

Law 453: Evidence (Fall 2017)

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Intro to Evidence.....	2
Relevance.....	2
Probative Value.....	3
Prejudicial Effect.....	4
Evidentiary Discretion.....	5
Probative Value and Witness Credibility.....	6
Character Evidence.....	7
Bad Character Evidence (Similar Fact Evidence).....	9
Good Character Evidence (s. 666).....	10
Rule Against Splitting the Case; Re-Opening.....	11
Modes of Proof: Admissions, Judicial Notice, Witness Competence, Documentary Evidence.....	12
Hearsay: General.....	14
Hearsay: Difficult Applications.....	15
Hearsay Exceptions: Overview, Admissions, Res Gestae.....	16
Hearsay: Prior Identification, Declarations Against Interest, Business Records.....	18
Hearsay: The Principled Approach.....	21
Direct Examination.....	23
Oath Helping and the Rule Against PCS.....	25
The Rules of Cross Examination.....	27
The Collateral Facts Rule.....	29
Prior Inconsistent Statements.....	31
Prior Convictions.....	32
Opinion Evidence: Non-Experts.....	33
Expert Evidence.....	34
Legal Advice Privilege.....	37
Litigation and Settlement Privilege.....	38

Intro to Evidence

The law of evidence has two primary objectives:

1. Proof as a matter of logic
2. Proof as defined by rules

Simpsons Murder Hypo: Outlining basic issues of evidence

- What would you need to prove, and how would you prove it in a way that you can articulate?
- What are the propositions (the “facts”) at hand currently?
 - Ex) We know someone died at 4:30, we know the accused has characteristics that match the suspect, and we know the person who entered the home around 4:20 was in a strong position to commit the crime, etc.
- What is the strength of the evidence provided?
- Are there additional facts or propositions to consider?
- What is the *chain of reasoning*? For an item to have value, you need to show a chain of reasoning
 - A → B, filled with logical inferences
- What is the reliability and quality of the evidence?

Lessons from the hypo:

- Establishing facts, understanding weakness and proving propositions is a key part of evidence law
- Rules help to show how this can occur
- Facts can quickly become complex

The “lynch pin” of evidence law:

- Relevance
- Probative value
- Reliability

Relevance

Relevant evidence: “any item of evidence that has a tendency to increase or diminish the probability of the existence of a fact in issue” (*R v Arp*)

Relevance is a legal question of admissibility for the trial judge: can this be admitted? Does it meet the low threshold?

The *basic rule* is that all evidence must be relevant to a material issue in the case: this is a necessary condition

- But, this is not *sufficient*: evidence will not be admitted just because it is relevant
- *Relevant evidence is presumed admissible*
- *Irrelevant evidence is presumed inadmissible*

The law of relevance wants:

- Evidence that is logically connected (increases or decreases probabilities)
- To exclude and ignore irrelevant evidence (distracting and confusing)
- To not waste time and money

Relevance Components: must both be satisfied for evidence to be relevant

Materiality: whether the evidence is directed to a material issue in the proceedings

- Primary materiality: evidence that is material because it relates to a primary issue arising in the case (one defined by the pleadings or matters in dispute)
 - Actual facts that need to be established to win the case
 - Defined by law, facts arising at trial
 - Ex) The mens rea for murder; indictment in a crim case
- Secondary materiality: can be used to describe *evidence about other evidence* in the case
 - Assesses the quality of material evidence
- Credibility is *always* a material fact
 - Ex) Philadelphia: questions about lifestyle are material, but they are not probative

Probativeness: evidence tendered must have a tendency to increase or diminish the probability of the existence of a fact, either as a matter of scientific truth logic, and/or through generalizations/assumptions about “how the world works”

- *Tendered vs. inferred facts*
 - Tendered fact is the one presented (A)
 - Inferred fact is the one that we can get to by a logical chain of reasoning (B)
 - Ex) Snake said he was drinking with the owner (tendered fact) → a person cannot be in two places at once → Snake is lying about his whereabouts (the inferred fact)
- Judges often use common sense or logic to infer probativeness
- Based on a logical chain of reasoning
- Doesn't need to be proven to be admitted: all it needs is a tendency (plausibility)
- Sometimes, this type of evidence will need to be argued for relevance

If evidence of a fact is *equally likely* to establish two opposite inferences, one of which is *not material*, then the evidence is *irrelevant*

- Any time you can come to a conclusion that a material fact leads equally to two alternate facts, the evidence is irrelevant
- **Exception:** both inferences happen to be material
 - Ex) The murder victim died from one method or the other

Probative Value

Probative value: best thought of as a relative figure that varies depending upon the strength of one's chain of reasoning

- In assessing PV, we consider:
 - How strongly the tendered evidence supports the desired inference
 - How material the suggested inference is to the case in question

Chains of Reasoning:

Chains of reasoning have three parts: (A) → (B)

- Tendered fact (A): whatever fact you're trying to admit
- Inferred fact (B): whatever fact you're trying to prove
- The chain itself (→): how we connect A to B

Probativeness: if the chain of reasoning has a tendency to show a material fact, then it is a valid chain of reasoning, and the evidence is relevant

- Considers the tendered fact (B): if you're trying to prove a tendered fact on a major issue in the case, the PV will be high; if you're trying to prove a peripheral issue, it will be low
- *The shorter the chain, the higher the PV (usually)* - this is why direct evidence has higher value
- The reliability of the evidence has no bearing on its PV: this is for the trier of fact to consider

Three things that determine PV in a chain of reasoning:

- The materiality of the fact
- The number of links in the chain (shorter is better)
- The strength of those links

Think critically when constructing the chain: Ex) Stocking tops

- It's not enough for the chain to simply be: She is dead and stocking tops were taken → likely that the murderer took the stocking tops → accused has stocking tops → accused took it
- Rather, the chain should look like this: stocking tops were taken from deceased → D has stocking tops (but not the exact ones) → **stocking tops have no value, the ordinary man wouldn't have them lying around** → D takes stocking tops, and it more likely to have killed the deceased than an ordinary person
 - We need to establish that the *stocking tops have no value*: this strengthens the PV because of the uniqueness

Admissibility vs. Weight

Evidence law is concerned more with admissibility: it is a question for the judge, while weight is a question for the trier of fact

- Trier of fact (usually a jury) will assess weight in the context of all the other evidence, etc.

Philosophical positions of judges will shape how much evidence is admitted: some judges prefer to simply defer to the jury for questions of weight, others will not admit at all

Prejudicial Effect

Prejudicial effect is the "distorting impact" of evidence: it is a measurement of the risk that the jury will use the evidence improperly

- Prejudice can lead the jury away from reaching a conclusion based on logic and common sense: the laws of evidence are designed to exclude evidence that tends to do this
- Prejudicial effect also applies to judges: they are supposed to consider it before they admit evidence

The fact that evidence is "bad" for someone's case *does not mean it is prejudicial*: it is only prejudicial if someone will use that evidence *for the wrong reasons*

- One way to think about PE is that it is the opposite of PV: PV is the logical chain of reasoning, while PE is the potentially illogical chain

Five types of prejudice:

- It may arouse the jury's sympathy: leads to an emotional, *not logical*, conclusion
- It may raise contempt or horror
- It may cause the jury to act out of a "hunch", rather than logic
 - This happens more in "common sense" or "overvalued" evidence that taps into myths (such as victim's sexual history in sexual assault trials)
- It is time consuming: will distract the jury from a proper focus on the facts of the case

- *Davies v Clarington (Municipality)*: injury case, P sought to call on 29 experts. Also plays into expense PE
- It will be overly expensive given the importance of the issue (mostly in civil trials)
 - *Johnstone v Brighton*: expert evidence would have assisted a proper determination of the case, but it isn't admitted due to costs, logistics, delay

The *core rule* for admissibility is: *is the evidence more prejudicial than probative?*

Ex) Questions to an accused about attractiveness of the victim in a sexual assault trial

- PE > PV. Questions of this type have very little to do with the assault itself, and present a dangerous and mostly illogical line of reasoning based on a hunch. They also raise a “damned if you do/don’t” issue WRT answering them.

Ex) Disrobing from *Philadelphia* illustrates the other side by eliciting sympathy for Beckett and making them conclude based on a feeling rather than a fact

- Aspects of emotional response, horror, and distraction

Evidentiary Discretion

General

The *evidentiary scale*: a figurative balance of probative value vs. prejudicial effect

- Any time PV > PE, the evidence is admissible (unless excluded by another rule of evidence)
- This applies to the Crown in a criminal proceeding, but *does not apply to defence*
- The discretion to exclude evidence is more than just a rule of evidence: it is the foundational balance upon which almost every rule of evidence is based

The law recognizes two sometimes overlapping kinds of exclusionary discretion:

- Judges in crim cases may exclude evidence obtained in circumstances that would result in unfairness if admitted
- Judges in crim, civil and admin cases can exclude technically admissible evidence where the benefit of its admission cannot outweigh the negatives

Evidence will not be excluded where the trial judge is confident that a strong warning to the jury will reduce PE sufficiently

Generally, courts are wary of excluding evidence tendered by the accused:

- *Seaboyer*: SCC recognized that discretion to exclude technically admissible evidence, but stated that it should only be used in situations where PV is *substantially outweighed* by PE
 - Based on a principle that an inaccurate acquittal is better than a wrongful conviction

Civil Cases

The law is the same here, but is not as straightforward due to risk, and the fact that the decision maker is a judge

- We are much more worried about misleading a jury vs. misleading a judge
- *Voir dire*: mini motion in which a judge decides the admissibility of evidence
 - If evidence is excluded in a *Voir dire*, a judge can't revisit it in their decision

The Discretion to Exclude

Evidence is excluded mostly in cases where the PE cannot be controlled with a charge to the jury or self-direction by the judge

- *Charge to the jury*: a strong admonition from the trial judge to not use the evidence in the prejudicial way

