

# TYPES OF EVIDENCE

## Extrinsic Misconduct Evidence PRESUMPTIVELY INADMISSIBLE

EXCEPT

### Similar Fact [*Handy*]

- "improbability of coincidence" leading to an inference of "specific propensity"

Factors: Timing, Frequency, Similarity

Consider: poss. of witness collusion/info sharing  
PvP balance

### Defence-led Similar Fact [*Grant*]

- must establish "sufficient nexus" between crime and third party

- no diff between known/unknown 3rd party  
- *Seaboyer* standard applied: "compelling significant similarities"

### Accused puts character in issue

- Crown can call evidence, but limited by scope of character ev from accused (general v specific)

## Eyewitness ID of Strangers PRESUMPTIVELY ADMISSIBLE

EXCEPT

- cops should follow specific procedures when eliciting ID ev from EWs, including:

**sequential photoset of similar-looking people presented without telling EW how many photos** [*Gonsalves*]

- these procedures help mitigate risks of **mistaken ID** (other ish is EW lying)

- however, any frailties in EW ev go to weight: *Hay*.

## Vetrovec Witness Testimony PRESUMPTIVELY ADMISSIBLE

EXCEPT

- *Murrin*: even jailhouse informants' testimony is presumptively admissible  
- however, *Vetrovec*: must warn the jury of dangers of v-witness evidence

Elements of warning

1- **Single out** witness; 2- Remind jury **why** witness is *Vetrovec*; 3- Advise that it would be **dangerous** to convict on v-wit's testimony alone; 4- Advise to look for **corroboration** of testimony  
- *Khe/a*: use broad definition for corroborative

## Post-Offence Conduct (POC) PRESUMPTIVELY ADMISSIBLE

EXCEPT

- *White #1*: not admissible where there's no prob value: e.g. where accused admits AR

- *White #2*: can go to whether AR was **anticipated** (no hesitation after shooting)

- *Peavoy*: can help defeat defences based on facts (e.g. too-high mental capacity for intoxication to succeed)

- *SCB*: accused can lead POC if there's some risk to him (e.g. yes if allowed DNA test, no if yelled "I'm innocent!")

## Bad Character of Witnesses PRESUMPTIVELY ADMISSIBLE

EXCEPT

s 12 of *CEA*: can bring in witness' crim rec  
- if accused on stand, though:  
*Corbett* application to exclude (parts of) crim rec

Factors

**Timing** (recent?), **Nature** (dishonesty?),  
**Similarity** (more similar, more prej)

Defence **strategy** (attacking C wit on crim rec?  
speaking to acc's good character?)

*Cullen* exception: cannot bring evidence of prior **acquittals** to go to bad character

## Real Evidence PRESUMPTIVELY ADMISSIBLE

EXCEPT

**Tangibles**: Require either **authentication** or **agreement of counsel**.

- authentication can be by

- 1- chain of custody
- 2- by witness to events

**Photo/video**: Need to authenticate and ensure "not fundamentally misleading, then PvP test

- *Nikolovski*: video good
- *Penney*: editing bad
- *Kinkead*: too much gore also bad

## Opinion Evidence (expert & lay) PRESUMPTIVELY INADMISSIBLE

EXCEPT

Admissible if certain tests passed:

- **Statutory** req's relating to **notice** (both parties)
- **Common law** requirements (*infra*)
- Final **PvP** balancing

OPINION EVIDENCE FOR NORMOS

- *Graat*: ordinary witnesses can speak to opinions "within the experience of normal person" & not speculative

OPINION EVIDENCE FOR EXPERTS

- Requirements dictated by *Mohan*, reiterated in *White Burgess*:

### Relevance

**Qualifications**: "significantly more experience than the average person" + no "fundamental bias" (added in *White Burgess*)

**Necessity**: issue must be clearly **beyond the knowledge** of the trier of fact; standard is **not helpfulness**

### Absence of other exclusionary rules

FOUNDATION

- *Abbey*: if expert ev is missing some critical foundation, it can be inadmissible on those grounds

- However, *Lavallee*: partial lack of foundation goes to weight, not admissibility.

PRESENTATION OF EXPERT OPINIONS

- Concern is with possible "usurpation" of ToF's role.
- Consider what facts you give to expert. Often want them to rule on a hypothetical. No concrete rule against giving them everything & letting them speak to ultimate issue, but often judge won't want it [*Abbey*: gang teardrop case]
- Expert evidence cannot go to **credibility**, however.
- *Sekhon*: blind courier case. expert ev shouldn't foreclose other possible interpretations

NOVEL EXPERT EVIDENCE

- *JLJ*: this type of evidence must pass a stricter test: three non-determinative factors
- 1- is there **general acceptance** of the evidence in the scientific community?
- 2- has this type of evidence been subject to the scrutiny of **peer review and publication**?
- 3- is there a known **error rate**?

