**Course**: Law of Evidence
**Date**: Winter 2002
**Professor**: West
**Textbook**: The Law of Evidence (Boyle, MacCrimmon, Martin); The Law of Evidence (Paciocco, Stuesser)

Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

**Table of Contents**

# Introduction

## The Role of the Various Players in the Trial Process

The point of evidence is to point out weaknesses in a case. When you have problems with the construction of knowledge, you are likely to have problems with the trial result. The rules of evidence are premised on the basis that lawyers will never mislead the trier of fact. The absolute integrity of the players is required in order for the trial process to be effective. The major players in this process are:

- Police
- Victim
- Crown Prosecutor
- Defense Counsel
- The Judge
- The Jury

**1. Police** – There are a number of ways that we fill in gaps and blanks in our imagination to put together a story – social schemas. This sort of things occurs with the police as well. Note: some indicate that police go after certain individuals under pressure to appease the public. Police have a terribly difficult job and they will make mistakes sometimes. Police are interested in getting their person and quickly.

**2. Victim** – There is no role for the victim in the trial, but there is a role during sentencing. In a criminal investigation the subject of the matter is the State versus the accused.

**3. Crown Prosecution** –The lawyer's primary duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. It is not the role of the Crown to try to craft a jury that is going to win over the case for the public. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and should make timely disclosure to the accused or defense counsel of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment.

**4. Judge** – Most people assume that the judge has full control of the trial. The judge is there to ensure the proper conduct of a trial – ensure timeliness, conduct, and decorum. The judge must guide the jury to make a neutral and impartial reasoned decision in a dispute. The judge is there to enforce the rules of evidence, determine its admissibility, and assess the weight to be given. The judge has the role of instructing the jury – assists the jury to apply the law to the facts. A judge is allowed to give his or her opinion on the value of the witness's testimony. Judges are rarely challenged.

**5. Defense Counsel** – People associate them with their clients. The lawyer's duty is to protect the client as far as possible from being convicted except by a court of competent jurisdiction and upon legal evidence sufficient to support a conviction. The lawyer may properly rely upon all available evidence or defenses including so-called technicalities not known to be false or fraudulent. When you have a guilty client, the case must be operated in a different way: The defense counsel may never deceive or mislead the court, not may s/he direct attention to some other person in the interest of saving a guilty client. The defense counsel, in such a circumstance, is entitled to cross examine other witnesses quite intensely in an effort to raise the *best* possible case for his or her client.

**6. The Jury** – Only 5% of trials in Canada are jury trials. There are occasionally provisions in the Criminal Code providing that there should be jury trials for more serious crimes. However, this is always to the discretion of the defendant. Juries have come into disrepute lately because there has been a change from having people judged by one's peers. Our juries are no longer really juries of our peers – they come by way of random selection of phone books and, at times, personal selection of stranglers. There are people that believe that the jury system is antiquated and should be outlawed.

**7. Other Contributors** – *Scientific Evidence* – this evidence sounds good and tends to easily convince juries, but it is not as reliable as one would like to believe or hope. There is a mystique about scientific expert evidence as a whole that is alluring. *Vulnerable and Disreputable Witnesses* – some witnesses will tell the police anything that they want to hear.

### R. v. Mentuck (1996) Man. QB

| Facts | Holding | Ratio |
|---|---|---|
| ○ This was a voir dire by the defense regarding the admissibility of inculpatory remarks allegedly made to the police while detained<br>○ Statements were allegedly made to the police, but the defense argues that he was denied the opportunity to speak to counsel | ○ Most general public believe that people do not confess unless they are guilty, but people do this more often than one might expect | ○ The individual's right to counsel must never be compromised |

### R. v. Stinchcombe (1991) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ A statement was made by a witness to an RCMP officer after the preliminary hearing<br>○ The witness was not called at trial and the defense did not have the information | ○ Information should not be withheld from defense, if it would impair the right of the accused to make full answer and defense<br>○ The Crown was not justified in refusing to disclose the statements | ○ The Crown has a duty to disclose all relevant information to the defense |

An outcome of this rule is that once a defense knows exactly what the Crown's case is, there is a hope that a plea-bargain or settlement may be struck.

### Lennox v. Arbor Memorial Services (2001) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Arbor employed Lennox as a groundskeeper who was subsequently suspended and fired<br>○ Trial judge found that his actions warranted the dismissal<br>○ The judge reviewed Arbor's Personnel Policy Manual, even though it had not be pleaded or produced until the trial judge insisted, and concluded the policy had been breached | ○ The trial judges conduct created an appearance of unfairness – the judicial intervention became interference and was improper<br>○ A judge may intervene when clarification and detail is required, in this case the judge's effort was directed at aiding the plaintiff<br>○ Trial judge diverted the parties from their issue toward what he believed the issue to be | ○ The judge's role is to ask questions if s/he needs clarification and not to comment on counsel's presentation and aid in the demonstration of the case |

### Meek v. Fleming (1961) Eng CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Fleming's defense counsel concealed from the court Fleming's demotion in the course of his trial with Meek, who claimed false imprisonment | ○ Even suppression of information that defense counsel felt would have no adverse effects is sufficient enough to taint the evidence – new trial ordered | ○ You may not suppress information that you think may make the case better |

# Judicial Notice

Judicial notice is the acceptance by a court, without the requirement of proof, of any fact or matter so generally known and accepted in the community that it cannot be reasonably questioned, or any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned. We assume that certain things are common sense and that no offering of proof required. It is only where the silence is broken and there is a fact in dispute that we go to the doctrine of judicial notice. There are three types of facts to be looked at in this area:

## 1. Adjudicative Facts

"Adjudicative" facts refer to the who did what, where, when, how, and with what motive or intent.

### R. v. Desaulniers (1994) PQ CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Psychiatrist testified for accused that children have the tendency to make up stories<br>○ Trial judge instead relied on his own research – Badgley Report<br>○ Judge took judicial notice of material extrinsic to the trial | ○ *Issue*: Is the Badgley so well-known that a judge should be able to read it and cite it as common knowledge?<br>○ The trial judge erred in venturing into areas of special knowledge with none of the expertise | ○ Judicial notice does not extend to expert evidence or a type of existing expert evidence which has not been put in evidence by one of the parties |

### R. v. R.C.T. (1994) Prov Ct.

| Facts | Holding | Ration |
|---|---|---|
| ○ A pair of scissors was found in the pocket of a young man while he was in possession of a stolen vehicle – local community members know that scissors can be used to steal cars | ○ *Issue*: Could the judge take judicial notice of the local communities knowledge? | ○ Types of Facts accepted in the course of a trial:<br>1. Facts so notorious that everyone would know them;<br>2. Geographic factors of the local area; and,<br>3. Knowledge known only to a class of persons locally. |

## 2. Legislative Facts

"Legislative" facts are those that establish the purpose and background of legislation, including its social, economic and cultural context – of a more general nature. These are more difficult. In the U.S. they do not take judicial notice of legislative facts. These facts refer to social science or economic data used to determine the constitutionality of certain legislation.

### Canada Post Corp v. Smith (1994) Gen Div.

| Facts | Holding | Ratio |
|---|---|---|
| ○ Problem arose, as there was a conflict of jurisdiction – thus, the Worker's Comp board submitted an affidavit maintaining that it had the constitutional jurisdiction to deal with the matter. | ○ The affidavit was not admissible as it did not set out the qualifications of the affiant and contained conclusions in the nature of legal submissions better suited to (1) judicial notice; (2) Expert Evidence; or, (3) Brandeis Brief – Intervener's Factum | ○ Legal and legal policy submissions cannot be introduced as fact, but rather must be introduced and supported by extrinsic evidence. |

## 3. Social Framework Fact

Much is known about human conditions and social realities and, therefore, judges rely a great deal on 'social context facts'. For the social context information to have any relevance, it must be linked to the evidence in the particular case. What is important is the need to link any generalizations relied on to the evidence in the particular case. In the absence of evidence, reliance on general propositions simply leads to inappropriate and unfair speculation, or, in the words of dissenters, stereotyping.

### R. v. Lavallee (1990) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Expert evidence of psychological experiences of battered women was presented<br>○ The accused shot her husband in the back of the head<br>○ Pleaded self-defense | ○ Evidence was admitted to provide necessary background info in determining whether defendant acted in self-defense – whether she feared for her life and acted in a reasonable belief of no choice | ○ Social framework facts, if properly linked to the evidence, may be admitted to support a proposition |

### R. v. R.D.S. (1997) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ A white police officer arrested a black 15 year old who had allegedly interfered with the arrest of another youth<br>○ 15 year old was charged with assault on a police officer<br>○ Police officer and accused were only witnesses called – their accounts differed<br>○ This case was heard by a judge on the bench for only four months<br>○ Trial judge found that the testimony of the police officer was less credible than the youth<br>○ Crown attorney questioned why the judge would believe the boy and not the police officer | ○ The trial judge acquitted the accused holding that since police officers do overreact, particularly in their dealings with non-white youth, indicates a questionable state of mind – this was probably a case of overreacting<br>○ Crown appealed on basis of reasonable apprehension of bias submitting that the trial judge was relying on personal knowledge and experience<br>○ SCC found other evidence to support the overreaction regardless of whether bias could be proved, majority held that nothing done was wrong | ○ To be valid, the general proposition needs to be linked to the evidence in the case<br>○ *Dissent*: There was no evidence presented at trial to indicated that this particular police officer's actions were motivated by racism |

### R. v. Williams (1998) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Williams, an aboriginal, elected a trial by jury. He brought a motion for an order permitting him to challenge jurors for cause because of widespread racial prejudice against aboriginals in his community | ○ The evidence in this case established widespread racial prejudice against aboriginals and that prejudice established a realistic potential of partiality such that the trial judge should have exercised his discretion to allow the challenge for cause | ○ The courts to accept facts without proof may apply judicial notice. This can be done by two methods:<br>1. Notorious Facts; and,<br>2. Resort to a source of indisputable accuracy |

# Relevance

Only relevant evidence can be permitted into a trial. Evidence is relevant if it has a tendency to make a proposition more or less probable. Evidence is really a relationship between facts.

*Example* – if the issue in a trial is whether a person was intoxicated, the type of evidence that would make the proposition more probable are: Individual had alcohol on breath; or, acting rowdy in a pub.

## Rules of Relevance & Exclusion

All relevant evidence is permissible unless it is subject to exclusionary rules or judicial discretion. Ask:

A. Does this information violate an exclusionary rule?
B. Is this Evidence subject to a judge's discretion to exclude?
C. What is the weight of this evidence? Care is taken to allow only 'safe' evidence in a trial.

The general rule is that all evidence, which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded. The test for relevance is an individual's logic and common sense – what is believed about human behaviour and events.

The general rule is subject to a number of exclusionary rules and rules subject to a judge's discretion of which the following are most frequently stressed:

a) Hearsay evidence;
b) Opinion evidence;
c) Similar fact evidence;
d) Evidence of subsequent repairs;
e) Settlement offers;
f) Conduct on other occasions; and,
g) Exceptions made at the direction of the trial judge, e.g. where the circumstantial evidence would:
    a. Be excessively time consuming;
    b. Unnecessarily confuse the jury concerning the issues;
    c. Unduly prejudice the opponent; and,
    d. Unfairly surprise the opponent.

*Relevance and Materiality* – Evidence may appear to be relevant, but may be immaterial because either:

a) It does not support the proposition or issue substantively; or,
b) It was not pleaded in the statement of claim;

## Direct versus Circumstantial Evidence

Direct evidence, if believed, establishes a material fact in issue without the need for inferences to be drawn. For example, an eyewitness' testimony to the fact, if believed, is direct evidence. There is a notion that direct evidence is given more weight or value than circumstantial evidence – this is not always the case as eyewitnesses have a penchant for error. Circumstantial evidence requires inferences to be drawn before it can be applied to determine the issue. For example, in the case of a murder trial the following would be circumstantial:

a) Possession of a weapon;
b) Blood on the accused's clothing matching that of the deceased;
c) The watch of the murdered man in the accused's dresser drawer; and etcetera.

## Judicial Discretion (Probative Value versus Prejudicial Effect)

Prior to the *Charter* a great deal of evidence was admitted that the judge would otherwise keep in check. Consider *R. v. Wray* (1970) SCC – a judge's sole discretion is to exclude based on its impact on the fact-finding process. The *Charter*, especially section 24(2), has broadened the judge's power of judicial discretion. Even statutory law could be overridden by judicial discretion supported by the *Charter*.

The judge's duty is to weigh the probative value versus the prejudicial effect. Probative value is the importance of the evidence – is the importance of the evidence so great that it would fly in the face of common sense not to let it in? Some factors to consider are:

1. The credibility of the witness;
2. The reliability of the evidence; and,
3. The strength of the inferences that can be drawn from the evidence.

After so analyzing, consider what the cost would be to the defendant or reputation of justice for allowing the admission of the evidence. Ask whether the evidence would distort the truth such that the trier of fact would be mesmerized by it? Would the admission of the evidence lower the level of regret for a jury? Sometimes the cost of the admission of the evidence distorts the trial.

### R. v. Seaboyer (1991) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused was charged with sexual assault of a woman with whom he had been drinking at a bar<br>○ Accused was refused the ability to cross-examine the appellant on her past sexual conduct pursuant to the 'rape sheild' provisions<br>○ Accused challenged the constitutionality citing prejudice | ○ The meaning of 'prejudice' must be broadly understood as encompassing both prejudice to the accused and prejudice to the trial process itself<br>○ The Court identified as twin myths the beliefs that past consensual sexual experiences of a complainant are: (1) relevant to credibility; and, (2) or to readiness to consent to sex. | ○ Evidence of the sexual history of the complainant of sexual assault can distort the reasoning process of the trier of fact by arousing hostility or bias toward the complainant, resulting in a misuse or misevaluation of evidence.<br>○ Past sexual experiences are not relevant to one's credibility or readiness to consent |

### Algoma Central Railway v. Herb Fraser & Associates (1988) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ A ship belonging to the plaintiff was damaged by the alleged negligence of the defendant<br>○ Plaintiff wishes to question procedures the defendant company adopted after the fire – showing the company then drew up procedural rules | ○ *Issue:* Should the new procedure be admitted as relevant?<br>○ The rule used to be that post event evidence would not be admitted – it may be prejudicial; as a matter of policy, it might deter corrective measures and policy adoption until after the litigation<br>○ The policy is relevant as it says something about the incident | ○ Subsequent repairs is questionable as an exclusionary rule and such evidence should be admitted or excluded at the bequest of the judge |

### Anderson v. Maple Ridge (1992) BC CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Not Done | ○ Subsequent repairs suffers from antiquity and is not left for the judge to apply | ○ The admitting of subsequent repairs is left to the judge's discretion to apply |

### Draper v. Jacklyn (1970) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Person was injured and had very bad facial abrasions – to fix this a cage was affixed to the patient, which had sharp edges that were corked on the ends. | ○ *Issue*: Should the picture of the individual with the apparatus be admitted?<br>○ If evidence is needed to be used to explain what the treatment looks like and the pain and suffering the plaintiff went through, the photo ought to be admitted | ○ Photo evidence is left to the discretion of the trial judge |

The rule about settlement offers has also been re-considered. Consider Rule 49 of the Rules of Civil Procedure and also:

### Walmsley v. Humenick (1954) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ A child was injured in a bow and arrow accident by another child<br>○ The parents of the other child offered to pay the injured child's medical bills | ○ *Issue*: Should the settlement offer be considered?<br>○ Offers to settle are, by and large, excluded from evidence<br>○ *Policy reason*: Might deter people from offering settlement and settling out of court | ○ Offers to settle are, by and large, excluded from evidence<br><br>○ Note: There has been discussion by jurists that it will depend on the nature of the offer regarding whether or not they will exclude it |

### R. v. Scopelliti (1981) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Scopelliti admitted that he shot and killed two persons while they were in his store<br>○ Claimed self-defense and evidence was admitted as to the individuals' previous specific behaviour | ○ Previous specific acts of violence by a victim or other third person which have significant probative value to prove a disposition for violence are admissible where a disposition for violence is relevant | ○ The courts have allowed information about the victim's previous behaviour to come forward |

# Types of Evidence

1. *Oral Testimony* – almost 90% of evidence that goes into trial is oral. This sort of oral testimony is subject to human vagaries (people filter information, memories fail, etc.,);
2. *Real Evidence* – includes any artifact that was involved in the action that is real:
    a. Original Evidence – gun, knife, shoe, etc
    b. Demonstrative Evidence – maps, diagrams, charts, video tapes, etc.,

## Real Evidence

Real evidence is expensive. Demonstrative evidence is usually very expensive and involves the use of experts. Demonstrative evidence is a tool that demonstrates something to the trier of fact, which appeals directly to their optical senses rather than to their intellectual senses. Recall that full disclosure is required for evidence to be admitted. Demonstrations must be well thought out and the lawyer must know what s/he is doing – if you do not know how the demonstration will turn out, then you do not do it at trial. Oftentimes, lawyers require the use of expert witnesses in using demonstrative evidence. All evidence must be authenticated – how will your evidence build the bridge between object and factual occurrence? Lawyers must 'lay a foundation' before they can admit evidence, which means establishing the exhibit's relevance, whether it is identifiable to a witness, that the witness in fact recognizes it, the witness saw it at relevant time, and etc.,

## Photographs and Videotapes

*Authentication* – the authenticity of the evidence will depend on:
1. Accuracy in truly representing the facts;
2. Fairness and absence of any mention to mislead; and,
3. Verification on oath by a person capable to do so.