Evidence with PE is regularly admitted: but, this is ok, as long PV>PE

- Parties control the case, and choose the types of evidence to tender: sometimes, the evidence will have PE, and will be admitted

There are varying beliefs among judges on the “trustworthiness” of juries

- The statement that "juries are sophisticated enough to understand warnings from judges and ignore prejudice" is problematic, because if taken to the extreme, it would demand that all relevant evidence be admitted

Photographs and Videotapes

The admissibility of photos and videos depends upon:

- Their accuracy in truly representing the facts
- Their fairness and absence of any intention to mislead
- Their verification on oath by a person capable of doing so

Witnesses can be called to verify a photo or video's accuracy

- But, there is some uncertainty as to whether or not this type of evidence needs to be backed up by eyewitnesses, or if the trier of fact can simply use it themselves

A court will sometimes exclude evidence if it is possible that it has been altered in some way (ie if a lot of time has passed, if it has been in multiple hands)

Ex) Angry ex-boyfriend case: photos to back up expert testimony and bring a conviction despite defence of provocation

- Photos may be gruesome, but PV can outweigh PE when looking at the whole thing: expert testimony is greatly enhanced by having the photos, and it advances the conclusion that the Crown seeks to make

Probative Value and Witness Credibility

Exam lessons:

- Can you distinguish between factors which normally go to PV and which go to weight?
- Credibility factors of a witness are *almost never* considered
- Reliability factors that go to the circumstances of the evidence usually considered
- Even then, PV must be substantially diminished, or PE high enough to warrant exclusion

When evaluating PV for the purpose of admissibility, judges can weigh/consider whether the evidence is informative enough to warrant being heard in all of circumstances

Main question: *do shortcomings in a witness affect the PV of the evidence?*

- Normally, credibility of the witness providing the evidence has no bearing on PV
- Questions about the reliability of evidence *can* be regarded as PV questions if they particularize the chain of reasoning
- But that doesn't mean it is inadmissible: still needs to be either PE or very low PV
- Law becomes very murky with big credibility issues: leads to a split

Conflicting Views: Trial Judge Position WRT Believability and Admission

1. *Mezzo*: McIntyre J states that assessing the quality of evidence blurs the line between judge and jury, and assessing the credibility and weight is the jury's job
 - Basic idea: no need to consider credibility in relation to PV
 - Big worry here is that considering credibility may give trial judges too much power to exclude evidence
 - We don't always trust juries
 - Strong argument against using credibility to assess PV is that the weaker the witness' credibility, the less likely the jury will give it any weight
2. Sankoff: any assessment of a witness' credibility should be considered by juries

Credibility vs. Reliability:

Credibility and reliability are very different concepts where PV is concerned

- *Credibility* is the extent to which the witness should be believed
 - These factors are almost never considered
- *Reliability* is about the evidence itself: how believable is the chain of reasoning?
 - If there is a 50/50 chance as to reliability, and we can't show that one inference is more likely than the other, evidence will not be probative because of reliability. Can you show that the witness meant what they they said is more likely than any non-material inference?
 - This goes to the circumstances of the evidence, and are usually considered

Despite credibility vs. reliability, PV must still substantially diminished, or PE high enough to warrant exclusion: can't just exclude without a good reason

Questions to ask in a problem:

1. Does the evidence have PV?
2. Are there objections to admitting the evidence, and if so, what are they?
3. Are the objections identified matters that go to the admissibility of the evidence, or are they to be decided by a jury?
4. What type of additional information would be useful in determining whether to admit the evidence?
 - What goes to the PV, not the weight?

Character Evidence

Character evidence: any proof presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour

- Rendition of the principle that PV > PE, but with its own particulars
- Asks the trier of fact to use past conduct to infer present fact
- Can be proven through opinion, proof of reputation, expert opinion, or circumstantially

Basics:

- Character to show credibility or sexual experience have special rules
- Rules can change depending on if the character evidence deals with a primarily material (what happened) or secondarily material (credibility) issue
- Big worry is overvaluing character evidence (high PE)
- "Neutral" character evidence that has no impact on one of the parties in the case is admissible as long as it is relevant to the case (ie X walks by a river, Y smokes cigarettes)

- Bad character evidence (negative trait) of a witness is admitted if PV is substantially higher than PE: usually situations where it isn't trying to specifically paint the accused as a bad person. Changes based on who it's related to
- Common types: to attack the victim, to prove a particular point of evidence, to exonerate yourself by trying to show that someone else did it
- Defence has a lower threshold of admission for character evidence than the Crown does: part of the power imbalance in the adversarial system

Habit

A habit may or may not reflect one's character. If it doesn't, standard rules of evidence should apply. If it does, the character evidence rules determine admissibility

- Can be admitted if it is probative

Third Party Suspects (Non-Sexual Offence Prosecutions)

A is trying to say that it was actually B who did it based on their characteristics

- Character of a third party can be proved provided that the PV of the evidence is not substantially outweighed by the PE
- Relevant third-party character evidence is prima facie admissible when called by the accused

Concerns and Necessities

- Big issue is that this can confuse a jury
- Have to show a "sufficient" connection between the third party and the crime charged: is there some reason to believe there is a connection?
 - This can arise in different ways: was there a motive? means or propensity to commit the crime?
- Where the suspect is unclear, necessary to look at similarities between the crime committed and a crime the accused *could not* have committed
 - Logic is that accused could not have committed crime 2 since they didn't commit similar crime 1

**Rebuttal evidence can be used to call into question the character of the accused if their defence rests on pointing the finger at the character of a third party*

Impermissible Inferences

Impermissible inference: where the jury will make a conclusion using the prejudicial line of reasoning

It is unavoidable that evidence where the jury can draw an impermissible inference is admitted

- In these cases, the trier of fact will be instructed not to take the prejudicial line of reasoning from the evidence
- Assuming the evidence has PV, most applications for exclusion focus on whether a charge to the jury will actually be effective in reducing the potential for the jury to draw proper inferences

Civil Cases

Cannot be called unless character is in issue: more strict than crim cases

Bad character evidence must adhere to the same evidence rules as crim cases: but, the rules should not be treated the same

- Prejudice issues are different between the two
- The rights of access to evidence are not skewed in civil cases as they are in crim cases (against the Crown)

Bad Character Evidence (Similar Fact Evidence)

Basics

- Bad character evidence that the Crown seeks to tender against the accused is presumed *inadmissible*
 - Has a much higher PE than normal character evidence
- Bad character evidence tendered *against* a Crown witness in a criminal case will be admissible unless the PE substantially outweighs the PV
 - Big questions here are is the case crim or civil? who is bringing the evidence forward? what's it being used for? who's it being used against?
- Unusual bad character evidence that matches what the accused is alleged to have done at trial tends to be admissible, because of the unique nature of the conduct
- The "*prohibited inference*" of using bad character evidence against an accused arises when the Crown tries to show that character evidence is admissible *because it shows that the accused is a bad person, and thus more likely to commit the offence in question*
- Threshold question: "is the proposed evidence discreditable to the accused?"

Dangers of bad character evidence for the accused:

- Jury will conclude that the accused is a bad guy, and therefore must have done it
- Jury will punish the accused for all the bad things he's done
- Jury may become confused by the bad things the accused has done

Bad character evidence can negatively affect a witness, not just the accused:

- The jury may decide that the witness is a bad person, and sympathize with the accused
- The jury may become confused about who's really on trial and overvalue the evidence

To admit bad character evidence, you need to increase the PV (decreasing PE is extremely hard): need to prove the evidence is enhanced by the facts of your case

3 Ways for the Crown to Admit BCE Against the Accused

Similar fact evidence: probative enough to be admitted

- Even if it's the same offence, you must weigh things like frequency, etc.

Admissible because of the nature of the case: materially linked to an issue

Admissible because of the accused/defence's trial conduct: makes the evidence more probative

Similar Fact Evidence

Basic logic: the more you can show links in a chain of reasoning, the more likely you are to have it admitted

- Reduces the possibility of coincidence

3 factors to consider

How material is the issue it's going to prove?

How strongly does it prove the issue? (Don't need to satisfy all factors)

- Frequency: the more prior acts, the more strongly it shows likelihood
- Connection in time: the closer it is, the more probative it is
- Similarity: the more similar is more probative
- Unusual nature: more unusual, less likely it will be a coincidence

- Independent voices: more people who claim accused has a particular propensity, more likely the allegations are true
 - Issue of collusion: more likely there is collusion, less likely the allegations are true

How prejudicial is the evidence?

- How bad is the bad act? How likely is it to “poison” the jury?
- Look at it in both absolute and relative terms
 - How bad is it absolutely?
 - How bad is it relative to the facts already admitted?
- How clear are the allegations against the accused? Canada *does not* permit the admission of offences where the accused has been acquitted/proceedings were stayed
- How confusing is the evidence?

Moral vs Reasoning Prejudice: need to distinguish between these two in BCE

Moral prejudice: horror and contempt - the human tendency to be influenced by an emotional reaction to the subject’s character rather than the strength of the evidence

- How bad is the act (absolute and relative)?
- Is it of a particularly repugnant nature?

Reasoning prejudice: practical challenges that admitting character evidence can present (distraction, confusion, expense)

- Are the facts complex?
- Do the facts “intermingle” with the facts at trial? The more they do, the more PE it can have
- Was the accused convicted?

Good Character Evidence (s. 666)

An accused may prove that they are not the kind of person who would commit via:

- Reputation witnesses; admissible expert testimony; their own testimony; similar fact evidence; opinions of familiar laypeople

Where an accused does this, the Crown is entitled to table counter character evidence

- But, the Crown’s rebuttal evidence must *only* be used to refute the assertion of good character, and on the issue of the accused’s credibility as a witness. It is *not* used as a basis for proving guilt or innocence
- The Crown may: cross-examine character witnesses and the accused on the character trait claimed; rebut reputation witnesses (rare); prove previous convictions; admit expert testimony; use otherwise admissible similar fact evidence
 - Crown can bring in testimony that rebuts the particular trait claimed: but, this depends on the circumstances, as the court is wary of diversions, etc.

