Introduction to Evidence

Evidence in Common Law

Example Criminal Case

Example Civil Case

3 kinds of rules in evidence law

Rules of Evidence

1) Rules of Process

2) Rules of Admissibility and Exclusion

3) Rules of Reasoning: how the trier of fact should come to a conclusion given the evidence that is admissible

Why should we exclude relevant evidence?

Some major goals of the rules of evidence

The Adversary system

Some critiques of the adversary system

Ethical Limitations on Adversary System

Contrast: Inquisitorial Systems

Case Law – Adversarial System

Imperial Oil v Jacques, 2014 SCC 66 - cardinal principal in a civil trial: to seek the truth

Brouillard v The Queen, [1985] 1 SCR 39 – justice needs to be seen to be done – judge may intervene

R v Mian, 2014 SCC 54 – judge is not a mere umpire – truth seeking

The myth of the jury trial – jury trials rare

How are evidentiary issues decided?

Sources of the Law of Evidence

United States Federal Rules of Evidence - codified

When do the rules of evidence apply? – traditional proceedings, not administrative, arbitrations, small claims court

Arbitration Act, RSA 2000, c A-43, ss. 20 & 21

Employment Standards Code, RSA 2000, c E-9, s. 100.

Police Act, RSA 2000, c P-17, s. 20 – rules of evidence apply

Provincial Court Act, RSA 2000, c P-31, s. 36 – not bound by rules of evidence


Relevance & Admissibility

Admissibility: 3 Basic Questions

Relevance

Direct vs Circumstantial Evidence

Credibility vs Reliability

Conditional Admissibility

Limited Admissibility e.g. criminal record

Remedies for TOF Hearing Inadmissible Evidence

Enforcement of Rules of Evidence

Relevance

Relevance = Probative and Material

What defines the issues? - Materiality

Primary Materiality – actual facts that need to be established - defined by matters in dispute, substantive law, circumstances of case/trial

Secondary Materiality – goes to credibility or reliability of primarily material evidence
Character Evidence

Similar Fact Evidence

Bad Character Evidence: Presumptive Exclusionary Rule

Why are we concerned about character evidence?

Case Law Examples

Balancing Process

Prejudicial Effect

Relevance = Material + Probative – common sense and logic

Admissibility vs Weight

Residual Discretion to Exclude Evidence Where Prejudicial Effect Exceeds Probative Value

Residual Discretion

Probative value

Admissibility or Weight?

Prejudicial Effect

Common, improper ways TOFs can use evidence → forms of prejudice (5) - SCHED

Moral Prejudice (distortion of TOF’s reasoning Process) & Reasoning Prejudice (practical consequences)

Balancing Process

Balancing Process: Probative Value and Believability (credibility and Reliability)

Balancing Process: Probative Value and Believability

Ways to limit or control prejudice – exclusion, editing, warnings to TOF

2 Threshold Tests for Admissibility of evidence – by the crown or in civil case (ordinary) – tendered by accused

R v Shearing, 2002 SCC 58 – sex assault – accused wants to use diary entries against complainant - Prejudicial effect must substantially outweigh probative value to exclude

R v Seaboyer, [1991] 2 SCR 577 – Accused’s evidence – to exclude, Pe must substantially outweigh PV


R v Barton, 2015 ABQB 159 – preserved tissue shown in court – mechanism of injury in dispute – PV > PE

Character Evidence

Character: Primary Materiality and Secondary Materiality

Why are we concerned about character evidence?

“Bad Character” (Discreditable Conduct) Evidence

Bad Character Evidence: Presumptive Exclusionary Rule

R v Michaud, 2011 NBCA 74 – videotape evidence of sex with younger girls, attraction etc., not admissible – bad character evidence

Character vs Habit evidence of habitat permitted if not circumstantial evidence of bad character

Exceptions to Presumptive Exclusionary Rule against Bad Character Evidence

1) Relevance to Some Other Live Issue

2) Accused Puts Character Into Issue: Trial Conduct

Accused’s Good Character Evidence

How does an accused “put character in issue” during testimony?

Special Issue: Accused’s Criminal History – if accused takes stand – goes to secondary materiality

Canada Evidence Act, s. 12

R v Corbett, [1988] 1 SCR 670 – Corbett application for cross-examining accused on criminal record

If accused puts his character into issue

R v NAP, (2002) 8 CR (6th) 186 (Ont CA) – cross examination on prior convictions allowed once character in issue – Criminal Code s. 666

Aside: Same rule in non-criminal cases? – less application

(3) Similar Fact Evidence

Similar Fact Evidence: To Prove Mens Rea – Francis (sale of crystal ring as diamond) – MacLean (shooting gun in house)

Similar Fact Evidence: To Prove the Actus Reus – brides in the bath

Similar Fact Evidence: To Prove Identity

Similar Fact Evidence - Balancing
(1) How strong is the evidence that the similar discretable acts actually occurred? ................................................. 40
(2) How strong is the connection between the accused and the similar fact event? ......................................................... 42
(3) “Connectedness”: How strongly does the discretable act support the inferences sought? – Common Factors from Handy .......................................................... 42
(4) Are the matters the similar fact evidence seeks to prove actually in issue? e.g. VanEindhoven – motive not in issue where admitted causing death for self defence ............................................ 43
Step 2 for Similar fact Evidence Admissibility: Prejudicial Effect .......................................................... 43
Step 3 for SFE: Balancing – Prejudicial Effect vs Probative Value .......................................................... 43
Practical Issues: Multiple Counts and Severance .......................................................... 44
Mandatory Direction to Jury .......................................................... 44
Musings on R v Ghomeshi – collusion likely present .......................................................... 44
3rd Person Character Evidence .......................................................... 45
Character Evidence Called by Crown Against Non-Accused Witnesses .......................................................... 45
Often arises in self-defence cases .......................................................... 45
R v Varga (2001), 48 CR (5th) 387 (Ont CA) – evidence of deceased’s propensity for violence where self defence established may be admissible – going to reasonableness of accused and who was the aggressor .......................................................... 46
Character Evidence Called by an Accused Against a Co-Accused .......................................................... 46
Character of Complainants in Sexual Assault Cases – Criminal Code s 276-277 .......................................................... 47
CC s. 276(2): ............................................................................. 47
Does s. 276(2) fundamentally change the admissibility test? .......................................................... 48
R v Darrach, 2000 SCC 46 – s 267 standard not a departue from conventional rules of evidence .......................................................... 48
Some Historical Context .......................................................... 48
Case law .......................................................... 50
R v Seaboyer, [1991] 2 SCR 577 – s 276 pre-amendment unconstitutional for infringing s 7 and s 11(d) rights .......................................................... 50
R v Darrach, 2000 SCC 46 – new s 276 upheld .......................................................... 50
Hearsay .......................................................... 50
What is hearsay – two necessary elements .......................................................... 51
Why do we have a hearsay rule? .......................................................... 51
Four Main Hearsay Dangers: perception, memory, narration, sincerity .......................................................... 51
Hearsay: Purpose is Key .......................................................... 52
Subramaniam v Public Prosecutor, [1956] WLR 965 (PC) – statement admitted for fact that it was made, not its truth, is admissible (not hearsay) .......................................................... 52
Limited uses .......................................................... 53
Hearsay comes in many forms .......................................................... 53
Does the declarant need to be someone who is “not called”? .......................................................... 53
Common Examples: Recanting Witness (Prior Statements) .......................................................... 53
Prior Inconsistent Statements .......................................................... 54
Police Officers’ Grounds? .......................................................... 54
Narrative? .......................................................... 54
Completely automated processes? – not hearsay .......................................................... 54
Implied Statements and Assertions – included in hearsay .......................................................... 55
R v Kearley (Eng HL) – accused charged with possession with intent – phone calls and visitors asking for drugs after arrest – not admissible – implies assertions as hearsay .......................................................... 55
R v Baldree, 2013 SCC 35 - similar fact pattern to R v Kearley; express and implied statements both inadmissible as hearsay .......................................................... 55
Hearsay Exceptions .......................................................... 56
Types of Hearsay Exceptions .......................................................... 56
**History and Background** ................................................................. 56

**Traditional Common Law Hearsay Exceptions - 8** ........................................... 57

1) **Dying Declarations** ............................................................................ 57

   Requirements for dying declarations: ......................................................... 57

2) **Admissions of a Party** ........................................................................ 57

   Alberta Rules of Court – civil trial ............................................................ 58

   Special rules in criminal cases ................................................................. 58

   Co-defendants ........................................................................................ 58

   Vicarious Admissions ............................................................................. 59

   Formal admissions vs. informal admissions ............................................. 59

   Alberta Evidence Act ............................................................................ 59

3) **Declarations Against Interest by a Non-Party** ........................................ 59

4) **Prior Testimony** .................................................................................. 60

   Statutory exception – Criminal Code ...................................................... 61

5) **Prior Identification** .............................................................................. 61

6) **Prior Convictions** ................................................................................ 62

   Alberta Evidence Act ............................................................................ 62

7) **Spontaneous Statements: Res Gestae** .................................................. 62

   (1) Statements of present physical condition ........................................... 63

   (2) Statements of present mental state ...................................................... 63

   R v Starr, 2000 SCC 40 – present mental state exception not proven – made in circumstance of suspicion (talking to wife but in car with another woman) – inferring mental state of someone other than declarant ............................ 64

   R v Griffin, 2009 SCC 28 – comment – if anything happens to me, it’s Griffin – no circumstance of suspicion – hearsay exception valid .................................................. 64

   (3) Excited utterances ............................................................................. 65

   (4) Statements of present sense impressions .......................................... 66

8) **Declarations in the Course of Duty – e.g. nurse notes, leg amputated (Ares v Venner)** ................................................................. 66

   Common Law Exception – Oral/Written Declarations admissible when (5): ............................................................................ 66

   R v Monkhouse, 1987 ABCA 227 - perjury case – declarant need not have personal knowledge – just needs to be ordinary and usual course of business .................................................. 66

   Statutory “Business Records Exceptions” ............................................... 67

**Statutory Exceptions: “Shortcuts to Proof”** ...................................................... 68

   Controlled Drugs and Substances Act: .................................................... 68

   Traffic Safety Act, s. 5 ........................................................................... 68

   Criminal Code ss. 657.1, 715.1, 715.2 ...................................................... 68

   Requirements for Statutory Exemptions – Addressing Fairness considerations .................................................. 69

**Principled Exception** .................................................................................... 69

**Development of the Principled Exception** .................................................... 69

R v Khan, [1990] 2 SCR 531 – principled exception – necessary and reliable ................................................................. 69

**Principled Exception to the Hearsay Rule: Principles – TEST TO APPLY on EXAM** ................................................................. 70

(1) Is the impugned evidence hearsay? ......................................................... 71

(2) Does the hearsay evidence fall within a hearsay exception? .................... 71

(3) If the hearsay evidence does not fall within a statutory or traditional common law hearsay exception, is it admissible under the principled exception to the hearsay rule where there is both: .................................................. 72

   Ultimate Use of Hearsay ....................................................................... 72

   (3a) Reasonable necessity ..................................................................... 73

   (3b) Threshold reliability ....................................................................... 73

   (i) Inherent Trustworthiness (Substantive Reliability) .............................. 74

   (ii) Testability (Procedural Reliability) .................................................. 75

   **Common Case: Prior Statements of a Witness** .................................. 75

   R v KGB, [1993] 1 SCR 740 – criteria for threshold reliability - testibility concern .................................................. 76

   Things to Remember about “KGB Statements” – 4 KGB criteria optimal, not mandatory requirements ........ 77
Putting Evidence Before the Court – Chapter 8

The Calling of a Witness

Circumstances in which a warrant may be issued

Witness Warrant when witness does not attend:


Competency vs. Admissibility vs. Weight

Competency – 1) Children and 2) Adults with mental disabilities

Historical Perspective


R. v. McGovern (1993), 82 C.C.C. (3d) 301 (MBCA) – witness must understand meaning of telling the truth

Legislative Amendments Required – s 16 of CEA

Child Witnesses:

R. v. S. (J.), 2008 BCCA 401 – s 16.1 of CEA - limited pre-testimonial inquiry to Child witness’s ability to understand and respond to questions – no need to understand/communicate meaning of truth/promise

Witnesses with Mental Disability

R. v. D.A.I., 2012 SCC 5 – witness be able to promise to tell the truth and communicate evidence – nothing more stringent required

Use of Experts:

Presence of the Jury:

Competence vs Compellability

Competence and Compellability of spouses

Statutory Exceptions Prior to 2015:

Examples of Exceptions at Common Law:


R. v. Schell, 2004 ABCA 143 - accused threatened that the witness and their children – exception to rule – Spouse deemed competent and compellable

R. v. Legge, 2014 ABCA 213 – common law spouses non compellable witnesses

Amendments to CEA s 4 – spouses now competent to testify and compellable

Other Key Questions – Accused’s Testimony

Cross Examination and Direct Examination

Examination in Chief - Direct Examination

The two worst direct questions

Exceptions to the direct question requirement – introductory/non-contentious matters, adverse ruling

Testimonial Aides – Two Aides

Examples

Is this the right approach?
What is a leading question? ...................................................................................................................... 91

Cross Examination .................................................................................................................................. 92
Things tested by Cross-Examination (5) - PRPLC .................................................................................. 92
Consistency .................................................................................................................................................. 92
Understanding Cross-Examination by reference to Improper Cross-Examination .............................. 93
Melgarejo-Gomez v. Sidhu, 2002 BCCA 19 – misleading witness and jury by bringing up testimony that had not occurred from another witness ................................................................. 93
R. v. C.L.J., 2010 ABQB 90 – using cross examination as a weapon against child witness ................. 94
R. v. Levert, 2001 CanLII 8606 (ON CA) – prejudicial effect of bringing up conduct and demeanour upon being confronted with allegations ........................................................................... 94
R v. Crawford, [1995] 1 SCR 858 - Evidence that a co accused failed to give his version to the authorities should be excluded – right to remain silent ............................................................................. 95
R v Porter – police statement after an accident cannot be used against you ........................................... 95
Summary ...................................................................................................................................................... 96

Browne v. Dunn – put matter to witness if going to present contradictory evidence later or impeach witness’ credibility ..................................................................................................................................................... 96
R v Quansah, 2015 ONCA 237 – trial instruction dealt with Browne v Dunn rule ................................ 96
R v TLP, 1996 ABCA 400 – accused testifying last in alibi case does not destroy credibility .......... 97
Collateral facts rule .................................................................................................................................... 97
Prior inconsistent statements ...................................................................................................................... 98
Canada Evidence Act, s. 10(1), 11 – Cross examination on prior statements ........................................ 98
Prior convictions ....................................................................................................................................... 99
Canada Evidence Act 12(1) and Alberta Evidence Act 24(1) – use of prior convictions going to credibility .............................................................................................................................................. 99

Real Evidence, Judicial Notice, and Special Procedures for Child Witnesses ........................................ 100

Real Evidence ........................................................................................................................................... 100

“Taking a view” ....................................................................................................................................... 101
Photographs and Videotapes ................................................................................................................... 101
Common issue – videotape evidence ....................................................................................................... 101
R v Bulldog, 2015 ABCA 251 – video was accurate and fair representation ........................................ 101
Full Exhibits and Exhibits “For Authentication” ...................................................................................... 102
Documents: The “Best Evidence Rule” – tender original if in the party’s possession ......................... 102
Aside re: “Spoliation”: The Effect of Destroyed Evidence .................................................................... 102
McDougall v Black & Decker, 2008 ABCA 353 – spoliation – rebuttable presumption of fact that evidence would not assist the spoliator ................................................................................... 102

Judicial Notice – 2 categories – 1) generally known/accepted, 2) can be readily determined/verified .... 102
Judicial Notice: Adjudicative Facts vs. Legislative Facts ......................................................................... 103
Special Procedures for Child Witnesses – 6 examples ......................................................................... 103
Testifying outside of the presence of the accused – CC s 486.2(1) ......................................................... 103
Aside re: credibility assessment and seeing witness – R v NS, 2012 SCC 72 – “niqab case” – seeing face of witness not to be set aside without compelling evidence ......................................................... 104
Admissibility of child’s videotaped evidence – CC s 715.1 .................................................................. 104
CC. s. 715(1) – Statement that “describes the acts complained of” ......................................................... 104
(3) Video must be made within a reasonable time after the alleged offence – tension in the case law ..... 105
(5) Witness must adopt the contents of the video .................................................................................... 105

Opinion and Expert Evidence ................................................................................................................ 105
Facts vs. Inferences .................................................................................................................................. 105
Two major categories of exceptions to general prohibition on opinion evidence .................................. 106
1) Lay Opinion Evidence

- 

R v Great, [1982] 2 SCR 819 – being drunk or impaired - ordinary knowledge whether a person is so intoxicated that their ability to drive is made worse

Quasi-experts – no extra weight on police evidence

The “Ultimate Issue Rule” – no longer a strict prohibition on witness’ opinion going to ultimate issue

Two major categories where we still prohibit witnesses from expressing opinions:

(1) Opinions on pure questions of Canadian law

(2) Rule against oath-helpers

2) Expert Witnesses

Expert Witnesses: Test for Admissibility (Mohan)

(A) Threshold Requirements: (1) Relevance: Is the opinion relevant?

(A) Threshold Requirements: (2) Necessity: Does the trier of fact need the evidence?

(A) Threshold Requirements: (3) No exclusionary rule: Does the opinion evidence violate an exclusionary rule?

(A) Threshold Requirements: (4) Properly qualified expert: Is this opinion offered through a properly qualified expert? – Two aspects: Part i and ii

(i) The person offering the opinion must, be qualified as an expert in a certain area

(ii) The expert must not stray from their area of expertise

Aside: Procedure for Qualifying an Expert

Aside: Rules of Notice for Experts

(ii) The expert must not stray from their area of expertise

Case Study: Dr. Charles Smith - R v Mullins-Johnson, 2007 ONCA 720 – qualified expert in many cases of wrongful convictions – went beyond his expertise

Area of expertise – cautious delineation (Abbey) – duty to keep within scope (sekhon)

(B) Gatekeeping Requirement

(5) Balancing: Does the probative value of this evidence outweigh its prejudicial effect?

“Cost/benefit balancing” – prejudicial vs. probative

Potential ways to limit prejudicial effect

Expert Witness Independence

White Burgess v Abbott & Haliburton, 2015 SCC 23 - expert duty to give fair objective non-partisan opinion evidence

Novel Science and Challenged Techniques/Theories

R v Trochym, 2007 SCC 6 – hypnotism inadmissible for unreliability

Daubert Factors for considering reliability of contested expert science – 4 factors

(1) Testing

(2) Peer review/publication?

(3) Error rate?

(4) General acceptance?

“Non-Scientific” or “Experiential” Expert Evidence


R v Sekhon, 2014 SCC 15 – unlawful trafficking of cocaine – such thing as blin courier? officer says no – anecdotal, not expert evidence

The Basis for Expert Opinions – 4 Ways Expert evidence allowed

(1) Expert training only

(2) Personal knowledge/observation

(3) Opinions based on hearsay/inadmissible information

R v Abbey, [1982] 2 SCR 24 – underlying facts must upon which expert opinion based must be proven

R v Lavallee, [1990] 1 SCR 852 – not necessary to establish every fact, just need some admissible evidence

Clarification from Palma: R v Palma (2000), (Ont SCJ) - facts upon which the opinion is based must be found to exist to give evidence weight

(4) Opinions based on hypothetical questions

Use of Authorities to Cross-Examine Experts
Privilege .................................................................................................................. 118

What is privilege? ........................................................................................................ 118

Major Examples of Privilege ....................................................................................... 118

Why do we recognize privilege? ................................................................................... 119

Wigmore criteria for privileged communications – 4 considerations ............................... 119

When do we recognize privilege? .................................................................................. 119

Waiver of privilege? ....................................................................................................... 120

Accidental disclosure? .................................................................................................... 120

Solicitor-client privilege ............................................................................................... 120

Privilege arises when: .................................................................................................... 121

Remember, privilege distinct from obligations under privacy legislation and professional obligations .......................................................... 122

Exceptions to legal advice privilege .............................................................................. 122

1) Future crimes exception ............................................................................................ 122

2) Innocence at stake exception: privilege is very nearly absolute – Innocence at stake test ......................................................................................................................... 123

R v Brown – SCC willing to relax evidentiary rule before solicitor client privilege – accused sought production of 3rd party solicitor client comm. – 3rd party’s girlfriend said that he had told her he had confessed to his lawyers .................................................................................................................................................... 123

3) “Public safety exception” – 3 requirements................................................................ 124

Smith v Jones, [1999] 1 SCR 455 – psychiatrist agent for lawyer – client tells psych he’s going to kill land rape prostitutes ........................................................................................................ 124

4) Statutory Exception – Code of Conduct .................................................................... 124

Litigation Privilege ......................................................................................................... 124

What is covered by litigation privilege? – Dominant Purpose test ................................. 125

Security National Insurance v EPS, 2013 ABPC 188 – MVA kills good samaritan – police sought statement given to insurer – Insurer could not assert litigation privilege ........................................................................ 125

“Implied Undertaking” Rule .......................................................................................... 126

Settlement Negotiation Privilege .................................................................................. 126

Not as strong as solicitor-client privilege – can be set aside in certain circumstances, e.g.: .................................................................................................................................................. 127

Be aware of rules of procedure that effectively codify this privilege in certain contexts, e.g. Alberta Rules of Court, rule 4.20: .................................................................................................................................................. 127

Spousal Privilege .......................................................................................................... 127

Spousal Immunity – Existing Rule- CEA s 4, AEA s 4 .................................................. 128

Spousal Privilege .......................................................................................................... 128

Rationale and Holder – recipient spouse ........................................................................ 128

Scope of Spousal Privilege – may apply to common law couples (R v Legge) – not compellable .................................................................................................................................................. 128

Case-by-Case Privilege ................................................................................................. 129

M(A) v Ryan, [1997] 1 SCR 157 – psychiatrist privilege – did not protect disclosure entirely ............................................................................................................................................... 129

R v National Post, 2010 SCC 16 – journalist’s source privilege ...................................... 129

Third Party Records in Criminal Cases ........................................................................ 130

Two disclosure regimes: - common law(for Non-sexual offences) and statutory (sexual offences) ................................................................................................................................. 130

O’Connor Application – non-sexual offences for disclosure ............................................ 130

Accused may bring application for production in sexual offence case (Mills application) ................................................................................................................................. 131

MillsApplication Test (sexual offences) ............................................................................ 131

Informant Privilege ....................................................................................................... 132

Public interest immunity – NOT GOING TO BE TESTED ........................................... 132

Self-Incrimination ......................................................................................................... 133

The broad principle is reflected in two (historic) common law rules of evidence: ................................................................. 133

Three (Modern) Categories of Rules ............................................................................. 133

1) Non-Compellability of Accused at their Own Trial ................................................... 133

Use of Accused’s Failure to Testify ................................................................................ 134

2) Self-Incrimination Protection for Witnesses ............................................................. 134
Privilege Against Self-Incrimination .......................................................... 134
Brief history lesson Prior to 1982 – Abolishment of Privilege for Witnesses (not accused in their own trial) and Creation of Use Immunity ........................................................................ 135
Two Problems with s. 5 of the CEA ............................................................. 135
The Charter: s. 13 for Use-Immunity; s. 7 for derivative use immunity .......... 136
The Self-Incrimination Protection of Witnesses – 4 Rules .......................... 136
Rule #1 – Accused Exercises right not to testify ......................................... 136
Rule #2 ........................................................................................................ 137
Refreshers: Compellable Witness? .............................................................. 137
Rule #3 and #4 .......................................................................................... 138
R v Nedelcu, 2012 SCC 59, at para. 9 – incriminating evidence – evidence given to assist or prove essential element of offence in prior proceeding ................................................................. 138
Derivative Use Immunity ............................................................................ 139
3) Pre-trial right to silence ........................................................................... 139
Exceptions ................................................................................................. 139
Pre-trial right to silence – Use of Compelled Statements ................................ 140
Primary factors considered ........................................................................ 140
R v Porter, 2015 ABCA 279 – good samaritan hit and killed – statement given to insurance company/police cannot be used against accused at criminal trial ................................................................. 140
Voluntariness ............................................................................................. 141
Was the accused’s will to remain silent overborne? .................................... 141
Oath Helping and Prior Consistent Statements .......................................... 141
Rule Against Oath-Helping ........................................................................ 141
Expert Evidence Relevant to Credibility .................................................... 142
Prior Consistent Statements ...................................................................... 142
Major exceptions: .................................................................................... 143
1) Prior consistent statements as circumstantial evidence.......................... 143
2) Rebut allegation of Recent Fabrication .................................................. 143
Another example – R v Stirling, 2008 SCC 10 – who was driving at time of MVA - ........................................................................................................ 144
3) Admissible as Hearsay Exception ............................................................ 144
4) Statements Made When Found in Possession ........................................ 144
5) Exculpatory Statements Made Upon Arrest – may be an exception ........ 144
R v Edgar, 2010 ONCA 529 – statement of accused may be permitted as prior consistent statement if they take the witness stand ................................................................. 145
6) Narrative ............................................................................................... 145
Key Limitations – Instructions for TOF ..................................................... 145
Credibility of Your Own Witness ............................................................... 146
Aside: Rehabilitating the Credibility of Your Own Witness ......................... 146
A frequent problem ................................................................................... 146
Use of your witness’s statements before trial .............................................. 146
At Trial ........................................................................................................ 146
Challenging the Credibility of your Own Witness ....................................... 147
Because a party implicitly vouches for its own witnesses ......................... 147
Example ..................................................................................................... 147
“Climbing the ladder”: Dealing with disappointing witnesses – 6 Options .... 147
1) Gently leading questions? ..................................................................... 148
2) Present memory revived? ..................................................................... 148
Present memory revived – Steps to follow .................................................. 148
1) Show that document would assist memory ............................................ 148
2) Ask permission for witness to review the prior statement ..................... 148
3) Witness reads prior statement .............................................................. 149
4) Witness asked whether review has assisted .......................................... 149
Eyewitness Identification Evidence

General

Criminal Code, s. 274
Alberta Evidence Act s 19(2)

Where does this all get you?

FH v McDougall
R v Lifchus
R v Hanemaayer,

9(1): Prior Oral Statements

Process to follow (after you have “climbed the ladder” e.g. present memory revived, etc.):

9(2): Written Statements & Statements Reduced to Writing – Application Process

Corroboration and “Dangerous Evidence”

Distinction Between 9(1) and 9(2)

Corroboration not required for sexual offences

A 2000, c A

Civil Case for sexual assault damages remains BOP

Cautions/discretionary warnings

Other frailties with eyewitness ID process:

Witness answers with refreshed memory
Past recollection recorded? – 4 Criteria
Transcript of prior testimony?
Cross-examination of your own witness – 3 paths: hostile witness, adverse witness, s 9(2) of CEA

Distinction between hostile and adverse witnesses

Hostile Witness

Adverse Witnesses

Canada Evidence Act – Section 9(1)
Canada Evidence Act – s 9(2) – more important

Distinction Between 9(1) and 9(2)

9(2): Written Statements & Statements Reduced to Writing – Application Process

Process to follow (after you have “climbed the ladder” e.g. present memory revived, etc.):

9(1): Prior Oral Statements

(6) KGB application (or another hearsay exception)

In Civil Cases

Alberta Evidence Act, RSA 2000, c A-18

Rules Relating to the Use of Admissible Evidence

Legal Rules Driving Fact-Finding

Corroboration and “Dangerous Evidence”

Mandatory rule of corroboration - rare

Alberta Evidence Act s 19(2)
Criminal Code, s. 274 - Corroboration not required for sexual offences

Corroboration and “Dangerous Evidence” – Cautions/discretionary warnings

General content of jury warning: 4 points

The Evidence of Children

Courts have warned about being too skeptical of the evidence of children – R v RW – revoke assumption that child’s evidence is less reliable

Still may be reason for caution/warning for a child’s evidence – R v Marquard – warning was required of risks – 3 yr old claiming nana put them on stove

Eyewitness Identification Evidence

R v Hibbert, 2002 SCC 39 – ID’d attacker after seeing Court footage – strong caution of ID evidence needed


R v Hanemaayer, 2008 ONCA 580 - wrongful conviction – different quality photo identified by mother – no other evidence supporting conviction

Other frailties with eyewitness ID process:

Burdens and Standards of Proof

Standard of Proof in a Criminal Case

R v Lifchus, [1997] 3 SCR 320 – presumption of innocence remains through trial – probably or likely guilty not enough

R v Starr, 2000 SCC 40 – BRD closer to absolute certainty than BOP

When the Accused Testifies - 2 major issues – credibility contest, disbelieve accused and draw conclusion of guilt

Three aspects/stages to instruction of the Jury – W(D) instruction

R v JHS, 2008 SCC 30 – W(d) instruction

Circumstantial Cases

R v Villaroman, 2016 SCC 33 – impaired driving context - question is whether circumstantial evidence is reasonably capable of supporting an inference other than that the accused is guilty

Standard of Proof in a Civil Case

FH v McDougall, 2008 SCC 53 – civil case for sexual assault damages remains BOP
Burdens of Proof .......................................................................................................................... 163
Presumptions .............................................................................................................................. 164
Legal Presumptions – who bears the burden .............................................................................. 164

Legal Presumptions, e.g. Criminal Code / NCR ..................................................................... 164
Factual Presumption, e.g. Leaving the Scene of an Accident .................................................... 164
Factual Presumption, e.g., Presumption of Care or Control ....................................................... 164

Factual Presumptions ............................................................................................................... 165
Factual Presumptions – Evidentiary burden Examples .............................................................. 165
Factual Presumptions - “Reverse Onuses” e.g. Oakes ................................................................. 165

R v Oakes, [1986] 1 SCR 103 – s 8 of Narcotic Control Act imposed reverse onus for presumption of possession with intent to traffic – violated s 11(d) .............................................................................. 166

“Conclusive” or “Mandatory” Presumptions ............................................................................. 166
Permissive Inferences, e.g., “Doctrine of Recent Possession” – not really a presumption – e.g. R v Kowlyk ...... 166

Sexual Assault: “Doctrine of Recent Complaint” ..................................................................... 166

R v DD, 2000 SCC 43 – no presumption against a delayed disclosure of sexual complaint .......... 166

Persuasive vs. Evidentiary vs. Tactical Burden ......................................................................... 167

Evidentiary Burdens .................................................................................................................. 167

(1) Prima facie case ................................................................................................................... 167

(2) “Air of Reality” Test ........................................................................................................... 168

INTRODUCTION TO EVIDENCE

EVIDENCE IN COMMON LAW

• Law of evidence predicated on several facts about legal system:
  • Adversarial system – we’ll always have 2 or more competing stories
  • Both parties must be allowed to call the evidence they want, and to challenge the other side’s evidence
  • Bifurcation of responsibility
  • Trier of Law → Trial Judge
  • Trier of Fact → Jury or Trial Judge
  • Trier of fact – the decision makers on resolving factual controversies
  • Trier of law – administers the law of evidence by determining what information the trier of fact can consider and ensuring that the trier of fact uses the evidence only in ways permitted by law (will be an adjudicator or judge)

• Good evidence is based on logic, reason, and common sense
  • Supports a finding of what is “true” in the circumstances
  • Bad evidence is based on speculation, conjecture, and rumour
  • Places a premium on evidence heard directly from a live witness, testifying in court, under oath
  • “Viva voce” evidence vs. documentary/real evidence

Bunch of Rules

• R v Graat, [1982] 2 SCR 819, per Dickson J.:
  o “[T]he law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions.”

EXAMPLE CRIMINAL CASE

• Investigation ie. right to remain silent
  o Questioning Witnesses? Warrants? Forensics? Interrogation?
• Arrest and charge
• Bail
  o relevant to strength of case
• Crown disclosure ie. informant privilege
• Guilty plea?
  o Trial commences if a plea of not guilty is made
• First: evidentiary voir dires are completed
• The Crown presents evidence first
• Each witness called by the Crown is “examined in chief”
• After the examination in chief, defence counsel examines the Crown’s witness, then the Crown can reexamine
• If a prima facie case was not made by the Crown, the judge could remove the case from the jury by directing a verdict of acquittal
• The defence then makes its opening statement and examines its witnesses in chief
• Limited reply evidence can be presented by the Crown once the defence finishes its case (there are limits on the evidence that can be led at that time)
• Where the defence calls evidence, it must make closing submissions first
• The judge then directs the jury and verdicts are returned by the jury:
  o General verdict – no reasons for the decision are provided
• Sentencing? Ie. expert evidence of character
• Appeal? E.g relevant to strength of case
  o Where a party objected at trial and a judge or adjudicator applied the incorrect evidentiary rule, a legal error occurred
  o Where no objection was made, appellate courts have discretion to bar an appeal

EXAMPLE CIVIL CASE
• Pleadings: Statement of Claim / Defence
• Affidavits of records and exchange of documents
  o e.g. solicitor-client privilege
• Questioning (examination for discovery) ie. permissible questions
• Settlement?
  o e.g. use of statements made in course of settlement negotiation
• Summary judgment?
• Summary trial?
• Trial?
  o e.g. use of expert evidence to prove liability
  o e.g. rules of competence & compellability for parties

3 KINDS OF RULES IN EVIDENCE LAW

RULES OF EVIDENCE
• Deep roots in Common Law
  o Rules of evidence developed over centuries
  o Law of evidence is still largely judge-made in Canada
• Especially late 20th Century → Significant changes
  o Codification and statutory modification of some rules
  o Many significant judge-made changes to traditional rules
    ▪ At first incremental: Ares v Venner, R v Khan (change to the hearsay rule – allowing mother of assaulted child to testify to what her child had said about what happened)
    ▪ Then, Charter revolution
  o Move away from rigid rules towards flexibility based on principle
    ▪ Great in theory - But harder for advocates, with loss of predictability
• Move to a purposive approach
  o Purposive approach was driven by the Charter of Rights and Freedoms and sexual offences in Canada
- Purposive exception to the hearsay rule: will exclusion advance the goals that the hearsay rule was intended to achieve?
  - Resulted from R v Khan (where hearsay rule would have resulted in exclusion of reliable out-of-court complaint about being sexually assaulted by a family doctor)
    - Also encouraged by access to justice concerns, especially in the context of aboriginal rights claims (e.g. including oral history as evidence)
- **Development of overarching exclusionary discretion** - judges can exclude evidence based on a cost-benefit analysis; if the probative value of the evidence is outweighed by the prejudice or costs its admission will cause

1) **RULES OF PROCESS**
- outlines how the evidence put before the court
  - How we treat witnesses, how we communicate questions and exhibit information in court
  - Who calls evidence first?
  - Does a mentally disabled person need to testify under oath?
  - When can a party make an opening statement?
  - Who gets to address the jury first at the end of the case?
  - What kinds of questions can be asked in direct examination? Cross-examination?
  - When can you cross-examine your own witness?

2) **RULES OF ADMISSIBILITY AND EXCLUSION**

**what evidence the trier of fact will consider.**
  - General principle is that we want trier of fact to have access to as much evidence as is possible (principle of access to information, which was elevated to a constitutional fundamental principle of justice by the SCC in R v Jarvis), but this is balanced against other principles.
  - Some rules are of restricted admissibility; they allow information to be admitted for one purpose but not others.
  - **General types of rules restricting admission:**
    - Practical exclusionary rules: reject evidence to encourage trial efficiency
      - E.g. limited number of expert witnesses permitted
    - Subordinated evidence rules: reject evidence to promote competing principles (e.g. privilege)
      - E.g. solicitor-client privilege
    - Non-evidence rules: reject evidence that won’t help trier of fact come to correct conclusion.
      - E.g. irrelevant information, hearsay
  - Character
    - When can an accused’s prior discreditable acts (e.g. prior crimes) be introduced into evidence? How can the trier of fact use them?
  - Opinion
    - When is a witness allowed to offer an opinion on a subject outside the knowledge of an ordinary trier of fact (e.g. DNA evidence, medical opinions, etc.)?
  - Hearsay
    - When is a witness allowed to testify about something they have not observed first-hand, but have instead, have learned from another person?
    - When will a court admit evidence that is not presented through a witness who testifies at trial, under oath?
  - Privilege
    - When does the law restrict access to, or the admissibility of, otherwise relevant evidence?
      - e.g. solicitor-client privilege, spousal privilege
    - Are there special rules about the use of “third party records” (and any special rules in the case of the evidence of sexual assault complainants’ records)?
  - Self-Incrimination
    - When can an individual’s prior testimony be used against them at their criminal trial?
3) RULES OF REASONING: HOW THE TRIER OF FACT SHOULD COME TO A CONCLUSION GIVEN THE EVIDENCE THAT IS ADMITTABLE

- After evidence is admitted, how can (or should) the trier of fact use it to reach a conclusion?
  - E.g standards of proof, burden of proof
  - How convinced need the trier of fact be, in order to give a party what they want? (BARD, BOP)
  - What does it mean to say there is a “presumption” about a certain fact?
- Rules of reasoning rooted in social policy and trial fairness concerns:
  - Evidence of children
  - Sexual assault complaints – “recent complaint”
  - Eyewitness evidence & jailhouse informants – risks of relying on certain kinds of evidence

WHY SHOULD WE EXCLUDE RELEVANT EVIDENCE?

- Some exclusionary rules exist to help facilitate the search for truth
  - e.g. hearsay rule – concerns about whether hearsay can be properly tested (may mislead trier of fact)
- Yet we exclude some evidence that may be logically relevant to the outcome
  - e.g. Accused’s criminal record
- So are trials and the rules of evidence only about the search for the truth?

R v Noel, 2002 SCC 67 - TENSION BETWEEN “TRIAL FAIRNESS” AND “TRUTH SEEKING”

- s. 13 of the Charter provides that: “A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.”
- Arbour J (for the majority):
  - “[I]t has never been the case in our criminal justice system that the search for truth could be pursued at all costs, by all means.”
  - necessity to exclude evidence in appropriate cases where the prejudicial effect of its use would overshadow its probative value.
- L’Heureux-Dubé J (dissenting):
  - “Ensuring that an accused receives a fair trial, deterring police misconduct, and preserving the integrity of the administration of justice are all laudable goals to which this Court must strive in its rules of evidence, at times to the detriment of full access to the truth.”
  - “Where these goals are met, however, the search for the truth must, in my view, be the preponderant consideration.”

SOME MAJOR GOALS OF THE RULES OF EVIDENCE

- (1) Truth-seeking
- (2) Protection of the right to a fair trial
  - The right to make “full answer and defence”
  - Preventing wrongful convictions
- (3) Efficiency of the trial process
- (4) Social policy goals
  - Preventing wrongful acquittals
  - Preventing re-victimization of complainants
  - Regulating police behaviour and conduct
  - Vindicating Charter rights (s. 24(2))

Frequent tension between goals

- Search for the truth vs. Protection of witness privacy
  - Rules about access to records of sexual assault complainants
- Search for the truth vs. Fairness to an accused and regulation of police
  - Exclusionary rule under s. 24(2) of the Charter
• Search for the truth vs. Efficiency and proportionality
  • Advantages to litigants with “deep pockets”?
• Search for the truth vs. Protecting relationships
  • Solicitor-client privilege and informant privilege

THE ADVERSARY SYSTEM
• Common law system is fundamentally adversarial
• These tensions play out within our adversarial trials
  o Difference in some civil systems – all evidence gathered is placed in front of the trier of fact, and the trier of fact decides what is important and what is unimportant
• Investigations are conducted by the police/parties
• Litigation is driven by the parties and their counsel, not the judge
  o Counsel decide which evidence to call & how to present their case
  o Counsel question witnesses – judges’ role in questioning witnesses is relatively limited
  o Defence counsel has expansive right to confront Crown (plaintiff) witnesses, cross-examine them, and test Crown (plaintiff) evidence
• Cases decided on admissible evidence presented at trial
  o Fruits of the investigation are not always part of record in court
  o Preference for public, viva voce evidence, given under oath
• Frequent use of layperson juries as fact-finders
• Complainants have a relatively limited role in criminal prosecutions
  o Criminal prosecutions initiated by police, prosecuted by Crown

SOME CRITIQUES OF THE ADVERSARY SYSTEM
• Bad lawyers risk bad outcomes
  o Not always a battle of equals
  o Often unequal resources
• Less about truth seeking and more about gamesmanship and protection of the guilty

ETHICAL LIMITATIONS ON ADVERSARY SYSTEM
• An adversary system does not mean “anything goes”
  o Limits imposed by substantive law, professional codes of conduct, and legal culture
  o e.g. rules about knowingly misleading the court
• Special responsibilities of a prosecutor
  o Not about “winning or losing” – Boucher v the Queen
  o Decision to proceed with prosecution – is there a reasonable likelihood of conviction based on the admissible evidence?
    ▪ based on public interest and reasonable likelihood of conviction based on the admissible evidence
  o Disclosure – R v Stinchcombe
• Special responsibilities of defence counsel
  o Responsibilities surrounding real evidence (R v Murray)
    ▪ Lawyer (Murray) was aware of incriminating evidence, he kept the video evidence of sexual assaults for the purpose of “impeaching” the other person involved – he was charged with withholding evidence but ultimately acquitted
  o Not coaching the accused, or tendering an accused to perjure themselves
  o Importance of treating witnesses with respect
• Code of Conduct, s. 4.01(2)(j):
  o “When acting as an advocate, a lawyer must not … introduce or otherwise bring to the tribunal’s attention facts or evidence that the lawyer knows to be inadmissible.”
Advocacy 4.01(1) When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

Duty as Defence Counsel When defending an accused person, a lawyer’s duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged.

Duty as Prosecutor 4.01(4) When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

- not to seek to convict but to see that justice is done through a fair trial on the merits

Disclosure of Error or Omission 4.01 (5) (a) A lawyer must not mislead a tribunal nor assist a client or witness to do so.

Contrast: Inquisitorial Systems

- Serious criminal investigations often directed by judges
  - Investigating judge is presumptively neutral
  - Investigating judge compiles a dossier with assistance of investigators, noting both inculpatory and exculpatory evidence
- Trials are directed by judges (often more than one)
  - Presiding judge questions the witnesses
  - Presiding judge determines order of the evidence
- Trial judges have access to investigative dossier
  - Evidence relied upon by trial judges need not have been presented in the course of the trial
  - Not conducive to exclusionary rules (“goes to weight” instead)
- Relatively limited use of juries as fact-finders
- Complainants have greater ability to initiate and participate in criminal prosecutions

Case Law – Adversarial System

- Cardinal principal in a civil trial: to seek the truth
- Rules of the law of evidence in civil matters allow judges “to find out the truth, and to do justice according to law.”

Brouillard v The Queen, [1985] 1 SCR 39 – Justice needs to be seen to be done – Judge may intervene

- We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done.
- “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

R v Mian, 2014 SCC 54 – Judge is not a mere umpire – Truth seeking
• Our adversarial system of determining legal disputes is a procedural system “involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.”
• Lord Denning explained in the context of trial judges in the United Kingdom: “. . . a judge is not a mere umpire to answer the question ‘How’s that?’ His object above all is to find out the truth, and to do justice according to law . . .”

THE MYTH OF THE JURY TRIAL – JURY TRIALS RARE
• Separation of the jury from the judge is mostly untrue – very few trials involve juries so the trier of law/trier of fact (the judge) hears all of the evidence, whether it is admissible or not, and that evidence likely influences the judge’s decision even where it should not, according to the rules
• Paradigm for evidence law → clear separation between trier of fact and trier of law
• But jury trials are now – by far – the exception, even in criminal matters
  o 97% of criminal trials take place in Provincial Court → judge alone – thousands and thousands of trials, all judge-alone
  o Even in Queen’s Bench → approximately 20 criminal jury trials proceed annually in Edmonton
  o Civil jury trials → possible, but extraordinarily rare in Alberta

HOW ARE EVIDENTIARY ISSUES DECIDED?
• Objections and Immediate Rulings
  o Done “on the fly”
  o Resolved summarily – little time for reflection
  o Usually relate to straightforward procedural issues
• Voir dire
  o A “trial within a trial” to decide an evidentiary issue
  o Parties call witnesses, judge hears argument
  o Often involve a formal ruling
  o In jury trials, jury is excluded
  o Separate hearing – evidence heard in a voir dire is not automatically part of the record at trial, even when judge-alone, unless the parties agree

SOURCES OF THE LAW OF EVIDENCE
• Common law (bulk of evidence law)
• But there are also some statutory rules
  o Canada Evidence Act – applies to matters over which federal government has jurisdiction
    ▪ e.g. Criminal prosecutions, Federal Court civil proceedings
  o Alberta Evidence Act – applies to matters over which provincial government has jurisdiction
    ▪ e.g. Provincial prosecutions, civil proceedings in Queen’s Bench
  o These are not comprehensive codes of evidence
    ▪ Unlike some jurisdictions, Canadian evidence law remains largely uncodified, common law
  o Charter of Rights and Freedoms
    ▪ S.24 allows exclusion of evidence acquired through Charter breach
    ▪ More an issue for criminal procedure and constitutional law – how we balance Charter rights against functioning of criminal justice system
    ▪ Remember – doesn’t apply to private legal proceedings anyway.
  o Rules of civil procedure
    ▪ The rules modify common law – mostly regarding privilege and witnesses.
  o Individual legislation (e.g. family law, administrative tribunals, land registration acts to assist in proving real estate transactions)
  o Rules of Professional Conduct

UNITED STATES FEDERAL RULES OF EVIDENCE - CODIFIED
• Codified in statute

**Rule 404. Character Evidence; Crimes or Other Acts**

- **(a) Character Evidence.**
  - **(1) Prohibited Uses.** Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
  - **(2) Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:
    - **(A)** a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
    - **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:
      - (i) offer evidence to rebut it; and
      - (ii) offer evidence of the defendant’s same trait; and
    - **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.
  - **(3) Exceptions for a Witness.** Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.

**WHEN DO THE RULES OF EVIDENCE APPLY? – TRADITIONAL PROCEEDINGS, NOT ADMINISTRATIVE, ARBITRATIONS, SMALL CLAIMS COURT**

- The rules of process, admissibility, and reasoning were created for (and continue to apply in) “traditional” court proceedings
  - e.g. a criminal trial, or civil trial in the Queen’s Bench
- **But the rules of evidence generally do not apply to:**
  - Administrative proceedings before boards/tribunals
    - This is seen as a feature of administrative proceedings
  - Arbitrations
  - “Small claims” trials in Provincial Court
    - Although some rules apply,
    - Most remain practically important

**ARBITRATION ACT, RSA 2000, C A-43, SS. 20 & 21**

- 20(1) The arbitral tribunal may determine the procedure to be followed in the arbitration. …
- 21(1) The arbitral tribunal is not bound by the rules of evidence

**EMPLOYMENT STANDARDS CODE, RSA 2000, C E-9, S. 100**

- 100(1) An umpire [a quasi-judicial decision maker who hears appeals of certain employment-related complaints] is not bound by the rules of evidence or any other law applicable to judicial proceedings and has power to determine the admissibility, relevance and weight of any evidence.
- (2) An umpire may determine the manner in which evidence is to be admitted. …

**POLICE ACT, RSA 2000, C P-17, S. 20 – RULES OF EVIDENCE APPLY**

- 20(1) For the purpose of conducting an appeal or an inquiry before the [Law Enforcement Review] Board, the following applies: …
- (h) the rules of evidence applicable to judicial proceedings apply; …

**PROVINCIAL COURT ACT, RSA 2000, C P-31, S. 36 – NOT BOUND BY RULES OF EVIDENCE**

- 36(1) For the purposes of a hearing [of a civil claim], the Court
  - (a) is not bound by the laws of evidence applicable to judicial proceedings, and
(b) may admit any oral or written evidence that it, in its discretion, considers proper, whether admissible in a court of law or not.

(2) Nothing is admissible in evidence at a hearing
   (a) that would be inadmissible by reason of any privilege under the law of evidence, or
   (b) that is inadmissible by any Act.

CRIMINAL PROCEEDINGS? – RULES DON’T APPLY TO BAIL (R V TORONTO STAR NEWSPAPERS)

Bail
   Rules of evidence do not apply: see Criminal Code s. 518
   \[\text{Criminal Code s. 518(1)(e): “…may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case”}\]
   Courts frequently rely on hearsay, bad character evidence
   R v Toronto Star Newspapers (2006), 211 CCC (3d) 234 (Ont SCJ)
   \[\text{Bail hearings are not meant to be trials, nor should the “summary proceeding assume the complexities of trials”.}\]
   Sections 516 and 522 [of the Criminal Code], in permitting the hearing to be adjourned for no more than three clear days without the consent of the accused
   \[\text{A desire for “swift justice” and informality}\]

Preliminary Inquiry
   Rules of evidence generally apply, with an important caveat:
   \[\text{Criminal Code s. 540(7): “…may receive as evidence any information that would not otherwise be admissible but that the justice considers credible and trustworthy in the circumstances of the case…”}\]
   R v Uttak, 2006 NUCJ 10
   \[\text{Recent statutory amendments to the Code have expressed a determination, on Parliament’s part, to broaden the range of evidence that is to be admissible on a preliminary inquiry}\]
   \[\text{The narrow exclusionary rules developed for trial have been replaced by a much broader mandate}\]

Trial
   Rules of evidence apply
   Often applied more rigorously in jury trials

Sentencing
   Usually informal, but if one party objects to a fact or insists on proof, can take on a trial-like procedure (see R v Gardiner)
   The hearsay rule does not govern the sentencing hearing
   Character evidence obviously becomes important

Extradition Hearings
   Specialized rules of evidence (“Record of the Case”)

Do the rules of evidence apply equally in non-criminal court proceedings?
   In theory and in general, yes – apply to civil/family cases as well
   In practice, many rules are often relaxed
   e.g. character evidence rule in child protection proceedings
   e.g. rules surrounding “self-incrimination” and compelled testimony
   Different nature of proceedings – different interests at stake as compared to criminal trial
   Fewer jury trials
   Administrative proceedings: Must look at statutes to see whether or not the laws or rules of evidence are applicable or binding

RELEVANCE & ADMISSIBILITY

ADMISSIBILITY: 3 BASIC QUESTIONS
• 1) Relevance
  o Relevant to something that is in issue in the trial
• 2) Exclusionary Rule
  o E.g. hearsay, character, opinion, privilege, s 24(2) of the Charter (bring justice into disrepute)
• 3) Prejudicial Effect exceeds Probative Value?

### RELEVANCE

#### MOST IMPORTANT RULE IN EVIDENCE LAW:
- Information can be admitted as evidence only where it is relevant - relevant evidence is *prima facie* admissible.
- Irrelevant evidence is (generally) inadmissible.
  - Irrelevant evidence might be admissible where it’s of peripheral importance (e.g. narrative context for relevant evidence).
- Relevance and materiality are necessary but not sufficient conditions for admissibility

- Relevance as defined in *Arp*: any item of evidence that has a tendency to increase or diminish the probability of a fact in issue being true is relevant.

### DIRECT VS CIRCUMSTANTIAL EVIDENCE

- **Direct evidence**: if believed, proves a fact in issue
  o Only question is believability
  o Generally, witness testimony about matter in question: “I saw Mr. X point the gun and shoot”
- **Circumstantial evidence**: relies on an inference to prove fact in issue
  o e.g. fingerprint evidence
  o E.g. break and enter, motorbike had a fingerprint, question is whether person who broke into the garage left the fingerprint
  o If the desired inference is speculative or unreasonable or too equivocal the evidence is irrelevant (R v White, 2011 SCC)
  o Judges may exclude evidence as irrelevant after relying on the accumulated knowledge from courts and studies to the effect that certain types of evidence can appear probative when they are not
    - E.g. the twin myths that a victim’s consensual sexual experiences are relevant 1) to her character or 2) to her readiness to consent to sex have been rejected as impermissible (R v Seaboyer, SCC 1991)

### CREDIBILITY VS RELIABILITY

- Whether we believe a witness is a function of two variables: *credibility* and *reliability*
- Credibility: the extent to which the witness should be believed
  - Credibility is an issue of weight – it does not go to probative value when considering admissibility
  - Is this an honest witness?
  - e.g. Bias/partiality? Reason to lie?
- Reliability: the extent to which the evidence should be believed
  - Is the witness’s evidence accurate?
  - Reliability can go to admissibility as well as weight.
  - e.g. Opportunity to observe? Ability to recall? Difficulties communicating evidence? Special concerns for children?

