evidence is not supported by the appellate judges’ lack of ability to evaluate evidence as many of the appellate judges have experience as a trial court judge. Fourth, though some judges thought that the only trial court’s opportunity of observing demeanor of a witness supported the suitability of the trial court for evaluation of evidence, psychological studies demonstrated that observing demeanor of a witness is not useful to evaluate credibility of witness’ testimony. Based on these four findings, this thesis insists that the appellate court should find fact based on fresh evidence without ordering a new trial at the trial court.

When a civil action is not disposed of by summary judgment and the parties do not reach a settlement, a trial is held. At the trial, each party argues its position and presents evidence, such as testimony of witnesses and documentary evidence. Then a judge or a jury makes its decision: they find the facts of the case, interpret the law, and apply the law to the facts. When the fact finder is a judge, the judge renders a judgment; when fact finder is a jury, the jury renders a
verdict and the judge delivers a judgment based on the verdict. After delivery of judgment, a party can appeal from the judgment; however, there is no trial at the appellate level. “An appeal is a complaint made to a higher court with respect to finding or ruling made by the lower court, asking the higher court to review the lower court’s decision.”¹ In *Housen v Nikolaisen* [*Housen*], the Supreme Court of Canada stated that “[t]he appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.”² Regarding factual matters, the appellate court typically employs a deferential standard of review for question of fact: “palpable and overriding error”.³ The purpose is to limit the number, length, and cost of appeals, promote the autonomy and integrity of trial proceedings, and recognize the expertise and advantageous position of the trial judge.⁴ ⁵ Without this level of error, the appellate court must not overturn the findings of fact made by the court below. The function of a court of second instance is mainly to judge questions of law, not questions of fact.⁶

Nevertheless many jurisdictions in Canada allow a party to ask the appellate court to take fresh/further evidence that was not introduced in the court below.⁷ In Ontario, the applicable provision is section 134 (4) of the *Courts of Justice Act*,⁸ which stipulates as follows:

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² *Housen v Nikolaisen*, 2002 SCC 33 at para 3, 2 SCR 235[*Housen*].
³ *Housen*, supra note 2 at para 25.
⁴ *Housen*, supra note 2 at paras 15-18.
⁵ Traditionally, the reason for adopting deferential standard of review regarding findings of fact made by trial judge was that the appellate court did not have opportunity to see and hear testimony of a witness. R. Gibbens, “Appellate Review of Findings of Fact” (1992), 13 Adv Q 445.
⁷ Alberta: *Rules of Court*, 390/68, r518(b); British Columbia: *Court of Appeal Rules*, BC Reg 297/2001, r31.1; Manitoba: *Court of Appeal Act*, CCSM 2004, cC240, s26(2) and (3); New Brunswick: *Rules of Court*, r62.21(2); Nova Scotia: *Civil Procedure Rules*, r90.47; North West Territories and Nunavut: *Rules of the Court*
Unless otherwise provided, a court to which an appeal is taken may, in a proper case, 

... 

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and  

... 

to enable the court to determine the appeal. 

Taking fresh evidence may result in proper findings of fact. However, because evidence is used to prove fact, taking new evidence by the appellate court means that the court deals with factual matters. This appellate court’s power may contradict the basic understanding of the function of the appellate court, that is, to judge questions of law, rather than questions of fact. In Mercer v Sijan [Mercer], the Court of Appeal for Ontario explained the policy considerations of this appellate court’s power: "The competing considerations, on the one hand, are the public interest in finality to litigation, and, on the other hand, the affront to common sense involved in a Court shutting its eyes to a fact which falsifies the assessment."9 A balancing of policy considerations leads to limitations on the introduction of fresh evidence in appellate proceeding. As the above-quoted provision shows, a party does not have the right to introduce fresh evidence; instead, a party may ask the appellate court to accept fresh evidence, and the court has discretionary power to receive the evidence. Accordingly, the Supreme Court of Canada in Palmer v R [Palmer] set out four tests to accept fresh evidence:10 

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases...
(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.\(^{11}\)

The four tests do not necessarily bind the appellate court because the court has discretion to accept the fresh evidence even if these tests are not satisfied.\(^{12}\) *Palmer* was a criminal case.\(^{13}\) However, the four tests laid out by *Palmer* were followed in civil cases. In Ontario, the Court of Appeal for Ontario followed the tests laid out by *Palmer*.\(^{14}\)

After the appellate court decides to accept further evidence, the court examines the evidence. Then the court has to dispose of the appeal. In general, there are two options for the court.\(^{15}\) One is to dispose of the case immediately; in other words, to change the judgment below. The other is to remand the case to the court below and order a new trial. In Ontario, section 134 (1) of the *Courts of Justice Act*\(^{16}\) stipulates as follows:

Unless otherwise provided, a court to which an appeal is taken may,

\(^{11}\) *Supra* at para 22.

\(^{12}\) E.g. *Katotakis v Waters (Williams R.)*, 194 OAC 343, [2005] OJ No 640. In the case, the court stated that even the requisites were not met, introducing new evidence could be allowed. In *Brace v R* (2014 FCA 92, [2014] 4 CTC 35), the appellate court indicated that the appellate court had residual discretion to admit fresh evidence even where the test in *Palmer* case was not met.

\(^{13}\) At that time, section 610(1) (d) of the *Criminal Code* (RSC 1970, c C-34) was the relevant provision regarding fresh evidence at the appellate court. This provision allowed the appellate court to “receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness” for the interests of justice.

\(^{14}\) E.g, *Visagie v TVX Gold Inc.*, 132 OAC 231, 187 DLR (4th) 193; *Dew Point Insulation systems Inc. v JV Mechanical Ltd.*, 183 ACWS (3d) 314, 259 OAC 179.


\(^{16}\) *Courts of Justice Act, supra* note 8, s134 (1).
(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
(b) order a new trial;
(c) make any other order or decision that is considered just.

The appellate court is not given free rein to order a new trial. Because conducting a new trial takes time and money and makes the previous trial useless. In *Caswell v Toronto Railway Co.*, the Ontario Court of Appeal addressed this point:

A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from anyone that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are of course occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests and may fairly be described as necessary evils, when necessary.

…

A strong case must therefore be presented before a new trial can properly be directed; so strong that even in some cases where an injustice has been done to one of the parties at the trial, a new trial is not granted unless the error was pointedly objected to at the time; and all through the practice upon applications for new trials the like reluctance in granting new trials is everywhere evident.17

The section 134 (6) of the *Courts of Justice Act* (Ontario) accepts this idea and allows the appellate court to direct a new trial only when some substantial wrong or miscarriage of justice has occurred.18

In case where the appellate court accepts the fresh evidence, what option should the court choose? Dispose of the case immediately or order a new trial? In criminal law, there is a leading case, *R v Stolar*.19 In that case, the Supreme Court of Canada held as follows:

17 *Caswell v Toronto Railway Co.*, 24 OLR 339 at paras 1 and 3, 19 OWR 785.
18 *Courts of Justice Act*, supra note 8, s134 (6).
If [the court of appeal] should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the court of appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the court of appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact. 20

There is no doubt that the appellate court may dispose of a case when the fresh evidence has a decisive character that would allow an immediate disposition of the appeal. However, on the premise that a new trial should be avoided, it is not self-evident what the appellate court will do when the fresh evidence has only sufficient weight or probative force which could alter the result of a case when it is considered with the other evidence. Here, the appellate court needs to take not only the fresh evidence, but also evidence introduced at the trial into consideration to decide a motion to admit fresh evidence. Because, according to case law, the fresh evidence “must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.”21 Compared to decide whether the fresh evidence, with other evidence introduced at the trial, could reasonably be expected to have affected the result, it appears there is no great difference in the court’s work in finding facts based on all evidence, evidence presented at the trial and fresh evidence. At most, it seems it would be slight additional work for the appellate court to find facts by itself. Finding fact by the appellate court enables the disposition of a case at the appellate level without a new trial at the court below and is consistent with the notion that a new trial should be avoided. Hence this thesis examines whether the appellate court should dispose of the case immediately or direct a new trial when the court takes fresh evidence in a civil case.

20 *Supra* at para 14.

21 *Palmer, supra* note 10 at para 22.
Chapter II of this thesis explores the historical development of the appellate court’s power to take fresh evidence and the reasons why this has been allowed. To some extent it seems strange that there is no trial at the appellate level, yet the appellate court may take fresh evidence and find facts. Hence to find out the reasons why the present system was drafted and adopted can give us a meaningful insight. Chapter II indicates that the present system was not based on a consistent idea. Rather, it was based on two inconsistent ideas: considering the appellate proceeding as rehearing of a case and choosing live testimony of witnesses as a principal way of presenting evidence.

In Chapter III, the practice of the appellate court when taking fresh evidence is summarized. By exploring cases, it is shown that the appellate court tends to dispose of the case immediately by changing the amount of damages when a party brings fresh evidence that may increase or decrease the amount. In contrast, when a party introduces fresh evidence to attack findings of fact other than damages, the court usually orders a new trial at the lower court. In many of such cases, the fresh evidence casts doubt on the credibility or truthfulness of a witness or party’s testimony or assertion, or supports a party’s position. The appellate court does not decide which testimony or assertion should be accepted; instead it directs a new trial. As a rule it is the practice of the appellate court to avoid judging credibility of evidence. This practice is supported by the idea that the trial court is more suitable to judge credibility of evidence that the appellate court.

If the appellate judges are not capable of evaluating credibility of evidence, there is no doubt that the trial judges were more suitable to evaluate credibility of evidence than the appellate judges. Chapter IV examines whether the appellate judges are capable of evaluating credibility of evidence. Because the most of the appellate judges have prior experience as the trial judge before their appointments to the appellate judges, it is denied that trial judges were more suitable to evaluate credibility of evidence than the appellate judges.
Observation of demeanor of a witness has been pointed out as one of the major reasons why live testimony of witnesses has been adopted as principal way of introducing evidence. If the observation is useful to evaluate credibility of evidence, this supports the idea that the trial court is more suitability of evaluation of evidence than the appellate court. Hence Chapter V, based on psychological studies, examines whether observation of demeanor is useful to find facts. The psychological studies cast doubt on the usefulness of observing demeanor. Accordingly, in Chapter VI this thesis takes position that the appellate court should make it a practice to dispose of a case immediately when taking fresh evidence.

