**CHAPTER 1: PROOF IN JUDICIAL DECISION MAKING**

**EVIDENCE** => The means by which parties attempt to prove/disprove matters in a case \**most times, cases come down to whether evidence can be admitted*\*

* This course: perspective from a criminal law context with a jury in the room
  + Heavily litigated (= lots of case law) & rules of evidence are more clearly defined (=purity to analysis b/c A liberty @ issue) \***same rules of evidence often used in other arenas of law, but made more flexible**\*

*SOURCES*

1. **CL**; arguments, more statutory? (i.e. like US, accessible) \*but: more flexibility, apply depending on the facts\*
2. **STATUTORY**: **Canada Evidence Act** (CEA) \*note there is also a **BC Evidence Act**, more civil claims => mirror each other in # of ways\*
3. **CHARTER**: s.7, 11 => impact many of the CL evidentiary rules

*ISSUES OF EVIDENCE WE WILL LOOK AT*:

* **Admissibility** => whether to ToF (trial judge) wants to hear the evidence
* **What purpose is the evidence coming in for?**
* **Weight =>** how much weight should it be given, despite its admissibility
* **Timing** => evidentiary issues can arise throughout a proceeding:
  + *Pre-trial:* best place to deal w/ issues of evidence (can focus on it & know what the evidence is before trial begins, can change how you proceed/frame of your case)
  + *During the trial*
  + *Appeals*

1. Intro
2. **Qualified Search for the Truth**

\**BIGGER PIC*: not just a bunch of rules => \**central guiding principle: weighing the good vs. bad*\*

* How can this be done? What will the central area of analysis be?
  + “fair trial” => basic components: **truth & justice** \*related but NOT the same\* ***NOEL***
  + ***EVIDENTIARY Q’s:* \*will it assist the search for the truth???\* Does it do more good than bad?**

***R. v. Noel***

(2002) SCC

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| **ISSUE** | * + - **What broader principles guide the admissibility of evidence?** |
| **REASON** | * + - \**balancing the integrity of the judicial process and searching for the truth*\*     - “the **search for the truth must be qualified** in appropriate circumstances where other more valuable principles apply (i.e. fair trial, deterring police misconduct, preserve integrity of justice system).. are all laudable goals to which this Court must strive in its rules of evidence, at times to the detriment of full access to the truth” |
| **RATIO** | * **Truth should be one of the driving forces behind evidentiary decision, but in some cases broader principles will contribute or even determine the analysis (over the truth)** |

*\*\*what about the concept of JUSTICE: broader q’s => policy, integrity, reputation, fairness,*

* + - If truth were the only guiding force, often @ expense of fairness, acting unfairly to achieve truth \**lose confidence in the justice system*\* => ***implicitly encourages police to engage in any methods to find truth***
    - Often: policy considerations are important

*= why it is a QUALIFIED search for the truth*

**Basic formula @ heart of every evidentiary issue: \*\*Weighing the probative value vs. its prejudice\*\***

* *Probative value*: usefulness in assisting search for the truth
* *Prejudicial value*: very *broad def. is necessary* => **bad to A/trial fairness, justice system or community as a whole**
  + Pre-judging the case, detracts us from the search for the truth
  + Prejudicing an institution, detracts the reputation of our justice system
  + Takes too much court time!! A search for the truth can take far too long! \*value of efficiency\*
  + Another societal relationship we want to preserve at a cost for the search of the truth (i.e. privilege)

1. **The Adversarial System**

* *Other systems*: where the judge takes on a number of roles, judge is an active participant
* *OURS*: responsibility in the hands of counsel => adversaries in the courtroom and the judge a passive role, not there to run the proceedings and make the decisions re: what evidence to present \* *are decisions of counsel*\*
  + *KEY*: duty not to MISLEAD the court!

***R. v. Swain***

(1991) SCC

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| **FACTS** | * A ran certain defences, Crown decided they should run an NCRMD defence, but A did not want to |
| **ISSUE** | * + - **\*\*WHO controls the defence?\*\* => right of Crown to raise NCRMD over A’s objections** |
| **REASON** | * + - **S.7**=> **PoFJ A has right to make fundamental decisions about the conduct of his/her defence**     - *\*deeper underlying principles:*  1. respect for autonomy and intrinsic value of all individuals 2. adversarial system; each side makes the decisions regarding which evidence to adduce, right to prepare the case themselves |
| **RATIO** | * **A gets the right to decide the issues they want to raise and which defences they want to put forward** * **Crown runs their case and defence runs theirs => an adversarial position** |

* + - Sometimes, the defence cans loose that control inadvertently => i.e. want to argue MR & intent, but raise some issue of A’s psychiatric issues; *D can open the door that would otherwise be closed*

*KEEP IN MIND => \*\*NOT purely adversarial\*\**

* + - Judge determines: admissibility (but still, may not be called strategically, even if admissible) integrity of court procedures (can say they are ‘stepping over the line’)

1. **DISCLOSURE; Discovery in Criminal Cases**
   * + **Providing to A all fruits of the investigation** (*CIVIL:* P and D have reciprocal disclosure duties to provide each side with all the relevant material they have in their possession)
       - A has little duty to the Crown (alibi, expert); Crown has broad disclosure duties to the D
       - ***ALL relevant material well before the trial \*\*and NOT just material that may/will be admissible\*\****
     + *WHY? Purpose*: \****Charter right*** => fair trial, full answer and defence
       - D may want to stress/use certain evidence differently than the Crown => must have access to it
       - (1)\*theme in wrongful convictions: failure to provide full disclosure
       - (2) practical/strategic purpose: lawyer for D- does any real defence exist? Can Crown prove case BARD?
     + Many cases are bogged down in fights over disclosure; multiple applications => disputes brought to trial judge who makes the ruling
     + *Consequences if failure to disclose/disclosing too late*:
       - A) possibility of mistrial
       - B) lengthy adjournment => dangerous b/c if too much delay, breaches right to be tried in “reasonable time”
       - *Civil*: costs, excluding evidence

***R. v. Taillefer; R. v. Duguay***

(2003) SCC

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| **ISSUE** | * Nature of Crown’s duty to disclose and consequences of breaching that duty |
| **REASON** | * *KEY underlying principles of disclosure* => protects A’s right to full answer and defence & can play a sig. part in judicial errors * ALSO: consistent w/ role of Crown as “truth seeker”; goal is NOT to obtain conviction, but to present all credible evidence (*BOUCHER*) * Failure low threshold in terms of what material has to be turned over \**RELEVANCE (to charge & defences) => broad definition; must err on side of inclusion*\*   + - BUT: *does* ***not*** *have to disclose* (1) what is clearly irrelevant (2) privileged (confidential informant, solicitor-client material- a list of its existence can be provided, *LAPORTE*) * *FAILURE to disclose* => 1) affected the outcome of the trial OR 2) affected to trial’s overall fairness   + - Key: NOT examining the undisclosed evidence in a vacuum; instead, reconstructed the whole picture |
| **RATIO** | * **BASIC TEST: is there a *reasonable possibility* (NOT probability) that it would be of use to the defence** |

* + - Privileged or highly sensitive material => new development that is occurring now, special arrangements made for the defence lawyers only to be able to view all of the sensitive/privileged material (must sign a K that they will not disclose its contents to anyone including their client) => usually followed by informal negotiations (avoid the war in front of the trial judge, cannot give helpful submissions if have not seen it!

1. Probative value, Prejudicial Effect & Admissibility

\*\*GENERAL RULE: all relevant evidence is admissible unless barred by a specific exclusionary rule (***FFB***)\*\*

*P/P: \*\*a basic CL test that EVERY piece of evidence has to meet\*\**

* + - In certain areas of evidence => this balancing has to be done very careful and is actually formally done (other areas, test must be met, but is not a formal process)
    - ***PROBATIVE***: does evidence have some use to the case? If irrelevant, not necessary
      * *MATERIAL & RELEVANT* => if so, has probative value \****a scale, more M&R, more probative value***\*

***R. v. Arp***

(1998) SCC

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| **ISSUE** | * **What = Probative value?** |
| **REASON** | * + - RELEVANCE: depends on the facts in issue in any particular case => the evidence must ***simply tend to increase or diminish the probability of the existence of a fact in issue*** |
| **RATIO** | * DISTINGUISH b/w probative value & relevance: can be relevant, but still inadmissible b/c has little probative value \*\***threshold of probative value => slight probative value can be outweighed by its highly prejudicial effect**\*\* |

**PROBATIVE VALUE TEST**

* **(1) is the evidence connected to a *fact at issue*?** (material)
* **(2) does the evidence *make the existence of that fact at issue more or less probable*?** (relevance)

*Factors in Determining Probative Value:*

* + 1. the proximity of the evidence to the timing of the offence;
    2. the clarity of the evidence;
    3. the general nexus between the evidence and the fact in issue

*POTENTIAL PREJUDICIAL EFFECTS: \*detract from search for truth\* PREJUDICIAL to (1) A (2) CJS\**

* + - Bad people tend to do bad things again
    - Make A pay for their conduct
    - ToF can be distracted from real issues of case (*Seaboyer*)
    - May cause ToF to not properly apply the burden of proof
    - Unfairly arousing jury’s emotions (*Seaboyer*)
    - Issue will consume an undue amount of time (*Seaboyer*)

***R. v. Seaboyer***

(1991) SCC

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| **ISSUE** | * **How to balance probative value vs. prejudice** |
| **REASON** | * LEGAL RELEVANCY: MUST look at the specific evidence attempting to be introduced and its relation to an issue at trial \**NOT IN A VACUUM*\* * HOW it may unfairly prejudice; counterbalancing factors such as unduly arousing jury’s emotions, distract the jury, consume an undue amount of time |
| **RATIO** | * **Legal relevancy must be addressed in relation to a specific issue at trial; is there a logical or practical link? Or is its value “trifling” in comparison to its prejudicial effect?** * **Can the evidence serve a legitimate purpose at trial?** |

* KEY: probative value rises if there is more proximity/clarity/specific in the evidence as it *RELATES* to the case

***DISPARATE STANDARDS/THRESHOLDS***

* + Threshold for Crown if the prejudicial value outweighs the probative value by the smallest amount then the evidence will not be admissible
    - * Crown can’t lead evidence solely for prejudicial effect
  + **Threshold for Defence – “*Seaboyer* Standard”**  Prejudicial value must ***substantially* outweigh** the probative value in order to result in the evidence being inadmissible
    - * *PURPOSE* : This is not as strict a test for getting information in as C is subjected to bc want to guard against wrongful convictions.