Limits on Good Character Evidence:

- Only applies in crim cases
- Because of time, accused can testify to good acts, but *cannot* call supporting evidence

S. 666 of the Criminal Code:

When the accused adduces good character, *any prior conviction can be admitted*

- Basically, the accused “opens the door” for the Crown. Argument that this is constitutionally unfair, and allows the Crown to do too much

Rule Against Splitting the Case; Re-Opening

Parties are entitled to know the full extent of the opposition's case before presenting a defence. The Crown should not have the first and last chance, and the defence should not be a victim of an unfair surprise.

- This is a rule of admissibility: if the prosecution forgets, and the evidence is not reply evidence, it's inadmissible

Rests on the basic order of evidence in adversarial proceedings (determined by burden of proof):

- Prosecution/plaintiff call and adduce → defendant calls → prosecution/plaintiff can then *reply*
 - Burden of proof means that the prosecution/plaintiff have to call and adduce *all* of their evidence initially
 - Idea is keeping things fair: defendant only has one chance to tender evidence
 - The ability to call reply evidence protects the Crown from being the victim of an unfair surprise themselves
 - Reply evidence (if admissible) *does not* split the case

Acceptable reply evidence has some relation to the defence's case, and does not split the case:

- To respond to matters the parties did not know would be necessary ("unanticipated" in first calling)
 - Didn't know because there was no indication from the defence that it would be necessary
- Where evidence only takes on new significance because of the defence's case (ex: accusing a third party)
 - If the issues/defence to which the proof is tendered does not have an "air of reality" or significance without the defence evidence, the Crown does not need to tender it first
 - Is it a "live issue"?
 - Potential to be very confusing to the jury

Ex: Crown hears a defence, and wishes to adduce evidence that the witness has become addicted to heroin. The witness has not been convicted, and this was not made material by defence.

- If the Crown wanted to tender this evidence, they would have had to when they initially called their case

Re-Opening (Exceptions to Rule Against Splitting the Case)

Happens as a result of case splitting, and is different from a reply: can you re-open your case to call new evidence?

- Usually when something new comes up: you recognize it should have been called, but you couldn't for one reason or another

Re-opening is nearly impossible in criminal cases, aside from two exceptions:

- Defence did something to mislead the Crown into not calling the evidence
 - Ex) Defence agrees to not contest an issue
- Failure is based on a procedural or technical (non-controversial) matter
 - Need to close off a technical issue everyone recognizes

Civil cases: three part test for re-opening (emphasis on first two points) - extent to which this is treated as factors/ individual criteria varies

- How important is the evidence?
- Did the party use reasonable diligence to uncover the evidence sooner?
- What are the effects of admitting the evidence? Will it expand the trial? Waste time?

Modes of Proof: Admissions, Judicial Notice, Witness Competence, Documentary Evidence

General

We use a dispute focused, adversarial system: we look to only prove what is in issue

- Crim: issues are set out in Crown's indictment
- Civil: pleadings frame the issue

Nothing is assumed in the adversarial process: everything has to be proven

- Can prove by admission: parties can admit to any fact
- Can use proof (admissible evidence) to prove facts, but this is inefficient

Admissions

Central issue: how do we prove without actual proof?

Formal Admissions

Designed to narrow issues in dispute and reduce the length of a trial. Highly encouraged in crim cases

Compelled in civil cases: costs can be imposed in a failure to make admissions on matters not in dispute (Rule 13.6(2)(a), 13.12)

- Form 33 notice: presumed admission, unless fact is denied or objected to

Formal admissions are an evidentiary rule, and are difficult to retract

- Unless retracted, they determine the factual matter admitted to: cannot admit contrary evidence
- Retraction rests mostly on how far along the proceedings are: admissions caught earlier are easier to change
- Admissions made by a party have a major impact in determining the materiality of other evidence

These are used mostly in Crim cases: *CC s. 655* allows the Crown to ask the accused to admit certain facts

- This provision acts one way: the Crown can request, but they don't need to take a request

Impact of an Admission: Admissions are binding on a legal and factual issue; admissions affect admissibility by changing the materiality of certain facts - establishes that both parties no longer contest certain things, etc.

- In AB, if you *don't* dispute a fact, then the fact is rejected
 - In ON, it's the opposite: no dispute means you accept

Withdrawing an admission:

Usually permissible for criminal defence until the case is closed: ideas of accused getting fair trial, etc.

More difficult in civil cases, as the parties are more evenly matched

- Here, courts will ask:
 - *When?* Sooner the better (*most important)
 - *Why?* Simple error, party switched counsel, etc?
 - *What?* Result will mislead court?
 - Will the other party be prejudiced, or can a costs award fix it?

Judicial Notice: “Proof without proof”

Anything not admitted must be proven - within reason

- You don't have to prove something like gravity exists: this is why we have the doctrine of JN

The law on JN is very narrow. The most likely reason for this is that parties should have the chance to call evidence to dispute propositions: we don't want to prejudice parties by approving claims that can be disputed

Judicial notice: as an evidentiary rule, a court can declare a fact without any proof being tendered

Types of Judicial Notice:

Judicial notice of the law

- You don't need to “prove” the law to a judge

Judicial notice of legislative facts

- Facts that are merely used to interpret or develop the law do not need to be proved by witnesses

Judicial notice of adjudicative facts (most common)

- Facts that are so general they can't be questioned, or facts that can be verified by undisputed sources
- High threshold because JN cannot be contradicted
- Drawing inferences vs. proving facts: JN is not used to draw common sense inferences to get from A → B

Factors for deciding judicial notice:

- How central is the allegation of the case? The more central it is, the less likely JN will be taken
- How certain is the proposition being tendered?

JN can come up after the fact (on appeal): at some point, the part realizes that someone hasn't proven something

Judges cannot use their own subjective experience to take JN: ex) can't add the primary fact of “I have driven on that road, and conclude...”

Ex) *Zundel*: holocaust denial case

- Crown wants court to take JN of the fact that the holocaust happened: the court says that it is too central to the accused's defence, and denies them
- The centrality of the fact is an important part in deciding whether JN should take place: the more important the fact, the less likely a court will find JN due to disadvantaging the other side

Witness Competence and Compellability

We believe that witnesses should provide most of the evidence

Competence: a witness is competent if they are eligible to testify. A witness is incompetent if they don't have the necessary pre-requisites to testify

- Common law competency rules re: reliability have been wiped out: we no longer treat reliability as a way to exclude. We not consider it a question of weight
- To be competent, a witness needs a minimal capacity to:
 - Observe
 - Remember
 - Communicate

- Understand the obligation to speak truthfully
- Competence is only usually an issue re: children and mentally disabled adults
 - *Canada Evidence Act s. 16.1*: everyone under 14 is presumed to have capacity, and don't have to take an oath
 - The burden is on the opposing party to show a lack of capacity

Compellability: a witness is compellable if they can be forced to testify; they are not compellable often for policy reasons

- Privilege has an indirect effect on compellability: a witness can be forced to testify, but they may be able to resist answering certain questions that qualify for a type of privilege
- Compellability issues/special cases:
 - On appeal, you cannot call a judge to testify re: their judicial capacity and reasoning
 - Ministers and politicians can be called, but it is much more difficult: parliamentary privilege
 - They're busy, we don't want them to testify unless it's absolutely essential
 - Calling opposing lawyers is tricky: courts generally resist it unless it is shown to be *absolutely essential*
 - Idea is that doing so complicates the trial process

Real Evidence and “Documentary” Evidence

Used as a way of bolstering oral evidence, and needs to be authentic

Basic Rules of Authenticity

- Must be able to show that what you are tendering is “what it purports to be”
 - True for documents, videos, and real evidence
- Usually on consent: most of the time, the opposing party will consent to the evidence
 - “It's what it purports to be, I'll just dispute what's in it”
- Where there are disputes, you will need call a witness to authenticate the evidence: these witness are usually only used for this purpose

Hearsay: General

Hearsay: an out of court statement that is offered to prove only the exact truth of what it asserts, without the opportunity to cross examine the real witness

- Main concerns: perception, narration, memory, sincerity
- Hearsay is not about the nature of the evidence, but it's *purpose*
- OCS: any statement that is written or produced by someone who doesn't come to court
 - If it's not said in *this trial*, it's an OCS

The hearsay rule's existence is connected most strongly to the principle that cross-examination is the best way of unearthing fabrications and errors

- Risk of prejudicial effect in secondhand evidence

Analytical devices:

- Does the fact that the statement was made have its own relevance to matters in dispute?
 - If it's not made to prove the truth, but is designed to show some other relevant purpose, it's not hearsay: we don't care why the person said it
 - Ex) Contract law case: the fact that something was said in general can have binding consequences. it doesn't matter if it's that exact thing

- Do we need to cross-examine the statement's maker to extract utility from statement
 - Who is the *real* witness? Who is the *most important*?
 - If it's the person who made the statement, it's hearsay
 - If it's the person who heard the statement, it's not

The common law framework

Starting point: is it hearsay? Hearsay evidence is *inadmissible*

- If the evidence is not hearsay, it is just governed by the other rules of evidence re: admissibility

Next steps:

- Does the evidence fit into a recognized common law exception? If so, it is admissible
- Does the evidence fit into a statutory exception? If so, admissible
- Does the evidence fit into a residual exception? If so, admissible

Hearsay: Difficult Applications

Statements in the Context of Automation

Statements from a *purely* automated source like a computer, etc. are not hearsay

- You can argue that there is no reason to believe that a machine can ever be cross-examined
- As long as there is human intervention, there is hearsay: we're ultimately dealing with someone who is capable of being cross-examined

Where the statement was made by an autonomous machine, you simply assess the problem based on PV and PE

- Clock example: can you show that the clock is inaccurate? This is how you would attack the admission of evidence like "it was 1:20 PM, I know because I saw it on a clock"

Handwritten labels: doesn't matter if it's printed from a computer. If there's human intervention, it's hearsay: you can CE

Police dogs/animals: not hearsay - a dog cannot be CE. The only question is whether or not the evidence has PV. Here, we would look at the dog's training, etc. to determine admissibility

Prior Statements of Witnesses

Any OCS that is not adopted by the witness is treated as hearsay if it's offered for the truth of its contents - regardless of the fact that the witness is present

- Primary issue is if contradictory statements are presented by the same witness in court: the old statements are hearsay if they're admitted for the truth of their contents

Conduct (Implied Statements)

Implied statement: any assertion that is not expressed by language, but is revealed through action

Conduct that is meant to assert meaning can be hearsay: the court doesn't discriminate between conduct used to assert meaning and statements re: hearsay

When conduct can be hearsay, it means that sometimes, what someone does can actually have another meaning

- Can we derive hearsay when someone does or says something, but means something else?
- Ex) Nodding someone's head: when does the "real meaning" of this amount to hearsay?