Before starting the argument, three things should be noted regarding the scope of this thesis. First, this thesis primarily focuses on an appeal against a judgment rendered after a trial, not an interlocutory order or a summary judgment. According to the section 134 (4) of the Courts of Justice Act of Ontario stipulates, a party may ask the appellate court to accept fresh evidence in appeals against a judgment, an interlocutory order, and a summary judgment. However the standard of acceptance of fresh evidence in appeals against an interlocutory order and a summary judgment is less stringent. Second, appeal from second instance is not a concern of this thesis. Only an appeal from first instance to second instance will be discussed. Third, this thesis focuses on typical civil cases. Family cases, such as divorce, support, and custody, and administrative cases are not in the scope of the thesis. As in civil cases, a party may ask the appellate court to take fresh evidence in family and administrative cases; but in these cases the standard of acceptance of fresh evidence is looser than one in civil cases.

22 Courts of Justice Act, supra note 8, s134 (4).
24 For administrative cases, see Re Houston and Cirmar Holdings Ltd., [1997] 17 OR (2d) 254, 70 DLR (3d) 766.
Chapter 2
Historical Development of Taking Fresh Evidence by the Appellate Court

2 Historical Development of Taking Fresh Evidence by the Appellate Court

This chapter will discuss how the appellate court’s power of taking fresh evidence developed in order to consider whether that power is harmonious with the absence of a trial at the appellate level. Because the Canadian system took over the English system, this chapter starts with a focus on the English system.

2.1 Origin of Accepting Fresh Evidence at an Appellate Court—Late 19th Century England

Before the enactment of the *Supreme Court of Judicature Act, 1873 & 1875*, common law and equity had different procedures and court systems in England. Both systems had their own appellate procedures and appellate courts.

2.1.1 Common Law

In common-law courts, namely the Court of King’s Bench, the Court of Common Pleas, and the Court of Exchequer, a plaintiff commenced a suit and selected a form of action, and the parties pleaded; then a trial by jury, or without jury on consent of the parties, was held. At the trial, the parties presented evidence, which was classified into two categories: testimony of witnesses and documents. Witnesses were examined and cross-examined at the trial. At the end of the trial, if there was a jury the verdict was delivered, and the judgment was rendered.

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25 *Supreme Court of Judicature Act, 1873* (UK), 36&37 Vict c66; *Supreme Court of Judicature Act, 1875* (UK), 38&39 Vict c77.
27 UK, *The Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and
A party who was unsatisfied with a judgment of a trial court was not allowed to make an appeal. Instead, to attack the judgment, the party could use a writ of error issued out of the Chancery. A cause of writ of error was heard and decided by the Court of Exchequer Chamber, whose judges were selected from the trial court. The party who used a writ of error could attack only limited defect or error that appeared on the face of the record. “The record contained only an entry of the declaration and pleadings, and the issue or issues joined thereon, with the award of the venire facias whereby the sheriff was to summon the jury, the judgment of the court and a number of formal matters. Inevitably, many questions could not ground a writ of error.” Because the evidence presented at the trial was not included in the record, a party could not attack the fact findings of the court or jury below; and the appellate court could not receive new evidence that was not introduced at the trial. The writ of error was later transformed into the “proceeding in error” by the Common Law Procedure Acts, 1852 & 1854. However the function of the proceeding in error was almost identical to that of the writ of error: only the record of the court below could be brought to the reviewing court and no other evidence could be introduced.

28 Manchester, supra note 26 at 133.
29 Ibid.
30 Supra at 172.
31 Supra at 173.
32 Supra at 172.
33 Common Law Procedure Act, 1852 (UK), 15&16 Vict c72; Common Law Procedure Act, 1854 (UK), 17&18 Vict c125.
2.1.2 Equity

In equity, the Lord Chancellor had original jurisdiction to decide a case. However, as it was impossible for the Lord Chancellor to hear and decide all the cases by himself, he usually delegated cases to the Master of the Rolls or the Vice Chancellors, subject to review by the Lord Chancellor. Thus, the Lord Chancellor, the Master of the Rolls, or the Vice Chancellor decided an equity case at the first instance.

The procedure of an equity case was begun by a petition ("bill") in which the petitioner stated his/her case and the relief he/she wanted. Then the parties exchanged their assertions, typically answer and replication, and issues were finalized. After completion of the pleadings, parties prepared evidence. Evidence that could be introduced in equity was quite different from the common law: only written documents could be used as evidence, and oral testimony of a person before a judge was not allowed. When a party wanted to use the statement of a person as evidence, the party had to conduct written interrogatories or present an affidavit. At written

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1854 (London: H. Sweet, 1857) at 315-316.
36 See Manchester, supra note 26 at 136.
37 See John Sidney Smith, A hand-book of the practice of the Court of Chancery (London: William Benning & Co., 1848) at 346. When the Lord Chancellor did not delegate authority to hear and decide a case, the Lord Chancellor himself heard and decided the case as a first instance judge.
38 UK, The First Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery (London: Her Majesty’s Stationery Office,1852) at 5 [Report for the Chancery Court].
39 Supra at 6-7.
40 Supra at 7-8.
41 Originally, an affidavit of a witness could be used only to prove mere exhibit and minor matters that was not directly contested between parties. However this limitation was relaxed in 1852. With consent of parties or leave by the court, a party was allowed to present affidavit to prove any fact. See Court of Chancery Procedure
interrogatories, the witness was examined by an officer of the court or a person specially appointed by the court, using a list of questions prepared by a party; and the examiner wrote down the witness’s answers. A party could introduce written evidence until a date fixed by the court; no party was allowed to adduce further evidence without special permission of the court. After preparing evidence, the case was heard at the hearing and decided by a judge based on the evidence and arguments. Traditionally, there was neither a trial nor a jury.

When a decree (judgment) was rendered by the Master of the Rolls or the Vice Chancellor, the decree was reviewable by the Lord Chancellor on a party’s appeal, rather than a writ of error. The review by appeal was quite different from the review by a writ of error. The appellate procedure was almost identical with the procedure of re-hearing; the Lord Chancellor as the appellate judge heard and decided the case as if hearing it at the first instance. The question before the Lord Chancellor on appeal was, “not whether the lower court committed error, but whether it rendered a decree which should have been rendered in the light of the entire case.” Questions of both fact findings and interpretation/application of law were reviewed on appeal, employing a *de novo* standard of review. A difference from the original proceeding was that

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*Act, 1852 (UK), 15&16 Vict c86, s36. Also see Report for the Chancery Court, supra note 38 at 21.*

42 *Supra* note 38 at 7. Originally, parties and their counsels were not allowed to attend the examination of a witness. However parties were allowed to attend the examination and to examine or cross-examine a witness from 1852. *Court of Chancery Procedure Act, 1852, supra* note 41, s31.

43 Report for the Chancery Court, *supra* note 38 at 8.

44 *Supra* at 9.

45 Manchester, *supra* note 26 at 178.


48 See *Supra* at 565.
only a hearing before a judge was conducted again: pleadings and written interrogatories were not repeated.\textsuperscript{49} The only new evidence allowed to be introduced was that which was recorded (deposited) before the original decree was rendered but was not presented at the court below.\textsuperscript{50} No other new evidence could be adduced at the appellate level. The reason for allowing new evidence was that “decrees, whether made on a hearing before the Lord Chancellor, or the Master of the Rolls, or the Vice Chancellor, [were] in law considered as the Lord Chancellor's decrees”.\textsuperscript{51} Later, to have a more efficient appellate court,\textsuperscript{52} the Court of Appeal in Chancery, composed of the Lord Chancellor and two Lord Justices, was created in 1851 as the appellate court that dealt with appeals against decrees rendered by the Master of the Rolls or the Vice Chancellor.\textsuperscript{53}

In 1852 the evidence rule was changed as a part of the improvement of the equity process, and a new form of taking evidence was introduced: oral examination of a witness before a judge, which was a primary form of presenting evidence at the common-law trial. By the court’s permission, parties were allowed to examine and cross-examine a witness before a judge at the hearing.\textsuperscript{54} By this change, oral evidence before a judge was allowed in equity for the first time. The reason for the change was trust in oral examination. Oral examination would be “a really satisfactory and efficient examination and cross-examination of the witnesses.”\textsuperscript{55}

\textsuperscript{49} See \textit{Supra} at 565.

\textsuperscript{50} \textit{Gray}, \textit{supra} note 46 at 209. See also \textit{Smith}, \textit{supra} note 37 at 353.

\textsuperscript{51} See \textit{Gray}, \textit{supra} note 46 at 209.

\textsuperscript{52} \textit{William Hemings, The Equity Statutes of 1851} (London: Law Bookseller and Publisher, 1851) at 1.

\textsuperscript{53} \textit{Court of Chancery Act, 1851} (UK), 14&15 Vict c 83.

\textsuperscript{54} \textit{Court of Chancery Procedure Act, supra} note 41, s39. This change was intended to give the court the power to conduct the examination of a witness before the court “for its own satisfaction”\textsuperscript{(Report for the Chancery Court, \textit{supra} note 38 at 22.)}. The examination of a witness before the court was not a right of a party, but discretion of the court. See \textit{John Sidney Smith, The practice of the Court of Chancery}, 7th ed (London: William Maxwell, Henry Sweet, and V. and R. Stevens, Sons, and Haynes, 1862) at 603.

\textsuperscript{55} Report for the Chancery Court, \textit{supra} note 38 at 22.
The adoption of oral examination before a judge as an available form of evidence was not directly intended for the appellate court, the Court of Appeal in chancery. However the Court of Appeal in Chancery had the same power as the court below. Thus, it was considered that the appellate court also had power to hear testimony of a witness even if the witness was not examined before the court below.\textsuperscript{56}

2.1.3 Merger of Common Law Courts and Equity Courts

To comprehensively address the problems caused by having two legal systems, common law and equity, the merger of courts and procedures of common law and equity was carried out under the \textit{Supreme Court of Judicature Act, 1873 & 1875}.\textsuperscript{57} All previous courts in common law and equity were abolished. As a court of first instance with general jurisdiction over both common law and equity, the High Court of Justice was established; the Court of Appeal was created as an appellate court succeeding both the Exchequer Chamber and the Court of Appeal in Chancery.

Regarding the procedures of common law and equity in the first instance, these procedures were unified. All cases were commenced by a writ of summons and modernized pleading followed.\textsuperscript{58} The process after the pleading was drastically changed: trial was generally introduced, and all testimony of witnesses was orally examined in an open court at a trial unless the court ordered otherwise for sufficient reason.\textsuperscript{59} This was seen as a, “compromise between the practice of the

\textsuperscript{56} Charles Stewart Drewry, \textit{The New Practice of the Court of Chancery}, (London: Law Times Office, 1856) at 172.