### CONDITIONAL ADMISSIBILITY

- Relevance of evidence may not always be clear, but counsel is given some leeway
- Often an issue in circumstantial cases
  - e.g. Crown opens a murder case by calling evidence about cell phone used by accused
    - Not normally relevant – but cell tower pings?
  - Counsel given leeway to establish relevance
• If no link is ultimately established, jury told to disregard the evidence
• Piece of evidence on its own may not be relevant but it’s relevance may be shown on the entirety of the case

LIMITED ADMISSIBILITY E.G. CRIMINAL RECORD
• Evidence may be admissible for one purpose, but not for another
• Trier of law must direct (instruct) the trier of fact about how this evidence can be used

Example: Accused’s Criminal Record
• If accused testifies at their own trial, may be confronted with his/her criminal record
• But, it is a basic principle of character evidence rule that we should not rely on prior bad conduct to convict
  o Can’t rely on the character or propensity of a person to do too much work
  o But can be used to bring into question the accused’s credibility – not to bring into question guilt on the current charge – used for impeachment only
• Criminal record only admissible to help the TOF assess credibility – is the accused, as a witness, telling the truth?
  o Impeachment only

How do we ensure the record is not misused?
  o Limiting instruction to jury
  o Strong trust in juries (and trial judges) to follow these instructions
    ▪ Social science evidence – questionable

Few other examples:
  o Statement of an accused:
    ▪ Tendered for “cross-examination only”
    ▪ Crown can use admission (if shown to be voluntary) or, prosecutor can decide not to use the admission – if the accused testifies, then the prosecutor can use the prior admission to point out inconsistencies in the accused’s statements
    ▪ BUT this can only be used to judge credibility – the prior admission is not evidence
  o Statement of co-accused
    ▪ Admissible only against co-accused who made that statement
  o Evidence of animus
    ▪ Can be used to prove motive, but not to show “type of person” who committed offence

REMEDIES FOR TOF HEARING INADMISSIBLE EVIDENCE
• Jury trial
  o Mid-trial instruction, final instruction
  o Serious cases – mistrial
• Judge-alone trial
  o Assumption judges can disabuse their minds
  o In extreme cases – mistrial
  o Judges trusted more – extreme cases will allow for mistrial to be granted

ENFORCEMENT OF RULES OF EVIDENCE
• Ethical requirements not to present evidence known to be inadmissible
• Borderline? Good practice to raise with opposing counsel in advance
• Objection of parties
  o Judicial responsibility to enforce rules of evidence, even if counsel do not object
• Enforcement on appeal
  o Failure to object – does not make evidence admissible, can still appeal
  o Practically, should make objections noted, or will risk appeal court concluding (a) evidence was not that important, (b) tactical decision by trial counsel
RELEVANCE

Relevance

- Legal question, decided by TOL
- Not a high threshold
- Relevance does not determine admissibility

- Evidence must be relevant to be admissible
  - “Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence.” (P&S)

- Irrelevant evidence is excluded to:
  - facilitate truth seeking
  - avoid trier of fact from being confused or distracted
  - avoid expensive wastes of time

- Does not need to conclusively prove an issue or resolve a contested point
  - just needs to increase probability

- Examples:
  - Robbery trial, identity in issue → eyewitness says the robber had brown hair, accused has brown hair
  - Impaired trial → evidence accused driver was weaving within his lane

RELEVANCE = PROBATIVE AND MATERIAL

- Relevance consists of 2 components:
  - Probativeness: the evidence must have an actual, measurable tendency to increase or diminish the probability of the existence of a fact.
  - Materiality: whether the evidence relates to a material issue in the case

- “Materiality” → an aspect of relevance
  - directed at a fact that matters to the outcome of the issues on trial

- Material → Evidence that is directed at a matter in issue in the case

- “Primary” and “Secondary” Materiality
  - Concepts rarely discussed in real world, but useful for us as we discuss class

WHAT DEFINES THE ISSUES? - MATERIALITY

- What facts are in dispute?
- Criminal trial → information/indictment
  - “On or about September 15, at or near Edmonton, Alberta, did unlawfully assault Bruce Ziff, contrary to s. 266 of the Criminal Code.”
  - Other factual questions may arise, but this is the starting point
- Civil trial → pleadings

PRIMARY MATERIALITY – ACTUAL FACTS THAT NEED TO BE ESTABLISHED - DEFINED BY MATTERS IN DISPUTE, SUBSTANTIVE LAW, CIRCUMSTANCES OF CASE/TRIAL

- Primary materiality → the actual facts that need to be established to win a case
  - Defined by the matters in dispute, as defined in the indictment or information (criminal) or the pleadings (civil).
  - Defined by the law governing the area of dispute (elements of criminal offences, law regarding formation of a contract, etc.)

Example: robbery case

- 343 Every one commits robbery who
  - (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
• (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
• (c) assaults any person with intent to steal from him; or
• (d) steals from any person while armed with an offensive weapon or imitation thereof.

• Evidence that accused brandished a weapon in the course of demanding the clerk to hand him cigarettes → primarily material, relevant
  ○ Yes – it is material and goes directly to something that the Crown must prove (identity)
• Police find child pornography when executing warrant to find the weapon → immaterial, irrelevant

Example – murder case
  ○ Recall: Crown must prove mens rea – knew would cause death, or knew would cause bodily harm likely to cause death
  ○ Intoxication? Motive to kill? Familiarity with firearms?
  ○ All may be material → logically probative of a matter in issue, the mental state of the accused

Materiality is defined by the substantive law
  ○ Need to know the law to understand what is relevant/material
  • What does the substantive law put in issue?
    ○ e.g. history between the parties? – relevant to self-defence
    ○ e.g. Charter challenge – training and experience of police? – may be relevant to police conduct

Materiality is defined by the circumstances of the case
  • Example – murder case
    ○ Accused’s passport → material? Usually not
    ○ Accused is charged with murdering X
    ○ Accused testifies he could not have killed X, because he was outside of country
    ○ Accused’s passport has no stamps? → material!

Materiality can (and often does) change based on the circumstances of trial

SECONDARY MATERIALITY – GOES TO CREDIBILITY OR RELIABILITY OF PRIMARILY MATERIAL EVIDENCE

• facts that help us determine the value of primary evidence presented to the TOF
  – Goes to the credibility or reliability of the primarily material evidence
  – Facts about the people who are giving evidence
• Examples:
  – Witness partiality? – e.g. in relationship with party
  – Capacity to observe or remember?
  – Prior inconsistent statements?

Example: Drug possession case
  – Mr. W and Accused were cell-mates in Remand Centre
  – Drugs found in Remand Centre
  – Mr. W testifies that the drugs weren’t his, and that he saw the Accused hide something under his bunk (where drugs were found)
  – Evidence that Mr. W…
    • Has a prior conviction for perjury
    • Was offered a “deal” on his own charges for testifying for the Crown
    • Knew the Accused from the “street” and had been previously assaulted by the accused
  – All secondarily material evidence
  – Does not go directly to establishing who possessed the drugs, but material to whether to believe Mr. W
RELEVANCE = MATERIAL + PROBATIVE – COMMON SENSE AND LOGIC

• How do we assess what is probative?
  o Common sense and logic
• Can be disputed
  o Based on life experience, assumptions
• Concerns – sexual assault cases?
  o At one time – failure to make immediate complaint was considered relevant

ADMISSIBILITY RULINGS CAN CHANGE

• Because evidence may become relevant/material throughout case, admissibility rulings may change
• Example – evidence of accused’s character
  o Crown wants to introduce evidence of accused’s violent history toward complainant – ruled inadmissible
  o Accused attacks complainant’s own character and tendency for violence vigorously in cross-examination
  o Crown may ask judge to re-visit this ruling

ADMISSIBILITY VS WEIGHT

• Weight and relevance are distinct concepts:

  Weight: how probative the evidence is, or how much it contributes to demonstrating a proposition (believability + informativeness). Considered at the end of trial.

  Relevance: whether the evidence pertains to a material issue. Considered when evidence is presented.

Weight – how informative is the evidence?

• Much evidence is admissible (i.e. relevant, no exclusionary rule, prejudicial effect does not exceed probative value) but unlikely to be relied upon by TOF
• This is a question for the TOF, not the TOL

Test for relevance low – just needs some logical link

• But strength of that logical link may be very weak
• TOF will place little weight on this evidence

2 key issues for determining weight:

• 1) How believable is the evidence? Is the witness credible/honest? Is the evidence reliable, or might it be inaccurate (bad memory, scientific uncertainty)?
  ▪ Believability can be broken down into:
    • Credibility – about the honesty of the witness
    • Reliability – the accuracy of the evidence
• 2) How informative is the evidence? How important is the issue it speaks to – is it peripheral, or is it the ultimate fact in issue? How effectively does it prove the point?
  ▪ Informativeness is determined by the strength of the inference you can draw from the evidence.

• e.g witness testifies she saw accused standing outside of liquor store before it was robbed
  • Legally blind
  • Fleeting glimpse
  • Never met accused before
  • History of making false statements to police
• Admissible? Probably
  • Weight? Virtually none
• Each individual piece of evidence does not need to meet ultimate standard of proof
  • Individual pieces alone may not prove case
• Question is whether taken together they satisfy the TOF
  • e.g. arson case
    o Motive – hatred of complainant
    o Opportunity – in area around time of arson
    o Means – purchase of a night vision scope

Scenario 1
• Accused is charged with speeding
• Accused wants to introduce evidence that police officer who gave him the ticket had a “quota” of tickets that needed to be issued every month, or he would not be considered for a new posting
• Relevance?: May be relevant because it can be used to show credibility of the police officer (even though it does not impact whether the accused was speeding or not)

Scenario 2
• Accused is charged with the theft of a rare painting
• Crown wants to introduce evidence that the Accused was an art collector
• Relevance?: relevant to establishing motive
  o Even if relevant, still two more steps to pass before being ruled admissible

Scenario 4
• Civil suit for negligence
• Plaintiff wants to call evidence to prove that the defendant is insured
  o Plaintiff’s Argument: Someone who is insured is less likely to be careful, so here, it is less likely the D was careful in this case
• Whether accused is insured is not admissible evidence, argument for it being relevant though, looking at moral hazard economics

Scenario 5
• Accused charged with importation of drugs
• Visited Hong Kong and returned with suitcase full of heroin
• Accused denies knowledge of heroin in the suitcase
• Crown wishes to call evidence that the Accused is receiving social assistance and is unemployed, and trip to Hong Kong cost equivalent of 4 times Accused’s monthly income
• Crown: poverty gave Accused motive to commit offence
• Accused: insufficient logical link between poverty and the commission of a crime
• Relevant – yes and was admissible – implausible that anyone on that limited needs would spend that much money on a two day trip to Hong Kong

Scenario 6
• Accused is charged with murdering his parents
• Crown seeks to introduce evidence that the Accused was member of a metal band that, and several years prior, co-wrote a song with these lyrics:
  o “You’re fucking crazy,
  o I was home one day trying to smoke my dope.
  o When the bitch walked in, I took her with a rope.
  o Ha, Ha, Ha, Ha. Yeah, Yeah.
  o Kill your fuckin’ mother, kill your fuckin’ father.
  o Stab once, stab twice. Ha, Ha, Ha, Ha.
  o Kill your parents.”
• Identity is in issue
• Disturbing but questionable whether or not it is relevant
RESIDUAL DISCRETION TO EXCLUDE EVIDENCE WHERE PREJUDICIAL EFFECT EXCEEDS PROBATIVE VALUE

Admissibility: Three Basic Questions
- (1) Relevance?
- (2) Exclusionary Rule?
  - e.g. hearsay, character, opinion, privilege
- (3) Prejudicial Effect Exceeds Probative Value?

RESIDUAL DISCRETION
- Question of admissibility
  - Question for the TOL (trial judge)
  - Not a mathematical process \(\rightarrow\) room for advocacy and exercise of trial judge’s discretion
- Two, sometimes overlapping kinds of exclusionary discretion:
  - Discretion in criminal cases to exclude evidence in circumstances such that it would result in unfairness if the evidence was to be admitted at trial (R v Buhay)
  - Exclusion of otherwise technically admissible evidence where the benefits of admission cannot justify the negative effects its admission would cause
    - At common law, no recognized discretion to exclude technically admissible defence evidence
    - R v Seaboyer – SCC recognized that such discretion exists, but probative value must be substantially outweighed by prejudice

PROBATIVE VALUE
- If we’re at step #3, we already know the evidence in question is relevant
  - As a matter of logic and human experience, makes a fact in issue more or less likely
- Probative value
  - Not just about any measurable tendency
  - How much more likely does this evidence make the material fact?

Two major considerations:
- (1) How important is the material fact that the evidence proves?
- (2) How strongly does the evidence prove the material fact?
- Impossible to quantify, but intuitively easy to understand
  - Probative value (PV) is a matter of persuasion, not of objective measurement. We have to argue probativeness.

We advance claims about probative value through chains of reasoning \(\rightarrow\) inferences.
- Basic structure: A (fact tendered in court) links to B (inferred material fact) through chain of reasoning, the strength of which = probativeness.
- Rule of thumb for irrelevant evidence: Where you can come to the conclusion that the tendered fact leads to two (or more) inferred facts, one of which isn’t material, then the evidence is probably irrelevant.
  - This evidence doesn’t shift any probabilities through chains of reasoning.

Probative Value: Example
- Theft case
  - Someone steals red bicycle from outside law school
- Elements of theft (simplified):
  - (1) Taking somethin from another person
  - (2) Intent to deprive another person of that thing
  - (3) Dishonest/fraudulent intent
• Alice tries to pawn the bike two weeks later
• Alice is charged with the theft of the bike

**Piece of Evidence #1:**
• Witness: “A few days after the theft, I heard Alice tell me she ripped off a guy’s bike at the University.”
• Material issue?
  – Goes to mens rea, issue of identity and actus reus
• Chain of reasoning?
  – Simple chain of reasoning - goes to all of the central issues, very probative

**Piece of Evidence #2:**
– Witness: “I saw Alice in HUB Mall 15 minutes before the theft. She was carrying bolt cutters.”
– Material issue?
  • Goes to identity and means
– Chain of reasoning?
  • Fairly direct – relatively probative evidence

**Piece of Evidence #3:**
– Witness: “I saw Alice riding a red bike the day after the theft.”
  • Probably relevant – as a matter of logic, makes fact of theft more likely
– Material issue?
  • Yes – but chain of reasoning is weaker
– Chain of reasoning?
  • Somewhat weak evidence, but it is admissible because it is relevant, it is somewhat probative – the chain of reasoning is not very strong

**Piece of Evidence #4:**
– Witness: “Alice stole my bike last year.”
  • Relevance – yes
  • Exclusionary rule – problematic – character evidence rule
  • Probativeness – while perhaps relevant, probably not very probative

**Intuitively, we know some evidence is more probative than other evidence**
– The chain of reasoning is more obvious
– The inferences are stronger

**ADMISSIBILITY OR WEIGHT?**
**Remember ➔ usually not the TOL’s concern**
– Matters of *weight* are reserved for the TOF, not the TOL
– It is up to the TOF to decide which evidence it accepts (credibility, reliability, strength of inferences)

**But, at the third stage ➔ asking whether the TOL (trial judge) should exclude evidence because prejudicial effect > probative value**
– Probative value involves an assessment of *weight*
– Even though we are concerned with a question of *admissibility*
  • “Threshold” reliability vs. “Ultimate” reliability
    – “Limited weighing”

**PREJUDICIAL EFFECT**
• How likely is it that the TOF will use the evidence in an improper way?
  – Measurement of risk – risk of reasoning with the evidence in an improper way
  – Will this evidence tend to cause the TOF to reach the *wrong conclusion*?
What are the negative aspects of this evidence?

- **What prejudice is not**
  - *Not* simply that the impugned evidence hurts a party’s case
  - *Not* simply that it increases chances of conviction in a criminal case

- **Evidence is not prejudicial simply because it will cause you to lose!**
  - It is prejudicial because it will cause you to lose for the **wrong reason**

<table>
<thead>
<tr>
<th>COMON, IMPROPER WAYS TO USE EVIDENCE</th>
<th>FORMS OF PREJUDICE (5) - SCHED</th>
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- (1) Arousing jury’s sympathy
- (2) Contempt/horror
- (3) Causing jury to reason on *hunches*, not logic
- (4) Distraction of jury from issues (time consuming)
- (5) Expense of issue given importance to case

1. **Sympathy**
   - e.g. evidence about victim’s background
   - e.g. accused is donator to charity, helps the disabled, etc.

2. **Contempt/horror**
   - e.g. crime scene photos
   - Greatest concern where it involves accused, but also relevant for other witnesses e.g. using the accused’s criminal record
     - causing the jury to believe that the accused is a bad person and caring less about what actually happened in the case at the bar

3. **Hunches, not logic**
   - Where common sense breaks down into stereotypes
     - “Rape myths”, sexual history
   - Concerns about how evidence could be greatly over-valued

4. **Distraction of jury from central issues (time-consuming)**
   - e.g. expert evidence on type of bolt cutters Alice was allegedly carrying
     - e.g. speed with which the type of cutters Alice was allegedly carrying could cut through a bike lock – would consume much time and expenses, and may not even be very probative, have to ask how much getting the evidence admitted will cost in comparison to how much is at stake e.g. $20,000 fender bender case

5. **Expense of issue given its importance**
   - More of a concern in civil cases

**MORAL PREJUDICE (DISTORTION OF TOF’S REASONING PROCESS) & REASONING PREJUDICE (PRACTICAL CONSEQUENCES)**

- Another way of thinking about types of prejudice:
  - **Moral prejudice** – distortion of TOF’s reasoning process
    - Risk that jury will convict the accused because he is a “bad person” or because of sympathy for the victim
    - “Inflaming the jury”
  - **Reasoning prejudice** – practical consequences of allowing the evidence to be admitted
    - Undue consumption of time, or the need to respond to minor side-issues
    - Unfair surprise
    - Risk of confusing TOF or distracting from key points

**BALANCING PROCESS**

Fundamental rule of evidence: where PV>PE, the evidence is admissible unless excluded by another rule (and vice versa).

- Evidence with *some* prejudicial impact is admitted all the time
– Just because there is some prejudice doesn’t mean it isn’t admissible
– We admit prejudicial evidence all the time

• Where prejudicial effect outweighs probative value → inadmissible
• Where probative value outweighs prejudicial effect → admissible
  – (Provided that no other exclusionary rule applies!)
• Not a scientific process
• An area of discretion
• Lots of room for advocacy
  – Advocate will argue why it is probative or why it is prejudicial

BALANCING PROCESS: PROBATIVE VALUE AND BELIEVABILITY (CREDIBILITY AND RELIABILITY)

Probative?:
– (1) How important is the material fact that the evidence proves?
– (2) How strongly does the evidence prove the material fact?
• Often we can only assess second factor by considering whether evidence is believable
  – i.e., reliability and credibility
• Whether we believe a witness is a function of two variables: credibility and reliability
  – Credibility → Is this an honest witness?
    • e.g. Bias/partiality? Reason to lie?
  – Reliability → Is the witness’s evidence accurate?
    • e.g. Opportunity to observe? Ability to recall? Difficulties communicating evidence? Special concerns for children?

BALANCING PROCESS: PROBATIVE VALUE AND BELIEVABILITY

• Think back to our bike examples
  – Probative value depends on whether we can believe these witnesses’ assertions
• Concern – allowing TOL of weigh probative value of evidence intrudes on area reserved for TOF
  – We usually reserve assessments of reliability and credibility for the TOF, not TOL
  – Concerns about usurping the role of TOF
  – There is a blurring of responsibilities here
• TOLs cautioned not to delve too deeply into issues of believability when assessing probative value
  – “Threshold” question, not “ultimate” reliability
  – Don’t want to usurp the role of the TOF

Balancing Process
• Is this hard in practice?
  – Very rarely an issue
  – Most relevant evidence is probative
  – In most cases, prejudicial effect limited as well
• This third stage is for marginal pieces of evidence – not frequently applied

WAYS TO LIMIT OR CONTROL PREJUDICE – EXCLUSION, EDITING, WARNINGS TO TOF

Other than Exclusion of evidence:
(1) Editing the evidence
  – e.g. removing prejudicial references from documents
  – e.g. can remove portion of the evidence e.g. portion of email chain

(2) Warnings to the TOF
  – Jury trial → jury charge
    • Warning not to use the evidence in a prejudicial way
      • E.g. do not be inflamed by photos of the crime scene
      • E.g. mid-trial instruction and end of the trial instruction
2 THRESHOLD TESTS FOR ADMISSIBILITY OF EVIDENCE – BY THE CROWN OR IN CIVIL CASE (ORDINARY) – TENDERED BY ACCUSED (SUBSTANTIALLY OUTWEIGH)

There’s really 2 thresholds for admissibility:

1. Evidence tendered by the Crown in a criminal case, and any party in a civil case, uses the ordinary balance between PV and PE.
2. Evidence tendered by an accused in a criminal case will be admitted unless the prejudicial effect substantially outweighs the probative value (Seaboyer).
   - Special concerns when an accused is defending themselves against a criminal charge
     - Accused’s liberty is at stake – more forgiving
     - Prefer wrongful acquittals to wrongful convictions

R V SHEARING, 2002 SCC 58 – SEX ASSAULT – ACCUSED WANTS TO USE DIARY ENTRIES AGAINST COMPLAINANT - PREJUDICIAL EFFECT MUST SUBSTANTIALLY OUTWEIGH PROBATIVE VALUE TO EXCLUDE

- Accused is charged with historical sexual assaults
- Accused has copies of the complainant’s diaries from the relevant periods
  - Put aside the issue of how the accused had a copy of the diary
- Diary omits any mention of the sexual assaults (or other related physical assaults that were mentioned in her testimony)
- **Accused’s argument:**
  - There is a reasonable expectation the complainant would have recorded this abuse if it happened
  - Relevant to the complainant’s credibility
  - If she omits mention of circumstances surrounding abuse, TOF should be invited to disbelieve her complaints
- **Crown response:**
  - Accused should not be allowed to cross-examine the complainant with the diary more prejudicial than probative
  - *Probative value? Weak* relies on inference that complainant would record abuse
  - *Prejudicial effect? Significant* risk jury will rely on discredited reasoning about how complainants act; invasive of complainant’s privacy
- TOF is precluded from *assuming* that the abuse would have been recorded in the diary
  - **But** this would not preclude the accused from attempting to demonstrate that *this* complainant would have recorded the abuse
- Prejudicial effect must *substantially* outweigh probative value
  - Accused permitted to cross-examine complainant using diary

Practically…?
- Judges rarely exercise their powers to exclude evidence on the basis it is more prejudicial than probative

APPLIED THE SAME WAY IN JUDGE-ALONE TRIALS?
- In practice, we’re more concerned about risks of prejudice in jury trials than judge-alone trials
- We also know that, practically speaking, judge has to hear the prejudicial evidence to decide on admissibility
  - If excluded – *cannot* consider and refer to it
- **But** the judge still needs to go through the prejudicial-vs.-probative exercise where necessary to do so
  - *Error of law to fail to do this balancing*
- “I’ll admit it… it goes to weight.”
  - Usually what the judge will say – see your concern, but I will admit it and you can argue that it should be weighed at a later point if it is not very probative and highly prejudicial

**Admissibility or Weight?**
• Remember → if you lose the admissibility battle, you can still argue that the TOF should give the evidence limited weight

CASE LAW EXAMPLES

**R V CANDIR**, 2009 ONCA 915 – RELEVANCE... MATTER OF HUMAN EXPERIENCE AND LOGIC... INCREASE OR DIMINISH LIKELIHOOD OF A MATERIAL FACT

- [46] To be receivable … evidence must be relevant, material and admissible.
  - The threshold for relevance is not high. To determine whether an item of evidence is relevant, a judge must decide whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence of a material fact more probable than it would be otherwise.

- [49] Materiality is a legal concept.
  - Evidence is material if what it is offered to prove is in issue according to the governing substantive and procedural law and the allegations contained in the indictment


- It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.

**R V EFFERT**, 2011 ABCA 134 – CROWN TENDERS PHOTOS OF CHILD’S BODY WHEN INTENT, IDENTITY, CAUSE OF DEATH ALREADY ADMITTED – INFANTICIDE VS MURDER – PE > PV

• Mother strangled newborn child and disposed of child’s body over neighbour's fence
• Only issue → murder vs. infanticide (partial defense to murder, focus is on the mother’s mind)
  - At trial, jury determines murder, defence appeals on the basis of unreasonable jury decision
• Martin JA:
  - “The death of a child is always extremely upsetting and a difficult matter to adjudicate dispassionately, even for those who are engaged in the administration of criminal justice on a full-time basis.”
  - “Such cruel and unnatural acts are hard to comprehend, particularly when they are committed by the child’s mother, whose instincts should be to protect and nurture.”
• Accused offers plea to infanticide – Crown rejects
• Crown tenders photographs of child’s body
• “[A]fter refusing to accept that plea, the prosecutor tendered 58 coloured photographs of the child’s autopsy, including some with the child’s skull reflected, even though the cause of death, ligature strangulation, was admitted and therefore not in issue.”
  - **Probative value?**
    - Remember, driven by live issues in the case
    - Here, identity and cause of death were admitted
    - Intent also admitted – no doubt she intended to cause the death of her child
    - Relevance? *Perhaps* mechanism of death and post-offence conduct → goes to accused’s state of mind (infanticide vs. murder) – mechanism of death is no longer material if it is admitted that she killed the child
    - But probative value very tenuous – as to what was going on in the accused’s mind
  - **Prejudicial effect?**
    - Obvious
• “[The Crown] went on to suggest to the jury that the appellant’s decision to continue smoking and to drink alcohol occasionally while pregnant, may be taken as an indication of her having planned the child’s demise; no doubt, a remarkable suggestion to other expectant mothers who are unable to stop smoking.”
  - Relevant?
    - *Arguable* that, as a matter of logic and common sense, disregard for child indicative of plan (at best arguable)
  - More prejudicial than probative?
    - Probative value extremely tenuous
    - Prejudicial effect obvious
R V Barton, 2015 ABQB 159 – Preserved Tissue Shown in Court – Mechanism of Injury in Dispute – PV > PE

Facts: Ms. Cindy Gladue was a sex trade worker. She was found dead in the Yellowhead Inn in north Edmonton, in a room that had been rented by the accused, Mr. Bradley Barton. Mr. Barton was charged with murdering Ms. Gladue. In a jury trial, the Crown sought to introduce Ms. Gladue’s preserved tissue into evidence. This tissue had been removed from her pelvic region by the medical examiner, Dr. Graeme Dowling, at her autopsy.

- Crown argued that the evidence was relevant to whether there was an accidental injury or a physical application of force during sex
- The defence objected to the admission of the preserved tissue on the basis the evidence, while relevant, was more prejudicial than probative.

Judge’s Reasoning: The tissue is the key to determination of how the injury was caused and what may have been used to cause the injury: a sharp object or some other mechanism such as a fist.

- Question: how did CG die?
  - Accident in course of sexual contact?
  - Intentional application of force (knife)?
- Conflicting expert testimony
  - Autopsy photographs already entered into evidence
- Prejudicial effect?
  - Real concerns about sympathy & horror
  - Inflaming passions of jury?
- Probative value?
  - Goes to the key issue in the case (the mechanism of the injury) – may have significant probative value

Decision on the evidence: ruled admissible
- Christina Big Canoe, “Cindy Gladue suffered her last indignity at murder trial” (CBC Story):
  - “I believe that four issues should have been given more weight when considering if Cindy's vagina should have been excluded as evidence. These include:
    - The dignity of an individual, including her privacy rights.
    - What impact the use of her actual remains had on Cindy's family and their faith in the justice system.
    - The unorthodox approach to evidence was unnecessary given the medical experts had other ways to demonstrate their positions.
    - The potential for vicarious trauma to those in the courtroom and the public in general.”
- Jury returned manslaughter verdict – currently on appeal

Character Evidence

Character Evidence:
- “Any proof that is presented in order to establish the
  - personality,
  - psychological state,
  - attitude,
  - or general capacity of an individual to engage in particular behaviour.”
  - E.g. person who is interested in young girls, alcoholic, propensity for anger, etc.
- We introduce character evidence to show a disposition of a person – that they’re the kind of person to do something

Examples of Character Evidence
- Direct opinions offered by witnesses
  - “Alice is a thief.”
  - “Bob is a pedophile.”
  - “Charles is an honest person.”
• Proof of reputation in community
  – “Everyone in Barrhead thinks Alice is a thief.”
• Circumstantial proof from prior incidents – not directly reflective of a person’s character, requires an inference to be drawn
  – “Alice stole my skidoo two years ago.”
  – Bob’s criminal record for sexually assaulting children
  – “Charles returned my wallet once, after I lost it.”

CHARACTER: PRIMARY MATERIALITY AND SECONDARY MATERIALITY
• Recall the distinction:
  – Primary materiality \(\rightarrow\) helps prove one of the facts directly in issue in the case
  – Secondary materiality \(\rightarrow\) helps us decide whether to believe or accept a certain witness’s testimony
• Character can obviously be relevant in both ways
  – Primary materiality \(\rightarrow\) e.g. in an assault prosecution, is this person predisposed to act violently?
  – Secondary materiality \(\rightarrow\) e.g., is this person a liar, whose evidence we should reject?
• Different rules depending on whether character evidence is being introduced for primary or secondary materiality

WHY ARE WE CONCERNED ABOUT CHARACTER EVIDENCE?
• Not because it is irrelevant! – it is relevant, so it will pass the relevance threshold
  – As a matter of logic and human experience, we know people have a tendency to act consistently with their character
• We use our history with other people (and our views on their character) all the time
  – Entire industries based on this reasoning, e.g., credit bureaus
• But character evidence comes with significant risks
  • Moral prejudice
    – Emotional reaction to bad character evidence
    – Over-estimation of the value of the evidence – risk of convicting because they are the “type of person” who would commit the offence, rather than facts of case
  • Reasoning prejudice
    – Distraction from real issues
    – Risk of confusing the TOF
    – Difficulties responding to the evidence
    – Expensive, time-consuming (becoming a trial of a person’s character, rather than what actually happened with the issues and charges on trial)

Probative value vs. Prejudicial effect
• Put in language of prejudicial effect vs. probative value, there is a strong risk the TOF puts too much weight on the character evidence

“BAD CHARACTER” (DISCREDITABLE CONDUCT) EVIDENCE
• Our particular concern in a criminal trial
• Bad character evidence (BCE) is character evidence that reflects badly on/discredits the person it is dealing with.
  • Includes any conduct or information that others are likely find as morally objectionable
  • High PE – draws attention to the person, not the facts of the case
• Would an ordinary person disapprove of this conduct/character/trait?
  • Likely to consider morally objectionable?
    • Prior criminal acts
    • Stigmatizing conditions
      • Mental illness, addiction
    • Non-criminal acts
      • Use of pornography, angry outbursts, infidelity
BAD CHARACTER EVIDENCE: PRESUMPTIVE EXCLUSIONARY RULE

- Crown cannot call general bad character evidence (that shows only that the accused is the sort of person who is likely to have committed the offence)
  - BCE is presumptively inadmissible against an accused in a criminal trial, and the onus is on the Crown to justify its admission.
    - Why? The prohibited inference – that the accused is the type of person who does bad things, and thus committed the offence in question.
    - Bad character is not an offence known to law (R v Handy, SCC 2002). We don’t punish people for having bad character, only for doing bad things.
  - Onus is Crown is to fit it into an exception

R V MICHAUD, 2011 NBCA 74 – VIDEOTAPE EVIDENCE OF SEX WITH YOUNGER GIRLS, ATTRACTION ETC., NOT ADMISSIBLE – BAD CHARACTER EVIDENCE

- The appellant, now 66 years old, was found guilty of incest … and of having sexual intercourse with a person under the age of 14 years who was not his wife; the two alleged victims were 11 years old and related to the accused
  - Accused charged with historical child sex offences
  - Crown introduced videotaped statements of the Accused to police
  - During interview, Accused told police:
    - He was very attracted to young girls
    - He had engaged in violent behaviour in the past
    - He had cheated on his wife during the marriage
    - He drank excessively
    - He had sexual intercourse with another 14-16 year-old girl over a period of several months
  - Accused cross-examined about these admissions
  - Crown refers to this evidence in closing address to jury
    - “The fact is that since his youth, the Accused has been a man attracted to young girls.”
    - Textbook character evidence – inviting the jury to base their decision on the accused’s propensity
  - No relevance to any other issue at play in trial
    - Accused did not put character into issue
  - Clearly inadmissible!
    - No relevance beyond inference the Accused was the sort of person likely to have committed the offences
    - There should have been a voire dire, where the videotapes should have been edited to restrict the evidence
    - The evidence was not being used to negate good character evidence, it was not adduced accidentally, and it was not relevant to motive, opportunity, means, or identity

CHARACTER VS HABIT EVIDENCE OF HABITAT PERMITTED IF NOT CIRCUMSTANTIAL EVIDENCE OF BAD CHARACTER

- Character ➔ “generalized description of a person’s disposition, or disposition in relation to a certain trait”
- Habit ➔ more specific – a regular practice of responding to a specific situation with a specific type of conduct
  - e.g. always stops at Starbucks on the way to the office on weekdays – this could be admissible
- Habit does not always reflect on someone’s character
  - e.g. always drinks Boxer beer – not in itself reflective of character
  - Law much less concerned about mere evidence of habit – generally admissible
- But sometimes, a habit may reflect on what we think about someone
  - Circumstantial evidence of character
  - e.g. buys cocaine from Jill on Friday night
  - If habit can reflect on the “kind of person” someone is, character evidence rules apply, such as carrying a gun or donating money to charity
EXCEPTIONS TO PRESUMPTIVE EXCLUSIONARY RULE AGAINST BAD CHARACTER EVIDENCE

Three major categories of exceptions to presumptive exclusionary rule about bad character evidence

– (1) Where the evidence is relevant to some other live issue in the trial
– (2) Where the accused puts his character into issue
– (3) Where the evidence meets the test for similar fact evidence
  • E.g. man charged with drowning wife in the bath tub; evidence admissible that previous two wives also died in the bath tub
  • Sankoff: These exceptions are circumstances where the probative value of the evidence now exceeds its prejudicial effect

Rules of Restricted Admissibility

• Recall: limits on how the TOF can use evidence
• Even if it falls within one of the exceptions, TOF has to be warned not to use this evidence to convict based on propensity alone

1) RELEVANCE TO SOME OTHER LIVE ISSUE

• Examples of other live issues
  – Motive (animus)
    • Domestic homicide: History of hostile behaviour directed towards an estranged spouse (motive of anger/distaste against wife – relevant to “identity” of killer)
    • Home invasion: Complainant had previously stolen drugs from the Accused (a drug dealer)
    • Those previous behaviours are bad character evidence… but when identity is an issue, and motive goes to the identity, the Crown is still able to lead that evidence
  – Means
    • Robbery with a firearm: Regularly seen carrying an illegal handgun identical to the model seen on the surveillance footage
      • This is bad character evidence – goes to propensity to commit crime – but it also shows that the accused had the means to commit the offence that was committed, so it is relevant to a live issue of identity
      • Remember, even if the evidence is relevant, and gets past the exclusionary bad character evidence, it can still be argued that it is inadmissible if prejudicial effect is greater than the probative value
  • Sometimes, impossible to separate out bad character evidence from the Crown’s theory and the surrounding circumstances
    – e.g. Bradley Barton / Cindy Gladue – Accused’s involvement in sex trade, as a customer
      • Bad character? Risk ordinary person would disapprove
      • Doesn’t really go to motive
      • But necessary to understand surrounding circumstances
      • This evidence would usually not be admissible… unless it is similar fact evidence
  • Not being used to prove disposition of accused
    – Relevant to some other issue
  • TOL must be careful to limit how much of this evidence is admitted
    – Doesn’t open the door to blackening the Accused’s character generally
    – Strict limits on what is admissible
  • Again, strict limits on how TOF can use this evidence – must be warned

(2) ACCUSED PUTS CHARACTER INTO ISSUE: TRIAL CONDUCT

• If the Accused does something to his character into issue in the trial, the Crown can call bad character evidence in rebuttal
• **Example: Sexual assault trial**
  - Crown is aware of two other complainants (no charges laid) who claim Accused sexually assaulted them
    - Bad character evidence – presumptively inadmissible
    - *(Similar fact evidence? – Assume no.)*
  - Accused testifies he is “not the kind of person to mistreat a woman”
    - *WHAM → CHARACTER PLACED IN ISSUE!*
    - Crown could then call other two complainants to testify about other incidents
  - The Accused is permitted to call **good character evidence** to establish they are unlikely to have committed the offence
    - e.g. assault case, defence is self-defence – may call evidence suggesting they are of a calm and peaceable character
  - **Trier of Fact can use this exculpatory evidence to help determine whether they committed the offence** *(primary materiality)*
    - But if Accused *does* call good character evidence, Crown can call bad character evidence to rebut suggestion of good character
    - Still not used to prove Accused is “kind of person” who is likely to commit this offence
      - But can be used to undermine suggestion of good character

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**ACCUSED’S GOOD CHARACTER EVIDENCE**

- Good character evidence (GCE) is **evidence which tends to show that the person does NOT have a propensity toward some action/offence.**
- Very rare to bring in good character evidence – opens up too many risks
- How can the accused prove they are of good character?
  - **Most common:**
    - (1) Accused’s own comments on witness stand
    - (2) “Reputation witnesses”
    - Occasionally, attempts via expert witnesses
  - **A few things to remember:**
    - Evidence from reputation witnesses is generally limited to statements of reputation in the community
      - Not allowed to call witnesses who spend days testifying about the Accused’s many good acts
      - Special way of calling this evidence – should research issue if you ever intend to call reputation witnesses
    - Law is very suspicious about the relevance of good character evidence in the case of sexual assaults

**When character is in issue, the Crown gets additional tools:**

- Cross-examination on the claimed character trait
- Rebuttal reputation witnesses
- They can (rarely) introduce reputation evidence to rebut the claim
- Testimony (including experts) can be introduced to rebut the claim
  - Expert may testify that the accused has a distinctive characteristic that makes it less likely that they committed the crime
- SFE can be led to neutralize the claim of good character – can’t be used to add affirmative weight to the Crown case
- Prior inconsistent statements can be used to undermine claim
- S. 666 of *Criminal Code*
  - This allows for questioning about the specifics of past convictions, not merely proving that those convictions exist.

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**HOW DOES AN ACCUSED “PUT CHARACTER IN ISSUE” DURING TESTIMONY?**

- In general: “By initiating evidence intended to suggest he is not the kind of person to have committed the offence.”
— “I did not and would not do that.”
— “I wouldn’t do that, I have a 19 year-old daughter.” (Charged with sex with 15 year-old.)
— “My mandate was to run the company legally.”
— But Crown isn’t allowed to use clever cross-examination to get Accused to inadvertently put character into issue

• Even if Accused does not expressly raise character as an issue (either through reputation witnesses, or Accused’s own testimony), accused may implicitly raise the issue in certain cases
  o e.g. self-defence case → calls extensive evidence about violent character of the deceased
  o Out of fairness, can Crown respond with evidence of Accused’s character for violence?
  o Some authority to suggest a vigorous attack on Crown witness’ character may but Accused’s character into issue (still controversial issue)

SPECIAL ISSUE: ACCUSED’S CRIMINAL HISTORY – IF ACCUSED TAKES STAND – GOES TO SECONDARY MATERIALITY

• Accused’s Criminal Record
  o In general, if the Accused does not testify, the Crown cannot introduce their criminal record (or prior criminal acts) into evidence
  o Would offend bad character evidence rule
  o Not relevant to any live issue
  o Significant risks of prejudice

• But if the Accused testifies, Accused can be cross-examined on their criminal record
• This does not mean the criminal record can be used by the TOF to decide whether they committed the offence
• Goes only to secondary materiality
  o i.e., do I believe this Accused’s evidence?
  o Example: theft, *perjury (goldmine, because it means conviction of lying to a court)
  o Can’t go to primary materiality of “did he commit the offence”, can only go to secondary materiality “can you trust this person’s testimony?”

CANADA EVIDENCE ACT, S. 12

12 (1) A witness may be questioned as to whether the witness has been convicted of any offence … including such an offence where the conviction was entered after a trial on an indictment.

How can this evidence be used?

— TOL can use Accused’s criminal record to disbelieve Accused’s evidence → history of dishonesty (secondary materiality)
— TOL cannot use Accused’s criminal record to conclude that the Accused had a propensity to commit the offence, or was the type of person who commits theft (primary materiality)

• Jury must be instructed on the distinction
  — Obviously, a fine distinction!

R V CORBETT, [1988] 1 SCR 670 – CORBETT APPLICATION FOR CROSS-EXAMINING ACCUSED ON CRIMINAL RECORD

• “Corbett Application”
  — Only really brought in a jury trial – not much point in judge-alone trial because information is brought in front of the judge anyway
• Trial judge (as TOL) has discretion to prevent the Crown from cross-examining the Accused on his criminal record
  — Significant chance of prejudicial effect exceeding probative value, even with caution to the jury
• Considerations?
  — How recent was the record?
  — How similar is the record to the offence currently charged?
  — More similar – more prejudicial
– Are these *offences of dishonesty* (e.g. theft, fraud, perjury, public mischief)?
– Can the record be edited (e.g. by removing particularly prejudicial convictions)?
– Has the accused attacked the character of Crown witnesses?

**IF ACCUSED PUTS HIS CHARACTER INTO ISSUE**

If the Accused puts his character into issue, all bets are off
– Criminal record can be used not only to evaluate Accused’s credibility…
– Now, can also be used to rebut the suggestion the Accused is of good character
– Yet still **cannot be used for prohibited, propensity reasoning** – to determine guilt or innocence based on the fact the Accused is “that kind of person”
  • In practice – significant practical risk of prejudicial reasoning

There is also a special rule in the *Criminal Code* for when Accused puts character into issue (s. 666)
– “Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.”

Normally, Crown can only prove fact of conviction
– But if the Accused calls good character evidence, Crown can get into the details of the prior offences
  • **Crown gets other additional tools when character is in issue:**
    – Cross-examination on the claimed character trait
    – Rebuttal reputation witnesses
    – They can (rarely) introduce reputation evidence to rebut the claim
    – Testimony (including experts) can be introduced to rebut the claim
    – Expert may testify that the accused has a distinctive characteristic that makes it less likely that they committed the crime
    – SFE can be led to neutralize the claim of good character – can’t be used to add affirmative weight to the Crown case
    – Prior inconsistent statements can be used to undermine claim

**R v NAP, (2002) 8 CR (6TH) 186 (ONT CA)** – CROSS EXAMINATION ON PRIOR CONVICTIONS ALLOWED ONCE CHARACTER IN ISSUE – CRIMINAL CODE S. 666

• accused may put his or her character in issue during examination-in-chief by answers which expressly or by implication indicate that he or she is not the sort of person who would have committed the offences alleged
  o any cross examination permitted under s 666 of the Criminal Code is then allowed

**ASIDE: SAME RULE IN NON-CRIMINAL CASES? – LESS APPLICATION**

• Strong argument that the character evidence rule has much less application in civil proceedings
  o Suggest that (1) Relevance, and (3) Prejudicial vs. Probative balancing sufficient in civil matters
  o In family proceedings, some issues of character will frequently be relevant to another matter in issue (e.g. best interests of the child – domestic violence)
• Prohibited inference is less problematic in civil trials – innocence isn’t at stake so moral prejudice is less problematic.
• GCE isn’t admissible in civil cases except in exceptional circumstances (i.e. allegations tantamount to criminal charges, like arson in an insurance case).
• SFE is admissible where it satisfies the SFE rule – if PV>PE, it’s admissible.
  o Unlike in criminal cases, SFE rule applies to both parties (not just the Crown).

**BAD CHARACTER EVIDENCE: PRESUMPTIVE EXCLUSIONARY RULE**
• Crown cannot call general bad character evidence (that shows only that the accused is the sort of person who is likely to have committed the offence)
  – There is a presumption that bad character evidence is inadmissible
  – Onus is Crown is to fit it into an exception

Scope of the Rule
• Can be a bit of a misnomer
  – Test applied not only where Crown is relying on “similar” facts
  – As Paciocco & Stuesser note, similar principles apply whenever Crown calls evidence to establish guilt of accused that reveals discreditable acts
• Some conceptual overlap between:
  – #1 – Where the evidence is relevant to some other live issue in the trial
  – #3 – Where the evidence meets the test for similar fact evidence

Similar Fact Evidence
• similar fact evidence is presumptively inadmissible, and the Crown must show on balance of probabilities that PV>PE on a case-by-case basis (R v Handy)
  – Onus on Crown to show, on a balance of probabilities, that probative value > prejudicial effect
  – Again, a “special case” of the general rule that probative value must exceed prejudicial effect
• A “strict test”
  – Trial judge acts as gatekeeper

SIMILAR FACT EVIDENCE: TO PROVE MENS REA – FRANCIS (SALE OF CRYSTAL RING AS DIAMOND) – MACLEAN (SHOOTING GUN IN HOUSE)
• e.g. Pawn shop / “bad cheque” case
  – Francis: Sale of crystal ring as diamond ring
    • Tried pawning similar ring under similar circumstances previously – decreases possibility that the accused was still unaware of the second ring also being diamond rather than crystal
    • Makes it less likely to be an honest mistake of fact
  – MacLean: To rebut defence suggestion accused would not have shot someone intentionally with others in the house – prior incident
    • Prior incident where the accused shot someone in a house where others were in the house – the prior incident became relevant

SIMILAR FACT EVIDENCE: TO PROVE THE ACTUS REUS – BRIDES IN THE BATH (SMITH)
e.g. “Brides in the Bath” – accused was George Smith
• Wife #1 – Bessie Munday
  • Dies July 1912 – Drowned, no signs of violence
  • Found in bathtub by husband, George Smith
  • Incidentally… a will, naming George Smith as sole beneficiary, made five days before her death
• Wife #2 – Alice Smith
  • Dies December 1913 – Drowned, no signs of violence
  • Found in bathtub by husband, George Smith
  • Incidentally… she had recently taken out a life insurance policy and named her husband as her sole beneficiary
• Wife #3 – Margaret Lloyd
  • Dies December 1914 – Drowned, no signs of violence
  • Found in the bathtub by husband, George Smith
  • Incidentally… a will, naming George Smith as sole beneficiary, made in hours before her death
• Admissible to establish improbability of accidental drowning x 3
• Text-book similar fact evidence

Makin
• Australian case
• Issue in murder trial: Accidental death of child, or homicide by parents?
• Twelve other babies found buried on the property

SIMILAR FACT EVIDENCE: TO PROVE IDENTITY
• Proving identity requires a **high degree of similarity** given how big of a logical leap the chain of reasoning makes otherwise.
  – Considerations: is there a “unique trademark” or distinctive *modus operandi*? Are there enough significant similarities to support the conclusion based on coincidence?
• 2-stage inquiry:
  – Based on the similarity between the acts in question, is it likely that the same person committed them?
  – Is there some evidence connecting the accused to the (past) similar act?
• e.g. “Hallmark” or “calling card” cases
  – Robbery cases – frequent
  – Sexual assault cases where no forensics
• E.g. gargoyle bandit – accused would jump up on the convenience store counter and demand money while perched like a gargoyle

SIMILAR FACT EVIDENCE - BALANCING
• We know that, for prior acts of discreditable conduct, prejudicial effect often outweighs probative value
  – Risk that TOF will put too much weight on the evidence, or be distracted by it
  – “More heat than light”
• As more and more similarities accumulate, the general presumption falls away – probative value of evidence increases
• Hard to state a clear “test,” because involves considering a number of factors related to probative value and prejudicial effect
  – Burden is upon the crown to show that probative value outweighs prejudicial effect

STEP FOR SIMILAR FACT EVIDENCE ADMISSIBILITY: PROBATIVE VALUE
(1) How strong is the evidence that the similar discreditable or criminal acts **actually occurred**?
(2) How strong is the *connection* between the *accused* and the similar fact event?
(3) How *strongly* does the similar discreditable or criminal act *support the inferences* the Crown seeks, in relation to the specific issue in the case (i.e. “connectedness”)?
(4) Are the matters the similar fact evidence seeks to prove **actually in issue** (i.e. are they material)?

(1) HOW STRONG IS THE EVIDENCE THAT THE SIMILAR DISCREDITABLE ACTS ACTUALLY OCCURRED?
• Can be *unproven allegation* or *prior conviction*
• What if the allegations of the prior discreditable act are contested?
  – Involves considerations of reliability and credibility
  – Remember – usually reserved for TOF (“weight”)
    • But TOL is acting as a “gatekeeper”
    • Some limited weighing required
  – Question that can be asked: Is the evidence *reasonably capable of belief*?
    • E.g. credibility of the complainant is suspect
    • The less credible, the less probative and the more potentially prejudicial it will be
• Can *prove through prior court proceedings*
  – Proof of conviction
  – Facts admitted in sentencing
• *Cannot rely on discreditable criminal acts where the accused has been acquitted*
  – Policy decision
-- Acquittals and stays normally barred from admission
  - Exception: *R v Ollis* – Crown can lead evidence underlying a previous acquittal to establish the accused’s state of mind in relation to a subsequent charge e.g. acquitted of false pretences for cashing a cheque when there was no money in the account, then subsequently cashing another cheque on the account
  - Exception: *R v Arp* – multi-count indictments – Crown can rely on evidence about one charge as similar fact evidence helping to prove another charge
  - The less creditable/reliable the evidence that the similar discreditable act occurred, the more prejudicial its admission

**SPECIAL CONCERN: COLLUSION**

-- Similar fact evidence often based on the objective improbability coincidence
-- But this is undermined if there is collusion
  - “Collusion” implies concoction, but also includes inadvertent colouring or tailoring of evidence
    - e.g. tainting through media reports
    - which is why the Crown limits the release of the details of a crime – otherwise defense will make case that the stories that come forward as similar allegations were the result of being coloured by the media reports
  - **Mere opportunity for collusion not enough to raise concerns – must be an “air of reality”**
    - But if there is an air of reality, the Crown must prove, on a balance of probabilities, “that the evidence is not tainted with collusion”
    - Even if Crown overcomes this hurdle, the possibility of collusion can still be considered by TOF when deciding whether to accept the evidence

**R V HANDY, 2002 SCC 56 – FOR SFE TO BE ADMISSIBLE, PV > PE**

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**Ratio:** For similar fact evidence to be admissible, probative value must outweigh prejudicial value; case lists the factors to consider in connecting the similar facts to the circumstances

-- Sexual assault trial
-- Crown calls ex-wife to testify about prior sexual misconduct
-- Ex-wife had met complainant a few months prior and told the complainant about the accused’s criminal record, her allegations of abuse, and that she received money for victim compensation ($16,500)
-- “It was not incumbent on the defence to prove collusion.”
  - Just needed to show an air of reality, in which case the Crown must show otherwise on a BOP
-- This alone was enough to establish PE > PV

**Facts:** respondent was charged with sexual assault causing bodily harm. The complainant, a casual acquaintance, says that consensual vaginal sex following a drinking session at a bar turned into hurtful non-consensual vaginal and subsequently anal sex accompanied by physical abuse. At the respondent’s trial, the Crown sought to introduce the evidence of his ex-wife about seven allegedly “similar fact” incidents that occurred during their seven-year, abusive and sometimes violent cohabitation (interrupted by his incarceration for unrelated sexual assaults); The trial judge admitted the evidence and the jury convicted the respondent of the lesser offence of sexual assault. Ontario Court of Appeal ruled that the similar fact evidence was wrongly admitted and ordered a new trial.

**Decision:** Appeal dismissed; new trial ordered

**Reasoning (Binnie J.):**

- **The Test of Admissibility**
  - Similar fact evidence is presumptively inadmissible.
  - The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice (*R v B (C.R.)*))
    - the strength of the similar fact evidence must be such as to outweigh “reasoning prejudice” and “moral prejudice”.
- Identification of the issue in question
If the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded

- evidence which tends to show bad character or a criminal disposition on the part of the accused is admissible if (1) relevant to some other issue beyond disposition or character, and (2) the probative value outweighs the prejudicial effect (R v B(F.F.))