This was resolved in *Baldree*: cell phone drug case

- Accused charged with drug trafficking. Police seize the phone. Phone rings, police answer. Person says “I want drugs now”. Is this hearsay?
 - This is no different than nodding one’s head. The evidence is really being tendered to prove the fact that “you [the accused] have drugs now”
- This is hearsay: the difference between an implied and express meaning here is semantics

When the implied meaning and express meaning should be treated the same, we have hearsay: presumed inadmissible

In some jurisdictions, OCS made by a witness who is present in court are only rarely treated as hearsay, because the primary rationale (no CE) is not engaged when the witness is present

Prejudicial Evidence: PV > PE

We can admit evidence and not breach the hearsay rule even though the jury might use it for the truth of its contents *if there is a relevant usage outside of the truth of the statement*

- We simply weigh PV (value of correct purpose) and PE (harm of incorrect purpose) to come to a conclusion

*Exam tip: if the non-hearsay purpose cannot be explained on the facts as presented, there is no non-hearsay purpose

Even the *Baldree* case can be admitted: if there’s enough phone calls of that type, we’ll admit it because the reliability of the evidence increases

“Documents in possession” rule someone in possession of a document can be inferred to have knowledge - circumstantial evidence

- If the document is not in the accused’s possession, it has no circumstantial relevance to the accused: there’s no other use for it than the hearsay purpose

Look for “combo” hearsay: Roger Clemens example of TV testimony

- You have brought in a television (the evidence) of the senator (1) referring to the affidavit from Laura (2) referring to a conversation with her husband (3) that Roger told him (4)

Hearsay Exceptions: Overview, Admissions, Res Gestae

Overview: “Pigeonholes”

Courts have recognized that the rule that all hearsay is admissible is inflexible: cuts out the good and the bad

“Pigeonhole” exceptions are the way that the common law exceptions developed

- Hearsay was admissible, but only if you fit into any of the small exceptions
- Problem: tons of exceptions develop (roughly 100, including ancient boundary marker, admissions, res gestae, etc.)
- House of Lords draws the line in *Myers*: no more exceptions unless parliament creates them

Wigmore started the “principled” revolution in case law (see below)

- Basics: necessity and reliability
- Affirmed in *Khan* and *Smith*: development of the principled revolution
 - Residual discretion (reliable/necessary) is the only one we need: but, still kept the common law exceptions

- Reaffirmed in *Starr*: but, the principled approach can *overrule* the common law exception (old exceptions can be filtered out)
 - Courts can also use the CL exceptions to overrule the principled approach on a case-by-base basis
 - **EXAM: If there's a common law exception, it's in**

What's wrong with pigeonhole exceptions?

- Both over and under inclusive
- Precedent made exceptions formal, but kept out good evidence; exceptions did not modernize with new ideas about reliability, admitted bad evidence
- Under: formal gov't documents could only be admitted if they were under "seal"
- Over: Anyone's present state of mind admissible, even if circumstances suspicious

The Common Law Framework

1. Does the evidence qualify as hearsay? If yes, it is prima facie inadmissible
2. Does the evidence fit into a common law exception? If so, it is admissible
 - Is it an admission?
 - Is it a spontaneous utterance?
 - Is it reflective of state of mind or physical condition?
 - Is it a declaration against interest?
 - Is it a past recollection recorded?
3. Does the evidence fit into a statutory exception (Business records)? If so, it is admissible
4. Does the evidence fit into the residual exception? If so, it is admissible

The Admissions (by a Party) Exception

Any oral or written statement, or conduct, by an adverse party to the case *can be admitted for its truth* every time

- This only covers hearsay: not all of the rules of evidence

This exists because it relates to what the hearsay rule is designed to protect: it's admissible not because it's reliable or necessary, but because we can cross examine the maker of the statement

- Ridiculous to try and object when the maker of the statement is the same party that's making the objection

This exception only applies to adverse parties to the case: you can't call your own statement for your own purposes, and you can't cross examine yourself

- This means that P and D can tender each other's statements (doesn't apply in crim)
- This exception is based on fairness, not reliability

An admission must be tendered by the Crown to be admissible

If a statement is made by an agent acting in the course of their duty, it can be attributed to the party: either individual or company, depending

Courts are divided:

- Classic position: admissible as admission if it would be reasonable in the circumstances to expect a response
- Alternative position (*Scott, 2013, MBCA*): accused must adopt the statement in some way for it to be an admission (conduct counts, but high standard)

- Both positions agree, where science comes from questioning by police, no admission EVER
- Right to remain silent makes it impossible to draw inference from “admission”

Res Gestae (“The Things Done”)

Four separate, rationally connected exceptions:

1. Statement of bodily condition
 - Must be a statement of *present* condition: “I feel ill now” not “I felt ill 3 weeks ago” - past state of mind is inadmissible
 - Reliability is premised on the fact that you would have no reason to lie, especially if you’re asking for help
 - Once litigation is possible, *inadmissible*
 - Whether it extends to *cause of pain* is contentious
2. Statement of intention/state of mind
 - Can relate to feelings or plans of action (“I am going to the park today”)
 - Cannot prove what *others* did (“Johnny and I are going to the park today”)
 - Must relate to present state of mind
 - Court will still examine circumstances
 - *R v Griffin*: we can admit potentially touchy state of mind evidence, but we have to use the relevant part of the evidence only
 - Dissent: doesn’t matter - PV is outweighed by PE. Basically, the jury is going to hear the whole statement, and they’re going to use it
3. Excited utterance
 - Principle here is spontaneity: given in circumstances where there is no reasonable probability that the person is going to lie
 - Unprompted, people don’t usually make these kinds of statements up, etc.
 - Any weakness will go to the weight of the evidence
 - Consider: are the circumstances such to afford reliability? Was the moment shocking or surprising?
 - *Guidelines*:
 - 1) Can the possibility of concoction or distortion be disregarded?
 - 2) Consider the circumstances in which it was made: was the event so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction, giving no opportunity for reasoned reflection?
 - 3) In order to be sufficiently “spontaneous” it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. I.e) the event must still be operative.
 - 4) As to the possibility of error, if only the ordinary unreliability of human recollection is relied upon, this goes to weight and not admissibility
4. Present sense impressions

Hearsay: Prior Identification, Declarations Against Interest, Business Records

The Common Law Framework

1. Does the evidence qualify as hearsay? If yes, it is prima facie inadmissible
2. *Does the evidence fit into a common law exception? If so, it is admissible*
 - *Is it an admission?*
 - *Is it a spontaneous utterance?*
 - *Is it reflective of state of mind or physical condition?*

- *Is it a declaration against interest?*
 - *Is it a past recollection recorded?*
3. *Does the evidence fit into a statutory exception (Business records)? If so, it is admissible*
 4. *Does the evidence fit into the residual exception? If so, it is admissible*

Note: these are predicated on the reliability/necessity framework from the principled approach

Prior Identification

Illustrates a different sort of necessity

Hearsay here depends on if it's being used for its truth: ex) "Joe picked Johnny" = "Johnny was the offender". But, why is it being adduced?

Declarations (Admissions) Against Interest

Common law recognizes an exception for statements made against the declarant's interest. Based on the idea that people don't admit things contrary to their interests unless those things are true

- Not the same thing as admissions by a party, since it isn't based on the adversarial system

Admissions by a person who is unavailable to testify (non-party) 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.

These kinds of statements are deemed reliable because people usually don't make statements that are against their own interest

Pecuniary and Proprietary Interests

A declaration against pecuniary or proprietary interest may be admitted where:

- The declarant is unavailable to testify
- The statement when made was against the declarant's interest, and
- The declarant had personal knowledge of the facts stated

Penal Interests

Much more strictly controlled: *a declaration against penal interest may be admitted where*

- The declarant knows that the statement will be held against them
- Person must have apprehended that they'd be vulnerable to penal sanction as a result of their admission
- The vulnerability to penal consequences is not remote
- The declarant is unavailable by reasons of death, insanity, or grave illness which prevents the giving of testimony even from a bed, or an absence of jurisdiction
 - A declarant is not unavailable where they simply refuse to testify

The statement as a whole must be weighed on a balance to determine whether it is or is not against the interest

- In a doubtful case, the court will want additional guarantees of trustworthiness out of fear of collusion and fabrication

Example: A is on trial for murder. B isn't. B says "I committed the murder". B dies. Now A wants to put forward this hearsay statement to escape culpability. Question will be whether the statement is truly against the declarant's interest.

The court will look to the situation in which it was made:

- Who it was made to (did B go to police or was he talking to friends?)
- When was it made (are they already serving life sentence in jail?)
- Is B part of a gang (and therefore bolstering his street cred), etc.

Business Records (ONLY Statutory Exception)

Business records are necessary for things like proving what the stock price of Apple was on June 14, 2001. They are deemed reliable based on the assumption that most business that create records in the course of business are unlikely to concoct, fabricate, or lie in making those records

S. 30 of the Canada Evidence Act

“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.”