*Prejudicial Effects* – even if real evidence is authenticated, there may still be issues of prejudice. A photograph may be excluded as prejudicial to the defendant in that it creates an undue sympathy or is inflammatory and interferes with the rationality of the fact determination process.

*Probative Value* – large police stations now have videotapes to record confessions (ON CA case January 2002). Where a video is challenged, it must be proved that there has been no tampering with the video

### R. v. Nikolovski (1996) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ The accused robs store and is caught on surveillance camera<br>○ At trial, the shopkeeper was unable to identify the accused, but the trial judge is satisfied with her own conclusion that the person on the tape was, in fact, the accused<br>○ Case appealed on the scope of the tape may – real evidence or testimony also 'speak for itself'? | ○ There is no reason why a photograph may not be probative in itself. A photograph may, in a proper case, be admissible into evidence not merely as illustrated testimony of a human witness, but as probative evidence in itself of what it shows<br>○ Pictures are akin to witnesses, they 'speak for themselves' | ○ Videos and pictures are 'silent witnesses' and there is no need to for a witness to corroborate the subject of them<br>○ Photos and videos are admissible as both real evidence and testimony |

*Note*: before any such evidence will be admitted, the lawyer must satisfy the court that it is authentic. As well, if you are going to use this type of evidence, you must tell the other side beforehand.

Three are three elements in admitting demonstrative evidence: (1) Authenticity; (2) Fairness; and (3) Probative Value. For instance, slowing down videotape in an injury case may have the effect of creating deliberateness about the action that is not present when the tape is played in full speed. In a criminal trial, if the party offering the evidence is the defendant it is far more likely to be accepted.

### High-Tech Evidence – Snoop Doggy Dogg Trial

| Facts | Holding |
|---|---|
| ○ Snoop was acquitted on voluntary manslaughter by manufacturing a computer animation to show a theory of the defense<br>○ Prosecution argued that Snoop's bodyguard shot the deceased in the back – defense was that it was in self-defense<br>○ Taken into account was the angle, the height of a car, the distance from that car, the entrance of the bullet to the victim | ○ A properly programmed computer animation is admissible, but its admission requires the laying of a proper foundation, including:<br>1. Describe the process used to create the animation and prove accuracy and reliability;<br>2. Qualify the reliability of the inputted data used to create the animation; and,<br>3. Fully disclose the animation to the other side for examination |

### Green v. Lawrence (1996) Man QB

| Facts | Holding | Ratio |
|---|---|---|
| ○ Plaintiff was involved in a domestic dispute and in an effort to restrain him he is put in a Full Nelson by the police<br>○ In the process his neck gets broken and he becomes a quadriplegic<br>○ The voir dire was to assess whether the plaintiff's computer animation should be admitted | ○ The animation should not be admitted<br>○ The animation was composed of only those pieces of evidence that would be beneficial to the plaintiff<br>○ Moreover, in creating the video the depiction of the actors distorted the truth of what actually happened – Superman versus a small man – not representative of the facts | ○ An animation must be representative of the facts, which include any depictions of the events, the actors, etc.,<br>○ A sufficient foundation must be laid to show the representation is accurate and has integrity |

### Owens v. Grandell (1994) OJ

| Facts | Holding |
|---|---|
| ○ Not Done | ○ In considering what type of authentication is required, it should be proved:<br>1. The data points measured at the accident were accurately recorded;<br>2. That the data points were entered correctly into the program;<br>3. The algorithms used in the software accurately depicted the accident;<br>4. Any additional modifications are valid;<br>5. Testimony that the experts are familiar with the demonstrative exhibit; and,<br>6. Show the depiction will properly aid the trier of fact |

*Taking a View* – Taking a view means to go to the scene of the crime: is it there to facilitate the trier of fact or is it actual evidence? Note: 'taking a view' is not conclusive evidence (*Swadren* v. *North York*)

*Documents* – Documents must be provided with the human being who explains what the document is. There are classes of documents that are easy to admit: Judicial documents and public documents. Those documents that cause problems are private documents. Business records (as private documents) may be admitted quite easily. The *Ontario* and *Canada Evidence Act* contain provisions for the admittance of business records such as bank statements, telephone calls, leases, receipts, contracts, etc., If you have signed a document and you are the party opposing its admittance you should consider the rules on page 341.

# Guest Lecturer – David Greenaway

## Hearsay Rule and Exceptions

Our courts are skeptical and unwilling to accept evidence of any witness who gives hearsay. Hearsay evidence is a written or oral statement given by a person not under oath. For example, take the case of a car that goes through a red light and hits a pedestrian. A witness may wish to testify about the events as they took place. Another witness who spoke to a bystander and learns of the event and testifies, his or her evidence would be classified as hearsay because the origin of the information is not under oath.

## Business Records

*Exception 1 – Admitting Business Records* – as the lawyer wanting to prove the records a notice should be sent to the other side specifying an intent to admit. At trial, the lawyer must call one person who can testify that those business records are made:

1. In the usual and ordinary course of business; and,
2. The particular records were made in the usual and ordinary course of the particular business.

In theory, one is supposed to file an original record. In practice, however, lawyers generally file a copy of the record. The underlying premise is that business records are inherently trustworthy because the commercial world relies on them – there is generally little motive to deceive anyone with the records. See *Ontario Evidence Act* section 35.

## Necessity and Reliability

*Exception 2 – Necessity and Reliability* – In the last 10 years the SCC has advanced another exception to the hearsay rule. If the documents are necessary and reliable, then the lawyer can generally get around the hearsay rule (see *Smith and Kahn*).

## Computer Generated Data

One of the problems that arise with computer documents is in identifying what the original document is. The first copy printed or the soft copy first created? The concept of an original is a meaningless concept in this context.

*Ontario Evidence Act* section 34.1 deals specifically with computer records: how lawyers can get computer records admitted into evidence at trial:

1. Proponent must prove the printout is consistently acted upon as the record of information;
2. Proponent relying on the record must prove the integrity of the computer system; and,
3. Integrity of the system can be proved as follows:
    a. Lead evidence that at all material times the computer was working properly;
    b. Demonstrate that the record was stored or recorded by a party to the proceeding who was adverse in interest to the party wishing to admit it; or,
    c. Establish that the computer printout or record was recorded or stored in the usual and ordinary course of business by an individual not party to the lawsuit[1]

The underlying premise is that if it is good enough for the bank it should be good enough for the court provided that the bank is not part of the lawsuit. A witness does not have to be put on the stand if the bank relies on them.

"Best Evidence" Rule – there is a requirement that parties provide the best evidence that is available – there is a bias in favour of original documents, for instance.

# The Role of the Witness

## History

The problem with witnesses lies in the area of memory distortion. There are a number of problems with witnesses and their memories:

1. Memory is a selective process whereby those images anchored in the mind are preserved longest;
2. Parts of our memory that erode are often replaced with images that unite the remaining fragments;
3. Uniting fragments correspond with data that represents what the individual desires them to be;
4. Memory images are often influenced by adjacent materials; and,
5. Memory becomes more distorted with time

Almost everyone can be a witness except:

1. The severely mentally ill (incompetent);
2. Very young children (generally under 3 ½); and,
3. Diplomats (saved from diplomatic immunity).

All witnesses are given an oath or an affirmation. Where it might not be reasonable to give a witness an oath, then the judge may accept unsworn testimony. In 1998, a white paper considered whether or not we should use a religious oath in a pluralistic society. It was recommended that the religious oath is dispensed with and replaced with a neutral affirmation. Reasons for the recommendation were the pluralist nature of Canadian society; the erosion of religious practice in Canada; and, the expense and inconvenience of keeping up with various religions.

Canadian society assumes that anyone 14 years of age or older is capable of swearing an oath. If a person is 13 years and below, the judge has to make an inquiry as to whether or not a person is capable of being sworn. The judge must determine whether the person knows that there is an obligation to tell the truth. Children between the ages of 3 to 6 are on the borderline as to whether they are able to testify at all.

### R. v. Kahn (1980) SCC

| Facts | Holding |
|---|---|
| ○ 4 ½ year old allegedly assaulted by doctor and uttered a statement to her mother about it | ○ *Issue*: Could testimony be admitted?<br>○ Judge asked, "Do you know what a lie is?" to which she could not distinguish – she could only communicate a story |

### R. v. Leonard (1990) ON CA

| Facts | Holding |
|---|---|
| ○ Not Done | ○ The child's understanding of the moral obligation must include<br>1. An appreciation of the solemnity of the occasion;<br>2. An understanding of the added responsibility to tell the truth;<br>3. An understanding of what it means to tell the truth in court;<br>4. An appreciation of what happens when a lies is told in court |

### R. v. Marquard (1993) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Child had burn on face, believed to be caused by the grandmother<br>○ Grandmother testified the child | ○ The court will require that a child has the capacity to communicate, determinable by a judicial inquiry | ○ So long as the child could understand the questions and communicate her answers, and so |

| | | |
|---|---|---|
| burned herself with a lighter<br>o Child was 3 ½ at time of incident and 5 at trial – grandmother challenged the ability of child to testify | o Testimonial competence comprehends: (1) the capacity to observe; (2) the capacity to recollect; and (3) the capacity to communicate | long as she knew the difference between right and wrong, the threshold for the admission of her testimony has been met |

*Summary* – There is a presumption that people 14 years of older are capable of understanding the oath, but they may be challenged by the other side in which case an inquiry will occur (*Canada Evidence Act* section 16). For people 14 years and younger, the individual must meet the *Leanord* test. For those 14 and under that might not appear to be able to meet such a test, the judge will undertake the *Marquard* test:

1. Witness must not be rendered incompetent by any rule of statute or common law;
2. Witness must have a sense of moral responsibility (*Leondard*); and,
3. Witness must have the mental capacity required to communicate the evidence (*Marquard*).

## Spousal Rules for Witnesses

A spouse is a 'married partner of the opposite sex' and does not include a common law or divorced spouse. Spouses have immunity and are not compelled to testify (do not have to testify if they do not want to) with the exception of *Canada Evidence Act* section 4(2), 4(4) and 4(5). For the vast majority of crimes that a spouse may commit, the spouse will have immunity. There is a common law exception: the spouse may have to testify if section 7 *Charter* rights are compromised

| **4(2)** | **4(4)** | **4(5)** |
|---|---|---|
| Specific enumerated offenses | Victim is younger than 14 | Threat to person's liberty/health |

### R. v. McGuinty (1983) Yukon

| Facts | Holding | Ratio |
|---|---|---|
| o Couple marries and the wife attacks husband with axe<br>o Husband does not want to press charges or be compelled to testify | o *Issue*: Can a spouse be compelled?<br>o The spouse in the section 4(5) exception is compellable – falling under a section 7 *Charter* right | o There is a privilege between spouses in the course of marriage subject only to the limitations of the *Canada Evidence Act* |

### R. v. Salituro (1991) SCC

| Facts | Holding | Ratio |
|---|---|---|
| o The accused was charged and convicted for fraud by using a forged document without the permission of his wife<br>o The parties were separated with no possibility for reconciliation | o *Issue*: Could Salituro, who was irreconcilably estranged, testify against her husband?<br>o Someone irreconcilably estranged may be compelled to testify in keeping with *Charter* values | o The common law rule is justified by the policy of protecting marital harmony – In cases where the parties are irreconcilably separated these policies do not apply – the common law should reflect this |

### R. v. Hawkins (1996) SCC

| Facts | Holding | Ratio |
|---|---|---|
| o Hawkins charged with selling information to 'Satan's Choice'<br>o Hawkins' girlfriend made several statements pretrial but she subsequently recanted them and married Hawkins | o *Issue*: Is the witness, now a spouse, compellable?<br>o Hawkins' spouse is not a competent witness as a genuine concern for marital harmony precludes her compellability | o Concerns for genuine marital harmony will serve to trump compellability with only a strict reading of the exception enumerated within the *Canada Evidence Act* |

## Probative Value of Testimony

There are two prime characteristics to oral testimony:
1. Reliability – how accurate is the testimony; and,
2. Credibility – how credible is a witness.

***Criminal Code* of Canada**

**686(1)(a)**: As a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

### R. v. Burke (1996) SCC

| Facts | Holding |
|---|---|
| o Burke charged with child-abuse, sexual assault, physical assault etc<br>o The basis of the evidence against him came from the oral testimony of three witnesses – who had been young boys at the time of the events, but are now adults<br>o Trial judge did not feel the witnesses were very reliable | o SCC held with respect to beating "SE" received was sufficient and reasonable for the physical assault<br>o Regarding the sexual assault, the SCC had a number of problems<br>o "SE" had given corroborative yet contradictory evidence; appeared on Oprah and later recanted the statements there made<br>o There is a duty on the trial judge and defense counsel to ensure that prosecuting witnesses do not speak to each other (collude)<br>o The trier of fact is obliged to consider the reliability of the evidence having regard to all the circumstances including the opportunity for collusion and whether the opportunity was used |

In short, one must look at whether the probative value of the evidence outweighs the prejudicial effect. Any corroborative testimony must be checked for collusion by the trial judge.

### R. v. Baskerville (1916) Eng CA

| Facts | Holding |
|---|---|
| o Not Done | o Corroboration is required where one accomplice testifies against another; and,<br>o The trial judge must warn the jury that it is dangerous to found a conviction on the evidence of accomplices unless you can find corroborating evidence |

The question of corroboration, however, became a technical and rigid point of law causing judges a number of problems. The question became what is 'corroborating evidence'?

### R. v. Vetrovec (1982) SCC

| Facts | Holding | Ratio |
|---|---|---|
| o 9 People arrested for drug trafficking<br>o The judge, in its long charge to the jury, did not warn them of the need for corroborating accomplice evidence | o *Issue*: Is the corroborating evidence with accomplices rule still relevant?<br>o The *Baskerville* rule has been overruled in the UK and such a rule has never existed in the US<br>o We do not need the rule | o A judge simply has to make a commonsense warning to the jury – not necessarily the corroborating evidence rule, but one that would be made of any witness<br>o Moreover, the defense counsel has the opportunity to cross-examine the accomplice |

In Canada we give full discretion to the judge to determine whether or not a warning is required to be given to the jury with regards to accomplices and corroborative evidence.

### Inquiry Into the Prosecution of Guy Paul Morin

The Prosecutor said to the jury during the opening remarks that they would hear from two people having heard the *confession* of Morin, but they would have the option to appear. There should be a presumption that jailhouse informant information is not reliable – the presumption should be rebutted in a voir dire. This should be done in order to ensure that a jailhouse informant is a reliable and credible witness. Informants almost always get something in return for testimony, making them notoriously not credible.