Application to the facts of the case:
- The Crown says the issue generally is “the credibility of the complainant” and more specifically “that the accused has a strong disposition to do the very act alleged in the charges against him”
- A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea.
- more accurately and precisely framed, the “issue in question” in this trial was the consent component of the actus reus

Factors connecting the similar facts to the circumstances set out in the charge include:

1. proximity in time of the similar acts: D. (L.E.), supra, at p. 125; R. v. Simpson (1977)
   - The acts happened in close proximity
2. extent to which the other acts are similar in detail to the charged conduct: Huot supra.; R. v. Rulli (1999)
   - The acts were dissimilar to the act in question at the trial
3. number of occurrences of the similar acts: Batte;
4. circumstances surrounding or relating to the similar acts (Litchfield)
5. any distinctive feature(s) unifying the incidents: Arp, supra, at paras. 43-45; R. v. Fleming (1999)
6. intervening events: R. v. Dupras
7. any other factor which would tend to support or rebut the underlying unity of the similar acts.

Also must consider: the potential distraction of the trier of fact from its proper focus on the facts charged, and the potential for undue time consumption (reasoning prejudice).

Significant reasoning prejudice and serious potential for moral prejudice

The Evidence of Collusion
- Complainant met with the ex-wife of the respondent and told the complainant that all she had to do was say that she had been assaulted and she would receive compensation

(2) HOW STRONG IS THE CONNECTION BETWEEN THE ACCUSED AND THE SIMILAR FACT EVENT?

- There must be some evidence linking the accused to a prior discreditable act
- TOL must be satisfied that there is “some evidence upon which a reasonable TOF can make a proper finding that the accused committed that similar act”
  - The “mere possibility” the Accused committed the similar act is not enough

(3) “CONNECTEDNESS”: HOW STRONGLY DOES THE DISCREDITABLE ACT SUPPORT THE INFERENCES SOUGHT? – CONNECTION FACTORS: FROM RANZ

- This is often the deciding factor
  - Just how “similar” are the discreditable acts in question?
- What is the issue in question that the similar acts help establish beyond mere propensity?
  - Crown must carefully define the issue in question the similar fact evidence is said to advance
  - e.g. identity, “modus operandi”
**Common factors when relied upon to prove actus reus or identity:**

- (1) Proximity in time?
  - Across a longer duration of time – less likely to have probative force

- (2) Similarities in details?
  - More similarities, more probative value

- (3) Number of occurrences? / Frequency?
  - Batte v R
  - Higher frequency, more probative force

- (4) Circumstances surrounding the similar acts?
  - e.g. Handy: Long-term relationship vs. one-night stand
  - Litchfield

- (5) Any distinctive features unifying the incidents?
  - “calling card” feature – as a matter of common sense, does not happen enough
  - If present, probative value goes up

- (6) Intervening events?
  - R. v. Dupras

- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

**In practice, given the “poisonous effect” of similar fact evidence, courts demand fairly high degree of cogency/similarity**

- Often a discussion of “hallmarks” or “calling cards,” although need not always rise to this level of similarity
- “Generic similarities” common to crimes of that type are not enough

**No “categorical” approach – each case turns on its facts and particular issues in question**

**More similarities → greater probative value**

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**ARE THE MATTERS THE SIMILAR FACT EVIDENCE SEEKS TO PROVE ACTUALLY IN ISSUE?**

**E.G. VANEINDHOVEN – MOTIVE NOT IN ISSUE WHERE ADMITTED CAUSING DEATH FOR SELF DEFENCE**

- If matters in question are admitted by the defence, then the Crown shouldn’t be able to call discreditable act evidence to prove an immaterial issue
- e.g. VanEindhoven – murder trial
  - accused charged with murder, potential for self defence
  - Crown can’t call evidence of prior violent acts towards the deceased to prove animus/motive where the accused has admitted causing death in this case
    - If admitted fault, the issue is not live

**Less material → more prejudicial**

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**MORAL PREJUDICE**

**Moral Prejudice**

- Risk of conviction because accused is “bad person”
- *Handy*: Cites social science suggestion jurors cannot disabuse minds of prejudicial information
- The more morally repugnant the act, the greater the moral prejudice
- The more relatively repugnant the act (compared to the crimes charged), the greater the moral prejudice

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**REASONING PREJUDICE**

**Reasoning Prejudice**

- Distracting the TOF
  - Has the potential to create a number of new live issues
  - Time and expensive of litigating collateral issues
  - Limits on accused’s ability to respond (e.g. passage of time, surprise)
• E.g. prior events from 20 years prior
  – Judge-alone trials?
  • Arguably reduced concerns about moral prejudice
  • But many of the same concerns about reasoning prejudice persist – distracting, time-consuming

**STEPS FOR SFE: BALANCING PREJUDICIAL EFFECT VS PROBATIVE VALUE**
– Remember – no inverse relationship between prejudicial effect and probative value
– As probative value increases, often so too does prejudicial effect

**PRACTICAL ISSUES: MULTIPLE COUNTS AND SEVERANCE**
• 2 basic situations:
  o Where the accused is charged multiple times arising out of a discrete offence
  o Where the accused is simultaneously charged with committing serial offences over a period of time
• Same basic principle applies – if PV>PE then the SFE will be admissible.
• **Where the SFE rule is satisfied, the Crown can use evidence from one charge as SFE to help prove another charge.**
  o This decision can be “textured”, and consider pieces of evidence individually for exclusion or for use only in certain ways in particular cases.
• Examples where Crown can rely on similar fact reasoning where multiple related charges
  – e.g. robbery spree, a number of sexual assaults
  – e.g. doctor charged with sexually assaulting 4 children
• TOF will obviously hear all of the allegations even if test for similar fact evidence is not satisfied

**Possibilities for dealing with SFE in multi-count indictments:**
– 1) If SFE rule is satisfied, just charge jury on how to use SFE.
– 2) Accused can apply for severance of counts
  • Are there compelling reasons to try them together?
  • e.g. meaningful legal/factual nexus between counts
  • May need to sever counts to deal with issue of prejudice
    • Severance will be justified where there’s risk of inconsistent verdicts, delay, efficiency, cost effectiveness, etc.
• Even if admitted:
  – It remains a matter for the TOF to decide what to do with the similar fact evidence
  – Undeniably powerful evidence
  – “Often … it is as close as a Judge comes to singlehandedly deciding the outcome of a case.”
  – Despite importance, TOF can still be left with a reasonable doubt even in the presence of similar fact evidence

**MANDATORY DIRECTION TO JURY**
• **Generally, jury must be charged on how they can use similar fact evidence**
  – (1) Must not rely on prohibited inference – must not reason from bad character or general disposition to guilt (R v B(C))
  – (2) Must not punish accused for past misconduct
  – (3) Must be told of the permissible inferences they can draw, based on live issues in the case
  – (4) Must be warned of risks of relying on similar fact evidence

**MUSINGS ON R V GHOMEISHI – COLLUSION LIKELY PRESENT**
• History of consensual sexual activity followed by sexualized violence – from at least 10 years prior
  – Expectation was that similar fact evidence would be used, but did not end up being pushed by the Crown, possibly there was worry about argument of collusion being made
• Similarity of Allegations?
– E.g. 3 complainants say there was teddy bear that Ghomeshi turned around…does this hint that there is thought of there being similarity in how the offence is being carried out?

• Matter in Issue?
  – Need to define with precision (Handy)
  – Not simply that he is a bad person who assaults women
  – Objective improbability of coincidence?

• Collusion?
  – Complainants were exchanging messages about desire to get justice and sharing stories
  – Also, stories were being released to the media as more allegations were made
  – Complainants being represented by the same lawyer – concern about there being a duty of lawyer to share helpful information e.g. same lawyer hears the story of each complainant… brings a risk of the lawyer given info on each complainants to each other

3RD PERSON CHARACTER EVIDENCE

CHARACTER EVIDENCE CALLED BY CROWN AGAINST NON-ACCUSED WITNESSES

• Major problems with leading bad character evidence against Accused?
  – Moral prejudice & reasoning prejudice
  – Rooted in fair trial concerns, risks of wrongful convictions
  – These concerns apply with less force for non-Accused witnesses

• In general, the Crown is free to lead evidence of bad character or discreditable conduct about non-Accused witnesses
  – e.g., if a defence alibi witness had a long history of lying to the police – clearly relevant to credibility of witness, admissible
  – Still subject to third stage exclusion – prejudicial vs. probative balancing

• In general, Accused is free to call bad character/discreditable conduct evidence about third parties (e.g. complainant, Crown witnesses)
  – E.g. Accused can bring up discreditable acts by a third party to implicate that third party, or can bring up discreditable acts of a Crown witness to bring the credibility of their testimony into question
  – Accused persons can present relevant “similar fact evidence” about other unknown suspects in an effort to cast doubt on their own guilt, so long as there is an air of reality to that defence and the probative value of the evidence is not substantially outweighed by the prejudice it could cause.
  – Exceptions for sexual assault prosecutions

R V ARCANGIOLI, [1994] 1 SCR 129 – CHARACTER EVIDENCE OF 3RD PARTY WITNESS PERMITTED

• the danger of a wrongful conviction does not arise where the character evidence pertains not to the accused, but to a third party witness.
• unless the third person is connected with the crime under consideration by other circumstances, evidence of such person's disposition to commit the offence is inadmissible on the grounds of lack of probative value (from R v McMillan)

OFTEN ARISES IN SELF-DEFENCE CASES

• Recall that relevance is driven by the substantive law – need to know something about self-defence

• Self-defence – mix of objective and subjective considerations
  – 34 (1) A person is not guilty of an offence if
    • (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
    • (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
    • (c) the act committed is reasonable in the circumstances.
• What is reasonable in the circumstances is defined by what a hypothetical reasonable accused would have known
  – 34 (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors: …
    • (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
    • (f.1) any history of interaction or communication between the parties to the incident; …
  
• In short, the “reasonable person” knows things that this accused knew about the complainant
  – Is it relevant, then, that the Accused knew complainant had a long history of violence, and typically carried a knife? – yes, even if the accused did not know the complainant but knew of their reputation
  – Also relevant to subjective elements
    • e.g. goes to credibility of Accused’s claim he was acting out of self-preservation, not anger
• What if the Accused did not know anything about the deceased’s history of violence?
  – Cannot be relevant to Accused’s actual state of mind at the time
  – Cannot be relevant to a reasonable person’s hypothetical state of mind
• Is it relevant (and thus admissible) for any other reason?
  – E.g. violent criminal record of the accused not known by the complainant
  – The complainant’s view was not affected by the history, nor would the view of the reasonable person
  – But it may be relevant if there is a question as to who the aggressor was
• Can still show that the deceased was more likely to have been the aggressor
  – Chain of inferences: History of violence → violent character → more likely to have been violent towards the Accused on this occasion
• Still subject to prejudicial-vs-probative balancing
  – but as defence evidence, prejudicial effect must substantially outweigh probative value
  – e.g. historical event of the accused punching someone once in the past… may be relevant but probably has little probative value and high prejudicial effect
  – type of convictions will be important – crimes of violence will have more probative value that convictions for child pornography or theft (even though those convictions may be relevant for the fact that they show a propensity to break the law)

Remember – by attacking character of the complainant (or another Crown witness), there is a risk the Accused will have implicitly put his character into issue
  – Issue of fairness – if Accused raises propensity reasoning against a third party, may be misleading for TOF to only hear about the character of that third party, and not the accused
  – Be aware – some conflicting case law here

R v Varga (2001), 48 CR (5TH) 387 (ONT CA) – Evidence of deceased’s propensity for violence where self defence established may be admissible – going to reasonableness of accused and who was the aggressor
  – “The admissibility of the deceased's propensity for violence in homicide cases where self-defence is raised is now well established.”
  – “The risk inherent in the evidence is also well known.”
  – “Attacks on the character of the deceased are often easy to make and risk the conclusion that it is a defence to a murder charge to show that the deceased's demise was a civic improvement.”

CHARACTER EVIDENCE CALLED BY AN ACCUSED AGAINST A CO-ACCUSED

“Cutthroat defence” – mutual finger pointing between co-accused
  – In a joint trial, an accused person can introduce BCE to attack the character of the other accused person when PV>PE.
• When an accused attacks a co-accused’s character, they put their own character in issue (R v Wilson)
• Accused is free to introduce evidence of bad character or discreditable conduct of their co-accused, to suggest they are the true perpetrator
  • Free to engage in propensity reasoning with respect to co-accused – “type of person” likely to commit
  • Inviting the jury to draw the inference that the co-accused is the more likely perpetrator
  – **BUT:**
    • BCE introduced this way can’t be used by the Crown to prove the guilt of the co-accused, or by the jury to convict the co-accused.
    • TOF can only rely on inference in *defence* of the accused
      • The jury must be instructed of that.

**CHARACTER OF COMPLAINANTS IN SEXUAL ASSAULT CASES – CRIMINAL CODE S 276-277**

“Twin myths”
  – (1) Sexually experienced → more likely to consent
  – (2) Sexually experienced → bad character → less likely to be credible

• Common law changed by statute (amendments to *Criminal Code*) – ss. 276, 277
• Remember definition of “bad character” or “discreditable conduct” that engages the rule for the accused
  – *Would an ordinary person disapprove of this conduct/character/trait? Likely to consider morally objectionable?*

• **Different scope to the statutory rules**
  – Not an absolute bar on bad character evidence regarding complainant
  – Not even *about* discreditable conduct of complainant
  – Limited to specific forms of evidence about sexual reputation and prior sexual activity

• **Reputation evidence**
  – **277** In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, *evidence of sexual reputation*, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

• **Evidence of complainant’s sexual activity**
  – **276** (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, *evidence that the complainant has engaged in sexual activity*, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
    – (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
    – (b) is less worthy of belief.

**Effect of ss. 267/277**
  – Even if this evidence were “relevant” (and today, that is far from clear), there is a *statutory exclusionary rule* on its admission in sexual assault-related prosecutions

**CC s. 267(1):**
  – Evidence of other sexual activity is inadmissible to support the “twin myths”
    • “Kind of person” who would consent
    • “Kind of person” who cannot be believed
  – Absolute prohibition on admission of evidence for these purposes

**CC S. 276(2):**
  – Further prohibition on admission of evidence of other sexual activity, *with exceptions*
  – **276(2)** In proceedings in respect of an offence referred to in subsection (1), **no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or**
with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

– (a) is of specific instances of sexual activity;
– (b) is relevant to an issue at trial; and
– (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

• General prohibition on all evidence of prior (other) sexual activity of the complainant, unless the Accused complies with the procedure to admit that evidence
  – Both with the Accused and with other individuals
  – Includes both prior consensual and prior non-consensual sexual acts

• “Adduce evidence” – includes via cross-examination of the complainant

DOES S. 276(2) FUNDAMENTALLY CHANGE THE ADMISSIBILITY TEST?

– (1) Specific instances of sexual activity
– (2) Relevant to an issue at trial
  • Consistent with the rule that all admissible evidence must be relevant – first stage
  • So this rule just incorporates the first step of admissibility
– (3) Has significant probative value
  • What does this require?

(3) “has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”

– Is this constitutionally problematic?
– Remember – usual test for excluding defence evidence – prejudicial effect must substantially outweigh probative value
– This is really just a procedural role – puts the accused on notice that they must show how the evidence is probative and must be shown in a voire dire

R V DARRACH 2000 SCC 46 – S 267 STANDARD NOT A DEPARTUE FROM CONVENTIONAL RULES OF EVIDENCE

– “The adverb ‘substantially’ serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value.”
  • “…both sides of the equation are heightened…”
– The word “significant” meant to exclude “evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the administration of justice.”
– “so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt”

SOME HISTORICAL CONTEXT

• 1982 – Original “rape shield” law
• R v Seaboyer, [1991] 2 SCR 577
  • Dealt with constitutionality of old version of s. 276 of the Criminal Code
  • Blanket exclusion on all evidence of prior sexual activity of the complainant with anyone other than the accused, except:
    • (1) Rebuttal evidence, after raised by Crown
    • (2) Evidence going to identity
    • (3) Evidence relating to consent on the same occasion
• Concern – evidence of other sexual activity may be relevant in other ways, which do not raise “twin myth” concerns
• Examples:
  • (1) Honest but mistaken belief in consent – accused’s belief could arise, in part, from other instances of sexual activity known to accused
• E.g. pattern of sex within a marriage – consent on the 47th time may be different from consent on the 1st time
• (2) To explain physical conditions relied upon to establish the assault (e.g. existence of semen, pregnancy, injuries)
  • Bringing up that the complainant had sex with someone else that night
• (3) To explain how a young complainant could provide such a detailed narrative
  • Bringing evidence that the complainant was abused by someone else other than the accused e.g. abused by an uncle or other family member

Unconstitutional (s. 276) – provision failed to distinguish between different purposes for introducing evidence of prior sexual activity
• The problem was not admitting evidence of prior sexual acts per se
• The problem was “the misuse of evidence of sexual activity for irrelevant and misleading purposes,” i.e., the twin myths
• Does not need to be framed as a blanket prohibition, limited to those three exceptions, to achieve that purpose

Amended in 1992 – and amended s. 276 is constitutional
• “The phrase ‘by reason of the sexual nature of that activity’ in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited.”
• “If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted.”
  • *if the complainant lied to the police about knowing the accused beforehand or having any previous sexual relationship – the accused can bring evidence to show that it is a lie or inconsistent statement

How is such evidence commonly used?
• Consider in light of frequent defences in sexual assault
  • (1) Consent
  • (2) Honest but mistaken belief in consent (reasonable steps?)
  • (3) No sexual activity occurred (credibility is key)
• Often artificial to separate out single instance of sexual contact between accused and complainant from the broader context/narrative of relationship
  • e.g. Paciocco & Steusser’s example: 17 year-old complainant and accused in 40s – is it important to know there had been intimacy in the past? May be necessary to explain why accused removed his clothes, brought certain type of condom, etc.
  • e.g. allegation of sexual assault by a spouse – what are “all reasonable steps” to ascertain consent in the context of the sexual relationship?

Can be very relevant to credibility – inconsistent statements from complainant about other incidents with accused or others?
• e.g. claim to police that complainant never wanted to see the accused again – but Accused would testify to subsequent instances of sexual activity? Still need to bring a s. 276 application
  • or… complainant saying that step dad sexually assaulted her and she had made up stories of sexual assault previously online, which were not real
• e.g. Showing photos before text
  • complainant showed photos of previous sexual conduct before they had sex…. Need a s 276 application possibly – there are notice requirements, 7 day notice required, Voire dire is necessary, must show probative value

Often a procedural trap for the defence
Can’t simply wait until cross-examination to raise the issue – detailed procedural requirements set out in s. 276.1
Application in writing
  • Contains “detailed particulars of the evidence that the accused seeks to adduce”
  • Explains relevance of that evidence
Proceedings held in camera
In general, must give Court/Crown 7 days’ notice

**CASE LAW**

**R v Seaboyer, [1991] 2 SCR 577 – S 276 PRE-AMENDMENT UNCONSTITUTIONAL FOR INFRINGING S 7 AND S 11(D) RIGHTS**

**Facts:** cases raise the issue of the constitutionality of ss. 276 and 277 of the Criminal Code (formerly ss. 246.6 and 246.7)
  • The provisions restrict the right of the defence on a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions.
  • R v Seaboyer: accused was charged with sexual assault of a woman with whom he had been drinking in a bar. On the preliminary inquiry the judge refused to allow the accused to cross-examine the complainant on her sexual conduct on other occasions.
  • R v Gayme: 18 year old accused charged with sexually assaulting the appellant 15 year old at school
    o defence, relying on the defences of consent and honest belief in consent, contends that there was no assault and that the complainant was the sexual aggressor

**Issues:** 1. Do ss. 276 and 277 infringe ss. 7 and 11(d) of the Charter?, 2. If so, are they saved by s. 1? …

**Decision:** S 276 unconstitutional as it infringes on s 7 and s 11(d) rights

**Reasoning:**
  • concern with the legislation is not as to its purpose, which is laudable, but with its effect.
  • appellants contend that the legislation, however laudable its goals, in fact infringes their right to present evidence relevant to their defence and hence violates their right to a fair trial, one of the most important of the principles of fundamental justice
  • Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff – valid purposes, hence does not infringe the right to a fair trial
    o Section 276, unlike s. 277, does not condition exclusion on use of the evidence for an illegitimate purpose. Rather, it constitutes a blanket exclusion, subject to three exceptions – rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident
    o s. 276 has the potential to exclude evidence of critical relevance to the defence – it is overbroad
  • relevant and helpful evidence should be admitted to court

**R v Darrach, 2000 SCC 46 – NEW S 276 UPHELD**
  • accused objects to the exclusionary rule itself in s. 276(1) on the grounds that it is a “blanket exclusion” that prevents him from adducing evidence necessary to make full answer and defence, as guaranteed by ss. 7 and 11(d) of the Charter
  • If evidence is not barred by s. 276(1) because it is tendered to support a permitted inference, the judge must still weigh its probative value against its prejudicial effect to determine its admissibility
  • The word “significant” was added by Parliament but it does not render the provision unconstitutional by raising the threshold for the admissibility of evidence – also added the word “substantial”, which supports the fairness of the threshold

**HEARSAY**
  • Hearsay → *presumptively inadmissible*
    - Exclusionary rule
      • (1) Relevant?
      • (2) Exclusionary rule?
• (3) Probative vs. Prejudicial?
• But many exceptions
  – Common law exceptions (many)
  – Statutory exceptions (many)
  – “Principled exception” (residual discretion)
    • Necessity
    • Reliability

WHAT IS HEARSAY – TWO NECESSARY ELEMENTS

Two necessary elements
• (1) Out-of-court statement/assertion
  – No contemporaneous opportunity to cross-examine the person who made the statement/assertion
  – Isn’t being directly communicated in court
• (2) Tendered for the truth of its contents
  – Introduced to prove what is being asserted in the statement/assertion
• When evidence that has both hearsay and non-hearsay purposes is admitted, we balance them with PV>PE for admissibility.
  o If the risk that it’ll be used for its hearsay purpose outweighs the chance it’ll be used for non-hearsay purposes, it can be excluded. This is rare.
  o Generally, risk of PE for dual purpose statements is handled through instructions to the jury not to use the evidence for its hearsay purpose.
• Definitions:
  – Declarant → Person who makes out-of-court statement
  – Recipient → Person who receives out-of-court statement, who is asked to testify at trial

WHY DO WE HAVE A HEARSAY RULE?
• Justification for rule: we can’t cross-examine, and thus test the reliability of, the maker of a hearsay statement because they’re not in court, and it’s prejudicial to use evidence that hasn’t been cross-examined to come to a conclusion.
• Preference for in-court evidence because it is:
  – (1) Under oath
    • People are more likely to lie in day-to-day life
  – (2) Ability to assess demeanor
    • Tone of voice, facial expression, etc.
  – (3) Ability to test evidence through cross-examination

FOUR MAIN HEARSAY DANGERS: PERCEPTION, MEMORY, NARRATION, SINCERITY
• Perception: Declarant may have misperceived the underlying facts
• Memory: Even if correctly perceived, the relevant facts may have been wrongly remembered by the declarant
• Narration: Declarant may have narrated the relevant facts to the recipient in an unintentionally misleading manner
• Sincerity: Declarant may have knowingly made a false statement

Example
• Bob: “Alice told me she saw Cindy steal the bike.”
  o Perception: Declarant may have misperceived the underlying facts
    ▪ How did Alice know it was Cindy? Had she met Cindy before? Did she have a clear line of sight? Was there anything in the way? How good is her vision? How did she know it wasn’t Cindy’s own bike?
  o Memory: Even if correctly perceived, the relevant facts may have been wrongly remembered by the declarant
How did Alice make a record of what she observed? Was she under the influence of drugs or alcohol? Does she suffer from any conditions that might make her memory suspect? Could she have been confusing two different incidents?

- **Narration**: Declarant may have narrated the relevant facts to the recipient in an unintentionally misleading manner
  - Could Alice actually be talking about another incident, but Bob might not fully understand the difference? Even if Alice used the word “steal” when talking to Bob, might she have simply meant that Cindy “took” the bike?

- **Sincerity**: Declarant may have knowingly made a false statement
  - Does Alice have a history of lying or doing dishonest things? Does Alice have some reason to dislike Cindy, or some other motive to lie?

**HEARSAY: PURPOSE IS KEY**
- Must always consider the *purpose* for which the statement is being introduced
  - Is the out-of-court statement being introduced for the *truth of its contents*? Or is there some other relevant reason for the TOF to consider the statement?

**SUBRAMANIAM V PUBLIC PROSECUTOR, [1956] WLR 965 (PC) – STATEMENT ADMITTED FOR FACT THAT IT WAS MADE, NOT ITS TRUTH, IS ADMISSIBLE (NOT HEARSAY)**
- Accused is charged with possessing ammunition for the purpose of assisting a terrorist
- Defence: Duress
  - Terrorists had threatened AC with harm unless the AC carried the ammunition for them
- Accused testifies:
  - Describes how he was confronted at gunpoint by communist insurgents
  - AC begins to explain what insurgents had told him

**Why was AC introducing evidence of what the insurgents had told him?**
- We don’t really care about whether the threat was real and sincere; we really only care about whether the statement was made
- “It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”
  - “It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.”
  - thereafter of the witness or of some other person in whose presence the statement was made.”

**Real issues are (a) whether the threats were actually made, and (b) whether the AC believed the threats**
- We can adequately investigate perception, memory, narration, and sincerity of these issues by cross-examining the AC
  - We really don’t care whether the insurgents were telling the truth

**Other Examples**
- Assault trial → Father charged with punching his son’s teacher
  - *School principal*: “I heard the son walk into the hallway and tell his father that the teacher had just sexually assaulted him. The father then went back in the classroom and I heard a commotion.”
  - Is it an out-of-court statement?
    - Yes – principal is relaying something he heard the son say
  - Is it being tendered for the truth of its contents?
    - Is it relevant at the father’s assault trial whether the son was sexually assaulted?  
      - *Not directly – but relevant to motive*. Non-hearsay.
    - Relevant not that it was true whether the son was sexually assaulted, but whether the son had said that he had been to his father

**Remember:**
- Any tendered fact can potentially be relevant for more than one reason
- Question is whether the out-of-court statement is relevant for some reason *other than the truth of the facts in that statement*
• Good practice: notify judge in a judge-alone trial that you are going to tender hearsay evidence for a non-hearsay purpose, and that it should be used for that purpose, and not for the truth of the facts in the statement relayed

LIMITED USES
• TOF must be careful about how out-of-court statements are used, even if not relied upon for their truth (and thus not hearsay)
  – Must be a jury instruction about limited uses of hearsay
  – Trial judge must be careful not to rely on out-of-court statement for the truth of its contents

HEARSAY COMES IN MANY FORMS
• Does not have to be the simple case of one witness testifying about what another witness told them (oral statements)
• Documents?
  – e.g. print-out from government computer system asserting that an individual’s driver’s licence was suspended on a given date
  – e.g. diagnosis of an injury found in a hospital chart
  – e.g. affidavit sworn by a witness
  – e.g. videotaped questioning, under oath
    • still out of court, witness can’t be cross examined, and it is being admitted for the truth of its contents – this is still hearsay
• Assertions? (As opposed to verbal statements)
  – e.g. Nodding “yes”
  – e.g. Pointing at someone – “he’s the driver”
  – e.g. Showing someone something – constable asks which shoes the murder was wearing, witness retrieves a particular pair

DOES THE DECLARANT NEED TO BE SOMEONE WHO IS “NOT CALLED”??
• Hearsay is sometimes defined in terms of the declarant being “unavailable” or “not called”
• e.g. Subramaniam:
  – “Evidence of a statement made to a witness by a person who is not himself called as a witness…”
• But what if that person is called as a witness?
  – Can a party then introduce a prior, out-of-court statement by that witness for the truth of its contents?

COMMON EXAMPLES: RECALLING WITNESS (PRIOR STATEMENTS)
• If a witness adopts their earlier OCS when testifying (e.g. when refreshing their memory during trial), there’s no hearsay problem.
• Crown calls Debbie to testify against Elaine in Elaine’s assault trial
  – Debbie has previously given a handwritten statement to the police:
    • “I was minding my own business when Elaine punched me in the face.”
  – At trial, Debbie gives different evidence
    • e.g. “I can’t remember what happened that night. I was really drunk.”
    • e.g. “I lied to the police. Elaine didn’t punch me. I fell.”
  – Crown offers Debbie a copy of her statement
    • Own handwriting? Shortly after the incident? Any additions, deletions, changes? Assist you in refreshing your memory to review it?
  – Debbie reviews a copy of her statement
  – A witness can then adopt a prior, out-of-court statement
    • “Yes, that refreshes my memory. I remember what happened now. Elaine punched me in the face.”
    • That statement is perfectly admissible – it is being used to refresh memory of the witness
• But what happens when the witness does not adopt the prior statement?, e.g.:
  • “I don’t even remember writing that down. I was really drunk when the police came.” → Can’t remember making out-of-court statement
  • “No, reading this doesn’t really help me. I still can’t remember what happened.” → Cannot say the prior statement is true, based on their present memory
  • “I was lying in that statement. I made it up. She didn’t really punch me.” → Recants prior statement
    – Can the Crown use the statement as evidence of Elaine’s guilt?
      • No → still presumptively inadmissible hearsay, even though the witness is available to testify in court
        • Hearsay dangers still exist
        • Court asked to choose between two conflicting versions
        • Prior, out-of-court statement is insulated from being meaningfully tested

PRIOR INCONSISTENT STATEMENTS
• As we will see, you frequently want to impeach a witness with a prior inconsistent statement
  • Witness at trial: “I clearly saw that it was the accused.”
    • Witness to police officer at the scene: “I didn’t get a good look at him.”
  • Is the statement to police an out-of-court statement? Yes
  • In cross-examination, can confront the witness with the prior statement
  • If the witness denies making the statement, may have to prove the statement was made, by calling the police officer → non-hearsay purpose
    • So it is not really hearsay – it is being tendered to show that the witness said something different previously, so it is relevant to credibility (believability of the witness)

POLICE OFFICERS’ GROUNDS?
• Police officers often receive information from others and act upon it
  • Police often require grounds to act – e.g. require reasonable and probable grounds to believe an individual has committed an offence before they can arrest that person
    • E.g. police officer receiving report of someone driving in unsafe fashion, appearing drunk
    • Officer then pulls over driver, administers breathalyzer and makes an arrest
    • The witness report is admissible, not for determining the truth of whether the driver appeared drunk and wobbly, etc., but for the fact that the statement was made to the officer and that the statement was sufficient to raise reasonable and probable grounds for the police officer
• Officers will frequently base their grounds on information received from others
  • Will be necessary for officers to testify about information received from others to justify their grounds

NARRATIVE?
• May be difficult (or distracting) to understand a witness’s evidence or behaviour without that witness relaying certain information received from others
  – “evidence necessary to understand the unfolding of events surrounding the offence”
• Must not be relied upon as confirmation of the truth of the facts relayed

COMPLETELY AUTOMATED PROCESSES? – NOT HEARSAY
• Is there someone to cross-examine? Has there been human intervention in the process? Or is the machine fully automated?
  – If there is no human intervention to make the statement, then there’s nobody to cross-examine. And we don’t have to worry about the machine lying.
• If fully automated → not hearsay:
  – e.g. time on a clock
  – e.g. printed label on a bottle (“rum”)
basically not hearsay if the police officer sees empty cans of kokanee, can’t object to say that it is
hearsay that there was beer in the cans

- But there are harder examples → hearsay:
  - e.g. print-out of records from computer systems that involve human input
  - e.g. hand-written label on box (“fentanyl”)

**IMPLIED STATEMENTS AND ASSERTIONS – INCLUDED IN HEARSAY**

- Hearsay includes conduct as well as statements. *Where conduct is used to convey meaning (nodding, waving your arms), it can be excluded as hearsay.*
  - Main issue: translating the conduct into a statement. Is there more than one meaning? What if someone does one thing but means something else?

- **Intended meaning, rather than the particular words, is key for hearsay.**
  - This includes slang, idiomatic speech, etc. – not all language is precisely designed for proving things in court.

- Similarly, statements that imply facts without directly stating them can be hearsay – exclamations, assertions, etc.

- Example:
  - You look out your office window and see someone look up at the sky, hold out their hand, and open an umbrella (you can’t see any rain yet)
  - *Implied assertion:* It is beginning to rain
  - Would it normally be an out-of-court statement to assert “my friend called me from outside my building and told me that it was starting to rain”? Yes.

- Example – Negligence trial
  - Issue: Were reasonable steps taken to ensure the ship was seaworthy?
  - Witness observes a ship’s captain carefully walk around the ship and check various parts of the ship, then invite his family on board the vessel
  - *Implied assertion:* The captain believed the ship was seaworthy

**More realistic/common example: drug telephone calls or drug text messages**

- Police recover cell phone from accused, Alan, a suspected drug dealer
- Police answer a phone call
- “Is Alan there? I want to buy some drugs.”

- Accused response:
  - Why you’re really tendering this is to rely on the caller’s *implied assertion* that the accused sells drugs
  - This poses hearsay dangers
  - We can’t cross-examine the caller
  - We can’t inquire into perception, memory, narration, or sincerity of the implied assertion
  - *Wrong number? Joke?*

**R V KEARLY (ENG HL) – ACCUSED CHARGED WITH POSSESSION WITH INTENT – PHONE CALLS AND VISITORS ASKING FOR DRUGS AFTER ARREST – NOT ADMISSIBLE – IMPLIES ASSERTIONS AS HEARSAY**

- police entered apartment of accused, charged accused with possession with intent to supply; in the hours after the entry, phone call and visitors asked for the accused and requested drugs (implying that the accused had drugs to sell); police statements about those requests were inadmissible, as they were implied assertions equivalent to hearsay

**R V BALDREE, 2013 SCC 35 - SIMILAR FACT PATTERN TO R V KEARLY; EXPRESS AND IMPLIED STATEMENTS BOTH INADMISSIBLE AS HEARSAY**

- “There is no principled or meaningful distinction between (a) ‘I am calling Mr. Baldree because I want to purchase drugs from him’ and (b) ‘I am calling Mr. Baldree because he sells drugs.’”
  - “In either form, this out-of-court statement is being offered for an identical purpose: to prove the truth of the declarant’s assertion that Mr. Baldree sells drugs.”
“If an out-of-court statement implicates the traditional hearsay dangers, it constitutes hearsay and must be dealt with accordingly.”

- These implied assertions/statements are also covered by the hearsay rule
- **Solution?**: Attempt to have admitted via the principled exception

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**HEARSAY EXCEPTIONS**

**TYPES OF HEARSAY EXCEPTIONS**

- **Exceptions to the hearsay rule:**
  - (1) Common Law
  - (2) Statutory
  - (3) Principled
    - Necessity & Reliability

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**HISTORY AND BACKGROUND**

- Development of exceptions to hearsay rule - defined by common law
  - Hearsay – defined broadly
  - Concerns about whether hearsay rule too broad – creation of categories when hearsay can be admitted

**Pigeonhole exceptions**: developed historically through common law; identified incrementally where conditions gave rise to conditions where the courts thought the out of court statement would be sufficiently reliable
  - Came to be treated as strict rules/exceptions – *DPP v Meyers* (HL, 1965)
    - Court said that no more hearsay exceptions would be accepted
    - Reluctance to create new common law exceptions – statute!

**Principled exception**: a catchall exemption that allows evidence in where it is sufficiently reliable and necessary (applied on case-by-case basis)
  - Academic criticism – Wigmore – influential – recommended going back to first principles
  - Canadian principled approach, looking at factors of:
    - (1) Necessity
      - Necessity: is there any other way to get the evidence admitted?
    - (2) Reliability
      - how satisfied are we that the statement is truthful and accurate, even though no cross-examination is possible?

**Legislative reform & judicial willingness to re-open the exceptions:**
  - SCC – creation of principled exception (*Khan, KGB, Khelawon*)
  - No more new common law hearsay exceptions
  - Maintained existing hearsay exceptions
  - New problems – principled exception
  - Traditional exceptions remain helpful
    - Even though they might be “special cases,” they’re helpful rules of thumb
  - **All of the other rules of evidence still apply when trying to get evidence admitted under a hearsay exception.**
    - Probative value must still exceed prejudicial effect for hearsay to be admissible.

**Basic approach for hearsay:**
  - Is the evidence hearsay? If yes, it’s presumptively inadmissible.
  - Does the evidence fit a common law exception? If yes, it’s admissible.
  - Does the evidence fit a statutory exception? If yes, it’s admissible.
  - Does the evidence fit the principled exception? If yes, it’s admissible.
  - If none of the above, it’s inadmissible.
TRADITIONAL COMMON LAW HEARSAY EXCEPTIONS

- (1) Dying Declarations
- (2) Admissions of a Party
- (3) Declarations Against Interest by a Non-Party
- (4) Prior Testimony
- (5) Prior Identification Evidence
- (6) Prior Convictions
- (7) Spontaneous Statements – \textit{Res Gestae}
  - Several rules categorized together
- (8) Declarations in the Course of Duty

1) DYING DECLARATIONS

- Remember \(\rightarrow\) modern approach – principled exception
  - Looks for (1) reasonable necessity, and (2) threshold reliability
- Many common law exceptions are rooted in similar considerations

REQUIREMENTS FOR DYING DECLARATIONS:

- (1) Criminal case involving the homicide of the deceased
- (2) Dying declaration of the deceased
  - Death must be “near and certain”
  - Deceased must be aware of this fact
- (3) Statement about the circumstances of death
- (4) Statement would have been admissible if the deceased had been able to testify

Traditional rationale?

- “While the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; the situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.”
  \textit{R v Woodcock} (1789) 168 ER 352 (KB)
- Religious basis for this reasoning – don’t want to lie on the deathbed
- On balance, common law accepts it where there is sufficient necessity and reliability:
  - Necessity? Obviously
  - Reliability? Quite Arguably, there are concerns
    - Do same religiously-inspired considerations apply today, though?
- Still some modern examples
- But exemplifies concerns about pigeon-holing of the rule!
  - Why only criminal cases?
  - Why only homicides?

2) ADMISSIONS OF A PARTY

A party may introduce into evidence against an opposing party any relevant:

- (a) Statement made by the opposing party
- (b) Act of the opposing party
- (c) Statement made by a third party that is \textit{expressly adopted} by the opposing party (or where it can be reasonably inferred it was adopted)
- (d) Certain “vicarious statements”
- (e) Statement made by a co-conspirator, in furtherance of the conspiracy
• “Anything the other side ever said or did.”
  – Statements and conduct
• Most common → statements made by the opposing party
  – Written or oral

Rationale for Admissions Exception
  – Less an issue of reliability or necessity
  – No concerns about inability to cross-examine the maker of the statement is the party itself!
  – If you want to address the reliability of something you said or did, you can always “call yourself as a witness”
    • Court is less concerned when the accused can stand up and refute the statement admitted against them
• Only applies to admissions of an adverse party
  – Can’t introduce your own out-of-court statements
• Doesn’t need to prove an “element” or even be an explicit admission of wrongdoing/fault – just has to be relevant
  – Don’t get too hung up on word “admissions”
  – Can be as simple of admitting to being in the area of the crime – anything that makes the material facts more or less likely to be true, as a result of human logic or experience
• Doesn’t require personal knowledge – if a party adopts another person’s statement, it’s admissible (R v Streu)
• Silence doesn’t amount to an admission unless there are other indicia present to suggest it does (i.e. a statement is made to the party that they’d be expected to respond to, and their silence reasonably suggests they’ve adopted the statement, and PV>PE).
  – Silence by an accused is never an admission in criminal cases.
  – But keep in mind that silence may have tactical consequences.

Criminal case – admissions made by the accused to others – may be introduced by the Crown
  – e.g. AC tells his friend he was driving a vehicle
  – e.g. AC writes an email to the complainant telling her he’s sorry

Civil cases
  – e.g. D writes an email to a contractor admitting he knew there was a trip hazard on his property
  – e.g. P tells her friend she’s drunk – later gets up to dance on the bar

ALBERTA RULES OF COURT – CIVIL TRIAL
  – Rule regarding questionings (prior to any trial) - 5.17(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:
    • a) each of the other parties who is adverse in interest; …
  – 5.31(1) Subject to rule 5.29, a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 … .

SPECIAL RULES IN CRIMINAL CASES
  – Statements made to persons in authority – Crown must prove voluntariness BARD – requires a voir dire unless specifically admitted
  – Admissions made to “ordinary” witnesses – no voir dire required

CO-DEFENDANTS
  • Statements made by one co-defendant to another cannot be admitted under the admissions exception.
    – Statements can only be used against their declarant.
    – True in civil and criminal cases
    – This doesn’t apply where the parties are tried separately.
  • Co-accused trials – AC #1’s statement cannot be admitted to prove case against AC #2
– e.g. AC #1 makes statement to police officer implicating the co-accused, AC #2 does not make a statement
  • both accused are charged; at the voire doire, the judge excluded the statement of AC #1 for issues of voluntariness and youth
  • but even if the statement had passed those initial issues and had been admitted, the jury could not rely on the statement of AC #1 as proof of the guilt of AC #2
– Same principle in civil trials with multiple parties

Harder cases → Co-conspirator’s exception to the hearsay rule / Admissions by parties in furtherance of a common design
– Notoriously confusing

VICARIOUS ADMISSIONS
• Where a person who is an employee/agent makes a statement in the ordinary course of their duties, it can be admitted as though it were the statement of the employer/principal. Applies when:
  – (1) Statement made by opposing party’s agent or employee
  – (2) Concerning a matter within the scope of the agency or employment
  – (3) During the existence of that agency/employment relationship
• Usher, to janitor: “Now you come when it’s too late, after someone falls. Why didn’t you come half an hour ago when I called you?”
  – May be admissible

FORMAL ADMISSIONS VS. INFORMAL ADMISSIONS
• Informal admission – not conclusive proof of an issue, nor is it binding
  o Formal admission – dispense with the need to prove a fact
• Beware of term “admissions against interest” – can confuse with another hearsay exception, declarations against interest by non-parties
• Remember, still subject to other rules, e.g.
  – Relevance
  – Character evidence issues
  – Voluntariness, Charter issues
  – Probative vs. prejudicial

ALBERTA EVIDENCE ACT
• Effect of apology on liability
  o 26.1(1) In this section, “apology” means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.
  o 26.1(2) An apology made by or on behalf of a person in connection with any matter
    o (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, …
    o (d) shall not be taken into account in any determination of fault or liability in connection with that matter.
    o (3) Notwithstanding any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.
• Only applies to civil actions

3) DECLARATIONS AGAINST INTEREST BY A NON-PARTY
Admissions by a person who is unavailable to testify may be admitted for their truth where the admission is against that person’s pecuniary or penal interests, and the person had personal knowledge of the facts admitted.
  o Basis: we don’t have reason to lie when making statements that are contrary to our interests.

Two categories:
  o (1) Declarations against pecuniary ($$) interests
  o (2) Declarations against penal interest

**Declarations against pecuniary interest**
  o (1) Declarant is unavailable to testify
  o (2) Statement, when made, went against the declarant’s interest
  o (3) Declarant had personal knowledge of the facts stated
    ▪ E.g. acknowledgement of debt owed or paid
  • Rationale?
    o Counter-intuitive and unlikely someone would say something that goes against their interest unless it is likely to be true (reliability)

**Declarations against penal interest**
  o Significant skepticism about this kind of evidence
  • Example:
    o Alice is charged with murder
    o Alice calls Bob as a witness
    o Bob: “Carol told me that she committed the murder”
    o Carol has died or absconded – unavailable

**Declarations against penal interest**
  o (1) Declarant is unavailable to testify
    ▪ e.g. death, illness, absconding – but not mere refusal to testify
  o (2) Declaration made in circumstances where the declarant apprehended vulnerability to penal consequences
  o (3) Vulnerability to penal consequences cannot be remote
  o (4) If a doubtful case, consider surrounding circumstances
    ▪ Other evidence supporting the declarant’s involvement?
  • Again – don’t confuse this with admissions by a party
    o This exception applies when we have declarations by a non-party

4) PRIOR TESTIMONY
• **Common law exception and Statutory provisions**
  – e.g. *Criminal Code* – ss. 715, 715.1, 715.2
• **Common law exception for prior testimony of non-party witness:**
  – (1) Witness is unavailable - necessity
  – (2) Parties are substantially the same
  – (3) Material issues to which the evidence is relevant are substantially the same - reliability
  – (4) Party against whom the evidence is tendered had an opportunity to cross-examine the witness in the earlier proceedings – reliability
• Is the exception overly restrictive?
  – e.g. Alice is charged with dangerous driving causing bodily harm to Carol. Bob testifies at Alice’s criminal trial. Bob says Alice was driving. Bob dies. Carol sues Alice.
    • Can Carol introduce Bob’s evidence from the criminal trial?
    • Under the common law, no – **different parties** *(R v Alice; Alice v Carol)*
  – Principled exception?
can try to fit into principled exception based on necessity and reliability – could be ruled admissible

STATUTORY EXCEPTION – CRIMINAL CODE

- **715 (1)** Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person
  - (a) is dead,
  - (b) has since become and is insane,
  - (c) is so ill that he is unable to travel or testify, or
  - (d) is absent from Canada,
  - and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

  - Discretion used in R v Daviault
    - SCC ordered a new trial following upon its ruling with the respect to the defense of extreme intoxication
    - Elderly victim of the sexual assault had died
    - The complainant had made a statement to the police that differed from her testimony at trial – she had said in the statement to the place that Daviault was drunk and then at trial she had said that he did not appear drunk – the Crown had not disclosed that prior statement to the defence before the first trial
      - Trial judge exercised discretion and did not allow the Crown to read into evidence the woman’s testimony from the first trial

**Example (statutory exception):**

- (1) Declarant’s evidence given at Accused’s previous trial or preliminary inquiry
- (2) Declarant either
  - Refuses to be sworn or give evidence,
  - Is dead or too mentally ill to testify, or,
  - Is outside of Canada
- (3) Declarant’s prior testimony was given in the presence of the Accused, and the Accused had a full opportunity to cross-examine the declarant

- May also be admissible in civil cases under the Rules of Court in a province

**Prior Testimony**

- Opportunity to cross-examine is enough
  - Need not have taken that opportunity
  - Has tactical implications

5) PRIOR IDENTIFICATION

An out-of-court identification can be admitted for its truth when a witness makes an in-court identification or testifies that they made an accurate identification in the past.

- Hearsay exception applies:
  - (1) Witness makes an in-court identification
  - (2) Witness can’t make an in-court identification, but can testify that they (a) previously gave a particular description, or (b) previously made an accurate identification
    - The prior identification must have been done under reliable circumstances.
  - e.g. may introduce evidence of a photo line-up conducted by the police
    - Can be relied upon to prove truth of contents, i.e., identification of person selected
Why do we privilege this out-of-court testimony of prior identification?

- Normally the common law is suspicious of out-of-court statements

**But where there has been a reliable identification, we know that this evidence is generally far more reliable than a “dock ID”**

- Properly conducted photo line-up – powerful

**e.g. “line-up” (either in-person or photo lineup)**

- Witness identifies the AC
- Out-of-court statement
  - Witness: “I pick out suspect #3” – Alice
  - Crown calls the police officer who conducted the line-up at trial
    - Crown: “Who did the witness identify?”
    - Police: “The witness identified suspect #3, Alice.”
    - Objection: Hearsay – going to the truth of the contents – goes to ID
  - The out of court statement can often be more reliable than an in-court identification

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**6) PRIOR CONVICTIONS**

- Party to a civil proceeding may prove that the other party (or a third party) has been convicted of a criminal offence → used to establish that the person committed the offence charged
  - However – it is accepted law that an acquittal is not admissible in a subsequent civil trial to prove that the party did not commit the offence

**ALBERTA EVIDENCE ACT**

**26(2)** When

(a) a person has been convicted of or is found guilty of an offence anywhere in Canada, and
(b) the commission of that offence is relevant to an issue in an action,

then, whether or not that person is a party to the action, proof of the conviction or the finding of guilt, as the case may be, is admissible in evidence for the purpose of proving that the person committed the offence.

**24(6)** Subject to subsection (4) [deals with defamation], the weight to be given the conviction or finding of guilt shall be determined by the judge or jury, as the case may be.

- In practice, difficult to overcome the presumption of facts established by a criminal conviction
  - High degree of fairness to the accused
  - Higher burden of proof
- But consider guilty plea to $150 traffic ticket
  - Should this be used to establish liability in a million-dollar personal injury claim?

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**7) SPONTANEOUS STATEMENTS: RES GESTAE**

- **Res Gestae**: “Facts surrounding or accompanying a transaction”
  - Wigmore: “entirely useless” and “positively harmful” expression
    - What is the “transaction”?
  - This is 4 discrete but related exceptions in one – they all involve “the things done” (res gestae) in the heat of the moment.
    - Basis: spontaneous utterances are unlikely to be false since there isn’t time to fabricate them. They have the “hallmark of truth.”

**Spontaneous statements:**

- (1) Statements of present physical condition
- (2) Statements of present mental state
- (3) Excited utterances
- (4) Statements of present sense impression

- Necessity?
  - In general, declarant does not need to be unavailable
Instead, based on the idea that these contemporaneous statements are the “best evidence available”

- Reliability?
  - Statement made spontaneously – no time for concoction and probably limited motive to lie

(1) STATEMENTS OF PRESENT PHYSICAL CONDITION

- P&S: Where a person claims to be experiencing a particular physical condition, the statement containing that claim is admissible, but only to prove that the person was experiencing the condition at the time, and to establish its duration.
  - Only allows present sense impressions – “my foot hurts” is fine, but “my foot started hurting yesterday” doesn’t qualify.
  - Once litigation is possible or the person has an intention to litigate, this exception doesn’t apply – there’s a motive to fabricate then.
  - Frequently relied upon to admit statements shortly after a violent incident or accident
    - Rationale – little time to fabricate, unlikely to lie (e.g. to doctors who are providing treatment)
      - Deals with sincerity, narration, memory, and perception concerns with hearsay
  - Example – Personal injury lawsuit – trip & fall
    - Plaintiff walking on the sidewalk stumbles and falls and twists his neck. A witness walks by and hears the Plaintiff moaning holding his neck and complaining of pain. - Admissible as a statement of present physical condition
  - Example – Personal injury lawsuit – trip & fall
    - Plaintiff goes to the doctor, two hours later. When the doctor touches Plaintiff’s neck, the Plaintiff winces and moans in pain.
    - Doctor: “The patient winced and moaned when I touched his neck.” - Hearsay? Being relied upon for truth of the fact that Plaintiff is in pain – assertive conduct
    - Live issue in case – degree of pain / duration of injury – quantum of damages
    - Falls within exception – “statement of pain”
  - Example – Personal injury lawsuit – trip & fall
    - Plaintiff goes to the doctor a month later. Plaintiff tells the doctor that he was in severe pain for two weeks after his accident, which was caused by tripping on the sidewalk.
    - Doctor: “The patient told me he was in severe pain for two weeks before his pain started to resolve. He also told me that the injury was caused by tripping on an uneven sidewalk.”
    - Admissible? – No
    - Must be a statement of present physical condition, or at least relatively contemporaneous with the physical sensation
    - Statements about the cause of the injury are not covered by the exception

There is case law that reflects concerns about availability of this hearsay exception where:

- (1) The declarant is available to testify and can remember the sensation in question, or,
- (2) Litigation is contemplated or has been commenced
- See Samuel v Chrysler Credit, 2007 BCCA 431
  - Person was injured, and was going to the doctor multiple times reporting pain
  - Note: defense will want to make the doctor’s hearsay evidence inadmissible; they will want the plaintiff to take the stand so the evidence can be tested through cross examination
  - Issue: will begin to be issues with motive to lie, etc. if exception is too generous

(2) STATEMENTS OF PRESENT MENTAL STATE

- P&S: Where a person describes his or her present state of mind (emotion, intent, motive, plan), the person’s statement to that effect is admissible where the state of mind is relevant and the statement is made in a natural manner and not under circumstances of suspicion.
- Remember – have to consider the purpose for which a statement of present mental state is being introduced by a party
  - e.g. Witness testifies she heard deceased yell at accused: “I hate your guts! I’m going to kick your ass!”
• Self-defence case → Is this hearsay? Need we even worry about finding a hearsay exception? Out-of-court statement, but is it being admitted for the truth of its contents?
  • Relevance → fact the statement was made, not the truth of the deceased’s assertions; goes to existence of Accused’s subjective fear and the reasonableness of the accused’s response
• We can infer some facts from a person’s state of mind (“I’m taking the dog for a walk” → I took the dog for a walk → makes it more likely I was walking in a certain area). But we can’t use one person’s state of mind to prove another person’s intentions or location or actions.