Records can be admissible for their truth where:

- They’re made contemporaneously with the matter being recorded
- By someone with personal knowledge of the matter
- Who is obliged to make the record
- In the ordinary course of their duties
- And who doesn’t have a motive to misrepresent

The business records exception is the only exception that allows “double hearsay”: the record (hearsay) relies on the hearsay statement of others

- Example of double hearsay: “She told me that he said X”

Situation changes when the person who gives the information is not under a business duty

Example: Constable takes statements by virtue of his job. Carl gives Constable a statement that says “I saw Johnny beat up Bob last week”. Carl dies. Can his statement be admitted at trial?

- Under federal jurisdiction, inadmissible: S. 30
 - Investigations are out of the exception. They are not normal business activities, and do not have the hallmark of reliability
- Under ON legislation: admissible, in theory
- **At common law (Alberta)**, inadmissible: not the ordinary course of business for the person *making* the statement (Carl)

Differences between statute (which does NOT exist in AB) and common law:

- Common law applies to oral and written statute applies to written
- Common law does not require notice to be given; some statutes do
- Common law may admit opinion; some statutes only allow statements of “fact” to be admitted (“any act, transaction, occurrence or event”)
- Under Statute, records are not admitted when made in the course of an investigation or inquiry, obtaining or giving legal advice, or in contemplation of a legal proceeding (s. 30(10))
- Common law and statute: “duty to make the record” reinforces the guarantees of reliability

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 [applies in CML as well; exceptionally broad] that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record....

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

...

Definitions

(12) In this section,

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; [exceptionally broad, includes police for example]

Electronic Records

Legislation does not create any new hearsay exceptions

- The concern is authenticity and maintaining confidence in the integrity of the stored information

The admissibility will depend on how it was created, and its purpose

- Certain electronic information is generated automatically without any human intervention and can be admitted as real evidence
- But, where humans create the information to record their observations, then it would need to be admitted under existing common law and statutory hearsay exceptions (ex - a deceased's online diary)

Business records electronically stored will need to comply with the business records exception for hearsay, and meet statutory or common law requirements re: authenticity

Hearsay: The Principled Approach

The Common Law Framework

1. Does the evidence qualify as hearsay? If yes, it is prima facie inadmissible
2. Does the evidence fit into a common law exception? If so, it is admissible
 - Is it an admission?
 - Is it a spontaneous utterance?
 - Is it reflective of state of mind or physical condition?
 - Is it a declaration against interest?
 - Is it a past recollection recorded?
3. Does the evidence fit into a statutory exception (Business records)? If so, it is admissible
4. *Does the evidence fit into the residual exception? If so, it is admissible*

Hearsay may be necessary to enable all relevant and reliable information to be placed before the court

- To admit this kind of evidence that doesn't fall into a hearsay exception, we use the principled approach of "reasonable necessity"

Reasonable necessity requires that reasonable efforts be undertaken to obtain the direct evidence of the witness, and is used where the witness is unavailable for some reason (competence, deceased, etc.)

- Not enough that the witness is simply unwilling

All common law exception exceptions must comply with this approach (although it is very rare for courts to reassess exceptions)

Necessity

The necessity criteria exists because we still don't like hearsay: we will only admit it if we absolutely have to

What satisfies necessity?

- Where the witness is truly unavailable (death, mentally ill at trial, etc.)
- Usually where the witness is absent (proof generally required) - best case is where the witness truly can't be located
- Functional necessity: satisfied where the witness is present but *can't remember anything*
 - Here, evidence is required to supplement testimony: usually good enough to satisfy necessity
- Possibly satisfied where need is relative: would take too much time, expense to prove

Reliability

How satisfied are we that the statement is truthful and accurate even though no cross examination is possible, or how satisfied are we that adequate substitutes for cross-examination exist?

Based on *Khelawon* (2008): considers two completely different components

Circumstantial guarantees of trustworthiness

- Nature of the statement
 - Is it documented, or oral? Worries about transmission errors, etc.
 - Is it "second hand" hearsay? Further from the source is worse
 - Could it have been tampered with?
 - Did people have access to it?
- Contents of the statement
 - Is it internally consistent? Does it make sense?
 - Are the contents "fantastic", or overly complex?
 - Does it describe a current state of mind or physical condition, or relate to other exceptions?
 - Are the contents confirmed by other evidence (*Bradshaw*)?
- Circumstances of making the statement
 - Was the person surprised, excited?
 - Were they under oath or any possible penalty (via a duty)? If you're under such an obligation, it will likely increase reliability
 - Were they induced? Drunk, etc?
 - What was the nature of the relationship between the statement maker and the witness? Are they in a situation where they might lie?
 - How short was the time period between the facts and the statement describing those facts?

- Truthfulness of the maker
 - Is the person a known liar?
 - Did they have a motive to lie in the circumstances?
- Observation
 - Where was the declarant?
 - What was their relationship to the events?
 - Could they have known otherwise about the issues at stake?

Adequate substitutes: not whether we have reason to believe the evidence is trustworthy, but other guarantees/substitutes that allow us to see that the witness is credible

- Is it recorded? (Past recollection recorded exception - see below)
- Was cross examination available (for statements made in another court)?
- Is the witness here? Where you have a witness on the witness stand and they are trying to admit hearsay, just cross them
 - If a witness doesn't remember, it's harder to say criteria has been met. But, this doesn't mean it's inadmissible

Keys to reliability:

- Understand *why* hearsay is excluded: concerns about cross-examination, trust of what witness said in court
- Focus upon the person making the statement, not the person testifying
- Look for matters that would be tested in cross-examination: are there concerns WRT a piece of hearsay that would really require testing?
- The standard is not perfection

Direct Examination

Direct examination/examination in chief is the phase where the witness is being questioned by the party that called them

- Open ended questions are preferred: enables the witness to tell their own stories
- Leading questions are not inadmissible, but can affect weight
- Counsel can attest to refresh the memory of a witness within limits

Two goals of direct examination: get out your facts, and humanize your witness

- These goals are achieved by focusing on the witness, and emphasizing their strengths (recall, truthfulness, etc.)

Leading Questions

Main rule: no leading questions on direct examination

Leading questions are any time in which you suggest the answer to the witness

Exceptions:

- Uncontested matters (like introducing the witness: what is your name, etc.)
- With leave from a trial judge, questions to children or those with mental disabilities

Consequences of leading questions

- Objections: embarrassment and loss of "flow" in your questioning
- Directions to the jury: affects weight of evidence

- Extreme cases can lead to a new trial because of “tainted evidence”
- Basic idea is PV > PE

Refreshing Memory

A trial is not a “memory contest”: you can let a witness look at almost anything, even inadmissible evidence, to refresh their memory

- The extent to which they really remember is a question of weight
- Exception here is memory recalled by hypnosis

You need to show what you’re using to refresh the memory: usually a document

- This does raise the legal fiction of “oral testimony” from notes

Dealing with a forgetful witness

- Forgetful before trial: No problem
 - Witness entitled to refresh using anything. *Refreshing before trial is never an admissibility question: it’s a weight question*
- Forgetful at trial: attempt to refresh memory. Have to satisfy rules of Present Memory Revived
 - Have to show the other party what you are showing to the witness
- Still forgetful at trial?
 - Attempt to admit the document itself. You must either satisfy past recollection recorded, or any other hearsay exception

Three possibilities when you show a witness a document to jog their memory:

- *Looks at the document and remembers*
 - No hearsay, no problem
- *Looks at the document and doesn’t remember*
 - Actual evidence is the document: hearsay problem; saying “I must have said that” is an OCS
 - Need to use “*past recollection recorded*” exception
 - Must have no recollection of information on document (necessity)
 - Recollection is recorded, and witness made or was in the presence of someone who made it at the time memory was fresh (reliable)
 - Ex) License plates: do you remember the number? No. Do you remember writing it? Yes. Were truthful when writing? Yes
- *Looks at document and remembers differently*
 - You cannot impeach your own witness, which raises a real problem: you have to vouch for your witness if you called them, which means that you can’t point out that they changed their story
 - Sit them down and call a different witness
 - Calling contradictory evidence does not impeach the witness

Hostile/Adverse

Witness is difficult

- Show witness statement: cross on statement and “circumstances of making statement”
- Problem is that you can’t lead, you can’t impeach

Witness is aggressive

- At common law, you can't impugn their character, but you can CE: you negate them through CE and try to get what you need
- *Canada Evidence Act, s 9*: if you can show a witness is "adverse" you can cross examine them on the circumstances of the statement (not their motives for lying, etc.)
 - Hostility is a separate, higher threshold

Hostility vs. Adverse (*Figliola*)

- Hostile ruling allows broad cross-examination
- Adverse ruling only allows CE on statements and the circumstances surrounding them
 - ONCA in *Dayes* extended this to include ability to ask questions about any motivations for providing false evidence, including grounds of bias or collusion
- How do you show adversity?
 - Prove to the court that the statement is inconsistent: if the witness agrees they made the prior statement, a court can allow the CE
 - If they don't, 9(1) outlines adverse, and (2) says that the court may grant leave to cross examine
 - Go into a voir dire and get them declared adverse

*Key: How do you deal with...

- A forgetful witness: show witness statement/call contradicting evidence
- An adverse witness: show witness statement; cross on statement and "circumstances of making statement"
- A hostile witness: cross at large

Oath Helping and the Rule Against PCS

Oath Helping: Broader Context

*You are not permitted to call evidence with the **sole purpose** of bolstering a witness' credibility*

- You can admit evidence if its secondary purpose is bolstering credibility
- Rationale behind this rule is to prevent prejudice: peoples' credibility, unless attacked, should be left alone
 - Prevents inquiries into credibility: saves us from diversions
 - We are concerned about the "illusion" that the evidence appears more helpful than it really is

Categorize this by asking "what is the relevance?"