### R. v. R.W. (1992) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Children's testimony case – children's testimony no longer requires corroboration | ○ Courts should not place too high a standard on the coherence of children's testimony – at the same time, the same standard of proof is required to convict | ○ Where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet, with regard to her evidence pertaining to events occurring in childhood, the presence of inconsistencies should be considered in the context of the age of the witness at the time of the events |

## Presentation of Testimonial Evidence

### Examination-In-Chief

One may not ask 'leading' questions in an examination-in-chief. Leading questions are those that suggest the answer wanted or presuppose a fact that has yet to be proved. One may only ask open-ended questions. One of the most difficult things is to get the witness to testify in a coherent fashion. Note that the witness is very nervous – they will almost always forget something.

### Refreshing Memory during Examination in Chief

The court is willing to allow the testifier to refresh memory by looking at past official documents or official transcripts – During the course of a long trial, memories may become distorted.

| Facts | Holding | Ratio |
|---|---|---|
| ○ Woman comes to court 2 years after issuing a statement to police | ○ *Issue*: Can the woman look at her old statement? | ○ Of course she can! |

*R. v. Pitt (1968) BC CA*

| Facts | Holding |
|---|---|
| ○ Woman charged with attempted murder of husband had recollection of the event and the defense thought the woman might benefit from being hypnotized – concern: jury would be dubious | ○ A lawyer may use hypnosis in order to help refresh the memory of a witness but this evidence will be given less weight |

Police Officers may use their own notes to refresh their memory. This is understandable as officers are often called to testify and are asked to do so months after the event. If a police officer is on the stand reviewing notes, counsel is entitled to receive and review them. Ultimately, refreshing notes may be used at trial, but the use of such notes may have an adverse effect on the weight give to that particular evidence.

## Types of Memory

**Present Recollection Revised**

o The oral testimony of the witness

*US v. Riccardi* (1949) US CA

| Facts | Holding |
|---|---|
| Riccardi hired to move possession from one house to another<br>-A truckload of items were missing – presumed to have stolen them<br>-Woman made lists of what had been removed | *Issue*: Could she look at the list to 'refresh' her memory?<br>Defense argued it as past recollection evidence<br>List simply helped her to remember – all we have is oral testimony |

o A person may revive memory literally or by using a list

**Past Recollection Recorded**

o The written record that is admitted as an exhibit

*Fleming v. Toronto Railroad Co.*

| Facts | Holding |
|---|---|
| -Plaintiff injured by streetcar & at trial defense brings forward inspector<br>-Wanted to testify as to inspection and had to rely on his worksheets<br>-Admitted and appealed | *Issue*: Would the worksheets be admitted?<br>3 Conditions for Records to be admittd<br>1. Made at time of event<br>2. Any reason to falsify?<br>3. Docs made personally? |

## General Rules for Cross-Examination

1. Cases are rarely won in cross examination, but can be lost;
2. Do not lose track of the witness' overall presentation in the grand scheme;
3. Analyze what is wanted from each witness;
4. Prepare a checklist of the specific points you want to make with a witness;
5. Do not attack everyone's integrity, a friendly style may result in a less tight lipped witness; and,
6. If there are no points to be made, do not cross-examine.

Cross Examinations have some limitations. They cannot be too long. You cannot harass a witness. The lawyer can ask just about anything about a witness – the rules with respect to character do not apply to witnesses other than the accused.

## Failure to Conduct Cross Examination

*R. v. Dick (1969) ON HCJ*

| Facts | Holding | Ratio |
|---|---|---|
| o A woman was walking home from a meeting and claimed two men in a car dragged her into the car, assaulted her for hours, and was later dropped off<br>o Defense council questioned her on her reputation and bad character, no questions on detail of incident<br>o Defense put accused on the stand who gave a different story attacking credibility | o Crown argued in front of the jury that the defense had used outrageous tactics in an attempt to get an acquittal<br>o Jury convicted and defense appealed<br>o There was a failure to cross-examine at the proper time (failed to follow Brown v. Dunn – a rule of courtesy)<br>o Appeal dismissed | o If you've got someone on the stand and you propose later on to impeach them with what they have said, you must face them with it so that the individual may address it |

*Brown v. Dunn (1893) Eng*

| Facts | Holding | Ratio |
|---|---|---|
| o There was a failure to cross-examine and a sense of unfairness for the opportunity to address the issues | o It is discourteous and unfair not to address particular issues that pertain to a witness while s/he is on the stand | o There is a duty to cross-examine if you intend to contradict the witness who has given damaging evidence |

## Children's Evidence – Aids to Memory

*R. v. D.O.L. (1993) SCC*

| Facts | Holding | Ratio |
|---|---|---|
| ○ Concerns videotape provision of Criminal Code<br>○ Accused was a grandfather of a little girl who alleged she had been assaulted for three years<br>○ There was no intercourse in this case, but the child was traumatized<br>○ Police began investigation in 1988 at which point a video was made<br>○ Child testified in person at prelim<br>○ Trial judge was asked for permission to use video tape discussion with police and he allowed it – conviction<br>○ Trial decision was appealed and the Man CA unanimously reversed the trial decision on the grounds that *CC* 715.1 was unconstitutional | ○ CA decision appealed to SCC<br>○ SCC rendered two decisions:<br>1. First, probative value outweighs the prejudicial effect of video<br>2. Second, these cases are committed against people who are discriminated already – L'Hereux-Dube ties this to a balance of power relationship<br><br>○ L'Hereux-Dube's decision involves whether or not we should take judicial notice of the information that she provides | ○ A child's testimony may be presented via a pre-recorded video tape – the rationale for this is to preserve a child's earlier account (presumably more authentic) and to limit the suffering of the child while on the stand |

There are some defense counsels who maintain that having interveners in a criminal trial places undue hardship and pressure on the accused. There is always a question of what the effect of intervention will be on the trial and whether it will be fair for the accused.

*R. v. Levoigiannis (1993) SCC*

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused was convicted of fondling a 12 year old boy<br>○ At trial, boy was allowed to testify at screen<br>○ Appellant argued, on appeal, that the use of the screen (CC486) was unconstitutional and court should not have allowed screen | ○ *Issue*: Should there be a screen present so the child cannot see accused?<br>○ Defense argued that the screen lends credence to the accused's guilt even before testimony<br>○ Defense argued that the accused should be able to confront the accuser | ○ A screen, for a variety of reasons, does not suggest that the accused is guilty before testimony<br>○ The main objective is to facilitate the giving of, in the judge's opinion, full evidence – the screen did not prevent cross-examination |

*R. v. W. (1999) SCC*

| Facts | Holding | Ratio |
|---|---|---|
| ○ 11 year old giving testimony froze on the stand and could not go forward | ○ Issue: Could someone else give the child's testimony?<br>○ Court allowed someone else to testify for the child<br>○ While other testimony would be hearsay in a strict sense, the court has allowed for this exception to facilitate the completion of testimony | ○ Children's testimony may be substituted by another as an exception to the hearsay rule in order to complete testimony<br>○ The other person's testimony will be taken as the child's |

SCC has taken the stand that the child will get the benefit of the doubt where possible. The child will be allowed to testify without corroboration and full support.

## Collateral Facts Rule

The 'collateral facts rule' prevents the calling of evidence to contradict the answers of an opponent's witness, whether given in chief or cross-examination, on 'collateral matters'. What constitutes a 'collateral matter' is open for debate and there are two basic approaches:

1. *Wigmore Test:* Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction? This test includes facts relevant to a material issue and facts that go to discredit a witness' credibility;
2. *Phipson Test*: Proof may only be given on matters relevant directly to the substantive issues in the case. Proof of contradiction going to credibility is prohibited unless it falls within certain exceptions; or,
3. *McCormick Test*: If the facts contradicting the witness have the potential to pull the lynchpin out of the story to make the entire story unravel, then they should be admitted

Collateral fact most often relates to the credibility of the witness. This is the type of situation where judges have cut off the defense counsel and not allowed them to proceed with a witness to testify on a collateral fact. There are a number of exceptions to the rule (*Phipson's* exceptions):

1. If you want to show the witness was biased, corrupt, or had an interest;
2. To prove the witness has a prior criminal record;
3. Medical evidence that reveals a defect;
4. To prove a reputation for untruthfulness; and,
5. Where a proper foundation has been made a prior consistent statement may be examined.

### A.G.. v. Hitchcock (1847) ER

| Facts | Holding | Ratio |
|---|---|---|
| ○ A person was charged with making moonshine in a non-standardized sized pot<br>○ Revenue laws were breached<br>○ Key witness, Spooner, was to testify that he saw the defendant make the moonshine illegally | ○ Court stopped testimony<br>○ Witness was testifying as to whether he accepted a bribe – not as to whether he was offered a bribe<br>○ The acceptance or denial of a bribe is a collateral fact | ○ There is no real reason to go on about a side issue that does not really have any bearing on the issue in dispute |

***Test***: "If the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it have such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him"

### R. v. A.R.B. (1998) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Young girl brings charge against step-father for indecent and sexual assault<br>○ Defense wanted to examine complainant about allegations that her step brothers assaulted her and then hoped to call those witnesses to contradict here testimony | ○ The fact that others had assaulted the girl is irrelevant for this trial<br>○ The testimony of the other two would have been collateral to the issue at hand<br>○ Ask yourself, what difference is it going to make that these two boys deny separate allegations? | ○ Facts supporting issues not privy to a particular case will not be admitted as per the collateral fact rule |

Collateral fact issues come up when the defense counsel wants to bring in more witnesses – tip off for exam. There is always a pursuing of the issue that has to do with collateral fact.

*Prior Inconsistent Statement* – a statement made orally, in writing, in audio, or on video prior to the trial and comes up at the trial and is inconsistent with the current statement being made.

*Voir Dire* – a trial within the trial with a function to determine the admissibility of evidence at the trial. Generally, where there is a jury the jury is excused and the parties make arguments before a judge for the admission of evidence, the judge makes a ruling and the jury is invited back in. Where there is no jury, the judge instructs him or herself to exclude that evidence that is found inadmissible. When the judge is the trier of fact and determines that the evidence is inadmissible the issue becomes how can we be sure the judge will absolutely not use it?

## Impeachment

It is the duty of the opponent to always impeach the other side.

*Canada Evidence Act*

***Section 9*** – deals with the situation where you call your own witness and s/he either becomes hostile, reluctant, cantankerous, etc., In certain situations the witness may surprise you and you are stuck with a witness that is not cooperative. What we are talking about in this section is a witness who is *reluctant* or *adverse*.

*Impeaching Own Witness* – common law rule: a party may not attack the credibility of his or her own witness. Counsel can mitigate unfavorable testimony by introducing other evidence or testimony to contradict the witness.

## Cariboo Observer v. Carson Truck Lines (1961) BCCA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Machinery was delivered and damaged – defense attempted to bring in a witness to show that the machinery was damaged due to poor crating<br>○ Witness testified that the crating was fine | ○ What could defendant do with own witness adverse?<br>○ Call subsequent witnesses to contradict the adverse testimony | ○ Counsel may bring forward other witnesses to discredit one's own witness – to mitigate the damage that was done by a particular witness |

Under the *Act*, if you have an oral or written statement you can apply to the judge to say that you have a prior inconsistent statement to show that the witness has provided two different versions of the story. The prior inconsistent statement can only be used to attack the credibility of the witness for the purpose of declaring the witness hostile, but not to got to truth (Secion 9)

***Section 10 & 11*** – Before impeaching a witness you must give notice to the party that you are going to impeach.

***Section 12*** – Gives you the right to cross-examine a witness about a prior conviction. This section takes a different turn when the person on the stand is the accused him or herself – the fear is the acknowledgment of a prior conviction may taint the trier of fact, who may then become less careful to try objectively. Note: If you have a client with a long criminal record, keep him/her off of the stand.

## Corbett v. The Queen (1988) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Corbett had a very long criminal record stemming back to teens – While on parole for murder he was charged with another murder<br>○ The accused had been charged with first degree murder<br>○ *Charter* 11(d) provides that any person charged with an offense has the right to be assumed innocent until proven guilty<br>○ *Evidence Act* 12 provides that a witness may be questioned as to whether he has been convicted of any offense and if he either denies or remains silent, the opposite party may prove the conviction<br>○ Defense counsel applied to the trial judge to keep out the accused's record arguing that Evidence Act section 12 would be unconstitutional and fail to uphold the notion of innocent until guilty | ○ Upheld the Constitution validity of section 12 of the *Evidence Act*<br>○ The judge has the discretion to properly deal with the issue<br>○ Juries have always been able to judge the credibility of witnesses<br>○ Although the Crown can bring out evidence about a person's prior conviction, they cannot ask questions<br>○ ***Dissent*** (Laforest): We have to always go back to first principles – the first principle that applies here is that all relevant evidence should be admitted.<br>○ Prior convictions about crimes of violence are not relevant to credibility of an individual's testimony<br>○ The only prior convictions that should be looked at are those that deal with the person's honesty – violent crimes are not relevant to a person's credibility:<br>○ This provision circumvents exclusionary rules;<br><br>○ *Factors to Look At:*<br>1. Nature of the conviction<br>2. Similarity of Offense<br>3. Remoteness of Offense (Time)<br>4. Fairness of Trial | ○ The prior convictions were simply evidence for the jury to consider, along with everything else, in assessing the credibility of the accused<br><br>○ *Dissent*: The only prior crimes that should be looked at when dealing with credibility are those that deal with an individual's honesty – fraud, dishonesty, and etc.,<br><br>○ When individuals go to court, they are to be tried for the allegations and not on their prior records<br><br>○ 'Angel or devil, a man has a claim to a fair trial of his guilt… the job of court and jury is to see *whether* the suspect has committed the particular offense' - Ratushy |

Since Corbett's case it is routine for defense counsel to make a 'Corbett' application and ask for a record to be excluded at the end of the Crown's case. It is now absolutely clear that the judge has complete discretion in this consideration (to have the record excluded from evidence)

# Hearsay & Statutory Exceptions

Hearsay, in the early days, were out of court comments made by somebody not in the courtroom. Includes out of court statements made by parties that are in the court. Why shouldn't the sworn statement be the one that is taken? One of the hardest things about hearsay is identifying when you have got it. Hearsay is an out of court statement (either oral or written), which is admitted for its truth. There is a Subramarium exception regarding non-hearsay narrative circumstances, which is used. There are a number of statutory exceptions to the rule against hearsay, such as admissions and declarations by non-parties. Still, though, the courts will take a principled approach to hearsay by analyzing: (1) Necessity; and, (2) Reliability. Even if hearsay passes the principled approach, it must be weighed by balancing the probative value versus a potential prejudicial effect.

One must pay very close attention to the use made of 'hearsay' evidence. Hearsay statements may be admitted when they are offered, not to prove the truth of the facts asserted, but for some other purpose. A statement adduced for such a non-hearsay purpose is described as non-hearsay, original or circumstantial evidence.

## Hearsay Checklist

1. Identify the statement as 'hearsay'
    a. An oral or written statement made out of court by another party that goes to the truth of the matter
2. Do any exceptions apply?
    a. Subramaniam Exception – a mere 'narrative' of what happened
    b. Statutory Exceptions
        i. Admissions
        ii. Declarations
        iii. Business Records
        iv. Former Proceedings
3. Judicial Discretion – exceptions extended
    a. Res Gestae
        i. Present Mental State
        ii. Declarations of Bodily Feelings
        iii. Conduct
        iv. Spontaneous Utterance
4. Principled Approach
    a. Necessity and Reliability
5. Probative Value versus Prejudicial Effect

### Subramaniam v. Public Prosecutor (1956) ER

| Facts | Holding | Ratio |
|---|---|---|
| o Accused says he made statements as a result of being captured by terrorists and was acting under duress<br>o Trial judge excluded statements about 'conversation' as hearsay | o Statements are not hearsay as they were not being admitted to represent some truth or fact, but rather simply to prove that the statement (phonetically if you will) was actually made | o It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that a particular statement was made |

### R. v. Wysochan (1930) Sask CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Three people were in a house, including Mr. Wysochan<br>○ They were drinking and a shooting took place – a woman was shot<br>○ When Mr. Kropa approached his wife she said, "Stanley, help me there is a bullet in my body" | ○ *Implied Assertion*: The wife is relaying a message to her husband, the inference is that she would not seek help from her shooter<br>○ Implied assertions in some instances are quite ambiguous | ○ Hearsay statements may be admitted merely to show an individual's beliefs or feelings |

*Exam Hint*: When evidence has to be pulled apart regarding the arguments to be made to admit or exclude is the simple part – the difficulty is in determining what is to be done with a particular piece of evidence.