**R V STARR.** 2000 SCC 40 – PRESENT MENTAL STATE EXCEPTION NOT PROVEN – MADE IN CIRCUMSTANCE OF SUSPICION (TALKING TO WIFE BUT IN CAR WITH ANOTHER WOMAN) – INFERRING MENTAL STATE OF SOMEONE OTHER THAN DECLARANT

• Murder case – victim is Cook – largely circumstantial case
• One hour before Cook is killed, he tells his girlfriend: “I’m going to go do an Autopac scam with [Starr].”
• Crown seeks to lead this statement through the girlfriend testifying – hearsay
  • Chain of reasoning: Cook’s intention to go be with Starr → (suggests that he was) actually was with Starr shortly after he expressed this intention → (suggests that it is) more likely Starr killed Cook (identity)
  • Crown’s assertion is that the evidence helps shows identity – the statement is sought for admission as to the truth of the statement
• **First problem:** Serious doubts about reliability of the statement of future intention
  • Cook’s girlfriend had just found Cook sitting alone in a car with another woman (so, perhaps there was a motive to lie)
  • Strong motive to lie about what his intentions were later that night
  • Statement was made under circumstances of suspicion → raises reliability concerns, and therefore, does not fall within present mental state exception
• **Second problem:** Crown argued to jury that “Starr had proposed the Autopac scam to Cook, so that Cook wasn’t worried about meeting him”
  • But there was no other evidence that Starr intended to commit an Autopac scam, beyond Cook’s hearsay statement
  • Hearsay exception allows proof of Cook’s present mental state – Cook’s intention to meet Starr commit auto fraud – but not Starr’s mental state
  • Crown was inviting jury to use hearsay statement to infer Starr’s intentions – not just Cook’s → impermissible
• **Evidence not admissible under present mental state exception to show state of mind of persons other than the declarant**
  • Enormous reliability concerns; cannot test source of belief

**R V GRIFFIN.** 2009 SCC 28 – COMMENT – IF ANYTHING HAPPENS TO ME, IT’S GRIFFIN – NO CIRCUMSTANCE OF SUSPICION – HEARSAY EXCEPTION VALID

• Murder case – victim is Poirier – ID is the issue
• Poirier and Griffin both heavily involved in drug trade – largely circumstantial case
• Poirier’s girlfriend, Williams, testifies that shortly before Poirier is shot, he tells her: “If anything happens to me it’s your cousin’s family.”
• Clear from the surrounding circumstances Poirier must have been referring to Griffin
• **Assertion of statement:** “If anything happens to me it’s [Griffin].”
• Crown argument: falls within hearsay exception for a statement of present mental state
  • Through this statement, Poirier expressing fear of Griffin, and this is important circumstantial evidence of ID
  • Chain of reasoning: Statement → specific fear of Griffin → helps explain state of relationship between the parties → evidence of animus/motive → identity of shooter
    • Long, tortured path to relevance, but somewhat reaching
• Reasoning:
• “In the present case, there was no argument that the statement was made under circumstances of suspicion.”
• “Poirier’s fear of Griffin was a relevant fact — it was relevant to motive and, in turn to the issue of identification.”
• “Although a declarant’s hearsay statement cannot constitute proof of a third party’s state of mind, this does not mean that the declarant’s state of mind can have no bearing on other issues in the case.”
• “That the relationship between a deceased and an accused was acrimonious or that the two had engaged in a dispute in the period leading up to a murder are highly relevant to the issue of motive because such information may afford evidence of the accused’s animus or intention to act against the victim.”
• “In the instant appeal, Poirier’s fearful state of mind is probative of the nature of the relationship between he and Griffin in the time period immediately preceding the murder.”

Fish J.’s Dissent:
• Considers the four problems with hearsay when deciding whether the exception should apply: perception, narration, memory, sincerity
• Concerns here aren’t with narration, memory, or sincerity – we can assume Poirier explained information properly, hadn’t forgotten anything relevant, and was telling the truth about his fears
• Note: in tough cases, it is useful to go back to the fundamental principles and dealing with the concerns that the hearsay exclusion is aimed at

(3) EXCITED UTTERANCES

A statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress of excitement caused by the event or condition.

• Key requirement: Statement is made in response to an event where there is no possibility of fabrication
  • “…the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded.”
• Basis for the excited utterances exception?
  • Sincerity ➔ Little time for fabrication
  • Memory ➔ Event still transpiring, so little risk of forgetfulness
  • Narration ➔ Usually relates to straightforward facts
  • Perception ➔ Perception heightened by stressful event
• Is this confirmed by social science evidence?
  • Stressful events have significant impact on our ability to correctly perceive incident, narrate it correctly
  • So the justifications above don’t seem to hold entirely true

• Possible applications?
  • 911 calls, during or immediately after a violent incident
    • e.g. R v Nicholas (2004), 70 OR (3d) 1 (CA): B&E & sexual assault trial. CO calls 911 about 10 minutes after incident. Too traumatized to testify at trial. 911 call admitted as excited utterances.
      • Here, the facts did not leave a question as to consent, the evidence was important for identity
    • Be careful, however:
      • Fabrication/concoction does not take long
      • Fact-specific – in Nicholas, facts fairly straightforward case
      • Statements in 911 call – often jumbled mess, omit important facts
        • So not all 911 calls are admissible – still fairly difficult to make those calls admissible
  • Immediate responses by accused when confronted with contraband?
    • e.g. R v Graham, [1974] SCR 206: Stolen briefcase found in hotel room. When confronted: “I have never seen it before in my life”.
    • e.g. R v Risby, [1978] 2 SCR 139: Officer: “What is this?” (holds up bag of drugs). Accused: “I don’t know.”
  • Some authority to suggest that if declarant is available, they should be called rather than relying on the hearsay
• i.e. party relying on excited utterances exception must establish necessity for relying on the hearsay statement

(4) STATEMENTS OF PRESENT SENSE IMPRESSIONS
• P&S: A statement that describes or explains an event or condition made while the person was perceiving the event or condition, or immediately thereafter, may be admitted for its truth.
  • Little (if any) Canadian authority explicitly recognizing this exception
  • Example: Witness overhears a bystander say “that car is going really fast!” right before an automobile accident (but witness doesn’t see the car herself)
  • Exception would allow witness to testify as to what bystander said, for the truth of its contents

8) DECLARATIONS IN THE COURSE OF DUTY – E.G. NURSE NOTES, LEG AMPUTATED (ARES V VENNER)
• This rule is found in statute and in common law.
• Illustrative hypothetical – medical malpractice case - *Ares v Venner*
  • Skiing accident in Jasper – breaks leg
  • Plaintiff goes to the doctor, has a cast applied
  • Nurse makes notes after cast applied – patients toes are swollen and blue, cannot move toes
  • Ultimately, due to loss of circulation, patient loses leg
• Plaintiff wants to introduce this evidence
• Easy – just call the nurse as a witness
  • Problem: we can’t tell which nurse made the notes!
  • Years later – nurses can’t distinguish handwriting
  • These are the facts of *Ares v Venner*, [1970] SCR 608
  • Are we as concerned about this sort of hearsay?
  • Prepared as a matter of routine and regularly relied upon by the businesses (few perception, narration concerns)
  • Recorded contemporaneously (few memory concerns)
  • Little motive to fabricate (few sincerity concerns)
• Traditional rule – hearsay, inadmissible
  • Find the witness and call them, or it isn’t going in

COMMON LAW EXCEPTION – ORAL/WRITTEN DECLARATIONS ADMISSIBLE WHEN (5):
Records can be admissible for their truth where:
• (1) Made reasonably contemporaneously
• (2) In the ordinary course of duty
• (3) By persons having personal knowledge of the matters
  • Relaxed in Monkhouse – just needs to be in the usual and ordinary course of business
• (4) Who are under a duty to make the record or report
• (5) There is no motive to misrepresent the matters recorded

Remember, will still need to establish these preconditions to get records admitted
• Can’t just walk into court with a photocopy of business records and assert the hearsay exception applies
• Someone will need to testify to nature of how records are kept, etc.
• The *business records exception* is the only exception that allows double hearsay (something you heard from someone else who heard it from someone else).
• In general, this exception is sensitive to business realities – issues with multiple authorship of records, incorporation by reference, etc. are less important than the process by which the records were made.

R V MONKHOUSE, 1987 ABCA 227 - PERJURY CASE – DECLARANT NEED NOT HAVE PERSONAL KNOWLEDGE – JUST NEEDS TO BE ORDINARY AND USUAL COURSE OF BUSINESS
• Perjury case – allegation AC lied about his income in maintenance proceedings
  • The accused appeals his conviction in Court of Queen’s Bench for perjury
  • The sole issue on the appeal is the admissibility of oral evidence of entries in payroll records relating to
    the appellant’s earnings over a two month period.
  • The witness, who was the Payroll Manager of the appellant’s employer, had extracted from more
    extensive payroll records, those which relate to the appellant for the period in question and read them into
    the record.
  • He had no personal knowledge of the information contained
• Crown sought to introduce business records (truck driver)
  • (1) Accused prepares and submits time slips
  • (2) Time slips transcribed by other employees (not called at trial) onto time sheets
  • (3) Crown witness used these time sheets to establish how much the AC had earned in the relevant period
• Time slips themselves?
  • Probably an “admission” – would be admissible on that basis, but these aren’t what were being relied
    upon by the witness
• But what about the time sheets?
  • Prepared by a third party employees, not called at trial
  • Out-of-court statement, relied upon for their truth
• Admissible under what is usually called the common law “business records exception” (from Ares v
  Venner)?
  • (1) Made reasonably contemporaneously, (2) In the ordinary course of duty, (3) By persons having
    personal knowledge of the matters, (4) Who are under a duty to make the record or report, (5) There is no
    motive to misrepresent the matters recorded
    • Person who prepared time slips did not have personal knowledge of how much AC had worked
• ABCA relaxes rule somewhat:
  • “The [record] need not have been made personally by a recorder with knowledge of the thing recorded. …
  [1]It is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for
  the preparation of business records.”
  • “Modern business records are customarily a compilation of original documents such as sales slips or other
    memoranda and rarely would that compilation be made by the person who prepared the original
    document. Yet those records are accepted as valid daily by all those affected by them.”
    • Evidence ruled admissible
• Here, reliability enhanced by the fact the AC was the source of the original information (time slips)

STATUTORY “BUSINESS RECORDS EXCEPTIONS”

Canada Evidence Act
30(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the
usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this
section in the legal proceeding on production of the record.
• Not enough that record simply made by a business
  • Must be created in the usual and ordinary course of business
    • “Business” is construed broadly – includes government agencies, corporations, etc.
    • Materials produced outside of the ordinary course of business (e.g. police records, investigations)
      aren’t admissible here.
  • Does not need to relate to the specific “business” carried on by an organization – may be “auxiliary”
    • e.g. railroad – can still admit, say, payroll records
  • Distinctions between questions of fact vs. opinion
    • But a hard distinction to draw (e.g. nurses and doctors opinions)?
Where it is not possible or reasonably practicable to produce any record described in subsection (1) …, a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy’s authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is … an affidavit of each of those persons …

• i.e., if you are not introducing the original document itself, get affidavits explaining:
  • (a) why you can’t produce the original, and,
  • (b) the fact the copy is authentic

Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

• Must give notice of intention to produce business records (minimum 7 days; more obviously better)

… [A]ny person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

• Can always ask judge for permission to cross-examine witnesses about the reliability of the record, how it was created, etc.

CEA s. 30(10)(a): Records made in the course of an investigation or inquiry are deemed inadmissible

CEA s. 30(11): Does not occupy the field – common law business records exception still applies

CEA s. 30(12): “business” defined to include government bodies as well as commercial businesses

Note: if you don’t fit the statutory exceptions, you can rely on the common law exception

STATUTORY EXCEPTIONS: “SHORTCUTS TO PROOF”

CONTROLLED DRUGS AND SUBSTANCES ACT:

45(1) An inspector or peace officer may submit to an analyst for analysis or examination any substance or sample thereof taken by the inspector or peace officer.

(2) An analyst who has made an analysis or examination under subsection (1) may prepare a certificate or report stating that the analyst has analysed or examined a substance or a sample thereof and setting out the results of the analysis or examination.

• This kind of document would normally be an out of court statement, and therefor excluded as hearsay – it is also opinion evidence outside the scope of an ordinary person’s knowledge

Controlled Drugs and Substances Act:

51(1) Subject to this section, a certificate or report prepared by an analyst under subsection 45(2) is admissible in evidence in any prosecution for an offence under this Act or the regulations or any other Act of Parliament and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate or report, without proof of the signature or official character of the person appearing to have signed it.

• Would normally be hearsay

TRAFFIC SAFETY ACT, S. 5

• Documents signed by officials

5 … (2) When proof is required of … (b) the disqualification of a person from driving a motor vehicle in Alberta … the production of a certificate purporting to be signed by the Registrar stating that …

• (d) the person named in the certificate is disqualified from driving a motor vehicle … shall be admitted in evidence as proof, in the absence of evidence to the contrary, … that the person so named is so suspended or disqualified, without proof of the signature or official character of the person signing the certificate, if any.

• (5) A document or certificate referred to in this section is admissible in evidence in all actions to which the Alberta Evidence Act applies.
In any proceedings, an affidavit or a solemn declaration of a person who claims to be the lawful owner of … property that was the subject-matter of the offence … containing the statements referred to in subsection (2), shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration …

(2) For the purposes of subsection (1), a person shall state in an affidavit or a solemn declaration
(a) that the person is the lawful owner of, or is lawfully entitled to possession of, the property …;
(b) the value of the property;
(c) in the case of a person who is the lawful owner of … the property, that the person has been deprived of the property by fraudulent means or otherwise without the lawful consent of the person; …
(d) any facts within the personal knowledge of the person relied on to justify the statements referred to in paragraphs (a) to (c.1).

• 657.1(3) → Crown must give copy of affidavit to accused and must provide reasonable notice of intention to tender it in evidence
• 657.1(4) → Court may order that the affiant attend at trial for examination or cross-examination
• This allows for an owner of the stolen property to submit a sworn affidavit rather than actually make a statement in court

Criminal Code, s. 715.1

• Evidence of victim or witness under 18
  o 715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

Criminal Code, s. 715.2

• Evidence of victim or witness who has a disability
  715.2 (1) In any proceeding against an accused in which a victim or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

REQUIREMENTS FOR STATUTORY EXEMPTIONS – ADDRESSING FAIRNESS CONSIDERATIONS

• Notice requirements
• Ability to apply for attendance of witness for cross-examination
• Similar statutory provisions:
  – Proving driving disqualifications
  – Proving that property was stolen
  – “Certificate of Analysis” in impaired driving prosecutions

PRINCIPLED EXCEPTION

DEVELOPMENT OF THE PRINCIPLED EXCEPTION

• DPP v Myers (1965) – HL refuses to create new hearsay exception
• Ares v Venner (1970) – SCC departs from HL approach; creates new common law business records exemption
  • Around the same time – Canada Evidence Act amendments for business records
• Still considerable academic concern about under-inclusiveness of hearsay exceptions

R v Khan, [1990] 2 SCR 531 – PRINCIPLED EXCEPTION – NECESSARY AND RELIABLE
**Ratio**: hearsay evidence is admissible if it can be shown to be sufficiently necessary and reliable

**Disturbing facts**
- 3.5 year-old child left alone with a doctor in the doctor’s office for about fifteen minutes
- Mother notices wet spot on child’s sleeve while leaving doctor’s office
- Approximately 15 minutes after leaving office, child discloses a sexual assault to the mother (“[Doctor Khan] put his birdie in my mouth,” etc.)
- Disclosure is apparently without prompting/leading questions
- Forensic evidence corroborates – mixture of semen and saliva on child’s sleeve (apparently no DNA evidence)

**Problem – child is not competent to testify**
- Essentially, child too young to understand promise to tell the truth
- In any event, serious concerns about whether a child of this age would remember incident and be able to recount it long afterwards at a trial
- Without child’s testimony, circumstances are extremely suspicious, but unlikely to constitute proof

**Decision**: dismiss the appeal; new trial ordered; conclude that the mother's statement in the case at bar should have been received

**Reason:**
- Crown attempted to introduce the evidence through a “spontaneous statement” hearsay exception
  - Recall: A statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress of excitement caused by the event or condition.
  - Many American courts had permitted the introduction of similar statements by children under this hearsay exception
  - SCC unwilling to apply the traditional exception
    - (1) Statement was not contemporaneous – 15 minutes had elapsed since incident
    - (2) Statement not made under sufficient pressure or emotional intensity to give the statement a guarantee of reliability
- Instead, SCC develops broad new approach to hearsay
  - Relies on dissent from DPP v Myers – basic principle underlying all hearsay exceptions is (1) reasonable necessity, plus (2) threshold reliability
  - (1) Reasonable necessity?
    - Here, inadmissibility of child’s evidence established necessity
  - (2) Threshold reliability? Discussed factors such as:
    - Timing of disclosure – quick disclosure
    - Absence of any reason to expect fabrication
    - Availability of child for cross-examination
    - Circumstances surrounding how hearsay statement was taken
    - Corroboration by other evidence – physical evidence of semen on child’s sleeve
  - Further Refinement of Principled Exception
  - It was not entirely clear from Khan whether this was a rule limited to the evidence of very young children, or whether it reflected a broader principle/exception
  - In the years that followed, the SCC clarified that what we were really dealing with was a broad new, residual hearsay exception
    - Further Refinement of Principled Exception
    - They said that no new hearsay rules would be accepted but the principled exception could be applied
  - Many important cases have refined the principled exception over the years:

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**PRINCIPLED EXCEPTION TO THE HEARSAY RULE: PRINCIPLES** – **TEST TO APPLY ON EXAM**
Evidence may be admissible for its truth when it is reasonably necessary and meets threshold reliability.

Younger’s rule – R+N=1. The greater the necessity, the less reliable it has to be to get admitted (and vice versa).

R+N has to be proved in *voir dire* to make an out of court statement admissible.

- Have to show that the evidence is sufficiently R+N to justify not being able to cross-examine about it.

**Test to Apply:**

1. **Is the impugned evidence hearsay?**
   - *Hearsay evidence is presumptively inadmissible.*
   - Therefore, the first question is: *is the impugned evidence hearsay?*
     - (1a) Is it an out-of-court statement (and thus not subject to contemporaneous cross-examination)?, and
     - (1b) Is it being relied upon for the *truth of its contents*?
   - *Burden of overcoming presumption is on the party that seeks to introduce the hearsay.*
2. **Does the hearsay evidence fall within a hearsay exception?**
   - (2a) If it falls within a statutory exception, it is admissible.
   - (2b) If it falls within a traditional common law exception, the evidence is almost certainly admissible, and there is no need to consider the principled exception to the hearsay rule.
   - (2c) *However, in rare cases,* a traditional common law hearsay exception itself can be challenged. A court could decide to modify the common law hearsay exception, to reflect the fundamental importance of necessity and reliability.
   - (2d) *Furthermore, in rare cases,* hearsay evidence that falls within an existing common law hearsay exception may be excluded because indicia of reliability and necessity are absent *in the particular circumstances of the case.*
3. **If the hearsay evidence does not fall within a statutory or traditional common law hearsay exception, is it admissible under the principled exception to the hearsay rule where there is both:**
   - (3a) Reasonably *necessity,* and,
   - (3b) Threshold *reliability.*
   - *The burden of establishing reasonable necessity and threshold reliability falls on the party that seeks to rely on the principled exception to introduce the hearsay.*
   - *Remember that the principled exception does not justify the admission of “otherwise inadmissible” evidence.*

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**1. IS THE IMPUGNED EVIDENCE HEARSAY?**
   - *Hearsay evidence is presumptively inadmissible.*
   - Therefore, the first question is: *is the impugned evidence hearsay?*
     - (1a) Is it an out-of-court statement (and thus not subject to contemporaneous cross-examination)?, and
     - (1b) Is it being relied upon for the *truth of its contents*?
   - *Burden of overcoming presumption is on the party that seeks to introduce the hearsay.*
2. **Principled Exception to the Hearsay Rule: Principles**

**2. DOES THE HEARSAY EVIDENCE FALL WITHIN A HEARSAY EXCEPTION?**

- Why do we still concern ourselves with the traditional exceptions?
  - Can’t everything be resolved by an application of the principled exception (necessity/reliability)?
  - Theoretically, yes – but there is value to predictability and certainty
  - Traditional exceptions provide a “useful shorthand”
- Will the courts ever develop a *new* common law hearsay exception (as happened in *Ares v Venner*)?
  - It appears not – *Smith* (1992): “The decision of this Court in *Khan* … should be understood as the triumph of a principled analysis over a set of ossified judicially created categories. … *Khan* … signalled an end to the old categorical approach to the admission of hearsay evidence.”
(2a) If it falls within a statutory exception, it is admissible. 
- Remember, the rules of evidence are creatures of common law
- If Parliament (or a provincial legislature) overrides the hearsay rule by statute, that rule governs
  - Subject always to a Charter challenge, of course
- There may be nuance to the statutory exception (and even statutory sub-exceptions within that exception), but you don’t need to resort to the common law hearsay exceptions or the principled exception
  - Principled Exception to the Hearsay Rule: Principles

(2b) If it falls within a traditional common law exception, the evidence is almost certainly admissible, and there is no need to consider the principled exception to the hearsay rule.
- Except in one of the rare and unusual cases described below, you don’t need to discuss the reliability or necessity of the hearsay evidence when it falls within the four corners of an existing exception.

(2c) However, in rare cases, a traditional common law hearsay exception itself can be challenged. A court could decide to modify the common law hearsay exception, to reflect the fundamental importance of necessity and reliability.
- So there’s a caveat: the common law can always change, so there’s always a chance the courts will reform the traditional exception
- Emphasis is on “rare cases,” however – quite uncommon
- *Starr* (2000): The *res gestae* hearsay exception for “present state of mind” was modified to require that the statement of present state of mind “appear to have been made in a natural manner and not under circumstances of suspicion” → i.e., with circumstantial guarantees the statement is reliable

(2d) Furthermore, in rare cases, hearsay evidence that falls within an existing common law hearsay exception may be excluded because *indicia* of reliability and necessity are absent in the particular circumstances of the case.
- There may be (again, unusual and rare) situations where there is something about the particular hearsay evidence sought to be introduced by the Crown that makes it not reasonably necessary, or of questionable reliability.
- TOL retain discretion refuse to admit the evidence even if it falls within the traditional hearsay exception.
- Here, the burden falls on the party that does not want the hearsay admitted, to demonstrate why there are insufficient indicia of reliability or necessity.

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### (3) IF THE HEARSAY EVIDENCE DOES NOT FALL WITHIN A STATUTORY OR TRADITIONAL COMMON LAW HEARSAY EXCEPTION, IS IT ADMISSIBLE UNDER THE PRINCIPLED EXCEPTION TO THE HEARSAY RULE WHERE THERE IS BOTH:

- (3a) Reasonably necessity, and,
- (3b) Threshold reliability.

### ULTIMATE USE OF HEARSAY

#### Admissibility of Hearsay
- Stage #1: Relevance? If yes, presumptively admissible.
- Stage #2: Exclusionary Rules – Is it Hearsay? If yes, presumptively inadmissible.
  - **Statutory Hearsay Exception**: Falls Within Statutory Exception to Hearsay Rule? If yes, admissible.
  - **Common Law Hearsay Exception**: Falls Within Recognized Common Law Hearsay Exception? If yes, almost certainly admissible (but…)
    - **Exception to Common Law Hearsay Exception**: Rare Case Where Hearsay Exception Doesn’t Apply Because of Case-Specific Necessity/Reliability Concerns? If yes, inadmissible.
  - **Principled Exception to Exclusionary Rule**: Falls Within Principled Exception? If yes, admissible.
- Stage #3: Prejudicial effect outweighs probative value (or for defence evidence, substantially outweighs)? If yes, inadmissible.

#### Admissibility – Trier of Law, Question of Law
• **Stage #1:** Relevance?
• **Stage #2:** Hearsay Rule and Hearsay Exceptions?
  • Principled exception: threshold reliability and reasonable necessity
• **Stage #3:** Prejudicial effect outweighs probative value?

**Weight – Trier of Fact, Question of Fact**
• Should we accept/believe/rely upon the hearsay when fact-finding?
  • **Ultimate** reliability
• How convincing is the hearsay evidence?
• Do any remaining hearsay concerns affect whether it is safe to rely upon the hearsay (e.g. because of no oath, no observation of demeanor, no contemporaneous cross-examination)?
• Does the inability to completely test the declarant’s perception, narration, memory, or sincerity raise reliability/credibility concerns?
  • Lawyer can argue that hearsay evidence is not reliable as she was unable to test it in cross examination
• Hearsay evidence is weighed in the context of all admissible evidence

(3A) **REASONABLE NECESSITY**

**Under the principled exception, when is hearsay evidence “reasonably necessary”?**
- Some cases are obvious – no other way the evidence could be admitted, because witness is simply unavailable
  - Witness is deceased
  - Witness incompetent to testify (e.g. too mentally ill to give evidence)
  - Witness is absent (e.g. has absconded and cannot be located after reasonable efforts)
- But *reasonable* necessity may include other circumstances where a witness is “available”
  - Witness physically present, but refuses to be sworn
  - Witness unable to testify without suffering trauma
  - Witness is physically present and testifies, but claims to have no memory of relevant facts
  - Witness is physically present and testifies, but *recants* (i.e. gives a different version of events than in their out-of-court statement)
  - It would take an inordinate amount of time or expense to call a witness to personally give the evidence (*greater acceptance in civil cases*)

• **There is no “presumption of necessity,” and necessity should not be lightly assumed**
  • Where party is relying on “trauma” exception, usually requires expert evidence of likely effects of testifying
  • Trauma – more than just fear or disinclination to testify
• May need to put the witness on the stand and explore the witness’s evidence (in a *voir dire*) before concluding necessity has been established
  • Often a real concern where a witness is very young or mentally disabled
• **Failure to take reasonable efforts to secure a witness’s evidence may undermine the claim of reasonable necessity**
  - Did you try to find the witness?
  - Did you put them under subpoena?
    • If not, then reasonable necessity will likely not be found
  - Did you try to take a sworn statement from a very old or sick witness?
  - Did you try to arrange a video link for a witness outside Alberta/Canada?
- Necessity is not the same as “importance to the party’s case”
  • It means that there is no other way to bring the evidence before the court

(3B) **THRESHOLD RELIABILITY**
• Are there other factors that allow the TOF to properly assess and evaluate the evidence, even though it is hearsay?

**Two subcategories of “threshold reliability”**
- (i) Inherent Trustworthiness (Substantive Reliability)
- (ii) Testability (Procedural Reliability)

**Not mutually exclusive!**: Concerns with one aspect can be compensated for by strengths with the other aspect
- Some inherent trustworthiness combined with some testability can be enough to equal “threshold reliability”
- For example, think about the case of Khan:
  - The child’s statement is not very testable, as she cannot respond to questions and be cross-examined; however, the inherent trustworthiness is high (age, innocence, time between act and making the statement, lack of motive to lie, not responding to pointed inquiry from mother)

**Threshold reliability – TOL acting as a gatekeeper**
- Threshold reliability not go to ultimate issue of whether the hearsay evidence should be believed/accepted by the TOF
- Even if admitted, the weight placed on the hearsay evidence is an open question, subject to argument, and reserved for the TOF – ultimate reliability
- Still, the TOL is clearly considering some matters typically reserved for the TOF
- Is the evidence worthy of consideration by the TOF?

(I) INHERENT TRUSTWORTHINESS (SUBSTANTIVE RELIABILITY)
- “There is no real concern about whether the statement is true or not because of the circumstances in which it came about.”
  - Not entirely true…
- Consider Khan (“the perfect case”)
  - Statement made very shortly after incident
  - Very young declarant who is discussing matters outside a young person’s ordinary knowledge
  - No leading/suggestive comments
  - No motive to lie
  - Corroborating physical evidence

**Relevant Questions for Inherent Trustworthiness:**
- Was the statement **spontaneous**, or was there time for reflection/contamination/fabrication? **How long after the events in question was the statement given?**
- Was the statement given naturally and without suggestion, or was it in response to prompting or leading questions?
- Does the declarant have a record of dishonesty?
  - Obviously less reliability if there is a record of perjury convictions, or known as a liar
- Did the declarant have a motive to lie or fabricate the statement? Or is there a proven absence of motive? Is there evidence that the declarant feels malice or animus towards the subject of the hearsay statement?
- Does the declarant have a motive to lie to the recipient of the hearsay statement? Was the statement partially against the declarant’s interest, or does it seem self-serving?
- Was the declarant (a) intoxicated or mentally ill at the time of the incident they are describing, or (b) intoxicated or mentally ill at the time they were giving the hearsay statement?
- Is the statement internally consistent? Is the statement plausible, or “fantastic”? inherently implausible?
- Are the contents of the statement confirmed by other evidence?
  - If there is corroboration by other evidence, does it go to the heart of the hearsay evidence (the reason it is being introduced by the party), or is it merely corroboration of minor or collateral facts?
  - Go back to the four basic concerns about hearsay: are there reasons to doubt the declarant’s perception, narration, memory, or sincerity?
• Couture (2007): “What must be shown is a certain cogency about the statements that removes any real concern about their truth and accuracy.”
  • Not a low threshold – “the test is a high one”
  • But remember, if there are concerns about the inherent trustworthiness of the hearsay, this can be compensated by strengths on the other aspect of threshold reliability, testability.

(II) TESTABILITY (PROCEDURAL RELIABILITY)

• “No real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested.”
  • Confusingly, this isn’t really about reliability at all
    • It is about whether there are adequate substitutes to contemporaneous cross-examination in the courtroom
• Are there adequate substitutes for:
  • (a) evidence under oath,
  • (b) observing the demeanor of the declarant, and most importantly,
  • (c) contemporaneous cross-examination of the declarant?

Questions to Ask for testability:
  o Was the declarant under oath when they made the hearsay statement? Were they warned of the consequences of lying, or the potential consequences to the person who is implicated by their statement?
  o Was the hearsay statement audiotaped or videotaped, so there are means of assessing the nuances of the evidence and the demeanor of the declarant?
  o Was the declarant cross-examined at the time they made the statement? Or was there sufficiently probing questioning to substitute for cross-examination?
  o Is the declarant now available to give evidence, under oath, at the trial?
    ▪ Probably the most important factor for testability – huge boost to testability and threshold reliability if the declarant can appear as a witness in court
    ▪ Couture (2007): “In the usual case, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes.”
  • But mere physical availability is not enough – the substitute we are seeking is a full opportunity to cross-examine the declarant
    • If the declarant is physically present but claims not to remember anything about the incident (or making the hearsay statement), cross-examination is not an effective way of testing the declarant’s out-of-court evidence
  • Concern is less about whether the hearsay statement is true, and more about whether the TOF can meaningfully evaluate its reliability and credibility
• Which should be considered first – (ii) testability, or (i) inherent trustworthiness?
  • May be worthwhile to consider testability first, because where there is sufficient procedural reliability, there is no need to examine the substantive reliability of the hearsay
  • Khelawon (2006): “When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement’s truth and accuracy, there is no need to inquire further into the likely truth of the statement.”
  • And again, remember that concerns about testability can be compensated for by inherent trustworthiness, and vice versa

COMMON CASE: PRIOR STATEMENTS OF A WITNESS

• Probably the most common example of a situation where a party seeks to introduce hearsay evidence under the principled exception
  • Basic problem:
    • Witness often don’t live up to expectations!

Common Example: The Use of Prior Statements of a Witness

• A witness adopts a prior, out-of-court statement where they can say:
• (a) that they remember making the prior statement, and,
• (b) based on their present memory, they can say that what they said in their out-of-court statement is true

• Once a witness adopts a prior out-of-court statement, in effect, it becomes part of their in-court evidence
• It is no longer hearsay, because they have asserted a present memory of the facts they previously stated out-of-court
• Not relying on the out-of-court statement – relying on the witness’s present memory and testimony → testable
• They can be fully cross-examined about their perception, narration, memory, and sincerity
• See R v Toten (1993), 14 OR (3d) 225 (CA).

But what if the witness doesn’t adopt their prior, out-of-court statement? – either because:
• (a) Even after reviewing their previous statement, they don’t have a present memory of those facts, or,
• (b) Their story has changed – they claim to remember things differently than they discussed in their prior statement

• Default rule at common law:
• Where a prior out-of-court statement is not adopted by a witness, that statement is not admissible for the truth of its contents
• Only admissible for credibility of the witness
• The opposing party can use the prior statement to impeach the witness, i.e. suggest the witness should not be believed
• But the TOF must be warned not to rely on the out-of-court statement for its truth – instead, only to assess the trustworthiness of the witness’s evidence

R v KGB, [1993] 1 SCR 740 – CRITERIA FOR THRESHOLD RELIABILITY - TESTIBILITY CONCERN

Ratio: criteria for the testability of hearsay evidence (threshold reliability): (1) The statement is made under oath or solemn affirmation, (2) The witness has been warned of the existence of sanctions for untrue statements, how the statement may be used in court, and the possible consequences if they are lying, (3) The statement is videotaped in its entirety, (4) The opposing party has a full opportunity to cross-examine the witness with respect to the statement

Facts:
• Two brothers were set upon by a group of four youths
• One of the youths produces a knife and stabs one of the brothers; that brother dies
• About two weeks after the stabbing, three of the four youths go to the police and make (separate) statements
• Statements are videotaped, and youth witnesses are cautioned that they could be charged
• Each had a parent; one had a lawyer
• In the statements, the three youth witnesses implicate KGB – suggest he admitted to them that he was the one who had stabbed the deceased
  o But when called at trial, three youth witnesses refused to adopt their videotaped statements
• Three youth refuse to adopt their out-of-court statements
  • Aside: There is a procedure where the party that calls a witness can apply to cross-examine their own witness about a prior statement – s. 9(2) of the Canada Evidence Act
• Here, when Crown cross-examines its own witnesses, they say they lied to the police when they made the earlier videotaped statements
  • Explanation?: they lied to exculpate themselves
  • Crown is left with a very thin case – Accused is acquitted
• Especially good facts for Crown:
  • Trial judge explicitly disbelieves the witnesses’ evidence at trial and prefers their videotaped statements; and
  • Witnesses subsequently plead guilty to perjury.
• Lamer CJC proposes requirements for substantive use of prior out-of-court statement
  • Attempt to replicate, as much as possible, all the traditional safeguards provided by in-court testimony
  • Now known as a “KGB statement”
    • As long as the 4 criteria below are met – threshold reliability will likely be met and evidence is admissible
• Reasonable Necessity?
  • Witness need not be physically unavailable – claim of lack of memory, or recantation, is sufficient
• Threshold Reliability?  →  *KGB* is about testability
  • Testability (Procedural Reliability) – four conditions
    • (1) The statement is made under oath or solemn affirmation
      • oath
    • (2) The witness has been warned of the existence of sanctions for untrue statements, how the statement may be used in court, and the possible consequences if they are lying
      • oath
    • (3) The statement is videotaped in its entirety
      • demeanor
    • (4) The opposing party has a full opportunity to cross-examine the witness with respect to the statement
      • Contemporaneous cross examination
• Inherent Trustworthiness (Substantive Reliability)
  • Where all of the above preconditions are met, in practice, threshold reliability is established, no matter the problems with the substantive reliability of the statement
  • TOL may not need to go on to consider in detail the statement’s substantive reliability

**THINGS TO REMEMBER ABOUT “KGB STATEMENTS” – 4 KGB CRITERIA OPTIMAL, NOT MANADATORY REQUIREMENTS**
• The prerequisites in *KGB* are optimal conditions, not mandatory prerequisites for admission of prior statements under the principled exception
  • Sometimes treated as a presumptive rule of admissibility where certain testability (procedural reliability) requirements are met
  • Effectively, like another distinct hearsay exception!
• *Khelawon*: Should not be interpreted as creating a categorical exception to the rule against hearsay based on fixed criteria
• When all of four conditions are not present, hearsay may still be admitted – particularly where there is something to say about inherent trustworthiness (substantive reliability)
  • And even where the four testability conditions are present, there remains discretion not to admit the statement in unique circumstances… inherent trustworthiness concerns, voluntariness and investigative misconduct

*KGB* ALSO SUGGESTS A THIRD REQUIREMENT, BEYOND (I) REASONABLE NECESSITY AND (II) THRESHOLD RELIABILITY – (III) VOLUNTARINESS AND NO INVESTIGATIVE MISCONDUCT
• (iii) voluntariness and no investigative misconduct
  • “The trial judge must satisfy him or herself … on the *voir dire* that the statement was not the product of coercion of any form, whether it involves threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.”
  • Separate requirement, or merely an aspect of threshold reliability?

Contents of Prior Statement Must be Otherwise Admissible
• Remember, the principled exception does not supersede all other exclusionary rules
• If an out-of-court statement contains evidence that is otherwise inadmissible, the statement should be edited before going before the TOF
  • e.g. character evidence
    • Declarant’s statement: “Bob has assaulted me three other times. He also likes to watch child porn.”
  • e.g. “double hearsay”
    • Declarant’s statement: “Alice told me that Bob had the gun.”
• But consider, e.g., admissions by a party (e.g. *KGB*)
Declarant’s statement: “Bob [the accused] told me he was the one who shot Carol.”

PRACTICAL ISSUES
- Domestic violence prosecutions
- Voluntariness of statement?
- If the witness can provide a somewhat reasonable explanation about why they lied, are KGB statements actually helpful for the Crown?
- At best, you are left with a witness who appears not to honour an oath

R V KHELAWON, 2006 SCC 57 – VIDEOTAPED STATEMENT INADMISSIBLE – INHERENT TRUSTWORTHINESS CONCERNS

Facts
- Declarant, S, is a resident at a nursing home
- Makes statements to another employee at the nursing home, suggesting that K had assaulted him
- Employee takes S to police, and he gives a videotaped interview with the police, implicating K
- S dies before trial
- Crown applies to introduce S’s statement under the principled exception to the hearsay rule

Decision: appeal dismissed; acquittals affirmed

Reasoning:
- Reasonable necessity?
  - Clear – no alternative – witness is deceased
- Threshold reliability? – balance two aspects
  - Testability (procedural reliability)? → Very limited
    - Videotaped, but statement not taken under oath
    - Limited discussion of potential consequences of lying
    - Most important – no opportunity to cross-examine the declarant at trial
  - Inherent trustworthiness (substantive reliability)?
    - Must do most of the hard work in this case
      - (This will frequently be the case where there is no ability to cross-examine the declarant, either at or before the trial)
- Why does it matter in this case?
  - Some limited corroboration of S’s statement
    - S claimed K had thrown his clothes into bags → Clothes were found in bags
    - S claimed was assaulted → Were bruises on his body
  - But remember how courts had defined the tests:
    - Testability (procedural reliability)
      - “no concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested”
    - Inherent trustworthiness (substantive reliability)
      - “no real concern about whether the statement is true or not because of the circumstances in which it came about”
- Several concerns about trustworthiness of statement here
  - Corroboration from injuries is limited → doctor suggested they could have been caused by a fall, and S was frail
  - Corroboration from bags is limited → could have filled them himself, no evidence it was K who filled them
  - Mental capacity was at issue → medical records suggested diagnoses of dementia, paranoia
  - Employee who took him to police had a possible motive to lie, and her possible influence on K was a live issue
- SCC: Error to rely on principled exception; videotaped hearsay statement of S was inadmissible

- In an interview with police, the complainant, J.U., told the interviewing officer that the accused, her father, was having sex with her “almost every day” (para. 4). She gave considerable details about the sexual activity and also described two physical assaults.
- The accused admitted to having sex with J.U. “many times”, describing similar sexual acts and the two physical assaults that J.U. had described (para. 5).
- At trial, J.U. recanted the allegations of sexual abuse. She claimed to have lied at the behest of her grandmother. The accused denied having told police that he had engaged in sexual activity with J.
- The reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth.


- Hawkins, a police officer, was charged with obstructing justice and corruptly accepting money.
- His then girlfriend, G, testified at his preliminary inquiry.
- After testifying the first time, G brought an application to testify again and recanted much of what she had said, with explanations.
- By the time of the trial, Hawkins and G were married and therefore G was incompetent to testify under s. 4 of the Canada Evidence Act.
  - The prior testimony was inadmissible at trial and Hawkins was acquitted
- **At the SCC:**
  - witness’s recorded testimony before a preliminary inquiry had sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial.
  - The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

PUTTING EVIDENCE BEFORE THE COURT – CHAPTER 8

THE CALLING OF A WITNESS

SUBPOENA
- Subpoena ad testificandum – requires that a person give evidence in court
- Subpoena duces tecum – requires person to attend to give evidence, but also compels person to bring anything in their possession or control that relates to the charge
  - No material difference except with a records application – the subpoena will state whether the witness is required to bring with them any relative documents/records

698 (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

SERVICE OF A SUBPOENA

701 (1) Subject to subsection (2), a subpoena shall be served in a province by a peace officer or any other person who is qualified in that province to serve civil process, in accordance with subsection 509(2), with such modifications as the circumstances require.

(2) A subpoena that is issued pursuant to paragraph 699(2)(b) shall be served personally on the person to whom it is directed.

Section 509(2):
A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his latest or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

CIRCUMSTANCES IN WHICH A WARRANT MAY BE ISSUED

• Where a witness is likely to give material evidence but will not attend in response to a subpoena if one is issued (s. 698(2)(a));
• Where a witness is likely to give material evidence but is evading service of a subpoena (s. 698(2)(b));
• Where a person is bound by recognizance to give evidence in any proceedings and that the person is about to abscond or has absconded (s. 704(1)); or
• Where a person who has been served with a subpoena (or is bound by a recognizance) to give evidence in a proceeding does not attend or does not remain in attendance (s. 705(1) and (2))

WITNESS WARRANT WHEN WITNESS DOES NOT ATTEND:

S. 705 (1) Where a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or provincial court judge before whom that person was required to attend may, if it is established

(a) that the subpoena has been served in accordance with this Part, and
(b) that the person is likely to give material evidence,
issue or cause to be issued a warrant in Form 17 for the arrest of that person.

Obtaining a witness warrant when a witness does not attend

• Witness warrant is exceptional
• The onus is on the applicant seeking the warrant.
• The applicant must satisfy the court on a balance of probabilities (see for example: R. v. Pereira et al, 2006 BCSC 1720 at para. 14)
• Proof of service of the subpoena does not require viva voce evidence. The court can rely on the Affidavit of Service (see s. 4(6)- s. 4(7)).
• Counsel must demonstrate that the witness’ evidence will be material.
  • It is not sufficient to simply produce the subpoena to satisfy this requirement (see for example, R. v. Singh (1990), 57 C.C.C. (3d) 444 (ABQB) at paras. 8 – 15; R. v. Pereira et al, supra, at paras. 9 – 10.
• A witness warrant is an exceptional remedy:
  • “The material arrest warrant provision is clearly an exceptional remedy. The consequences of the issuance of a warrant are far more serious for the witness than is the service of a subpoena. The very liberty of the subject is involved. It is one thing to attend court in answer to a subpoena. The subpoenaed witness may feel compelled to attend but attends by an act of his or her own will. It is quite another to be picked up by the police and escorted to the court room. The issuance of the warrant should therefore be subject to careful consideration when an application is made to the trial Judge for its issuance. It is appropriate and indeed essential that the trial Judge undertake a new inquiry into the materiality of the potential evidence to determine whether or not the warrant should be issued.” (R. v. Scott, [1990] 3 SCR 979, para. 54; in the context of s. 698)
  • While that applicant must demonstrate “a witness is likely to provide material evidence, counsel does not need to prove that a witness will testify as anticipated” (see Pereira et al, supra, at para. 14; see also R. v. Khasria, , 2013 ONSC 5707)
  • The court should not transform this analysis into a pseudo trial. Consider the case of R. v. Khasria, 2013 ONSC 5707 (Justice Durno)

R. V. Khasria, 2013 ONSC 5707 – WITNESS WARRANT REFUSED B/C KGB STATEMENT AVAILABLE – OVERTURNED ON APPEAL

Facts:

• Accused charged with domestic assault
• Complainant provided KGB statement on same date as alleged offence
• 6 days later, complaint requested that Crown withdraw charges
Complainant personally served with subpoena  
Complainant failed to attend the trial date  
Crown sought material witness warrant  
In refusing to grant the witness warrant, the trial judge held:  
• believed that she would not appear or that if she showed up, it would be involuntary  
• Now the Crown has an opportunity because she has given a video statement to cross-examine her thereon. What will transpire, if that takes place, is the court will be led to a conclusion that the lady was either lying under oath…  
• …to the police or in all likelihood, lying under oath to the court. Her credit would suffer and in my books when something like that happens, it impacts greatly on the credibility of the complainant.  
The trial judge also concluded that:  
• “The issuing of a material witness warrant involved the exercise of discretion with the Crown required to show the witness would give material evidence. Bearing in mind her behaviour, it was highly unlikely that she would give material evidence. She would either refuse to testify or would testify in such a fashion that it would not result in material evidence. It was unlikely that she would give material evidence and the Crown had failed to meet the prerequisite so the Court probably had no discretion to issue a warrant.” (para. 27)  
On appeal:  
• Justice Durno was “persuaded that in making that determination the trial judge failed to act judicially because he refused the application on improper bases. The trial judge effectively conducted the trial on the basis of his assumptions about a witness he had never seen and whose KGB statement was never seen by the trial judge” (para. 47)  
• Justice Durno further confirmed that the court should take reasonable steps to satisfy itself that the non-attendance of a witness was not the result of intimidation, fear, etc. The court should not speculate that a witness’ absence is voluntary (para. 63)  
• Moreover, even if voluntary “…to suggest that a voluntary absence can defeat the public interest in a trial on the merits in a domestic abuse case, is to send the wrong message about domestic abuse - a message that for domestic assaults that are not as serious as others where children are subpoenaed, the failure of a reluctant witness to attend will result in an acquittal.”

COMPETENCY

• “Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law.  
  2 key concepts:  
  o Competence: the witness must be eligible to testify.  
    ▪ Historically, this was a high threshold; today, we favour admitting evidence and treating competence as an issue for weight.  
  o Compellability: we can’t force some witnesses to testify even if they’re eligible.  
• Evidence from a witness who isn’t competent to testify is inadmissible.  
• As a matter of course, witnesses are presumed to possess the basic “capacity” to testify.  
  o However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.” (R. v. D.A.I, 2012 SCC 5, at para. 16)

COMPETENCY VS. ADMISSIBILITY VS. WEIGHT

Admissibility:  
• Recall: the general rule is if the evidence is relevant + not subject to exclusion under any other clear rule of law or policy = admissible.  
• “The rules of admissibility determine what evidence given by a competent witness may be received into the record of the court. Evidence may be inadmissible for various reasons. Only evidence that is relevant to the case may be considered by the judge or jury. Evidence may also be inadmissible if it falls under an exclusionary rule, for example the confessions rule or the rule against hearsay evidence. Among the purposes of the rules of
admissibility are improving the accuracy of fact finding, respecting policy considerations, and ensuring the fairness of the trial.” (D.A.I. supra, at para. 17)

Weight
- “Fulfillment of these requirements [competency and admissibility] does not establish that the evidence should be accepted. It is the task of the judge or jury to weigh the probative value of each witness’s evidence on the basis of factors such as demeanor, internal consistency, and consistency with other evidence, and to thus determine whether the witness’s evidence should be accepted in whole, in part, or not at all.” (D.A.I., supra, at para. 18)

COMPETENCY – 1) CHILDREN AND 2) ADULTS WITH MENTAL DISABILITIES
- Competency is merely the first stage in the evidentiary process.
- The standard is low: “It seeks a minimal requirement — a basic ability to provide truthful evidence.” (D.A.I., supra, para. 19)

Two Competency Regimes
- Generally, subject to challenge, witnesses are presumed competent.
- The categories in which such a challenge can arise:
  - Adults with mental disabilities (s. 16 CEA applies)
    - Witnesses over 14 are presumed to be competent.
      - Capacity is a question of law for the judge, not for experts.
      - The onus is on the party challenging the witness’ mental capacity to prove it.
  - Children under the age of 14 (s. 16.1 CEA applies)
    - Old rule for children was that persons under the age of 14 were presumed incompetent to be a witness
    - Children under 14 are now presumed competent.
      - Canada Evidence Act: children are presumed competent, and don’t have to swear an oath to testify.
      - Children must only promise to tell the truth (R v DAI, 2012 SCC)
      - To get their evidence excluded, you have to show that the child doesn’t have the capacity to understand and respond to questions.

HISTORICAL PERSPECTIVE
- Prior to amendments made in 2005 (which came into force in January 2006), both children under 14 years of age and persons over 14 years of age whose mental capacity was challenged were subject to the same regime.
- The inquiry regarding the competency of the child witness was mandatory in every case.

- The 3.5 year old complainant suffered a severe facial burn.
- The complainant had lived with the accused (her grandmother) from birth to the time of her injury.
- Young girl said that nanna had put her on the stove
- Witnesses said that they found the girl on the couch with a butane lighter and a cigarette and had said that she had tried to light a cigarette
- On appeal to the SCC, the appellant (Mrs. Marquard), argued that the s. 16(1)(b) inquiry was deficient.
  - During the inquiry, the complainant had been asked about the importance of telling the truth and demonstrated that she could distinguish between the truth and a lie (para. 7)
  - The appellant’s argument focused on the meaning of words “conduct an inquiry to determine ... whether the person is able to communicate the evidence.”
  - The appellant argued that “it is not enough to explore the child’s ability to understand the truth and communicate. The judge must, in her submission, satisfy herself that the child is competent to testify about the events at issue in the trial. To this end, the trial judge must test the child’s ability to perceive
and interpret the events in question at the time they took place as well as her ability to recollect accurately and communicate them at trial.” (para. 9)

**Ruling:** “communicate the evidence” indicates more than mere verbal ability

- Whether witness is capable of perceiving events, remembering events and communicating events to the court

**McLachlin J. (as she then was) concluded:**

- “The phrase “communicate the evidence” indicates more than mere verbal ability. The reference to “the evidence” indicates the ability to testify about the matters before the court. It is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court

**R. V. KHAN (1988), 42 C.C.C. (3D) 197 (ONCA) – CHILD COMPETENCY – NEED ONLY UNDERSTAND DUTY TO SPEAK TH TRUTH**

- While most notable for the exceptions to the hearsay rule, also addressed issues regarding competency.
- At issue was the interpretation of previous legislation, which provided “…the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.”
- In explaining this standard, Robins, J.A. noted:
  - “To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so.” (para. 18)
- In obiter, Robins, J.A. also opined that “the standards applicable to the admission of a child's unsworn testimony under s. 16(1) [the section being addressed in Khan] are in reality no different than those now set by the new provision dealing with unsworn evidence (s. 16(3)) which came into effect on 1st January 1988.”
- There was subsequently a line of appellate authority interpreting s. 16(3) require that the witness understand “the duty to speak the truth”.

**R. V. MCGOVERN (1993), 82 C.C.C. (3D) 301 (MBCA) – WITNESS MUST UNDERSTAND MEANING OF TELLING THE TRUTH**

- Accused convicted of having had sexual intercourse with a female under the age of 14 years, attempting to obstruct justice, and failing to comply with a condition of his bail.
- Appealed on various grounds, including that the trial judge erred
  - in finding the complainant to be competent, and
  - by finding that evidence provided under s. 16(2) and s. 16(3) are not subject to evidentiary distinctions in terms of weight
- The complainant was 19 years of age (at the time of appeal), but is a slow learner with a developmental age of less than ten years.
- The court concluded that beyond the witness (a) promising to tell the truth and (b) having the ability to communicate the evidence, the witness must also understand “…what it means to tell the truth.
  - However, as would be seen as the case law developed, these were really difficult concepts for witnesses to explain. This would subsequently be addressed in both the jurisprudence and in legislative scheme.
  - In relation to the other issue raised on appeal, the court noted that evidence provided under s. 16(3) should, by the mere fact the evidence was given while promising to tell the truth, be afforded less weight than evidence provided under s. 16(2).