# PROCEDURE

## Fresh Evidence Motion on Appeal

Evidence must be **relevant, reliable, and critical**. [*Hay*]  
Fourth, non-determinative factor: was **due diligence** exercised at trial wrt this evidence? Somewhat more laxly-enforced in criminal than civil trials, but a lower degree of due diligence means will have to meet a higher standard of above 3 factors

## Examination-in-Chief v Cross-examination

- Examination-in-Chief (aka Direct Examination): leading questions largely prohibited except for trivial matters [*Rose*]
- Trial judge can shut down baseless cross-examination [*Lyttle*]
- Abusive cross-examination not allowed [*R (AJ)*]

## Refreshing Witness's Memory

- First, application for **Present Memory Revived** to show them the prior statement and (hopefully) revive their memory.
- If this fails, go to **Past Recollection Recorded** in Hearsay to get statement in.

## Judicial Notice

*Daley*: "notorious or generally accepted so as not to be in debate by reasonable people" OR "capable of immediate and accurate demonstration from sources of indisputable accuracy"

## Rule in *Browne v Dunn*

- must ask relevant witnesses about material issues that will later be raised [*McNeill*]

## Rebuttal Evidence

- Crown can call evidence in rebuttal if there's no way they'd know the matter would arise & it's not on a **collateral** issue

## Prior inconsistent statements

CEA s 10: if you want to cross-examine any witness on their inconsistent testimony, you need to bring the inconsistent statement to their attention (& the attention of the judge, though not necessarily trier of fact)

## Prior consistent statements

Generally inadmissible, except:

- Backing up EW ID of strangers
- Rebutting evidence of recent fabrication [*Cassibo*]
- Limited narrative exception
- Exculpatory statements of accused if they're taking the stand [*Edgar*]

## Cross-examination of own witness

- usually goes s 9(2) then 9(1)

CEA s 9(2):  
Cross-examination limited to the statement & inconsistencies.

- *SCL*: feigned memory loss can count as "inconsistent"

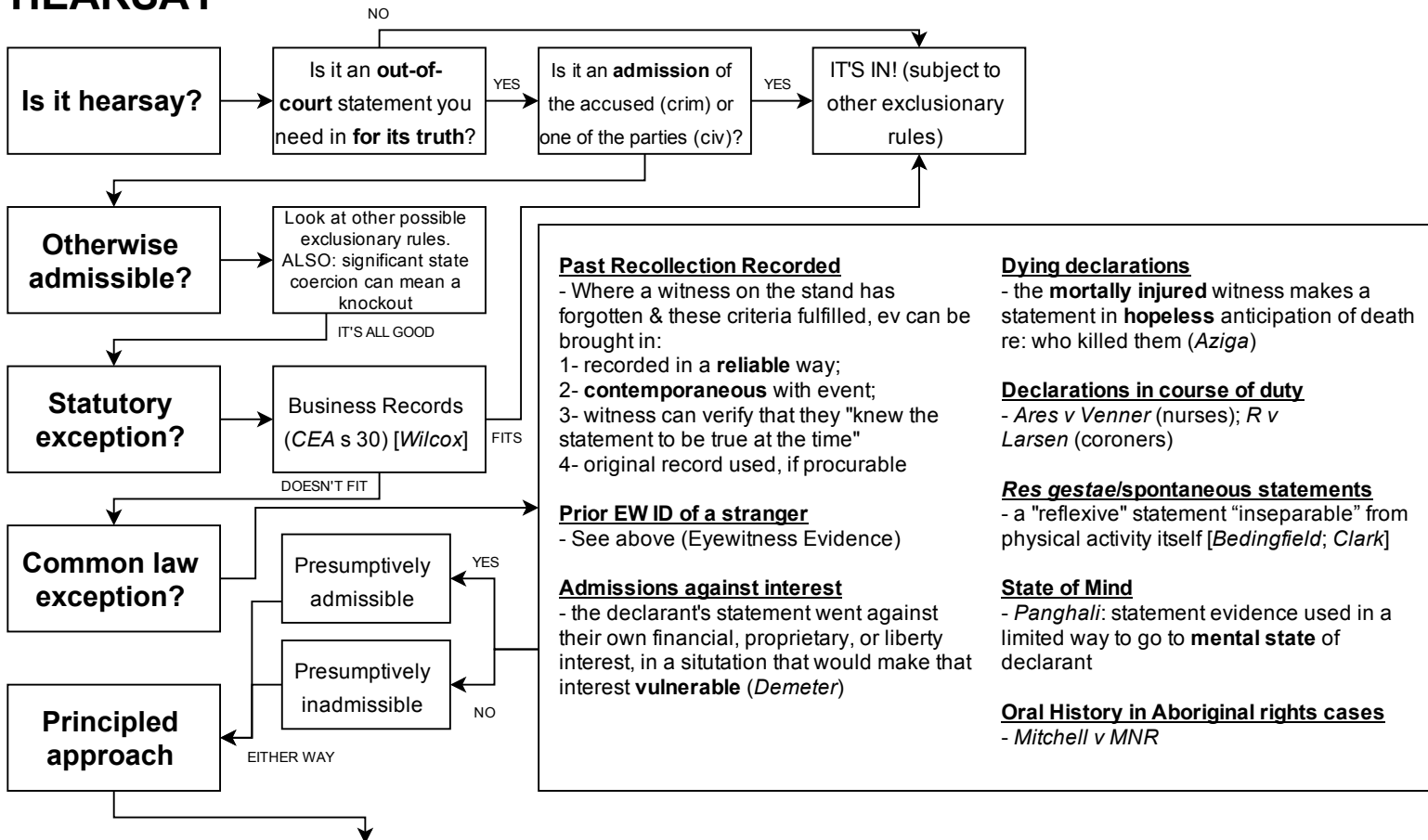
Requires [*Milgaard*):