***R. v. B.(F.F.)***

(1993) SCC

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| **ISSUE** | * Probative value vs. prejudicial effect in relation to character evidence * Whether instructions to the jury re: prejudicial evidence is necessary |
| **REASON** | * *Character Evidence:*  1. Must relate to issues beyond disposition/character (i.e. credibility) 2. Probative vs. prejudicial  * KEY: if admissible => *JURY MUST RECEIVE SPECIAL INSTRUCTIONS*   + - “(must) properly instruct juries as to the use....of evidence which is highly prejudicial to the A”; w/out proper instructions, may misuse the evidence and could result in an unfair conviction |
| **RATIO** | * **Evidence that is admissible yet highly prejudicial requires special instructions to the jury re: how to properly use the evidence to avoid unfairness in the trial process** |

***R. v. Penney***

(2002) Nfld CoA

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| **ISSUE** | * Concern re: allowing all relevant evidence to be admitted , leaving weight to be determined by the ToF |
| **RATIO** | * **Best assurance of safe convictions: ensuring strict application of proof BARD** |

1. Types of Evidence
2. **DIRECT vs. CIRCUMSTANTIAL**

***R. v. Dhillon***

(2001) BC CoA

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| **ISSUE** | * Direct vs. Circumstantial evidence |
| **REASON** | * *DIRECT*: **goes directly to the proof of a fact at issue**   + - 2 possible sources of error: 1) mistaken 2) lying * *CIRCUMSTANTIAL*: **indirect evidence; evidence of a chain of circumstances from which you are asked to draw inferences which may lead to the proof of a fact at issue**   + - 3 possible sources of error: 1) mistaken 2) lying ***\*\*3) the wrong inference can be drawn from the circumstances\*\**** |
| **RATIO** | * **Both direct and circumstantial evidence are admissible as a means of proof** * **However, the possibility of error when dealing with circumstantial evidence is greater b/c must be satisfied BARD that A’s guilt is the only reasonable inference to be drawn** |

***R. v. Robert***

(2000) Ont. CoA

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| **FACTS** | * Case against A’s was purely circumstantial; trial judge convicted based on the lack of proof for the A’s explanation for the fire |
| **ISSUE** | * **Must an A provide an alternative reasonable explanation for circumstantial evidence other than an inference of guilt?** |
| **REASON** | * + - *\*\*must separate\*\**   A) finding of a reasonable inference drawn from circumstantial evidence and  B) the presence of proof BARD of A’s guilt   * An A does *NOT have to provide a reasonable explanation for the circumstantial evidence* => NO obligation on an accused to prove anything by way of reasonable conclusion or reasonable inference |
| **RATIO** | * **It is NOT the A’s responsibility to provide a reasonable explanation for an inference (i.e. guilt) that can be drawn from circumstantial evidence** * **INSTEAD: guilt can only be found if there is NO *OTHER* RATIONAL EXPLANATION for the circumstantial evidence but guilt**   + - ***Don’t have to accept or believe this evidence, but it can raise a reasonable doubt; takes away evidence that could be used to raise reasonable doubt*** |

***R. v. Baltrusaitis***

(2002) Ont. CoA

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| **ISSUE** | * + - Can ONLY evidence that is “credible and reliable” be used to find reasonable doubt? |
| **RATIO** | * **Finding an A not guilty is based on ALL evidence, not only evidence that is credible and reliable** |

* *Argument*: Defence evidence should be credible & reliable before it is put in the threshold
  + There should basically be a “screening process” to get rid of evidence that does not pass a threshold lvl
  + SO: judge should give the jury an instruction that this threshold applies; in numerous cases, such an instruction has been given, i.e. “the evidence you use is only that which you “believe”, must deliberate only with that evidence”
  + \*must “accept or believe” before evidence goes into “decision-making pot”\*
* **PROBLEM:**
  + CANNOT have different standards/thresholds for crown vs. defence evidence!
    - * *Don’t want jurors to look at individual pieces of evidence* => instead, should look at evidence as a whole \*def never use a proven standard for individual evidence (this was clear from the case law) \*WHY? => some evidence may be diff. if looked at alone vs. in context w/ other evidence\*
      * \*\**standard of “accepted and believed” is fundamentally inconsistent with the burden of proof*, cuts off evidence which may support a defence, or may support reasonable doubt \*acquit based on evidence they don’t believe or don’t accept!!!

1. **REAL vs. DEMONSTRATIVE**

* Evidence that is tangible; presented to the jury in an inanimate form => just b/c tangible, not necessarily admissible = still apply probative/prejudicial weighing

1. *VIDEOTAPES*

***R. v. Penney***

(2002) Nfld. CoA

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| **ISSUE** | * **The standard in determining admissibility of videotape evidence; probative vs. prejudicial value** |
| **REASON** | * Use the factors considered in assessing admissibility of photographs (*CREEMER*)  1. *Accuracy in truly representing the facts* (i.e. by security camera vs. operated by a person who selectively videotapes) \*depicts entire event w/out gaps?   => DEPENDS On what it is being used for\* (no problem for identification, but yes for being used to demonstrate a sequence of events)   1. *Fairness and absence of intention to mislead* 2. *Verification by oath of a person capable of doing so*  * *PRE-CONDITION TO ADMISSION*: \*\*ensuring the video has NOT been altered or changed\*\*   + - Was it edited in a way that distorts the truth? |
| **RATIO** | * **To be admissible videotape evidence must accurately depict the facts and cannot have been altered or changed (judged on a BoP)** * **Analysis depends on WHAT (PURPOSE) it is being used for (i.e. identification vs. sequence of events)** |

* KEY: Can be a “wonderful witness” => video allows the ToF to directly see what happens; usually highly probative
  + BUT cannot make assumptions that is always probative & admissible
* *NIKOS: two basic processes:*
  + 1) ***AUTHENTICATION***
    - * + Where did this come from? Does it represent the incident/time in Q?
        + HOW? (1) the person that shot the tape, (2)play it and have someone who was there saw it is also constitutes/represents what they saw, (3) testify to the setting up of the system/cameras
  + 2) ***PROBATIVE/PREJUDICIAL***
    - * + A) accurate representation? Must capture a relevant issue in the events; best: ENTIRE, relevant scene from a good vantage point?

Motive of the person videotaping? (bad motive may go to prejudice, b/c concerned w/ things that may be misleading)

Editing, gaps, format changing?

* + - * + B) \*\**ANALYSIS depends on the PURPOSE that you are leading the evidence*\*\*

i.e. different threshold or identification vs. sequences of events; probative value may diminish b/c of gaps for one purpose but not other, increasing the potential prejudice

* + - * + \*\**PENNEY* => potential prejudice in terms of distracting us from a proper search for the truth

1. *PHOTOGRAPHS*

***R. v. Kinkead***

(1999) Ont. Superior Court

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| **ISSUE** | * The standard in determining admissibility of photographic evidence |
| **REASON** | * *BASIC TEST*: probative vs. prejudicial * PREJUDICE: **the danger that the jury will use the photos for purposes other than drawing the inferences and conclusions they are introduced for** (unnecessarily inflame the jury’s emotions to debilitate their search for the truth\*\**in spite of court instructions to the contrary*\*\*   + - \*\*must assess the jury’s ability to properly follow instructions     - HOWEVER: **any prejudice alleged MUST have an AIR OF REALITY and cannot be merely speculation or conjecture** |
| **RATIO** | * ***TEST*: It must be REASONABLY CONCLUDED to cause the jury to disregard other evidence and to interfere with their sworn deliberation duties to be too prejudicial to be admissible** |

* *FACTS:* Crown wanted to show close-ups, etc. with the intention of trying to prove that one victim was the target
* *Strategies to avoid potentially prejudicial photos:*
  + Judge does editing to resolve the controversy
  + Defence can deflect arguments that some photos need to be admissible for probative value by admitting to the facts the photos are trying to demonstrate

1. **DOCUMENTS**

*\*DOCUMENTS as evidence—EXHIBITS\* (at this point NOT abt admissibility of the contents of the documents)*

1. *AUTHENTICATION*

***Lowe v. Jenkinson***

(1995) BC

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| **ISSUE** | * + - Admissibility of documents as evidence |
| **RATIO** | * **To be admissible, a document must be authenticated as an accurate reproduction/representation** |