**LEGISLATIVE AMENDMENTS REQUIRED – S 16 OF CEA**

- It appears that the section was not being interpreted as intended when the provisions came into effect in 1988 (see for example, *R. v. D.A.I, supra*, at paras. 29, 42-43 and the appendices referenced within, in which McLachlin C.J.C, considers the legislative intent behind the provisions)
- As a result of the restrictive interpretations that were being applied to s. 16 (as it then read), Parliament decided to intervene.
• In 2005, the legislation was amended to create a separate competency regime for children.

<table>
<thead>
<tr>
<th>CHILD WITNESSES</th>
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<tbody>
<tr>
<td><strong>Canada Evidence Act</strong></td>
</tr>
<tr>
<td><strong>16.1(1)</strong>. A person under fourteen years of age is presumed to have the capacity to testify.</td>
</tr>
</tbody>
</table>

**No oath or solemn affirmation**

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

**Evidence shall be received**

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

**Burden as to capacity of witness**

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

**Court inquiry**

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

**Promise to tell truth**

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

**Understanding of promise**

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

**Effect**

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

<table>
<thead>
<tr>
<th>Alberta Evidence Act: courts can exclude evidence if a child doesn’t understand an oath, but it’s discretionary and uncommon (kids don’t usually testify in civil trials).</th>
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</thead>
<tbody>
<tr>
<td><strong>19(1)</strong>. In a legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given on oath if, in the opinion of the judge, justice or other presiding officer, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.</td>
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**R. V. S. (J.), 2008 BCCA 401 – S 16.1 OF CEA - LIMITED PRE-TESTIMONIAL INQUIRY TO CHILD WITNESS’S ABILITY TO UNDERSTAND AND RESPOND TO QUESTIONS – NO NEED TO UNDERSTAND/COMMUNICATE MEANING OF TRUTH/PROMISE**

• Post 2005 amendments
• Convicted of sexually assaulting his 7 year old son and 10 year old daughter. At trial, they were 8 and 10 years old. They both testified from behind a screen and both promised to tell the truth. (para. 1)
• Appellant argued that s. 486.2 CCC and s. 16.1 CEA violated his ss. 7 and 11(d) Charter rights.
• The BCCA rejected the suggestion “that a child's presumed testimonial incompetence is a fundamental principle of justice, or that a child's presumed testimonial competence diminishes an accused's right to a fair trial.” (para. 54)
• Now, arguments against competence of children rarely arises, because it is more difficult to show incompetence and competence is presumed
• BCCA rejected in this case the argument that presumption of child’s competence infringed on Charter rights of the accused
  • Affirmed by the SCC

• In dismissing the appellant’s argument, the unanimous court held that s. 16.1 CEA:
  • Even if a capacity issue is identified, s. 16.1 limits the pre-testimonial inquiry to questions about a child's ability to understand and respond to questions.
  • It expressly prohibits questions about a child's understanding of the nature of a promise to tell the truth.
    • During the trial, however, a child witness's credibility and the reliability of their evidence may be challenged. The child witness may be cross-examined on their understanding of the nature of a promise to tell the truth and on the abstract concepts associated with that promise." (para. 49)

• The court considered the effect of the amendments on the trial process:
  o “Section 16.1 changes the focus of a child's evidence from one of admissibility to one of reliability. It discards the imposition of rigid pre-testimonial requirements which often prevented a child from testifying because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining. It reflects the findings of Child Witness Project that the accuracy of a child's evidence is of paramount importance, not the ability of a child to articulate abstract concepts…” (para. 49)

WITNESSES WITH MENTAL DISABILITY
• Note: Section 16 was amended with the Victims’ Bill of Rights, which came into force July 23, 2015 (see addition of s. 16(3.1)).
• Mentally disabled witnesses:
  o If they can’t observe, remember, or communicate, the witness is incompetent.
  o If they can’t swear an oath or make an affirmation, the witness must be able to promise to tell the truth; if neither is possible, the witness is incompetent.
    ▪ Per DAI (SCC 2012), mentally disabled witnesses don’t have to understand that promise, only be capable of making it.

**Canada Evidence Act**

**Witness whose capacity is in question**

16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
(a) whether the person understands the nature of an oath or a solemn affirmation; and
(b) whether the person is able to communicate the evidence.

**Testimony under oath or solemn affirmation**
(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

**Testimony on promise to tell truth**
(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

**No questions regarding understanding of promise**
(3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

**Inability to testify**
(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
Burden as to capacity of witness

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

R. V. D.A.I., 2012 SCC 5 – WITNESS BE ABLE TO PROMISE TO TELL THE TRUTH AND COMMUNICATE EVIDENCE – NOTHING MORE STRINGENT REQUIRED

- Trial judge found the mentally handicapped individual to be incompetent for being unable to understand a solemn oath and the duty to tell the truth
- SCC said that it is sufficient for the witness to promise to tell the truth

Facts: The complainant was 26 years old, but had the mental capacity in the range of a 3 to 6 year old

- The allegation was that she was repeatedly sexually assaulted by her mother’s domestic partner (she disclosed to a teacher and then subsequently to the police. Using bodily gestures, she described the game as involving touching her breasts and vagina. She told the police that this had happened many times).
- The Crown sought to call her as a witness
  - The complainant did not understand the nature of the oath/affirmation, so s. 16(3) was being considered.
- The case essentially came to an end given the ruling. The accused was acquitted.

The Crown appealed.

- On appeal, the accused/respondent argued that satisfying s. 16(3) went beyond being able to communicate evidence and promising to tell the truth. The accused argued that the witness must be able to “understand the nature of a promise to tell the truth.” (para. 24)

The majority observed:

- The court rejected the notion that “promising to tell the truth” should be read to include a further consideration into the understanding of the obligation to be truthful. (para. 63)

The majority summarized the s. 16(3) inquiry as follows. The section:

- “…imposes two conditions for the testimonial competence of adults with mental disabilities:
  1. the witness must be able to communicate the evidence; and
  2. the witness must promise to tell the truth.

- When assessing whether the witness can communicate evidence, the trial judge is to consider whether the witness “can relate concrete events by understanding and responding to questions. It may be useful to ask if [the witness] can differentiate between true and false everyday factual statements.” (para. 82)

- Subsequently s. 16(3.1) was added to the legislative scheme.

USE OF EXPERTS:

- “Whether a complainant "is able to communicate the evidence" in this broad sense is a matter on which a trial judge can (and invariably does) form his or her own opinion.
- It is not a matter "outside the experience and knowledge of a judge or jury" (Mohan, supra, at p. 23). It is the very meat and potatoes of a trial court's existence.” (R. v. Parrott, 2001 SCC 3, at para. 57, Binnie J., writing for the majority)

PRESENCE OF THE JURY:

- The inquiry into competency will generally be conducted in front of the jury as the issues explored will also relate to the credibility and reliability of the witness’ evidence (and accordingly the weight given to it).

COMPETENCE VS COMPELLABILITY

- “Competence and compellability are separate, though related, concepts.
  - Competency means a person may lawfully be called to give evidence; an incompetent witness cannot testify even if he or she wishes to do so.
A compellable witness is one who may lawfully be forced to attend and testify, generally by subpoena, against his or her wishes.”
(R. v. Legge, 2014 ABCA 213, at para. 15)

COMPETENCE AND COMPELLABILITY OF SPOUSES

- In a civil case, any party or the spouse of any party is a competent and compellable.
- Historically, at common criminal law, a married person is both incompetent and non-compellable against their husband or wife, subject to certain exceptions.
- Rationales for justifying the common law rule of not admitting spouses as witnesses:
  - Protection of matrimonial harmony
  - The natural repugnance in compelling a wife or husband to assist in convicting the other
- Likely as a corollary of the diminished importance of these rationales, a significant trend towards undermining the spousal immunity rule developed.
  - Statutory exceptions (see s. 4(2) and s. 4(4) CEA)
  - Exceptions at common law

STATUTORY EXCEPTIONS PRIOR TO 2015:

Accused and spouse

4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

(2) The wife or husband of a person charged with an offence under subsection 136(1) of the Youth Criminal Justice Act or with an offence under any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3) or 162.1(1), or sections 170 to 173, 179, 215, 218, 271 to 273, 279.01 to 279.03, 280 to 283, 286.1 to 286.3, 291 to 294 or 329 of the Criminal Code, or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged.

Communications during marriage

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

Offences against young persons

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the Criminal Code where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged. Saving

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

Failure to testify

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

EXAMPLES OF EXCEPTIONS AT COMMON LAW:


- The accused was charged with forgery as a result of signing his wife’s name on a cheque.
- The wife wished to testify. The issue that arose: is the spouse of an accused, who is separated from the accused without any reasonable possibility of reconciliation, a competent witness for the Crown?
- No objection was taken to her testifying at trial. The accused was convicted and appealed on the single issue above.
SCC held “Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.” (para. 39)

Where spouses are irreconcilably separated, there is no marriage bond to protect and we are faced only with a rule which limits the capacity of the individual to testify.” (para. 47)

R. V. HAWKINS, 1996 3 S.C.R. 1043 – POLIC OFFICER MARRIED WOMAN TO HAVE HER NON-COMPETENT/NON-COMPELLABLE TO TESTIFY – EVIDENCE STILL ADMISSIBLE IN HEARSAY

The appellant/accused was a police officer who was alleged to have provided a member of the Satan’s Choice Motorcycle Club with confidential information regarding an investigation into the Club (in exchange for $).

A material Crown witness was the accused’s girlfriend.

Prior to the preliminary inquiry, there were discussions between the accused and the witness, as well as between each of them and the police regarding the possibility of the accused and the witness getting married to make her incompetent and non-compellable.

However, the witness then left the accused and entered witness protection.

At the time of the preliminary inquiry, she was both a competent and compellable witness. She was called to testify and provided evidence that incriminated the accused. Shortly after the preliminary inquiry, the witness retained her own counsel and sought to testify again. Her application was granted and she recanted key portions of her prior evidence.

Between the conclusion of the preliminary inquiry and the trial date, the accused and the witness were married.

On appeal:

It was well established at common law that the rule of spousal incompetence prevents a spouse from testifying to events that took place both before and during the marriage. By virtue of s. 4(5) CEA, the spouse of an accused is incompetent as it relates to events prior to the marriage. (para. 37)

No modification to the common law rule regarding spousal incompetency was made and the resulting conclusion was that the witness was not competent in the proceedings against her husband (para. 51)

Although now incompetent, the preliminary inquiry evidence was admissible under the hearsay rules (para. 97).

R. V. SCHELL, 2004 ABCA 143 - ACCUSED THREATENED THAT THE WITNESS AND THEIR CHILDREN – EXCEPTION TO RULE – SPOUSE DEEMED COMPETENT AND COMPELLABLE

The accused was convicted of first-degree murder in the context of a gang-related contact killing.

One of the issues on appeal was whether the trial judge erred in finding the accused’s wife to be competent and compellable.

At the trial level, there were two separate voir dires considering her competence/compellability.

There was a voir dire in relation to both of the common law exceptions to the spousal incompetency rule, with the exceptions being:

1) when the parties irreconcilably separated, or

2) when the circumstances of the offence reveal a threat to the life, liberty or health of the proposed witness. (see para. 20)

At the first voir dire, the issue was whether they were irreconcilably separated.

The evidence on their relationship included:

At the time of the murder, the witness was in a common law relationship/residing with another man.

They lived with her children (two of which were the accused’s children).

They has been in that relationship for 4.5 years.

The accused had been living in British Columbia for several years while the parties were separated, but had returned to Alberta for work.

Until his arrest for the murder, the accused stayed at various places in Edmonton and on occasion stayed at the witness’ residence.

The accused had also begun a relationship with a 15 year old girl.

Despite this, the witness could not say if she would remain legally married to the accused.

The trial judge held that the Crown had not demonstrated “irreconcilable separation” on a balance of probabilities and accordingly, did not find this to be an exception to the spousal incompetency rule (para. 13).
Notably, on appeal that Crown and Court agreed that there was sufficient evidence before the trial judge to establish “irreconcilable separation” (para. 13).

At the second voir dire, the trial judge found as a fact that the accused had threatened that the witness and their children could be shot if she disclosed what she knew (para. 15).

Both the trial judge and the ABCA were satisfied that this brought the witness into the exception to the general rule. The witness was found to be competent and compellable.

R. V. Legge, 2014 ABCA 213 – Common Law Spouses Non Compellable Witnesses

Case not entirely relevant anymore with the laws that have already changed to allow spouses to be competent and compellable.

Here the ruling was that the exception also applies to common law partner

- The accused was charged with evading police, mischief, possession of stolen property, possession of a weapon, and careless transport of a weapon.
- The accused’s common law spouse was an essential witness for the Crown. She did not wish to testify.
- At trial, the judge concluded that spousal immunity applied and the witness was not compellable against the accused.
- The Crown appealed.

Held: Common law spouses are non-compellable witnesses for the Crown (there is contrary authority from other jurisdictions)

- Limits imposed by the ABCA:
  - Only addressed compellability (not competence)
  - Only applies where the already existing exceptions to the common law rule as contained in s. 4 CEA did not apply.
- Also generally called into question the existence of the spousal immunity rule.

AMENDMENTS TO CEA S 4 – SPOUSES NOW COMPETENT TO TESTIFY AND COMPELLABLE

Accused and spouse

4 (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Spouse of accused

(2) No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

Communications during marriage

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(4) and (5) [Repealed, 2015, c. 13, s. 52]

Failure to testify

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

OTHER KEY QUESTIONS – ACCUSED’S TESTIMONY

- An accused is never required to testify in their own trial
- Crown can’t comment on the failure of the accused to testify.
  - This is both in the Canada Evidence Act (s. 4(1)) and in the Charter (ss. 11(c), 13 – no using evidence, when the accused testifies, to incriminate them in subsequent proceedings).
- When there are co-defendants in a criminal trial, they can’t be forced to testify against each other. This can be circumvented by the Crown:
o If the parties are tried separately
o If one of the parties is acquitted or their charge is stayed (so no risk of jeopardy)
o If one of the parties pleads, or is found, guilty (so no risk of additional jeopardy)

CROSS EXAMINATION AND DIRECT EXAMINATION

EXAMINATION IN CHIEF - DIRECT EXAMINATION

• Examination in chief (direct examination) is the party’s opportunity to present their case – it is when the party examines their own witness to elicit information.
• The plaintiff cannot split their case – only unanticipated matters raised in cross-examination can be responded to in reply.
• Questions in direct examination must be neutral and open-ended.
  • You cannot suggest an answer or ask questions that presume facts that haven’t been testified about – the witness is testifying, not the lawyer.
• If you ask leading questions during direct examination:
  • The other side can object, interrupting your examination
  • If more severe, the jury can be directed to give answers to leading questions less weight
  • In extreme cases, a new trial can be ordered
• R v EMW (2011 SCC) – Court did not consider binary questions to be leading

THE TWO WORST DIRECT QUESTIONS

• Opening with “Tell us what happened”
• Ending with “Is there anything else you would like to tell us”

The leading of evidence whether in chief or cross should always contribute to the theory of Counsel’s case.

• Questions should be deliberately and carefully asked.

EXCEPTIONS TO THE DIRECT QUESTION REQUIREMENT – INTRODUCTORY/NON-CONTENTIOUS MATTERS, ADVERSE RULING

Exceptions to the direct question requirement

• Basic rule of direct examination: no leading questions are permitted unless:
  • The matter is introductory or non-contentious (e.g. introducing the witness)
  • The lawyer is asking the witness to identify something or someone
  • The witness is a child or is mentally disabled, and the judge gives leave to ask leading questions
  • The matter is complex or technical
  • A ruling that a witness is adverse or hostile

TESTIMONIAL AIDES – TWO AIDES

• We require witnesses to testify from memory, but what about when a witness requires aid to refresh their memory
• Witness sees a hit and run and immediately writes down the license plate of the car, but can’t independently remember the number at trial
• Police officer takes notes of his investigation as it occurs and wishes to refresh his memory at trial
• Before trial, any evidence with a sufficiently reliable foundation (no memories recalled by hypnosis – Trochym) can be used to refresh a witness’ memory, even if that evidence isn’t admissible (Fliss – evidence was excluded under s 24(2) of the Charter).
  • The witness can be cross-examined about what they did to refresh their memory
  • Any issues with memory or the evidence used to refresh memory go to weight

The two aids

• Past Recollection Recorded
  • The witness professes to have no memory presently but relies on a previous record as being accurate and it is accepted effectively being accurate
  • When a witness can’t remember something, written documents or records may be introduced to assist them in testifying when:
    o It’s necessary to refresh the witness’ memory (they can’t recall the information at all);
The past recollection was recorded by the witness (or made in their presence) in a reliable fashion:
- The record was made when their memory was still sufficiently fresh and vivid to be accurate;
- And the witness can attest that the record accurately reflects their knowledge and recollection at the time it was made.
- Where possible, the original record should be used.

- Evidence introduced through past recollection recorded won’t become part of the evidentiary record unless adopted by the witness in court.
  - It’ll get phone numbers, license plates, etc. admitted, but it’s fairly limited in scope.
  - Generally, the witness should not simply read from the record unless necessary (e.g. the record is a transcribed conversation).
  - Fleming v Toronto Ry Co (1911 ONCA) – no requirement that the witness who has viewed the document actually recall the event before testifying to it – here, the witness was testifying as to numbers on railcars

- Present Recollection Revived
  - Witness views the record and has his present memory revived such that he can testify from memory

Wigmore created this distinction – but this distinction only exists in the extreme cases
- Generally speaking, you are not really reviving a memory, rather the record itself is being used to enter the matter into evidence
- In the middle, the distinction really doesn’t exist; the difference is only present when the witness has absolutely no recollection of the event/fact

**EXAMPLES**

License Plate Number on the piece of paper
- Past Recollection Recorded
- No current memory, sufficiently accurate

Police Officer’s Notes
- Has a memory, but refreshes his memory as to a detail
- Present Recollection Revived
- Or is it?

**IS THIS THE RIGHT APPROACH?**
- A real difficulty always about the rule about past recollection recorded is that the present assurance of past honesty, while a sufficient assurance of trustworthiness to warrant admission, is not necessarily sufficient to justify acceptance.
- A jury cannot treat it like a talisman.
- All the factors relevant to trustworthiness should be weighed, including whether the witness might, when making the record, have had a motive to lie or been under some pressure, internally or externally, that might have put a blush upon the honest truth
- In my view, a case where a witness cannot recall and affirm what is on the tape is probably a case for the judge to give the jury a special warning: see R. v. Vetrovec (1982), 1982 CanLII 20 (SCC), 67 C.C.C. (2d) 1, 136 D.L.R. (3d) 89, [1982] 1 S.C.R. 811.

R v. Meddoui, 1990 CanLII 2592 (ABCA) – SUGGEST PRINCIPLED HEARSAY EXCEPTION APPLIED TO PAST RECOLLECTION RECORDED
- Meddoui involved a witness who remember giving a statement but had no memory of the contents.
- How do you prevent a trier of fact from imputing credibility by way of the use of past recollection recorded?
- Nova Scotia, Alberta and British Columbia have all suggested that that the principled exception to the hearsay rule be applied to past recollection recorded.

**WHAT IS A LEADING QUESTION?**
- Question that subtly or explicitly suggests the answer?
- Assumes facts in dispute
CROSS EXAMINATION

• Cross-examination is the opposite of direct examination: leading questions are permissible, and the purpose is to undermine the credibility of the witness (rather than to establish facts).
  • Each witness who takes the stand puts his or her credibility into issue, and counsel in cross examination are free to discredit or impeach the witness’s credibility
• Any party who is adverse in interest to the person who called the witness can cross-examine that witness. Basic rule: if you didn’t call them, you can probably cross-examine them.
  • Co-defendants in civil cases can cross witnesses called by other defendants.
• Cross-Examination functions to test and discredit the evidence of a witness. It is premised on some core foundations of the trial process and the search for truth
  • Contributes to a logical and principled reasoning process
    • “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 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.” Faryna v. Chorney
• Cross Examination is provides the evidentiary foundation to allow the trier of the fact to evaluate conflicting evidence and facts

Limits on Cross Examination

• Questions (about credibility) in cross-examination must have a good faith basis to be permissible.
  • You can’t knowingly assert a fact as true where it can’t reasonably be supported by the evidence (both in law and according to the Law Society Code of Conduct – no misleading the court (Rule 4.01(2)).
  • Lyttle – a good faith basis requires some foundation in a reasonable inference, experience, or intuition.
  • Where a factual predicate in the question is “manifestly tenuous and suspect,” the opposing party can ask the judge to determine if there’s a good faith basis for it in voir dire.
• Some questions are prohibited:
  • “Why would the complainant lie?” – too prejudicial and speculative
  • “Why didn’t you tell the police you are innocent?” – offends right to silence
  • “You saw the Crown’s disclosure and are tailoring you answers to it, aren’t you?” – this is unconstitutional
• The Crown has higher burden to be fair than other parties – shouldn’t raise questions without good faith basis, no smuggling in BCE, no destroying the character of the accused.
  • R v Ellard (2003 BCCA) – accused charged with the swarming death of a woman; problem with line of questioning was that it suggested that there was an onus upon the accused to provide a motive and in so doing it undermined the presumption of innocence

THINGS TESTED BY CROSS-EXAMINATION (5) - PRPLC

• Perception- Did you see what you think you saw?
• Reliability- Have you recounted your evidence
• Partiality- Is your evidence coloured by bias or prejudice
• Logic- Can an opinion withstand critical scurtiny
• Credibility- Is the witness being truthful honest

CONSISTENCY

• Consistency is a primary tool of credibility for Courts.
  o Cross-Examination is the most efficient tool to impeach a witness on a prior inconsistent statement.
• Section 9(2) of the Canada Evidence Act
  • (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the
witness’ present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

**UNDERSTANDING CROSS-EXAMINATION BY REFERENCE TO IMPROPER CROSS-EXAMINATION**

**R. V. ELLARD - 2003BCCA 68 – INVITING SPECULATION – PLACING BURDEN ON THE ACCUSED – NEW TRIAL GRANTED**

- Q  Now, all of those people have come and said that you told them essentially that you killed Reena Virk? You have to answer yes or no.
- A  Yes, I --
- Q  In particular, C., G.O., N. hasn't given evidence, of course C.N., and then other people I named have come and given that evidence; you'll agree with that?
- A  Yes.
- Q  Why were they saying that?
- A  I don't know.
- Q  You don't have any idea?
- A  No.
- Q  Were they all -- do you know whether they were collectively conspiring against you?
- A  No, I don't know anything about that.
- A  Was there anything about you that makes you important to frame in this murder?
- A  I don't think so, no.
- Q  Are you aware of any motive F.T. may have to say such a thing about you?
- A  Possibly maybe rumours or loyalty to whoever, Warren maybe. I don't know.

**What is this wrong?**

- “The potential prejudice arising from this form of questioning is that it tends to shift the burden of proof from the Crown to the accused.
- It could induce a jury to analyze the case on the reasoning that if an accused cannot say why a witness would give false evidence against her, the witness's testimony may be true. The risk of such a course of reasoning undermines the presumption of innocence and the doctrine of reasonable doubt. The mind of the trier of fact must remain firmly fixed on whether the Crown proved its case on the requisite standard and not be diverted by the question whether the accused provided a motive for a witness to lie.”

**MELGAREJO-GOMEZ V. SIDHU, 2002 BCCA 19 – MISLEADING WITNESS AND JURY BY BRINGING UP TESTIMONY THAT HAD NOT OCCURRED FROM ANOTHER WITNESS**

- Q  I suggest to you, sir, that you estimated at that time, this is from the statement that you provided at that time on behalf of the defendant, Mr. Sidhu, you estimated that he was about five feet south of the crosswalk when he was hit?
- A  That's correct.
- Q  That's what you said in your statement, isn't it?
- A  Yes.
- Q  I put it to you, sir, that you initially said to the police constable - you weren't here when he testified the other day - I put it to you that you actually -
- MS. MURRAY:  
  - My lord, the police constable didn't give any evidence about what this witness testified about.
- [COUNSEL]:  
  - My lord, this isn't proper, what my friend is doing. She knows this is cross-examination. I'm testing credibility and she knows that, my lord.
- THE COURT: All right. Go ahead.
- [COUNSEL]:
• You weren't here when Constable Perry testified, but I put it to you that at one point you told Sergeant - rather, Constable Perry that the collision happened within the crosswalk and then you changed your mind?
  • A I don't recall.

Why is this wrong?
• There is a duty of good faith – lawyer cannot put false or inaccurate evidence to the witness in cross examination
• Not appropriate to engage in trickery
  • “Here, the cross-examiner was aware that Constable Perry did not give any testimony concerning Mr. Boychuk's earlier statements.
  • In fact, Constable Perry was not even asked about this. Accordingly, it was improper to put the above-cited question to Boychuk in terms that would clearly suggest, to Boychuk and indeed to members of the jury, that the police constable had testified in the manner suggested.

R. V. WALKER, 1994 ONCA 827 – MISUSING CHARACTER EVIDENCE IN WAY THAT INCREASED PREJUDICIAL EFFECT – PORTARYING ACCUSED IN BAD LIGHT

• Person with dark past alleged of killing his common law partner
• Questions were used to bring in bad character evidence – painting a negative picture for the jury, inviting them to engage in reasoning that the accused was a bad person, and was thereby more likely to be guilty of the offence
  • “The Crown blamed the appellant for just about everything that was wrong in Cloutier's life. According to counsel, the appellant exploited her, abused her physically, prevented her from dealing with her drug addiction and generally destroyed her life.

Why is this wrong?
• “The cross-examination of the accused by the Crown went too far. It was designed to portray the accused as a callous, unfeeling and exploitive brute who was the kind of person who was likely to have committed the crime.
  o Character evidence which was originally admissible because its probative value outweighed its prejudicial effect became inadmissible because the improper cross-examination of the accused elevated the prejudice to a point where it outweighed the initial probative value.”
• Trial judge gave a limiting instruction to the jury, but the CA said that it wasn’t enough
  • Test in Handy – probative value must substantially outweigh prejudicial effect

R. V. C.L.J., 2010 ABQB 90 – USING CROSS EXAMINATION AS A WEAPON AGAINST CHILD WITNESS

• During cross-examination, the accused’s counsel pointed out inconsistencies between testimony that T.W. provided at the preliminary inquiry and testimony she provided during cross-examination.
• For example, T.W. testified during the preliminary inquiry that the sun was up at the time of the alleged incident.
  • During her cross-examination, T.W. testified that the sun was not up. Counsel then questioned T.W. as to which was true. In other words, was she not telling the truth during the preliminary inquiry.
• Although this Court explained to T.W. that she would not get into any trouble by answering this question, T.W. simply did not answer the question.
• After a break and further questioning, T.W. said that she was not telling the truth during the preliminary inquiry. During re-direct, she said that she was not lying when she answered that question during the preliminary inquiry; she just made a mistake.

What is the concern?
• “A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth.” - R. v. F. (c.), 1997 CanLII 306 (SCC).
• Inconsistencies with adults can not be treated the same way as inconsistencies with a child’s evidence (SCC)

R. V. LEVERT, 2001 CANLII 8606 (ON CA) – PREJUDICIAL EFFECT OF BRINGING UP CONDUCT AND DEMEANOUR UPON BEING CONFRONTED WITH ALLEGATIONS

• Crown counsel introduced evidence concerning the appellant’s reaction when M.L. and her husband confronted him with the complainant’s allegations. The effect of that evidence was that the appellant was “very, very, very calm”, “not on the defensive at all”, but that he denied the allegations.
• The appellant was cross-examined on this evidence. He dealt very well with the evidence. In clear terms he explained his reaction.
  • He knew M.L. to be a good friend and was sure that once they talked it out with the complainant she would discover that nothing had happened.
  • In his jury address, Crown counsel invited the jury to consider whether the appellant’s reaction was reasonable.

What’s the problem?
• [25] No objection was taken at trial or in this court to this part of M.L.’s evidence.
• BUT: Suggesting to a jury that someone’s reaction was unreasonable in the circumstances is inviting speculation and inferences
  • Prejudicial effect is great, probative value is low
  • Demeanour of the accused is not very probative
• If... the evidential value of the conduct and demeanour of the accused on hearing the statement is slight and the prejudicial effect of the statement is great, the trial Judge has a discretion to exclude it: Director of Public Prosecutions v. Christie, supra, at pp. 161 and 165. [Emphasis added.]

R V. CRAWFORD, [1995] 1 SCR 858 - EVIDENCE THAT A CO ACCUSED FAILED TO GIVE HIS VERSION TO THE AUTHORITIES SHOULD BE EXCLUDED – RIGHT TO REMAIN SILENT
• Q.Mr. Crawford, if my memory is correct the incident that brings us here today happened one year and 20 days ago; is that right?
  • A.I think so, yes. I'm not too sure, I didn't check.
  • Q.Well, it's the 22nd day of November today, 1989?
  • A.Yes.
  • Q.Do you agree with that?
  • A.Yes.
  • Q.So this incident happened one year and 20 days ago?
  • A.Yes
  • Q.You have had one year and 20 days to think about what you were going to tell us about this?
  • A.Just the truth.
  • Q.You've had one year and 20 days to think about it
  • A.Just the truth
  • Q.Have you ever told the police anything about it?
  • A.No.
  • Q.Have you ever told anybody in authority anything about it?
  • A.Just my lawyer.
  • Q.You have been well represented by counsel?
  • A.Yes.
  • Q.You were aware through your counsel what all the evidence was in this case?
  • A.Well, yes.

What’s the problem
• Evidence that a co-accused failed to give his version to the authorities should be excluded.
• Cross examination is implying that the accused is denying allegations because they had time to concoct a story
• Crown is implying that remaining silent is more likely to be guilty
• Right to silence should not be used against the accused – asking about whether comment was made to the police

R V PORTER – POLICE STATEMENT AFTER AN ACCIDENT CANNOT BE USED AGAINST YOU
• Your police statement after an accident cannot be used against you as an accused
• You are statutorily required to give a statement to the police after an accident – that statement is inadmissible in court
• You are also required to comply with your insurer – this statement cannot be used against you in court, as it is also mandatory to provide a statement to insurance, and insurance is statutorily mandatory to drive in AB, so the right to remain silent would be infringed if the statements were admissible as evidence

SUMMARY
• Cross-Examination is the vessel for the Court’s reasoning. If it relies on prejudice or improper or misleading reasoning, it is likely improper questioning.
• In fact, whether or not the questioning is explicitly relied upon, the impact on reasoning may be such that it taints the decision in any event.

BROWNE V. DUNN – PUT MATTER TO WITNESS IF GOING TO PRESENT CONTRADICTORY EVIDENCE LATER OR IMPEACH WITNESS’ CREDIBILITY
• A party who intends to impeach an opponent’s witness must direct the witness’s attention to that fact by appropriate questions during cross examination – this is a matter of fairness to the witness
  • “The rule in Browne v. Dunn requires that counsel put a matter to a witness involving the witness personally if counsel is later going to present contradictory evidence, or is going to impeach the witness’ credibility:” R. v. Werkman 2007 ABCA 130
• Failure to cross-examine about a particular allegation means that you accept what the witness says, and you cannot later contradict it with further proof.
  • Justification: failure to cross is unfair because it deprives the witness (and the party who called them) of the chance to rebut a different story or answer a challenge against them.
  • More important justification: we can’t test reliability and credibility outside of cross
• Today, the approach to the rule in practice generally uses a two-part test:
  • Did you cross-examine the witness and try to impeach their story in an effective way, even if the exact point in issue wasn’t raised?
  • Did the witness know they were going to be contradicted?
• In practice, this is more of a tactical requirement – you fail to cross at your own peril.
  • Generally, we can recall witnesses if there’s a failure to cross.

R V QUANSAH, 2015 ONCA 237 – TRIAL INSTRUCTION DEALT WITH BROWNE V DUNN RULE
Facts: Quansah and Tu were in prison and engaged in a prison fight; Quansah said he stabbed Tu in self-defence. The jury at Quansah’s trial decided otherwise and found him guilty of first degree murder. Quansah appealed, arguing that the trial judge misapprehended the rule in Browne v. Dunn (1893), 6 R. 87 (H.L. (Eng.)) and, as a result, included in his charge an instruction that was not warranted and fatally compromised the fairness of his trial.
  • appellant said that the trial judge erred in holding that the appellant’s trial counsel had breached the rule in Browne v. Dunn, by failing:
    i. to cross-examine Clare, Fallis and Ireland about a shoe propping open the door to Tu’s cell before the appellant arrived on the morning of the stabbing;
    ii. to cross-examine Fallis on Quansah’s alleged remark, “your friend needs help”, as Quansah left Tu’s cell after the stabbing; and
    iii. to cross-examine Ayres on whether he threatened Quansah in their cell the night before the stabbing.
  • Second, the appellant contends that the trial judge erred in instructing the jury. The appellant alleges the trial judge erred in telling the jury they could consider, as a factor in assessing the weight to be assigned to Quansah’s evidence, the failure to cross-examine these witnesses and thus afford them an opportunity to respond to the contradictory version offered by the appellant.

Decision: Appeal dismissed; conviction upheld
Reasons:
• In Browne v. Dunn, Lord Herschell, L.C., explained that if a party intended to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence
  o The confrontation principle is not violated where it is clear, in all the circumstances, that the cross-examiner intends to impeach the witness’s story
• **Breach of rule in Brown v Dunn:**
  - The Ayres threat
    - Ayres was not cross examined about the alleged threatening of Quansah the night before the murder
    - The appellant’s state of mind within hours of killing Tu was an important issue at trial.
  - The shoe in the door
    - Clare was not cross examined about Clarke’s role in standing by the door and there being a shoe in the door prior to arriving at the cell
    - appellant’s version challenged the reliability of the evidence of Clare, Ireland and Fallis and the accuracy of their observations. The placement of the shoe in the door in advance of the appellant’s entry was a matter of significance to the facts of the case and not some inconsequential detail. It was a subject on which both Fallis and Ireland should have been cross-examined. The failure to do so was of sufficient significance to permit the trial judge to find that counsel had not complied with Browne v. Dunn
  - The post-offence remark
    - Fallis was not cross examined on any remark made to him by Quansah after the murder
    - The appellant’s version, and expressed concern about Tu’s condition, provides some support for a claim that Tu died as a result of an unfortunate consequence of a consensual fight in which the appellant acted lawfully, rather than as a result of a previously-formulated plan to kill. – so it was an important element that should have arisen in cross examination

• **Ground #2: The Remedy for the Breach**
  - breaches of a rule grounded in fairness do not attract a single or exclusive remedy
  - The trial Crown did not raise his Browne v. Dunn complaint until the pre-charge conference. The basis for the complaint arose when the appellant testified. – by the time the objection was raised the witnesses could not be recalled for cross-examination
    - Timely objection is consistent with the duty of Crown counsel under Boucher v. The Queen
  - The trial judge chose the remedy of trial instruction based upon what was fair and reasonable in the circumstances

**R V TLP, 1996 ABCA 400 – ACCUSED TESTIFYING LAST IN ALIBI CASE DOES NOT DESTROY CREDIBILITY**

- The Crown’s position with respect to the appellant was that she was the second of two masked robbers; the other robber already having been proven guilty. The defence theory was, firstly, alibi, as well as a denial advanced directly by the appellant in her own testimony
  - The accused testified as the last defence witness and the trial judge said that her placement in the line up made her testimony useless or of little weight
- While it is true that in alibi cases, calling the accused out of order, that is, other than as the first witness, may, and quite frequently does, diminish the weight to be accorded to her evidence, it does not necessarily do so and certainly does not destroy entirely the credibility of that evidence.
- An accused is entitled to have his or her evidence heard in full and assessed in conjunction with all of the other evidence presented at the trial and in the light of the submissions of counsel.

**COLLATERAL FACTS RULE**

- **Calling a witness (or evidence) to contradict another witness solely on the grounds of credibility is impermissible.**
  - Justification: while credibility is always relevant for witnesses, fully exploring credibility would lead to endless trials and waste time. It’s a policy-based rule that excludes useful information to favour expediency.
  - This is still just an application of PV>PE.
- **When are facts collateral?**
  - If it directly relates to a fact at issue, it’s never collateral – it pertains to more than credibility.
  - If the evidence can be tied to some issue in the case other than credibility, it’s not collateral.
  - If it only proves the witness is lying, or is the type of person who would lie, and it isn’t related to any other substantive purpose, it’s collateral.
• Exceptions to the collateral fact rule:
  o Where the collateral fact shows corruption/bias/motive/prejudice/interest against a party or the system, it can be admitted.
  o Previous convictions can be admitted if the witness denies them, discussed below.
  o Proof of the witness’ reputation for truth telling in the community can be admitted at common law – just that the reputation exists, not the reasons for it.
  o If there’s evidence (likely from an expert) regarding relevant mental or physical conditions that affect the weight of a witness’ testimony, that can be admitted (e.g. if they wear glasses, if they suffer hallucinations, etc.).

PRIOR INCONSISTENT STATEMENTS

• Prior inconsistent statements (PIS) are OCS that can be used to impeach witnesses (making them look like they’re lying, or unreliable, or they can’t keep their story straight). A PIS is always probative regarding credibility.
• **PIS can only be used to attack the credibility of a witness.** If we want to use them as evidence they need to fall under a hearsay exception or be adopted by the witness in their testimony.
  o Jury must be instructed to only use PIS for credibility, not substantive issues.
• The collateral fact rule still applies – the PIS must be relevant to more than just the witness’ credibility.
• Procedure for admitting PIS is set out in statute, and we use different rules for oral and written statements:

CANADA EVIDENCE ACT, S. 10(1), 11 – CROSS EXAMINATION ON PRIOR STATEMENTS

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**Canada Evidence Act**

**Cross-examination as to previous statements**

10(1). On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness’ attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

**Cross-examination as to previous oral statements**

11. Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

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**Alberta Evidence Act**

22(1). A witness may be cross-examined with regard to previous statements made by the witness in writing, or reduced to writing, and relative to the matter in question, without the writing being shown to the witness.

(2). If it is intended to contradict the witness by the writing, the witness’s attention shall, before the contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of contradicting the witness.

(3). The judge or other person presiding may, at any time during the trial or proceeding, require the production of the writing for the judge’s or the other presiding person’s inspection, and may on production make any use of the writing for the purposes of the trial or proceedings that the judge or other presiding person thinks fit.

23(1). If a witness on cross-examination with regard to a former statement made by the witness about the matter in question and inconsistent with the witness’s present testimony does not distinctly admit that the witness made the statement, proof may, subject to subsection (2), be given that the witness did in fact make that statement.

(2). Before that proof is given, those circumstances of the alleged statement that are sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether the witness did make the statement.
• So for recorded statements, we need the statement (s. 10); for oral statements, we need a witness (s. 11).
• Unless it’s unfair, witnesses can be cross-examined without showing them the prior inconsistent statement.
• Procedure for impeaching witnesses with a PIS:
  o The in-court testimony must be confirmed by the witness.
  o The witness is then confronted with fact that they made a PIS.
  o Then the contradiction is identified. The confrontation involves either introducing the recorded material, or describing the circumstances under which the oral statement was made (s. 10). The confrontational occasion – time, place, other people involved.
    ▪ Under s.10 (recorded material), only the part that contradicts the witness needs to be presented.
  o The witness is then asked if they made the PIS.
    ▪ 3 outcomes:
      • Witness accepts that they did. Cross proceeds normally, and PIS can’t be used for its truth, only for credibility (unless hearsay exception applies, e.g. admission).
      • Witness adopts the PIS as their testimony. Cross proceeds normally, statement can be used for truth.
      • Witness denies making the earlier statement.
  o The statutory scheme is only really relevant where the witness denies making the PIS.
• Remember: PIS made by an accused or a party in a civil case are admissions, and can be used to prove substantive issues as well as credibility.

PRIOR CONVICTIONS
CANADA EVIDENCE ACT 12(1) AND ALBERTA EVIDENCE ACT 24(1) – USE OF PRIOR CONVICTIONS GOING TO CREDIBILITY

Canada Evidence Act
12(1). A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.
(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

Alberta Evidence Act
24(1). A witness may be asked whether the witness has been convicted of a crime and, on being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved.

• Any witness, including the accused, can be questioned about prior convictions.
  o Proof requires proof of identity and a signed certificate specifying the substance (but not the circumstances) of the conviction.
  o “Conviction” means convictions – not charges or discharges or disciplinary hearings.
• Cross about prior convictions under these sections goes to credibility, not substantive issues (prior convictions are BCE).
  o Contrast with s. 666 of Criminal Code, which allows prior convictions to be used for any purpose when the accused raises GCE.
  o If the Crown or a party in a civil gets a prior conviction admitted when presenting their own case, rather than through cross-examination, that conviction can be used to assess credibility alongside whatever it was adduced to prove.
• Corbett - judges have discretion to exclude any prior convictions where admission would prejudice the trial (PE>PV).
  o Each prior conviction is considered (and can be excluded) independently.
  o This applies in civil cases as well as criminal, though civil is less common.
• Corbett applications can be made any time after the Crown closes their case (typically immediately thereafter).
  o Underwood – it’s not fair to make the accused decide whether to testify before they know if their convictions are admissible.
A Corbett application is only relevant where the accused/party wants to take the stand and testify. (This is pretty unfair – prior convictions are typically excluded unless they’re admitted as BCE, but become somehow admissible when the accused takes the stand.)

- A Corbett application is made in voir dire, where the defence is required to disclose evidence to provide context to the decision. (If the context changes and it would have a material impact on the decision, the exclusion can be revisited.)
  - Defence makes the application before calling evidence and after the close of the Crown’s case
  - If the judge rules that cross-examination should be allowed on the prior convictions, the defence may then decide not to call the accused or to call the accused and raise the prior convictions in examination in chief in order to soften the blow

- Factors for admissibility in a Corbett application:
  - The nature of the prior conviction – does it reflect on honesty (perjury, theft, fraud, forgery)? Is it horrifying or stigmatic (child porn, bestiality)?
  - Remoteness in time – the longer ago the conviction was, the less probative it is.
  - Similarity – **the more similar the prior conviction is to the present case, the more prejudicial it is.**
    - Remember that this is the opposite of SFE. The more similar it is here, the more likely it is that the jury will make a prohibited inference.
  - Fairness – do we need to know if the accused is a liar? Did the accused make the case a “credibility contest” (meaning that the trier of fact has to compare the credibility/character of the accused against a Crown witness)?

### REAL EVIDENCE, JUDICIAL NOTICE, AND SPECIAL PROCEDURES FOR CHILD WITNESSES

### REAL EVIDENCE

- **Usual approach** – oral testimony of witnesses
  - Viva voce evidence – from someone’s voice
- **Real evidence** – a tangible item made an “exhibit” for the judge or jury
  - Physical Objects (e.g. linked to the matter in question)
    - i.e. firearm in homicide, knife in attack
  - Photographs and Videotapes
  - Demonstrative Evidence
    - (e.g. visual aids)
  - Documents
  - Computer-Generated Evidence
- **“Views”**
  - Leaving the courtroom to another location

**Real Evidence Key Points**

- 1) **Must be authenticated** (to be what party purports to be) in order for the party proffering the evidence to establish its relevance
  - e.g. drugs – are these the drugs the Crown claims were found in the back of the Accused’s car? – only relevant if they are the actual item found
- 2) **Must be Continuity**: continuity chain, i.e. who handled it
  - **“Chain of custody,”** e.g.:
    - Chain of evidence is important –because if the chain is broken at some point it will create a serious problem – this is all with a view of establishing continuity and the authentication of the item
    - Drugs seized from back of car by Cst. A
    - Cst. A gives drugs to Cst. B, who puts them inside an evidence bag and initials the seal on the bag
    - Cst. B takes the evidence bag to a police evidence locker and locks the bag inside
    - Cst. C takes the bag out of the evidence locker and opens the bag to take a sample of the drugs to mail to the lab, then re-seals the bag and re-initials the bag, locking the evidence bag back in the locker
• Cst. D opens the evidence locker and takes the evidence bag of drugs to court as an exhibit
• Holes in the chain of custody – chain does not need to be proven BRD, but there needs to be continuity
  • Will need to bring the different officers in to testify
• (c) **Integrity**: evidence has not been substantially altered/interfered with since seizure

• **Admissibility** → low threshold – some evidence to support conclusion the item of real evidence is what the party claims it is
• **Weight** → always free to argue little weight should be given to evidence because of continuity concerns

**Stage 3 for admitting evidence: probative value vs prejudicial effect**
• Remember, “stage 3” applies to real evidence – residual discretion to exclude evidence where prejudicial effect outweighs probative value
  • e.g. autopsy photos where cause of death is not in issue

“TAKING A VIEW”
• Members of jury (and judge, and counsel, and accused, and clerk, and sheriffs) leave the courtroom to go personally view something
• **Criminal Code**:
  • 652(1) The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, **direct the jury to have a view of any place**, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.

**PHOTOGRAPHS AND VIDEOTAPES**
• Need not be the actual photographer/videographer who created the photography
• But party tendering photo/video needs to be able to establish that the video is a **fair and accurate** depiction
  • Important point – photos are not self-authenticating – need evidence **under oath to establish fairness & accuracy**
    • Best to call the photographer as a witness to authenticate
  • “Is this photograph a fair and accurate depiction of the intersection of Jasper Avenue and 100 Street as it looked at the time of the accident?”
• **Admissibility depends on**:
  • Accurate depiction
  • Fairness
  • Verification under oath by person capable of doing so

**COMMON ISSUE – VIDEOTAPE EVIDENCE**
**R v Bulldog, 2015 ABCA 251 – VIDEO WAS ACCURATE AND FAIR REPRESENTATION**
• Three co-accused, beating at a prison gym caught on a surveillance video, there was a fourth guy who stood aside
• Defense argued that each of their coaccused was the person who stood aside, and video was not good enough to tell which person was which
• A prison guard was used to piece together the authenticity – accurate and fair representation
• Justice said:
  • “[A party’s] failure to establish that this video recording was not altered should not be fatal, so long as the [party] proves that it is a **substantially accurate and fair representation of what it purports to show**.”
• **Older Cases**:
  • R v Maloney, 1976
    • Videotapes of NHL hockey player smashing Toronto player’s head on the ice not admitted as they were out of sequence or in slow motion, distorting the reality and speed of what occurred
  • R v Penney
    • Seal hunter charged with failing to kill a seal in a quick manner
• Judge refused to admit the video evidence as format, sequence and timing had been modified
• The more a video relies on disputed acts, the less valuable it becomes

FULL EXHIBITS AND EXHIBITS “FOR AUTHENTICATION”
• Exhibits “for identification” – not yet authenticated
  • “Lettered” exhibits – “Exhibit A,” “Exhibit B,” etc.
  • e.g. Cst. D brings evidence bag of drugs to court
    • Logically, he may need to testify first
    • But he may not know anything about where drugs came from
    • Drugs would become an exhibit for identification
• Full exhibits – properly authenticated, considered by trier of fact
  • “Numbered” exhibits – “Exhibit 1,” “Exhibit 2,” etc.
  • Letter exhibit becomes numbered exhibit once authenticated, e.g., “Exhibit 3, formerly Exhibit B”

DOCUMENTS: THE “BEST EVIDENCE RULE” – TENDER ORIGINAL IF IN THE PARTY’S POSSESSION
• Principle: trier of fact should not have to rely upon a photocopy/reproduction or someone’s memory of a document when the original document itself can be produced
  • Meant to avoid concerns about fraud/forgery
  • Real evidence is generally considered more reliable than human evidence
• “Best evidence rule”: the original document must be tendered when a party seeks to prove the contents of that document
  • Significant limitation: confined to cases where the party has the original document and could produce it, but does not
  • Exceptions for where party can satisfy the court that original is lost, destroyed, or otherwise in the possession of another

ASIDE RE: “SPOLIATION”: THE EFFECT OF DESTROYED EVIDENCE
• Omnia praesumuntur contra spoliatorem
  • “all things are presumed against the wrongdoer” if evidence is intentionally destroyed
• Special/different principles in criminal context
  • See e.g. R v La, [1997] 2 SCR 680
  • Post defence conduct can show a presumption of consciousness of guilt

MCDougall v Black & Decker, 2008 ABCA 353 – SPOLIATION – REBUTTABLE PRESUMPTION OF FACT THAT EVIDENCE WOULD NOT ASSIST THE SPOLIATOR
• “Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.”
  • “The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator.”
  • “The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.”

JUDICIAL NOTICE – 2 CATEGORIES – 1) GENERALLY KNOWN/ACCEPTED, 2) CAN BE READILY DETERMINED/VERIFIED
• Court may dispense with calling of proof (evidence) by taking judicial notice of particular fact or matter that is generally known and accepted in the community or any fact that can be readily determined or verified
• Two categories
  • (1) Everyone knows “any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned”
  • (2) Anyone can find out “any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned”
(1) **Everyone knows** → “any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned”
- Within the knowledge of the relevant community – may vary depending on community
  - e.g.:
    - There are a number of bars on Whyte Avenue
    - K-Days is held in the summer
    - It is dark at 9:00 PM in December in Edmonton

(2) **Anyone can find out** → “any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned,” e.g.:
- **Calendars**: October 25, 2014 was a Saturday
- **Maps**: Edmonton and Edson are approximately 200 km apart
- **Indisputable Historical Facts**: Saigon fell to North Vietnamese forces in 1975
- **“Almanac” Facts**: The sun rises at approximately 7:37 AM on October 1st in Edmonton

**Judicial Notice: Adjudicative Facts vs. Legislative Facts**

**Adjudicative facts**: factual questions to be determined in a particular case, e.g. “who did what, where, when, how, and with what motive or intent”
- E.g. judicial notice of assumptions underlying toxicology reports in impaired driving cases and dictionary meanings of words

**Legislative facts**: facts that have relevance to legal reasoning, the law-making process, or broad questions of policy
- Often relevant when considering the constitutionality of a statute
- e.g. **R v Clayton**, 2007 SCC 32: used figures from Statistics Canada about rates of firearm-related offending when evaluating whether legislative objective was “pressing and substantial”
- questions of policy e.g. effects of climate change on the environment; poverty in Aboriginal communities

**Social Framework Facts**
- Refer to social science research used to construct a frame of reference or background context for deciding factual issues crucial to resolving a case
  - Lavallee – battered wife syndrome
    - Relied upon a great deal of evidence that the woman would not have put up with this kind of abuse had she not suffered from battered wife syndrome
  - **R v Ipeelee**
    - Taking judicial notice of systemic and background issues affecting Aboriginal peoples

**Special Procedures for Child Witnesses – 6 Examples**

**Many special procedures for children, who are particularly vulnerable witnesses, e.g.:**
- (1) Exclusion of the public from the courtroom: **CC s. 486**
- (2) Support persons while testifying: **CC s. 486.1**
- (3) Testifying outside courtroom / behind screen: **CC s. 486.2**
- (4) Prohibitions on accused personally cross-examining the child witness if self-represented: **CC s. 486.3**
- (5) Publication bans on identity of child witness: **CC ss. 486.4, 486.5**
- (6) Admissibility of child’s videotaped evidence: **CC s. 715.1**
  - Many of these special procedures also exist for adults who suffer from mental illness

**Testifying Outside of the Presence of the Accused – CC S 486.2(1)**
- **CC s. 486.2(1)** → judge may “order that the witness testify outside the courtroom or behind a screen or other device that would allow the witness not to see the accused” (e.g. CCTV)
• Presumptively allowed – shall grant the order, upon application of the prosecutor or the witness, unless the judge “is of the opinion that the order would interfere with the proper administration of justice” (very limited exception)

• Accused and counsel must still be able to see witness
  • 486.2(5): “A witness shall not testify outside the courtroom … unless arrangements are made for the accused, the judge, … and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.”