\textsuperscript{57} \textit{Supreme Court of Judicature Act, 1873} supra note 25; \textit{Supreme Court of Judicature Act, 1875}, supra note 25.

\textsuperscript{58} Manchester, \textit{supra} note 26 at 146.

\textsuperscript{59} \textit{Rules of Procedure}, being Schedule to the \textit{Supreme Court of Judicature Act, 1873}, supra note 25, r36; \textit{Order 37}, being First Schedule to the \textit{Supreme Court of Judicature Act, 1875}, supra note 25, r1.
Courts of Common Law and Equity, respectively. The common-law practice of oral examination was adopted as a general rule of taking evidence, but an affidavit could be allowed in exceptional cases, borrowing from the rules of equity.

Regarding appellate review, the concept of proceedings in error was abolished, and appeal by way of re-hearing was adopted as a uniform method of review in both common law and equity courts of first instance. Rule 50 of the Rules of Procedure, and rule 2 of Order 37 stipulated that “[a]ll Appeals to the Court of Appeal shall be by way of re-hearing”. Similar to the Court of Appeal in Chancery, it was considered that “[t]he Court of Appeal [had] full power over the whole subject matter, with power to give any judgment that ought to be give, and with all powers of the Court of first instance”. However the Court of Appeal was only allowed to receive new evidence on special grounds. Rule 52 of the Rules of Procedure and rule 5 of Order 68 stipulated as follows:

The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner. ... Upon appeals from a judgment after trial or hearing any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court… .

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60 William Thomas Charley, The new system of practice and pleading under the Supreme Court of Judicature acts, 1873, 1875, 1877, the Appellate Jurisdiction Act, 1876, and the rules, orders, and costs thereunder, 3d ed (London: Waterlow and Sons Limited, 1877) at 638.

61 Rules of Procedure, supra note 59, r29; Order 37, supra note 59, r1.

62 Rules of Procedure, supra note 59, r50.

63 Order 37, supra note 59, r2.

64 Arthur Wilson, The Supreme Court of Judicature acts, 1873 and 1875 (London: Law Publishers and Booksellers, 1875) at 303.
Even though the admissibility of new evidence was expanded compared to a writ of error, it was still limited in comparison to the previous appeal procedure in the Court of Appeal in Chancery.\textsuperscript{65}

2.1.4 Summary

Before the merger of common law and equity in the late 19th century, appeal was not allowed in the common-law courts, where trials were held and oral testimony was used as evidence; instead, only a writ of error was allowed. In a writ of error, review of the findings of fact of the court below was prohibited and no new evidence could be introduced. On the other hand, in equity, in which there was no trial and oral testimony was originally not allowed as evidence, new evidence could be introduced in appeals, in which the appellate court reviewed a case as if re-hearing it. The merger of the common-law and equity court systems and procedures allowed appeal for both common law and equity; however, new evidence was only allowed in special circumstances at the discretion of the appellate court. It is supposed that the new rule for fresh evidence was made as a balance between common law and equity.

\textsuperscript{65} The Supreme Court of Judicature Acts stipulated that appeal was done as a way of re-hearing and the Court of Appeal had the same power as the court of first instance had. From this point of view, it was reasonable to consider that fact findings of the lower court were reviewed by the appellate court under de novo standard, without affording deference to the court below. However the appellate court was very reluctant to intervene fact findings of the court below. The appellate court presumed that the findings by the court below were right because the court below had opportunity to see the demeanor of witnesses. William Blake Odgers, \textit{The principles of pleading, practice, and procedure in civil actions in the High Court of Justice}, 4th ed, (London: Stevens and Sons Limited, 1900) at 312-313.
hearing it. The merger of the common-law and equity court systems and procedures allowed
appeal for both common law and equity; however, new evidence was only allowed in special
circumstances at the discretion of the appellate court. It is supposed that the new rule for fresh
evidence was made as a balance between common law and equity.

2.2 Ontario’s Acceptance of English Rules

Until 1791, Ontario was a part of Quebec and French civil law was applied. By enactment of the
Constitution Act, 1791, Quebec was divided into two regions: Upper Canada and Lower
Canada. Upper Canada eventually became present-day Ontario. In Upper Canada, common law
was introduced instead of French civil law.

In the first half of the 19th century, the Court of King’s Bench dealt with common-law cases as a
court of first instance and the Court of Chancery was a court of first instance for equity cases.
A party could make an appeal against decisions made by both courts of first instance. Even in
common law cases, appeals were permitted. The reason for this was that appeals had been
allowed in the former Quebec until the creation of Upper Canada, and this rule was maintained.
Regardless of whether a case was common law or equity, all appeals were heard and decided by
one court of appeal. This was a special body of the governor’s council which consisted of the
Chief Justice, the Vice Chancellor (head and sole judge of the Court of Chancery), and two or
more members of the executive council.

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66 Constitution Act, 1791 (UK), 31 Geo III c31.
67 An Act Introducing English Civil Law into Upper Canada, 1792, UCS 1792 (32 Geo III) c 1.
68 Created by the Judicature Act, 1794 (UK), 34 Geo III c2.
69 Created in 1837. See Christopher Moore, The Court of Appeal for Ontario: Defining the Right of Appeal,
1792-2013, (Toronto: The Osgoode Society, 2014) at 8.
70 Constitution Act, 1791, supra note 66, s34; Judicature Act, 1794, supra note 68.
71 Constitution Act, 1791, supra note 66, s34.
72 Judicature Act, 1794, supra note 68. See also Moore, supra note 69 at 8. In practice, “by the 1840s appeals
In 1849 the court system was changed by the *Administration of Justice Act, 1849*. The Court of Common Pleas was newly created as a trial court for common law cases. By this creation, Upper Canada had three courts of first instance: the Court of Queen’s Bench, the Court of Common Pleas, and the Court of Chancery. The appellate court was also changed. The Court of Error and Appeal was created, and only professional judges were members of that court. However, there was no specialized appellate judge; all judges of the three courts of first instance became ex-officio judges of the appellate court.

To strengthen the appellate court, two further major changes were made in 1874 by the enactment of the *Administration of Justice Act 1874*. The first change was in the composition of the Court of Error and Appeal: this court got four full-time judges, and trial judges were no longer ex officio judges of the this court. The second change regarded the introduction of new evidence at the appellate level. For the first time in Ontario, section 11 of the act allowed the appellate court to receive new evidence, but only if there were special grounds. The text of the section was as follows:

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were mostly being heard by professional judges rather than by the governor’s political councilors.” Moore, note 69 at 8.

73 Originally, governor’s council itself heard and decided appellate cases. S34 of the *Constitution Act, 1791*.

74 *Administration of Justice Act*, 1849, SPC 1849 (12 Vict) c63.

75 Moore, *supra* note 69 at 18.

76 *Administration of Justice Act, 1874*, SO 1874, c7.

77 Moore, *supra* note 69 at 42. However, “new appeal judges of 1874 were authorized, and expected, to sit on the trial courts at least part of the time” since it was anticipated that “volume of appeals would not occupy the whole time of the four appellate judges” (*Supra* at 43).

78 This provision was succeeded by s 22 of the *Court of Appeal Act, 1877*, RSO 1877, c38.
The Court of Error and Appeal shall have all the powers and duties as to amendment and otherwise of the Court or Judge from which or whom the appeal is had, together with full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before any person whom the Court may direct. ... Upon appeals from a decree or judgment upon the merits at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without the special leave of the Court. ...

This provision was similar to a provision of the United Kingdom’s *Supreme Court of Judicature Act 1873 & 1875*. 79 The provision was not initially included in the draft, but, based on recommendations of judges at that time, was later added. 80 In the discussion of the new act before the Parliament, objection was made to the power of taking evidence at an appellate court based on anticipation that troubles would arise from the power. Attorney General Mowat refuted the objection, saying that “[j]udges would circumscribe within proper limit the power given by the clause.” 81

Unlike United Kingdom’s *Court of Judicature Acts, 1873 & 1875*, mergers of courts of first instance and procedures of common law and equity were not done in the *Administration of Justice Act 1874*. Those mergers were accomplished in Ontario by the *Judicature Act 1881*. 82

In Ontario, from the beginning of the common law system, both in common-law case and equity cases, a party could appeal against a decision of the court of first instance, and there was a unified appellate court that heard and decided appeals. Hence, permitting the taking of new evidence at an appellate level was not done to balance between common law and equity. Rather,

79 *Rules of Procedure, supra* note 59, r52; *Order 68, being First Schedule to the Supreme Court of Judicature Act, 1875*, supra note 25, 5.


82 *Judicature Act, 1881*, SO 1881, c5.
it was done because taking evidence at an appellate level had been allowed in England and judges of the Ontario courts requested it. It is not clear why the judges requested it. However, all judges of Ontario at that time were judges of both the court of first instance and the appellate court; it is possible that they were concerned about fact findings even at an appellate level and felt the inconvenience of a prohibition on receiving new evidence at an appellate level.

2.3 Development of the Rules in Ontario

The rule regarding taking new evidence at the appellate level was modified by many later acts and rules. In 1975, phrases requiring “special grounds” to admit new evidence were deleted, and the text became as follows:

On all appeals, or hearings in the nature of appeals, and on all motions for a new trial, the court or judge appealed to has all the powers as to amendment and otherwise of the court, judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the court or judge appealed to, or as may be directed.

The text of the rule, as modified, became the present text in 1990. However, there was no difference in substance before and after those amendments. Further, there was little debate at that time regarding the validity of the rule.

Although the appellate court has discretionary power to take new evidence, special grounds are needed to take it. After the enactment of the Administration of Justice Act 1874, the courts addressed this reality in a series of cases in the 19th century and early of 20th century. Decisions were made as to whether new evidence should be allowed at the appellate level, but from the text

83 For example, Ontario Judicature Act, 1881, supra, s13; Consolidated Rules of Practice, 44 Vic c5 s1, r585; Rules of Practice and Procedure of the supreme court of Ontario, RRO 1960, reg 396, r234.
84 O Reg 106/75.
86 See note 8 and accompanying text.
of the judgments it is not clear how the court interpreted the rule and what the requirements were to take new evidence. An exception was Rathbone v Michael, where the court held that the new evidence must be of some fact, essential to the case, of the existence of which there is no reasonable doubt, or no room for serious dispute; and there must have been no remissness in adducing all possible evidence at the trial.

In Varette v Sainsbury, the Supreme Court of Canada discussed the criteria for ordering new trials based on new evidence, stating that “a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive.” The Supreme Court referred to the English case of Young v Kershaw which considered whether the decision to grant a new trial based on discovery of new evidence was an issue of the case. There, the Court of Appeal in England held that “new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial, would have been conclusive so that the verdict must have been found otherwise than it was.”

