



E5 Recent Ontario Court Decisions Involving Hair Evidence

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After attending this presentation, attendees will gain an awareness of current legal issues pertaining to the admissibility of microscopic hair comparison evidence.

Recent challenges and rulings regarding microscopic hair comparison evidence have arisen in Ontario, and these may have an impact in other jurisdictions. As such, this presentation will impact the forensic community and/or humanity by fit to hair examiners to be aware of the issues involved.

The goal of this presentation is to familiarize forensic hair examiners and individuals in the legal community regarding some recent hair evidence admissibility issues in Ontario courts.

This presentation will cite and summarize recent Ontario court rulings involving microscopic hair comparison, including brief discussions of hair findings, the courts' interpretation, and ruling implications and applications.

Due, in part, to *R. v. Morris* (1983) and the *Report of Inquiry into the Wrongful Conviction of Guy Paul Morin* (1998), the onus has been placed on judges to consider the admissibility of evidence whilst keeping in mind prejudicial effect versus probative value. This is separate from the issues of acceptability of the science (as in the Supreme Court ruling of *R. v. Mohan*, 1994) or the relevance of the evidence, where admissibility relegates the determination of weight or probative value to the trier of fact. Case by case, the judge must take into consideration the circumstances relative to the evidence to determine admissibility vis-à-vis prejudicial effect. As a result, the courts in the province of Ontario have increased their scrutiny regarding microscopic hair comparison. The admissibility of hair evidence has been challenged in trial and appeal courts. Some rulings have resulted, which may have a direct impact on other cases in court or in pre-trial discussion.

For obvious reasons, the courts accept hair comparisons that are supported by nuclear or mitochondrial DNA analysis. There is also an acceptance of hair examination when it is used for exclusion purposes or in screening, prior to DNA analysis. Although no rulings have been made in Ontario to exclude microscopic hair comparisons supporting that an individual is the source of the hair, challenges commonly hinge upon hair comparisons that fail to exclude an individual, yet have no associated DNA results. Latitude has been given for some such hairs, when accompanying similar hairs do have supporting DNA results, the extrapolation being that, together, the possibility of their originating from the same source is stronger.

In *R. v. Portillo* (2003), the Court of Appeal agreed with the trial judge that "hairs which were a DNA match to the appellants were found on the deceased could add to the probative value of the evidence that certain other hairs found at the scene were microscopically similar to the appellants' hairs, and at the same time diminish the potential prejudice."

In *R. v. Bennett* (2003), the Court of Appeal disagreed with the trial judge who allowed the hair examiner to testify with respect to hairs that were only partially similar to hairs from the accused, and to hairs at the scene which matched the accused by nuclear DNA analysis, albeit with the caveat that the jury should be clearly advised of the limitations of these hair comparisons (as was done by the expert). The implication was made later by the Crown that these were relevant due to the number and locations of the hairs and their racial origin (uncommon to the area). The appeal court questioned the wisdom of the defense counsel in accepting, at face value, those hairs which were microscopically similar to the accused but had no associated DNA results. It did not, however, rule against their admission, citing *R. v. Portillo*.

This ruling affected at least two cases. Within a fortnight of its release, defense counsel in *R. v. Vanezis* (2003) called for a *voir dire* regarding the admissibility of the hair evidence. Both the Crown and defense mutually agreed to enter into evidence those hairs with nuclear DNA results (no microscopic comparisons done), but not include hairs with microscopic comparisons that had yielded inconclusive results (due to lack of an adequate control sample from the accused). In *R. v. Paul* (2003), the judge cited *R. v. Bennett* and *R. v. Morris* in his refusal to admit certain hairs that had been compared to a human hair wig on the deceased. At the pre-trial hearing, the color analysis performed (microscopic and thin layer chromatography) was equated by the expert to forensic fiber comparison, not traditional morphological microscopic hair comparison.

Forensic hair examiners should have a clear understanding of the issues involved in these rulings and be prepared to discuss the implications relative to their cases. The rulings are apt to be applied incorrectly by court officials who do not have any forensic science background or understanding of the scientific premise or limitations of hair examination.

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