• More limited discretion in the case of other witnesses (“ordinary” adult witnesses)
  • CC s. 487.2(2): “the order would facilitate the giving of a full and candid account by the witness of the acts complained of”
  • Order can also be made for adults, except that the defense will need to show why it is needed; no presumption for the order being granted, as is the case for children
  • Note the amendments since the publication of the textbook

ASIDE RE: CREDIBILITY ASSESSMENT AND SEEING WITNESS - R v NS, 2012 SCC 72 – “NIQAB CASE” – SEEING FACE OF WITNESS NOT TO BE SET ASIDE WITHOUT COMPPELLING EVIDENCE
• R v NS, 2012 SCC 72 – “niqab case” – McLachlin CJC, majority:
  • “I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial.”
  • “Being able to see the face of a witness is not the only — or indeed perhaps the most important — factor in cross-examination or accurate credibility assessment.”
  • “But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence.”

ADMISSIBILITY OF CHILD’S VIDEOTAPE EVIDENCE – CC S 715.1
CC s. 715.1:
• “In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.”
• Special Procedures for Child Witnesses

CC s. 715.1 – Broken Down:
• Essentially an exception to the hearsay rule
• Not exactly like the principled exception but it deals with many of the same concerns

CC S. 715(1) – STATEMENT THAT “DESscribes the acts complained of”
• (1) Witness was under 18 at the time the offence was alleged to have been committed (not at the time of trial)
• (2) Statement must be video-recorded → testability
• (3) Video must be made within a reasonable time after the alleged offence → reliability (memory)
• (4) Witness must testify at trial (i.e. be physically present, and theoretically available cross-examination) → testability
• (5) Witness must adopt the contents of the video
• (6) Judge has a discretion to exclude
We know sexual assaults are not always reported promptly by children – needs to be interpreted flexibly

- At the upper end, some cases where video was admitted even where a delay of two years from when abuse occurred
- But the reason for this requirement is to ensure witness’s memory is fresh
- No strict rule that “time does not run” prior to the disclosure of abuse – if interpreted too flexibly, “guts much of the reliability”
- Normally the judge will not hold to a restrictive timeline for a complaint being made

Remember what “adoption” usually means with prior statements → witness able to say at the time of trial, based on the witness’s present memory, that the facts in the prior statement are true

- Interpreted more flexibly under s. 715.1
- Require only that:
  1. The witness must recall giving the statement
  2. The witness must be able to say that, at the time he/she gave the statement, he/she was attempting to tell the truth

Admissibility of child’s videotaped evidence

- Process – voir dire
- Remember – like all hearsay exceptions, does not trump other rules of admissibility
  - Videotape may need to be edited for hearsay, bad character evidence, etc.
- Even if cannot rely on s. 715.1, can still apply for admission under the principled exception

s. 715.1: Major differences from principled exception?

- No need to establish necessity
  - Do not need to inquire into child witness’s present memory of the allegations
  - Child may still remember subject-matter of allegations, but videotaped statement may still be admissible
- No need to establish threshold reliability
  - Statutory prerequisites (child testifies in court and available for cross-examination, made within a reasonable time, ability to say was telling truth when gave statement) are deemed sufficient guarantees of threshold reliability
  - May be admissible even if witness cannot remember anything about allegations – and thus, very limited ability to cross-examine
  - Contradictions are irrelevant – go to weight only

In general, we are not interested in a witness’s inferences (conclusions drawn from facts, also known as opinions)

- General exclusionary rule → witnesses are not permitted to express opinion evidence
  - “I saw him stab the guy three times in the chest.” → Fact
  - “I think he wanted to kill him.” → Opinion
  - “You’re probably going to kill someone if you stab them in that part of the chest.” → Opinion
  - “I think that was way too violent a response to be self-defence.” → Opinion
- Drawing inferences is usually the responsibility of the trier of fact, not witnesses
- Witnesses’ opinions are distracting, time-consuming, potentially misleading, and often not that helpful
TWO MAJOR CATEGORIES OF EXCEPTIONS TO GENERAL PROHIBITION ON OPINION EVIDENCE

- **Lay opinion evidence** (ordinary knowledge or experience, not beyond the knowledge, understanding, or experience of the ordinary juror)
- **Expert evidence** (special knowledge or experience, beyond the knowledge, understanding, or experience of the ordinary juror)

1) LAY OPINION EVIDENCE

- Ordinary witnesses express opinions all the time – this exception is often just common-sense
  - “He was drunk” – opinion (inference) about sobriety
  - “The car was going 100 km/h” – opinion (inference) about speed
  - “That’s the guy who was in the driver’s seat” – opinion (inference) about identity
- Not as concerned about the examples here because:
  - Within the realm of common sense of ordinary person
  - Can be questioned about how the opinion was formed

Common examples of lay opinion evidence

- Direction of travel of footprints
  - ABCA ruled admissible because “any schoolchild” could draw the inference but have difficulty explaining it without voicing the opinion
- You could go through and break down the reasons for each of these opinions (inferences)
  - But it’s often just easier to let the witness express an opinion about these sorts of everyday issues
  - Of course, it’s not always easy to draw the line between “fact” and “opinion”

Lay witnesses may present their relevant observations in the form of opinions where:

- (1) They are in a better position than the trier of fact to form the conclusion;
- (2) The conclusion is one that persons of ordinary experience are able to make;
- (3) The witness, although not an expert, has the experiential capacity to make the conclusion; and
- (4) The opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.

Common examples of lay opinion evidence:

- Age and weight
- Speed of vehicles
- Distances
- A person’s emotional state (happy, upset, angry, sad)
- Identification of a person
- The condition of objects (new, used, worn)
- Sobriety
- Inferences/deductions that can be made by “any schoolchild,” and that are simply easier to communicate and understand by way of an opinion
  - e.g. direction of travel of footprints left in the snow

**R v Graat** [1982] 2 SCR 819 – BEING DRUNK OR IMPAIRED - ORDINARY KNOWLEDGE WHETHER A PERSON IS SO INTOXICATED THAT THEIR ABILITY TO DRIVE IS MADE WORSE

**Facts:** an impaired driving case. Three police officers and civilian witness testified that they believed the accused’s ability to drive was impaired by alcohol. On appeal, the accused objected on the basis this was inadmissible opinion evidence, which went to the very issue the trier of fact was requited to decide.

**Issue at trial:** Is the driver’s ability to operate a motor vehicle impaired (i.e. made at least somewhat worse) by reason of the consumption of alcohol?
• Police officer and civilians had offered their opinions about whether driver’s ability to operate a motor vehicle was impaired, e.g.:
  • Q: Now officer, when you were at the scene, and having made the observations of the driving of the accused man, having observed him, having smelled the alcoholic beverage on his breath and observed him walk and observed him standing, observed him speaking to you what, if any, conclusion did you come to regarding his ability to drive a motor vehicle?
  • A: It was in my opinion that the accused’s ability to operate a motor vehicle was impaired by alcohol beverage.

• Is this an opinion?
  • Sure is – witness is drawing an inference about accused’s ability to operate a vehicle, on the basis of his observations of the accused’s sobriety and driving pattern
• SCC – admissible as lay opinion evidence
  • Difficult for a witness to express the underlying facts that justify the inference being drawn
  • Not a matter of scientific, technical, or specialized testimony – a matter of common, ordinarily knowledge whether a person is so intoxicated that their ability to drive is made worse

QUASI-EXPERTS – NO EXTRA WEIGHT ON POLICE EVIDENCE
• Because we are simply relying on the ordinary experience and common sense of a witness, it is important not to put extra weight on police evidence
  • e.g. police are not treated as “quasi-experts” in impaired driving

THE “ULTIMATE ISSUE RULE” – NO LONGER A STRICT PROHIBITION ON WITNESS’ OPINION GOING TO ULTIMATE ISSUE
• Originally at common law, a witness was not allowed to express an opinion on “the very issue before the court”
  • e.g. whether a complainant consented to sex, whether the accused suffered from a disease of the mind, whether the accused’s ability to drive was impaired, etc.
• No longer any strict prohibition on a witness’s opinion going to the ultimate issue
  • Need to be more careful when opinion goes to the ultimate issue, but no bar on admissibility
  • Closer the witness comes to making opinions on the very issue that must be shown, the more skepticism applies to the witness opinion – because you don’t want the trier of fact to too easily adopt the opinion as their own

TWO MAJOR CATEGORIES WHERE WE STILL PROHIBIT WITNESSES FROM EXPRESSING OPINIONS:
• (1) Opinions on pure questions of Canadian law
• (2) The rule against oath-helping

(1) OPINIONS ON PURE QUESTIONS OF CANADIAN LAW
• No witness, expert or otherwise, can provide an opinion on a pure question of domestic law.
• e.g. can’t call a lawyer to opine about the enforceability of a clause in a contract – question of law
• e.g. a police officer can’t offer an opinion about the guilt or innocence of the accused (R v Van, 2009 SCC 22)
  • Q: Why didn’t you continue your investigation any further, officer?
  • A: Because, in my opinion, the accused is the person who did it.
• (1) Responsibility for drawing inferences about the guilt or innocence of the accused belongs to jury, not the police officer
• (2) Risk the jury will place too much weight on officer’s opinion
• (3) Risk the jury will conclude officer’s opinion was based on other evidence not known to them
• On the other hand, sometimes the legal question (impairment by alcohol) is so commonsense we don’t have concerns (Graat)
• However, if dealing with foreign law, you can retain an expert in foreign law to provide an opinion
The “rule against oath-helping” prohibits a witness – even an expert – from expressing an opinion about whether a particular witness is telling the truth.

Evidence cannot be called for the sole purpose of bolstering a witness’ credibility (e.g. psychiatric testimony regarding credibility, polygraphs, reports that a witness seems trustworthy or their testimony is accurate). This applies in civil and criminal trials.

- Why? - Credibility determinations are the responsibility of the jury, not a witness – risk the jury will defer to witnesses’ opinions.
- Witnesses can never say whether they believe the statements of another witness.

**Rule against oath-helping**

- a party is not permitted to lead evidence solely for the purpose of establishing whether a witness is telling the truth
  - e.g. child sex assault case → calling mother of complainant and asking whether she believes her child is telling the truth
  - e.g. credibility case → calling a psychologist with experience in identifying deception to offer an opinion about whether a witness was telling the truth in a statement to police
  - e.g. sexual assault case → allowing the investigating officer to comment about how she does not lay a charge every time there is a complaint of a sexual assault
  - e.g. credibility case → calling a polygraph examiner to comment on whether witness “passed” a polygraph exam
  - e.g. forensics case → crime scene investigator testifies that his opinion has been corroborated by ten colleagues

However, a property qualified expert can provide general information relevant to judging the credibility of a witness

- ....subject to rules of expert opinion evidence (will discuss)
- e.g. witness suffers from a mental illness or delusions – qualified expert witness comments on how someone with the same condition could misperceive events
  - E.g. defendant has FASD – can call an expert to talk about how behavior of someone with FASD may generally act
- One controversial area – psychological evidence about how victims of child sexual abuse behave
  - Much of this evidence may simply be unnecessary, and can be explained through a jury-instruction: see *R v DD*, 2000 SCC 43
  - Sexual abuse cases – often, judge takes judicial notice and deals with it through jury instruction that victims may act in certain manners e.g. continuing to live under the same roof as the abuser – profile of a sexual abuse victim (“don’t assume that the victim will act in a certain way”)

**2) EXPERT WITNESSES**

- We often require witnesses who can express opinions (draw inferences) about important issues outside jurors’ knowledge/experience, e.g.:
  - **Engineering** – What caused the bridge to collapse?
  - **Forensic Sciences** – Does the accused’s DNA match the DNA found in the complainant?
  - **Collision Reconstruction** – What does the damage to the vehicle tell us about how fast it was going before the collision?
  - **Medicine** – What tests would a prudent physician perform when a patient presents with these symptoms?
  - **Toxicology** – Given the blood alcohol level at the hospital, what was the blood alcohol three hours earlier, when the accident happened?
  - **Psychiatry** – Was the accused suffering from a mental illness, and how might it have affected their ability to understand the nature or consequences of his actions?

- Not always “strictly scientific” evidence
• **Accounting** – What accounting procedures would a reasonably prudent auditor perform when auditing this kind of a company?
• **Social Sciences** – What is the meaning of a teardrop tattoo within gang culture?
• **Customs or Practices of a Particular Undertaking/Community** – How much force is typically permitted within the game of rugby? Within the skydiving industry, what safety measures are usually observed, or considered necessary? What street jargon or slang is used by drug users?

Major area of risk – concern expert evidence will be misused by the trier of fact
- Impressive credentials – cloaked in fancy language – concerns the triers of fact will be overwhelmed or place too much weight on the evidence
- May be expensive and time-consuming distraction
  - Especially since 1990s – emphasis on gatekeeping responsibility of the trier of law – goes to admissibility, not just weight

**EXPERT WITNESSES:** TEST FOR ADMISSIBILITY (MOHAN)

- (A) **Threshold Requirements**
  - (1) **Relevance**: Is the opinion relevant?
  - (2) **Necessity**: Does the trier of fact need the evidence?
  - (3) **No exclusionary rule**: Does the opinion evidence violate an exclusionary rule?
  - (4) **Properly qualified expert**: Is this opinion offered through a properly qualified expert?

- (B) **Gatekeeping Requirement**
  - (5) **Balancing**: Does the probative value of this evidence outweigh its prejudicial effect?

**Pause for Context**
- **Stage #1**: Relevance? If yes, presumptively admissible.
- **Stage #2**: Exclusionary Rules
  - (hearsay, bad character, procedural rules, etc.)
  - **Opinion**: Test for admissibility of expert opinion
    - **Threshold requirements**
      - (1) **Relevance**
      - (2) **Necessity**
      - (3) **No Exclusionary Rule**
      - (4) **Properly Qualified Expert**
    - **Gatekeeping** – Prejudicial vs. probative balancing
  - **Stage #3**: Prejudicial effect outweighs probative value (or for defence evidence, substantially outweighs)? If yes, inadmissible.

*(A) THRESHOLD REQUIREMENTS: (1) **RELEVANCE**: IS THE OPINION RELEVANT?*
- Simply repeats most basic rule of evidence – as a matter of logic and human experience, the expert evidence must make the existence of a fact in issue more (or less) likely
- **Some historical background…**
  - Courts used to distinguish between “logical relevance” (usual test) and “legal relevance” (cost-benefit analysis)
  - Now (since 2015, in White Burgess), we can restrict ourselves to “logical relevance” at this stage
  - “Legal relevance” and the cost-benefit analysis is instead considered at the gatekeeping stage

*(A) THRESHOLD REQUIREMENTS: (2) **NECESSITY**: DOES THE TRIER OF FACT NEED THE EVIDENCE?*
- If the trier of fact can form their own opinions on the issue *without* the assistance of the expert, the expert opinion evidence is not necessary
  - e.g. evidence from a psychologist that witnesses have problems with their perception or recall when events are stressful – this is essentially a matter of common sense
• when information can be communicated through a jury instruction instead of expert evidence – e.g. frailties of eyewitness identification evidence

(A) THRESHOLD REQUIREMENTS: (3) NO EXCLUSIONARY RULE: DOES THE OPINION EVIDENCE VIOLATE AN EXCLUSIONARY RULE?

• Cannot get around other exclusionary rules by introducing the evidence through an expert’s opinion
  • e.g. hearsay, bad character, procedural rules

(A) THRESHOLD REQUIREMENTS: (4) PROPERLY QUALIFIED EXPERT: IS THIS OPINION OFFERED THROUGH A PROPERLY QUALIFIED EXPERT? – TWO ASPECTS: PART I AND II

(I) THE PERSON OFFERING THE OPINION MUST, BE QUALIFIED AS AN EXPERT IN A CERTAIN AREA

• Expertise? – special knowledge and experience going beyond the trier of fact
• Need not come from formal training or education, as long as it goes beyond anecdote or transient experience
• No fixed rules
• Standard is not particularly high – does not need to be the best in the field
• Most weaknesses in qualifications or experience (a) go to weight, or (b) are considered at the gatekeeper stage

(II) THE EXPERT MUST NOT STRAY FROM THEIR AREA OF EXPERTISE

• An expert is qualified in an area – defined at the outset

ASIDE: PROCEDURE FOR QUALIFYING AN EXPERT

• Will generally require a voir dire
• Party tenders the witness as an expert in a certain area/field
  • “Diagnosis, prognosis, and treatment of disease in human beings”
  • “Collision reconstruction”
  • “Forensic psychology”
  • “Manner of use, packaging, and distribution of cocaine”
• Inquiry into the witness’s qualifications in that area
  • Provide witness with a copy of their CV
  • Have them go through CV, summarize qualifications
  • Cross-examined on qualifications, experience, etc.

ASIDE: RULES OF NOTICE FOR EXPERTS

Notice requirements – Criminal Cases

• CC s. 657.3(3)(a) – Presumptive rule – any party who intends to call an expert witness must give notice at least 30 days before trial, including
  • (i) name of proposed witness
  • (ii) a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise
  • (iii) a statement of the qualifications of the proposed witness as an expert
• CC s. 657.3(3)(b) – Crown must, within a reasonable period before trial, provide Accused with
  • (i) a copy of the report, if any, prepared by the proposed witness for the case; or
  • (ii) if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based
• CC s. 657.3(3)(c) – Accused must, no later than close of Crown’s case, provide Crown with the same (i.e. report or summary of opinion)
• CC s. 657.(4) – Remedy for non-compliance → adjournment, order for particulars, potentially recalling witnesses
Notice requirements – Civil Cases

- Alberta Rules of Court – see e.g. Rules 5.34 – 5.40
- (A) Threshold Requirements:
  (4) Properly qualified expert: Is this opinion offered through a properly qualified expert?

(II) THE EXPERT MUST NOT STRAY FROM THEIR AREA OF EXPERTISE

- An expert is qualified in an area – defined at the outset
- Important to ensure that the expert’s opinion does not go beyond their defined area of expertise

CASE STUDY: DR. CHARLES SMITH - R v MULLINS-JOHNSON, 2007 ONCA 720 – QUALIFIED EXPERT IN MANY CASES OF WRONGFUL CONVICTIONS – WENT BEYOND HIS EXPERTISE

- Dr. Charles Smith – head of pediatric forensic pathology at the Hospital For Sick Children, 1982-2003
- Qualified as an expert in innumerable cases
- Responsible for several wrongful convictions, often involving the sudden, unexpected death of a child

R v Mullins-Johnson, 2007 ONCA 720

- 4 year-old dies suddenly while uncle, William Mullins-Johnson, was watching her
- Charged with 1st degree murder & sexual assault of his niece
- A number of experts, including Drs. Rasaiah, Smith, and Zehr, testified for the Crown at the trial
  - “Their unanimous view was that various findings from the examination of [the child’s] body and the autopsy showed that she had been sexually assaulted over some period of time.”
  - “Drs. Rasaiah and Smith also testified that [the child] had been suffocated by her killer.”
  - Convicted of 1st degree murder, appeals dismissed
- “AIDWYC took up his case and retained an eminent pathologist, Professor Bernard Knight, to reinvestigate the case.”
  - “He concluded that the various bruises and injuries said to be the result of abuse and murder were no more than the result of normal processes following death or were caused by procedures connected to the post-mortem investigation.”
  - “Similarly, the various bruises to [the child’s] chest, neck and head, which were said to show that she had been physically abused during her life and manually suffocated, were the result of post-mortem artefacts related to lividity (the settling of the blood in the body after death).”
  - Two other forensic pathologists agreed with Prof. Knight
- The expert witnesses at trial had offered opinions beyond their expertise and had discounted other possible explanations
  - Accused had spent 12 years in jail before being released

How could this happen?

- “In the cases that led to the creation of this Inquiry, Dr. Charles Smith was allowed to give expert evidence in pediatric forensic pathology, often without challenge or with only limited review of his credentials.”
  - “He was an apparently well-credentialed expert from a world-renowned institution.”
  - “An expert like this can too easily overwhelm what should be the gatekeeper’s vigilance and healthy skepticism…”
  - “In fact, as we now know, Dr. Smith had none of the requisite training in forensic pathology and no reliable scientific basis for many of his opinions.”

AREA OF EXPERTISE – CAUTIOUS DELINEATION (ABBEEK) – DUTY TO KEEP WITHIN SCOPE (SEKHON)

- Abbey: “A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential.”
• Sekhon: While these concerns are perhaps more pronounced in jury trials, all trial judges — including those in judge-alone trials — have an ongoing duty to ensure that expert evidence remains within its proper scope.

(B) GATEKEEPING REQUIREMENT
(5) BALANCING: DOES THE PROBATIVE VALUE OF THIS EVIDENCE OUTWEIGH ITS PREJUDICIAL EFFECT?

“Gatekeeping” – is this expert evidence worthy of admission and consideration by the TOF?
– Another example of how the lines are sometimes blurred between the roles of TOF and TOL
• Questions of credibility of expert witness will still be reserved largely for the TOF
– But otherwise, TOL has a relatively robust role screening expert evidence for admission

“COST/BENEFIT BALANCING” – PREJUDICIAL VS. PROBATIVE

• In the past, sometimes referred to as “legal relevance”
• Based on concerns about questionable expert evidence being admitted too frequently, and its effect on the litigation process
• Obviously greater concerns in jury trials
– More stringently applied in the case of jury trials

Benefits (probative value), considering e.g.:
– Cogency: Does the evidence speak directly to a live issue in the case?
– Importance: Does the expert evidence relate to an important issue (vs. a minor or side-issue)?
– Reliability: How reliable is the expert’s opinion?
  • Is the opinion based on proven facts?
  • Is the expert’s theory or technique reliable?
  • Is the expert impartial?

Costs (prejudicial effect), considering e.g.:
– Undue consumption of time
– Distraction of the TOF from the real issues
– Inability of opponent to meaningfully respond
  • Surprise
  • Expense/resource concerns
  • Practical inability to meaningfully test complex evidence through cross-examination
– Complexity of expert’s opinion or how it is expressed
– Risk jury will be misled by impressive credentials and language
– “Conclusory” language that suggests opinion goes to the ultimate issue

POTENTIAL WAYS TO LIMIT PREJUDICIAL EFFECT
– Jury instructions about the limits of expert evidence
  • Directions to expert not to present evidence in conclusory style
– Modifying scope of expert’s opinion, or placing limits on opinions expressed/language used
  • “Consistent with,” “match”
  • E.g. forensic science that indicates that the accused can’t be ruled out but nothing more, maybe it doesn’t rule out many people
  • “consistent with” often less conclusive than it sounds
– Procedural requirements
– Pre-trial examination of witnesses or more detailed expert reports

EXPERT WITNESS INDEPENDENCE
“Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence”
- “They must be aware of this duty and able and willing to carry it out”
- “If they do not meet this threshold requirement, their evidence should not be admitted” → threshold requirement of independence – “qualified expert”? 
- “Once this threshold is met, however, concerns about an expert witness’s independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence” → factor to consider when weighing costs and benefits

Threshold stage: “This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert’s evidence would be ruled inadmissible for failing to meet it.”

Gatekeeping stage: “Finding that expert evidence meets the basic threshold does not end the inquiry. … [T]he judge must still take concerns about the expert’s independence and impartiality into account in weighing the evidence at the gatekeeping stage.”
- “At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.”

Novel Science and Challenged Techniques/Theories
- Special concerns about “junk science” being admitted too easily
- Some special rules for how to critique/scrutinize areas of science that have not been readily accepted in the past
  - Gatekeeping role is more important/prominent where science is novel
  - More strictly and stringently applied
- How reliable is this theory/technique, really?
  - Areas of human endeavor that are borderline, relatively unproven

As a category, not always easy to define “novel” science
- Principles intended to apply to new theories/techniques
- But courts are willing to re-scrutinize previously settled areas of science (e.g. hair analysis, bite mark analysis)
  - Hair analysis used to be commonly admitted in court
  - A few years ago, it was discovered that the expert evidence often went beyond the expertise of the experts
  - Discovered that there was frequent uncertainty and error in the analysis
  - Recently, gate analysis by a podiatrist was admitted in the BCCA
  - “With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”
  - Expert evidence of a type regularly accepted often continues to be accepted (Trochym)
- Also, not always easy to define “science”

R v Trochym. 2007 SCC 6 – Hypnotism Inadmissible for Unreliability
- Memory of the witness refreshed using hypnotism
- Key issues in trial – time of death, whether AC was present at a certain time
  - Witness’s first statement to police – saw the AC on Thursday afternoon
  - Witness undergoes hypnosis
  - Changes version – actually saw him Wednesday afternoon
- Ruling of the court: memory refreshing devices too unreliable to admit

Prior state of the law – the “Clark guidelines”
- ABQB case, drawn from American case law
- Intended to limit possibility of hypnotist influencing the subject’s memories – planting the seed of ideas
– e.g. independence, no outside information, etc.

• Problem: do these guidelines really speak to the reliability of the technique?

**DAUBERT FACTORS** FOR CONSIDERING RELIABILITY OF CONTESTED EXPERT SCIENCE – 4 FACTORS

• “Daubert factors” – considerations for reliability of contested expert science
  – *To determine if there is enough threshold reliability – to justify placing in front of a jury*

Daubert Factors:

• (1) Testing: Whether the technique can be and has been tested
• (2) Peer review/publication: Whether the technique has been subject to peer review and publication
• (3) Error rate: The known or potential rate of error
• (4) General acceptance: Whether the theory or technique used has been generally accepted

(1) TESTING

• Laboratory studies suggest hypnosis may not be particularly effective in recovering memories
• Concerns about whether lab conditions reflect real life
• “It is significant that, despite their disagreement on other issues, all the experts in this case testified that while hypnosis can result in the subject’s remembering a large number of details, these will include both accurate and inaccurate information.”

(2) PEER REVIEW/PUBLICATION?

• Hypnosis is not new
• Academic consensus: “while it is not generally accepted that hypnosis always produces unreliable memories, neither is it clear when hypnosis results in pseudo-memories or how a witness, scientist, or trier of fact might distinguish between fabricated and accurate memories”
• DO NOT give “peer review” undue weight
  • Just because it is peer reviewed, does not mean that the study or test was repeated or is repeatable

Peer review/publication? – observations

• It is not hard to get published in a journal that appears to have impressive credentials
  • “The American Journal of Homeopathic Medicine (AJHM) is a peer-reviewed scientific journal, specifically intended to meet the needs of physicians involved in the specialty of homeopathy.”
  • Junk science in the view of courts
• “Peer review” can mean a lot of different things
  • e.g. Simply reading a copy of the expert’s report
  • e.g. Attempting to reproduce the expert’s findings

(3) ERROR RATE?

• Very little was known about the error rate of recovered memories

• Error rate? – observations
  • Type I error and Type II error
    • “False positives” vs. “False negatives”
    • For forensic techniques, given bias against wrongful convictions, we are generally more concerned about “false positives”
      • Not so concerned about false negatives – wrongfully finding disconnect between the accused and the evidence
      • But you are concerned about false positives – positively linking the accused the evidence

(4) GENERAL ACCEPTANCE?

• Variety of approaches between jurisdictions
Hard to say it was generally accepted

**Observation:**

- **Generally accepted by whom?**
  - Within the police community?
  - By the courts? (somewhat tautological)

- **Generally accepted for what?**
  - Many techniques are accepted for therapeutic purposes, but not necessarily for use in court
  - Penile plethysmography (R v JL-J, 2000 SCC 51)
    - Attaching an item to the accused’s penis; reading whether there was stimulation triggered by certain images
    - Not reliable, even though the technology is accepted for other uses
  - E.g. use of MRI for mapping brain activity
    - Not reliable to use as a lie detector

**“NON-SCIENTIFIC” OR “EXPERIENTIAL” EXPERT EVIDENCE**

- Not always easy to define contested evidence in terms of science
- Concern – evidence will be essentially “anecdotal” and insufficiently reliable, despite being dressed up in the language of an expert opinion
  - What is the sample size? Was there bias in the sample selection? Was there statistical significance in the results? Can the study be repeated?
  - How was the opinion formed?
- Do we still use the Daubert criteria?

**R v ABBEY, 2009 ONCA 624 – SOCIOLOGIST EXPERT EVIDENCE – TEARDROP TATTOO MEANING – EVIDENCE ADMITTED AT ONCA – STILL ONGOING DISPUTE OVER EVIDENCE**

- AC charged with murder of rival gang member
- AC had a teardrop tattooed on his face a few months after the murder
- Crown wishes to call expert evidence about the significance of a teardrop tattoo

**Dr. Totten – sociologist, studies street gangs**

- Opinion: teardrop tattoo on the face of a young male member of an urban street gang signifies:
  - (1) Death of a fellow gang member or family member of the wearer,
  - (2) Wearer had served time, or
  - (3) Wearer had murdered a rival gang member
- Opinion is based on his years of study of urban street gangs in Canada
- Crown in a position to disprove possibilities #1 and #2 with respect to Mr. Abbey

**Defence objects to this evidence** – insufficiently reliable to justify admission

- Trial judge applies the Daubert criteria
  - e.g. little “testing,” no “known error rate”
- Evidence excluded, accused acquitted

**Crown appeals**

- “It is not surprising that Dr. Totten's opinion could not pass scientific muster.”
  - “…Dr. Totten did not pretend to employ the scientific method and did not depend on adherence to that methodology for the validity of his conclusions.”
- “As his opinion was not the product of scientific inquiry, its reliability did not rest on its scientific validity.”
  - “Dr. Totten's opinion flowed from his specialized knowledge gained through extensive research, years of clinical work and his familiarity with the relevant academic literature.”
  - “It was unhelpful to assess Dr. Totten's evidence against factors that were entirely foreign to his methodology.”
“Scientific validity is not a condition precedent to the admissibility of expert opinion evidence.”
- “Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated.”
- “Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field.”

**R v Sekhon, 2014 SCC 15 – Unlawful Trafficking of Cocaine – Such Thing as Blind Courier? Officer Says No – Anecdotal, Not Expert Evidence**

**Facts:** appellant, Ajitpal Singh Sekhon, was charged with unlawfully importing cocaine and unlawfully possessing cocaine for the purpose of trafficking. He was arrested when he attempted to cross the border from Washington State into British Columbia. The key issue at trial was whether Mr. Sekhon knew about the cocaine that was secreted in the pickup truck he was driving.

- Evidence about blind couriers from police officer
  - Opined that they did not exist just because he hadn’t come across them
  - Drill down into the opinion, discover that his experience was dated and limited to hardcore drug abusers
  - *Anecdotal evidence of this kind is just that — anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown’s favour, and of coming from the mouth of an “expert.”*

- Decision of the SCC: impugned testimony ruled inadmissible
- So, don’t take the opinion at face value – ask about how the opinion was formed
  - Was the anecdotal evidence related to
  - Not always easy to draw a line between experiential evidence and anecdote!

**The Basis for Expert Opinions – 4 Ways Expert Evidence Allowed**

1. **Expert Training Only**
   - Provide general/background information about a theory/technique/matter, without commenting on the facts of this case
   - E.g. general phenomenon that abused children may continue to associate with their abusers

2. **Personal Knowledge/Observation**
   - Expert has personally performed an experiment or interacted with person/evidence in this case
     - E.g. burn expert in R v Marquard – examined the burn before diagnosing it
     - Testifies to the underlying facts and then offers an expert opinion on what the facts mean
   - Rules about expert evidence generally go to their opinions, not their personal observations in the case

3. **Opinions Based on Hearsay/Inadmissible Information**
   - Experts often need to apply their expertise to the particular facts of the case
   - May need to perform investigation to gather information they need to offer their opinion
     - E.g. *Lavallee* – gathered information about history of abuse from accused’s family
       - abused spouse case – battered woman
       - essential for trier of fact to know the basis for the opinion so that the opinion can be evaluated
   - Expert opinion that is based on hearsay is not necessarily inadmissible, even though the hearsay statements are inadmissible – confusing!
     - Testimony of the expert in Lavallee could be used only be used to evaluate the opinion, not as proof of facts of the events that were described to the expert by the accused and her family
   - **However:**
     - As stated in Abbery and interpreted in Levallee:
       - It is necessary for the facts supporting the opinion to be found to exist based on admissible evidence; it is not however, necessary to establish every fact that the expert relied upon
• Must be some admissible evidence to establish foundation of expert’s opinion
  – SCC on information used by the expert that came from someone not party to the litigation:
    • Trier of fact is free to weight the opinion even if that information does not meet established
      hearsay exceptions (R v B(SA))

**R v Abbey. [1982] 2 SCR 24 – UNDERLYING FACTS MUST UPON WHICH EXPERT OPINION BASED MUST BE PROVEN**

  – “Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be
    found to exist.”
    • Underlying facts of the opinion must be proven
    • Example: must prove that woman was battered for years to be able to admit the evidence that battered
      women are likely to act in certain ways
  – Expert can testify based on hearsay information
  – But before TOF can rely on the expert’s opinion, there must be admissible evidence proving the hearsay
    information in the report
    • “Evidentiary foundation” for the opinion

**R v Lavallee. [1990] 1 SCR 852 – NOT NECESSARY TO ESTABLISH EVERY FACT, JUST NEED SOME ADMISSIBLE EVIDENCE**

  – Facts supporting the opinion must exist based on admissible evidence
  – But it is not necessary to establish every fact relied upon by the expert
    • So this is slightly different from Abbey – not all underlying facts need to be proven to admit the
      expert opinion
    • Just needs to be some proof of the underlying facts
  – “As long as there is some admissible evidence to establish the foundation for the expert’s opinion, the trial
    judge cannot subsequently instruct the jury to completely ignore the testimony.”
  – Basis of opinion on hearsay still goes to weight

**CLARIFICATION FROM PALMA: R v Palma (2000), (ONT SCJ) - FACTS UPON WHICH THE OPINION IS BASED MUST BE FOUND TO EXIST TO GIVE EVIDENCE WEIGHT**

  • Palma shot and killed three people and relied on the defence of not criminally responsible
  • Typical facts where this arises – NCR case
  • Accused is examined by defence experts
    – Long interviews with accused
    – Accused discusses the circumstances of the killing
    – Interviews form the basis for expert opinions about accused’s mental state
  • Accused signals he is unlikely to testify
  • Are the statements to the experts subject to a hearsay exception?
    – Remember – an “admission” by an accused can only be led by the Crown, not the accused as a defence

**Rules from Palma:**
1. An expert opinion is admissible if relevant, even if it is based on secondhand evidence.
2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist.

But remember **Lavallee:**
  – “[A]s long as there is some admissible evidence to establish the foundation for the expert’s opinion, the
    trial judge cannot subsequently instruct the jury to completely ignore the testimony.”
“The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.”

- Somewhat strange – seems to contemplate that evidence can be *admissible*, but TOF is told to give little or no weight
- Take-away: remember to directly establish basis for expert’s opinion as much as possible!
  - Just because there is expert evidence, must be some proof of the underlying facts first to put the expert evidence in front of the jury

**4) Opinions Based on Hypothetical Questions**

- Expert may be presented with a “hypothetical” and asked to draw inferences (i.e. offer an opinion) based on that hypothetical
  - e.g. “calculating backwards” for blood alcohol level
  - Example: in a drunk driving case
    - Trying to show through expert evidence that you can tell what the blood alcohol level was a few hours before the test was administered
- **But the underlying facts may well be contested**
  - Accused saying that they consumed alcohol between the accident and the test
  - If you want to admit expert evidence about stopping time on a dry road, but can not prove the underlying assumption that the road was dry, evidence not admissible
- “Before any weight at all can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist” (*J-LJ*)

**Use of Authorities to Cross-Examine Experts**

- **Expert may be cross-examined on the basis of books or articles within the expert’s field**
  - Expert must acknowledge the book/article as *authoritative* – can only be cross examined where she makes such an acknowledgment
  - Ignorance insulates experts in Canada
  - If witness adopts opinions of author, they become part of the witness’s evidence
  - If witness recognizes authority of the work, but rejects its conclusions, the witness can be asked to explain why
  - Responses may be considered when assessing the witness’s credibility
  - So, go find out an authoritative text on the subject, be able to cross examine the expert on the authoritative source

**Statutory Provisions**

- Provisions in provinces impose limits on the number of experts who can be called without leave of the court
- Other provisions permit reports by certain experts to be filed with the court without the need to call the expert

**Privilege**

**What is Privilege?**

- **Both a rule of evidence and a “substantive rule”**
  - Both an exclusionary rule and a limit on ability to compel disclosure
  - *Do not have to answer question*: places limits on what witnesses may be asked (and compelled to answer) in court proceedings
  - *Do not have to disclose information*: Also limits the documents/other information a party need turn over/produce in pre-trial proceedings

**Major Examples of Privilege**

- Solicitor-client privilege
- Litigation privilege
- Settlement negotiation privilege
Candidly discussing facts without the other party being able to use those admitted facts against them

- Spousal privilege
- “Case-by-case” privilege
- Public interest immunity
- Confidential informant privilege
- Third party records in criminal cases
  - O’Connor applications
  - Mills applications (CC s. 278.1)

WHY DO WE RECOGNIZE PRIVILEGE?

- Obviously an exception to the truth-seeking goal of the rules of evidence
  - Prevents the TOF from learning all relevant information
  - Interferes with adversaries’ ability to gather information and prepare their cases
- Other societal interests outweigh the interest in truth-seeking
  - Privacy and confidentiality
  - Preserving relationships

WIGMORE CRITERIA FOR PRIVILEGED COMMUNICATIONS – 4 CONSIDERATIONS

4 Considerations for Privilege – looked at for all the different kinds of privilege:

- (1) Originates in confidence that communication will not be disclosed
- (2) Confidentiality must be essential to maintain the relationship between the parties
- (3) The relationship must be one that ought to be sedulously fostered, in the community’s view
  - Important relationship and one that is in the best interest of the community to sustain
- (4) The injury caused to the relationship by disclosure must be greater than the benefits gained from the correct disposal of the litigation

WHEN DO WE RECOGNIZE PRIVILEGE?

- Utilitarian – cost-benefit analysis
  - e.g. value of preserving friendship vs. value of preserving solicitor-client relationship
- Wigmore’s criteria are helpful, but do we apply them to every possible set of facts?
  - Not always easy to perform this balancing
  - Uncertainty – need for greater clarity in many cases
- Class privilege vs. case-by-case privilege

Class privilege: a prima facie presumption that the communications are privileged (inadmissible and not subject to disclosure)

- If the information falls within the definition of a class privilege, there is a presumption against disclosure
- Party that seeks to admit information (or compel its production) has the burden of justifying why it should be introduced/produced

Class privileges:

- Exist both at common law and in statute
- e.g. Solicitor-client privilege (common law)
- e.g. Spousal privilege (statute)
- SCC has signaled that new class privileges will be a product of statute – not recognized at common law
  - R v National Post

Case-by-case privilege:

- Involves consideration of Wigmore’s criteria
- Onus is on the party asserting the privilege – party seeking to withhold the information
WAIVER OF PRIVILEGE?

Privilege belongs to the *holder* – the person whose benefit the privilege was created

- Some cases are easy – e.g. solicitor-client privilege in a criminal case
  - Privilege-holder is the client, not the lawyer
  - the lawyer cannot waive it without their consent.
- Harder where your client is corporate or government – who is the “client”?  
  - **Privilege can only be waived by the holder**
    - Regardless of who has possession of the information in question

Normally, waiver must be informed:

- (1) Holder is aware of the existence of the privilege
- (2) Holder voluntarily indicates a desire to waive that privilege

Waiver is interpreted somewhat flexibly

- Cannot be used as a sword and a shield
- May conclude there has been “implicit waiver”
- Relying on privileged information for one purpose may open the door to other uses
  - e.g. client’s disclosure of only part of information provided by lawyer (*R v Shirose*)
  - RCMP wanted to explain why they carried out a sting operation by saying that they received some legal advice
  - The defence then wanted to see not just the limited amount that the RCMP wanted to release; they wanted a subpoena to force the disclosure of all of the legal advice received by the lawyer
  - The release of some of the information was seen as an implicit waiver of privilege
  - So… you have to be careful what you release to the other side – this could be seen as implicit waiver of privilege; cannot cherry pick the information you want to release
- Yet waiver can be for a limited purpose/scope
  - e.g. one document vs. all communications with counsel

ACCIDENTAL DISCLOSURE?

Traditionally position: privilege is lost

- Based on traditional view that privilege protected the *source* of the information from being compelled to testify

Modern position is more forgiving

- Civil cases: privilege is not automatically lost, but must take steps to re-assert the privilege
- Criminal cases: engage different concerns

*Code of Conduct: Inadvertent Communications*

- 6.02 (12) A lawyer who comes into possession of a privileged communication of an opposing party must not make use of it and must immediately advise the opposing lawyer or opposing party.
  - Stop reading, advise other side, destroy it
  - If there is disagreement about status, may secure the communication pending resolution
  - Must advise other side if you have read it

SOLICITOR-CLIENT PRIVILEGE

*P&S definition*: A communication between a solicitor and a client, of a confidential nature and related to the seeking, forming, or giving of legal advice, is privileged information.

- Class privilege

By far the **strongest form of privilege known to law**
– Common law rule, but endowed with constitutional importance
  • Protected by s 7 of the Charter – life, liberty, and security of person
• See e.g. Canada (Attorney General) v. Chambre des notaires du Québec, 2016 SCC 20:
  – In response to money laundering legislation – requiring all people, including solicitors to disclose information on suspicious transactions
    • lawyers good for money laundering – won’t have to disclose why money changed hands
    • problem: forcing lawyer to disclose would breach solicitor client privilege
  – “this rule has deep significance and a unique status in our legal system”
  – “the right to professional secrecy has become an important civil and legal right”
  – “the professional secrecy of lawyers … is a principle of fundamental justice within the meaning of s. 7 of the Charter”
  – Privilege does not apply though if there is an investigation by the professional regulatory body e.g. the Law Society

Solicitor-client privilege: rationale
• Clients must be able to speak freely and candidly with lawyers in order to obtain proper advice
  – Without this privilege, could never reveal information lawyers need to properly advise clients
• Access to justice (Smith v Jones) – clients must be able to speak freely with lawyers to get legal advice, and if there was a chance those communications could be disclosed it’d undermine the legal system. Without legal advice, we can’t exercise our rights.

PRIVILEGE ARISES WHEN:
  – There is a confidential communication;
  – Between a lawyer and a client;
    • Remember – only lawyers are allowed to give legal advice.
  – Made for the purpose of seeking, forming, or giving legal advice

When solicitor-client privilege applies:
• Communications must be intended to be confidential, so be sure to maintain confidentiality
  – Presence of unnecessary third parties may defeat a claim of privilege
  – Be careful who is in the interview room with you and your client
  – Marginal cases can be difficult – parents in a case involving a youth?
• Protects communications (the imparting of information), not observations
  – Does not apply to “pure facts,” e.g., client seen arriving at lawyer’s office
  – But even “pure facts” that are integral to lawyer-client relationship may be protected
    • e.g. fee schedule, listing payments towards account
      • Main example: breakdowns of legal fees, which aren’t communication but can be used to infer what services were provided.
      • e.g. trust account statements… may not be subject to privilege
• Privilege may even extend to client’s identity
  – e.g. retainer to turn over real property
    • hiring solicitor just to turn over murder weapon – cannot be forced to identify that person
  – e.g. client consults criminal defence lawyer
  – Very situation-dependent
• Does not apply to real evidence – protects a communication between client and lawyer
  – e.g. client comes in with murder weapon
  – e.g. client provides financial records to lawyer
  – “A lawyer is not a safety deposit box”
  – Many hard cases beyond the scope of this class
• Privilege survives the death of the client
• Duties of loyalty and confidentiality (privilege) can create significant conflicts where a lawyer represents multiple parties to related litigation
Sometimes better for each person to have separate lawyer

**Solicitor-client privilege – “communication”**

- No need for a formal retainer before privilege may attach to a communication
  - “Communication” means any information created or made for the purpose of helping the lawyer understand what is going on in the case.
  - Potentially even on the “first phone call”
  - Casual conversation less likely to be covered
  - Is the purpose of communication for seeking legal advice?

**Easy case: statements made directly to lawyer by the client in an interview**

- **COMMON INTEREST “PRIVILEGE”**
  - For the purpose of legal advice privilege, confidentiality extends beyond the lawyer and client to include people the lawyer works with AND people who are common in (legal) interest with the client.
  - You can share communications with people who are common in interest without breaching confidentiality.
  - Important in commercial dealings with multiple parties.
- **Extends to communications with staff/agents**
  - e.g. clients’ communications with legal assistants
  - e.g. applications to Legal Aid for coverage
  - e.g. translators – can just be a family member who knows English, need not be a professional translator
  - e.g. experts retained to gather information for the lawyer from the client

**Harder cases: government or corporate lawyers**

- Protects communications were legal advice is sought
- Does not protect business advice or general managerial duties, falling outside the law
  - Often arises in the case of FOIP and aboriginal law
  - The line is obviously very blurry

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**REMEMBER, PRIVILEGE DISTINCT FROM OBLIGATIONS UNDER PRIVACY LEGISLATION AND PROFESSIONAL OBLIGATIONS**

- (a) Privacy legislation (e.g. *PIPA*), and,
  - Wil limit what you can keep secret for a client
- (b) Professional obligations under *Code of Conduct*
  - Can’t be forced to divulge under the privilege, but obligations may go beyond the privilege – some exceptions

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**Code of Conduct**

2.03 (1) A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;
(b) required by law or a court to do so;
(c) required to deliver the information to the Society; or
(d) otherwise permitted by this rule.

- “This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.”

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**EXCEPTIONS TO LEGAL ADVICE PRIVILEGE**

1) **FUTURE CRIMES EXCEPTION**

- No privilege for advice to facilitate the commission of a crime or fraud
There is no privilege for communications that are themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime or fraud.

- Only protects communications made for legitimate purpose of obtaining lawful legal advice
- Does not extend to communications where client’s purpose for obtaining advice is to commit a future crime

- A client’s business idea or proposed transaction may turn out to be illegal, but may not fall into exception
  - Client’s intent is key
  - Entitled to ask how to carry out activity that is newly legal or on the border of legality
  - Are they making a good faith attempt to comply with the law?

2) INNOCENCE AT STAKE EXCEPTION: PRIVILEGE IS VERY NEARLY ABSOLUTE – [INNOCECH]

INNOCENCE AT STAKE TEST

- Limited exception: “innocence at stake”
  - “As restrictive a test as may be formulated short of an absolute prohibition in every case”
  - In very limited circumstances, permits disclosure to an accused in a criminal case
  - The tests must be shown on a balance of probability:

**Innocence at Stake Test**

(1) Threshold test

- (a) Information sought from the solicitor-client communication is not available from any other source; and
- (b) Accused is otherwise unable to raise a reasonable doubt

(2) Innocence at stake test

- (a) Accused seeking production must demonstrate an evidentiary basis to conclude the communication (i) exists, and (ii) could raise a reasonable doubt; and
- (b) If this evidentiary basis exists, trial judge examines communication to determine whether it is likely to raise a reasonable doubt about accused’s guilt
  - Onus on accused at both stages – balance of prob.

**Practical problems**

- Accused must show both:
  - (a) that information is not available from any other source, and
  - (b) an evidentiary basis to believe the information exists
- Accused is put in a position of arguing that they will be convicted unless the information is disclosed!
  - Test makes very little sense
  - Can almost never say that there is no other way
  - In practice, useless “exception” – impossible to satisfy
  - SCC signals courts should be more willing to relax evidentiary rules (e.g. hearsay) before relaxing solicitor-client privilege

**R v Brown** – SCC WILLING TO RELAX EVIDENTIARY RULE BEFORE SOLICITOR CLIENT PRIVILEGE – ACCUSED SOUGHT PRODUCTION OF 3RD PARTY SOLICITOR CLIENT COMM. – 3RD PARTY’S GIRLFRIEND SAID THAT HE HAD TOLD HER HE HAD CONFOSEH TO HIS LAWYERS

- Brown was charged with murder; Brown brought a motion to compel production of a third party solicitor-client communication that had taken place between Benson and his lawyers
- Foundation for the application was a statement from Benson’s girlfriend, that Benson had told her that he had killed the victim and confessed as much to his lawyers
- Motion court judge granted the defence motion and ordered the production of certain documents otherwise protected by privilege
- SCC overruled since there were other ways to bring the evidence before the court e.g. through a hearsay exception
3) “PUBLIC SAFETY EXCEPTION” – REQUIREMENTS

Requirements for the public safety exception:
– (1) Clear risk to an identifiable person or group
– (2) Risk of serious bodily harm of death, and
– (3) Imminent danger

SMITH V JONES, [1999] 1 SCR 455 – PSYCHIATRIST AGENT FOR LAWYER – CLIENT TELLS PSYCH HE’S GOING TO KILL AND RAPE PROSTITUTES
– Client charged with sexually assaulting a prostitute
– Lawyer sends client to psychiatrist for a forensic evaluation
– Psychiatrist – agent for the lawyer, so conversations covered by solicitor-client privilege
– Client discloses, in considerable detail, his plans to kidnap, rape, and murder prostitutes

4) STATUTORY EXCEPTION – CODE OF CONDUCT

Code of Conduct
2.03 (3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that an identifiable person or group is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

• “In assessing whether disclosure of confidential information is justified to prevent substantial harm, a lawyer should consider a number of factors, including:
  (a) the seriousness of the potential injury to others if the prospective harm occurs;
  (b) the likelihood that it will occur and its imminence;
  (c) the apparent absence of any other feasible way to prevent the potential injury; and
  (d) the circumstances under which the lawyer acquired the information of the client’s intent or prospective course of action.”

A few concluding thoughts:
– Exceptions for advice from other lawyers on ethical issues
– Non-application for professional discipline proceedings
– Wiretaps and interception of other private communications

LITIGATION PRIVILEGE

• P&S: Communications between a lawyer and third parties are privileged if, at the time of the making of the communication, litigation was commenced or anticipated and the dominant purpose for the communication was for use in, or advice on, litigation.
  – Material produced for the dominant purpose of litigation (commenced or anticipated) is protected by litigation privilege (Blank).
  – Sometimes described as “work product” privilege
  – Examples:
    • Expert retained to review disclosure
    • Witness statements gathered from potential witnesses by a private investigator
• Does not exist to protect the lawyer-client relationship, but rather, to facilitate the adversarial process
  – Zone of secrecy in which parties may prepare case
• Litigation privilege expires with the litigation in question.
  – Per Blank, where there is closely related litigation (meaning litigation arising out the same cause of action between the same or related parties, or litigation that shares the same essential purpose and issues) that’s still ongoing when the litigation in question wraps up, litigation privilege may be extended.

Comparison
Solicitor-client privilege
• Protects the relationship
• Applies whenever client seeks legal advice
• Permanent, and survives even death
• Protects confidential communications

**Litigation privilege**
• Facilitates the adversarial process – about protecting the process
• Applies only in context of litigation
• Expires at conclusion of litigation
• Communications need not be in confidence

**Litigation Privilege**
• Line may be blurry, especially where dealing with client information through an agent
  – e.g. translator or expert hired to interview client – probably solicitor-client privilege
  – e.g. investigator retained to gather information from outside sources – probably litigation privilege
• Privilege is far less “sacred”
  – Civil rules may require disclosure of some information, e.g., exchange of expert reports

**WHAT IS COVERED BY LITIGATION PRIVILEGE? – DOMINANT PURPOSE TEST**
• Problem: not always clear why information gathered (e.g. accident reports)
  – May be apart entirely from litigation purposes e.g. being a prudent employer
• Three options:
  – “Sole purpose” test – only reason information was gathered was for litigation or anticipated litigation
  – “Dominant purpose” test – use in litigation or anticipated litigation was dominant or primary purpose, even if gathered for other reasons as well
  – “One substantial purpose” test – use in litigation or anticipated litigation was a purpose

**Canadian approach:**
– “Dominant purpose” test – dominant or primary purpose for preparation/gathering of information was for use in litigation (or anticipated litigation), even if prepared/gathered for other reasons

**SECURITY NATIONAL INSURANCE V EPS**, 2013 ABPC 188 – MVA KILLS GOOD SAMARITAN – POLICE SOUGHT STATEMENT GIVEN TO INSURER – INSURER COULD NOT ASSERT LITIGATION PRIVILEGE
• Motor vehicle accident on Anthony Henday kills a Good Samaritan who stopped to help
• EPS became aware of the vehicle that was involved in the accident, and discovered who insured vehicle
• Obtained a production order under the Criminal Code for disclosure of the statement the insured gave to his insurer (adjuster)
  – Insurance company asks Court for permission to decline to disclose – asserts litigation privilege

**Two basic inquiries:**
– (1) Was litigation ongoing (or reasonably contemplated) at the time the document was created?
– (2) Was the dominant purpose of creating that document preparation for that litigation?
• Litigation is often contemplated, in a general sense, whenever there is a serious accident
• Important distinction “between an insurer contemplating litigation following a serious motor vehicle collision and an insurer taking steps to accumulate information, including statements taken from the insured driver, for the ‘dominant purpose’ of prosecuting or defending litigation.”
  – Both must be present for litigation privilege

**Security National’s position:**
– Family had advised of fatality.
– Insurer was aware there was a surviving mother, who would have a claim.
– Adjuster swore an affidavit attesting that “it was extremely rare for a file involving a fatality to not ultimately result in litigation.”