* + - If “shaky” buts gets over authentication threshold, this could nevertheless hurt its probative value
    - *HOW?*
      * Call the person who created the minutes
      * Or more indirectly: can someone who can vouch for the document being consistent with the “original”, or just b/c was found in possession of someone

1. *BEST EVIDENCE RULE*

* ***Old rule NO LONGER APPLICABLE => applied flexibly***: a party must produce the best evidence that the nature of the case will allow, and any less good evidence is to be excluded
  + - *Idea behind it*: evidence presented in court should be in its original form => if you have the original use it! (least chance that will
      * *\*\*reason why rule is not strict*: live in modern world of computers, photocopies => so can be difficult to say what “original” is and practically, better to put them on CD to send out to all parties/preserve them
      * *NOW*: acceptable practice to use various forms that are not necessarily original/best, but are VERIFIABLE copies *\*\*fits into whole authentication debate => authenticate the process*; authenticate back to the original; if original gone, must present evidence that it is a reliable copy

***Garton v. Hunter***

(1969) HoL

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| **RATIO** | * **All relevant evidence (barring an exclusionary rule) is admissible and the “goodness or badness” of it goes to its weight, NOT its admissibility** |

***R. v. Controni & Papalia***

(1979) SCC

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| **ISSUE** | * + - Admissibility of re-recordings as evidence, despite it not being “best evidence” |
| **RATIO** | * **Non-originals are inadmissible unless it is shown that:**  1. **The original’s destruction was accidental or done in good faith, without intention to prevent its use as evidence \*NO FRAUD\*** 2. **The non-originals are authentic** |

***R. v. Bell and Bruce***

(1982) Ont. CoA

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| **ISSUE** | * + - What is the standard for determining “authenticity” or “true-copies” of originals? |
| **RATIO** | * **A computer print-out constitutes a “copy” under the *CEA* even thought the form in which the information is recorded changes; rules of evidence must adapt to changing technology** |

***R. v. West***

(1989) BCCA

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| **ISSUE** | * + - Is a computer print-out admissible? |
| **RATIO** | * **A computer print-out constitutes a “copy” and is admissible; questions as to its accuracy goes to weight rather than admissibility** |

***Can v. Betterest Vinyl Mfg. Ltd.***

(1990) BCCA

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| **ISSUE** | * + - Does the best evidence rule still apply or are copies admissible w/out adducing evidence as to why the originals are unavailable?     - If available, are originals required? |
| **RATIO** | * **The best evidence rule no longer applies; however, evidence must be lead that supports the authenticity of the copies** |

1. Judicial Notice

* **BASIC IDEA**: *Counsel is responsible for leading evidence to support the factual/legal submissions you want to make at the end of the day*
  + SO: MUST focus on exactly what evidence is being lead => if miss something, cannot at the end present a logical conclusion if did NOT present evidence on it
  + But: **JUDICIAL NOTICE** => ‘saving grace’, ***use if don’t lead evidence on a certain fact, but want to rely on it***
    - * + \*BUT: NOT too reliable => up to judges’ discretion, so usually, preferable to call specific evidence \*
* Procedurally: depends, but typically =>
  + 1) contact the other side: can we make an admission?
  + 2) in pre-trial conference; make court aware of the possibility to taking judicial notice (i.e. could lead evidence, but do not want to waste courts’ time so maybe judicial notice is appropriate)

***Olson v. Olson***

(2003) Alb. CoA

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| **FACTS** | * Chambers judge concluded that no evidence was required to show that sports training would advance a career and instead relied on judicial notice |
| **ISSUE** | * What is judicial notice and when can it be taken? * *SPECIFIC:* can participation in athletic activity lead to career opportunities? \*in the absence of specific evidence => could the judge make this finding? |
| **RATIO** | * **JUDICIAL NOTICE: *“acceptance by court or judicial tribunal, w/out req. of proof, of the truth of a particular fact or state of affairs”*** * **STRICT THRESHOLD for JUDICIAL NOTICE: facts that are**  1. **So notorious or generally accepted as not to be the subject of debate among reasonable persons OR** 2. **Capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy** |

* Onus on party trying to lead proposition to present specific evidence on it (could have done so in a variety of ways” specific evidence for that child, or expert evidence to support the proposition generally)
  + Once start to lead evidence, do not have to meet the strict standard for judicial notice => then up to the other side to lead contrary evidence

**CH. 2: EXTRINSIC MISCONDUCT EVIDENCE**

* “extrinsic misconduct evidence” => evidence outside the allegation that makes the person look ***GENERALLY*** bad
* ***PRESUMPTIVELY inadmissible*** (1) waste of time & (2) can lead ToF to jump to erroneous conclusions
  + BUT: if has some probative value => *P/P WEIGHING*

1. Bad Character of the Accused

* (*CUADRA*) Well-accepted principle: **CANNOT adduce evidence of prior criminal conduct of an A in order to show that by reason of his/her bad character he is more likely to have committed the offence** \*\*UNLESS:\*\* (*looking for some* ***other purpose***)
  + 1) it is relevant to some other issue beyond disposition or character AND
  + 2) probative value outweighs the prejudicial effect (then => dealt with via jury instruction)

1. **GENERAL ADMISSIBILITY**

***R. v. Cuadra***

(1998) BC CoA

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| **FACTS** | * Assault case where a key witness gave conflicting statements; recanted sworn testimony he gave at prelim about never seeing a knife on the A * Trial judge allowed Crown to adduce evidence of A’s character to “rehabilitate” the witness’ inconsistent testimony, despite D’s arguments that the prejudicial effect of the evidence outweighed its probative value |
| **ISSUE** | * + - Was bad character evidence of the A admissible to explain why the key witness gave conflicting statements?     - Was the evidence relevant to another issue beyond character and did the probative value outweigh the prejudicial effect? |
| **HOLD** | * + - Admissible b/c relevant to a key witness’ credibility and high probative value |
| **REASON** | * (1) *ANOTHER PURPOSE:* Certainly the evidence was ***relevant to the witness’ credibility***    + - Here: just b/c the witness not directly threatened ≠ inadmissible     - A witness should have the right to explain inconsistencies * (2) *Probative vs. prejudicial*? => highly probative AND ***any concern that may arise can be resolved by detailed jury instructions*** \*limit the use to which they can make of the evidence\* |
| **RATIO** | * **Evidence of the A’s bad character can be admissible if it is relevant to another issue at trial beyond character and the probative value outweighs its prejudice** * **The prejudice created by admitted the evidence can be resolved by making it clear to the jury the limited use they can make of the evidence** |

1. **SIMILAR FACT EVIDENCE**

* (***HANDY***) Generally, **similar fact evidence is prohibited as circumstantial proof of conduct**
  + *DANGER*: jury may confusing multiplicity of incidents and put too much weight than is logically justified
  + ***“may capture the attention of the ToF to an unwarranted degree” => promote tunnel vision***
* *EXCEPTION*: HIGH threshold => but can use the evidence in a fairly direct manner
  + **Similar fact evidence is admissible if it shows a *distinct and particular* propensity to act in a specific way under specific circumstances** (as opposed to a general propensity to do bad things).
  + *SO: prior bad acts demonstrate a specific course of conduct relating to the CURRENT act* **=> *probative value b/c of improbability of coincidence***

*\*\*Worried about TWO kinds of prejudice:*

1. **MORAL**: risk of an unfocussed trial and a wrongful conviction
2. **REASONING**: distracting jury from charge itself

***R. v. Handy***

(2000) SCC

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| **FACTS** | * Sexual assault case where Crown introduced evidence of A’s ex-wife about 7 alleged “similar fact” incidents => Appealed b/c D argued on basis that it was outside the subject matter of the indictment and highly prejudicial to a fair trial * Main issue at trial: credibility of A (consent) * Crown sough to intro the evidence to demonstrate that A has propensity to inflict painful sex and when aroused, will not take no for an answer * At trial, judge admitted the evidence b/c it “if believed” est. a pattern of behaviour and that was not for him to resolve the possibility of collusion |
| **ISSUE** | * When can similar fact evidence be admissible when the credibility of the A is at issue? |
| **HOLD** | * + - Agreed w/ CoA which also found that the **evidence was wrongly admitted and ordered a new trial** |
| **REASON** | * KEY: ***usefulness of the evidence rests entirely on the validity of the inferences it is said to support*** \*degree of relevance and strength of inference\* * ***NARROW exception*** *of admissibility*: SO highly relevant and cogent that probative value for truth outweighs any potential for misuse \*BoP\*   + - “**affront to common sense to suggest that the similarities were due to coincidence**”     - = Defies coincidence or an innocent explanation * TEST: Probative vs. Prejudicial => “disposition” or “propensity” evidence CAN be admissible (but is presumptively inadmissible)  1. ***POTENTIAL FOR COLLUSION***: if present, on ***AIR OF REALITY*** destroys the foundation on which admissibility is sought b/c provides an innocent explanation 2. ***what is the “issue in Q”*** (= important control) => the purpose for which the evidence is offered “Crown *must identify a live issue in the trial to which the evidence of disposition is said to relate*” 3. ***Identification of the Required degree of similarity*** *(“general propensity” = insufficient)*    * + Do connections reveal a “degree of distinctiveness or uniqueness”? 4. ***Identification of CONNECTING factors*** => evidence appropriately connected to the facts alleged in the charge?    * + \*character (conduct complained of?), proximity in time, frequency of occurrence, similarity in detail, surrounding circumstances, any intervening events?      + \*\*NOTE: similar fact evidence need NOT be conclusive\*\* |
| **APPLIC.** | * + - HERE: collusion a huge issue that trial judge failed to deal w/ as part of “gate-keeper” function     - Issue in Q: consent component of AR and A’s alleged propensity to take no for an answer     - *SIMILARITIES:* trial judge paid insufficient detail to the dissimilarities; broader context of relationships different * Judge understated the potential for distraction and prejudice => threshold for admittance was too low |
| **RATIO** | * **Similar Fact evidence is presumptively inadmissible unless on a BoP it can be shown that its probative value outweighs its prejudicial effect** |