After Varette v Sainsbury, interpretation of the rule regarding taking new evidence became more precise. In Mercer, the Court of Appeal in Ontario set out three conditions that had to be met to

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87 For example, in Dean v Ont. Cotton Mills, [1887] 14 OR 119; Leach v Grand Trunk Ry, [1890] 13 PR 467; Burfoot v DuMoullin, [1891] 21 OR 583; Dolen v Metropolitan LI Co., [1894] 26 OR 67; Wood v Reesor, [1895] 22 OAR 57; Warren v Van Norman, [1898] 29 OR 84, 508; Butler v McMicken, [1900] 32 OR 422; Royal Bank of Canada v McNaughton, [1931] 2 OR 298, new evidence was received. On the other hand, in Merchants Bank v Lucas (1888) 12 PR 526; Fraser v London St Ry (1899) 18 PR 370; Dueber Watch Case Mfg. Co. v Taggart (1899) 19 PR 233, the appellate court refused to take new evidence. However these cases did not give interpretation of the rule in detail.

88 Rathbone v Michael, [1910] 20 OLR 503.

89 Young v Kershaw, [1899] 81 TLR 531 [Young].


91 Young, supra note 89 at 532.
accept new evidence: (a) reasonable diligence, (b) credibility of the new evidence, and (c) the evidence’s effect on an issue. The court stated that “the public interest in finality to litigation” and “the affront to common sense involved in a court shutting its eyes to a fact which falsifies [the decision]” were competing considerations. 92

Recently, regarding the due diligence test of Palmer case, the Court of Appeal in Ontario held that the due diligence test was, “less significant when the evidence is in the hands of a party against whom it is tendered and there was an obligation on the party to disclose or to produce it” and eased the test slightly. 93

After allowing the appellate court to accept new evidence, tests for admitting new evidence have been gradually formulated. In the course of these developments, English case law was cited frequently by Canadian courts. Although there are many cases regarding acceptance of new evidence, there has been little debate about its reasonableness.

2.4 Summary

Originally, acceptance of fresh evidence was a rule formulated in England to merge common law and equity courts and procedures. At that merger, the appeal was intended as re-hearing, as if the appellate court had the same power as the court below. Hence the appellate court had the power to dispose of a case without ordering a new trial. However, there is no trial at the appellate level and the court’s power to take fresh evidence was limited compared to the court below. The reason for this was to balance previous rules of common law and equity; in other words, a trial

92 Mercer, supra note 9 at para 8.
93 Dean v Mister Transmission (International) Ltd., 2010 ONCA 443 at para 17, 189 ACWS (3d) 663.
was regarded as important. The fresh evidence rule was eventually adopted in Ontario because it was the rule of England and English law was the model of Canadian law, and because trial judges thought admitting new evidence was useful. Since then, English case law, still regarded as a model in Canada, has played an important role in the development of the rule in Ontario.

There has been no major change or discussion in Ontario regarding the rule of accepting fresh evidence by the appellate court. Hence it is beneficial to focus mainly on the development of the rule in England.

Allowing the appellate court to receive fresh evidence was derived from the concept of the appellate court’s function in equity: rehearing of a case. Disposition of a case by the appellate court after receiving further evidence is harmonious with this concept because the appellate court in re-hearing a case should have and exercise the same power as the trial court. Contrarily, at common law the appellate court’s power was very limited compared to the trial court: in that system, live testimony was a principal way of presenting evidence and there was no trial at the appellate level. Thus, in the common law’s concept of an appellate court, ordering a new trial when the court takes fresh evidence is desirable because the appellate court does not have the opportunity to hear live testimony. Hence it is demonstrated that the present system of the appellate court regarding the power of taking fresh evidence has been based on inconsistent ideas. In the next chapter of this thesis, the practice of the appellate court when the court takes fresh evidence will be examined in order to discuss an idea that has been valued in the practice.
Chapter 3
The Practice of the Appellate Court after the Court Takes Fresh Evidence

3 The Practice of the Appellate Court after the Court Takes Fresh Evidence

As stated in Chapter I, there is no leading civil case that explains criteria used by the appellate court to choose between disposing of a case immediately and ordering a new trial at the trial court. This chapter will explore the practice of the appellate court by examining previous cases.

Before showing cases, it would be necessary to show how the cases are selected. Since this chapter will examine how the appellate court disposes of an appeal after taking fresh evidence, cases that indicate disposition of an appeal are selected mainly from The Canadian Abridgment. In other words, cases in which an application to take fresh evidence was granted, but the result of the appeal was unknown, are not the subject of this chapter. Furthermore, cases in which fresh evidence was related to findings of fact other than adjudicative facts are excluded. This is because findings of legislative facts are related to interpretation of law.

In the following paragraphs, the cases will be divided into two categories: cases in which fresh evidence relates solely to the assessment of damage, in other words, diminution or aggravation of damages, and the other cases. This is because “[t]he application of the rules concerning the admission of fresh evidence on appeal is, perhaps, less strict in appeals involving solely the assessment of damages. In such cases, in which the quantum of the trial judge’s award is directly at issue, the existence of fresh evidence which would have altered the quantum of the award is

plainly material to the outcome of the appeal.” In *Mulholland v Mitchell*, the House of Lords took fresh evidence in a damages case and stated:

> [T]he question whether fresh evidence is admitted or not is to be decided by an exercise of discretion. As my noble and learned friend Lord Pearson said in *Murphy v. Stone-Wallwork (Charlton) Ltd.* [1969] 2 All ER 949 at 960, [1969] 1 WLR 1023 at 1036, the question is largely a matter of degree and there is no precise formula which gives a ready answer. In this case, I think that it can be fairly argued that the basis on which the case was decided at the trial was suddenly and materially falsified by a dramatic change of circumstances. An appeal on the whole question of damages is pending and it would be unsatisfactory for the court to deal with that appeal without taking into account the falsification, if such there be, of the basis of the trial judge's award. In the absence of the fresh evidence, the Court of Appeal would be restrained from dealing with the reality of the case before it.

This holding was adopted and applied by the Canadian courts in *Knutson v Farr*, *Mercer*.

### 3.1 Diminution or Aggravation of Damages

Nine damages cases will be examined in the following paragraphs. In every case, fresh evidence that was admitted demonstrates a new fact that occurred after the trial. By examining cases, it will be shown that, although there are exceptions, in cases in which the admitted fresh evidence indicated or suggested the proper amount of damages, the appellate court disposed of the case immediately by modifying the award. By contrast, when the admitted fresh evidence did not show or suggest the proper amount of damages, the appellate court tended to direct a new trial.

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97 Supra at 310.
99 *Mercer, supra* note 9 at para 27.
3.1.1 Modification of damages awards by the appellate court based on fresh evidence

In *Hudson v Burnett*, the Appeal Division of the New Brunswick Supreme Court in an automobile accident action admitted fresh evidence adduced by an appellant who was an alleged victim of the accident, and increased the damages award. The fresh evidence was medical evidence that indicated the victim’s condition and physiotherapy treatments she received after the trial. The court stated that the appellant’s suffering and discomfort would “continue for a more extended period than the evidence given at the trial would suggest” based on the fresh evidence. However the court did not explain the reason why the court chose to modify the damages award instead of ordering a new trial. In *Mercer*, the Ontario Court of Appeal received fresh evidence adduced by an appellant, a defendant, and decreased the damages in an automobile action. The fresh evidence was an agreed statement of facts showing the marriage of a plaintiff, the widow of a man deceased in the accident, and the income of her new husband. Although the fresh evidence demonstrated financial advantage for the plaintiff, it was not clear how much benefit the plaintiff would receive from her new husband. Nevertheless the court decreased the award without explaining the reason for not directing a new trial. In *Cory v Marsh*, another automobile accident action, the British Columbia Court of Appeal received fresh evidence introduced by an appellant, a party who was responsible for a car accident, and decreased the damages award. The fresh evidence demonstrated that one of the plaintiffs died shortly after the trial. The appellate court, finding that the plaintiff’s award for future loss of earnings and costs became excessive by his early death, reassessed and reduced the damages award by itself. In these cases, in which the appellate courts modified awards without ordering a new trial, fresh evidence demonstrated that the damages awards rendered by the trial courts were not accurate and offered certain grounds to estimate the proper amount of damages.

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101 Supra at para 10.
3.1.2 Ordering a new trial by the appellate court based on fresh evidence

In Vagi v Peters [Vagi], the Saskatchewan Court of Appeal admitted fresh evidence introduced by an appellant, a party who was allegedly responsible for a car accident, and ordered a new trial. The fresh evidence consisted of affidavits pertaining to new evidence showing that a plaintiff, one of those injured in the accident, had “deliberately misled the Court” at his examination for discovery and trial by denying a previous injury and hiding other information regarding damages and relating to the credibility of his testimony. The court stated that “[i]t is apparent that the evidence which has been shown to be untrue in this case is not only relevant but in some areas critical” as the reason for ordering a new trial.

In Christie (Guardian ad litem of) v Insurance Corp. of British Columbia [Christie], an appellant who was injured in an automobile accident made an application to introduce fresh evidence to challenge the trial judge’s award for his future pecuniary loss. The fresh evidence established the onset of epilepsy suffered by the appellant, which was caused by the accident but occurred after the date of the judgment below. The British Columbia Court of Appeal received the fresh evidence and ordered a new trial confined to the assessment of future pecuniary loss. The reason for ordering a new trial was that the court “felt it would be impossible for [the court] properly to assess the issues relating to the appellant's future pecuniary loss claim, and that it would be inappropriate for [the court] to attempt to do so.”

In Coulter v Ball [Coulter], appellants who were allegedly responsible for a car accident, sought to introduce fresh evidence to attack the trial judge’s finding regarding an award of the cost of future care of a plaintiff who suffered a serious brain injury. The award contained the plaintiff’s accommodation fee at a supervised living facility, and the assumption of the award was that the plaintiff would voluntarily agree to live in a supervised living facility.

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105 Supra at para 3.
106 Supra at para 8.
107 Christie (Guardian ad litem of) v Insurance Corp. of British Columbia, [1993] 28 BCAC 262, 79 BCLR (2d) 370.
108 Supra at para 1.
living facility. The fresh evidence consisted of documents that related to the plaintiff’s conduct and attitude after the trial and demonstrated that the plaintiff remained resistant to supervised living unless forced to do so by probation order. The British Columbia Court of Appeal received the fresh evidence; found that the finding of the court below regarding a supervised living facility could not be supported by evidence, and ordered a new trial for reassessment of the cost of future care since “the question of Mr. Coulter's accommodation is linked to other aspects of his cost of care.”