## 1. Admissions

Most of the hearsay will be found in admissions. There is a debate as to whether admissions should be classified as hearsay. An admission is any statement (oral or written) that the opponent makes that may be used against him or her. At the time the opponent makes the statement it might not be bad, but once at trial it may have another meaning. The assumption is that anything that is said that is adverse to an individual's interest would not otherwise be made unless it was true. The most formal admission is a confession – guilty pleas.

### R. v. Strand (1968) CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Health and safety inspector spoke to foreman, who made comments about the company not exercising due diligence<br>○ Foreman was required by law to speak to an inspector when the inspector came to the workplace | ○ Dissent: (Good Law) The agency relationship must be proven and the scope must be acting within the scope of his or her employment – thus, if a streetcar driver opened the door too soon, he is acting within his scope and company can be made vicariously liable | ○ An admission can only be used against the person who makes it unless there is an agency relationship whereby the agent will bind the principal to such a confession |

In the instance where the accused is going to rely on an alibi, the accused ought to utter that alibi to police. Where an accused is going to present the defense of alibi, the fact that an individual is silent as to the alibi might be admitted.

R. v. Chambers (1990) SCC – the Crown cannot cross-examine on pretrial silence except where an alibi is mentioned .

R. v. Crawford (1994) SCC – the exception with respect to the adverse inference from silence in the context of alibi.

| Hearsay | Non-Hearsay | Exceptions | Principled Approach | Final Weighting |
|---|---|---|---|---|
| ○ An out of court statement | ○ Subramanium Exception | ○ Admissions<br>○ Declarations<br>○ Biz Records<br>○ Former Proceeding | ○ Necessity<br>○ Reliability | ○ Probative Value versus Prejudicial Effect |

### Co-Accused

There are occasions where, for matters of efficiency, parties are tried together. Sometimes, however, there is a problem where one of the co-accused admits something or confesses. The rule is that admissions made by one co-accused cannot be used as evidence against another. A confession or admission can only be used against the person who makes it. The judge, under this circumstance, may either split the trial or instruct the jury to segregate the information.

*Schmidt v. The King (1945) SCC*

| Facts | Holding | Ratio |
|---|---|---|
| ○ Not Done | ○ A confession is only evidence against the person who makes it | ○ Admissions made by one co-accused may not be used as evidence against the other |

R. v. S(RJ) 1993 ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Not Done | ○ Evidence must be segregated and each person is to be tried based on the evidence brought against them | ○ A co-accused must appear and testify against the evidence that can legally be brought against him |

*Conspirator* – Statements made by one conspirator in the furtherance of an ongoing conspiracy are admissible against all of the conspirators.

*Partner* – Once you can prove there is a partnership, the admission of one partner is admissible against the other. The statement of one partner is admissible against the other.

## 2. Declarations

(Against Interest by Third Parties)

In order to meet the exception, the declaration must be made by a person who is unavailable (dead, institutionalized, or missing). Secondly, the statement must be made counter to a third-parties interest. Finally, the third party must have no motive to misrepresent. Declarations have broken down into two groups:

1. Pecuniary or Property Interest; or,
2. Penal Interest

Declarations against a person's property interest have to do with the fact that a third-party will admit that, for example, a debt has been paid and the third-party passes away.

### Mr. Pultercapt Example (In Class)

| Facts | Holding |
|---|---|
| ○ Mr. P. went to a doctor and was diagnosed with a heart condition<br>○ Lived with the condition for a couple of years<br>○ In 1941, Mr. P. buys life insurance and proclaims that he was healthy<br>○ Insurance company suspects that it was pre-existing – the doctor that Mr. P. saw earlier was dead<br>○ The doctor's records are available – An account's payable ledger | ○ The ledger is said to be a declaration against the doctor's interest to the extent that the outstanding sum has been paid (against interest because s/he cannot collect the money anymore) |

### Demeter v. The Queen (1978) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Hitman murdered a man's wife<br>○ Hitman confessed<br>○ Defense had a special witness – a convict who wanted to testify in the defense that another convict had confessed to the killing of Mr. D's wife | ○ Because the third party is already in prison, he has nothing to lose by making the admission<br>1. The declarant must be vulnerable to penal consequences;<br>2. These consequences must be real and not remote;<br>3. There must be no possibility of collusion with the accused; &<br>4. There must be some link between the declarant and the crime | ○ A declaration made by one as against a third party must be made with something to lose – the person making a declaration against the third party must have something to lose in making the declaration |

### R. v. O'Brien (1978) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ O'Brien and Jensen were co-accused for drug trafficking<br>○ O'Brien gets convicted but Jensen leaves the country<br>○ Jensen returns and informs O'Brien's counsel that he did it all<br>○ Jensen wishes to testify under Evidence Act s.5<br>○ Jensen dies before opportunity | ○ *Issue*: Would Jensen's declaration presented through counsel be admitted?<br>○ Since the confession was made under solicitor-client privilege and Jensen did not want the statement to be used against him in applying a section 5 use, the declarer had nothing to lose and, therefore, the statement could not be made | ○ Declarations as against third parties will not be admitted unless penal or financial consequences may follow |

## 3. Business Records

Business records generally come in without any difficulty. There are three places where business records can be brought in:

1. Under The Common Law – made in the ordinary course of business under duty to create record
2. Statutory – With Seven Days Notice
3. Statutory

### R. v. Henry Coxen (1878) ER

| Facts | Holding | Ratio |
|---|---|---|
| ○ Coxen collided with another ship, Coxen, in the Thames river<br>○ The Ganges brought suit against the Coxen, but on a subsequent voyage the Coxen disappeared<br>○ The Coxen crew left one member back in London, England who had the logbook of the Coxen<br>○ An accident report was contained in the logbook | ○ The person who makes the accident report would have a motive to misrepresent and the record was not admitted<br>○ An accident report is not in the ordinary course of business – ships do not ordinarily collide | ○ To be admissible, business records must be created:<br>1. In the ordinary course of business;<br>2. Where there is a duty to make the record;<br>3. At or near the time of the event;<br>4. Without a motive to misrepresent |

*Canada Evidence Act* Section 30 – a record made in the usual and ordinary course of business will be admissible, but circumstances surrounding the record must be looked at. Section 30(10) – it cannot be a record that is used in the course of making an investigation or for obtaining or giving legal advice. It must be usual in the business to make the particular type of record wanting to be admitted. A record includes computer printouts and things stored in a computer.

*Ontario Evidence Act* Section 35 – Investigator reports may be admitted as well as electronic documents and other business records.

The only business records that give us cause are accident reports made by employees for employers. Reports must be made in an unbiased way and if there is any motive for bias, then the business report must not go in.

Are computer printouts admissible as business records?

### R. v. Sunila and Soneyman (1987) NS SC

| Facts | Holding | Ratio |
|---|---|---|
| ○ A number of computer printouts were proffered for admission<br>○ Defense argued that CEA 30(10) does not permit the admission of records made through course of investigation | ○ *Aries* v. *Venner* (below) applied and the printouts were found as necessary and reliable<br>○ Computer printouts may be considered business records | ○ Hearsay will only be admitted where it is necessary and reliable |

## 4. Former Proceedings

### Civil Cases and Former Proceedings

Rule 31.11(6) and (7) provide that (6)a judge may grant leave to hear the preliminary statements of (a) a person who has died; (b) extremely ill; (c) any other sufficient means; or (d) refuses to take oath, but this determination will be based on (7)(a) the extent to which the person was cross-examined; (b) the importance of the evidence; (c) the principle that evidence should be presented orally; and, (d) any other relevant factor.

*Walkerton v. Erdman (1894) SCC*

| Facts | Holding |
|---|---|
| ○ Mr. Walkerton was walking along the street and fell into a ditch<br>○ In hospital he made a statement that was cross-examined<br>○ Walkerton died and his wife brought the case to court<br>○ Wife wanted to introduce as testimony his deposition | ○ A deposition could be brought in because it was given by him, he was cross-examined on it, and the issues it referred to were the exact same ones |

### Criminal Cases & Former Proceedings

Pursuant to *Criminal Code* section 715, where a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved to infer the person is (a) dead; (b) now insane; (c) extremely ill; or, (d) out of the country, and where it is proved that evidence was taken in the presence of the accused, it may be read in as evidence in the proceedings without further proof, unless the accused proves there was no opportunity to cross-examine.

## Principled Approah

There had been a view in Canada that judges were no longer to make exceptions to the hearsay rule (Meyers v. DPP). There were so many created that a statutory reliance was wanted, but the courts decided that hearsay evidence may be admitted under the principled approach where a judge feels its admission is both necessary and reliable.

### Ares v. Venner (1970) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Alberta did not have a business record exception<br>○ Ares went skiing and broke leg<br>○ Dr. Benner put a cast on his leg, the cast was too tight and Aries suffered immense pain<br>○ Ares had the leg below the knee amputated and he sued Benner<br>○ Plaintiff wanted to proffer the nurse's notes<br>○ The notes were proffered as business records | ○ *Issue*: Could the court make another exception for the records as business records to be admitted? Court said yes.<br>○ Judges were breaking out from the British exception of no more exceptions<br>○ Hospital records made contemporaneously by someone having personal knowledge of the matters and under a duty to record should be received in evidence | ○ Where you can prove that evidence is necessary and reliable, it may be admitted under a broad principled approach |

### R. v. Smith (1992) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Appellant and deceased spent a weekend in London<br>○ Crown's theory was that he wanted the girlfriend to smuggle drugs – he left her in a motel, then came back – they had an argument along the way and he allegedly killed her and dismembered her arms<br>○ At trial the following was admitted without argument: gf made four calls to her mother<br>○ (1) Larry has gone away, I am stuck here in London<br>○ (2) Larry has not come back and I need a ride<br>○ (3) Larry has come back and I no longer need a ride<br>○ (4) I am on my way | ○ CA held that statements 3 and 4 are hearsay and not admissible<br>○ (1) She is saying that she wants to come home – present state of mind<br>○ (2) Present state of mind that she wants to go home<br>○ (3) This refers to a past act and cannot be admitted under the Res Gestae<br>○ SCC applies *Kahn* and *Ayers* – a principled approach based on necessity and reliability<br>○ Reliability became an issue – there was not sufficient reliability to admit the statement<br>○ Case was sent back for a new trial | ○ Follow this pattern:<br>○ Is it hearsay?<br>○ Is it non-hearsay (subramanium)?<br>○ Is there an exception that it fits into?<br>○ Any exception must be strained through necessity and reliability<br>○ Analyze the probative value versus the prejudicial effect |

The courts have been taking a piece of hearsay, characterizing it, and examining whether it fits into any of the exceptions. More than this, the principled approach has been taken to see whether the hearsay is necessary and reliable.

# Hearsay & Expansion of Exceptions

| Hearsay | Non-Hearsay | Exceptions | Principled Approach | Final Weighting |
|---|---|---|---|---|
| ○ An out of court statement | ○ Subramaniam Exception | ○ Admissions<br>○ Declarations<br>○ Biz Records<br>○ Former Proceeding | ○ Necessity<br>○ Reliability | ○ Probative Value versus prejudicial effect |

The rules with regard to hearsay have been expanding over the years and the recent trend has been to return to the first principles.

*Dying Declaration* – could only go in if the person who made it had a hopeless and settled expectation that they were going to die. The rationale was that these kinds of dying declarations were probably reliable because people were very unlikely to tell a lie before they were to meet their maker. It is up to the judge to determine that the person making the declaration has a settled and hopeless expectation of death. Death does not necessarily have to be imminent, but within a fairly reasonable and quick period of time.

## Res Gestae

Some argue that the notion of res gestae is a failure of the law. Res Gestae are things that are said and done around a particular incident. If one has a drawer in his or her house that contains those things that one does not know where to put, that drawer would contain the res gestae. Thus, statements made at the time the incident happened. There are four major categories:

1. Statements of a person's present mental state – for example, a witness says that "I heard John say that he is the Emperor Napoleon". This generally is directed towards the future – the mental state in the present and the intention in the future;
2. Declaration of Bodily Feelings – the spontaneous utterance of an individual's declarations;
3. Declarations accompanying and explaining relevant acts; and,
4. Spontaneous Utterances – things that people say in the heat of the moment.

The rationale is that these statements made very close to the time of the event are made so quickly and spontaneously that the person stating them have not had the time to fabricate or concoct – they come out of the stress of the moment. Psychologists, however, have told us that under such stress our perception of reality is distorted. Res Gestae only covers information about the present and beliefs about the future. Statements that refer to the past are inadmissible.

### 1. Present Mental State

*Sheppherd v. The US*

| Facts | Holding | Ratio |
|---|---|---|
| ○ Sheppherd was a physician charged with poisoning his wife<br>○ Defense, she took her life herself<br>○ Wife made a number of statements: (1) "No one likes me, nobody would miss me"; (2) "I intend to kill myself"; (3) "John intends to kill me"; (4) "I tried to kill myself last night, but the drugs didn't take" | ○ (1) Present mental state – not questioning whether the statement is true, but instead her belief and mental state; (2) This is a person's intention – present intention – to kill herself; (3) This is an intention, but it is not hers and, thus, inadmissible hearsay; (4) Any fact or action that refers to facts in the past is inadmissible | ○ Any statement that refers to an act that occured in the past is inadmissible<br>○ Present mental state includes only those out of court statements that indicate present thoughts |

## 2. Declarations of Bodily Feelings

*Yolden v. London Guaranty and Accident Co (1950)*

| Facts | Holding | Ratio |
|---|---|---|
| ○ Deceased lifted heavy object and commented on straining himself<br>○ Went home and next day had terrible stomach problems<br>○ Insurance Co. resisted policy on the basis that the man died of intestinal flu – not covered | ○ Statement can go in to prove that it was said, but not as a factual connection<br>○ The statement is admissible to show that there was an injury, but not that the particular injury went to cause the death<br>○ Doctors can then be brought in to testify the likelihood of a causal link | ○ A declaration of a bodily feeling may be an extension of the subramaniam exception whereby the statement may be admitted, in this case, that some type of injury did likely occur |

## 3. Declarations Accompanying Relevant Acts

*R. v. Rettan (19..) Australia HL*

| Facts | Holding | Ratio |
|---|---|---|
| ○ Wife killed by 'accident'<br>○ Husband claims the rifle was shot accidentally, he was cleaning his rifle, it discharged and killed wife<br>○ Crown wishes to present evidence of a series of telephone calls<br>○ Wife made call to 911<br>○ At 1:09 father called George<br>○ At 1:15 a call was made to 911<br>○ Telephone operated stated that the female voice stated, "Get me the police please"<br>○ At 1:20 a police officer called the home and spoke to accused | ○ This utterance goes in to show the individual's state of mind<br>○ Implied implication that she had either been shot or had been threatened to be shot at 1:15<br>○ This statement was put in under the Res Gestae exception at trial<br>○ The HL said that this was part of an act, a telephone call, and goes in under the Subramanium Exception | ○ Comments that go in to explain an act will go in as non-hearsay circumstantial evidence |

## 4. Spontaneous Utterances

*R. v. Kahn (1990) SCC*

| Facts | Holding | Ratio |
|---|---|---|
| ○ A mother and her 3 ½ year old daughter go to a doctor's appointment and after the 3 ½ year old daughter explained that 'doctor put his birdie in her mouth'<br>○ Trial judge held that the girl was too young to give even unsworn testimony<br>○ Conversation with mother was elicited by the mother some 30 minutes later<br>○ Semen was found on girls collar | ○ SCC: The trial judge was correct in holding that the mother's evidence of the child's statement was inadmissible based on the traditional tests for spontaneous utterances<br>○ However, in the case of children's testimony the strictures of hearsay should be relaxed ('tender years' exception) and hearsay statements should be admitted provided that the evidence is reliable and its admission necessary<br>○ Evidence was necessary as the child's viva voce evidence was rejected and reliable as they were corroborated with real evidence | ○ Necessity has to be treated fairly flexibly<br>○ Reliability is going to depend on the circumstances of a child –tender years exception |

## Prior Inconsistent Statements

Prior Inconsistent Statements are hearsay, but they may be admissible where their admission is necessary and reliable. Any time a person has made an out of court statement that contradicts a statement made under oath it will be considered hearsay. An individual who says something at the police station and another at trial may be impeached under *Evidence Act* s.9. The use that was made by the prior inconsistent statement can be used only to attack credibility and not a means to prove a case through its truth.