* *NOTE*: for admissibility of 3rd party propensity evidence see *Grandenetti*
* *STEPS*:
  + 1) ***presumptively inadmissible***
  + 2) SIMILARITY?
    - * Timing, conduct, surrounding circumstances, number of other incidences, etc.
      * If does not meet the similarities threshold => is there another way to bring the evidence in?
  + 3) Alternative Explanation
    - * \*\*Defence lifeline => collusion? “air of reality”? \**CROWN*: BoP no collusion\*
      * \*\*Does this go to admissibility or weight? => *HANDY*: usually WEIGHT

1. **POST-OFFENCE CONDUCT**

* Can also be used in torts => particularly with intentional torts
* Interesting area of evidence, b/c conceptually it has been simplified
  + \*however: errors often made (sometimes in its admissibility, but more so in its use after admitted)
  + ***Peavoy, white***: “de-mystification” => it really is just circumstantial evidence that arises after the alleged offence that can assist ToF in determining guilt/innocence
* Theory behind its ***probative value***: the A through his or her conduct after the offence is showing a “consciousness of guilt”. \***conduct consistent with how a guilt person would act**\*. 2 major CATEGORIES:
  + 1)*Attempts to avoid detention* (i.e. fleeing the scene, cleaning up the area)
  + 2) *Attempts to avoid successful prosecution* (i.e. bribing witness, obstructing justice)
  + Probative value however, can have a large range => depends on the specific facts of the case \****MUST BE RELEVANT TO A FACT AT ISSUE*** (*Peavoy*)\*
* *Why has the court struggled with this evidence?*
  + 1) it has inherent prejudice: types of evidence you would call is extrinsic misconduct evidence
  + 2) (*White*) Type of evidence that can cause people to jump to conclusions => jurors associate far too much weight to this type of evidence
  + SO: courts say they ***want very clear probative value*** before we allow it to be led (*WHITE*)

***White v. the Queen***

(1998) SCC

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| **FACTS** | * After alleged crime, A fled town, made comment to a witness and tried to dispose of a gun = > all of which was used as evidence of post-offence conduct to support their guilt * The A however held that their conduct could be explained by the fact that they were violating their parole and that they acted so b/c of other crimes they committed (not the alleged murder) * The trial judge and CoA disagreed that the evidence had no probative value and admitted it |
| **ISSUE** | * Did the trial judge properly instruct the jury re: inference to be drawn from post-offence conduct?   + - Should the trial judge have instructed the jury that post-offence conduct had “no probative value”?     - Should the jury have been instructed to draw no inferences unless believe post-offence conduct was motivated by charge and not by another cause? |
| **HOLD** |  |
| **REASON** | * *Review of the law*   + - Conduct of A after a crime can provide circumstantial evidence; but, like most circumstantial evidence can be ambiguous and ***susceptible to jury error for failure to take account of alternative explanations***     - ***Arcangioli***: jury is not permitted to consider post-offence conduct when A has admitted culpability for another offence and the evidence cannot logically support an inference of guilt w/ respect to one crime vs. other   *Post-Offence conduct going to a lvl of culpability*   * KEY: distinguished the facts here b/c although A admitted culpability to another offence, the issue was their IDENTITY and NOT their degree of guilt re: culpable act admitted to \*depends on facts of the case\*   + - Only take-over fact-finding role and instruct “no probative value” in lmtd. Circ. => NOT required where A denied involvement in facts of underlying charge (despite trying to explain actions by reference to an UNRELATED culpable act) * *STANDARD of PROOF* for post-offence conduct: ***BARD ONLY applies to final determination of guilt/innocence => NOT to individual pieces/categories of evidence\*do not want evidence piecemeal, should be considered comprehensively\****   + - Defeated argument that b/c of the uniqueness of post-offence-conduct evidence => BARD should apply to this piece of evidence specifically     - \*\*concerns can be dealt with through LIMITING INSTRUCTIONS     - \*\****EXCEPTION***: if Crown’s case almost entirely based on post-offence conduct (the “driving-force” behind the crowns case) => here: obviously ToF must believe it BARD in order to convict (logical vs. a new “rule”) |
| **RATIO** | * Adjust how refer to it: “consciousness of guilt” (which pre-supposes guilt!) => just call it “post-offence conduct” * **If provide a REASON => NO “no probative value” instruction required if A is still denying basic involvement in the underlying charge \*only if issue is degree of culpability is it required\*** * it is up to the ToF to decide b/w the 2 explanations (guilt vs. other explanation- so long it is reasonable) \**fact that there are competing explanations does not rob it of its probative value*\* * NO special evidentiary standard for post-offence-conduct evidence => concerns can be dealt with via limiting instructions (i.e. other explanations, not to jump to conclusions) |

*CAVEATS to keep in mind:*

* Crown must show that the ONLY reasonable inference is guilt => cannot simply present it if guilt cannot be said to be a reasonable inference
* One issue here con’t to plague courts => *issue of post-offence-conduct going to a lvl of culpability (vs. identity)*
  + Some cases either do not have identity issues, or in addition, have issues of lvl of culpability
  + If A admits identity => can Crown still lead evidence of post-offence-conduct?
    - * + ***IN THESE CIRC: no probative value to the evidence*** => where you are looking at degrees of culpability
* SO: WHILE *must approach each case on its own facts* => could be some very specific circ. that may cause the general rule not to apply \*\*GENERAL RULES\*\*
  + - identity: in (*White*)
    - Lvl of Culpability: out
    - none vs. some culpability: in (*Peavoy*)

***R. v. Peavoy***

(1997) SCC

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| **FACTS** | * A testified at trial, admitting he stabbed the deceased, but that he acted in self-defence and was too intoxicated to form the intent necessary for 2nd degree murder * Also testified that after it occurred, he washed the knife, put it away, straightened the apartment and tried to call his lawyer \*evidence of attempts to avoid detection\* |
| **ISSUE** | * Are his actions admissible as “post-offence conduct” to infer guilt? |
| **HOLD** | * + - Trial judge’s non-direction re: use of after-the-fact evidence = reversible error, new trial ordered |
| **REASON** | * ***(1) After-the-fact conduct must be relevant to a fact at issue*** => must also be (2) ***reasonably capable of supporting an inference which makes the fact at issue more or less likely*** * While it can be used to help determine whether the A committed a culpable act, it CANNOT be used as proof of intent to commit murder   + - Distinguished ***Arcangioli***: here, the A did NOT admit culpability for the act (as in that case) b/c he testified that he acted in self-d => SO: evidence does have probative value |
| **RATIO** | * **After-the-fact evidence cannot be used to determine guilt if the A has NOT admitted culpability (i.e. is claiming self-defence)** |

* Here: a situation where identity is not an issue, admitting to be there => but is NOT a lvl of culpability, it is about ***whether A is at all culpable or not***
  + What if the jury rejects self-d (where then culpability is an issue b/c consciousness of guilt is at issue) => and then has to decide b/w manslaughter and murder? => \*\* *have to instruct the jury as to this distinction*\*\*
  + *PEAVOY*: adds an extra intricacy of intoxication (which would reduce murder to manslaughter) \*\*whole basis of intoxication, looking at the A before, during and after to see if they were in control of their actions – was A doing practical, controlled things? (so: doesn’t this open the door for admitting post-offence conduct, which technically, should not be at issue)
  + *\*\*3 layers\*\**
    - * + 1) self-d => YES for consciousness of guilt
        + 2) manslaughter vs. murder => NO for consciousness of guilt
        + 3) evidence of purposeful behaviour => allowed to be used to rebut intoxication \*\****not b/c it shows consciousness of guilt, but b/c it shows thought-driven acts***\*\* KEY: jury must be instructed on this LIMITED use\*

\*\*practically => is this charge far too intricate?