In these three cases, in which the appellate courts ordered new trials, the accuracy of damages awards was attacked by the fresh evidence. The fresh evidence, however, did not indicate or suggest the proper amount of damages; because the fresh evidence only attacked the accuracy of evidence presented at a trial (Vagi) or finding or premise of the court below (Christie and Coulter).

### 3.1.3 Other cases

In some cases, fresh evidence was introduced but the result was neither to modify judgment below nor to order a new trial. One type of these cases is the situation in which an appellee (a respondent), not an appellant, seeks to introduce fresh evidence for the purpose of defending and/or supporting a judgment below. In *Jackson v Inglis*\(^{111}\) and *Sengmueller v Sengmueller*,\(^{112}\)

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\(^{110}\) *Supra* at para 86.

\(^{111}\) *Jackson v Inglis*, [1985] 30 ACWS (2d) 420, 7 OAC 377. In the case, the plaintiff who suffered injury in a traffic accident sued the defendant for damages. The trial court awarded damages to the plaintiff. In its judgment, the court found that the plaintiff would be unable to work in high grade jobs. The defendant filed an appeal and protested against the assessment of damages for plaintiff’s future loss of earnings. The fresh evidence adduced by the plaintiff was affidavits of her husband and her doctor. The affidavits stated that the plaintiff quitted her work and her inability to resume her work.

\(^{112}\) *Sengmueller v Sengmueller*, [1994] 7 OR (3d) 208, 111 DLR (4th) 19. In this case, the appellant filed an appeal from a trial judgment for the payment of equalization payment of net family property to her. In the
the appellate courts accepted fresh evidence introduces by an appellee and dismissed the appeal made by an appellant. The other type is a case in which an appellant introduced fresh evidence but the appellate court does not render a judgment in the appellant’s favor. In Knutson (Guardian ad litem of) v Farr, the trial court awarded damages for a respondent, who suffered a severe head injury in a traffic accident and remained unaware of his surroundings. The appellant appealed from the part of the award that was for non-pecuniary damages. The respondent cross-appealed to increase the non-pecuniary damages and introduced fresh evidence: medical reports that showed slight improvement of his condition after the trial, such that he might now benefit from measures of solace. The British Columbia Court of Appeal admitted the fresh evidence but reduced the damages against the respondent based on the new findings without stating a detailed explanation.

3.2 Cases other than Diminution or Aggravation of Damages

Ten cases in which an issue other than an assessment of damages was disputed at an appellate level will be examined in the following paragraphs. Cases in which the appellate court did not order a new trial will be discussed first, followed by cases in which a new trial was ordered.

3.2.1 No New Trial Was Ordered

Three cases are examined. In Cooke v McMillan, the appellant appealed from a trial court’s judgment ordering specific performance. The respondent introduced fresh evidence in the form

appeal, the appellant stated that the trial judge errored in reducing disposition cost from the net family property. An appellee sought to introduce fresh evidence: evidence that showed dramatic decrease of his real property’s value and forced realization of his registered retirement saving plan. The appellate court admitted fresh evidence and dismissed the appeal.

113 Knutson (Guardian ad litem of) v Farr, 1984 BCLR 145, 12 DLR (4th) 658.
of an affidavit demonstrating facts, i.e., dates of death of persons concerned, which were essential to support the judgment. The Divisional Court of the Ontario High Court of Justice accepted the fresh evidence and dismissed the appeal based on the facts proved by the fresh evidence. In this case the facts demonstrated by the fresh evidence were simple, and it seems there was little room to dispute them. It is presumed that this was why the appellate court did not order a new trial.

In Arcand v Kaup, a respondent claimed damages arising out of the collision of two vehicles on a highway, the trial court gave a judgment for him. The appellant filed an appeal asserting that the trial court’s finding, that one of the vehicles had been on the “main provincial highway” within the meaning of a certain statute at the time of the collision, was wrong. The respondent then applied to introduce fresh evidence, a certified copy of an order in council, to establish that the highway was the “main provincial highway”. The Appellate Division of the Alberta Supreme Court gave leave to adduce fresh evidence and dismissed the appeal. Since the fresh evidence was the order in council, it is inferred that producing evidence against the finding supported by the fresh evidence was unreasonable.

In Chrysler Financial Services Canada Inc. v Misner, the trial court (a small claims court) dismissed an appellant’s claim for a deficiency remaining after selling collateral “on the basis of the lack of jurisdiction in the Small Claims Court to grant relief under Part V of the Personal Property Security Act, R.S.O. c. P.10 (the "PPSA").” The appellant appealed and made an application to adduce fresh evidence: a copy of the notice of intention to sell it had issued by the appellant in accordance with the PPSA. The appellant had tried to introduce the evidence at the trial when the respondent challenged the sale on the basis of a lack of a notice to sell, but the trial court had rejected the appellant’s request for adjournment. However, the Ontario Superior Court

117 Supra at para 1.
of Justice granted the application, allowed the appeal, and ordered the respondent to pay the
deficiency balance accepting that the small claims court did have jurisdiction to handle a PPSA claim. Because the fresh evidence, the copy of the PPSA notice, was the best evidence to demonstrate service of the PPSA notice, it appears that the fresh evidence had conclusive effect.

In these three cases, fresh evidence had conclusive effect to decide the issue involved, and it seems rebuttal was difficult. Hence, it is concluded that it is a tendency of the appellate courts to dismiss an appeal or to modify a judgment below rather than order a new trial when the fresh evidence would be conclusive of the issues in the case.

3.2.2 A New Trial Was Ordered

In the following paragraphs, nine cases in which the appellate court ordered a new trial will be discussed. The cases are divided into three categories: (1) fresh evidence contradicting testimony of a witness at the trial, (2) fresh evidence affecting credibility of testimony of a witness at the trial, and (3) fresh evidence indicating the opposite of the trial court's findings. It appears that when fresh evidence requires examination of credibility in connection with other evidence, the appellate court leaves the task to the trial court rather than perform the task. As noted below, some cases indicated that the trial court was more suitable to deal with questions of credibility than the appellate court.

In Richardson Greenshields of Canada Ltd. v Naguschewski [Richardson] 118 and Westby v Kosolowsky [Westby], 119 fresh evidence introduced was inconsistent with testimony of a witness at a trial. In Richardson, the respondent, a brokerage house, conducted transactions with an

\[\text{\[Richardson\] 118 and Westby v Kosolowsky [Westby].}^{119}\]

\[\text{Richardson Greenshields of Canada Ltd. v Naguschewski [Richardson] 118 and Westby v Kosolowsky [Westby].}^{119}\]

\[\text{Richardson Greenshields of Canada Ltd. v Naguschewski, [1996] BCWLD 1125, 62 ACWS (3d) 10 [Richardson].}\]

\[\text{Westby v Kosolowsky, 2011 BCSC 1402, 207 ACWS (3d) 384 [Westby].}\]
investment company and suffered damages arising out of the transactions when the respondent got uncleared checks endorsed by the investment company. Since an appellant participated in the transaction to some extent and knew that the investment company’s principal was in jail at the time of the transactions because of credit problems, the respondent claimed damages based on negligent misrepresentation and/or contract of indemnity. At the trial, the trial court, accepting the testimony of a broker who brokered the transaction in question to the effect that he did not know the principal of the investment company was in jail, held the appellant liable for the respondent’s damages. In appealing from the judgment, the appellant tried to introduce fresh evidence consisting of two affidavits: one by the appellant himself and the other by a new person who stated that the broker said to him that the broker knew the principal was in jail at the time of the transactions. The British Columbia Court of Appeal accepted the fresh evidence and ordered a new trial. In the judgment, although the court did not recognize the fresh evidence to be “of the decisive character that would allow an immediate disposition of the appeal”,\textsuperscript{120} the court acknowledged that “because of its significance at the trial (in relation to the issue of whether or not [the broker] had knowledge of [the principal of the investment company]'s incarceration), the fresh evidence ‘has sufficient weight or probative force’ that indeed if believed might have altered the result at trial.”\textsuperscript{121} It is presumed that, because the fresh evidence contradicted testimony of a witness at the trial and an assessment of the credibility of both testimonies was needed, the appellate court did not find the fresh evidence decisive to decide the outcome of the case.

In \textit{Westby}, the appellant claimed for repayment of his loan, but the respondent insisted that money she received from him was payment of back child support. The trial court dismissed the claim, being unsure which party to believe. The appellant asked the British Columbia Supreme Court to receive fresh evidence: a transcript of court proceedings before a judge regarding transfer of the case by telephone, in which the respondent admitted the money was a loan. Accepting this fresh evidence, the appellate court set aside the order below and ordered a new trial.

\textsuperscript{120} Richardson, supra note 118 at para 16.

\textsuperscript{121} Ibid.
trial. In its reasoning, the appellate court acknowledged that, if the transcript were presented at the trial, the respondent’s confession could affect the credibility of her testimony and could result in acceptance of the appellant’s testimony.122 The court stated that “these issues of credibility must be determined by a trial judge at a new trial”123.

In *Zesta Engineering Ltd. v Cloutier [Zesta]*,124 *Topgro Greenhouses Ltd. v Houweling [Topgro]*,125 and *Kuo v Kuo [Kuo]*,126 the fresh evidence that was introduced affected the credibility of the testimony of a witness at the trial. In *Zesta*, an appellant, a company selling electric equipment, brought an action against a respondent, former employees, for an injunction against starting a business in competition with the appellant. On the other hand, most of the respondents counterclaimed for damages for wrongful dismissal. The parties disputed whether the respondents were loyal to the appellant during their employment; in particular, whether they used the appellant’s confidential information and tried to take the appellant’s customers away. The trial judge found that the respondents were loyal throughout their employment. The appellant appealed and then applied for leave to introduce fresh evidence that “form[ed] the basis of an outstanding criminal charge against”127 the respondents by showing the fraud. The fraud, according to the appellant, consisted of selling the appellant’s inventory and diverting payment for the inventory to a third company for the respondents’ own sake. The Ontario Court of Appeal granted the application and ordered a new trial, finding that “had the fresh evidence been available at trial, the trial judge may well have taken a very different view of [the respondents’] credibility and, in turn, of the underlying facts to this litigation.”128 The appellate court declined to judge the credibility of the respondents’ trial testimony in connection with the fresh evidence.