### R. v. KGB

| Facts | Holding | Ratio |
|---|---|---|
| o The respondent and three other youths were involved in a fight with two men<br>o One of the youths pulled out a knife and killed on of the men<br>o During video taped interviews, the three youths told police that the respondent had told them that he though he killed the victim<br>o The three youths recanted their previous statement at trial<br>o Under the common law these statements can only be used to impeach the witness and not for truth | o The rule limiting the use of prior inconsistent statements should be reformed<br>o Cory J – Prior inconsistent statements of a witness other than the accused may be used as substantive evidence of its contents where:<br>1. The statement was voluntary<br>2. The individual was warned of the consequence of criminal sanction for making a false statement<br>3. The statement was videotaped in its entirety<br>4. There has been an opportunity to cross examine at trial | o Inconsistent statements made by a witness other than the accused should be admissible as evidence of the truth of their contents, if the evidence is necessary and reliable |

### R. v. F.J.U. (1995) SCC

| Facts | Holding | Ratio |
|---|---|---|
| o Accused and child are separated at the police station where the accused admits sex assaults<br>o Child is taken to another room and in describing the assaults she confirms the accused's statements<br>o The recorders malfunctioned and neither the father or daughter signed a printed version of their statements<br>o At trial, the father denies and the daughter recants the prior statements | o The father's statement is considered an admission<br>o *Issue*: What can we make of the daughter's prior inconsistent statement?<br>o When two statements contain similar assertions of fact, one of the following must be true:<br>1. Similarity is coincidental;<br>2. Similarity because of collusion;<br>3. Second knew the content of the first statement;<br>4. Similarity is the result of third party influence; or,<br>5. Similarity occurred because the two were both telling the truth<br>o There was enough similarity to admit the prior inconsistent statement for their truth | o The indicia of reliability will depend on their circumstances – statements that are so strikingly similar to each other may be admitted for their truth<br><br>o Cory J's criteria is likely to be very useful for an individual attempting to admit prior inconsistent statement's for their truth<br><br>o Dissent – There are two thresholds for bringing forward hearsay:<br>1. Threshold Reliability – whether there are some indicia of reliability or circumstances that guarantee it; or,<br>2. Ultimate Threshold – whether the statement was actually said (actually true or not) |

### Winnipeg Child and Family Services v. L.L. (1994) Man CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Five children molested by their parents and their mother's boyfriend<br>○ The children are brought into protective care<br>○ Pondered whether the children would testify against parents | ○ *Issue*: Would the hearsay evidence offered by police officers, teachers, and social workers be sufficient – should the children have to testify at all in court?<br>○ If it were a criminal proceeding, they might have to testify, but since it is civil they do not<br>○ The notion of a principled approach to hearsay is not applicable to a child protection case | ○ When children are involved in civil disputes some of the rules of evidence are very much relaxed and the testimony may go be admitted through the mouths of adults |

### R. v. Hawkins (1996) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ See above<br>○ Mrs. Hawkins would not testify at trial due to spousal immunity, but could her pretrial transcript be used at trial? | ○ *Issue*: What is to be done about the pretrial transcript created at the preliminary hearing?<br>○ The testimony given at the preliminary inquiry could be admitted for truth of its contents through an exception to the hearsay rule – her hearsay evidence was necessary since she was unavailable to testify and it was sufficiently reliable as it was given during the course of a pretrial | ○ Prior statements can be admitted if they are both necessary and reliable under the judge's residual discretion<br>○ *Dissent* – the admission of the pretrial statement hearsay would create a disruption of marital harmony |

### R. v. Starr (2000) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Cook, an ex-con winds up in a Winnipeg bar where he, a young woman and another couple drink<br>○ Star leaves and goes to another car<br>○ Cook goes to get gas, after having an argument with his woman<br>○ At one point, Cook says "I have to go and do an auto scam with Rob"<br>○ In front of a farm house, witnesses hear two pops and then three pops an hour later – the next day two bodies and a small car are found<br>○ The two bodies are Cook and the woman that was in the car<br>○ Crown theorizes – the individuals are biker members and Star is supposed to execute Cook. Star told Cook about the auto scam in order to induce Cook out into the country | ○ There are three crucial pieces of evidence:<br>1. The hearsay statement;<br>2. A prior identification made by the couple that Cook drove home prior to whatever happened to him; and,<br>3. The adequacy of the judges charge to the jury regarding what is meant by BRD<br>○ The exceptions are simply a guideline, the principled approach prevails<br>○ The requirements of the prior identification exception where not satisfied in this case given the absence of the underlying circumstances of necessity. The testimony was equally inadmissible under the principled approach. | ○ The principled approach, in the law of hearsay, will be the most weighty |

*Prior Identification Exception* – sometimes the police will pick up a witness and ask them to make identification. In this particular instance, Mr. and Mrs. Ball were picked up and they were shown pictures of a number of people. The first time they looked they could not identify anybody, but later the wife says that Star looks somewhat familiar to her. Crown brings forward two police officers to bring in this prior identification of Mr. Star as somewhat familiar.

If a person identifies somebody prior to trial, that identification is hearsay at the trial. Generally, the person is asked whether they can identify the person during the trial.

"I have to go and do an auto scam with Robert" – The court characterized this statement as a statement of present intention, which falls under the exception of res gestae. The judges then were divided into two main groups as to how they would characterize that statement:

1. It is a statement of present intention and should go in, unless there are circumstances of suspicion around the statement. The judges determined that there really were not suspicious circumstances.
2. This is a present intention, but it also takes into account somebody else's intention – a joint intention cannot fall under this category. There is just too much of a chance that this comment was made to get his girlfriend off of his back – does not meet the traditional exception of res gestae. However, in applying the principled approach method, we have never really countenanced joint intention – they do not think that it fits under the principled approach. Once ousted by the principled approach, it is gone.

If there is a problem on the basis of reliability in the principled approach, then the evidence should not be admitted. *L'Hereux-Dube* – if you find that a piece of evidence meets the criteria for a traditional hearsay exception, then it is admitted. The principled approach is not there to limit the exceptions, but to allow more exceptions to go in. Hearsay is not supposed to be limited, but more is supposed to be admitted.

Why Keep the Traditional Approach?

1. The traditional approach makes it more predictable and efficient to analyze evidence;
2. It serves an explanatory and educational function;
3. It preserves the historic and contemporary rationales for the admission of hearsay; and,
4. If hearsay fits into one of the traditional exceptions it will be held to be presumptively admissible.

# Opinion Evidence

There are a number of different groups to consider with regard to opinion evidence, two specifically are:

1. Lay People;
2. Experts

## Lay-People

These are people that are brought into a trial to give testimony. The layperson should only be allowed to give the facts – what they did, what they heard, and what they saw. However, it is almost impossible to give testimony without giving some opinion evidence.

### R. v. Graat (1982) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ At trial, two arresting officers and a desk sergeant testified that in their opinion Mr. Graat's ability to drive was impaired by alcohol<br>○ A witness testified that he would have let Mr. Graat remain in his home rather than let him drive if, in his opinion, he was impaired<br>○ Trial judge preferred the testimony of the officers | ○ Appealed for two reasons:<br>1. Police gave opinion evidence without being experts; and,<br>2. This kind of evidence, which speaks to the charge, goes to the issue of trial and usurps the juries power<br>○ Defense argues that the police are not expert witnesses<br>○ *Held*: Once it is established that evidence may be relevant, one must ask whether it must be excluded for some policy reason<br>○ The probative value of the evidence was not outweighed by any such policy reason | ○ Police are not expert witnesses, although they are probably much more expert than citizen's in certain regards<br>○ A lay person may offer an opinion, but it is completely up to the trier of fact to give the opinion weight<br>○ The notion of usurping the function of the jury is a bogus one because the jury can choose to accept all of the opinion, some of it, or none of it – the jury is autonomous<br>○ Compendious statement of fact exception – a clarification of a statement that is made |

The fact is that we ask laypeople repeatedly to give opinion evidence in the identification of handwriting; the individual's condition; the emotional state of the person; the condition of things; and, certain questions of value, estimates, speed, and etc., *Canada Evidence Act* section 8 – a layperson may give evidence as to the identification of an individual's handwriting. It is a matter of weighing that evidence.

## Expert Opinion

An expert is a person with more knowledge than the trier of fact in a specific area. The person might have specialized knowledge, special experience, or academic credentials. We are not looking at any high status person. The experts that most often appear over and over in court are real estate appraisers, mechanics, psychologists, and etc., Sometimes you get in trials the 'battle of the experts'. One of the issues that arise is what happens where you have a trial with an imbalance of expert witnesses?

There are rules with respect to expert witnesses. In criminal trials, each side is allowed five although an application may be made to the court for an exception. Also, occasionally a law firm will hire an expert witness that they will not use on the stand – the expert will help them to prepare the case that they are about to make.

Prior to the following case, you could get an expert witness to testify so long as s/he is going to be helpful. This case helped to define a test for allowing expert witnesses:

### R. v. Mohan (1994) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Mohan was a doctor that was charged by four of his young patients with sexual assault - Mohan denied all allegations<br>○ The trial judge refused to admit the evidence of a psychiatrist who intended to testify that the respondent did not fit the profile of a pedophile and sexual psychopath, the likely perpetrators of the crime | ○ The psychiatrist's group files were not reliable enough to say that the evidence was necessary to clarify an otherwise inaccessible matter<br>○ SCC: this is not sufficiently reliable evidence as there is no general acceptance of this kind of profile | ○ Admission of expert evidence depends on the application of the following criteria:<br>1. Relevance;<br>2. Necessity in assisting the trier of fact;<br>3. The absence of any exclusionary rule; and,<br>4. A properly qualified expert |

The test is not without its disadvantages, we do not know what each of these categories means. However, we are starting to get a picture of what they do mean. Relevance and necessity are difficult to ascertain.

| Relevance | Necessity | Exclusionary Rule | Qualification |
|---|---|---|---|
| ○ Relevance is evidence that tends to make a fact in issue more probable than not<br>○ Some Cost/Benefit analysis must be conducted – some of the determining factors is the evidence's reliability, it's validity and etc.,<br>○ Costs – will the evidence confuse or mislead the jury, will it take up too much time, will the jury be overwhelmed by the mystique of the evidence and just give up and believe the expert? | ○ The evidence has to be more than merely helpful and must offer information that is outside or beyond the knowledge of the trier of fact<br>○ The trier of fact needs it because the expert has information that they do not have<br>○ For example, evidence regarding the 'battered wife syndrome' (R. v. Lavallee) | ○ The evidence must not fall into a rule for exclusion<br>○ In this case, the evidence proffered by the psychologist did contradict an exclusionary rule – character evidence | ○ The individual proffering the evidence must be a properly qualified expert witness |

### R. v. Frye US SC

| Facts | Holding |
|---|---|
| ○ Not Done | ○ If an expert is testifying to information that is generally accepted in the scientific community it will be admissible |

A federal US evidence rule came in that was broader than Frye. The court *R*. v. *Daubert*, set out four criteria for testing the admissibility of scientific evidence:

- Testing – can the theory or technique be tested, or has it been tested?
- Peer Review – has the theory been subjected to peer review or publication?
- Error Rates – are there established standards to control the use of the technique?
- Acceptability – is the technique generally accepted in the relevant technical community?

## Social Science Research Evidence

This research has given us a context with which to look at various issues. It is important that we understand how it would be used in the trial. An excellent example of how this analysis is used is the following:

### R. v. Chisholm (1997) Gen Div

| Facts | Holding |
|---|---|
| ○ Chisholm was involved in an assault reported months after<br>○ Expert was to be called in to offer a number of propositions: people who are assaulted delay in offering testimony; and, these people exhibit a number of symptoms<br>○ Trial judge admitted the report as part of the narrative<br>○ The admissibility of expert testimony rests with the judge | ○ *Issue*: Could post offense evidence proffered by a psychologist of sexual assault be admitted?<br>○ Analysis was based on relevance and necessity – the jury could rely on the disclosure of the report that the assault did occur<br>○ The jury might have been disproportionately influenced, however, by the opinion |

## Social Context

### R. v. Malott (1998) SCC

| Facts | Holding |
|---|---|
| ○ Mrs. Malott was often in residence at the Hiatus House in Windsor – the personnel there testified that she was one of the most battered people going through<br>○ In a fit of rage, Malott murdered her battering husband and then shot his girlfriend – the girlfriend was injured<br>○ At trial, the case was tried as a battered woman syndrome case – however, in these cases you don't have the woman doing anything more than attacking their partner<br>○ There was an attempt to show that battered woman syndrome had become too rigid – other circumstances might surround it | ○ Malott did not succeed at the SCC level – there wasn't enough evidence to give a defense to her<br>○ Battered women must be understood according to the woman's perception and not the stereotype of what a battered woman is – it is not a legal defense, but a psychiatric explanation of how woman sometimes act<br>○ Syndromization – the jury ought to be informed, and here was, that the issues are to be considered from the perspective of someone whose perceptions at the time of the event in question have been shaped by their syndrome (in this case – abusive experiences) |

## Rule Against Oath-Helping

Evidence may not be admitted that is totally self-serving because it has no weight – it comes out of the mouth of the person charged or one with a vested interest in the lawsuit. The rule against oath-helping, though, is slightly different. A properly qualified witness can provide general information relevant in judging the credibility of a witness, but is prevented by the rule against oath-helping from expressing an opinion about the probability that a particular witness is telling the truth. In other words, a witness may not be offered to bolster the credibility of another.

### R. v. Beland and Phillips (1987) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused charged with conspiracy<br>○ A co-conspirator gave evidence against others in the group<br>○ The accused passed a polygraph | ○ One may not use a polygraph as it goes to the issue of the trial – juries themselves are the best judges of credibility | ○ Polygraph evidence is not admissible in trial because it is inherently self-serving |

### R. v. Kyselka (1962) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ A mentally deficient teenage girl was sexually assaulted by a number of boys<br>○ She took the stand to make a complaint – she did not have a full understanding of what happened<br>○ Crown wanted a psychiatrist to testify that the girl did not have the capacity to make such a story up | ○ The psychiatrist's statement violated the rule against oath-helping – it was offered solely to help prove or bolster the young girl's credibility | ○ Evidence dealing with credibility presented by witnesses cannot be about the specific accused or another witness, it must be of a general application<br>○ The credibility of the witness issue would draw the jury away from the real issue |

### R. v. Marquard (1993) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Grandmother burned her granddaughter on the stove element<br>○ Experts offered evidence of the young girl's mental state generally based on showing symptoms | ○ Experts could say that children who are abused are likely to exhibit symptoms of withdrawal and passivity – however, an expert cannot say that the specific child is withdrawn and passive | ○ Experts cannot offer evidence to bolster the credibility of the specific witness – the statement must be of a general application, how certain people react in certain circumstances |

Oath-helping gets back to the ultimate issue to be established by the trial. In an instance where an opinion is given that relates to this ultimate issue, that opinion will face a much higher scrutiny than any other.