- 1- a **prior statement**
- 2- reduced/reducible to writing, or audio recorded
- 3- shown **inconsistency**
- 4- prove **authenticity** of prior statement
- 5- in interests of **justice**

CEA s 9(1):

- allows for a wider scope of cross-examination & impeachment of credibility
- however: requires **adversity** and **positive harm** to calling party's case [*Malik; Cassibo*]
- purpose is to neutralize witness's damaging testimony

# HEARSAY



**Past Recollection Recorded**  
 - Where a witness on the stand has forgotten & these criteria fulfilled, ev can be brought in:  
 1- recorded in a **reliable** way;  
 2- **contemporaneous** with event;  
 3- witness can verify that they "knew the statement to be true at the time"  
 4- original record used, if procurable

**Dying declarations**  
 - the **mortally injured** witness makes a statement in **hopeless** anticipation of death re: who killed them (*Aziga*)

**Declarations in course of duty**  
 - *Ares v Venner* (nurses); *R v Larsen* (coroners)

**Res gestae/spontaneous statements**  
 - a "reflexive" statement "inseparable" from physical activity itself [*Bedingfield*; *Clark*]

**State of Mind**  
 - *Panghali*: statement evidence used in a limited way to go to **mental state** of declarant

**Oral History in Aboriginal rights cases**  
 - *Mitchell v MNR*

- *B (KG)* establishes two requirements that hearsay evidence must meet in order to be admitted: **Necessity** and **Threshold reliability**.

- Standard: Balance of Probabilities (*Seaboyer* for defence)

**NECESSITY**

- Usually not the critical factor, often obvious
- Party must show best efforts (**due diligence**) to get evidence through regular channels
- **Radical change** in statements by witnesses may prove necessity (first use 9(2) and 9(1), and look for absence of an intelligible rationale for change in story)

**THRESHOLD RELIABILITY**

- Two branches; both should be addressed [*Khelawon*].

PROCEDURAL RELIABILITY [*B (KG)*]

- 3 requirements that mirror what is lost in hearsay as opposed to *viva voce* testimony
- 1- **Oath**
  - consider: was the statement made under any kind of oath? was it in a formal setting, to authority figures?
- 2- **Presence**
  - best case: audio/video of statement & and preceding conversation.
  - if written, at least hopefully signed
- 3- **Cross**
  - having the declarant there is good, but if they claim not to remember the statement, hard to cross

SUBSTANTIVE RELIABILITY [*Smith; Khan; UFJ*]

- aka "inherent trustworthiness" factors
- 1- any **motivation to lie**?
- 2- any **corroborative** evidence?
- 3- **logical** coherence of statement?
- 4- statement **contemporaneous** with events?
- 5- any **state misconduct or coercion** involved?

# ADMISSIONS

## Formal Admissions

By agreement of counsel, facts about the case can be conclusively established without evidence.