122 *Westby, supra* note 119 at para 41.
123 *Supra* at para 42.
124 *Zesta Engineering Ltd. v Cloutier*, [2002] 164 OAC 234, 21 CCEL (3d) 164 [*Zesta*].
125 *Topgro Greenhouses Ltd. v Houweling*, 2004 BCCA 39, 193 BCAC 94 [*Topgro*].
126 *Kuo v Kuo*, 2007 BCCA 479, 163 ACWS(3d) 10 [*Kuo*].
127 *Zesta, supra* note 124 at para 13.
128 *Supra* at para 27.
In *Topgro*, the parties disputed over the right to acquire the shares of a departed shareholder. The respondents were a company and its remaining original shareholders, and the appellant was a late-coming shareholder. The departed shareholder had allegedly his shares to the appellant under a two-installment payment plan. The respondents contended that this transaction was fraudulent and violated an agreement among the shareholders. In a summary trial, the court gave a judgment in favor of the respondents. The appellant appealed and move the appellate court to accept fresh evidence supporting his assertion, consisting of an affidavit of the departed shareholder stating that he agreed to defer payment for the shares. The British Columbia Court of Appeal admitted the fresh evidence and ordered a new trial. While acknowledging the necessity for the court to form its own opinion on the evidence in the record, the court did not do that “because of the fresh evidence in the form of [the departed shareholder statement]”\(^\text{129}\) and considered the trial court as the more desirable place to find fact “which may involve questions of credibility.”\(^\text{130}\)

In *Kuo*, money lending was disputed between two brothers. The respondent claimed for repayment of his loan, but the appellant denied borrowing from him asserting that he borrowed the money from their father. The respondent’s claim was granted at the trial based on a loan agreement signed by both parties. The appellant appealed and sought to introduce fresh evidence: correspondence between the respondent and government offices dated months before the alleged loan, in which the respondent asked the government offices to deprive the appellant of his pension based on his alleged fraudulent conduct. The British Columbia Court of Appeal accepted the fresh evidence and ordered a new trial, mentioning that the fresh evidence “would appear to bear directly on [the respondent’s] credibility in saying that he loaned his brother the money.”\(^\text{131}\)

\(^{129}\) *Topgro*, supra note 125 at para 35.

\(^{130}\) *Ibid*.

\(^{131}\) *Kuo*, supra note 126 at para 10.
The appellate court acknowledged that the fresh evidence cast doubt on the credibility of a party’s assertion but did not judge its credibility.

In *Bradbury v Insurance Corp. of British Columbia [Bradbury]*\(^\text{132}\) and *Opron Construction Ltd. v Clearwater Concrete Products (2000) Ltd. [Opron]*\(^\text{133}\), fresh evidence that was adduced indicated the opposite of the trail court's finding. In *Bradbury*, an appellant who was struck by unknown driver and had no memory of where he was standing or walking at the time, claimed for damages caused by the accident. The trial court apportioned liability equally between the appellant and the unknown driver. Unsatisfying with this apportionment, the appellant filed an application in the appellate court to introduce fresh evidence: testimony of a witness who was a passenger in the appellant’s vehicle. The British Columbia Court of Appeal granted the application, set aside the judgment below and directed a new trial on the issue of liability. The court did not explain in detail why a new trial was ordered instead of modifying the judgment below. However, a respondent challenged the believability of the fresh testimony evidence, and the court stated as follows to illustrate that the fresh evidence, if believed, would be conclusive:

> [I]t is well known that it is very difficult to determine the credibility of a witness merely from the printed page. There can be no doubt that if this evidence had been before the learned judge below, it was open to him to accept it and, therefore, to come to a different conclusion from the conclusion to which he did come on the crucial fact of where the appellant was at the time he was struck.\(^\text{134}\)

It is inferred that the court ordered a new trial to decide the credibility of the fresh evidence because its credibility was in question.

In *Opron*, the parties contended about how to measure a quantity of gravel that was delivered by vehicles. The trial judge accepted a conversion factor used by the Alberta Forestry Service in

\(^{132}\) *Bradbury v Insurance Corp. of British Columbia*, [1989] 42 BCLR (2d) 397, 38 CPC (2d) 225 [*Bradbury*].

\(^{133}\) *Opron Construction Ltd. v Clearwater Concrete Products (2000) Ltd.*, [1990] 43 CPC (2d) 101, 22 ACWS (3d) 742 [*Opron*].

\(^{134}\) *Bradbury*, supra note 132 at para 19.
converting weight to volume. An appellant appealed and asked the Alberta Court of Appeal to receive fresh evidence, a statement from an officer of Alberta Transportation indicating that “there was some improper conduct by some persons in connection with the weighing at the Alberta Forest Service scale.” 135 The appellate court accepted the fresh evidence and ordered a new trial, stating that:

We could not possibly resolve all the trial issues if we accepted that evidence or if we heard that evidence. [A council for the respondent] points out that that evidence should be subjected to cross-examination and he points out some interesting avenues of cross-examination which he would pursue. In the circumstances where that evidence would have to be heard by a court and subject to cross-examination and be heard in the context of other evidence, we propose allowing the appeal by directing a new trial at which this evidence may be led. We do that because we could not resolve the issue here nor could it be resolved by a commission or something of that nature.136

It is suggested that the appellate court considered that it was not suitable at the appellate level to conduct an examination of a witness and find facts based on all relevant evidence.

3.3 Summary

In cases in which admitted fresh evidence relates only to the assessment of damages, the appellate courts tend to modify the damages instead of ordering a new trial; when the proper damages are suggested by the fresh evidence the appellate court will dispose of the case by modifying the damages. By contrast, in cases in which admitted fresh evidence is related to other than the assessment of damages, the appellate courts prefer ordering a new trial to modifying a trial judge’s decision. Only when the fresh evidence introduced is conclusive of issues in a case, the appellate courts tend to modify a judgment below (or dismiss an appeal). When fresh evidence demands evaluation of credibility of evidence, the appellate court avoids the evaluation by ordering a new trial based on the idea that a trial court is more suitable to decide credibility of evidence.

135 _Opron, supra_ note 133 at para 4.

136 _Ibid._
Because trial records on appeal contain transcripts of witness testimony, even if fresh evidence demands considering credibility of evidence to dispose of a case, the appellate court has at hand and can use all the evidence necessary to make such a disposition. At least, the court is able to collect all necessary the evidence; specifically, the party against whom the fresh evidence is introduced has an opportunity to adduce his own fresh evidence in rebuttal. When the appellant’s fresh evidence is an affidavit, the appellate court has the power to summon the affiant to the court and give the parties the opportunity of examining and cross-examining the affiant as a witness. Nevertheless appellate courts tend not to do this, and thus it is necessary to consider the reasons why they regard the trial court to be more suitable to evaluate credibility of evidence.
Chapter 4
Advantage of the Trial Court – Does appellate judges’ experience as the trial court judge matter?

4 Advantage of the Trial Court – Does appellate judges’ experience as the trial court judge matter?

It is the practice of the appellate court to order a new trial at the trial court when the court takes fresh evidence which demands evaluation of credibility of evidence as long as the fresh evidence concerns an issue other than an assessment of damages. As the appellate court is in the position to utilize or collect all the evidence which is relevant to a case, it appears that this practice is based on the idea that the trial court is more suitable to evaluate credibility of evidence than the appellate court. Focusing an ability of the appellate court, this chapter tries to consider one of the reasons behind this idea.

At the trial, evidence is presented and a fact finder finds fact based on its evaluation of the evidence. Evaluating evidence and finding fact is a part of the trial judge's role. By contrast, there is no trial at the appellate court. Evaluating evidence and finding fact is not a part of the appellate court judge's role. Without the experience of evaluating evidence and finding fact, it would be difficult for one to evaluate evidence and to find fact. If many of the appellate court judges do not have the experience of the trial judge, this means that the appellate court does not possess enough ability to evaluate evidence and to find fact. In this situation, ordering a new trial at the trial court is appropriate when the appellate court takes fresh evidence which requires evaluation of credibility of evidence.
The appellate judges in the US often do not have experience as the trial court judge. In general, “judges in the United States initially come to the bench from other lines of legal work and after a substantial number of years of professional experience…[O]nce on the bench they do not, generally, follow a promotional pattern through the ranks of the judiciary.”137 Professor Marcus summarized one of the features of the appellate judges in the US as follows:

American judges are … selected for trial or appellate courts on a variety of grounds that differ significantly from what one would find in a true bureaucratic structure. Routinely, trial court judges come to bench with decades of very successful practice behind them. Often those appointed to the appellate bench are considerably younger and lack similar practical experience… Under these circumstances, having the appellate judges closely supervising the day-to-day activities of the trial court (first instance) judges would make no sense.138

How about the situation in Canada? Based on the statistical results of the book “The Court of Appeal for Ontario” written by Moore139 and the website of the Court of Appeal for Ontario140, I checked how many of the judges of the Court of Appeal for Ontario, including its predecessors, had experience as the trial court judge when they were appointed to the appellate court. The results are shown in table 1.

137 Daniel Meador, American Courts, (St.Paul: Thomson West, 2000) at 49.
139 Moore, supra note 69.
140 “Judges of the Court of Appeal for Ontario” (12 April, 2016) online:< http://www.ontariocourts.ca/coa/en/judges/>
Table 1: judges of the Court of Appeal for Ontario, including its predecessors, and their prior appointments as the trial judge.

<table>
<thead>
<tr>
<th>Year of appointment</th>
<th>Prior appointment as the trial judge?</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>1849-1874</td>
<td>7 judges (31.8%)</td>
<td>15 judges (68.2%)</td>
</tr>
<tr>
<td>1874-1912</td>
<td>8 judges (47.0%)</td>
<td>9 judges (53.0%)</td>
</tr>
<tr>
<td>1913-1938</td>
<td>10 judges (71.4%)</td>
<td>4 judges (28.6%)</td>
</tr>
<tr>
<td>1938-1967</td>
<td>13 judges (46.4%)</td>
<td>15 judges (53.6%)</td>
</tr>
<tr>
<td>1967-1990</td>
<td>16 judges (57.1%)</td>
<td>12 judges (42.9%)</td>
</tr>
<tr>
<td>1990-2007</td>
<td>22 judges (78.6%)</td>
<td>6 judges (21.4%)</td>
</tr>
<tr>
<td>2007-2016</td>
<td>17 judges (94.4%)</td>
<td>1 judge (5.6%)</td>
</tr>
<tr>
<td>Incumbent as of April 1st, 2016.</td>
<td>26 judges (89.7%)</td>
<td>3 judges (10.3%)</td>
</tr>
</tbody>
</table>

In the past, percentages of the appellate judges with experience as the trial court judge were not always high. For example, more than half of judges who were appointed to the appellate court between 1874-1912 and 1938-1967 did not have experience as the trial court judge. However, in recent years, many of the appellate judges have the experience. For instance, between 1990 and
2007, twenty two newly appointed judges out of twenty eight newly appointed judges had the experience. The percentage of the appellate judge with the experience increases. Between 2007 and 2016, seventeen out of eighteen judges had the experience. At present, out of twenty nine incumbent judges of the court as of April 1st, 2016, twenty six judges have the experience.\(^{141}\)

What are situations in the other provinces? I checked the websites of the Court of Appeal in every province and of Canadian Government to find out whether the every judge of the Court of Appeal as of April 1st, 2016 had experience as the trial court judge before his or her appointment to the appellate court. The results are shown in table 2.