### Hearsay Comments

Expert testimony is almost always based on hearsay – expertise comes through the synthesis of information obtained and learning that occurred outside of the trial. Because it is based on hearsay, there have come to be a few rules that have come into play. There has to be a certain groundwork of real facts laid before expert opinion will be allowed.

### R. v. Abbey (1982) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Abbey charged with possession of narcotic and relevant contraptions flying into Vancouver from Brazil<br>○ Coming through customs, the officers stops and asks what is in the bad – he says, "That's coke"<br>○ Abbey's defense – he is mentally ill, but the only person taking the stand is Dr. Valente, psychiatrist<br>○ Trial judge found Abbey not guilty by reason of insanity | ○ The entire defense was made by the psychiatrist – no case was made to show facts supporting the statements made by the psychiatrist because everything the expert had said was hearsay<br>○ In order to get expert testimony based on hearsay, it must be underpinned by some factual foundation – there are no facts here underpinning the testimony | ○ Opinion evidence may be based on second-hand or hearsay evidence. However, testimony as to the circumstances upon which that opinion is based must be introduced in order to establish the veracity of the second-hand evidence.<br>○ Second-hand evidence must be corroborated by real evidence/fact |

### R. v. Lavalee (1990) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused did not take the stand, there was a lot of testimony | ○ As long as there is some factual basis that has been proved in court | ○ The weight of the expert opinion is to be graduated according to the |

| | | |
|---|---|---|
| regarding her visits to the hospital<br>o Medical reports and neighbor reports of battery were admitted<br>o Experts testified – Dr. Shane testified that he spoke to Lavalee and her mother who told him of their history of abuse: his opinion was based on what he had heard and seen<br>o Crown argued that all the facts the Dr. testified to were not proven | and is in the record of trial, that will corroborate the testimony of the beating, the expert evidence will be admitted and weighted<br>o The trial judge erred in treating as proven the facts upon which the psychiatrist relied in formulating his opinion | number of relevant facts offered at trial<br><br>o As long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony – the judge must warn the jury that the testimony should be given less weight |

There have to be some basic facts already proven before a judge will give weight to the expert evidence provided. The more the expert relies on facts not proven, the less weight the trier of fact should attribute to the opinion.

### R. v. Scardino (1991) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| o Man killed his wife in her sleep<br>o He went to neighbor and claimed that he killed his wife and was temporarily insane<br>o Psychiatrist who believed that there was a degree of automatism – Francesco Scardino did not know what he was doing | o The degree of the Dr's opinion that is dependent upon statements attributed to the accused is of no weight because those facts are not presented before the court<br>o No facts have been found on which the psychiatrist can base his opinion | o An expert's opinion is admissible in evidence notwithstanding the absence of proof in the areas relied upon. However, the weight to be given to the opinion in such cases is diminished, sometimes to the point where the opinion can be given no weight at all. |

### R. v. Fisher (1961) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| o A man went to a bar and picked up a woman, they drove around and she made sexual advances at him he stabbed her 16 times<br>o Defense – he was too drunk to know what he was doing<br>o Crown – he had the capacity to form the intent to commit crime | o At trial, Fisher is convicted<br>o The Dr's testimony was here ok because the jury still has the right to make a determination on its own<br>o The psychiatrist was given a hypothetical situation based on the facts as they were presented and then rendered an opinion | o The weight given to an expert opinion will depend largely upon its factual underpinning – whether the opinion was based on the specific facts or whether a hypothesis based on certain facts correspond with the facts in issue |

It is customary that the expert is given a number of questions in hypothetical form – these hypothetical questions, however, sometimes skew the issue. Note: Psychiatrists are not qualified to testify with regards to an individual's drunken state – we need an expert toxicologist.

### R. v. Terceira (1998) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| o Semen and hair were found<br>o The likelihood of a match were different for semen than hair | o It is up to the trial judge as to whether or not evidence should be presented statistically | o Judicial discretion applies to the statistical probability of one event over another |

In a trial where there is very strong DNA evidence against an accused, it will be used as only one piece of evidence – it should not be used to determine the entire outcome of the trial. Jurors, however, are notionally convinced by DNA evidence. When experts are testifying they are always relying on a species of hearsay – whatever materials they've reviewed that has made them an expert.

Aboriginal Land Claims

Anthropologists are often the experts proffered by aboriginals in their land claim cases.

### Delgamuukw v. British Columbia (1997) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Because the anthropologist lives among the aboriginal people, an affinity has been developed and his opinion is inherently biased | ○ Supreme Court – experts may have a bias one way or another. At trial, however, that expert is properly able to give an expert opinion | ○ An expert's personal bias does not preclude him or her from offering an expert opinion (it might be an issue when you consider the weight to be afforded) |

### R. v. B.M. (1998) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ The appellant was charged with a number of offenses that he had committed<br>○ At the time he was charged he wanted to bring a clinical psychologist claiming to have expertise in a number of areas<br>○ Trial judge excluded her testimony – a clinical psychologist not doing research is not given much weight | ○ The expert should have been able to testify as to the memory of very young children – an interpretation of when memories actually start (infant memory) | ○ Experts may testify, without having regard to the facts, where they provide general information that is inadvertently relevant and tied to the facts |

# Admissibility

## Confessions

The confession rules have been problematic in the past. The rule is very old – there has always been the sense that once a person confesses, it is very potent evidence. The logic is, who would confess to a crime if it were not true? False confessions, however, are not uncommon.

No statement by an accused person is admissible as evidence against him or her unless it is proved by the prosecution beyond a reasonable doubt to have been a voluntary statement in that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. This applies whether the statement is incriminatory or exculpatory. Three major elements of confession:

1. Reliable
2. Voluntary
3. Fair

Why would a confession need to be voluntary if we can prove that it is absolutely reliable? The value of respecting the human being is the hallmark of our democratic civilization and, as such, confessions must be voluntary. The individual who confesses must be treated with dignity:

1. There cannot be fear of prejudice or hope of advantage by confessing. An individual may not be induced by either threat or promise – if this happens there may not be a reliable confession;
2. The confession has to be made to a person in authority. This requires a definition of a person in authority; and,
3. If there is a threat or promise, that inducement must have a causal relationship to the person confessing.

Where a person's confession is exculpatory, a voir dire is required to prove that it is voluntary. There is a very unusual case:

### R. v. Piche (1971) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Ms Piche was at her mother's house when police came to the door and informed her that her husband was found dead – she said she had no idea about it<br>○ At trial her story is that she was at home wanting to commit suicide, got a rifle and as she approached to kiss him, she accidentally shot him | ○ Her exculpatory statement, that she was not there, was really a confession – it was held against her as an admission of guilt<br>○ A voir dire is required to prove the three elements (reliable, voluntary, and fair) if a comment that appears to be exculpatory may later be construed as an admission of guilt | ○ Any statement by an accused relative to the offence charged was inadmissible against him if made involuntarily |

### R. v. Evans (1949) Eng CA

| Facts | The Point |
|---|---|
| ○ Evans' wife, and child were found brutally murdered<br>○ Evans was taken into custody and he confessed five times to the murder<br>○ By the time the trial came around, he had recanted the confession<br>○ Evans took the stand and in the cross-examination he was caught in a prior inconsistent statement – he was convicted and hung<br>○ Christie, a neighbor, turns out to be a serial killer responsible for the death | ○ We might never know exactly why, but people confess to crimes they do not commit |

If someone confesses to the police, they generally plead guilty. However, if somebody confesses and later recants, something has gone wrong. Wherever you have someone recanting a confession, there is real reason for the court to scrutinize that confession.

If you make a confession to a person in authority, then once it is made the confession rule applies. The rule is that there has to be a voir dire and the confession has to be proved beyond a reasonable doubt. Therefore, if a confession is made to a person who is not a person in authority, then one does not have to go through the requirement of a voir dire. The rationale to the rule is to safeguard against the improper tactics of those people in authority. Over time, this rule of who a person in authority is became problematic. Confessions made to undercover police fell outside of this rule. Consider:

### R. v. Rothman (1980)

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused was charged with drug trafficking<br>○ A police officer, posing as a fellow prisoner, entered the cell and in the course of conversation Rothman admitted to selling some 'hash' | ○ *Issue*: Is the undercover officer a 'person in authority' sufficient enough to require a voir dire?<br>○ The test of whether a person to whom a confession is made is a 'person in authority' is subjective<br>○ Accused made statement freely<br>○ Consider a community shock test when examining police tactics | ○ The court must consider whether a person in authority has conducted himself in such a manner as to induce the accused to make a statement that may be untrue; and, even if this is satisfied a Court may exclude a statement if it were to bring the administration of justice into disrepute |

### R. v. Hodgson (1998) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Hodgson had been a baby-sitter to a certain family, he babysat the complainant over a series of years<br>○ When this little girl turned 16, she told her parents that Mr. Hodgson had sexually assaulted her on many occasions<br>○ The family confronted him at work, Hodgson confessed and the father held Hodgson at knife-point until the police arrived<br>○ There was no voir dire at trial | ○ *Issue*: Should the trial judge have held a voir dire to determine the voluntariness of the confession?<br>○ To find that the relevant person was one in authority, the evidence must disclose that the accused subjectively believed that the receiver of information was in a position to control the proceedings and that there was an objectively reasonable basis for that belief<br>○ There was nothing here to suggest that the family was tied to having control over the proceedings, thus while Hodgson may have had the subjective belief of a connection, there was no objectively reasonable basis for the belief | ○ Confession rule and factors to consider:<br>1. The confession must have been voluntary and be the product of an operating mind;<br>2. The confession must not have been obtained by threat or inducement;<br>3. Where the confession is made before a person in authority, a voir dire will be required;<br>4. A 'person in authority' is a subjective test;<br>5. There must be a reasonable basis for the accused's belief;<br>6. Undercover officers will not usually be viewed as 'persons in authority';<br>7. The defense must raise the issue of the accused's belief in speaking to an authority;<br>8. At a voir dire, the accused must prove the belief and if demonstrated the Crown must deconstruct the belief or prove the voluntariness of the confession;<br>9. In extremely rare cases, where the judge suspects that a voir dire might be necessary he may by his or her motion direct a voir dire<br>10. A voir dire by a judge's own motion will only arise in the rare case where the evidence, viewed objectively, alerts the judge for need<br>11. Judge shall direct that any statement obtained by coercion should be given very little weight |

***Interrogation Example***

| Facts | Holding |
|---|---|
| ○ Police officers arrest two men, bring them to the station, disrobe them and then tape their confession | ○ Taping individuals without clothes on is *oppressive interrogation* |

What is wrong with this if the confession, although not voluntary, is reliable and true? It really is a point of view – a philosophy over how the criminal justice system operates. Canada – human dignity.

### R. v. Oikle (2000) SCC

| Facts | Holding |
|---|---|
| ○ Oikle is a Nova Scotia man who becomes a suspect in a series of intentional fires in the little town of Waterville<br>○ Police have been calling in various suspects and asked them to submit to polygraph testing<br>○ Oikle showed up and stayed after being informed of his rights<br>○ Oikle takes the test and presumably fails it – he is told of the failure<br>○ He entered the hotel at 3 and by 5 he failed – immediately after the test he is taken for questions<br>○ At 7:30pm he confesses to setting his gf's car on fire<br>○ He is brought to the police station and is interrogated<br>○ Oikle expresses that he wishes to go home – he is tired<br>○ At 11 he confesses to all of the fires | ○ The trial judge found the confession to be voluntary and convicted him<br>○ CA – reversed the decision on the grounds that the confession was induced<br>○ SCC – The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.<br>○ Properness of confession will depend on whether threats or promises have been made – There was a voluntary confession here<br>○ Police tricks, according to defense counsel, tend to:<br>1. Minimize the seriousness of the crime;<br>2. Compel individuals to confess to avoid hurting loved ones;<br>3. Create a muse of trust;<br>4. Create an atmosphere of oppression<br>○ *Dissent*: The cumulative effect of the police tactics created too much of a strain and the confessions were, therefore, involuntary – bringing a confession linked to a polygraph makes it difficult for the individual to recant in the future |

### R. v. Horvath (1979) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ 17 year old is charged with the murder of his mother<br>○ Next day he is questioned by the RCMP – an officer trained in interrogation<br>○ He was left alone, but was being taped secretly and made three statements | ○ Officer was so kind and persistent that the young accused was hypnotized by him and then made inculpatory statements<br>○ The officer's skill in questioning overbore the young man, who by the end did not have an operating mind, but instead suffered from 'complete emotional disintegration' | ○ A confession must be voluntary, made with an individual retaining his or her operating mind and not in any other eroded mental state |

## The Role of the Charter

The Charter has made a huge difference for the criminal justice system in Canada, but it really was not supposed to. Prior to the Charter's enactment, illegally obtained evidence was admissible. The trial judge was given very little discretion to exclude it.

### R. v. Wray (1980)

| Facts | Holding | Ratio |
|---|---|---|
| ○ Wray was arrested and suspected of killing a gas station attended<br>○ Wray was taken to Toronto and questioned for 8 hours, but he constantly requested his lawyer<br>○ The request was never given and Wray eventually confessed | ○ Issue: Should the confession be excluded?<br>○ Although the evidence was illegally obtained, the evidence was reliable and, therefore, although it might act against the accused, it was not unfair that the court might use it | ○ Any misconduct on the part of the police in obtaining evidence might be set aside based on the reliability of that evidence obtained<br>○ The individual's right is secondary to the reliability of persuasive evidence<br>○ This is "Pre-Charter"! |

*US Miranda Rules* – These rules gave American accused the right to silence at the moment they were arrested or detained.

### Section 24.2

There was the notion that if any evidence was obtained in a manner that would bring the administration of justice in disrepute, the judge may exclude that evidence. The original thought was the 24.2 would come half way between the US Miranda Rules and the Canadian Common Law. However, our section has brought us to virtually the same position as Miranda.

### R. v. Hebert (1990) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Hebert was charged with assault of a hotel register/clerk<br>○ Hebert was arrested and told police he did not want to speak to them, he wanted to speak to his lawyer<br>○ An undercover agent at the cell befriended him and he elicited a confession from Hebert<br>○ The lawyers argued that there had been a breach to the right to silence and the right to counsel | ○ The courts found in Charter:<br>○ *Section* 7 a seed to the right to silence – a person should not be forced to incriminate themselves faced by the overwhelming power of the state<br>○ *Section* 13 – right against self-incrimination<br>○ *Section* 10(b) – right to counsel<br>○ These sections taken together amount to a right to silence | ○ The arrested or detained individual may stand mute to a police officer and nothing will be held against him or her |

Prior to this case, the right to silence was characterized as the right not to have to stand up at trial. Note: This right is not an absolute right, but it is strong enough to preclude an officer from questioning upon the request to speak to counsel. However, if an undercover officer does not solicit information, but simply listens to someone and does not actively provoke information and in the course of an ordinary conversation the accused voluntary admits to the crime, that admission will be admissible. Ordinary people do not understand that a right to silence is particularly robust. It is commonly believed that taking silence may have a negative impact.

### R. v. Ellis

| Facts | The Point |
|---|---|
| ○ Roommate of Ellis advised her not to speak to police officers as a number of children at Toronto Sick Kids were dying unexplainably<br>○ The right to silence was exercised | ○ This case was tied up in court for three years before Ellis was free to go – the point is, though, that there is particular suspicion in the public eye upon refusal to speak |

### R. v. Warren

| Facts | Holding | Ratio |
|---|---|---|
| ○ Warren was a minor arrested for having sabotaged a mine in BC killing nine people<br>○ Warren made a confession after a long time and at trial the RCMP officer was questioned about the questioning that went on – he said he just knew that Warren was guilty because of his silence | ○ Warren had a right to silence, under arrest and detention, to say nothing – the judge properly instructed the jury of this<br>○ Warren understood the consequences of confessing and was instructed repeatedly of his right to counsel | ○ The right to silence is a real right that some people properly take advantage of |

In the UK the right to silence has been specifically excluded by statute where an adverse inference may be drawn if the accused does not speak or testify. The notion is that when a person does speak to the police the person really does want to. When the person speaks to the police, the police must prove that the individual had agreed not to exercise their right to silence. The right to silence exists, butit is an uncomfortable fit with public opinion.