- Ex) Polygraph: sole purpose is to bolster credibility
- Ex) "I knew she wasn't lying" (*W(PA)*)
- Ex) Testimony that a witness was cooperative, etc.
- Ex) Calling a psychiatrist to assess the witness' testimony

Prior Consistent Statements

Declarations made by witnesses before they take the stand that are consistent with the testimony they give while on the stand

- Generally inadmissible: not probative, proof is self-serving, are superfluous
 - Repeating the same thing 3 times doesn't make you any more credible than saying it once
 - PCS provide the "illusion of evidence", despite the fact that there is only one source
 - Premise of PCS is flawed: if a story 3 times is good, wouldn't it be better 100 times? Wastes time, etc.

- Encourages people to tell a story and stick to it: creating evidence
- To be admitted, a PCS must have *independent value* that increases PV: falls into established exceptions

Rule excludes a statement by a witness with relevant (but useless) evidence to offer, and stops a lawyer from calling the recipient of the PCS who has no other evidence to offer

*Even if a PCS is admitted, there are two prohibited uses:

- Use to assume that because a witness has made the same statement in the past, they are more likely to be telling the truth
- Treating it as corroborating the in-court testimony

PCS Exceptions

Prior Identification

- Ex) A witness comes to court, points to the accused, and says: "That's the guy who robbed me." He then says: "And this is not the first time I've said so. *The police showed me an array of photos, and I said "That's the guy who robbed me."* Defence counsel objects, claiming this is an inadmissible prior consistent statement.
 - The objection is likely to be: *overruled*, because the statement has value for the jury. *If you identify someone closer to the event, the idea is that the identification is more reliable.*
- In a situation where the witness is not sure about a police lineup ID, we need to assess the reliability (it is necessary because the witness can't remember). Treat it like any other hearsay.

PCS to Rebut Prior Inconsistent Statement

- It's only fair that, if an inconsistency is raised, a witness can be shown that they said a different thing before: gives the jury the whole picture
- Ex) X and Y go home together. Next day, Y tells her friend Z that she had a great time with X. Two days later, Y tells counsellor she was raped by X. Defence crosses her about PIS to Z, suggests Y is lying. Prosecution wishes to tender the statement to the counsellor, which is consistent with the statement Y is making now in her testimony.
 - This statement is admissible under the exception: rebuts inference that witness is making up the story in court for the first time; her pre-trial conduct in talking about the incident is now in issue, so the jury must have all the facts
 - Statement was also made close to the event

The Narrative Exception

- Provides some relevance to the fact that an original complaint was made. You want to provide a narrative to make a cohesive story for the jury in some circumstances: provide "content and structure"
- Allowed to tender "fact" of PCS to help show how offence came to police attention
- *Applies especially in sexual assault cases, where there is a danger of a hidden inference*: basically, concern that if you don't tell the jury that you complained close to the incident (especially if the legal complaint happened much later), the jury will conclude that the victim is lying
 - Sexual assault cases are harder to prosecute, and the courts have to give some leeway
- Contrast to other exceptions: statement not normally repeated

Statements on Arrest - Only accepted in ON since 2010 (*R v Edgar*)

- "One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of crime"
- Statements made upon arrest or first confrontation with accusation are a valid exception in ON
- But, the accused must testify: otherwise, the statement is being used as hearsay

- Not a great rule: is the fact that they denied it on day 1 relevant to the trial? Does it make innocence more likely?

Exception to Rebut Accusation of Recent Fabrication

- Based on situations where the evidence has additional PV because the PCS rebuts an *allegation being made* about witness credibility
- Arises where there is a suggestion that the witness is lying or mistaken based on a motive, and the OCS logically rebuts whatever suggestion was made in CE
 - If OCS does not rebut suggestion, it is inadmissible
 - Ex) Motive for lying: if witness X said the same thing *before the motive for lying that they are accused of arose*, it rebuts the allegation
 - Motive for lying alleged to arise in 2016, but PCS was made in 2015
- As long as someone is alleging that someone is wrong, the fabrication marked is ticked: issue is recency
- You can't just allege a fabrication generally: there has to be a motive attached
- *Memory loss can be a fabrication*

*To have PV, the statement must have occurred *before the triggering event*

- Must identify the motive in question and when it arose
- Must resolve whether OCS made before this alleged motive
- Where it was, it will logically rebut suggestion made in CE

The Rules of Cross Examination

Cross examination has two basic goals: eliciting favourable testimony from a witness, (supporting) and discrediting the testimony of a witness (destructive)

- Leading questions are permitted, but are improper when the witness is sympathetic to the accused's side (witnesses working "for" the Crown are less susceptible to leading questions)

CE is still restricted by the rules of evidence, but there is leeway in subject areas like credibility, since it can be used to impeach

- CE designed to impeach can focus on a number of things:
 - Showing bias, prejudice, interest, corruption
 - Attacking character
 - PIS to contradict
 - Challenging capacity to observe, recall, communicate
 - Putting forward contrary evidence
 - Showing witness' evidence is contrary to common experience

When, How, and Who?

Principle rule is that you are entitled to cross any of the witnesses you didn't call

- Interests, etc. do not matter for this starting point

Civil cases caveat: Court can limit CE by a party who has the same or substantially the same interest as the witness

- In civil cases, there are often a lot of parties with aligned interests, so CE is done on a "per-witness" basis
- We want to avoid a "sweetheart" cross examination

- Ex) D calls a party, and P and co-D can both CE - but, if the two Ds are aligned in interest, you can get a “sweetheart” CE. Co-D gets a free CE where they can lead the witness: huge advantage to defending parties to allow sympathetic witnesses to be led

Limitations on CE

Credibility questions have to be limited: if they weren't, you could ask anything

- Relevance would not stop this, since credibility is always a material issue

Questions can't be abusive, and PV > PE

Questions must be asked on a *good faith basis* - more like an ethical rule (*Howard and Lyttle*)

- Cross examiner may pursue any hypothesis honestly advanced on strength of reasonable inference, experience or intuition. No requirement of evidentiary foundation for every factual suggestion
 - Basically, you can't ask questions based on facts that are knowingly false or can't be supported by evidence
 - As long as there is a small possibility, you can ask it
 - Questions without a good faith foundation have the potential to cause prejudice arising from the fact that there is no factual basis for the question
- Character evidence rule can be used to stop bad faith questioning on the accused: for everyone else, the good faith rule does this
- Final determination of good faith is left up to the trial judge to decide

Rationale of good faith is about misleading the jury and PE

Good faith example: A witness to a car accident is giving evidence for the plaintiff, who is claiming damages for negligence. Counsel for the defendant wants to suggest the witness may have been drinking, and their perceptions impaired, because the accident took place at 2 am on Saturday night in Edmonton. What is the MINIMUM counsel would have to possess to assert that the witness may have been drinking?

- Minimum is evidence that the accident took place near 104 St and Jasper, and that there are a lot of bars in the area

Specific Limits on the Crown

- The Crown cannot ask the accused about the accuracy of Crown witnesses: this suggests that the accused must provide a motive, and undermines the presumption of innocence
- Crown cannot ask about “discreditable conduct” of the accused, unless discreditable conduct is part of the case: protects from bad character evidence
 - Even if an accused invites CE on their character, Crown has to be within the boundaries
 - Discreditable conduct as part of the case: accused charged with murder in a drug deal, drug trafficking is fair game

CE the Accused: Forbidden Questions

- “Are you a member of a satanic cult?” (Unless otherwise relevant to the case, but never for credibility)
- “Why would this complainant lie?”
- “Why didn't you just tell the police you were innocent?”
- “Very convenient you'd say that, you have the Crown's disclosure, don't you...”

The Failure to CE: The Rule in *Browne v Dunn*

Failure to CE is said to be unfair to the witness, unfair to the party that called the witness: neither can respond to a challenge or allegation made later - no chance to refute a story/answer a challenge brought against them using that witness

Basic Overview

1. Did you fail to CE the witness?
 - Did the witness “know” your point?
 - Were they “effectively” cross examined (even if the exact point was not raised)?
2. If not, what should the remedy be?
 - Can the witness be re-called, and the story put to them?
 - Should trier of fact be instructed to take failure into account (deemed acceptance)?

How does the law respond?

Historically, failure to CE was treated as a *deemed acceptance* of a witness’ testimony

This traditional rule is now not often applied: courts will now look to whether the witness has been “effectively given a chance to tell their story”, and at whether they knew that they would be contradicted

- Big question is *did we assess their credibility?*

Why should we care now?

Failure to cross examine can still be held against you by the judge (the “adverse inference”)

*Sankoff commentary about why *Browne v Dunn* is bad: use this on the exam when recognizing an objection and stating which way it could go

- You CE on purpose: it’s incredibly stupid not to
 - Failures to CE will be a big concern for the trier of fact
- CE in a jury trial: adverse inference
- Judge can choose to find against you, *or simply recall the witness* (which will be dealt with in costs)
 - It is usually unanticipated that opposing counsel will not CE: just raise these issues in reply

The Collateral Facts Rule

Prevents the calling of evidence to contradict answers of an opponent’s witness on “collateral matters”, whether given in chief or on cross

- *If the evidence is only presented to contradict an opponent’s witness, it’s inadmissible; but if it’s relevant to matters in the case, it’s admissible*
- Rationale for this is basically, when would it stop? Parties could just keep calling witnesses to contradict each other based on potentially irrelevant issues
- In applying the rule, look at the chain of reasoning: if it can go to only credibility, then it is collateral. If there are other *logical ends* to the chain related to issues in the case, it is not

The better question to ask: “is the evidence worth listening to?”

Collateral fact rule (like other rules) can be boiled down to PV>PE: when will the value be more than the time it will take, etc.

The “first rule” of credibility: We accept that credibility is always a relevant matter, but that we cannot explore it fully

- The rule may lead to unfair results sometimes, *but that's ok*
- Collateral/non-collateral distinction should not overwhelm PV > PE

**Note: the collateral fact rule has NOTHING to do with questioning: you can ask witnesses anything to impeach their credibility, as long as there's a good faith basis*

- The collateral fact rule governs calling witnesses

What are collateral facts? When are questions collateral?