***Regina v. B (S.C.)***

(1997) Ont. CoA

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| **FACTS** | * \*only issue at trial was identity => C positively identified the A * The A testified that during the course of the investigation he testified that he offered to take a lie detector test, as well as offered blood evidence, his clothes, etc. * A was acquitted => Crown appealed that judge erred in admitting it and in using it to bolster the A’s credibility |
| **ISSUE** | * Is evidence of the A’s offer to take a lie detector test admissible? |
| **HOLD** | * + - There was no error in law in admitting the evidence (new trial ordered re: other issue) |
| **REASON** | * **PROBATIVE?**   + - Generally speaking, evidence of a prior consistent statement is inadmissible b/c has very lmtd probative value     - ALSO: A offer to take a polygraph has probative value only to the extent that one can infer he acted in a way that a guilty person would not => however, that inference is based on a lot of factors (i.e. what if knew was inadmissible anyways? Or if knew how to cheat it?)     - = in many cases => *will not pass the threshold of admissibility* * *HOWEVER*: **in this case, the evidence went far beyond the offer to take a polygraph test; voluntarily provided other samples, cooperated**   = **PRINCIPLED BASIS**: **after-the-fact evidence should be allowed to also support the inference that the A did NOT commit the crime \*should work both ways\***   * *\*\*MUST LOOK at # of FACTORS/CAVEATS*   + - The after the fact evidence “in its totality”     - Nature of evidence (i.e. when arrested, yelling that you are innocent)     - Circumstances of the case (i.e. here, defence was NOT consent = would have lmtd probative value)     - IMP. to note: this does NOT support the a discussion of the admissibility evidence that an A refused to cooperate => CHARTER rights and policy concerns at play here b/c have a right not to cooperate |
| **RATIO** | * ***Consciousness of Innocence*: no principled reason why the opposite conduct cannot lead to the opposite inference** * **SO: can be admissible if its probative value is not substantially outweighed by its prejudicial effect** * **CAVEATS: no requirement for A to act in cooperative manner** |

* Law in this area very sparse => *white & peavoy*: opened idea that what happened after can be probative
* This case gives an **anchor** that ***if you want to lead evidence that A did not act consistently with a guilty person***

1. Bad Character of the Witness

* On a cross examination you can attempt to undermine a witnesses’:
  + **(1) reliability:** associated not with honesty or trustworthiness but the accuracy of their evidence due to certain objective circumstances (i.e. eyewitness saw quickly; was scared; was dark, etc)
  + **(2) credibility**
    - *Questioning the trustworthiness of the witness*; witness may be lying, exaggerating, minimizing
    - Common areas which give rise to an issue of credibility: inconsistent statements; interested in the judgment (association, financial, related); other motivation; Questionable logic in their story; demeanour on the stand)
    - *Prior bad acts of witnesses*: i.e. dishonesty related prior criminal offence (fraud; obstruction) – could be a relevant factor in assessing the witness’ credibility; may be a factor to consider how much weight or emphasis should be put on that witness’ evidence

1. **PRIOR CONVICTIONS**

*STATUTE:*

* ***CEA*** s.12 => ***legislative judgement that prior convictions bear upon the credibility of a witness***
  + ***12.*** *(1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.*
  + *(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.*
  + *(2) A conviction may be proved by producing*
    - * *(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and*
      * *(b) proof of identity.*
* **NOTE**: *CL states that extrinsic misconduct evidence is presumptively inadmissible (includes criminal records) => SO: this is an example of a deliberate attempt to modify the CL*
  + An accused person is a witness (so: clear that this was meant to apply to all witnesses)
  + *COURT:* how to apply this statute in a way that protects the principles behind the CL rule (to prevent WC!)
    - (1) recognition that they ***cannot be brought in for general propensity purposes***
    - (2) “***CRITICAL LIMITING INSTRUCTION***” (note: *Corbett* “high water mark” for trusting juries)
  + Practically minimizing the potential for misuse:
    - Just read the fact of the conviction, don’t get into details \*keeps jury focussed on the fact of the record and NOT the details that will make them susceptible to general propensity reasoning

***R. v. Corbett***

(1998) SCC

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| **FACTS** | * + - A convicted of non-capital murder; part of his parole was that he stay w/in 25 miles of Victoria     - At trial, defence counsel was denied application that s.12 of CAE applied b/c of s.11(d) of Charter => to “soften the blow”, trial counsel lead the evidence on past convictions     - In address to jury, judge warned that evidence of past convictions could only go to credibility (the case however, clearly turned on credibility)     - CoA held trial judge did not err (was a dissent => probative value was minimal & prejudice was high) |
| **ISSUE** | * Was A deprived of right to a fair trial by the introduction of evidence of his earlier conviction for capital murder? * Is s.12 of CAE inconsistent w/ s.11(d) of the Charter? |
| **HOLD** | * + - NO, are not necessarily inconsistent; A was NOT deprived of a fair trial |
| **REASON** | * S.12 does NOT create a presumption of guilt, rather it is simply allows for the introduction of more evidence for the jury to consider * ISSUE: is *the risk that the jury will mis-use the evidence so great? \**must be addressed within the specific circumstances of the case => Trial judge’s discretion\*   + - In this case: a serious imbalance would have arisen if A had not been cross-E on his record, b/c DC attacked Crown witness on the same basis     - \*\**IMP. factors*: temporal proximity, crimes with an element of dishonesty (likely to have more probative worth), similarity of criminal record to crime charge with (weighs against admission) * \*Must BALANCE => **clear directions as to the limitations of the evidence** (wrong to make too much of the possibility that the jury may use it for the wrong purpose) |
| *DISSENT:*   * Must weigh the probative value and prejudicial effect => the more similar the previous conviction to current conduct = the more prejudicial   + - Court must be more wary (esp. when consider the stringent test for ‘similar fact” evidence) |
| **RATIO** | * **TJ has discretion to exclude PC of A (in spite of s.12) based on P/P** * **HERE: trying to balance to potential of the jury to misuse the evidence with the *risk of the jury getting a distorted picture*** * **IMP. of limiting instruction => ONLY used to evaluate their credibility (NOT as general propensity evidence) \*high degree of trust placed in jury to only use it for this limited purpose\*** |

1. **OTHER DISCREDITABLE CONDUCT**

* Greater leeway to explore previous convictions when the witness is NOT the A \*AND: even if did not result in convictions!\* (Important in assessing credibility => previous charges?)

***R. v. Cullen***

(1989) BCCA

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| **FACTS** | * + - A charged with assault, Crown lead evidence from complainant that he had assaulted her before, however A was acquitted on those charges     - Defence was also restricted in Q complainant on previous criminal charges (a conditional discharge was entered, so no conviction was “registered”) |
| **ISSUE** | * Can evidence be lead re: a) acquitted charge B) lmtd to only recorded convictions? |
| **HOLD** | * + - New trial ordered => erred in limiting questioning |
| **REASON** | * A) Conduct leading to charge of which A has *been ACQUITTED cannot be admitted as similar fact* => innocent until proven guilty * B) narrow limitations of CEA s.12 apply to A, not ordinary witness => *PURPOSE*: to demonstrate that the witness has been involved in discreditable conduct   + - Defence should not have been restricted => ***deprived jury of evidence that may have assisted in deciding weight of C’s evidence*** |
| **RATIO** | * **Importance of jury properly assessing the credibility of witnesses removes the restrictions on cross-examining the witness of past discreditable conduct (i.e. CR, dishonesty, etc.)** |

***Titus v. R.***

(1983) SCC

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| **FACTS** | * + - Trial judge refused DC’s request to cross a Crown witness on an outstanding indictment for murder based on the principle of innocent until proven guilty     - Witness was neither an A, nor was it proposed to Q him on previous convictions => instead, simply that he was indicted |
| **ISSUE** | * Can DC cross-E a Crown witness on an outstanding indictment for murder? |
| **HOLD** | * + - YES; trial judge erred in precluding the evidence |
| **REASON** | * \*IS PROPER and admissible “for the purpose of showing a possible motivation to seek favour with the prosecution” => however this *LMTD purpose* must be stressed * *A is entitled to employ every legit means to test the Crown’s evidence, including the right to explore all circumstances capable of indicting that a Crown witness may have a motive to favour Crown* |
| **RATIO** | * **It is proper to cross-E the witness on an indictment b/c PURPOSE is to demonstrate a motive for lying = essential for assessing credibility \*BUT: lmtd purpose must be stressed\*** |

1. **THE VETROVEC WITNESS**

* *Fundamental Q*: safe to rely on their testimony?
  + Danger of testimony highlighted in inquiries into wrongful convictions
* *PURPOSE of the warning*: to alert jury of danger of relying on the unsupported evidence of an unsavoury witness and to explain the reasons for special scrutiny of their testimony (***KHELA***)
  + *SO*: make application when are serious credibility/reliability concerns **=> (1) how “bad” is the witness? & (2) how important is their testimony to the Crown’s case?**
  + Identification of “***recognized categories***”: jailhouse informant; witness that has lied under oath during this or another proceeding; witness who has given multiple inconsistent statements; witness who is an accomplice and is now getting a deal; witness getting a benefit for testifying (money; jailhouse privileges; plea bargain)
* *WARNING*: KEY: “**clear, sharp warning**” (***VETROVEC***)
  + - * + (1) Must consider all of the factors that might impair the credibility and decide whether special instruction necessary
        + (2) Direct them to potential corroboration to determine whether the “evidence properly weighed overcame its suspicious roots”
        + SO: alerts ToF that it is “dangerous to convict on the unconfirmed evidence of their testimony” => must look to the rest of the evidence => Q: *does it give them confidence to use evidence of unsavoury witness?*
* *STRUGGLE*: do you specifically instruct them in this area, or do you at all?
  + - * + “crown-friendly” dissent in ***Khela*** => PROBLEM: value of simplicity must give way to protecting against WC (experience: just handing it over to ToF and making as simple as possible does not do enough to assist them in understanding the extreme danger of this type of witness)

***R. v. Dhillon***

(2002) Ont. CoA

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| **FACTS** | * + - Murder case where fundamental issue at trial was identity; eyewitness testimony and circumstantial evidence only     - Jailhouse informant: at time of trial informant had 43 convictions, and had unsuccessfully offered to be a police informant previously     - Trial judge decided to give “vetrovec” warning => disreputable nature of the witness’s character and need to find confirmatory evidence |
| **ISSUE** | * Was the vetrovec warning adequate? |
| **HOLD** | * + - New trial ordered; *examples of potentially confirmatory evidence given to jury were not capable of confirming jailhouse informants testimony* |
| **REASON** | * When trial judge illustrated for jurors the type of corroborative evidence => erred \*especially important err b/c the jailhouse informants testimony was central to the Crown’s case   + - Evidence that they “chatted” does not support/provide confirmatory evidence of WHAT was actually said, and whether their testimony is actually true! |
| **RATIO** | * **A judge must be careful in giving confirmatory evidence, cannot usurp role of jury, but should give some examples of USEFUL confirmatory evidence** |