*Breach of Charter Rights* – Breach of Charter Rights are seen to be one of the more serious breaches that can arise during the course of the trial. Police know that if they don't make the individual's right clear that it can be quite detrimental.

### R. v. Lim and Nola (1999) ON HC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Two Vietnamese gang members are accused of a series of car bombings in Toronto<br>○ The individuals are being interrogated by the T.O. hold up squad – they are advised of their right to counsel, but their English is very poor | ○ Although the statements were voluntary it is questionable whether the accused understood the right to counsel<br>○ The police must have known that there was a reasonable possibility that the accused did not understand his right to counsel, and yet they proceeded to question him<br>○ Admitting the statements may bring the administration of justice into disrepute | ○ The police must take all necessary precautions to ensure that the accused understand their Charter rights before proceeding<br>○ If the police have reason to believe that there is no understanding, they cannot be willfully blind to it |

### R. v. Mohl (1989) SCC

| Facts | Holding |
|---|---|
| ○ A breathalyzer test was administered to Mohl while he was too drunk to understand he had a right to counsel | ○ The right to counsel creates an obligation on the officer to:<br>1. Inform the accused by a method of communication and in terms that the accused can understand;<br>2. Inform the accused when he is capable of understanding or comprehending that right;<br>3. Give the accused an opportunity to exercise that right; and,<br>4. Not to require the accused to provide evidence, which may criminate him prior to affording him the reasonable opportunity to make a reasoned choice to retain and instruct counsel<br>○ SCC restored a conviction in this case by commenting that assuming that there had been a violation of the 10(d) right, the admission of evidence would not bring the administration of justice into disrepute |

### R. v. Collins (1987) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ The appellant while sitting in a bar was seized by the throat by a police officer and after a struggle a green balloon containing heroin was taken from the appellant<br>○ Appellant sought to exclude the evidence at trial on the basis that it was obtained in a manner that infringed her rights to be free of unreasonable search and seizure | ○ Given that the officer did not have reasonable and probable grounds, the evidence must be excluded on the basis of unreasonable search<br>○ Factors to consider:<br>1. Whether the admission of the evidence would bring the criminal justice system into disrepute<br>2. The type of evidence obtained<br>3. The Charter right infringed<br>4. Whether the violation was serious<br>5. Whether the violation was deliberate, willful, or flagrant<br>6. Were there circumstances of urgency or necessity<br>7. Were other techniques available<br>8. Would the evidence have been obtained in any event<br>9. Is the offense serious<br>10. Is the evidence essential | ○ Three basic factors, test for the exclusion of evidence under Charter section 24.2:<br>○ Fairness of Trial;<br>○ Seriousness of the Breach; and,<br>○ Repute of the Administration of Justice<br><br>○ An unreasonable search would bring the administration of justice into disrepute |

### R. v. Cook (1998) SCC

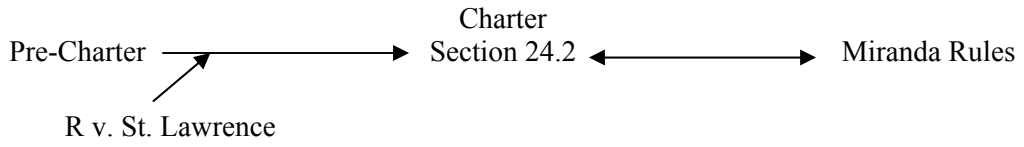
| Facts | Holding |
|---|---|
| ○ Cook was arrested in the US by American authorities for a murder committed in Canada<br>○ Cook appeared in court without a lawyer and remanded on a certain date – no lawyer was sent<br>○ The Canadian police officers warned him of his rights in a confusing and defective manner in the midst of interrogation<br>○ Cook gave a statement to the police that was exculpatory<br>○ At trial, Cook changed his exculpatory story<br>○ The Crown wanted to use the statement against him to challenge his credibility – the trial judge admitted the statement on this ground | ○ The Canadian officers were required to comply with the Charter and permit Cook to claim Canadian constitutional rights although they were on American soil<br>○ The confusing warning deprived Cook the opportunity to decide whether to obtain legal advice<br><br>○ *Dissent*: We agree that there was a technical breach on the right to counsel – there was some confusion – however, the evidence was really not a confession, but rather a denial. The evidence should be admissible on the basis |

## Exclusion of *Evidence*

*Search Warrants* – once a police officer is armed with a search warrant it should be the end of the matter. However, a committee surveying search warrants found that more than half of the warrants would have failed Charter challenges.

Section 24.2 has wide-ranging competing goals that are sometimes in conflict:

1. Compensate persons whose right have been breached;
2. The determent of police misconduct; and,
3. Wants to preserve the integrity of the trial process by excluding evidence that will bring the administration of justice into disrepute




### R. v. St. Lawrence

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused was charged with killing a jockey<br>○ After questioning, he had admitted to throwing a number of objects away over the fence of a racetrack | ○ *Issue*: Should the objects and their links be used at trial?<br>○ If the police can take the stand and talk about the finding of the objects without referring back to the confession they may be presented at trial | ○ *Note*: This is Pre-Charter! |

**Miranda Rules** – Where the police have obtained evidence contrary to the rules is tainted. Moreover, any derivative evidence is also tainted. "You can't use fruit from the tainted tree". Americans have moved to a middle ground – derivative evidence combined with other corroborative evidence will be admitted.

### R. v. Feeney (1996) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ During a murder investigation, the police entered Feeney's residence (a trailer) without permission after receiving no answer at his door<br>○ Feeney was arrested when the police saw blood on his shirt<br>○ Feeney's shirt and shoes were seized and he was taken to the police station for questioning<br>○ Feeney was not told of his right to counsel upon first being detained and he was not given an adequate opportunity to secure counsel prior to being questioned | ○ *Issue*: Were Feeney's rights to counsel and the freedom from unreasonable search and seizure violated?<br>○ The search into the equipment trailer was a warrantless search – a person's home may not be entered without a search warrant in the absence of exigent circumstances – the arresting officer did not have reasonable grounds to arrest prior to forcible entry<br>○ Majority of SCC excluded everything – the breach of 10(b) automatically excludes everything<br>○ The section 8 breach is very serious – there was nothing the police had to go into the equipment trailer for | ○ *Dissent*: The police are sitting in a rural area and could not acquire a search warrant within a reasonable time – based on the timeline, what were they expected to do?<br>○ Real Evidence exists and should be admitted at some point – how do you properly characterize evidence? The 3 part test from Collins should be viewed at and applied<br><br>○ This case was sent back to retrial without any of the evidence obtained during the search |

### Conscriptive versus Non-Conscriptive Evidence

Non-Conscriptive Evidence – If the accused was not compelled to participate in the creation or discovery of the evidence, the evidence will be classified as non-conscriptive.

Conscriptive Evidence – Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body, or the production of bodily samples.

### R. v. Stillman (1997) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Stillman is 17 years old and charged with the murder of a 14 year old girl<br>○ The lawyer asked him to turn himself in and he appeared before police with a letter from the lawyer declaring silence and he did not want to give any bodily samples<br>○ Despite this, the police obtained bodily samples, such as hair, teeth indenture, and buccal swabs<br>○ The police collected mucous from a discarded tissue<br>○ The police proceed to trial with evidence as such obtained<br>○ Trial judge admitted the evidence | ○ SCC: majority held that there was a breach of the boys right to be free of an unreasonable search and/or seizure<br>○ The swab, hair, and tooth impression were serious breaches, but the Kleenex tissue was a less serious breach<br>○ Where a *Charter* breach occurs and evidence is obtained as a result unless it would have been discovered another way, that evidence (conscriptive) will not be admissible<br>○ The defendant should have the right not to incriminate himself | ○ Evidence is *conscriptive* if it was obtained and the accused had to participate in incriminating himself in violation of his or her rights by means of a statement, the use of the body, or the use of bodily samples.<br>○ Evidence is *non-conscriptive* where it exists independently of the Charter breach in a form useable by the state.<br>○ The other kind of conscriptive evidence will be *derivative* evidence – where the accused has taken it to the police and confesses and as a result the police go into the real world and find a link. |

### Evidence from Body

| Facts | Holding |
|---|---|
| ○ Two young men were involved in a robbery and the police forced them into a police line-up<br>○ Two teenagers identified them in the line-up | ○ The individuals did not know that they could resist the line-up and their identification, therefore, could not be used |

There will be two exceptions regarding the inadmissibility of conscriptive evidence:

1. Where an independent source of evidence would have turned up anyway
2. Where the discovery of the evidence is inevitable

### R. v. Colarusso (1994) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Colarusso struck two cars killing one driver – police demanded breathalyzer, but none taken<br>○ Admitted into hospital, Colarusso's blood and urine were taken for medical reasons<br>○ The coroner gave the samples to the police so they could be analyzed | ○ The police seized the samples and violated Colarusso's right to be secure against unreasonable searches<br>○ Since the police could have obtained the evidence through other investigative measures (a search warrant) the analysis results were admitted | ○ Evidence will be held admissible if it could be obtained from another source<br>○ If reasonably attainable from another source, the admission of illegally obtained evidence will not bring the administration of justice into disrepute |

### *R. v. Black* (1989) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Black, unable to confer with her counsel, made a statement leading to the finding of a knife in her apartment used in a killing | ○ The appellant was not given a reasonable opportunity to confer with counsel on the charge of murder – the knife was *derivative* evidence | ○ Even if there had been no violation, police would have searched the apartment and found the knife and its admission into evidence would not have rendered the trial unfair. |

### Three Point Test for Exclusion of Evidence (Cory J):

1. Classify the evidence as either conscriptive or non-conscriptive;
2. If conscriptive, crown must prove that it would have been discovered through non-conscriptive means otherwise it will not be admitted for reasons of disrepute; and,
3. If it would have been found by non-conscriptive means anyway, the evidence would be admissible.

***Exam Hint Scenario***

| Facts | Holding |
|---|---|
| ○ A person is seen late at night with a backpack – the police approach him and ask him what he is doing<br>○ Police want to look into it and in it they find bolt-cutters | ○ This evidence is not conscriptive – the individual participated in a mild way and pulled out the bolt cutters |

### R. v. Burlingham (1995) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Police arrest accused and during a forced confession the accused tells the police that the weapon is at the bottom of a river that is currently frozen over<br>○ Appellant argues that all the derivative evidence should not have been admitted | ○ A forced confession led police to find a weapon that they would not otherwise have found<br>○ The finding of the gun constituted derivative evidence flowing from a section 10(b) *Charter* breach | ○ Evidence that flows from a *Charter* breach and would not otherwise be obtained is inadmissible at trial – its admission would bring the administration of justice into disrepute |

### R. v. Mellenthin (1992) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ RIDE Program officer pulls over a driver for sobriety reasons and notices a bag with cellophane sticking out of it and asks whether he may look in<br>○ Driver shuffles it around and produces a sandwich – officer notices a vial, the type used for cannabis resin and asks the driver to get out of the vehicle and searched the vehicle finding vials, cannabis resin, and cannabis cigarettes | ○ The appellant was here detained and could have felt compelled to answer questions<br>○ Upon detention, the individual should have the right to counsel<br>○ Questions pertaining to the gym bag were improper as the stop point exists only for sobriety purposes – officer had no reason to believe that she was drunk, let alone in possession of narcotic | ○ To admit evidence obtained in an unreasonable and unjustified search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process and most surely bring the administration of justice into disrepute. |

# Character & Similar Fact Evidence

## Character Evidence

The Crown in a criminal trial cannot offer evidence of the accused's bad character unless it is an issue in the case. The same holds true in civil trials.

### R. v. Walker (1994) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Walker was accused of murdering a prostitute<br>○ The Crown brought out the fact during cross-examination that Walker was a pimp and had a slew of prostitutes under his control | ○ The trial judge should have stopped the abusive cross-examination of the appellant when it became apparent that character evidence, which was let in as part of a narrative, was being used by the Crown for an improper purpose – to elevate the prejudice the jury might have against Walker as a pimp | ○ Bad character evidence may not be proffered at trial unless it is closely tied to a relevant issue in the case and not simply being tied to the accused |

A person's character is always relevant, but it might not be fair to force the accused to answer for every bad thing s/he has done in life, which might not be relevant to the case at hand. There are exceptions to this rule that have to do with the accused attempting to bring in his or her own good character. There are three ways to do this:

1. The accused will bring in good character witnesses that will testify to the individual's reputation in the community;
2. The accused can talk about his or her own good character on the stand;
3. Expert evidence can be brought in to attest/testify as to the accused's character (this can be done by the Crown or the Defense)

Once the accused brings in good character evidence, it opens the door for the Crown to bring in bad character evidence. The Crown can bring in character witnesses to speak to the specific bad things that the accused did. This is one of the reasons that you do not have more good character evidence at trials.

### R. v. Clarke (1998) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Woman sends accused a letter – she no longer wants to see him<br>○ Woman claims he enticed her to go outside, they had an argument on the street – alleged he assaulted and held her at knife point<br>○ Man claims that he was trying to comfort her, she let him into her van, she lied about the assault<br>○ Man proposes to supply five character witnesses<br>○ Three of the five comment that the complainant has a bad reputation as a liar | ○ "Would you believe Mr. Clark under oath" and "Would you believe the complainant under oath" – were questions found to be inadmissible as usurping the function of the jury<br>○ Good character witnesses may go on to speak to the bad character of other witnesses, but not the accused<br>○ Judges, in allowing character evidence, have a large degree of discretion – there is a bias in admitting more defense evidence | ○ The bad character rule adheres to the accused, anyone else in the trial other than the accused can have their bad character brought out in the trial – you can attack bad character of the Crown's witnesses subject only to very specific limitations |

### R. v. Kootenay (1994) Alta CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ Young man is accused of sexual assault and he brings in two good character witnesses – an old principal and an employer<br>○ Trial judge charges that the jury has the final say on this evidence – accused was convicted and appealed | ○ There is no special formula for a trial judge to direct a jury with respect to the weight of good character evidence, this judge properly exercised his or her discretion<br>○ | ○ The charge to the jury must only set out the possibility that this is a credible person |

When you bring in reputation of the accused good character, the Crown may rebut that by bringing in witnesses that will testify as to the accused's bad character.

### R. v. Mitchelson US

| Facts | Holding | Ratio |
|---|---|---|
| ○ A character witness was asked whether or not he knew that the accused was reported to have assaulted another individual – no talk of any charge or conviction | ○ The question was testing the knowledge of the character witness – this question exists to impeach the good character witness<br>○ If the report occurred prior to the character witness' knowledge of the accused, it would not be admitted | ○ Questions that might appear to be attacking the character of an accused may be allowed for the purposes of testing the credibility of a witness |

There have been a series of out-of-date cases dealing with homosexuals, which affected the law with respect to character evidence.