1. If the question relates to a fact in the case, it is *never* collateral: collateral questions look solely at credibility
2. Being able to prove that the witness is lying is not enough to overcome the rule
 - If this was enough, the rule would be irrelevant
3. Can you tie the evidence to some issue in the case *other than* credibility?
 - If you can, you can contradict the witness
 - If the only purpose of the evidence is to show the witness is the type of person who would lie, it is collateral
4. Does it fall within an exception?

Exceptions to the Rule: These give otherwise collateral evidence a higher PV

1. Bias against a party *or the system*
 - Bias, motive, or interest are always allowed to be explored fully
 - Bias against a party could be racial, etc. or personal
 - Systemic bias: you're an anarchist, etc.
 - Ex) “Didn't Johnny beat up your brother?”
2. Prior convictions
 - S. 12 of the Canada Evidence Act makes clear that, if the witness lies about them, you can admit prior convictions
 - Convictions are so easy to prove that they won't lead to a diversion
 - Ex) “Haven't you been convicted of shoplifting?”
3. Relevant physical or mental condition that can affect the weight of the testimony
 - This includes things like wearing glasses, having hallucinations, etc.
 - Trying to show more than that they're lying: trying to show that quality of the evidence is impacted
 - Mental condition has to go very deeply to who they are and their overall ability to give testimony
 - “Don't you suffer from hallucinations?”
4. Witness' reputation for truth telling
 - This is an extremely archaic rule, isn't used: basically, you can call the reputation, but not the actual reasons
 - Based on small communities, etc.
 - Ex) “Does X have a reputation for lying in the community?”

Flexible Test for Collateral Facts: Proof of collateral facts may be admissible when...

- The witness' accuracy is essential to a resolution of the case
- The collateral fact is significant, and proof of it would impact on veracity
 - There's a difference between stealing office supplies and being disciplined for misleading a court
- Inquiry into the collateral fact will not diver the trial (substantially)

**Note: this isn't the law, but has been adopted in some ways by courts*

Prior Inconsistent Statements

Prior inconsistent statements can be used on CE to impeach a witness: show that they are lying, unable to keep facts straight, or unreliable

- Basically, the witness gives in court testimony, and you confront them with contrary out of court testimony

In most cases, there is no need for the statement to be used for its truth

- Impeachment of witnesses serves the same purpose
- Jury must still be told that the PIS can't be used for its truth (if a hearsay exception is not used)
- More common to try and admit as hearsay when the witness is hostile or adverse (because you need the evidence)

Two Chains of Relevance That Can Be Used to Put Forward PIS:

1. Person who gives different versions must be lying in one of them → witness is giving two versions → witness is a liar (attacks credibility)
2. Someone who says that they wanted to fight X probably did → witness said this → witness wanted to fight X
 - Note: this is hearsay, and can't be used unless satisfying an exception

PIS: Procedural Framework and the Canada Evidence Act

Ss. 10 and 11 of the CEA were enacted to address what to do if a witness denied making a prior statement that is alleged to be inconsistent

- Was it recorded (s. 10 of the CEA) or made orally (s. 11)?: oral statements need a witness
 - 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.*
 - 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.*
- Once witness is made aware of the statement, three possibilities: they can admit they made the statement, or that they didn't (in some way), they can also full adopt the statement: best case scenario

Witness adopts: "Yes, and I meant it!"

- If a witness adopts the statement, no more relevance to ss. 10 and 11
- Witness has made the statement and now adopts it, sit down

Witness admits, doesn't adopt: "Yes, but I didn't mean it!"

- CEA irrelevant
- Witness has accepted making the statement, but disagrees with the statement itself: begin CE

Witness denies: "I didn't say that!"

- CEA relevant
- If denied, statement must be shown (if recorded) or better circumstances of alleged conversation (date, etc.) must be given before a contrary witness can be called
 - This is a matter of fairness
 - *Ss. 10 and 11 are not exceptions to the collateral fact rule*

For civil cases, ss. 22 and 23 of the *Alberta Evidence Act* apply:

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.

- Need the trial judge's permission

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.

Prior Convictions

Canada Evidence Act, s 12(1): A witness may be questioned as to whether the witness has been convicted of any offence

(1.1): If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction

- This is *never collateral*: in this case, you're always allowed to prove it

Alberta Evidence Act (civil), s. 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

Starting point: we can admit PCs to test the credibility of a party or an accused in a criminal case despite the character evidence rule

- In *Corbett*, the SCC decided that there was no Charter violation in s. 12, but read it down. "May be admitted" means that the trial judge has the discretion to exclude convictions where it would cause an unfair trial
 - S. 12 can *only* be used to test credibility

PCs Will Be Excluded Where PE > PV

Indicators of PE:

- What is the nature of the conviction?
 - Does it reflect on honesty (perjury, theft, fraud)? If so, more likely in
 - Is it likely to horrify? If so, more likely out
- Remoteness: the more remote, the less likely

- Older convictions reflect less
- Similarity: *the more similar, the more prejudicial*
 - We're trying to show that they're the type of person who would lie, *not commit the exact offence*
- Comparative credibility/credibility contest
 - Did the accused argue that other parties shouldn't be trusted because they're the type of people who would lie? If so, it becomes more relevant whether or not the accused is someone who would lie
 - "You are the type of person who lies, aren't you?" vs. "You are lying, aren't you?"
 - Attack on character suggests "type of person": Credibility contest
 - Attack on facts and suggesting that the witness is lying is just part of defence: no contest

*On exam, identify the key factors

This isn't all or nothing: you can admit some convictions and not others, even if they're for the same offence

Admitting Convictions Against Defendant: Basic Overview

- During the Crown's case, the only relevant rule is bad character
- If admitted as part of the Crown case, the conviction can be used for character purposes and to assess credibility
- Once the Crown's case is closed, 2 outcomes:
 - You can admit it under s. 666 (bad character evidence)
 - You can admit it to test *credibility* (s. 12)
 - If the PV>PE, you can admit a prior conviction as character evidence regardless of whether defendant testifies
 - BUT, if you are looking to use s. 12 specifically, *the accused must take the stand*
- If the Crown wishes to use s. 12, defendant is entitled to a ruling before testifying
- Judge will go through convictions and consider them against list of factors
- If conviction excluded, Crown can re-apply if defendant does something unexpected in testifying, like attacking Crown witness
- If convictions admitted under s. 12, jury must be advised that they are only for credibility

Accused can make a *Corbett* application: made at the close of the Crown's case, and asks whether certain convictions can be excluded

- Judge will consider: how dated the convictions are; whether the convictions are similar to what the accused is being tried for; the nature of the accused's defence and how it was advanced; whether the convictions are of a type that demonstrate dishonesty; the seriousness and stigma a conviction has; whether excluding a conviction would leave other convictions to be considered

Opinion Evidence: Non-Experts

The general rule is that witnesses may not give opinion evidence: they must testify only to facts within their knowledge, observation and experience

- We want triers of fact to come to conclusions, not the witnesses
- Admitting opinion also has the potential to waste time and cause confusion: relevance and PV can't do a lot to control things if opinions are simply admissible

We care about what witnesses actually saw, not about hypotheticals or their opinions

Facts vs. Inferences (Opinions)

- Facts are supplied by the witness
- Inferences are supplied by the trier of fact, and are always a matter of interpretation based on the facts
- Without direct evidence, we need to prove facts by using inferences

Ex) Different inferences based on facts

- Facts: “I saw Bob scowling and screaming obscenities as he drove towards Dan”
 - Inference 1: Bob was intentionally trying to hit Dan
 - Inference 2: Bob just caught his hand in the glove compartment and broke three fingers
 - Inference 3: Bob is psychotic and screams obscenities daily
- These will change if you introduce more facts

Non-Expert Opinion Testimony: Key

To be admitted, all 4 should be satisfied

- It must be a conclusion based on a personal perception
- Opinion must be rationally based on the perception
- Opinion is the only reasonable way of conveying the information, and the jury needs it
- Must be on a subject that is within the general competence of most people

Exceptions to Non-Expert Opinion Testimony

Rule of thumb: We can admit “non-controversial” opinions that are simply ways of describing facts or events

- Ex) That car was fast, that person was tall, etc.
- These are technically opinions, but we don’t really care about them unless they go to a relevant fact that needs to be proven

Admitted opinions must be conclusions based on *personal perception*

- Ex) Person was drunk. If a witness saw the person and says “I think the person was drunk”, then we care about why they think what they think
- If you didn’t see it, you can’t give the opinion

The opinion is a *reasonable* way of conveying the information, and the jury needs it

- Saying someone is drunk is easier than trying to describe drunkenness

Must be on a subject that is within the *general competence* of most people: has to be the type of opinion most people can give

- If it’s easy, let the opinion in and leave it to questions of weight
- Ex) Saw/smelled marijuana. Sight and smell are competencies that everyone has; we can attack the weight of this evidence after it is admitted

Witness must be able in the circumstances to give the opinion

- Do they have the competency as a lay witness? Or, do they need to be qualified as an expert?