EPS’s position:
– Did not consult with a lawyer prior to arranging for statement.
  • Suggests that investigation was not for dominant purpose of litigation
– Adjuster almost always got the insured’s version of the events through a statement, even where litigation was not contemplated.
– Adjuster needs information from the insured to determine whether Security National should pay out a claim by the insured.
– No specific claim by adjuster that dominant purpose was for anticipated litigation.
• Unable to say on these facts that investigative purpose went to preparation for litigation, as opposed to merely background investigation & determining whether to pay claim by insured.
• **No litigation privilege attached.**

**“IMPLIED UNDERTAKING” RULE**
• Information revealed in course of litigation process cannot be used for any purpose
  • Parties give an implied undertaking to the court that it will only be used for the present litigation
    – e.g. can’t use for business intelligence, post on Internet
    – May apply to court to be relieved of this undertaking
    – Remedy for violation is contempt
  • Applies to civil proceedings (exchange of records) and criminal proceedings (Crown disclosure)

**SETTLEMENT NEGOCIATION PRIVILEGE**
• Statements made for the purpose of settlement, during the course of settlement negotiations, are privileged and cannot be used against the party making them.
  – Settlement privilege creates a “zone of privacy” during settlements.
  – This includes admissions, non-admission, the nature of the settlement deal, etc.

**Recognized class privilege:**
– (1) Litigious dispute must exist (or be contemplated);
– (2) Communication must be made with the express or implied intention it will not be disclosed to the court if negotiations fail; and
– (3) Purpose of the communication must be to attempt to effect a settlement.

• **Justification:** we want to encourage settlement (which may include admitting things contrary to your interests in court), and if we allowed those statements to be used against their declarant settlements would never happen.
• Historically, this was the “without prejudice” rule – lawyers would sign letters “without prejudice” to indicate that they can’t be used against their client.
• **To be protected by settlement privilege, the statement must be made in a bona fide attempt to settle a dispute (real or apprehended).**
  – This includes preliminary discussion before litigation, as well as during litigation. But litigation must be contemplated at the time of the discussion.
  – Lawyers don’t need to be involved – it can just be between parties, so long as it’s *bona fide.*
  – This applies in civil and criminal (plea bargains, conditional admissions, etc.) cases.
• Settlement privilege applies to both failed and successful negotiations.

**“Without prejudice”**
– Common expression included on documents, meant to expressly signal party’s intentions
• Not a magic incantation
  – Documents/communications may be privileged even if the phrase is missing – more-so a matter of intent
Even where phrase is used, document is not necessarily covered by settlement negotiation privilege

- Also prohibits disclosure to third parties
  - e.g. Letter from AC’s doctor shared with Crown, then shared with police for further investigation?
    - Man involved in an accident claims to have suffered from epilepsy and did not know about it – doctor’s evidence was shared with Crown and passed along to the police
    - Police received a production order for the medical records
    - Medical records showed that prior to the accident, there was some suggestion by the doctor not to drive…. Goes to standard of care
    - This was breach of privilege
  - e.g. Disclosure of settlement agreement to other parties in a lawsuit?

- Also consider explicit undertakings, trust conditions, or mediation contracts as a possible means of controlling dissemination of information exchanged in resolution discussions

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**NOT AS STRONG AS SOLICITOR-CLIENT PRIVILEGE – CAN BE SET ASIDE IN CERTAIN CIRCUMSTANCES, E.G.:**

- (1) To prove there was a concluded agreement
- (2) To show an agreement should be set aside because of fraud or misrepresentation
- (3) To prevent negotiations from being used as a cloak for perjury, but only in clear cases
- (4) To explain apparent acquiescence to delay, in certain cases
- (5) “Without prejudice except as to costs”
- (6) In a criminal case, where necessary to make full answer and defence (e.g. *Bernardo*)
- (7) Where it’d be sufficiently unfair, in light of the policy aim of encouraging settlement, to keep the information secret.
  - One example: risk of double recovery by a party in multi-party suits. If the plaintiff might recover more than they’re entitled to through multiple settlements, the privilege can be loosened.
  - Where it’d be sufficiently unfair, in light of the policy aim of encouraging settlement, to keep the information secret.
    - One example: risk of double recovery by a party in multi-party suits. If the plaintiff might recover more than they’re entitled to through multiple settlements, the privilege can be loosened.

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**BE AWARE OF RULES OF PROCEDURE THAT EFFECTIVELY CODIFY THIS PRIVILEGE IN CERTAIN CONTEXTS, E.G. ALBERTA RULES OF COURT, RULE 4.20:**

1. A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a dispute.
2. Unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute
   - (a) are privileged and are made or generated without prejudice,
   - (b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and
   - (c) may not be referred to, presented as evidence or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

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**SPOUSAL PRIVILEGE**

- Important to distinguish between *spousal incompetency* and *spousal privilege*
  - Spousal *incompetency* (or spousal *immunity*) – (historic) rule that sometimes made a husband/wife incompetent to testify at their spouse’s trial (i.e. unable to be called as a witness against spouse)
    - Eliminated both in the civil and criminal context
    - Previously could not be sworn in and forced to answer some questions, with some exceptions
  - Spousal *privilege* – rule that limits the questions that can be asked of a spouse at their husband/wife’s trial
    - More of a procedural rule
Can’t really compel a spouse to give a statement

**SPOUSAL IMMUNITY – EXISTING RULE- CEA S 4, AEA S 4**
- Essential removes immunity

*Canada Evidence Act, RSC 1985, c C-5*

4 (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

(2) No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.
- Recent amendments have abolished spousal incompetency in matters subject to the *CEA*

*Alberta Evidence Act, RSA 2000, c A-18*

4(1) The parties to an action and the persons on whose behalf the action is brought, instituted, opposed or defended are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of themselves or of any of the parties.

(2) The spouses and adult interdependent partners of the parties and persons mentioned in subsection (1) are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of any of the parties.
- This is essentially the same rule as for criminal actions, but applies to civil actions

**SPOUSAL PRIVILEGE**
- This exists to protect trust and the integrity of marriages. It’s separate from spousal competence – the decision to waive it belongs to the witness.

**RATIONALE AND HOLDER – RECIPIENT SPOUSE**
- **Rationale** – preserving marital harmony
- **Privilege belongs to the recipient spouse, not the declarant spouse**
  - (i.e. the spouse who testifies, not the spouse who is being testified *against*)
  - Declarant spouse cannot assert privilege on recipient spouse’s behalf
  - Spousal privilege may be waived by the recipient spouse

**SCOPE OF SPOUSAL PRIVILEGE – MAY APPLY TO COMMON LAW COUPLES (R V LEGGE) – NOT COMPELLABLE**

*Canada Evidence Act, RSC 1985, c C-5*

4 (3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.
- Applies only *during the marriage* – privilege ends with the marriage
  - Makes sense – no marital harmony left to protect
- Applies only to *communications made during the marriage, not pre-marriage communications*

*Canada Evidence Act, RSC 1985, c C-5*

4 (3) No husband is compellable to disclose *any communication* made to him by his wife during their marriage, and no wife is compellable to disclose *any communication* made to her by her husband during their marriage.
- Any communication – need not be communicated by spouse in confidence
- Applies to *communications, not observations*
  - “What did your husband tell you when he came home?” vs. “When did your husband come home, and what was he wearing?”
  - Likely applies to same sex couples as well, even though this is not specified in the provision

*Canada Evidence Act defines privilege in terms of “husband” and “wife” – does it also apply to common law spouses?*
Spousal immunity rule had been found to violate s. 15 of the Charter by extending only to married couples: \textit{R v Legge}, 2014 ABCA 213.
\begin{itemize}
  \item ONCA disagreed: \textit{R v Nguyen}, 2015 ONCA 278.
\end{itemize}


Appears to be an open question in Alberta
\begin{itemize}
  \item Argument could be made that the privilege extends to same sex couples
\end{itemize}

CASE-BY-CASE PRIVILEGE
\begin{itemize}
  \item Even if communication does not fall within a well-defined category of privilege, may still be protected – courts may recognize privilege on a case-by-case basis
\end{itemize}

\textbf{Apply the four Wigmore criteria for privileged communications:}
\begin{itemize}
  \item (1) Originates in confidence that communication will not be disclosed
  \item (2) Confidentiality must be essential to maintain the relationship between the parties
  \item (3) The relationship must be one that ought to be sedulously fostered, in the community’s view
  \item (4) The injury caused to the relationship by disclosure must be greater than the benefits gained from the correct disposal of the litigation
    \begin{itemize}
      \item \textit{This criterion often does “most of the work”}
    \end{itemize}
\end{itemize}

\textbf{When have case-by-case privileges been recognized?}
\begin{itemize}
  \item In brief – not very often
  \item Spiritual advisors (priests in confessional)?
  \item Doctors?
\end{itemize}

\textit{M(A) v Ryan}. [1997] 1 SCR 157 – PSYCHIATRIST PRIVILEGE – DID NOT PROTECT DISCLOSURE ENTIRELY
\begin{itemize}
  \item Case of doctor sexually assaulting 17 year old patient
    \begin{itemize}
      \item Doctor sought post-assault records with another psychiatrist
      \item MA asserted case-by-case privilege over that information
    \end{itemize}
  \item Psychiatrist-patient records – recognizes potential as a case-by-case privilege
  \item \textbf{Outcome:}
    \begin{itemize}
      \item “It is open to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances.”
      \item “Once the first three requirements are met and a compelling \textit{prima facie} case for protection is established, the focus will be on the balancing under the fourth head.”
      \item “The result depends on the balance of the competing interests of disclosure and privacy in each case.”
    \end{itemize}
  \item Court nonetheless orders limited production of psychiatrist’s notes because “the communications might be expected to bear on the critical issue of the extent to which the respondent Dr. Ryan’s conduct caused the difficulties the appellant was experiencing.”
    \begin{itemize}
      \item Stringent conditions on disclosure.
        \begin{itemize}
          \item Psychiatrist’s notes and records were disclosed, but not the psychiatrist’s notes to herself
          \item Privilege did not fully protect from disclosure
          \item Bearing was on quantum, not liability
          \item Implication: if the court doesn’t recognize the privilege here, the privilege is somewhat unlikely
        \end{itemize}
    \end{itemize}
\end{itemize}

\textit{R v National Post}, 2010 SCC 16 – JOURNALIST’S SOURCE PRIVILEGE
\begin{itemize}
  \item Journalist-source privilege
    \begin{itemize}
      \item “The fourth Wigmore criterion does most of the work.”
    \end{itemize}
\end{itemize}
“Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good).”

- **Factors that need to be balanced:**
  1. Nature and seriousness of offence?
     - More serious and severe offence – will likely have to disclose
  2. How central is the evidence to the dispute?
  3. How probative is the information?
  4. What type of information is sought? (e.g. real evidence vs. information/statements/identity)
  5. Bad faith investigation?
     - Person seeking the information just wanting the source to wrongfully punish in their own interest
  6. Available from other sources?
  7. Degree of public importance of story?

**Case-by-Case Privilege**
- Problem with case-by-case privilege – no guarantees in advance, despite assurances of confidentiality
- Remember that with case-by-case privilege, burden is on the party asserting the privilege

### THIRD PARTY RECORDS IN CRIMINAL CASES

**TWO DISCLOSURE REGIMES: - COMMON LAW (FOR NON-SEXUAL OFFENCES) AND STATUTORY (SEXUAL OFFENCES)**
- Common law – non-sexual offences
    - Still good law except for the case of sexual offences
- Statutory – records in sexual offences
  - *CC s. 278.3 & R v Mills*, [1999] 3 SCR 668
    - Limits how the information can be disclosed; may limit the ability to give full answer the defence (unconstitutional)
    - Mills interpreted it creatively to find it constitutional

**Accused has a right to disclosure, but no right to “direct the investigation”**
- If information related to the allegations comes into the possession of the investigating agency or the Crown, general duty to disclose, subject to arguments about relevancy and privilege
- But Accused cannot direct or require police to collect information
  - e.g. videotape of an incident held by corner store
  - e.g. complainant’s medical or counselling records
  - but accused can bring a 3rd part records application

- Another frequent dispute is over whether information held by the police constitutes “fruits of the investigation” (and is thus presumptively disclosable), or just other potentially relevant information that happens to be held by police (and thus arguably not *Stinchcombe* disclosure)
  - *Stinchcombe* said that anything that was not privileged had to be released to the accused
  - e.g. police discipline records?
  - e.g. police training manuals?
  - e.g. calibration/testing records of forensic devices (e.g. screening devices)?

**O’CONNOR APPLICATION – NON-SEXUAL OFFENCES FOR DISCLOSURE**
- At common law, accused can make an application to require a third party to produce records: O’Connor Application
  - Test discussed in *R v O’Connor*, [1995] 4 SCR 411
Process:

- (1) Serve the record-holder with a subpoena
  - Specific subpoena that directs person to bring real evidence
- (2) Bring an application before the trial judge, on notice to the Crown, explaining why the records sought are likely relevant to an issue at trial
- (3) If record-holder asserts privilege, deal with privilege claim; in most cases, a well-founded claim of privilege will defeat the application
- (4) Test applied by trial judge:
  - (a) If the trial judge is satisfied (on the basis of the affidavit and application) the records are likely relevant, the judge orders production for inspection – the judge reviews the record
    - Likely relevant – lower threshold than the “relevance” requirement in the next step
  - (b) If, after reviewing the records, the judge concludes the records are relevant to the accused’s ability to make full answer and defence, then the judge orders production to the accused (on conditions)

Parliament responded with s. 278.1-278.91 of the Criminal Code:

- significantly limits the applicability of the common law regime to sexual offence prosecutions
- fear was that defence could get the complainant’s counselling records that showed other issues in the complainant’s life and support a sexual assault myth (e.g. crazy woman more likely to make up a story of assault)
- In sexual assault cases, records of a sexual nature (e.g. speaking to a therapist or rape crisis counselor) can be excluded under ss. 278.1-278.91.
  - This isn’t technically a privilege, but it functions like one to keep those records out.
- 278.1 – defines “record” – “any form of record that contains personal information for which there is a reasonable expectation of privacy”
  - “…but does not include records made by persons responsible for the investigation or prosecution of the offence” (important qualification)
  - E.g. must have been a third party records application for gaining the messages between the complainants in the Ghomeshi trial – but this means that the defence must have had some knowledge that those kinds of collusion-ish conversations had occurred
- 278.2 – presumptive rule against disclosure
  - (1) Except in accordance with sections 278.3 to 278.91, no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences …:
    - an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3;
    - Sexual offences
  - 278.2(2) – Applies even when the documents are turned over to the police or prosecutor, unless protections have been expressly waived
  - 278.2(3) – Prosecutor has a duty to give notice of possession of these documents to the accused

ACCUSED MAY BRING APPLICATION FOR PRODUCTION IN SEXUAL OFFENCE CASE (MILLS APPLICATION)

- In camera hearing
- Record-holder and complainant are not compellable

MILLS APPLICATION FOR PRODUCTION IN SEXUAL OFFENCE CASE

(1) Getting to Inspection – Relevance

- Accused must demonstrate that the record is likely relevant to an issue at trial, or to the competence of a witness to testify
  - Not having seen the record…
- “Reasonable possibility” the information is probative
Parliament provided an exhaustive list of reasons why a record is not relevant – 278.3(4)
These would appear to preclude production for virtually any reason!

278.3(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify: …
(c) that the record relates to the incident that is the subject-matter of the proceedings;
(d) that the record may disclose a prior inconsistent statement of the complainant or witness;
(e) that the record may relate to the credibility of the complainant or witness; …
- Essentially makes it difficult to meet the likely relevant standard
  - *R v Mills*, [1999] 3 SCR 668
    - SCC adopts a very tortured reading of this section to preserve its constitutionality
    - Accused must simply point to “case-specific information,” beyond a mere assertion, to explain why the information is likely relevant
- In practice, it is not easy to demonstrate likely relevance given the procedural limitations

(2) Getting to Inspection – The Interests of Justice
- Even if information is *likely relevant*, accused must go on to demonstrate why production for inspection is “necessary in the interests of justice”
- Weighing of need to make full answer and defence against intrusion on CO’s privacy and potential concerns about dignity, in light of probative value of record
- Again, judge is doing this “in the blind”!

(3) Inspection by Trial Judge
- Trial judge reviews the record and determines whether record (or parts of record) should be produced to the AC
- Again, trial judge balances same factors considered at the inspection stage
- Disclosure may be made on stringent conditions

INFORMER PRIVILEGE
- Prohibits disclosure of information that could identify a confidential informant
  - Rationale: Protecting the safety of informants and encouraging disclosure
- Very strong form of privilege – no balancing of interests
- Privilege belongs to *both* the Crown and the informant – must be waived by both
- Applies to informants (providing information), not *agents* (performing tasks at the direction of the police)
- Privilege protects the informant’s identity, not the information provided – but in practice, information provided may identify informant
  - Many disputes over how much information can/should be revealed
  - Hard in case of anonymous tips – how do police know what might reveal identity?
- “Innocence at stake” exception applies
  - If exception found to apply, Crown given option of staying charged before information is disclosed

PUBLIC INTEREST IMMUNITY – NOT GOING TO BE TESTED
- the government can claim privilege for information used in its operation under the Canada Evidence Act.
  - S. 38: information used for defence or national security purposes can be fully excluded when the Crown objects (full-scale privilege applies).
  - S. 39: Cabinet confidences will be maintained for 20 years.
    - Aim is to keep Cabinet communications from being used to challenge governmental decisions. Ministers need to be able to speak freely without repercussions or scrutiny.
  - S. 37: general public interest immunity (a sort of catchall category). Material relating to a national interest may be privileged (or disclosed) after balancing the need for the disclosure of the information and the need to keep it secret.
SELF-INCRIMINATION

• Broad principle against self-incrimination in Canadian law
• Two major aspects:
  – Rules that apply to formal proceedings (trial)
  – Rules that apply outside formal proceedings, during investigations (pre-trial)

Principle Against Self-Incrimination

• Deep historic roots in English law – Star Chamber
  o People forced to answer under oath and then the answer was used against them
• Intimately linked to adversary system
• Related to the presumption of innocence
• Crown must make out a “case to meet” before accused is called upon to respond

Rationales:

• Belief in inherent dignity of individuals
• Concerns about abuse of state power
• Risk of unreliable information when compelled

THE BROAD PRINCIPLE IS REFLECTED IN TWO (HISTORIC) COMMON LAW RULES OF EVIDENCE:

(1) Rule prohibiting accused from being compelled to testify at his/her own trial
  • Aside: Only relatively recently accused was even allowed to testify in own defence

(2) Privilege against self-incrimination: witness (at someone else’s trial) could refuse to answer questions where the answers would tend to incriminate them

THREE (MODERN) CATEGORIES OF RULES

(1) Non-compellability of accused at own trial
(2) Self-incrimination protection for witnesses
(3) Pre-trial right to silence

1) NON-COMPELLABILITY OF ACCUSED AT THEIR OWN TRIAL

• Old common law rule – accused were disqualified from testifying at their own trial (incompetent to testify)
  o Could still try to offer an explanation, indirectly (often when acting as their own counsel)
  o Line between evidence and argument blurred compared to modern rules
  o But accused could not be sworn to give evidence like any other witness

Abolishment of the old common law rule:

• Canada Evidence Act, RSC 1985, c C-5
  4 (1) Every person charged with an offence … is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

• Predecessor legislation abolished old common law rule
• Accused may testify, if he/she so chooses (i.e. accused is a competent defence witness)
• Testifies under oath/solemn affirmation
• Exposed to cross-examination like any other witness
• But accused cannot be forced to testify

Current Rule: Charter, s. 11(c):
11. Any person charged with an offence has the right … (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; …

- Rule now has constitutional status
- Limits on rule:
  - “charged with an offence,” “in proceedings against that person, “in respect of the offence”
- To benefit from protection, three conditions must be present:
  - Person must be compelled to be a witness
  - Proceedings must be against that person
  - Proceedings must be in respect of that offence
- Accused cannot be forced to testify at their own trial (even when tried jointly, with a co-accused), but…
  - Accused is compellable in a co-accused’s trial if the co-accused is tried separately
    - If two people are both charged with a murder but are tried separately – either can be compellable
    - If they were tried together, the only way that they would provide testimony if they chose to do so
  - Accused is compellable in proceedings that are not against the accused (criminal or otherwise, e.g. fatality inquiry, someone else’s trial)
  - Accused is compellable in proceedings against the accused that are not in relation to “the offence,” e.g., a civil lawsuit arising out of the same facts
    - E.g. compellable in civil proceedings in tort for battery, while not compellable in their defence of criminal proceeding for sexual assault
- Very rarely: “constitutional exemption”
  - Very rare
- S 7 will buttress s 11(c) where the predominant purpose of calling a person at a hearing is to obtain information or evidence for the prosecution of the witness – enable a witness to avoid testifying

USE OF ACCUSED’S FAILURE TO TESTIFY

- Accused’s failure to testify in own defence cannot be relied upon by the Crown as evidence of the accused’s guilt
  - Would undermine the protection afforded by s. 11(c) if failure to testify could be used against the accused
- Some ways this principle is weakened in practice:
  - “Tactical compulsion”
    - Judge may comment on the absence of any reasonable explanation for Crown’s case, where the Crown’s case otherwise proves allegations BARD
    - On appeal
    - Tactical compulsion – self incrimination protects when there is legal compulsion to testify, not tactical compulsion (Darrach)
      - Darrach – accused had to testify to show the evidentiary foundation for bringing the complainant’ prior sexual history into evidence

2) SELF-INCrimINATION PROTECTION FOR WITNESSES

- Old common law privilege against self-incrimination: witness could refuse to answer questions in a formal proceeding where the answers would tend to incriminate the witness

5th Amendment to US Constitution

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PRIVILEGE AGAINST SELF-INCrimINATION

- How to respond to self-incrimination concerns?
– (a) Witness may decline to answer questions (e.g. in the United States, “take the Fifth”) on the grounds it may incriminate them
  • “Front end protection” – maximum protection for witness, but important evidence may be lost
    • You can refuse to answer all questions – but this doesn’t look good for the witness
    • This was the traditional common law approach that was followed in the USA – not so in Canada
– (b) Witness may be required to answer questions, but the witness’s answers cannot be used against the witness in other proceedings – followed in Canada
  • “Back end protection” – trial gets your evidence (facilitates truth-seeking), but can’t use testimony against the witness

BRIEF HISTORY LESSON PRIOR TO 1982 – ABOLISHMENT OF PRIVILEGE FOR WITNESSES (NOT ACCUSED IN THEIR OWN TRIAL) AND CREATION OF USE IMMUNITY

Canada Evidence Act, RSC 1985, c C-5
5 (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
  • Abolished the old common law privilege against self incrimination….
    • But balance is struck in s 5(2)

Canada Evidence Act, RSC 1985, c C-5
5 (2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.
  • Establishes a new, statutory protection that is “use immunity” – compelled to answer but answer cannot be used against them
    • “Use immunity” – the quid pro quo for compelled testimony

Alberta Evidence Act: similar provision
6(1) A witness shall not be excused from answering any question on the ground that the answer may tend to incriminate the witness or may tend to establish the witness’s liability to prosecution under an Act of the Legislature.

(2) A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Questions re adultery
7(1) No witness in an action whether a party to it or not is liable to be asked or shall be bound to answer a question tending to show that the witness has been guilty of adultery unless the witness has already given evidence in the same action in disproof of the alleged adultery.

(2) Notwithstanding anything in this Act, subsection (1) does not apply in the case of any prosecution for an offence against the criminal law of Canada but evidence given in any such prosecution and tending to show the commission of adultery is inadmissible in evidence in any civil proceeding.

Notes:
  • Can’t be cross examined on knowledge of s. 13 or s. 5 of the Canada Evidence Act (R v Jabarianha; R v Noel)

TWO PROBLEMS WITH S. 5 OF THE CEA
  • (1) The witness must expressly invoke the section in order to take advantage of its protections
Many witnesses are simply unaware

- (2) Provides only use immunity
- Problem: what if the witness’s testimony leads investigators to a “smoking gun”?
  - “Lawyer: Where did you hide the knife?”
  - “Witness: In the hole behind the old shed.”
  - Police recover the knife, with the deceased’s blood and the witness’s fingerprints
  - Can the knife be used in evidence at the witness’s subsequent trial – even if his testimony cannot?
- Is there derivative use immunity?
  - s. 5 of the CEA only speaks to use immunity

THE CHARTER: S. 13 FOR USE-IMMUNITY; S. 7 FOR DERIVATIVE USE IMMUNITY

- Section 13 – automatic protection
  - Not required to invoke the protection, as was the case with s. 5 of the Canada Evidence Act
- Section 7 – derivative use immunity

Section 13 of the Charter

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

- Offers similar (or better) protections as compared to s. 5 of the CEA – and do not need to explicitly invoke the Charter to be protected
- Constitutional use immunity (vs. statutory use immunity under s. 5 of the CEA)

THE SELF-INCrimINATION PROTECTION OF WITNESSES – 4 RULES

- A complex area of the law
  - SCC has issued a series of rulings that can be hard to sort out
  - Hasn’t helped that SCC has changed course recently about the scope of protection under s. 13

- Exception to the rules: if the accused is being prosecuted for perjury or obstruction of justice

RULE #1 – ACCUSED EXERCISES RIGHT NOT TO TESTIFY

- P&S: If the accused does not testify at his trial, his testimony from an earlier proceeding cannot be used against him at that trial, regardless of whether he was the accused or a mere witness in the earlier proceeding.

Rule #1: Example
• AC testifies at his first trial: admits killing the deceased, claims self-defence
• AC is convicted, appeals, new trial is ordered
• AC does not testify at his second trial
• Crown seeks to introduce AC’s testimony from the first trial, to prove he caused deceased’s death
  – Remember – hearsay exception – admission by accused
• **Prohibited by s. 13 of the Charter**
  – An accused who does not testify at his trial has absolute use immunity at that trial

**Concern**

• So if the accused gets a second trial, can he completely change his story… and make up a better story the second time around?
  – May be exposed to a perjury prosecution, but this is better than a murder conviction!
  – Is this fair?

**RULE #2**

• **P&S: If the accused does testify at his trial, testimony he previously provided during an earlier proceeding where he was not a compellable witness can be used to cross-examine him at his trial, and, depending on its relevance, it can be used either (a) as proof of his guilt (“incrimination”), or (b) to challenge his testimony (“impeachment”).**

**REFRESHER: COMPELLABLE WITNESS?**

• “during an earlier proceeding where he was not a compellable witness”
• Accused **compellable** to testify in:
  – (a) Any civil trial where he is either party or witness
    • Remember, in civil proceedings, parties are compellable
  – (b) Someone else’s criminal trial
    • Can be called by the Crown or by the defence
• Accused **not compellable** to testify in:
  – His own criminal trial (even with co-accused)

**Rule #2: Example**

• Alice is charged with murder
  – Not compellable at her own trial
• Alice testifies at the first trial: “I was drunk and I stabbed him, but I didn’t mean to kill him”
• She is convicted of murder, appeals, new trial
• Alice testifies at the second trial: “I didn’t stab him, it was Bob”
• **Can the Crown use Alice’s testimony from the first trial against her if she testifies at the second trial? Yes.**
• Alice was not compellable at her first or second trial
• If she chooses to testify at her second trial, her evidence from the first trial is fair game
  – (a) If the earlier testimony contains admissions that help prove the Crown’s case, it can be used to **incriminate**, i.e., prove that fact or element of the offence (e.g. the fact she stabbed the deceased – unlawful act)
  – (b) Even if the earlier testimony was entirely exculpatory (e.g. if she had not admitted to any stabbing, and had advanced an alibi), her prior testimony can be used for **impeachment**, i.e., to show her testimony at the second trial is untrue, because it has changed

**Rule #2**

• Why the different outcome?
  – If the accused chooses to testify at second trial, there has been no state compulsion on either occasion
  – Accused has freely chosen to testify, twice
  – Concerns about state abuses are limited
— Fairness concerns – should accused be able to radically alter testimony and expose herself only to a perjury charge?

RULES #3 AND #4

• P&S: If the accused does testify at his trial, his earlier testimony from a prior proceeding where he was a compellable witness
  — (3) cannot be used at his trial, if the earlier testimony has the potential to be used by the Crown as affirmative evidence of the accused’s guilt (i.e. for incrimination); but
  — (4) can be used at his trial to challenge his testimony (i.e. for impeachment) if that earlier testimony does not have the potential to be used by the Crown as affirmative evidence of the accused’s guilt.

• Distinction based on the nature of evidence
  — Driven by the language of s. 13 of the Charter
    • “A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.”
  • Seems to draw a distinction between “incriminating” and “non-incriminating” evidence and “incriminating” and “non-incriminating” uses

R V NEDELCU 2012 SCC 59, AT PARA. 9 – INCriminating evidence – evidence given to assist or prove essential element of offence in prior proceeding

— “What then is ‘incriminating evidence’?”
  • The answer, I believe, should be straightforward. In my view, it can only mean evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt, i.e., to prove or assist in proving one or more of the essential elements of the offence for which the witness is being tried.”
  • Motorcycle accident; Accused is charged with dangerous driving causing bodily harm; Accused is also sued by passenger on motorcycle
  • In the civil proceedings, accused is questioned (examined for discovery) → claims he cannot remember the accident
    — Remember, witnesses are always compellable in civil proceedings – so he was compelled
  • At his later criminal trial, accused testifies → claims to remember what happened
    — Provides a detailed account of accident
  • Prior testimony: “I remember nothing”
    — This testimony is not itself evidence of guilt
      • This evidence could not be used by the Crown to prove an element of the offence
      • Therefore not “incriminating evidence” in the meaning of s. 13
  • Crown is permitted to use evidence from the civil proceeding to impeach accused’s testimony at criminal trial
    — Trier of fact invited to disbelieve the Accused because his testimony has changed

Rule #4: Example

• Same scenario – dangerous driving causing bodily harm and civil lawsuit
  • Accused is examined for discovery in civil proceedings → admits was driving at 200 km/h immediately before accident, admits weaving in and out of traffic
  • Accused testifies at his criminal trial → claims his top speed never exceeded 130 km/h, and claims that he only changed lanes once or twice
  • Evidence from the civil proceedings was incriminating → could have been used to prove an essential element of the offence
    — Thus, Crown not permitted to use prior evidence at the accused’s criminal trial, even to impeach (cross-examine) the accused
    — So it’s almost better sometimes to give incriminating evidence at the prior compelled testimony, because then it can’t be used against you in the subsequent criminal trial (if you testify at the criminal trial; if you don’t testify the prior testimony can’t be used against you anyway)
What if the accused is technically compellable, but wasn’t actually compelled?

- Accused (defendant in lawsuit) chooses to testify as part of his own civil case
- Accused was not technically compellable to testify, because the other party did not actually force him to take the stand and give evidence in the civil trial – counts as not being compelled

- **R v Nedelcu**, 2012 SCC 59, at para. 104:
  - “Therefore, to determine whether the quid pro quo is engaged in a particular case, the court should consider whether the witness was statutorily compellable and not whether the witness felt subjectively compelled to testify.”
- If the law *could have been* used to force the accused’s testimony, accused considered “compellable”
- (Until the SCC changes its mind)
- Crown’s use of accused’s prior testimony at accused’s trial

### DERIVATIVE USE IMMUNITY

- The “smoking gun” problem mentioned earlier
  - s. 5 of the CEA only provides *use* immunity
  - Likewise, s. 13 of the *Charter* only addresses the use of “incriminating evidence so given” – use immunity
  - Section 7?
- s. 7 of the *Charter* provides protection – “derivative use immunity”
  - Principle against self-incrimination is a principle of fundamental justice under s. 7
  - Evidence derived from compelled testimony may be excluded pursuant to ss. 7, 24(2) of the *Charter*
  - If accused shows plausible connection between the accused’s compelled testimony and discovery of evidence, Crown must prove, on a balance of probabilities, that the evidence would have been discovered even without the testimony
  - If Crown cannot, evidence is excluded

### 3) PRE-TRIAL RIGHT TO SILENCE

**Basic rule:** no obligation to speak with police

- In general, no one (witness or suspect) is required to provide information to investigators/state agents
  - Often police will seek witnesses such as parents when a child is the accused
  - Lawyer can get their lawyer associate to tell the parents that they should probably not give statements to the police, no duty to assist
  - Instead, free to choose whether to cooperate

**At trial, no adverse inference can be drawn against an accused for remaining silent, or failing to cooperate with investigators**

- A few exceptions, e.g., failure to give alibi notice
  - If you are going to claim to be elsewhere at the time of the crime, you must give reasonable notice
  - But typically, AC even can be selective about what information provided & not risk adverse inference: see **R v Turcotte**, 2005 SCC 50 (“send an ambulance”)
    - Guy came into hospital, saying that there were bodies on his farm and to send an ambulance
    - When questioned by police, the guy was not required to answer specific questions
    - You can be selective about being silent – you don’t waive your right to silence by partial disclosure

**EXCEPTIONS**

- Obviously there are exceptions – situations where information may be legally (statutorily) compelled from someone, e.g.:
  - Taxation, securities, regulated industries (e.g. farming)
• Motor vehicles, e.g. Traffic Safety Act, s. 71(1): “A driver of a vehicle involved in an accident shall, in the form and manner prescribed by regulation, provide a report of the accident to ... a peace officer having jurisdiction where the accident occurred ...”
  • Don’t even necessarily have to say who was driving... can write that “somewhere in this area and in this time period, my vehicle was involved in a collision with another vehicle“
• The border, e.g. Customs Act, s. 11(1): “...[E]very person arriving in Canada shall ... without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties ...”

PRE-TRIAL RIGHT TO SILENCE – USE OF COMPELLED STATEMENTS
• Use of such compelled statements in a prosecution may risk infringing the principle against self-incrimination
  • Principle reflected in ss. 11(c) & 13 of the Charter
  • But (as noted) the principle against self-incrimination is also a “principle of fundamental justice” under s. 7 – broader application
  • s. 7 goes beyond the specific protections of ss. 11(c) & 13
• Use of a compelled statement against the accused in subsequent criminal proceedings may infringe s. 7 of the Charter
  o Not always – balancing required
  o Gets complex, e.g. income tax: R v Jarvis, 2002 SCC 73
    ▪ Can be compelled to provide info to the CRA

PRIMARY FACTORS CONSIDERED:
(1) Existence of coercion?
  o Strength of coercion to provide information
(2) Adversarial relationship?
  o Focused on you in particular or more of a background regulatory purpose e.g. number of fish you caught
(3) Risk of unreliable information being provided?
(4) Risk of abuse of power?
  • Risk of the abuse of power by investigators in using coercion

R V PORTER, 2015 ABCA 279 – GOOD SAMARİTAN HİT AND KİLLED – STATEMENT GİVEN TO INSURANCE COMPANY/POLİCE CANNOT BE USED AGAINİST ACİCİ At CRItıMİAL TRIAL
• Same case mentioned last week – Good Samaritan is hit and killed on the Anthony Henday – driver not IDed
• AC retains counsel the next morning
• Goes to the police station to make a written accident report, as required by the Traffic Safety Act
  o Law is clear – when AC gives such a statement under compulsion, statement cannot be used against AC at a criminal trial: R v White, [1999] 2 SCR 417
  o Lawyer specifically notes the statement is given only because compelled by TSA
  o Always do this: write at the top of the statement – I am compelled by law to provide the following statement
    ▪ Also tell the client not to talk – the written statement should be the only statement
• Accused is arrested, but declines to make any further statements to investigators, and is released
• Police use AC’s statement to obtain a production order against AC’s insurer
  o Very questionable move: officer doesn’t mention that the AC’s statement was made pursuant to the TSA
  o Ignore the validity of the production order for now
• AC gave statement to his insurer, which contains admissions about identity of driver
  o E.g. said he was driving, heard a bump, drove home and saw on the news that someone had been struck in a hit-and-run
  o Crown knows it cannot tender the TSA statement at trial (per White)… but the insurer statement?
• **Insurance Act, s. 556** – establishes “statutory conditions” that are “deemed to be part of every contract” of insurance:
  o “The insured must promptly give to the insurer written notice, with all available particulars, of any accident involving loss or damage to persons or property …”
• **This section does not compel an insured to divulge information to the state**
  o Instead, compulsion arises from a mandatory term in an otherwise voluntary contract of insurance, made between private parties
• Yet still arguably legal compulsion – requirement to divulge information to someone else (insurer)
  o Insurance is mandatory if you want to drive
  o Failure to comply with mandatory condition would very likely result in denial of coverage

(1) **Existence of coercion?**
• Voluntary choice to drive – privilege, not a right
• But insurance is mandatory, and practically speaking, driving is not optional for many people
  o Note, statement may also have been excludable under derivative use – the police learned of the incriminatory statement via another compelled statement

(2) **Adversarial relationship?**
• May not have been adversarial relationship with the insurer
• But there was clearly an adversarial relationship with the state – criminal investigation ongoing

(3) **Risk of unreliable information being provided?**
• Significant incentive to lie to insurer if statement may be used against insured at criminal trial

(4) **Risk of abuse of power?**
• Allowing Crown to use such statements would be an end-run around **White** – risk of abuse
• Based on the 4 factors: **ABCA: s. 7 engaged, statement inadmissible**

**VOLUNTARINESS**
• At trial, when Crown wishes to use a statement made by the accused to a **person in authority**, Crown must prove the **voluntariness** of that statement (**Oikle**)
  o There must be a **voir dire** to prove voluntariness unless explicitly waived by the accused
  o Unusual test – Crown must prove voluntariness **beyond a reasonable doubt**
    ▪ Each of the 4 factors below must be proven **BRD**
  o Applies whether Crown tenders the statement as part of its case (i.e. to incriminate), or merely for cross-examination (i.e. to impeach)
    ▪ Often the Crown will wait until the accused makes a statement at trial, and if that statement is different from the previous admission, the Crown will want to admit the prior statement to impeach the accused, but will then have to prove voluntariness

**WAS THE ACCUSED’S WILL TO REMAIN SILENT OVERBROKEN?**
  o 1) Inducements (e.g. promises of leniency, threats)
  o 2) Oppressive circumstances (e.g. denial of food, physical abuse)
  o 3) Lack of an operating mind (e.g. intoxication)
  o 4) Trickery/other conduct that could shock the conscience of the community (e.g. injecting truth serum)

**OATH HELPING AND PRIOR CONSISTENT STATEMENTS**

**RULE AGAINST OATH-HELPING**
• As a general rule, a party may not ask questions or present evidence solely to bolster the credibility of the party’s own witness.
  – e.g. asking witness about their impressive titles/credentials/standing in the community
  – e.g. leading evidence about the moral/ethical life lived by the witness (e.g. the rehabilitated prisoner)
  – e.g. asking another witness whether they believe the first witness, or whether first witness is a truthful person
  – e.g. calling a polygraph examiner to testify about the positive results of witness’s polygraph exam
  – e.g. asking police officer (who took a statement) about impressive record for getting truthful confessions
  – contravened where a police officer stated that he believed the Crown witness and testifying that his belief was based on the witness’ willingness to take a polygraph test (R v Siu)

Why isn’t it allowed? Two major concerns:
  – (1) Undue consumption of time
  – (2) Potential to distract the trier of fact
• Credibility of a witness is assumed until impeached by the opposing party

EXPERT EVIDENCE RELEVANT TO CREDIBILITY
  • A party may call expert evidence about facts relevant to the credibility of one of their witnesses where the facts are likely to be beyond the experience of the trier of fact, but the rule against oath-helping prevents the expert from going so far as to testify that the witness is likely to be telling the truth.
    – e.g. expert evidence about how children may respond to sexual abuse
  • Concerns:
    – Fine line between educating the trier of fact and engaging in impermissible oath-helping
    – Expert evidence may not be necessary – jury charge may be sufficient (DD)
    – Must be strictly limited to “background information,” and not cross the line into offering an opinion about credibility of witness

PRIOR CONSISTENT STATEMENTS
  • General rule: Evidence that a witness previously made a prior statement consistent with that witness’s evidence is, in general, inadmissible.
    – If relied upon for the truth of its contents, hearsay concerns: out-of-court statement, with no contemporaneous cross-examination, tendered for the truth of its contents
    – Even if only offered to support the credibility of the witness: concerns about probative value and the self-serving nature of the statements

Two major concerns about admitting prior consistent statements:
  • (1) Lack of probative value
    – Probative value is slight: “consistency is a quality just as agreeable to lies as to the truth”
    – Prejudicial effect is significant: repetition of allegations may give false sense of credibility to TOF
  • (2) Self-serving nature
    – A prior consistent statement doesn’t actually corroborate a witness, because this evidence isn’t independent of the witness

Prior Consistent Statements
  • Obvious cases: witness testifies about what witness told someone else, before court
    – E.g. repeating their prior statement to the police
  • Less obvious cases: police officer repeats allegations, as relayed by the complainant
  • Subtle cases: police officer testifies that, after speaking with the complainant, officer went looking for the accused and eventually arrested him for sexual assault (R v Demetrius)
    – Implies that the prior statement pointed to wrongful conduct of the accused
    – Could also object on the grounds of hearsay – but could get past this by saying that the statement is not being admitted for its truth
MAJOR EXCEPTIONS:

– (1) Circumstantial evidence of something relevant
– (2) Rebut allegation of recent fabrication
– (3) Admissible as a hearsay exception
– (4) Statements made when found in possession
– (5) Statements made upon arrest (maybe)
– (6) Narrative

Two things to keep in mind about exceptions:

• Even if a prior consistent statement is admitted as an exception to the rule
  – (1) TOF cannot assume that because a witness made the same statement in the past, they are more likely to be telling the truth now; and
  – (2) It cannot be relied upon as corroboration of the witness’s in-court testimony

1) PRIOR CONSISTENT STATEMENTS AS CIRCUMSTANTIAL EVIDENCE

• Sometimes the very fact a prior statement was made will raise relevant, permissible inferences
• Major example – state of mind
  • e.g. accused makes nonsensical comments shortly after a killing, denying responsibility (R v Edgar)
    – Mental state of accused is in issue
    – May be necessary to repeat specific denials of guilt from earlier, consistent statement, to understand how witness was behaving – state of mind
    – Circumstantial evidence of a disordered mind
• Remember: often possible to call evidence of a witness’s state of mind/sobriety/demeanor without getting into the details of what witness said
  – Rebut e.g. asking witness about what the accused’s demeanor was, whether she appeared emotional, how the person was speaking, how intoxicated they were

2) REBUT ALLEGATION OF RECENT FABRICATION

• Where witness’s evidence is challenged as having been fabricated/created some time after the events in question, a prior consistent statement may be admissible to rebut this suggestion of recent fabrication
• Often an issue where defence alleges some sort of a “triggering” motive to lie
• Example:
  – Complainant testifies she was sexually assaulted
  – Defence theory – sex was consensual, complainant lying about her lack of consent
  – Accused suggests the allegation was fabricated in response to her husband discovering she had an affair
  – Crown could lead evidence to demonstrate complainant disclosed sexual assault (e.g. to friend, to police) long before her husband ever discovered affair
  – R v B(AJ)
    • Allegation of recent fabrication found to be implicit in the defence claim that the complaint was inspired by a book she had read
    • She had in fact complained of the sexual assault prior to reading the book
• Criminal Code, s 275: Recent complaint in sexual offences
  – An error to use failure to complain as a basis for a presumptive adverse inference relating to credibility or consent
• Relevance is not from the consistency of the allegation – it is to undermine an allegation of fabrication
  – So it is not being used itself to show that the witness is telling the truth
  – Relevance is from the fact it undermines the suggestion that the allegation was fabricated at some later time
  – Thus, to be relevant, the prior consistent statement must pre-date the point where the opposing party claims the (allegedly fabricated) version of events was first adopted by the witness
Main issue: who was driving before accident
- Stirling (Accused) or Harding (Crown witness)
- Defence counsel cross-examines Harding about the fact he has launched a civil lawsuit, and the fact he had drug-related charges dropped by the Crown
- Implication was that Harding fabricated story to support his civil suit, or in exchange for having charges dropped
- Opened the door for the Crown to introduce statements made shortly after accident, identifying Stirling as the driver
- Still, remember limited use of this evidence
  - “The fact that Mr. Harding reported that the appellant was driving on the night of the crash before he launched the civil suit or had charges against him dropped does not in any way confirm that that evidence is not fabricated.”
  - “All it tells us is that it wasn’t fabricated as a result of the civil suit or the dropping of the criminal charges.”

Recent Fabrication
- Only used to rebut suggestion of recent fabrication – not to support credibility of Harding’s claim he wasn’t the driver
- Little gained, on those facts, to Accused implying fabrication was as a result of civil lawsuit
  - All this did was open the door to admissibility of prior consistent statements, to rebut this suggestion
- Not just of use to the Crown/complainants
- Exception may apply for any witness
  - Can also be used to rebut a suggestion of recent fabrication by the accused
  - May be helpful to take a recorded or signed, dated statement

3) ADMISSIBLE AS HEARSAY EXCEPTION
- If a prior consistent statement is admissible for the truth of its contents (i.e. admissible under a hearsay exception), it can be used to support the credibility of the witness
  - e.g. admissible under principled exception
    - However, remember that party seeking to introduce prior consistent statement will need to show necessity – may be difficult if out-of-court statement is completely consistent with witness’s in-court testimony
    - e.g. res gestae exceptions
  - Statement of physical condition (“my back hurts”) – corroborated by witness’s trial testimony

4) STATEMENTS MADE WHEN FOUND IN POSSESSION
- e.g. accused is found with drugs or stolen property, immediately denies possession
  - rationale: speaker too caught up in startling event to have time or reflection necessary to make up a lie
- Mentioned these earlier as potential hearsay exceptions
- Prior consistent statement may be admitted for the truth of the assertion (“it’s not mine”), and to support accused’s credibility if accused testifies
- Is it really that hard to spontaneously lie?

5) EXCULPATORY STATEMENTS MADE UPON ARREST – MAY BE AN EXCEPTION
- Normally, exculpatory statement doesn’t help accused
  - Aside re: why lawyers advise clients not to give statements
  - Don’t say anything!
- Spontaneous out of court statements made upon arrest when first taxed with an accusation can exist as an exception to the rule against prior consistent statements
**R v Edgar, 2010 ONCA 529 – Statement of Accused May Be Permitted as Prior Consistent Statement If They Take the Witness Stand**

- “It is open to a trial judge to admit an accused's spontaneous out-of-court statements made upon arrest or when first confronted with an accusation as an exception to the general rule excluding prior consistent statements…”
- “…as evidence of the reaction of the accused to the accusation and as proof of consistency…”
- “…provided the accused takes the stand and exposes himself or herself to cross-examination.”
- So some statement of the accused may be permitted as a prior consistent statement

**Concerns with Edgar:**
- (1) Both the innocent and guilty are able to spontaneously lie when caught – is there much probative value to this evidence?
- (2) Undermining the right to silence
- (3) Based on concerns about TOF drawing problematic inferences from silence – but this isn’t how we usually address improper inferences
  - Not yet followed by other appellate courts and has not been brought up in front of the SCC

**Narrative**

- “Narrative” is a potential exception to many exclusionary rules
  - e.g. hearsay, bad character
- **Basic idea:** may need to hear inadmissible evidence in order to allow a witness to tell their story in a natural way, and to understand their other evidence
  - **But** – a concept (in my opinion) over relied-upon and fraught with danger
- “Pure” narrative – evidence is necessary in order to place witness’s evidence in context and understand their version of events
  - e.g. parents of complainant confront accused with allegation of sexual assault, claim accused makes inculpatory admissions (R v George)
    - Confrontation makes no sense unless TOF learns that the complainant had made allegations to parents immediately before
- P&S: “The doctrine of narrative should be used to reveal the existence of prior statements solely where it is necessary to do so. If those statements have no impact on the unfolding of events, they should not be referred to.”
  - Only as much detail as necessary to understand narrative
  - Not an invitation to introduce everything that was previously said by a witness
- Prior statement should be described in general terms

**Circumstantial evidence** narrative – a trickier concept, often used with child witnesses

- Could assist in rejecting challenges to credibility related to delay in reporting
  - Most likely to be used in assessing testimony of child witnesses
- e.g. abuse only disclosed after complainant is no longer around the accused
- e.g. situation like R v Khan – child witness who immediately discloses detailed version of events
  - May have been admissible under the principled exception, but no necessity if child can testify
  - If there was no necessity, the immediate disclosure may still be relevant as a circumstantial evidence narrative – cannot be admitted solely for showing that the child was more likely to be telling the truth
  - **But** – even if admissible, only admissible to establish the timing of the complaint, which may assist in assessing credibility/truthfulness of the witness, not to confirm truthfulness of witness’s evidence

**Key Limitations – Instructions for TOF**

- (1) **Prior consistent evidence cannot be used to enhance the credibility of the person making the statement**
  - Evidence does not become more credible because it has been repeated
- (2) **Prior consistent statements are not independent, and therefore, do not corroborate a witness**
• (3) Unless admissible under a hearsay exception, prior consistent statements cannot be relied upon for the truth of their contents

**CREDIBILITY OF YOUR OWN WITNESS**

**ASIDE: REHABILITATING THE CREDIBILITY OF YOUR OWN WITNESS**

• Cannot call oath-helping evidence for your witness in chief, but may be able to do so to rehabilitate your witness who has been attacked by opponent

  • **(1) Rebuttal evidence**
    • Calling evidence to respond to claims of lack of credibility that arise from cross-examination (or opponent’s case)

  • **(2) Softening the blow in advance**
    • e.g. asking about obvious concerns during examination-in-chief
      • Criminal record (e.g. accused)
      • Cooperation with authorities in exchange for leniency
    • Don’t go too far – e.g. *R v Clarke* (1981), 32 AR 92 (CA)
      • Introduces witness as AA sponsor, devoted husband, etc., painting the witness in a positive light
      • But you can ask whether there was an exchange provided for the witness making certain statements in agreement with the Crown

**A FREQUENT PROBLEM**

• What happens when your witness “doesn’t come through”?
  • You have a wonderful witness statement
  • It proves an essential part of your case
  • The witness takes the stand and… says something that supports the opposite side or refuses to talk

**What good are prior statements?**

• Are great for cross-examination by the opposing party
  • Prior inconsistent statements can always be used by opposing party for impeachement
  • Changing stories are not the hallmark of credible or reliable witnesses

• Not as helpful for the party who calls a witness
  • Remember the rule against oath-helping: in general, cannot introduce a witness’s prior consistent statement
  • But the prior statement *may* be helpful when your own witness doesn’t come through

**USE OF YOUR WITNESS’S STATEMENTS BEFORE TRIAL**

• **Best approach: meet with a witness before trial**
  • Prevent the disappointment in the first place!
  • Witnesses are, in general, free to use whatever means they find helpful to refresh their memories before trial begins (including prior statements)
  • This is a big reason *why* we take statements from witnesses
  • Have your witness review their prior statements before Court
  • Exception: hypnosis (*Trochym*) – can’t be used

• **A witness can be cross-examined about how they have refreshed their memory**
  • Trial judge has discretion to order production of means used to refresh memory (e.g. a statement)
    • If the refresher was speaking to another witness/friend – starts to look like the testimony may have been tainted
    • Often goes to *weight* – is this memory real or contaminated?