### R. v. Lupien (1970) SCC

| Facts | Holding |
|---|---|
| ○ A man goes to a convention, picks somebody up at the bar and goes back to the hotel room<br>○ RCMP breaks in and they find this man having sex with another man – he is charged with gross indecency<br>○ Lupien's defense was that he could not know that the other individual was a man b/c he was homophobic | ○ If the expert's evidence is 'helpful', then it should be admitted<br>○ Expert testimony about character could go into trials where the expert was going to testify that the accused belonged to a distinctive group of people who have a particular 'badge' of activity |

### R. v. Mohan (1994) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Doctor was accused of sexually assaulting four of his patients<br>○ Psychologist had profiles, which claimed that the acts spoken of could only be committed by individuals with a particular profile and the doctor did not fit within any of the profiles | ○ There is no evidence to indicate that the profile of a pedophile or psychopath was standardized to the extent that it could be said that this profile matched that of the offender depicted in the charges | ○ There is no such thing as a profile that has gained any consensus as being reliable enough to say that the evidence was necessary to clarify an otherwise inaccessible matter |

### R. v. Turner

| Facts | Holding | Ratio |
|---|---|---|
| ○ A young woman provokes a man by admitting that she is no longer in love with him and pregnant with another man's child<br>○ Psychiatrist testifies as to the man's feelings at the time (disposition) | ○ Juries generally understand the disposition of a person and we do not need expert evidence speaking to it | ○ Experts are no more qualified to speak to an individual's disposition as is the trier of fact |

### Lowery v. The Queen (1974) PC

| Facts | Holding |
|---|---|
| ○ Two young men were co-accused of killing a young girl – each one blamed the other<br>○ The court allowed one of the co-accused to bring in psychiatric evidence that he was the less likely to commit the crime because of a low score on an aggression scale | ○ In order for the testimony regarding disposition to be admitted, you have to prove:<br>1. Evidence is relevant;<br>2. Evidence is not excluded by policy; and,<br>3. Evidence falls within the proper sphere of expert evidence |

### R. v. McMillan (1977) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ A baby was rushed to the hospital and died – it was determined that the baby had died of abuse<br>○ Police arrested both the mother and father – the father, at the time, was trying to protect his wife by making a quasi-confession<br>○ By trial, he was not so willing to protect his wife – man wanted a full defense, but at the same time did not want his wife to be charged with the crime<br>○ Defense counsel asked permission of the judge for testimony of the wife's psychological state in the middle of the trial – testified that the wife had suffered brain damage as a child and witnesses had said that she appeared cold to the child | ○ Issue: You can bring psychiatric evidence to attest to the disposition of a third party where<br>1. Evidence is relevant<br>2. Evidence is not excluded by policy<br>3. Evidence falls within the proper sphere of expert evidence<br>○ The Crown should be able to get some psychiatric evidence from the accused<br>○ Once you have brought in evidence for a third party, it may be open for the Crown to ask about the accused | ○ Evidence of a third person's motive is admissible |

What happens when an accused inadvertently triggers good character evidence rules? There have been a number of cases where the accused takes the stand and it sounds like the accused is putting his

### R. v. McNamara (1981) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ In the course of defending himself McNamara questions why anybody would assert that he would commit a crime | ○ McNamara inadvertently triggered the good character rule, which allows the Crown to examine bad character | ○ Where the accused testifies or supports his own good character, the Crown may question his bad character |

There are two ways to prevent a criminal record from being admitted at trial:

- Do not put the accused on the stand; and,
- Do not ask any witnesses about the accused's character

### R. v. Scopelliti (1981) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ An immigrant from Italy now with a convenience store near Orillia<br>○ Two youths enter the store and are very menacing – they scared him<br>○ At some point during the encounter he shot them both in the back – two bullets in each body<br>○ Scopelliti pled self-defense<br>○ Greenspan raised a number of events showing that the two youths were really bad people – the information would go to enhance and bolster Scopelliti's testimony of the events that occurred in the store | ○ Trial judge allowed the evidence to come in<br>○ The type of evidence had here requires physical evidence to corroborate testimony – there was gum on the floor and a magazine rack was knocked over<br>○ If you are to use character evidence that is unknown to the accused at the time, you will require physical corroborative evidence of the individual's testimony | ○ Two Questions: if you are going to bring in bad character evidence of the victim, should the Crown be able to bring in good character evidence of the victim? Second, if the defense is going to bring in bad character evidence of the victim, should the Crown be able to bring in bad character evidence of the accused?<br><br>○ These questions remain unanswered |

The court is always there to provide a balance – if the accused can say this, the Crown should have an opportunity for rebuttal.

The ability of an accused to speak to the character of the complainant in a sexual assault is problematic. This area comes in the rape shield provision. Prior to the shield it was always open to the accused to bring out the sexual history of the complainant. The basis of the shield is that the sort of inquiry is not really relevant and plays on the myths of women as being either Whores or Madonna's.

## Similar Fact Evidence

*The Presumption: Discreditable conduct evidence of the accused will be inadmissible.*

If sole purpose is to show that the person has the propensity to commit the crime it will go to credibility and will not be admissible. The accused should not have to account for all past wrongs. In the vast majority of cases the judge will exclude this because a juror may convict on the basis of one's bad past. There is a very strong notion that this is due to due process. Trial evidence, similar fact evidence, our trial judge must weigh the probative value vs. probative effect. Evidence of discreditable conduct and evidence of the past only go to show that the accused had the propensity to do such a thing in the past. You have to be tried for the crime you are charged with at the moment – not in the past.

### Makin, Privy Council 1894

| Facts | Holding | Ratio |
|---|---|---|
| ○ Couple advertised that they would take in babies. Found four bodies in backyard and found one child's body<br>○ Looking at different residences, they had found 13 dead bodies | ○ General Principle: Evidence will not be admissible even if relevant if its ONLY use is to show that the accused has a disposition, a propensity to or was likely to do something | ○ Categories useful in arguing probative value over and above propensity |

| | | |
|---|---|---|
| across there old residences<br>○ Makin is charge with death of only one child<br>○ Prosecution wanted to bring in testimony of police that were buried in various backyards<br>○ Makin objecting on the grounds of similar fact evidence and said that this baby died due to natural causes | ○ When its admission is for purposes other than showing the likelihood of the guilt to innocence of the accused (propensity, disposition, character).<br>○ The old caselaw has organized these other purposes into categories. Similar fact evidence was admitted to Rebut a defence of accident | |

### R. v. Litchfield (1993) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Dr charged with 14 counts of sexual assault<br>○ The cases were grouped based on the seriousness of the assaults and evidence concerning any other female was not admitted for the purposes of each other count | ○ All the evidence by the complainants going to the severed counts should have been admitted with respect to all the counts before the trial judge | ○ The evidence of other touching, while it might be characterized as similar acts, was not tendered solely to show that the respondent was a person of bad character or of a disposition likely to commit the offences, but rather to provide information highly relevant to understanding the context in which the offences occurred |

### R. v. L.B. (1997) ON CA

| Facts | Holding | Ratio |
|---|---|---|
| ○ LB was charged with one count of sexual assault against his stepdaughter<br>○ The complainant was 18 at the time of trial, incidents occurred while she was 8 to 12<br>○ At trial, evidence was introduced from three other women who allege sexual abuse by LB when they were younger<br>○ The trial judge allowed the testimony in and charged the jury by indicating that they could not conclude that L.B. had a 'propensity'<br>○ Defense appealed on the grounds that the that trial judge erred in allowing similar fact evidence in and cited prejudicial effect | ○ The evidence showed a pattern on the part of LB that he preyed on young and teenage family members in his home and care<br>○ The trial judge did not err in relying on the evidence of prior discreditable conduct because the trial judge's reasons for judgment were a model of fairness<br><br>*New Rule*: Evidence of the prior discreditable conduct of the accused sought to be introduced by the Crown will be inadmissible except when its probative value outweighs its prejudicial effect (there is a presumption against the admission of such evidence). | ○ Similar fact evidence is inadmissible except where its probative value outweighs its prejudicial effect<br><br>○ Test for the admission of prior discreditable conduct:<br>1. Is the Conduct, which forms the subject matter of the proposed evidence, that of the accused?<br>2. Is the proposed evidence relevant and material?<br>3. If relevant and material, is the proposed evidence discreditable to the accused?<br>4. If discreditable, does its probative value outweigh its prejudicial effect? |

Other children's testimony is relevant but will probably be left out where its prejudicial value is so strong that it beats its probative value.

## R. v. Arp (1998) SCC

| Facts | *Holding* | Ratio |
|---|---|---|
| ○ Two women were murdered in a similar way two and one half years apart in the same city<br>○ Arp was arrested after the first murder and he willingly gave scalp and public hair samples to the police – he was released when there was no match<br>○ During the second murder, Arp refused to give samples, but his cigarette butts, which were taken after the interview, were analyzed and matched semen samples from the second victim<br>○ The earlier samples he provided were analyzed and matched the second victim<br>○ At trial, all evidence was ruled admissible<br>○ Arp claims that the jury charges regarding similar fact evidence and the admission of evidence from the hair samples violated his *Charter* rights | ○ As a general rule, where similar fact evidence was adduced to prove identity, the jury is to be instructed that once they have concluded that there was sufficient likelihood that the same person committed the alleged similar acts, they could consider all the evidence relating to the similar acts in considering whether the accused is guilty of the acts in question<br><br>○ The proper standard to be applied to a jury's primary inference on similar fact evidence was proof on a balance of probabilities<br><br>1. Must prove there is similar fact evidence at Voir dire before a judge<br>2. Can be tried for both crimes. | ○ Issue of Identity Test:<br><br>○ There must be a high degree of similarity between the acts (almost a unique trademark or signature)<br><br>○ In assessing similarity the judge should consider only the manner in which the acts were committed and not evidence as to the accused's involvement in each act.<br><br>○ There must be some evidence linking the accused to a similar fact |

## R. v. S.M.B. (1996) Ont Gen Div

| Facts | *Holding* | Ratio |
|---|---|---|
| ○ Domestic Violence case – how much information should you let in?<br>○ In 1994, while on a conviction and a 24 month parole, which included a restraining order from seeing or speaking to his wife, the accused raped and twice beat up his wife<br>○ The Crown wished to introduce evidence prior to 1993 (time of conviction) and following 1994 (time of alleged act)<br>○ *Issue:* whether or not evidence prior to the offense should admitted | ○ The probative value of the evidence reasonably and persuasively outweighs the potential prejudicial consequence upon admission<br><br>○ The evidence is admissible to afford important narrative and context to the charged offenses – but the jury ought to be charged against making a propensity profile<br><br>○ Jurors ought to know the entire extent of the abuse, the dynamics of relationship and the control held over the wife | ○ Similar fact evidence in domestic violence cases is not solely to show a propensity; it is to show the dynamic of the relationship; intention or design of relationship; and, how parties are acting with each other. |

# Privilege

## General

Privilege generally refers to a right of a party to claim that some information is confidential and should not be admissible at trial. A privilege is invoked to protect some important societal concern:

1. The protection of confidential relationships;
2. The administration of justice;
3. The investigation of crime;
4. The furtherance of candour in the public service

However, a privilege necessarily impedes the search for truth and with a few exceptions there is a presumption against the recognition of privilege. Note that the SCC has recognized two kinds of privilege:

1. Class Privilege – there is a prima facie presumption that the communications are privileged, as between solicitor-client, an informer, a public interest immunity, or other statutory privilege; and,
2. Case by Case Privilege – there is a prima facie presumption that the communications are not privileged and the party seeking to raise it must show why the communication should be excluded

## Case by Case Privilege

The usual test for common law privilege was enunciated by Wigmore:

1. The communication must originate in a confidence that they will not be disclosed;
2. Confidentiality must be essential to maintain a satisfactory relationship between the parties;
3. The relation must be one which in the community's opinion ought to be sedulously fostered; and,
4. The injury that would injure the relation by disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation

### Slavutych v. Baker (1975) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Baker applied for tenure<br>○ University policy was to obtain peer information through confidential communications<br>○ Slavutych wrote a scathing review and made a number of allegedly unfounded remarks and, on that basis, he was subsequently fired | ○ *Issue*: Should the communication be confidential?<br>○ The court adopted the Wigmore test and held that the communication was confidential as between Slavutych and the university | ○ Confidential communications must be sedulously fostered in order to uphold relationships that depend on confidentiality |

### R. v. Gruenke (1991) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ Accused was convicted of the murder of an 82 year old man based on a confession to a priest<br>○ Gruenke attempts to assert privilege and claims that her *Charter* rights would be in breach should the admissions to the pastor be admitted into evidence | ○ A priest penitent is not privileged in Ontario<br>○ The *Charter* does not go so far as asserting privilege under 2(a)<br>○ Religious privilege exists in the US – health society argument | ○ Priest penitent is not privileged in Ontario<br>○ Dissent – L'Hereux-Dube wants to expand the privilege – a priest would be held in contempt if he refused to reveal information |

The spousal privilege protects communication between spouses, but there are cases where spouses may be compelled to testify in the trial. The issue has been whether the spouse has the privilege or the accused has the privilege in the proceedings. However, the statutory privilege for spouses does not confine the privilege to 'confidential communication', and there is authority to suggest that 'any communication' means exactly that and protects all spousal communications whether intended to be confidential or not (MacDonald v. Bublitz (1960) BS SC). Does the spousal privilege protect all communications or just confidential communications?

### R. v. D.Z. (1995) ON CA

| Facts | Holding |
|---|---|
| ○ Defendant asserts that the Crown should not have even asked questions requiring his wife to assert her spousal privilege thereby causing prejudice through the unanswered question | ○ Privilege should be asserted in front of a jury<br>○ To do otherwise would leave the jury confused as to why the Crown did not pursue an obvious line of questioning |

## Solicitor-Client Privilege

This privilege is considered to be a substantive rule and not just an evidentiary rule – it is a fundamental civil right. The client is considered to be the holder of the privilege and only s/he can then waive it. There are instances, however, where the solicitor-client privilege will be suspended.
**1**. When the confidential communications are an element of the crime itself, one should be suspicious as to their protection.

### Descoteaux v. Mierzwinski (1982) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ ML was suspected of trying to obtain legal aid under false pretenses as to his financial situation<br>○ Police officers with a warrant took the forms completed by ML<br>○ Office protested and the Bar Association intervened on the basis that the docs were privileged | ○ The documents were not privileged<br>○ This was an exception to the fundamental principle of solicitor-client privilege because according to the information the data provided by ML as to his financial situation were criminal in themselves as they contained the material element of the offense charged. | ○ Confidential communications will not be protected when they are the material element of a crime |

Note: There must be evidence of a criminal purpose or fraud (Goodmand & Carr v. MNR).
**2**. Also, when confidential communications are made for the purpose of obtaining legal advice to facilitate the commission of a crime, the privilege may not be upheld.
**3**. Moreover, when the privilege stands in the way of the accused's right to defend him or herself on a criminal charge, the solicitor-client privilege may be waived.

### R. v. McClure (2001) SCC

| Facts | Holding | Ratio |
|---|---|---|
| ○ McClure was staff at a school where he was charged with sex offenses against 11 children<br>○ The 12th child proceeded civilly and McClure sought production of the plaintiff's civil litigation file | ○ Privilege may be suspended if 'innocence is at stake'<br>○ The "Innocence At Stake Test" may override privilege | ○ Test: Accused must establish that the information is not available through other means; accused had to establish some evidentiary basis for the claim; and, the judge must determine if the info sought would likely raise a reasonable doubt |

**4**. Note also that where public safety is at stake, the solicitor-client privilege may be suspended.

### Jones v. Smith (2000) SCC

| Facts | Holding | Ratio |
|---|---|---|
| o Psychiatrist wished to make known information that a particular accused 'loved to kill' | o Danger to public safety, in appropriate circumstances, justifies the setting aside of privilege | o Where public safety is involved, the solicitor-client privilege may be suspended |

## Inadvertent Loss

### Royal Bank of Canada v. Lee (1992) AB CA

| Facts | Holding |
|---|---|
| o A court appointed receiver obtained an alleged confession about doctored inventory records<br>o A lengthy letter was prepared with the lawyer on the subject, but it was not removed from the records and accidentally submitted along with them to the court | o The contents of the letter suggested at least a dominant privileged purpose and ought to be protected<br>o Litigation privilege applies |

Privilege will be protected where it is lost inadvertently, such as losing a file, having a conversation that is overheard, and someone comes upon privilege information in an innocent way. However, where confidentiality is lost inadvertently due to some carelessness, the privilege may not be protected.

In general, the solicitor's work product will be protected, which include written reports, the fruits of an investigation, expert's advice.

### Waugh v. British Railway Board (1980) HL

| Facts | Holding | Ratio |
|---|---|---|
| o Husband was crushed to death and widow brings an action for compensation<br>o Railway's practice is the production of accident reports in preparation of legal cases | o *Issue*: Is the widow entitled to the report?<br>o Sole Purpose – if the sole purpose of the report was in contemplation of litigation, it will be protected<br>o Dominant Purpose – if the dominant purpose of the report is for legal advice it will be protected<br>o Substantial Purpose – if the substantial purpose of the report is for litigation it will be protected | o The Test in Canada is the "Dominant Purpose Test" |

# Index