Table 2: judges of the Court of Appeal in every province and their prior appointments as the trial judge as of April, 2016.

<table>
<thead>
<tr>
<th>Province</th>
<th>Prior appointment as the trial judge?</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes (percentage)</td>
<td>No (percentage)</td>
</tr>
<tr>
<td>Ontario</td>
<td>26 judges (89.7%)</td>
<td>3 judges (10.3%)</td>
</tr>
<tr>
<td>Quebec</td>
<td>23 judges (79.3%)</td>
<td>6 judges (20.7%)</td>
</tr>
</tbody>
</table>

\(^{141}\) Though three judges do not have experience as a trial court judge before their appointments to the appellate court, two judges have experience as a trial lawyer before their appointments. The Honourable Eleanore A. Coonk and The Honourable John I. Laskin practiced as a litigation lawyer before becoming the judge of the court. The Honourable Grant Huscroft was law professor before his appointment to the court.
The percentages of the appellate judges with experience as the trial court judge are not higher in some provinces with a small number of appellate judges, such as Prince Edward Island and Saskatchewan. However, in many provinces the percentage is high. In total, 87.3 percent of all appellate judges in all provinces have the experience as a trial court judge before their appointment to the appellate court. It is fair to say that many of the appellate judges have the experience.
As many of the appellate judges have the prior experience as the trial judge, they have experience of evaluating evidence and finding fact before their appointments to the appellate court. In this case, the appellate court possesses enough ability to evaluate evidence and to find fact. Thus, even if the appellate court takes fresh evidence which demands evaluation of credibility of evidence, ordering a new trial is not the only option; the court has ability to dispose of a case after evaluating credibility of evidence at the appellate court. However, in practice, the appellate court orders a new trial at the trial court. The reason behind this practice is not that the appellate court does not possess enough ability to assess credibility of evidence. One needs to consider other possible reason behind the practice.
Chapter 5
Usefulness of Observing Demeanor of a Witness to Find Fact

5 Usefulness of Observing Demeanor of a Witness to Find Fact

When the appellate court deals with finding of fact, the court needs evidence. What kinds of evidence does the court utilize? As long as evidence is fresh evidence introduced at the trial, the court utilizes all kinds of evidence: for example, paper such as affidavit, and testimony of a witness. As for evidence presented at the trial, the court needs to rely on record as there is no trial at the appellate level. Thus, the court reads transcript of testimony of a witness at the trial instead of listening and watching the testimony. Testimony and transcript of the testimony provide same words. However information they provide is different.

The trial transcript provides the spoken words of the witnesses, but this is not all the information connected with the testimony. The examination of a witness on the stand gives a finder of fact the opportunity to evaluate the demeanor of the witness in addition to the spoken words. Demeanor is defined as “[o]utward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.”142 The appellate court can use only the transcript and does not have an opportunity to observe the witness’s demeanor; only the trial court has that opportunity. Thus it is inferred that, in practice, an appellate court’s lack of opportunity to observe the demeanor of a witness leads to the conclusion that the trial court is more suitable for evaluating evidence. In other words, the practice values live testimony. In Bradbury, the British Columbia Court of Appeal explained the reason why the court ordered a new trial at the trial court after taking fresh evidence as follows:

[I]t is well known that it is very difficult to determine the credibility of a witness merely from the printed page. There can be no doubt that if this evidence had been before the learned judge below, it was open to him to accept it and, therefore, to come to a different conclusion from the conclusion to which he did come on the crucial fact of where the appellant was at the time he was struck.143

142 Black’s law dictionary, 9th ed, sub verbo “demeanor”.
143 Bradbury, supra note 132 at para 19.
If observing demeanor is meaningful to evaluate testimony of a witness, the trial court’s opportunity of observing the demeanor justifies that the trial court’s advantage of evaluating evidence and justifies the practice of the appellate court when the court takes fresh evidence that demands evaluation of credibility of evidence. In this chapter, it will be discussed whether observing demeanor of a witness is really beneficial to find of fact.

5.1 Demeanor in the Canadian Legal System

Demeanor plays an important role in human communication.¹⁴⁴ In the common law, it is a traditional notion that observing demeanor is meaningful to evaluate the credibility of a witness at a trial. Hence, people consider that observing demeanor of a witness by a factfinder at the trial is an essential element of the judicial system. Wigmore stated that the conduct of the witness “is no less admissible when exhibited in the court-room and on the stand, even though no formal offer of it is then required. The demeanor of the witness on the stand may always be considered by the jury in their estimation of his credibility. … The witness’ demeanor, then, without any definite rules as to its significance, is always assumed to be in evidence.”¹⁴⁵

The Supreme Court of Canada understood observation of the demeanor of a witness as an essential part of an adversary system by holding that “our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanor can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regarded this process as the optimal way of testing testimonial evidence.”¹⁴⁶

¹⁴⁶ R v Khelawon, 2006 SCC 57 at para 34, 2 SCR 787.
The importance of observing demeanor by a fact finder connects with many points in the legal system. Demeanor is one of the reasons why hearsay evidence is inadmissible at a trial. In *R v Baldree*, the Supreme Court of Canada held that the relation between demeanor and hearsay is as follows:

The defining features of hearsay are (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 (S.C.C.), at para. 56. As Justice Charron explained in Khelawon, at para. 35, the hearsay rule reflects the value our criminal justice system places on live, in-court testimony:

Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanor can be observed by the trier of fact, and whose testimony can be tested by cross-examination. …

In short, hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanor in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration, and sincerity…

Further, the importance of demeanor supports face-to-face confrontation in a criminal proceeding. The Supreme Court of Canada “confirmed the common law assumption that the accused, the judge and the jury should be able to see the witness as she testifies” although the court did not recognize face-to-face confrontation as “an independent constitutional right.” In the context of discussing the relation between observing a witness’s face and a fair trial, the court pointed out that "[n]on-verbal communication can provide the cross-examiner with valuable insights that

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147 *R v Baldree*, 2013 SCC 35 at para 30-31, 2 SCR. 520.
148 *R v NS*, 2012 SCC 72 at para 23, 104 WCB (2d) 824.
149 *Supra* at para 22.
may uncover uncertainty or deception, and assist in getting at the truth"\textsuperscript{150} and "[c]overing a witness' face may also impede credibility assessment by the trier of fact, be it judge or jury."\textsuperscript{151}

Furthermore, demeanor is traditionally the main ground for the appellate court to defer to fact findings made by the trial court. In 1927, the House of Lords stated in \textit{S.S. Hontestroom v S.S. Sagaporack} that:

\[\text{Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.}\textsuperscript{152}

The Canadian courts have employed a very similar deferential standard of review of findings of fact. For example, in \textit{Stein v The “Kathy K”}, the Supreme Court of Canada, after citing English authorities including \textit{Hontestroom}, stated as follows:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.\textsuperscript{153 154}

In a criminal case, the courts take the same position. In \textit{R v Gannon}, the court held that:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and

\textsuperscript{150} Supra at para 24.
\textsuperscript{151} Supra at para 25.
\textsuperscript{152} S.S. Hontestroom v S.S. Sagaporack, [1927] AC 37 at 47 (HL).
\textsuperscript{153} Stein v The “Kathy K”, [1975] 62 DLR (3d) 1 at para 7, 6 NR 359.
\textsuperscript{154} The Supreme Court of Canada held that this standard of review was applied “not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge.” in Schwartz v R, [1996] 1 SCR 254 at para 32, 133 DLR (4th) 289. In Housen, the Supreme Court of Canada reaffirmed that the standard applied to all factual findings made by the trial court (Housen, supra note 2 at paras 19-25).
attempting to reconcile the various versions of events. That is why this Court decided, most recently in L. (H.), that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.\textsuperscript{155}

While demeanor is an established part of the legal system, different courts have different attitude toward the usefulness of a witness’s demeanor. As a matter of course, some courts acknowledge that demeanor is helpful to evaluate credibility of a witness. The Supreme Court of Canada has repeatedly mentioned the importance of observing demeanor to evaluate credibility of witness’ testimony. In \textit{R v White}, the court said that:

\begin{quote}
[The issue of credibility] is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness’ general conduct and demeanour in determining the question of credibility.\textsuperscript{156}
\end{quote}

In \textit{Laurentide Motels Ltd. v Beauport (City)} the court suggested that the trial judge should “assess [witnesses’] movements, glances, hesitations, trembling, blushing, surprise or bravado.”\textsuperscript{157} In \textit{R v Lifchus}, the court, recognizing that the demeanor of a witness affected evaluation of the witness’s credibility, stated that: “[i]t may be that the juror is unable to point to the precise aspect of the witness’ demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness' demeanor cannot be taken into consideration in the assessment of credibility.”\textsuperscript{158}

\textsuperscript{155} \textit{R v Gangnon}, 2006 SCC 17 at para 20, 1 SCR 621.


\textsuperscript{157} \textit{Laurentide Motels Ltd. v Beauport (Ville)}, [1989] 1 SCR 705 at para 232, 23 QAC 1.

\textsuperscript{158} \textit{R v Lifchus}, 118 CCC (3d) 1 at para 29, 150 DLR (4th) 733.
In addition to these cases, there are a number of cases in which the trial courts found facts or evaluated credibility of witness testimony based on demeanor of the witness. For example, in 
*Babineau v. LeBlanc*, the New Brunswick Court of Queen's Bench said, “I was impressed with the evidence of Claude Cormier. He gave his evidence in a straightforward manner. His demeanor on the witness stand was dignified, his recital scrupulously honest and creditable. Where his evidence differs from that of other witnesses I accept his testimony in preference to the evidence of others without hesitation.”