- Crown cannot unduly refuse admissions [*Proctor*]
- Defence cannot admit to things Crown isn't alleging [*Castellani*]

## Informal Admissions

Generally admissible, subject to *Charter*, common law protections for acc, rule re: partial overhears [*Hunter*]  
Mr. Big cases are presumptively inadmissible [*Hart*]

## Mr. Big Confessions [*Hart*]

Presumptively inadmissible. Concern is with reliability & abuse of process.

- Consider: **vulnerability** of accused (age, experience, etc.); level of **coercion** or **inducements** offered by cops
- Court can be satisfied of confession's reliability because of corroborative evidence but still knock it out because of abuse of process.

## Confessions to police, other authorities

Presumptively admissible; however, Crown must establish **voluntariness** beyond a reasonable doubt.

- "operating mind" doctrine
- plus, can knock out under abuse of process any evidence obtained via police trickery that would "shock" the community
- can't use improper methods of persuasion —e.g. can use moral inducements, but not legal inducements; can't use threats

### TEST

- 1- Threat or favour (legal inducement) was put out there
- 2- Threat or favor was explicitly/implicitly tied to talking
- 3- Causative (1 is linked to 2 and talking resulted)

## In joint trials

Admissions, other ev can be edited to reduce prejudice to other accused. [*Grewall*]

## *Charter* protections

s 10(b): right to retain and instruct counsel without delay & be informed of that right

- **informational** component: you have to be told you can contact a lawyer
- **implementational** component: cops have to help you speak to a lawyer if you want to, within a reasonable timeframe
- **restrictive** component: cops can't ask questions of you while waiting to talk to the lawyer
- s 8: search and seizure

## Right to silence (under s 7):

- *Singh*: "right to silence" while in custody covered by voluntariness; is common knowledge and does not need to be expressly communicated to every individual, but as cop-citizen interaction becomes more intense, police should inform the person of their rights
- *Turcotte*: right to silence isn't just on detention/arrest; always applies. Cannot make negative inference from invoking right to silence.
- *Profokiew*: accused can point to their forthcomingness as a plus, but not their co-accused's silence as a negative

## Right against self-incrimination (s 13)

- testimony as a compelled witness cannot be used against that witness in a subsequent criminal trial—including derivative ev
- however, *Nedelcu*: past testimony on "innocuous" issues can be used to impeach credibility
- Statutorily-compelled testimony also counts: *BC Securities Commission v Branch*.

## *Charter* limitations

s 24(2): judge has discretion to exclude any evidence obtained in violation of *Charter* if it would serve "interests of justice"

- (1) was there a breach? (2) was evidence obtained through breach?
  - (3) would admission of evidence bring administration of justice into disrepute?
- statements usually out
  - Consider [*Grainf*]:
  - 1- **seriousness** of state misconduct (police "good faith" etc.);
  - 2- **severity** of infringement (from accused's prospective)
  - 4- **reliability** of evidence (did *Charter* breach mean less reliable evidence was obtained?)

## Derivative evidence

It's not just "otherwise discoverable". But just use otherwise discoverable.

# PRIVILEGE

## Class Privilege

Automatic *prima facie* inadmissibility for any evidence obtained through breach of class privilege.

- Only type we're responsible for is solicitor-client. (others: spousal, informant)

### ATTORNEY-CLIENT PRIVILEGE

- Requirements
- 1- must be a **lawyer**
- 2- giving **legal advice** (lawyers wear many hats)
- 3- that's intended to be **confidential** (having third parties in the room can be complicating here)
- 4- and isn't about how to **break the law**.

## Case-by-case privilege

- Any other privilege, including doctor-patient, journo-source, etc. has to be evaluated case-by-case.

- Requirements:
- 1- Intended to be **confidential**
- 2- Confidentiality must be **essential** to the full and satisfactory maintenance of the relation between the parties
- 3- The relation must be one which in the opinion of the community ought to be sedulously fostered.
- 4- The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation [cost/benefit analysis]

## Exceptions to privilege

- **Inadvertant disclosure**: is not an exception & does not breach privilege except in the most egregious of cases. [*Airst v Airst*]
  - **Public safety exception**: requires 1- a clear risk to a person or identifiable group 2- that the risk be serious and 3- imminent.
  - **Waiver**: explicit or implicit. **Implicit** includes testifying to the fact that you went to a lawyer as a factor in your favour [*Shirose and Campbell*].
  - **Innocence at stake**: *McClure*: must go to a core issue with a genuine risk of wrongful conviction; accused not able by any other means to raise a RD.
- Two-stage test: show some evidentiary basis for request, then judge looks at ev and determines whether it could raise an RD as to factual innocence. (poss. including of a greater offence in favour of a lesser included offence)