* Evidence **did not meet the “material threshold**” => also, a strong expectation of benefit
* *PROBLEM*: D must watch attack of V witness, i.e. tunnelling => could open the door to evidence that would typically be inadmissible (i.e. now relevant and material re: that PO improperly focussed on A, so could bring in evidence of WHY the PO focussed on A and why that was a logical thing to do)

***R. v. Khela***

(2009) SCC

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| **FACTS** | * + - Murder case, case rested on testimony of two unsavoury witnesses => trial judge gave warning     - D argued inadequate b/c failed to instruct that to be confirmatory, the evidence supporting their testimony must be (1) independent and (2) material |
| **ISSUE** | * Was the Vetrovec warning adequate? What should it contain and |
| **HOLD** | * + - Warning “read as a whole” was adequate (despite not using specific terms independent & material), appeal dismissed |
| **REASON** | * Importance of instructing juries on when it is ok to rest a case on one witness’s testimony \***specific instruction is required** => crafting best left to trial judge on case; discretion, no single formula * *4 foundations of a VETROVEC warning:*  1. Draw attention to testimonial evidence requiring special scrutiny 2. Explain WHY requires special scrutiny 3. Caution dangerousness of convicting on unconfirmed evidence of this sort 4. Should look for evidence from another source to corroborate their testimony \*these items of evidence should “give comfort to the jury that the witness can be trusted in their assertion” \*REQ: **MATERIAL & INDEPENDENT**\*  * A warning should address these four elements; but need not be formulaic, can be read as a whole * *\*instruction must* ***make clear the type of evidence capable of offering support****; not sufficient to tell them to rely on whatever they want* |
| *DISSENT*   * Strict criteria detract from what the jury should be focussing on: assessing the witness’s credibility in a rational & flexible manner \*functional approach is preferable; no checklist!\*   + - Saying “materiality & independence” are required => useless, no one even knows what they mean! “futile line-drawing exercise” => “simpler is better” |
| **RATIO** | * **ToF needs guidance re: how & when to rely on an unsavoury witness’ testimony** * **\*Importance of CONFIRMATORY EVIDENCE\* => evidence need not necessarily be “reliable” but must be independent and material** |

* Mix b/w too rigid & too open => two extremes rejected \*important foundations, but discretion still remains with TJ\*
  + Majority: cannot turn the jury loose on all the potentially confirmatory evidence => need more guidance, should turn their attention to a certain subset of evidence
* *REQUIREMENTS IDENTIFIED*: \*underlying rationale: severely worried about the witness\*
  + - * + (1) **MATERIAL:** goes to some significant part of their account
        + (2) **INDEPENDENCE** of the Vetrovec witness (whole concept => need evidence where there is no possibility of it being tainted) \**if there is a reasonably possibility that there is evidence of tainting/collusion => should not use it b/c doesn’t meet the independent threshold\**
        + *NOTE:* is no reliability threshold before that evidence comes in to potentially support (so can use evidence that appears to have some reliability concerns => law wanting to be flexible)
* *Nikos*: feels the court could have gone a little further to add more to the instruction: still potential for the V formula to be “turned on its head”
  + Doesn’t the instruction give the jury the potential to use one piece of indep/material evidence => using just that to confirm => take “express route” to conviction! Ironically, does it almost make it easier to convict with a V witness vs. a regular witness? **\*this could be guarded against\***
    - * + 1) *V formula being PROPORTIONAL* => the worse you think the witness is, the more work the confirmatory evidence is going to have to do to bring it up to threshold of reliability \*quantity or quality of the I&M evidence must reach a certain lvl\* (V witness are crafty, often can find I &M corroboration, i.e. in Morin case)
        + 2) Even when find potentially confirmatory evidence => *STILL proceed with caution*!
* Special cases where a specific, critical part of a V witness story should have confirmatory evidence “in (a certain) regard”
  + i.e. accomplice knows exactly how it went down, and say A is their accomplice => wouldn’t we want specific confirmatory evidence re: identity
  + However, there was a case just before where in that scenario, the court didn’t require it to be backed up (Kheler)...?

1. **GOOD CHARACTER EVIDENCE**

* Good character evidence *can be used in two ways* for the D:
  + (1) A does not seem to be the type of person to commit the offence (*NOTE*: don’t let Crown do opposite, D gets more leeway)
  + (2) to support the credibility of the A testimony
* *HOW do you put in character evidence:* 
  + Call others to talk about the A good character
  + HOWEVER: \*\****LMTD to evidence of GENERAL reputation*** (how do they know A, could you tell me their general reputation in the community for \_\_\_(trait)) => *Cannot get into detail of WHY you hold that opinion*
* *REAL RISK in bringing it in:*
  + (1) Expose witness to cross => can be tested
  + (2) And could potentially open door to crown bringing in bad character evidence

***R. v. E.D.H.***

(2000) BCCA

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| **FACTS** | * + - Appellant convicted of sexual misconduct; appealed on basis that trial judge improperly admitted evidence of bad character, or did not properly instruct the jury on uses of the bad character evidence     - Crown examined on certain evidence that brought his character into Q; held material was relevant b/c A put his character at issue |
| **ISSUE** | * (A) Did A put his character at issue by denying his guilt? (B) If so, was the jury properly instructed on how to use bad character evidence? |
| **HOLD** | * + - New trial ordered, jury not properly instructed |
| **REASON** | * R v. ***McNamara*** (1981)   + - ***A does not put character at issue by denying guilt*** => however: ***cannot expressly/impliedly assert he would not have done those things b/c he is a person of good character w/out putting character at issue***  1. Difficult Q: did A cross over line of permissible repudiation? \*SO: *deference given to trial judge*\* => heard and saw A testify = “unique position to appreciate the tones and nuances of the testimony” 2. ***Bad character must ONLY be used to test credibility, NOT as a basis for determining guilt/innocence*** |
| **RATIO** | * **An example of character being unintentionally put at issue => if D puts character at issue by saying that they are not the type of person to do that offence, opens door to Crown to then lead character evidence of their own** * **ToF MUST then be warned of HOW they can USE the evidence \*very restricted\* (Seaboyer standard)** |

* Evidence that Crown had of general disposition was not admitted b/c too prejudicial => put A put character at issue, so fair game to Crown then bring it up to challenge good character of A => THEN: must examine whether limiting instructions were sufficient \**great example of the different steps in determining admissibility of evidence*\*

1. **OTHER DANGEROUS EVIDENCE: EYEWITNESS IDENTIFICATION**

* Another area of evidence where special instruction is required => problems with it are counter-intuitive
* *Eyewitness identification = about RELIABILITY* (as opposed to credibility)
  + it is by accident they are there, not caught up, so usually credibility is taken off the table
  + On the surface, often seem very confident, appears to be a lack of reliability issues
  + **HOWEVER**: ***history has told use that these honest witness have made huge mistakes (largest category of WC we have) So dangerous, b/c evidence seems so probative and reliable***
    - Not just mistaken identification, but confident mistakes! People are confident; ability of the mind to transfer the image to someone else (possibly subconscious) \*known phenomena\*
* *SOLUTION?* \****usually, still not an admissibility issue => goes to weight, jury instructions***\*
  + Charge/warning: known WC in this area:
    - (1)please be careful with this type of evidence (identify reasons why)
    - (2) look for outside evidence (not as strict as V, more general warning not rely on it on its own)
* *Bigger Picture:* development of certain processes to try and enhance the quality of identification evidence
  + \*\* more important than in court identification is **what the person said at the time *fresh in their mind, tainting less likely***\* (exception for usually not allowing consistent prior statements for their truth- will explore this later)
    - A) through a recorded statement of their description
    - B) via photo line-up (\*importance of proper techniques => i.e. independent conductor, no hints/encouragement, one at a time process-so don’t know how many are coming, and is not “best of the grp”)

*\*\*certain circumstances that make eyewitness identification more unreliable:*

* Stranger identification (vs. Known person)
* Stressful situation
* Fleeting glance
* Issues of distance & lighting
* Obstructions/partial obstructions

***R. v. Gonsalves***

(2008) Ont. SCJ

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| **FACTS** | * + - A identified by two eye-witnesses as their robber; police did not audio/videotape the identifications, it was not a double-blind process, nor were they shown all of the photos |
| **ISSUE** | * Reliability of eye-witness testimony |
| **HOLD** | * + - Eye-witness identification sufficiently reliable to support a conviction |
| **REASON** | * Although the reliability of eye-witness testimony must be scrutinized (as the role it can play in WC is well-document) => *can still form basis of a conviction*   + - Identified a number of factors that increased its reliability: witness read instructions, different witness’ testimony mutually corroborative, amount of time witness saw suspect, sighting in circumstances of stress?, lighting conditions?, description vague or specific, independent investigator conduct photo line-up, lack of bias/suggestion on part of PO, sequential line-up, no evidence of collusion     - A special caution is necessary |
| **RATIO** | * **Despite the failure to use double-blind administrator, the absence of audio/video taping and lack of investigator’s notes, the eye-witness identifications were found to be sufficiently reliable based on various other factors \*despite questionable identification procedures, can still find guilt => flaws go to the weight of the evidence\*** * **CAN convict based on the testimony of an eye-witness => capable of providing proof BARD** |