The Alberta Court of Queen's Bench, in *Terra Energy Ltd. v Kilborn Engineering Alberta Ltd.*, stated, “I pause here to comment that I was not impressed with the demeanour or evidence of Mr. Somers. On the stand he was arrogant, stubborn and evasive. On countless occasions he displayed what I might call a ‘convenient memory.’ He gave me the very distinct impression of being simply far too busy (or perhaps far too important) for insignificant, picayune matters such as those under dispute in this lawsuit. That contributed to his evasiveness and lack of candour.”

In *R v McLaughlin*, the Yukon Territory Supreme Court explained the reason why the court believed testimony as follows:

> I found the evidence of each of the accused to be believable. I confess that, in part, I believed the accused because of the manner in which they testified and because they were not shaken in any significant way by the cross-examination of the Crown… Perhaps, more than anything, what impressed me the most was their ability to recall with great precision and candour an obviously embarrassing and regrettable scenario.”

On the other hand, there are cases in which the court exercised caution against value of overvaluing demeanor. In *Faryna v Chorny*, the British Columbia Court of Appeal acknowledged that demeanor of a witness could be used to evaluate credibility of a witness but underlined that demeanor was just a factor. The court explained as follows:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the

159 Babineau v. LeBlanc, 161 APR 428 at para 9, 32 ACWS (2d) 313.

160 Terra Energy Ltd. v Kilborn Engineering Alberta Ltd., 198 AR 245 at para 245, 32 CLR (2d) 85.

161 R v McLaughlin, 2010 YKSC 9 at para 40, 87 WCB (2d) 96.
truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.\(^{162}\)

The Ontario Court of Appeal took the same position. In *R v JF*, the court held that it was “an error for a trial judge to base credibility decisions solely on the demeanour of witnesses”\(^{163}\) and revoked the trial judge’s fact findings, which were mainly supported by witness’ demeanor. The Nova Scotia Court of Appeal also viewed demeanor with caution and insisted on the necessity of checking witness testimony’s consistency or inconsistency with other evidence. In *R v SHP*, the court stated that:

While demeanor is a legitimate marker in the assessment of the veracity and reliability of someone taking the stand, it is not the only measure and must, I respectfully suggest, always be approached with caution.

One is not judging character. The obligation is to ascertain the truthfulness and reliability of a person's testimony. Appearances alone may be very deceptive. A most reprehensible witness may well be telling the truth. A polished, well-mannered individual may prove to be a consummate liar.

Reasons of intelligence, upbringing, education, race, culture, social status and a host of other factors may adversely affect a witness's demeanour and yet may have little bearing on that person's truthfulness. Consequently, quite apart from that witness's appearance or mood, his or her testimony must be carefully considered for its consistency or inconsistency with all of the other evidence presented at trial before any decision can be made concerning its acceptance, in whole or in part, or the weight to be attached to it.\(^{164}\)

The Ontario Superior Court of Justice took the same attitude toward demeanor, mentioning as follows:

In assessing the credibility of any witnesses it is important for a trial judge to keep in mind the caution of O'Halloran J.A in Faryna v. Chorny (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) at p. 357, "[t]he law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses.” It is an error to make a credibility determination based solely on the demeanour of a witness. While the demeanour of a


\(^{164}\) *R v SHP*, 2003 NSCA 53 at paras 28-30, 176 CCC (3d) 281.
witness is a factor that may be considered, it is only one factor to be considered in the context of a cumulative assessment of all the evidence…

Thus, while I can properly consider any witnesses' demeanour in assessing her credibility my assessment of her credibility turns on a broader assessment of her testimony. Whether it is consistent, whether it makes sense or is inherently hard to credit, how it ties in to all of the evidence in the case. This is especially true in an identification case where the issue is the reliability, rather than the credibility, of the victims evidence. With an eyewitness, demeanour has no virtually no positive probative value with respect to the reliability of the identification.165

In *Re: Novac Estate*, the Nova Scotia Supreme Court stated that “[i]t is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution.”166

Further, there are cases in which the court cast doubt on the usefulness of witness demeanor to evaluate credibility of the witness. For instance, in *R v AM*, the Ontario Court of Justice stated that:

Demeanour evidence can be highly subjective and unreliable whether it is observed first-hand or interpreted second-hand by the trier of fact. In this particular multi-cultural jurisdiction, the use of translators for more than 60 different languages and a corresponding number of different cultural and religious backgrounds often make it very difficult to interpret or rely upon court demeanour. Consequently, reliability findings often turn upon the comparison of one witness's evidence with other evidence at trial and prior or subsequent (in)consistent statements.167

In *Law Society of Upper Canada v Neinstein*, the Ontario Court of Appeal mentioned that “while demeanour is a relevant factor in a credibility assessment, demeanour alone is a notoriously unreliable predictor of the accuracy of evidence given by a witness.”168

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166 *Re Novac Estate*, 2008 NSSC 283 at para 36, 170 ACWS (3d) 432.
Some of the present legal notions and/or doctrines are based on the idea that observing demeanor of a witness at the trial is meaningful to find fact. Many judges have accepted the idea and value demeanor to help determine credibility of a witness. However, there are cases in which judges viewed demeanor with caution; some courts have considered demeanor unreliable. Finding such disagreement over the usefulness of observing witnesses’ demeanor, it is necessary to consider whether observing demeanor is conducive to evaluation of the credibility of a witness.

5.2 Suggestion from Psychological Studies – Detecting Deception

The idea that demeanor is useful to evaluate credibility of a witnesses is based on the presupposition that one can distinguish lies from the truth by observing demeanor. However, psychological researchers have conducted a series of studies of lie detection by observing one’s demeanor or the manner of telling a story. These studies are beneficial to consider the idea of usefulness of observing witness’ demeanor at the trial.

According to the psychological studies, it is the common understanding that people are not good at detecting deception based on non-verbal cues, no better than chance level. For example, Ekman and O’Sullivan published the result of their laboratory study about people’s ability of detecting lying in 1991. In the study, examiners showed videotapes in which interviewees answered questions to subjects: members of the Secret Service, polygraph technicians, police officers, trial judges, psychiatrists, and college students. The subjects were asked to decide whether the interviewees answered truthfully. Only members of the Secret Service scored well above chance level: 64 percent of them answered correctly. The other groups scored at chance level: polygraph technicians, 56 percent; police officers, 56 percent; trial judges, 57 percent; psychiatrists, 57 percent; college students, 53 percent. Vrij and Winkel conducted another

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Subjects, police detectives in the Netherlands, were shown videotapes of people who had been instructed to tell the truth or a lie. Though the subjects were confident of detecting deception, the accuracy rate for them was only 49 percent, below the chance level. This study demonstrated that even people with experience of detecting deception were not good at distinguishing lie from the truth by observing demeanor.

The same results were shown in meta-analysis studies, a statistical study method which combined the results of several similar studies to find out more reliable result. Bond and DePaulo reviewed 206 studies in 2006 and concluded that “people achieve[d] an average of 54% correct lie-truth judgments, correctly classifying 47% of lies as deceptive and 61% of truths as nondeceptive.” Further they found out that “people are more accurate in judging audible than visible lies.” In 2006, Aamodt and Custer conducted their meta-analysis study by analyzing 108 studies. They revealed similar result: an average accuracy rate was 54.5 percent. Similar result was demonstrated in another meta-analysis study conducted by Bond and DePaulo in 2008. Analyzing 142 studies, they showed an average accuracy rate was 55 percent, the chance level.

Though there is a traditional notion in law that one can detect lies from the truth by observing demeanor, the reality is opposite; one is not good at detecting deception based on non-verbal cues. Why one is not good at detecting deception? Psychological studies also answered this question: “the absence of nonverbal and verbal cues uniquely related to deceit …, the existence

172 Supra at 214.
173 Ibid.
of typically small differences between truth tellers and liars, and the fact that liars actively try to appear credible contribute to making lie detection a difficult task.\textsuperscript{175} For example, eye contact, gaze aversion, eye blinking, self-manipulations, postural shifts, movements of hand, leg, and head, and message duration, speech rate, filled pauses, pitch, response latency, speech error are regarded as an indicator of one’s deception. However, these behaviors do not or little correlated with deception; one who is lying does not or hardly have such behaviors.\textsuperscript{176} Further, honest people, who do not lie, makes such behaviors when they are in nervous. Thus, according to studies, observer wrongly regarded that one’s sign of nervousness as a cue of deception despite the sign was not an indicator of deception.\textsuperscript{177}

While demeanor is regarded in the legal system as useful to some extent to assess credibility of a witness, the psychological studies have indicated the opposite. The results of psychological studies point out that demeanor is not useful for assessment of credibility of a witness’ testimony.\textsuperscript{178} Thus, opportunity of observing demeanor of a witness does not justify advantage of the trial court for evaluating credibility of evidence. The present practice of the appellate court, ordering a new trial at the trial court after taking fresh evidence which requires evaluation of credibility of evidence, lacks sufficient basis.

\textsuperscript{175} Aldert Vrij, Pär Anders Granhag & Stephen Porter, “Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection” (2010) 11(3) Psychological Science in the Public Interest 89 at 89.


\textsuperscript{177} See Vrij, Granhag & Porter, \textit{supra} note 175.

Chapter 6
Conclusion

6 Conclusion

When the appellate court takes fresh evidence, the court needs to select either disposition of a case at the appellate level or ordering a new trial at the trial court level. Examining the historical development of the appellate court’s power to take fresh evidence, it was shown that the power came from somewhat inconsistent ideas: considering the appellate proceeding as rehearing of a case and choosing live testimony of witnesses as a principal way of presenting evidence. In practice, the importance given to live testimony of a witness plays a great role in deciding what the appellate court should do after receiving fresh evidence. In cases where parties contest an award of damages on appeal, it is the tendency of the court to dispose of a case relatively easily without ordering a new trial. In other cases, however, the appellate court tends to order a new trial based on the perception that the trial court is more suitable to decide credibility of evidence; only when the fresh evidence is decisive will the appellate court dispose of a case. Since most of the appellate judges have prior experience as the trial judge and they are well capable of finding facts based on evaluation of credibility of evidence, the reason behind this practice are the ideas that only the trial court has an opportunity to observe the demeanor of a witness and that observation of demeanor is useful to assess credibility of witness’ testimony. The legal system has adopted the notion, and some courts support it. However, according to the psychological studies, this notion is not justified: observing demeanor does not help people to detect lies. Hence there would be no necessity for the appellate court, when receiving fresh evidence that requires evaluation of evidence, to leave this assessment to the trial court.
Conducting a new trial imposes expenses in cost and time, which could be saved by disposing of a case instead of ordering a new trial. Therefore, it is concluded that the appellate court should dispose of a case instead of ordering a new trial when the court receives fresh evidence, even when this requires the court to judge the credibility of testimony.