Expert Evidence

We allow experts to give opinion evidence because sometimes we need them to get the results we are looking for: they explain things that ordinary people are unable to understand

There is always a real danger that expert evidence will be misused and distort the fact finding process (Mohan, 1994)

Experts can give opinions on matters relevant to a trial even if they did not personally examine, perceive or hear any aspect of the testimony their evidence is based on

- Common: toxicologist in an impaired driving case

Expert evidence: Concerns

- Increase in time and cost
- Distorted value: impressive witnesses
- Usurp trier of fact: battle of experts
- Reliability? Substantive and procedural
 - Determined procedurally by lawyers and judges who don't understand the science
- Hired guns: advocates
 - Whenever you add an expert to your case, you are able to deflect the case (temporarily) from the accused

Expert opinion evidence is also presumed inadmissible: must pass threshold test to be admitted (derived partially from *White Burgess...* (2015, SCC)):

1. Is the opinion relevant?
 - Self-explanatory: does it go to an issue in the case?
2. Is the evidence necessary?
 - Is the expert providing information that is outside the experience and knowledge of a judge and jury?
 - Could ordinary persons come to a conclusion about this without the expertise?
 - Ex) Immigration case where caregiver exploited: don't need an expert to show that foreign caregivers are vulnerable and unlikely to ask for help
 - Can't call to say accused sometimes make false confessions
 - *Can't call an expert to testify about what the law means*
3. Does it clash with any exclusionary rules (Hearsay, oath-helping/case splitting, bad character; civil rules)
 - Civil rules include: expert report filing, how many experts you're allowed, etc.
 - Experts are allowed to use hearsay to an extent to form an opinion: not used for its truth, but to form an opinion. Whether that opinion can be used depends on whether the hearsay elements can be proven
 - Is it just to add value to the opinion? If so, can't be used
4. Is the expert qualified to give this evidence?
 - Expertise can come from a number of things: something as simple as having spent more time with particular videotapes can qualify someone as an expert
 - All you need is a "specialized knowledge"
 - You could theoretically tender someone with very low credentials (although you wouldn't)
 - Degree of expertise can be relevant as a question of weight - CE after admission
 - *Bias/partiality*: SCC said in *White Burgess* that bias is a question of admissibility, but almost always goes to weight
 - "Exclusion... should occur only in very clear cases in which the proposed expert is unable or unwilling to prove the court with fair, objective, and non-partisan evidence"

- Where the expert has a personal interest or strong link to the case, it will more likely be excluded: do they stand to benefit more than just by being paid as a witness?
- *Civil cases*: rules of court say that experts must be unbiased
- Would the expert give the same story to either side? Very high threshold, failure is rare
- When can you object on bias basis?
 - Nature and extend of connection, not mere fact of connection
 - Employment isn't enough, but familial relationship might be
 - Direct financial interest in outcome of litigation might be

Additional gatekeeping requirement: Balancing Test

Is PV > PE (PE includes prejudice to the trial process as a whole)? The expert was good enough to get past step 1, but how good are they? Factors include:

- How biased/partial is the expert?
- How necessary is it (again)?
 - Idea of what expert evidence is designed to do
- Ultimate issue principle
 - Where the expert is testifying to the *ultimate issue in the case*, the court has to be more wary: PV/PE analysis becomes more strict
 - Particular questions that ask the expert to draw the conclusion that the jury has to may be excluded: final conclusion should generally be left to juries
 - Ex) Wrongful ID issue: calling an expert to say that people make wrongful IDs in stressful situations
 - Ex) Child sexual abuse cases: calling an expert to talk about the symptoms, and equating them with the witness
- How complex/time consuming is it?
- How important is the issue it resolves?
 - We don't allow experts for side issues
- Foundation: How many of the underlying facts are established?
 - Experts are allowed to use hearsay to an extent to form an opinion: not used for its truth
 - Facts that can be used to form expert opinion include: personal observation; evidence given by other witnesses; hypothetical questions that are to be established; certain out of court material (facts of background expertise)
 - If there are no primary facts, the evidence itself is inadmissible
- How reliable is the underlying expertise? (Exam: can you generally assess that reliability is a concern?)
 - Is it *novel science* (*R v J(JL)*)? Forensic kinesiology, hypnosis, hair transfer evidence, bullet lead analysis
 - Has the technique been tested? Has it been peer reviewed? Is it accepted? is there a high margin of error? How has the data been accumulated? Are the methodologies generally accepted?

Two reminders that explain how expert evidence can be used:

- Is there admissible evidence to support opinion?
- Has the expert stayed within their expertise?

Keep in mind that any admissibility question is a weight question waiting to happen: once admitted, you can CE on the above factors

Legal Advice Privilege

Privilege rules are not based on PV and PE: they are based on a notion that a competing interest is strong enough to warrant exclusion despite PV

- Courts will always err on the side of protection

Why do we have legal advice privilege?

- Lawyers need to be able to help clients in need privately: if you know the info will be used against you, why would you go to a lawyer?
- Privilege belongs to the *client*, not the lawyer; lasts for life and death (and insanity) and is “system wide”

What is required?

A lawyer, a client, and a communication that is *confidential* and is made *for the purposes of legal advice*

1. The Communication is intended to be confidential

Confidentiality (or the attempt to maintain it) is the core: privilege doesn't extend to situations where confidentiality is deliberately breached by a party, or even accidentally breached (depending on the efforts taken to right that wrong)

- There are a number of things you can say in confidence that are not protected by privilege
- Distinguish between confidential obligations and privilege: everything that comes into a lawyer is confidential, but not everything is privileged
- Communications that have been overheard can still be privileged: ex) is wiretapped phone calls
 - *R v Uljee* (NZ): person confesses to his lawyer, police hear through open window: it was intended to be in confidence, so it is privileged

“Common interest privilege” concept: you are not entitled to raise privilege against someone who you have the privilege with

- This works with co-accused
- If two privileged parties turn on each other, neither can say that they intended confidence when the statement was made
 - But, they can claim privilege against the rest of the world
- You are allowed to share the information with any party common in interest and retain privilege: but, this gets extremely complex in civil cases

2. The advisor who received the communication is acting in a professional capacity. The communication is part of a *lawyer client relationship*.

Lawyers often act in other capacities: as trustees, business advisors, law professors, babysitters...

- Where the matter is contested, the court will look at the role in which the lawyer was acting, and the relationship between the parties
- Where the report is in some way “related to the rendition of legal services”, it will be privileged: broad idea

3. The communication is *made for the purpose of giving or obtaining legal advice*

- Videos count as confidential for this purpose
- Lawyers are not a crime safety deposit box: test is always the “made” portion
- We don't care about the situation at hand or how much you need the material, etc.: we care about whether it was made for the purposes of legal advice

- *Meranda v Richer* (2003, SCC): communications made for legal advice are presumed privileged, and it is up to the opposing party to show that it was not made for legal advice

*If these steps are satisfied, you have valid privilege

Exceptions

The *future crimes* or *crime-fraud* exception

- Premise: you can't use your lawyer to commit a crime or fraud. If you illegitimately solicited the legal advice with the intent of committing a crime, the exception applies
- It is not a "crimes" [confession] exception: if it was, everyone speaking to a crim lawyer would not be covered by privilege
- Question of intention
 - Reserved for situations where the purpose of soliciting the advice was wrong: can't just be that you didn't know the illegality of something and asked your lawyer about it to avoid a crime; has to be more pointed, specific - using the lawyer
- You don't have to prove that the lawyer knows it's criminal: it's about whether the client knows

Waiver

A client can always expressly waive the privilege, and privilege can be implicitly waived

- The guiding principle: it would be unfair to retain privilege given the actions of a client
 - Lawyers are agents: can waive privilege on client's behalf without express authorization

Waiver: Confidence

- A failure to maintain confidentiality
- Voluntary disclosure to a party without common interest
- Accidental disclosure complex generally does not amount to waiver
- 6.02(12) of the Code of Conduct does not cover waiver

Waiver: "Some means all"

- You can waive some information without waiving it all
- But, if you expressly waive some material, that might show an intention to release more
- Will apply where other materials are needed to give the full picture

Other exceptions include: the public safety exception, innocence at stake exception, state of mind waiver

Litigation and Settlement Privilege

Litigation Privilege

Main issue: certain material obtained for the purposes of litigation (doctor's notes, etc.) is not protected by legal privilege

- Litigation privilege mitigates this by creating a zone of privacy: when someone is investigating and defending themselves in the pursuit of litigation, the other side can't steal their info
- Once litigation is over, you don't need it anymore: thus, no longer applies

Examples include: Lawyer-investigator, Client-investigator, Lawyer or client preparatory work

Litigation privilege only applies *where the material in question was prepared for the **dominant purpose** of real or apprehended litigation*

- Privilege will only come into play if the court can be certain that the material was prepared for this
- Ex) *Waugh v British Railways Board* (1979, UK): British Railways sends an inspector immediately after a crash and he prepares an accident report. BR says it's privileged: they sent the inspector because they knew they'd be sued
 - Court says that it was not prepared for the *dominant purpose* of litigation

Courts err on the side that it was not prepared for litigation unless it is exceptionally clear: no general exception

Rules of Court are encouraging more disclosure, contrary to litigation privilege

- Ex) Experts - have to be able to turn the info over
- *Chrusz (ON)*: Insurance company investigating a policy holders' fire is not, or should not be considered to be, in a state of anticipation of litigation - high threshold

Lizotte (2016, SCC): litigation privilege ensures the efficacy of the adversarial process by maintaining protection to facilitate investigation and preparation of a case for trial

- Litigation privilege is a class privilege: "presumption of inadmissibility"
- A balancing test would lead to unnecessary uncertainty
- New exceptions can be recognized in certain narrow circumstances
- Privilege applies against third parties (civil)
- Litigation privilege is not a "second class" privilege: statute can't just overrule it

Settlement Privilege

Idea is that parties should be free to settle their disputes, and that we want to encourage them to do so: anything said in settlement negotiations is protected

Basics

- Often referred to as the "without prejudice" rule
- Protects what would otherwise be "admissions" from being tendered
- Any statement made in bona fide attempt to settle dispute of any kind (real or apprehended)
- Very broad scope: anything that relates to settlement negotiations (admissions or not)
- So long as it was made in process, and part of, attempt to settle (*Sable v Ameron Corp*)

Exceptions

1. Threats or fraud (not bona fide): if you're *actually* threatening someone
 2. Where it's necessary to uncover disputed aspect of settlement (not for truth of admission)
 3. Where nature of settlement may cause prejudice to the other party
 1. Ex) Multi-party settlement, possibility of double-recovery
 2. Separate proceedings: A and B reach a settlement and keep it a secret. A sues C, and C wants the settlement from A and B to evaluate their position. If there is worry about A unfairly winning twice, some info may be given up
- Rule exists in crim, civil, and admin proceedings