**CH. 3: OPINION EVIDENCE**

*JAILHOUSE INFORMANT WITNESS, Problems:*

* + - Not present at the scene, Expecting a benefit from the testimony, History of testifying in this manner, specifically linked to wrongful convictions
* ***NOTE: EXPERT WITNESS***: they share a lot of these characteristics!!! \*SCC has said to really caution these; didn’t see anything, but called nevertheless for one side or the other
  + So: a very unusual type of witness \*\*BUT: **necessary b/c circumstances of cases can often be beyond knowledge of the ToF**: ***to help ToF an inference they otherwise would not be able to draw***
    - (1) needs assistance to better understand the facts of the case OR
    - (2) understanding behavioural

*STATUTES:*

* ***CEA***, s.7 \**trying to limit how much time is spent with experts*\*
  + Expert witnesses: Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding
* ***CC***, s.657.3 => Puts disclosure requirement of the defence for expert evidence – this is a statutory exception to the rule that defence do NOT have to disclose.
  + **657 (1)** permits application to have expert evidence to be entered by way of a report. (keep costs down; good if expert evidence that will be easily accepted by the court)
  + **657(2):** must give 30 days notice to the other party that you are going to call an expert. D has to provide an outline of the evidence to the C 30 days in advance and the expert report before trial, the Crown has to hand over expert report 30 days in advance.

1. Common Knowledge
2. **THE GENERAL RULE**

* *Does any opinion have to come from an expert?* \*NO => RATIONALE:
  + (1) must allow their testimony to “flow”
  + (2) if don’t allow them to, may draw a distorted picture => mislead ToF into drawing an opposite conclusion (logically waiting for the next statement, so if don’t, assume the opposite)
* *LIMITATIONS:*
  + (1) probative vs. prejudicial weighing
  + (2) ONLY opinion on fact => cannot provide a legal conclusion
  + (3) WEIGHT: the value of the opinion can be undermined via cross-E => that may not be the only logical opinion possible based on the facts

***Graat v. R***

(1989) BCCA

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| **FACTS** | * + - A was seen crossing the centre line, driving onto the shoulder, when pulled over smelled like alcohol, staggered and had bloodshot eyes     - Before PO could do a breathylzer, A taken to hospital complaining of chest pains     - At trial, both the PO’s and a friend testified |
| **ISSUE** | * Is opinion evidence admissible when it is on the very question to be decided (whether A is impaired) |
| **HOLD** |  |
| **REASON** | * Line b/w fact and opinion is not a clear one => TEST for admitting opinion evidence:  1. Is the evidence relevant? 2. Though probative, should it be excluded by a clear ground of policy or law?  * In this case: c***learly probative b/c w/out opinion, witnesses could not communicate an accurate depiction of events*** \*must look at whether evidence calls for a specialist\*   + - Here: “intoxication is not such a special condition that would require a medical diagnosis” * ***Non-experts can only give opinion on questions of FACT and not LAW***   + - (1) trial judge exercises a large amount of discretion re: what is admissible     - (2) ToF must decide what weight to give evidence, but should be reminded that opinion evidence of PO must not overwhelm (here: entitled to no special regard) |
| **RATIO** | * **We allow people to provide opinions in general areas of knowledge/within the ordinary experience of people => certain basic inferences and opinions we can as human beings deduce \*\*SO: must fall w/in the general scope of knowledge\*\*** |

* *FACTORS Lay opinion evidence may/will not be permitted:*

1. Is a logical inference being drawn from the facts?
2. Are the facts the opinion is based on too speculative?
3. Is the opinion being phrased as a legal conclusion?
   * + - “A seemed intoxicated” but can’t say “A was too intoxicated to drive”
4. Trying to give evidence beyond the common knowledge?
   * + - i.e. lay witness can’t say “X fell down and *was having a heart attack*”
5. Expert Evidence
6. **THE GENERAL RULE**

**\*\*REMAINS basic guiding test for admitting expert evidence\*\***

***R. v. Mohan***

(1989) BCCA

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| **FACTS** | * + - Defence tried to admit testimony of psychiatrist that would say the A did not fit the psychiatric profiles of the perpetrator in the case => excluded by the trial judge & A convicted => appealed |
| **ISSUE** | * Is expert evidence admissible to show that the character traits of the A do not fit the psychological profile of the perpetrator? * When is expert evidence admissible? |
| **HOLD** | * + - Trial judge was right to exclude, did not meet the requirements for expert evidence, groups/profiles identified were not sufficiently distinctive, nor were they sufficiently reliable |
| **REASON** | **4 criteria for expert opinion evidence**: \*breaking down probative vs. Prejudicial\*   1. *RELEVANCE*    * + Q of law => Related to a fact at issue? => even if yes, must look at impact on trial process: Probative vs. prejudicial value \*danger that it will be misused & distort fact-finding process; danger of it overwhelming by the “mystic infallibility” of the evidence\* 2. *NECESSITY in ASSISTING ToF*\*the most controversial (esp. when going to behavioural type of evidence)\*    * + **Does the jury need assistance to be able to draw the inference**?      + More than simply “helpful”, but not too strict of a standard => ***provide info “which is likely to be outside the experience and knowledge of a judge/jury***” \*necessary b/c of their technical nature\* 3. *PROPERLY QUALIFIED EXPERT*    * + Could be training based/academic/experience-based expertise \*greater knowledge than avg. person\* 4. *ABSENCE OF EXCLUSIONARY RULE*    * + After 1st three steps, take a step back => is there something about the testimony that would engage serious prejudice? (i.e. nature is so inflammatory = too prejudicial)  * KEY: closer evidence approaches an opinion on the ULTIMATE issue => the stricter the application of the relevant/reliability principle * *Expert evidence as to DISPOSITION*   + - Trial judge must be satisfied that the perp/A has distinctive enough behavioural characteristics that the evidence will be of material assistance in determining guilt/innocence \*reliable indicator or simply personal opinion?\* |
| **RATIO** | * **Must be careful, need to put limitations on experts (practicality, *danger of the ToF turning over their job to the expert* & do not want the ToF to be weighed on too heavily)** * **NECESSITY: Could the jury draw an inference without the expert?** * **KEY: even if admissible => these factors can then go to WEIGHT** |

* Even though each requirement must be met individually => if a close call on one of the other factors, stress one of the factors which is strong \*not the most important issue in the case\*
  + i.e. relevance => not as important as “necessity”
* *NIKOS*: some of the factors Mohan has in relevance test => should be in “is there an exclusionary rule” test? (i.e. too prejudicial? => the way they are providing their evidence causes significant problems)
* *EXAMPLE CASE to test criteria: someone in a position of trust/authority, so: was there genuine consent?*
  + (1) start looking for experts
  + (2) disclosure of plan to call expert (so other side will probably get counter expert)
  + (3) Other side wants to dispute admissibility => voir doir:
    - * + 1. *Relevant?* \*est. b/c issue of consent
        + 2. *Necessity?* => is it an inference that people could draw on their own? Or, is an expert need to better understand the psych behind the dynamics of this relationship
        + 3. *Properly Qualified Expert?*
        + 4. *Exclusionary rule?* => too prejudicial vs. Probative? \****instead of not being admissible => may just change/alter how the expert can lead the evidence w/out it being too prejudicial?***

1. **THE HYPOTHETICAL Q**

* Decide it is admissible => but must remember the risk we are concerned w/ (that expert will take over ToF’s job) \**SO: are ways of leading the evidence that can diminish this risk*
  + If expert testifies by coming to a conclusions re: ultimate issue => way evidence has come in, risk of usurping is particularly profound = DANGEROUS!
  + ***BETTER ALTERNATIVE***: using a **hypothetical question, using more general questions** (vs. Using specific facts of the case) \*\*in a more indirect way => so: ToF can identify their own connection b/w the expert’s testimony and the facts of the case \*\**MUST AVOID GETTING TO THE ULTIMATE ISSUE*\*\*

***Bleta v. The Queen***

(1964) SCC

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| **FACTS** | * + - A charged with murder; defence that he acted in an automatonic state => psychiatrist testified to this by answering a question phrased “based on the evidence”     - Jury acquitted => CoA ordered a new trial |
| **ISSUE** | * Must an expert give opinion only based on a hypothetical Q, or can it be based on the evidence given at trial? |
| **HOLD** | * + - Restore verdict |
| **REASON** | * It *must be clear to the ToF WHICH evidence the expert is basing their opinion on* => discretion to trial judge to require it be asked in hypothetical form (= not necessary) * Importance of instructions if opinion is based on the evidence => clear to jury that they are NOT bound to accept the evidence upon which the doctor based his opinion |
| **RATIO** | * **Hypothetical form is not necessary so long as it is clear what the evidence is on which an expert is being asked to found their conclusion** * **A great deal of deference is given to trial judge to determine admissibility** |

* **TWO** **situations in which counsel does not have to use a hypothetical question**:
  + 1. If the evidence is not in dispute (e.g. evidence not in dispute re the consumption of alcohol and drugs. Can directly ask the expert if a person of this weight and height would be intoxicated).
    2. If the expert has dealt directly with the accused (e.g. expert interviewed A and is giving evidence re the state of mind of the A). (***Bleta***)