**AT TRIAL**
CHALLENGING THE CREDIBILITY OF YOUR OWN WITNESS

- When a party calls a witness, they implicitly vouch for the witness as worthy of belief (or at least not wholly unworthy of belief)
  - Does not mean a party is required to argue that the trier of fact should uncritically accept everything their own witness says
- Often a problem for the Crown
  - Disreputable characters (e.g. accomplices) may be key Crown witnesses
    - E.g. witness takes the stand and says that the accused did not do it
  - Crown may also decide, out of a sense of fairness, to call a witness that may hurt its case
    - But should not call witness for tactical purpose of discrediting them

BECAUSE A PARTY IMPLICITLY VOUCHES FOR ITS OWN WITNESSES...

- **General rule:** the party who calls a witness cannot lead evidence to show their witness is **not a credible person**
  - Prohibition on impeaching your own witness
- Of course, a party can always call other witnesses that contradict an unhelpful witness
  - Counsel is free to ask trier of fact to prefer one witness’s evidence over another
  - You’re impeaching your witness, but doing so indirectly
- **Normally, must examine your own witness in chief**
  - Open ended questions, not leading

EXAMPLE

- Complainant in domestic assault case gives a handwritten statement to the police
  - “I was sitting at the table in the kitchen. My husband walked in, yelled at me, then punched me in the face.”
  - Accused pleads not guilty
- Complainant takes the stand at trial
  - “Q: What happened after he walked into the kitchen?”
  - “A: I forget what happened next. I was drunk.”
    - …or…
  - “A: I fell out of the chair and hit my face on the floor.”
    - …or…
  - “A: I punched my husband, and then he hit me back.”
- A big problem for the Crown
  - The prior written statement is not evidence – hearsay!
    - Out of court statement being tendered for the truth of the statement
- **What now?**
  - Start impeaching/cross-examining your own witness?
    - But the general rule – you’re not allowed!
    - Cant start impeaching your own witness – general rule
  - Give up and pull the case?

DEALING WITH DISAPPOINTING WITNESSES – 6 OPTIONS

- A number of different possible approaches
  - Need to ask yourself: Is this mere forgetfulness, or deliberate falsification?
  - Often start with the simple option, and work your way up – “climbing the ladder” (P&S)

Options for dealing with the disappointing witness:

- (1) Gently leading questions?
- (2) Present memory revived? → refreshing memory with a prior statement
  - Witness may refresh memory / adopt prior statement
• (3) Past recollection recorded?
• (4) Transcript of earlier testimony?
• (5) Cross-examination of your own witness?
  • Hostile witness?
  • Adverse witness?
  • s. 9(2) of the Canada Evidence Act?
• (6) KGB statement/hearsay exception?

(1) GENTLY LEADING QUESTIONS?
• This is the simplest option – leading questions to trigger memory
• Trial judge has discretion to allow party to lead its own witness where there appears to be memory problems
  • e.g. “A: I’m not too sure what happened. I was pretty drunk. My memory is fuzzy.”
  • (Permission to lead?)
  • “Q: Did something happen between you and your husband that night?”
  • “A: Yes. He punched me.”

(2) PRESENT MEMORY REVIVED?
• Law allows use of a prior statement during trial, to refresh the witness’s memory
• Prior statement used as an aide memoire
  • Triggers an existing memory
• Prior statement does not need to have been made immediately after the event in question
  • Not all the same requirements as “past recollection recorded”
• See R v Pickunyk, 2012 ABPC 318, at para. 30
  • Great summary of the usual procedure used in Alberta courts

PRESENT MEMORY REVIVED – STEPS TO FOLLOW:

(1) SHOW THAT DOCUMENT WOULD ASSIST MEMORY
• (a) Witness may ask to refer to their prior statement
• (b) Or counsel may inquire whether would assist
  • “I understand that you wrote a statement for the police after they came to your house that night.”
  • “Would it assist you to refer to that statement?” or “Would reading that statement help refresh your memory?”
  • If witness declines, then the witness is not asking to use the prior statement to refresh memory → you then need to proceed “up the ladder”
  • Declining starts to look like maybe the witness is adverse

A common script: Police officer notes
• Officer begins testifying
• Officer gets to portion of testimony where they can’t remember a detail – asks to refer to notebook
• Crown asks a series of leading questions:
  • “Q: Did you take any notes in relation to this investigation?”
  • “Q: Where these notes made by yourself, in your own handwriting?”
  • “Q: Were they made shortly after the events described?”
  • “Q: Have there been any changes to these notes since you made them?”
  • “Q: Would referring to these notes help refresh your memory?”
• Some of these questions unnecessary for present memory revived (but helpful for PRR – see below)

(2) ASK PERMISSION FOR WITNESS TO REVIEW THE PRIOR STATEMENT
• A) Counsel shows document to opposing counsel & ensures opposing counsel has a copy
• B) Prior statement should be described on the record
“Your Honour, I would like to provide the witness with a copy of a handwritten statement that appears to have been signed by this witness, dated April 14, 2016.”

C) Opposing counsel asked whether they object

• If objection (e.g. because statement could not refresh memory, or doubts about authenticity), judge hears argument and rules (in general, while the witness is outside the courtroom)

(3) WITNESS READS PRIOR STATEMENT

• Statement reviewed by the witness in silence
  • You should not direct the witness to simply read the statement – better if they review in silence, and then ask if it assisted in refreshing their memory
  • If lengthy, counsel may direct the witness to a specific part (if not inappropriately leading)
    • “I would direct your attention to the third paragraph on page 4 of your statement.”

(4) WITNESS ASKED WHETHER REVIEW HAS ASSISTED

• “Q: Did reviewing that statement help refresh your memory?”
  • If review of statement didn’t help, then we aren’t reviving a present memory → need to proceed “up the ladder”

(5) WITNESS ANSWERS WITH REFRESHED MEMORY

• “Q: Are you now able to tell us what happened that night?”
• Questions still must not be leading, e.g.:
  • “Q: Now that you’ve looked at your statement, do you remember whether your husband hit you?”
• Answers must still be part of present memory
• Witness should not refer to statement when they are answering questions (reading details from their prior statement)
  • If they have to read directly off the statement, this is a strong sign they aren’t operating off their present, refreshed memory
  • As opposing counsel, consider asking judge to tell witness to turn over their statement

This is often the solution to witnesses who are initially forgetful

• Sometimes described as “adopting” prior statement
  • “Adopting” means more than just acknowledging that prior statement was made
  • Witness must be able to say, based on their present memory, what they said in their prior statement is accurate

BUT:

• See e.g. R v Kelly, 2011 ONCA 549, at para. 41:
  • “A witness cannot adopt a prior inconsistent statement unless that witness has a present recollection of the events referred to in the statement and can attest to the accuracy of the statement based on a present recollection of those events.”
  • “A witness who has no present recollection of the events but insists that the statement was true because, for example, she would not lie to the police, has not adopted the prior statement and subject to some other rule of evidence, the prior statement is not admissible for its truth.”

Counsel should not simply hand up a witness statement when the witness first takes the stand, and then have the witness review statement immediately (akin to a “script”)

• Inappropriately leading: see e.g. R v Rose (2001), 53 OR (3d) 417 (CA), at para. 19.
• Trial meant to investigate the witness’s present memory – not simply have them read their witness statement to the court
  • This often happens with police officer notes or a police report

(3) PAST RECOLLECTION RECORDED? – 4 CRITERIA
• What if the witness does not have a present memory of the matters in question?
• Another way to introduce their evidence

Past recollection recorded – four criteria:
• (1) Past recollection was recorded in some reliable way
• (2) At the time recorded, memory must have been sufficiently fresh and vivid to be probably accurate
• (3) The witness must be able to assert today that the record accurately represented their knowledge and recollection at the time it was recorded
  • “Knew it to be true at the time”
• (4) Original record must be used, if available

• In effect, “past recollection recorded” is a hearsay exception – the prior statement is the source of the evidence, not the witness
  • Necessity → witness can’t remember, based on present memory
  • Reliability → recorded reliably, made when memory was fresh, and witness can assert it was accurate at the time
• But preconditions are important
  • Can’t record something long after (where memory has likely faded, and recorded memory less likely to be accurate)
  • Can’t have someone else record the information for you – e.g. police officer records information for the witness, but witness doesn’t check what was recorded by officer
    • Person can’t just say that the statement recorded by the officer is correct when she didn’t write it and never saw it (e.g. giving a licence plate number)

The myth of “refreshing” memory
• Police officers frequently rely on their notes to “refresh” their memory
  • Do we really believe that their notes are merely “refreshing” their present memory of, say, a licence plate they wrote down 15 months before trial?
  • There’s no way the officer has a present memory of that licence plate – has long since forgotten this trivia
  • Same principles apply for many other witnesses
  • Better to characterize as a past recollection recorded, rather than a present memory revived
  • The standard questions asked of police officers lay the groundwork for past recollection recorded
  • Courts often become procedurally sloppy on these issues
  • Often useful for other party to cross-examine a witness who has referred to witness statement
    • Helpful to investigate how much they actually remember today vs. how much they are simply relying on their statement
    • If no present memory, must comply with rules for past recollection recorded to be admissible
  • As an advocate, pick your battles

(4) TRANSCRIPT OF PRIOR TESTIMONY?
• Witness who cannot recall may be directed to transcript of their prior testimony
  • e.g. testimony at preliminary inquiry
  • e.g. testimony at questioning in civil case (examination for discovery)
  • Similar procedure to past memory revived – directed to document, asked to read silently, re-asked the question

(5) CROSS-EXAMINATION OF YOUR OWN WITNESS – 3 PATHS: HOSTILE WITNESS, ADVERSE WITNESS, S 9(2) OF CEA
• What if presenting a prior statement to the witness doesn’t change their answer?
  • May claim the statement won’t refresh their memory
  • May review it, then claim it didn’t refresh their memory
  • May say it refreshed memory, but still give a different answer
  • Counsel’s natural desire: confront the witness & ask why their evidence has changed from statement!
But this amounts to *impeaching* your own witness
Not allowed to start cross-examining on the inconsistency without satisfying rules for doing so

Multiple paths to cross-examining own witness, with different requirements:
- (1) *Hostile* witnesses
- (2) *Adverse* witnesses in the meaning of s. 9(1) *CEA*
- (3) Use of s. 9(2) of *CEA*
- No matter which approach is followed, must be a ruling from the trial judge permitting counsel to cross-examine own witness
  - Declaration made after a formal application

**DISTINCTION BETWEEN HOSTILE AND ADVERSE WITNESSES**

- **Hostile**: “A witness is hostile when he does not wish to tell the truth because of a motive to harm the party who has called him, or to assist the opposing party.”
- **Adverse**: “A witness is adverse if the evidence he gives is unfavourable, or opposed in interest, to the party who called him.”
  - Just need to show that the witness is not helpful
- **Distinction is important**
  - because it defines how far counsel can go when cross-examining own witness
  - Adversity is a lower standard – but you don’t get as much leeway to cross-examine the witness
- **Adversity is broader than hostility**
  - Adversity means merely giving unfavourable evidence
  - Hostility means the witness is not giving evidence fairly and with a desire to tell the truth, because they have a hostile animus towards the party that has called them to testify
  - Hostility permits cross examination at large while adversity only permits limited cross examination
- **Hostility is declared under the common law; adversity is found under s 9 of the Canada evidence Act**
  - Both must be secured from the presiding judge in a voire dire

1. The Hostile Witness
- **Hostile witness**: witness who displays such a hostile animus towards the examiner that Court can safely find that he is testifying without desire to tell truth
- Court can then give leave for examiner to cross-examine witness “at large”
- Can then use all the tools available in cross-examination
  - Ability to ask leading questions
  - Resort to *CEA*, ss. 10 and 11

2. The Unfavourable/Adverse Witness
- **Unfavourable/ adverse witness**: witness who appears favourable to examiner, but their testimony is inconsistent with a prior statement
- **Section 9(1) *CEA* & ss. 25(2) & 25(3) *AEA***: allows examiner to provide proof of prior inconsistent statement:
  - Examiner can rely solely on the prior inconsistent statement itself to prove adversity
  - But cannot resort to s. 25(2) of *AEA* for impeaching credit of own witness
  - Interests of party & his lawyer are indivisible
  - A party cannot be “adverse” to himself within meaning of s. 25(2)

3. Section 9(2) of the Canada Evidence Act, Common Referred to as the 9(2) Application
- Does not require declaration of adversity
- Can cross-examine on a prior inconsistent statement in writing, reduced to writing, or audio-video recorded
- Cross-examination only on the statement

**HOSTILE WITNESS**
At common law, court may grant counsel leave to cross-examine their own witness when the witness is hostile

- **Hostile**: “A witness is hostile when he does not wish to tell the truth because of a motive to harm the party who has called him, or to assist the opposing party.”
- You can now cross examine at large – as if they were the witness of the opposing party

Counsel asks judge for leave to cross-examine

- Judge hears argument in witness’s absence
- Judge rules on hostility application

**How to determine hostility?**

- Demeanor / general attitude
- Substance of evidence
  - Can ask them questions that show that the witness is trying to hurt your case or help the other side e.g. providing otherwise inadmissible comments about the positivity of the other side

Where leave granted, hostile witness may be cross-examined **at large**

- i.e. cross-examined on any topic – not just the specific topic being discussed when witness declared hostile
- But remember, still does not permit counsel who called witness to challenge the witness’s general credibility
  - Cannot go so far as to show that the person is a liar
  - Must attack credibility on specific points

**ADVERSE WITNESSES**

- Adversity – a lower standard than hostility
- **Adverse**: “A witness is adverse if the evidence he gives is unfavourable, or opposed in interest, to the party who called him.”
  - No need to show a lack of desire to tell the truth, or a motive to assist the other side
  - Just need to demonstrate the witness has given unhelpful evidence

**CANADA EVIDENCE ACT – SECTION 9(1)**

9(1) *A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.*

- First line: Just restates the common law
- Then the use of the word adverse – courts have constantly struggled with what adverse means and whether it means the same thing as hostile

**An angry aside about these stupid sections of the CEA**

*Common Law Procedure Act 1854 (UK):*

- “A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; **but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence ...**”
  - On its face, seems to suggest there must be a ruling by the judge that a witness is adverse before they may be contradicted with other evidence
    - Does not even expressly that cross examination will be permitted – but courts have interpreted to mean that it will be
  - **Problem:** There need not be a declaration of adversity before calling other witnesses to contradict a witness
    - THIS DRAFTING BLUNDER HAS REMAINED ESSENTIALLY UNCHANGED FOR 162 YEARS (AND COUNTING)
• **Greenough v Eccles** (1859): a “drafting blunder”
• **Remains unchanged for 162 years**
• Bullerwell hates s 9 of the CEA
• Compare the analogous *Alberta Evidence Act* provisions – better-drafted

**Adverse Witnesses**

• If a witness is adverse (has given evidence that is unfavourable to the party who called him/her) then s. 9(1) allows the party to confront the witness with that prior statement
• Case law has also interpreted s. 9(1) to allow the party calling the witness to cross-examine an adverse witness
• A right of cross-examination under s. 9(1) is not obvious from the statutory language:
  • “…if the witness, in the opinion of the court, proves adverse, the party … by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony”
• Speaks only of “proof of an inconsistent statement”
• Implication has been that the witness can be cross-examined about that inconsistent statement
• But scope of cross-examination arguably varies based on province – still no uniform interpretation!

**Cross-Examining Adverse Witnesses – No uniform interpretation of s 9(1)**

9(1) in British Columbia

• “Adverse” = “Hostile”?
• Finding the witness is “adverse” allows the witness to be cross-examined *at large*, about all relevant topics.
• See *R v TET* (1991), 3 BCAC 29 (CA), at para. 33.

9(1) in Ontario

• “Adverse” is lower standard than “hostile”
• Finding the witness is “adverse” only allows cross-examination about *the prior inconsistent statement* and the circumstances surrounding its making.
• This is also the law in Alberta
• See *R v Figliola*, 2011 ONCA 457, at para. 49.

**Even the courts don’t appear to fully understand this**

• There are shockingly few reported decisions on these issues… and there is arguably some Alberta authority for the proposition that hostile = adverse.
• *R v Marceniuk* (1923), 20 Alta LR 53 (SCAD):
  • “The statement of what was said by Wandyga in the absence of the accused could not be admissible except upon one ground, viz., as a previous contradictory statement made by a witness called by the Crown, that is, Wandyga, after the Judge upon application had decided that he was ‘adverse’ which, according to the authorities, means having exhibited such a hostile animus towards the party calling him as to reveal a desire not to tell the truth.”
• Inconsistent with *R v Koester* (1986), 70 AR 369 (CA)

**CANADA EVIDENCE ACT – S 9(2) – MORE IMPORTANT**

9(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness’ present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

• Was introduced as a response to the discontent with s 9(1), but it now appears that s 9(2) appears to speak to written and recorded statements while s 9(1) appears to speak to prior oral statements

**DISTINCTION BETWEEN 9(1) AND 9(2)**

• 9(1)
  • Oral statements (not recorded verbatim)
• Requires finding of adversity
  • 9(2)
    • Written statements and oral statements reduced to writing (e.g. transcript of oral questioning)
      • Statement need not be signed
      • Does not require finding of adversity

Scope of Cross-Examination under s. 9(2) of the CEA
• Unlike where there has been a declaration of hostility, cross-examination under s. 9(2) is not “at large”
• Cross-examination is restricted to (a) the inconsistency between the prior statement and trial testimony, and (b) the reasons why this statement is inconsistent

9(2): WRITTEN STATEMENTS & STATEMENTS REDUCED TO WRITING – APPLICATION PROCESS
• No requirement of witness being declared adverse but a prior inconsistent statement whether written or recorded in some fashion

PROCESS TO FOLLOW (AFTER YOU HAVE “CLIMBED THE LADDER” E.G. PRESENT MEMORY REVIVED, ETC.):
(1) Party calling witness advises court it wants a s. 9(2) voir dire
  • Witness/jury excused
  • Ask the judge for a s 9(2) voire dire because you have what appears to be a prior inconsistent statement
(2) Party calling witness identifies alleged inconsistencies in the statement for the judge
(3) Judge reviews statement to see if:
  • There appears to be an inconsistency; and
  • The statement is “recorded” – oral recording or written
(4) If there appears to be an inconsistency and the statement appears to be recorded, the party is invited to prove the statement – this is all done without the jury present (in front of the judge)
  • Confusing language – not prove was true, but prove the prior statement was made
  • Witness is recalled
  • If witness admits making prior statement, statement proven
  • If denies, may need to call other witnesses to prove the statement
(5) Opposing counsel cross-examines the witnesses who are called to prove the statement, and may call own witnesses
  • To prove the statement wasn’t actually made; or
  • To bring out circumstances showing it is not in the interests of justice to allow the s. 9(2) application
(6) Party bringing application may re-examine on new issues arising
(7) Parties argue whether leave to cross-examine should be granted
  • Witness is again excused
  • Probative-vs.-prejudicial balancing
  • Judge has discretion whether to allow the application
  • Probative vs Prejudicial Balancing:
    • Probative considerations:
      o Do the statements clearly conflict, or are the differences marginal?
      o How important are the issues in the statement to the case?
      o How important are the inconsistencies to the witness’s credibility?
      o Is there a possibility cross-examination will change the witness’s testimony?
    • Prejudicial considerations:
      o Was the witness’s statement obtained fairly, or was there trickery, inducements, oppression, or Charter breaches?
      o Is there inadmissible/prejudicial information in the prior statement that will be exposed to the jury?
      o Will this create a distracting side issue?
(8) If leave to cross-examine is granted, judge defines how far cross-examination may extend, and witness is brought back in for further cross

- Jury returns
- E.g. your complainant witness shows up, no longer says that her husband punched her in the face, which she said in the witness statement
  - You give some leading information, suggest that she was speaking the truth, and invite her to adopt the prior statement as the truth

(9) If, during cross-examination, the witness admits making the prior inconsistent statement, the fact that prior statement was made becomes evidence in the case

- If the witness claims not to have made the statement, the party who called the witness may call other witnesses to prove the statement was made
- Ultimately, whether prior statement was made is a question for the jury

- If the witness adopts the prior statement as true (i.e. says on the basis of the witness’s present memory that the prior statement was true) – mission accomplished
  - The evidence in the prior statement can now be considered for the truth of its contents

- If the witness still denies the truth of the prior statement, then the prior statement may be considered only for the purpose of evaluating the witness’s credibility
  - The claims in the prior statement are not evidence that can be relied upon to prove the case

9(1): PRIOR ORAL STATEMENTS

- Similar process, but must first obtain a declaration of “adversity”
- Can show adversity from the fact of the prior inconsistent statement

In Practice

- Most statements these days are written, or are reduced to writing (audio/video recorded), so s. 9(2) is often the applicable provision
- Remember, your cross-examination under s. 9(2) can be a means of demonstrating hostility, and gaining access to more extensive cross-examination
  - Can ask for a declaration of hostility
- Unless the witness adopts the prior statement as true (i.e. changes their testimony after cross), you’re often still stuck without any evidence that can be relied upon to prove guilt
  - Prior inconsistent statement not admissible for truth of its contents

Steps After a s. 9(2) Application: Next Rungs on the Ladder

- Declaration of hostility?
  - Cross-examination “at large”
  - Can inquire into things like a motive to lie, connections between the parties, etc.
  - KGB application (or another hearsay exception)?

(6) KGB APPLICATION (OR ANOTHER HEARSAY EXCEPTION)

- May start with a s. 9(2) voir dire (and see if witness adopts prior statement as true) and then move on to KGB (principled exception) in a later voir dire
- Or may have a single, combined voir dire and inquire into necessity/reliability at the same time
- If witness doesn’t adopt prior statement in the voir dire, necessity is probably made out

WHERE DOES THIS ALL GET YOU?

- Consider our example – recanting domestic assault complainant
• Often left with contradictory statement that shreds the witness’s credibility, but no admissible evidence to prove case
• Even if you have succeeded on a KGB application, left with two contradictory statements under oath
  • Witness is shown to have lied under oath at least once
  • Hard to get a conviction when the standard is proof beyond a reasonable doubt
  • Judge is often left believing one statement over another but will still have a doubt, and will have to acquit

IN CIVIL CASES
• Remember, Canada Evidence Act applies to (a) criminal proceedings, and (b) non-criminal proceedings governed by the Canada Evidence Act (e.g. lawsuits in Federal Court)
• The provincial evidence acts will apply to most civil/family proceedings – need to use those provisions
  • Analogous provisions exist, but no equivalent s. 9(2)
  • Better drafted than s 9(1)
  • Common law of hostility still applies in these proceedings
• In practice, similar procedure is followed in civil cases

ALBERTA EVIDENCE ACT, RSA 2000, C A-18

25(1) A party producing a witness shall not be allowed to impeach the witness’s credit by general evidence of bad character but the party may contradict the witness by other evidence.
(2) If the witness in the opinion of the judge … proves adverse, the party producing the witness may with the permission of the judge … prove that the witness made at some other time a statement inconsistent with the witness’s present testimony.

RULES RELATING TO THE USE OF ADMISSIBLE EVIDENCE

Fact-Finding and Deciding Cases
• Triers of fact are, in general, invited to apply “reason and common sense”
  – Counsel make submissions about which version of events or possibilities are rational, reasonable, plausible, or likely
  – This is where good advocate shine – convincing people what is more likely (or at least possible)

LEGAL RULES DRIVING FACT-FINDING

CORROBORATION AND “DANGEROUS EVIDENCE”
• Corroboration rules come in two forms:
  – Mandatory – evidence cannot be relied upon unless there is other, independent, confirmatory evidence
    • Error of law to act on uncorroborated evidence
    • If relied upon without corroboration, can be appealed as an error of law
  – Cautions – warning from trial judge that trier of fact should be cautious about relying upon evidence without other, independent, confirmatory evidence
    • If trier of fact is properly instructed by trial judge, ultimate use of this evidence is up to the trier of fact

MANDATORY RULE OF CORROBRATION - RARE

ALBERTA EVIDENCE ACT S 19(2)
19(2) No case shall be decided on the evidence of a “child of tender years” who does not understand the nature of an oath] unless the evidence is corroborated by other material evidence.
• Mandatory rule of corroboration
• Trier of fact legally obliged to reason in a certain way
CRIMINAL CODE, S. 274 - CORROBORATION NOT REQUIRED FOR SEXUAL OFFENCES

274 If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 286.1, 286.2 or 286.3, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

- Sexual offences used to require corroboration
- Common law corroboration requirements for sexual offences abrogated by common law
- Mandatory corroboration is still required for perjury

CORROBORATION AND “DANGEROUS EVIDENCE” – CAUTIONS/DISCRETIONARY WARNINGS

- Mandatory corroboration requirements are rare and becoming less common
- More often, framed as a stern warning to the trier of fact (trial judge often has discretion)
  - Where there are “defects in the evidence of a witness that may not be apparent to a lay trier of fact”: R v Sauve (2004) 182 CCC (3d) 321 (Ont CA), at para. 76.
  - e.g. jailhouse informants, accomplices, witnesses of unsavory character
  - Often described as a “Vetrovec warning” after a leading SCC decision

Discretionary warnings

- Warning will be required where a witness plays more than a minor role in the Crown’s case and where the court should suspect the credibility of that witness
- Where a warning is required, its form is not burdened with the technical requirements that traditionally plagued the law of corroboration
- Relevant question is whether the evidence is capable of restoring the trier’s faith in the relevant aspects of the witness’s account

GENERAL CONTENT OF JURY WARNING: 4 POINTS

1) Point out the need for special scrutiny of a witness’s evidence
   a. E.g. evidence provided by jailhouse informant

2) Identify why there is a need for special scrutiny
   a. E.g. character and motivations of the informant

3) Warn the jury it may act on unconfirmed evidence, but that it is dangerous to do so

4) Caution the jury to look for evidence from another source that would tend to show the untrustworthy witness is telling the truth
   - Provides a framework for jury’s reasoning
   - Although these warnings are most important for jury trials, they are a reminder of the risks associated with judge-alone trials as well
     - Although difficult to demonstrate a verdict was unreasonable on appeal, if a trial judge convicts on the basis of dangerous evidence, may be greater reason for an appellate court to get involved

THE EVIDENCE OF CHILDREN

- Old Criminal Code provision:
  “586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.”
- Repealed January 1, 1988
- Many battles over what it meant for evidence to be “corroborated in a material particular”

COURTS HAVE WarnED ABOUT BEING TOO SKEPTICAL OF THE EVIDENCE OF CHILDREN – R v RW – REVOKE ASSUMPTION THAT CHILD’S EVIDENCE IS LESS RELIABLE

R v RW, [1992] 2 SCR 122: - often relied on by prosecutors
– “The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child’s evidence with caution where such caution is merited in the circumstances of the case.”
– “But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children’s evidence is always less reliable than the evidence of adults.”
  • “So if a court proceeds to discount a child’s evidence automatically, without regard to the circumstances of the particular case, it will have fallen into an error.”
– “Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.”

STILL MAY BE REASON FOR CAUTION/WARNING FOR A CHILD’S EVIDENCE – R v MARQUARD – WARNING WAS REQUIRED OF RISKS – 3 YR OLD CLAIMING NANA PUT THEM ON STOVE

• R v Marquard, [1993] 4 SCR 223:
  – Very young child gave unsworn evidence (3 and a half when burned, almost 5 when testified)
  – Testimony: “my nanna put me on the stove”
  – Contradictory statement made before court: “I tried to light a cigarette”
  – “I am satisfied that the evidence of the child required a warning from the trial judge as to the risks of accepting it. The child was very young. She was unable to give much detail about the incident. And she had told a different story at an earlier time.”

EYEWITNESS IDENTIFICATION EVIDENCE

• Notorious source of wrongful convictions
  – 80% of DNA exonerations involve mistaken eyewitness ID
  – Strong basis for the effect in psychology literature
  • People will believe that they are right when they are completely wrong

• Remember credibility and reliability
  – Credibility → is the witness honest?
  – Reliability → is the witness accurate?
• Witnesses providing eyewitness identification are frequently credible (trying to be honest), but their evidence may not be reliable
  – The trier of fact may be misled because the witness is sincere, and has no motive to lie, but is wrong

R v HIBBERT, 2002 SCC 39 – ID’D ASSAILANT AFTER SEEING COURT FOOTAGE – STRONG CAUTION OF ID EVIDENCE NEEDED

Facts:
• Real estate agent in Duncan, BC, is brutally attacked at an open house
• Provides a description of her attacker in the hospital: 55-year-old Caucasian male, 5’8”, 180 pounds, with grey hair and a grey sweater, dark brown pants, bushy eyebrows, “brown felt-type English driving hat”
  – About two weeks after the attack, she is shown a photo line-up that includes the accused
  – She does not identify the accused, but says she thought she had seen him before, and notes “I feel like I’ve had a conversation with him,” but the conversation might not have been on the day of the attack
  – About two months after the attack, the accused is arrested for the attack
  – Local TV shows the accused being led into the courthouse
  – The victim asks her husband to tape the show
  – The next day, she watches the tape – pauses to carefully scrutinize accused’s face
  – Next day, tells police: “you got the right man”
  – Identifies the accused at trial (“dock ID”)
• Neighbour, Mrs. Baker, made eye contact with a suspicious man around the time of the attack
  – Provides a roughly consistent description: 5’8” to 5’10”, white skinned, about 50 years old, wearing a hat
  – Shown a photo line-up about two weeks later
  – Says the photo of the accused “resembled” the person she saw, but she could not be sure
When asked whether she thought she would be able to recognize the person she saw “for sure,” she replied: “I don’t know if I could or not, I might be able to.”

Mrs. Baker also sees news footage of accused being arrested

Confident “dock ID” at trial

SCC makes some general comments about identification evidence:

SCC says dock ID still has some value:

1. Some minimal weight to opinion of the witness
2. Risk jury will note its absence
   - Won’t the jury wonder why the witness didn’t point to the accused
3. Tells us something if witness cannot ID in the dock
   - But, usually, very simple for the witness to pick out the accused because they are already in handcuffs
   - May want to point out for the record – accused is one of the only people in the courtroom

Must be very strong jury caution when there are risks of tainting

- “I think it is important to remember that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere.”
- “The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.”
- “I think it would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of a witness and the accuracy of that witness.”
- “Here it should also have been stressed that the impact of [the complainant] having seen the appellant arrested by the police as her alleged assailant could not be undone.”


Incident at the Hinton Travelodge

- Complainant answers a knock at the door
- Man forces the door open and pushes her backwards on the bed, briefly sexually assaults her before she knees her attacker in the groin and escapes out of the room
- Out of “peripheral vision,” sees her attacker run out of her room behind her – says this is the only time she got a look at his face
- Accused had been attending his company’s Christmas party in the Travelodge banquet facilities, and had made plans to meet friends afterwards at a nearby steakhouse
- Police are summoned, have a very brief discussion with the complainant
- Only description she provided: “grey pants”
- Officer finds accused walking in the Travelodge parking lot, wearing grey pants

Officer grabs accused and forcibly brings him to the room where the complainant was recovering

- Complainant points at accused (held on each side by a police officer): “that’s him”
- Accused is arrested, taken to police station
- Accused gives statement to police: says he had just left banquet facilities and was on his way to meet friends at the steakhouse
- When asked why he was pointed out, says “I think because I was walking down the hall at the time”
- Denies any involvement in sexual assault

Complainant later makes a point of emphasizing how her attacker’s eyes were “very glossy”

- Complainant initially says she saw accused’s face for 10 to 15 seconds
- Later changes evidence to say 5 to 10 seconds

Complainant IDs accused at trial without hesitation (“dock ID”)

- Hotel employees testify about a drunken man who was seen wandering the hallways of the hotel
- None make any note of the encounter at the time
Later provide descriptions of drunken person consistent with the accused’s clothes
None had ever seen the accused before
Saw the accused placed under arrest that night
Never saw the accused after, until trial
All three employees identify the accused without hesitation (“dock ID”)
• Accused calls several colleagues to confirm he wasn’t intoxicated when he left Christmas party, and little alcohol was even served
  Accused testifies, denying he attacked her
  Accused is convicted (judge alone trial)
• “Unreasonable verdict” appeal – a tough argument to make
• ABCA allows the appeal, substitutes acquittal
  “It is important that investigating police should obtain from each identification witness, as soon as possible after the alleged observation, the fullest description of the person observed, which can be cross-checked with the descriptions given by other witnesses, and with the actual appearance of the person suspected, and with the descriptions given by the witnesses in court.”
  “The witnesses should be interviewed independently of each other, if at all possible before they have had the opportunity of communicating, and always without suggestion or assistance.”
  “Meticulous notes should be taken of the descriptions obtained.”

**R V HANEMAAYER, 2008 ONCA 580 - WRONGFUL CONVICTION – DIFFERENT QUALITY PHOTO IDENTIFIED BY MOTHER – NO OTHER EVIDENCE SUPPORTING CONVICTION**
• At about 5:00 AM, man breaks in to residence and enters bedroom of 15 year-old girl
  Jumps on 15 year-old, covers her mouth with his hand, and tells her he has a knife
• Mother is awakened, investigates, sees attacker sitting on her daughter
  Mother yells at him and he turns around
  Mother says attacker walked towards her, came close to her face, “roared,” and fled
  Mother claims she “studied his face very closely” and says she looked at him for 40-60 seconds
  Daughter testified that less than 30 second elapsed from when he entered the bedroom and when he fled
• Mother claims she is “particularly adept” at remembering faces because she has worked as a teacher
  She drove around and collected names of construction companies working in the area
  Called companies and provided description
  Given the name of the accused as a possible suspect by a personnel manager of one of the companies
• Mother picks the accused out of a photo line-up
  Investigating officer had told her that she picked out the accused (whose name she knew)
  during cross-examination at trial, mother had agreed with suggestion that the accused’s picture looked different in the line-up (less sharp)
  So the accused’s photo was different quality from others
• Accused is arrested, provides statement denying involvement
  No forensic evidence connecting him with the assault
  Accused pleads not guilty
• Crown provides accused with an offer:
  • Plead guilty to B&E and assault, joint submission for two years less a day
    “His lawyer told him he would almost certainly be convicted and would be sentenced to six years imprisonment or more”
    “The appellant agreed to accept the deal even though he was innocent and had told his lawyer throughout that he was innocent.”
• Nearly two decades later, Paul Bernardo’s lawyer sends police a list of “18 sexual assaults and other offences that he believed had not been solved”
  No explicit admission of culpability by Bernardo, but rather suspicious
• One of the listed crimes was this break-in
  At the time of the attack, Paul Bernardo lived two blocks from the victim’s home
Bernardo had been convicted of a number of very similar sexual assaults that occurred during this time period (“Scarborough rapist”)

- On the basis of interview with Bernardo, police were satisfied he had committed this assault

**Guilty plea set aside on appeal after the fact, years later**

**OTHER FRAILTIES WITH EYEWITNESS ID PROCESS:**

- (1) No circumstantial evidence connecting accused
- (2) Photo line-up was presented as an **array**, not sequentially – “the danger is that the witness may choose the picture from the array that is the best fit”
- (3) Accused’s photo was different from others in array
- (4) Officers conducting the line-up were involved in the investigation and knew ID of suspect
- (5) Police had informed the mother she had identified the suspect – “could only serve to increase her confidence”
- (6) No permanent record was made of the line-up procedure

**BURDENS AND STANDARDS OF PROOF**

**STANDARD OF PROOF IN A CRIMINAL CASE**

- **Standard of proof: “beyond a reasonable doubt”**
  - Trier of fact can only convict if, at the end of the case, on the basis of all the admissible evidence, they are left without a reasonable doubt on each of the elements of the offence, despite any defences raised by the accused

- **But what is a “reasonable doubt”?**
  - Closer to absolute certainty than to proof on a BOP (*Starr*)

**R V LIFCHUS, [1997] 3 SCR 320 – PRESUMPTION OF INNOCENCE REMAINS THROUGH TRIAL – PROBABLY OR LIKELY GUILTY NOT ENOUGH**

- “That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.”
- “BRD is based on reason and common sense.”
  - “It is logically derived from the evidence or absence of evidence.”
- “Even if you believe the accused is probably guilty or likely guilty, that is not sufficient.”
  - “In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.”
  - “On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so.”
  - “Such a standard of proof is impossibly high.”

**R V STARR, 2000 SCC 40 – BRD CLOSER TO ABSOLUTE CERTAINTY THAN BOP**

- “[A]n effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.”

**WHEN THE ACCUSED TESTIFIES – 2 MAJOR ISSUES – CREDIBILITY CONTEST, DISBELIEVE ACCUSED AND DRAW CONCLUSION OF GUILT**

- **Two major concerns when accused testifies:**
  - (1) The trier of fact will engage in a “credibility contest,” i.e., decide which witnesses to “believe,” and then convict based on whose evidence the trier of fact prefers
  - (2) Disbelieve the accused, and then jump to the conclusion the accused must be guilty because he lied

- Both errors are inconsistent with the presumption of innocence and the burden on the Crown
- Supreme Court has suggested model jury instruction – now known as “W(D) instruction”

**THREE ASPECTS/STAGES TO INSTRUCTION OF THE JURY – W(D) INSTRUCTION**

- (1) “First, if you believe the evidence of the accused, obviously you must acquit.”
• (2) “Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.”

• (3) “Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.”
  – Some courts add another “stage”
  • “If you do not know who to believe, you must acquit.”
  – Not all evidence needs to be proven BRD, but items essential to a conviction must be shown beyond reasonable doubt

Discontent with the bar set so high for sex assault cases
• But when you’re in the courtroom, with someone’s liberty at stake, presumption of innocence is given the highest value

The instructions in W(D) are not a “magic incantation”
• What is important is that the trier of fact understands:
  – (a) The trial is not a “credibility contest” – the trial is not about “who you believe more” or choosing between two versions of events
  – (b) Because the burden of proof is always on the Crown, it is not necessary to accept or believe the accused’s evidence in order to be left with a reasonable doubt
• This does not mean the accused’s evidence is considered in isolation
  – Allowed to consider whole of case at “stage 1 and 2”
  – If the Crown’s evidence is especially compelling, this can be reason enough to reject the accused’s evidence
• Trier of fact may believe “some, all, or none” of a witness’s evidence
  – Possible to accept the inculpatory parts of the accused’s story, while not being left with a reasonable doubt by the exculpatory parts

Beyond a Reasonable Doubt
• The test of proof “beyond a reasonable doubt” does not apply to individual pieces of evidence
  – Each item of evidence, standing alone, may not prove the case beyond a reasonable doubt
  – Test is applied by looking at all the evidence, considered as a whole

**R V JHS, 2008 SCC 30 – W(D) INSTRUCTION**
where credibility is a central issue in a jury trial, the judge must explain the relationship between the assessment of credibility and the Crown’s ultimate burden to prove the guilt of the accused to the criminal standard.
• Essentially, W. (D.) simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts.
  o It alerts the jury to the “credibility contest” error.
• main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

CIRCUMSTANTIAL CASES
• **Direct evidence**: something a witness personally saw or heard
  – “I saw it raining outside”
• **Circumstantial evidence**: evidence from which trier of fact is asked to draw inferences
  – “I saw someone walk in wearing a raincoat and carrying an umbrella”
• Circumstantial cases raise special concerns
  – Real risk that a “cloud of suspicion” will cause the trier of fact to draw unwarranted inferences
• **Traditional common law rule** – the “Rule in Hodge’s Case” – meant to protect against jumping to conclusions in circumstantial cases
  – whether guilt is the “only rational conclusion” that may be drawn from the evidence
R V Villaroman, 2016 SCC 33 – Impaired Driving Context – Question Is Whether Circumstantial Evidence Is Reasonably Capable of Supporting an Inference Other Than That the Accused Is Guilty

- Possibility of defense that your blood alcohol increased between when you were driving and when you gave a blood or breath sample
- *“An instruction about circumstantial evidence … alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence.”*
  - There is a real risk the jury will “jump to conclusions” not supported by the evidence
  - “If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining.”
    - “But we may then notice that the sidewalks are dry or that there is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion.”
    - “The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been raining.”
    - “I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to ‘negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.’”
    - “Other plausible theories’ or ‘other reasonable possibilities’ must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.”
- “the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.”
- Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of “filling in the blanks” by too quickly overlooking reasonable alternative inferences

**Standard of Proof in a Civil Case**

- Much easier to define
- At one time, some commentators suggested there was a “shifting standard,” based on the seriousness of the allegations
  - e.g. moral stigma of a sexual assault tort case
- This approach has been rejected

*FV McDougall, 2008 SCC 53 – Civil Case for Sexual Assault Damages Remains BOP*

- “There is only one civil standard of proof at common law and that is proof on a balance of probabilities.”
- “The only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.”
- Even though losing a civil trial for sexual assault (battery in tort), comes with negative stigma in society, the standard of proof remains BOP
- It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred.

**Burdens of Proof**

- If the accused seeks to exclude evidence, they face the burden to show, on a BOP, that the Charter violation occurred
- Crown has ultimate burden of guilt BRD
- Tactical burdens not assigned by law but arise because of strength or nature of the opposing litigant’s case
  - E.g. bolus drinking defence – person who provided an over the limit breath sample raising a reasonable doubt whether that alcohol was actually in her blood while driving – e.g. chugging alcohol after being pulled over
  - No legal burden to show this but after testing over the limit, she faces such a technical burden
• Also, accused person facing sexual assault charge will have a technical burden of providing evidence to support their claim and that the evidence meets the statutory requirements for admissibility if they want to prove that the complainant engaged in sexual activity not forming the subject matter of the charge

PRESUMPTIONS

• The common law has used the word “presumption” to refer to many different things
  • Legal presumptions
    – e.g. Presumption of innocence
  • Factual presumptions
    – e.g. the “presumption of care or control”
• Remember: Any burden on an accused that has the effect of requiring a conviction in the presence of a reasonable doubt contravenes s 11(d) of the Charter

LEGAL PRESUMPTIONS – WHO BEARS THE BURDEN

• Just another way of saying who bears the burden of proof in a case
  – Crown usually bears onus of proving the case BRD exception e.g. presumption of no mental disorder existing
  – Most important – presumption of innocence in a criminal case
• Presumption of law exists automatically and typically has no function other than to assign the burden of proof
  – E.g. presumption of innocence, presumption of absence of mental disorder

LEGAL PRESUMPTIONS, E.G. CRIMINAL CODE / NCR

Defence of mental disorder
16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption
(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
  • Assigns the burden of proof to the accused on this issue
  • Factual Presumptions
  • If some “triggering” fact is proven, then some other fact is rebuttably presumed (often an element of an offence)

FACTUAL PRESUMPTION, E.G. LEAVING THE SCENE OF AN ACCIDENT

252 (1) Every person commits an offence who has the care, charge or control of a vehicle … that is involved in an accident with [another person or vehicle] and with intent to escape civil or criminal liability fails to stop the vehicle … give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

252 (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, … offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

• If you leave the scene of the accident, in the absence of evidence to the contrary, it is presumed that you have the mens rea for the crime
• Evidentiary burden (evidence to the contrary)
  ○ Just raise a reasonable doubt supported by evidence

FACTUAL PRESUMPTION, E.G., PRESUMPTION OF CARE OR CONTROL

258 (1) In any proceedings … in respect of [an impaired driving-related offence]
(a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle … the accused shall be deemed to have had the care or control of the vehicle … unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle …

- If the Crown shows that you were intoxicated and sitting in the driver’s seat, you are presumed to have had care and control of the vehicle
  - The accused must then rebut the presumption by showing that they did not intend to have care and control over the vehicle and that there was no risk of them putting the vehicle into motion

**FACTUAL PRESUMPTIONS**

- **Presumption of fact does not arise automatically as a matter of law**
  - Presumption of fact: upon proof of fact A, B will be rebuttably presumed

- **In general, two types:**
  - **“Reverse onus” provisions** – accused is obliged to rebut the presumption, on a balance of probabilities
    - e.g. “the proof of which lies on him”
    - E.g. s. 8 of the Narcotic Control Act, which presumed those in possession of narcotics to be in possession for the purpose of trafficking – no force or effect (Oakes)
  - **Evidentiary burden (also called mandatory presumptions)** – accused need only point to some evidence in the record that raises a reasonable doubt
    - e.g. “absent evidence to the contrary”
    - Evidence need not come from the accused’s case
    - E.g. ss 212(3) of the Criminal Code presuming that a person living with a prostitute was living off the avails of prostitution – raised the prospect of convicting someone in the presence of reasonable doubt, because a trier of fact could have a reasonable doubt about a person’s livelihood that they could not prove otherwise, absent evidence to the contrary

**FACTUAL PRESUMPTIONS – EVIDENTIARY BURDEN EXAMPLES**

**Factual Presumptions - fraud**

364 (1) Every one who fraudulently obtains food, a beverage or accommodation at any place that is in the business of providing those things is guilty of an offence punishable on summary conviction.

(2) In proceedings under this section, evidence that the accused obtained food, a beverage or accommodation at a place that is in the business of providing those things and did not pay for it and …

(f) offered a worthless cheque, draft or security in payment for the food, beverage or accommodation, is, in the absence of any evidence to the contrary, proof of fraud.

- Presumption of fraudulent mens rea – evidentiary burden

**Factual Presumptions – certain sexual offences**

172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with a person … who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of [certain sexual offences].

(3) Evidence that the person referred to [above] was represented to the accused as being under the age of eighteen years … is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

- Presumption of mens rea – evidentiary burden

**FACTUAL PRESUMPTIONS - “REVERSE ONUSES” E.G. OAKES**

- Raises obvious concerns where the factual presumption collides with the presumption of innocence
  - Less of a concern where accused need only point to some evidence in the record that raises a reasonable doubt
  - Greater concerns where the accused bears the burden of proving something on a balance of probabilities

**Old Narcotic Control Act:**
• Simple possession (less serious offence) vs. possession for the purpose of trafficking (more serious)
• Presumption that drugs were possessed for the purpose of trafficking
• s. 8: “…if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged…”
  o reverse onus – accused has to show more likely than not – so on the BOP

**R V OAKES, [1986] 1 SCR 103 – S 8 OF NARCOTIC CONTROL ACT IMPOSED REVERSE ONUS FOR PRESUMPTION OF POSSESSION WITH INTENT TO TRAFFIC – VIOLATED S 11(D)**

• “Mr. Oakes is compelled by s. 8 to prove he is not guilty of the offence of trafficking.”
• “This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(d).”
• “The presumption required under s. 8 of the Narcotic Control Act is over-inclusive and could lead to results in certain cases which would defy both rationality and fairness.” Not upheld under s. 1.

**“CONCLUSIVE” OR “MANDATORY” PRESUMPTIONS**
• Misleading use of the word “presumption”
• **Criminal Code:**
  198(2) … [A] place that is found to be equipped with a slot machine shall be **conclusively presumed** to be a common gaming house.
  201(1) Every one who keeps a common gaming house … is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
• This simply defines “common gaming house” to include a place equipped with slot machines
  – Not actually a presumption

**PERMISSIVE INFERENCES, E.G., “DOCTRINE OF RECENT POSSESSION” – NOT REALLY A PRESUMPTION – E.G. R V KOWLYK**
• Sometimes a “presumption” is just a common-sense inference available from the facts
  – e.g., an accused found with stolen property shortly after that property was stolen
• **R v Kowlyk, [1988] 2 SCR 59:**
  – “Unexplained recent possession of stolen property has long been sufficient to allow a permissive, not mandatory, inference of guilt of both theft and offences incidental thereto, even in the absence of other evidence of guilt.”
• “Doctrine of recent possession” is often described as a “presumption” – really just a piece of circumstantial evidence that may support an inference of guilt

**SEXUAL ASSAULT: “DOCTRINE OF RECENT COMPLAINT”**
• Common law doctrine in the case of sexual assault cases, delayed disclosures of complaint
• **Presumption against the credibility of a complainant where the complainant failed to raise a prompt “hue and cry”**
  – **R. v. Lillyman, [1896] 2 QB 167:** “It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact”

**Criminal Code (1983 amendments):**
275. The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1, 155 and 159, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

**R V DD, 2000 SCC 43 – NO PRESUMPTION AGAINST A DELAYED DISCLOSURE OF SEXUAL COMPLAINT**
• “A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave.”
• “Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse.”
• “A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.”

Is evidence of delayed disclosure always irrelevant (and thus inadmissible)?
• But what about cases like Handy – delayed disclosure coupled with suggestion of collusion/profit motive?
• When does it take on some relevance?
  • Human logic/common sense vs strict rules – the trier of fact may still draw inferences
  • Are these questions of fact, or questions of law? How should we instruct a jury?
    • Worth musing about – no clear answer

PERSUASIVE VS. EVIDENTIAL VS. TACTICAL BURDEN
• Evidentiary burden vs. legal (persuasive) burden
  • Persuasive burden: At the end of the day, does the evidence here prove the case to the necessary standard (e.g. prove elements of offence BARD)?
    • Crown has the persuasive burden to prove case BRD – Crown always has persuasive burden at the end of the day
    • Accused has persuasive burden if they want to rely on NCR defence
  • Evidentiary burden: Is there enough evidence here to leave the issue with the trier of fact?
    • Even where there is no strict legal presumption of a fact, courts sometimes speak of the “tactical burden”
      • No legal requirement to call evidence, but practically, if party does not do so, risks losing

EVIDENTIARY BURDENS
Examples:
• (1) Prima facie case
  • Is there enough evidence to commit a person to stand trial at a preliminary inquiry?
  • Is there enough evidence to justify allowing the case to go to the jury, or should there be a directed verdict (nonsuit)?
    • Is there enough evidence to justify ordering that a person be extradited?
• (2) “Air of reality” for a defence

(1) PRIMA FACIE CASE
• Prima facie case standard – example of an evidential burden
  • Crown must demonstrate a prima facie case in order to have an accused person committed to stand trial after a preliminary inquiry
  • Must show that a properly instructed jury could rationally conclude that the accused is guilty beyond reasonable doubt
• Some evidence on all required elements which, if believed, would be sufficient for the party to prove its case
  • Judge assumes evidence in support of party’s case is true
  • No weighing of credibility – this is an issue for the trier of fact
  • If no evidence if brought for one element of the offence – case likely can’t be proven

• e.g., at preliminary inquiry, or application after Crown’s case for directed verdict (nonsuit):
  • Test: evidence in the record upon which a properly instructed jury, acting judicially, could convict the accused
  • Where there is no prima facie case, the case is withheld from the trier of fact

• Harder where case is circumstantial, not direct
  • Trial judge must engage in some “limited weighing” of reasonable inferences

Extradition hearings
• For extradition, look for double criminality
Must be a prima facie case in other country and a prima facie case for a criminal offence if the same activity was engaged in Canada

- Judge has discretion to give no weight to evidence that is unreliable
- Where evidence is certified under the Extradition Act by a foreign country, it is presumed to be reliable

(2) “AIR OF REALITY” TEST

- As a matter of law, we know the Crown bears the legal (persuasive) burden of disproving most defences, beyond a reasonable doubt
- Accused must meet an evidential burden if they want to rely on an affirmative defence
  - E.g. self defence or provocation
  - Once the defence has been put in issue, Crown must disprove defence BRD
- E.g. self-defence under s. 34 of Criminal Code → defence results in acquittal where there is a reasonable doubt about three elements:
  - (1) Reasonable apprehension of force / threat of force
  - (2) Defensive purpose
  - (3) Reasonable defensive response
  - Must be an air of reality on each element

Does this mean that a jury needs to be instructed on self-defence in every case?

- No – trier of law has a screening function
- Trial judge asks whether there is evidence upon which a properly instructed jury could acquit, if it believed that evidence
- Must be such an “air of reality” for every element of a defence
- Again, not assessing credibility at this stage
- Assume the best possible factual findings for accused

Error of law to fail to put a defence to the jury where there was an air of reality to that defence

- Conversely, error of law to put a defence to a jury where there was no air of reality
- Frequent ground of appeal in jury cases
- “Reasonableness” often an element of a defence
  - Like with circumstantial case, trial judge must engage in some limited weighing of what might be reasonable
  - Concern: takes reasonableness assessment away from the jury and gives it to judges/appellate courts?

“Air of Reality” Test – Judge Alone Trial

- Crown often argues, in judge-alone trials, there is “no air of reality” to a defence
  - Somewhat confused use of language – confusing evidentiary burden and persuasive burden
  - Evidentiary burden, not the persuasive burden