1. **THE BASIS & WEIGHT OF EXPERT OPINION**
   * + Decision as to whether a sufficient basis has been laid for the admission of an expert opinion rests in each case in the *discretion of the trial Judge*.
   * Opinion more often than not will be based on second-hand evidence \*hearsay\*
   * ***Obligation on party tendering evidence of establishing, through properly admissible evidence, the factual basis on which such opinions are based.***
   * Even if the expert is world-class, their testimony must still relate to the case, and it is the trier of fact’s role to decide if the case at bar has similar circumstances, and, thus, if the expert ideas have any foundation
   * **SEQUENCE:**

* Zero evidence brought to show foundation = issue of admissibility and expert opinion will not be admissible (***Abbey***)
* Weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.
* LIBERALIZED: Where there is SOME foundation with SOME evidence missing re basis on expert opinion = issue of weight. (**Wilband; Lavallee**) This holds even if there are some fairly significant foundation issues. (**Lavallee**)

***R. v. Abbey***

(1982) SCC

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| **FACTS** | * + - Sole defence of importation/trafficking charges was insanity     - Two psychiatrists testified => P for A used a considerable amount of hearsay evidence while testifying => BUT: material relied upon was never admitted into evidence     - Crown objected that the trial judge accepted and treated as factual much of this hearsay evidence |
| **ISSUE** | * Can an expert witness use hearsay evidence when providing an opinion? * If so, what are the limitations in using this hearsay evidence? Must it/can it be accepted as fact? |
| **HOLD** | * + - YES: BUT: must lead admissible evidence on which to base that opinion => NOT LEAD HERE |
| **REASON** | * ALL relevant evidence is admissible, with some exceptions:  1. Hearsay evidence- unsworn & is not cross-examinable; exceptions to this as well 2. Opinion evidence => unless req. that an expert be called for knowledge on special matters, then can give an opinion  * *An expert can give opinion evidence based on hearsay* => IF RELEVANT and it is NOT introduced to est. The VERACITY of that evidence \*not admitted to prove the fact of what the expert has been told\*   + - DANGER: ToF will accept it as going to the truth of the facts stated => if are accepted as facts, violates the hearsay rule!! |
| **RATIO** | * **Although expert evidence based on hearsay is admissible, It is an error in law to treat as factual hearsay evidence upon which opinion evidence is based \*the fact that it is based on hearsay goes to its WEIGHT, not its admissibility\*** * **HOWEVER => *MUST put forward the basis for the expert’s opinion for evidence to be admissible* \*\*\*Significant foundation problem goes to admissibility (not weight)\*\*\*** |

***R. v. Lavalee***

(1990) SCC

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| **FACTS** | * + - A charged with murder after shooting her CL husband who allegedly beat her and     - A suffered from battered women’s syndrome (WBS) and an expert was called to testify as part of her defence of self-defence     - The doctor’s testimony was to the effect that the A felt trapped, vulnerable and unable to escape and acted desperately in the belief she was going to be killed that night     - Crown appealed an acquittal on the basis that the doctor’s evidence should have been excluded, or in the alternative, that the trial judge’s instructions as to its use were deficient |
| **ISSUE** | * Should the doctor’s evidence have been admitted? * If so, were the trial judge’s instructions on its use adequate? |
| **HOLD** | * + - Evidence properly admitted; |
| **REASON** | *Admissibility*   * Premise: avg. person may not have sufficient knowledge to draw and appropriate inference => in this case, esp. Important b/c of stereotypes and myths re: battered women \*expert necessary to testify to complex psychological effects of BWS\*   + - In this case, difficult for a layperson to understand BWS and to comprehend why a BW would stay in a relationship and why she would act out in the way she did   *Adequacy of Instructions*  \*important to recognize the inherent dangers of admitting expert testimony based on hearsay => jury must be warned that they cannot decide the case based on what they did not see or hear   * \*\**WEIGHT* => must facts on which the opinion is based exist before one can rely on the opinion?   + - ***NO => so long as there is some admissible evidence to est. the foundation for the expert’s opinion, the trial judge should not instruct the jury to ignore the testimony!***     - Must determine if corroborative evidence is provided |
| **RATIO** | * **The admissibility of expert evidence can depend on whether the subject matter may be difficult for the layperson to comprehend, the need to dispel popular myths/stereotypes** * **Expanded on WEIGHT issue in Abbey (b/c that could easily be confined to facts b/c no admissible foundation) \*Flexible approach => not everything must be led in evidence “some admissible evidence”** |

***R. v. Wilband***

(1967) SCC

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| **FACTS** | * + - Crown sought to have A confined as a “dangerous sexual offender” => at trial two psychiatrists gave opinion that A would be likely to commit further serious sexual offences     - Psychiatrists opinion was based on both personal conversation and on hearsay materials => DC objected b/c opinions were based on hearsay     - Given dangerous offender statues, CoA agreed |
| **ISSUE** | * Can opinion evidence be based on hearsay> |
| **HOLD** | * + - YES => appeal dismissed |
| **RATIO** | * **To form an opinion, one must consider all possible sources of information, and using hearsay is a recognized normal psychiatric procedure** * **Only the VALUE (not admissibility) of opinion may be affected if rested too much on hearsay** |

***R. v. Jordan***

(1984) BCCA

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| **FACTS** | * + - A convicted of importing narcotic     - Expert witness testified re: tests completed to show that an unknown substance was heroin     - D objected that the testimony of one of the technicians that assisted in the tests was not given personally |
| **ISSUE** | * How do expert witnesses establish the factual basis on which their opinions are based? Are the permitted to rely on hearsay evidence of another expert who assisted? |
| **HOLD** | * + - YES |
| **RATIO** | * **A scientific expert is entitled to use such scientific data as is deemed necessary** * **Obligation on party tendering evidence of establishing, through properly admissible evidence, the factual basis on which such opinions are based.** |

1. **ULTIMATE ISSUE**

***R. v. Bryan***

(2003) Ont. CoA

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| **FACTS** | * + - A convicted at trial where crown adduced evidence from PO that went to the ultimate issue (drug trafficking) “*these are the generic things and by the way I’ve looked at the particular facts of this case and it looks like this person has the drugs for the purpose of trafficking*”     - appealed on grds that it was inadmissible and prejudicial on that basis that it spoke to ULTIMATE ISSUE |
| **ISSUE** | * Can an expert give opinion evidence on the ultimate issue? |
| **HOLD** | * + - YES; appeal dismissed |
| **RATIO** | * **No general rule precluding expert evidence on the ultimate issue \*BUT: stricter test\*** |

* ***HOWEVER: can be problematic => increases the seriousness of other admissibility factors:***
  + P/P \**court will be particularly strict*\*
  + Foundation => worried about an expert opinion that CANNOT be applied to the facts of the case (distracting and opinion might favour one side; if has no purpose might tempt someone to rule on an irrational basis)
* *BOTTOM LINE*: no general rule against opinion on UI BUT: ***court will be particularly strict with other admissibility criteria, the closer it goes to the ultimate issue*** (*Mohan*)

1. Particular Matters
2. **CREDIBILITY OF A WITNESS**

* **The rule against oath *helping*** *prohibits the admission of evidence adduced solely for the purpose of proving that a witness is truthful****.***
* **HOWEVER: CAN admitted if, in addition to being oath-helping it has *some other legitimate purpose***
  + **i.e.:** properly admitted as part of the narrative, explain the delay of disclosure of a complainant in a sexual abuse case, support the complainant’s testimony that she had been abused.
  + Law on expert evidence has allowed flexibility on the concept of ultimate issue, but not on the issue of credibility

***R. v. Llorenz***

(1989) BCCA

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| **FACTS** | * + - Sexual assault case where Crown’s case rested almost entirely on the complainant’s credibility; no independent evidence of sexual abuse, however did speak to a psychiatrist about it     - The psychiatrist’s testimony included statements which strongly support an inference that he believed the complainant to be telling the truth regarding the assaults, as well as some disclaimers |
| **ISSUE** | * Should the expert have been permitted to send such a strong message to the jury that he believed the complainant’s allegations? |
| **HOLD** | * + - Appeal allowed, new trial ordered |
| **REASON** | *Oath-helping*   * Rule against it: ***prohibits the admission of evidence adduced solely for the purpose of proving that a witness is truthful***   + - *FINE-LINE*: evidence about credibility (i.e. witness is truthful) and evidence about a witness’s behaviour or testimony that, while potentially assisting with credibility, has another legitimate purpose, i.e. forming part of the narrative (in the latter case, the probative vs. Prejudicial test must still be completed)   *Application*   * The psychiatrist’s evidence that formed part of the narrative formed a VERY small part of his testimony; prejudicial effect far outweighed probative value b/c of danger of jury using it to support the truth of the complainant’s statements   + - His disclaimers were insufficient b/c were NOT directed at alerting jury to rule against oath-helping, nor did could they overcome the bulk and nature of the evidence he gave re: her credibility * KEY: *essential that the charge to the jury warn on the use of this kind of evidence* |
| **RATIO** | * **The rule against oath-helping states that evidence cannot be adduced solely for the purpose of proving that the witness is truthful** * **To be admissible, it must have another legitimate purpose which must have great probative value and subsequently, the jury must be charged as to the lmtd use they can make of the evidence** |

* Key problem here: ***WAY in which evidence was lead*** => basically stated “I believe this witness”; too direct, but could have gotten into the substance in a more indirect way to allow jury to then make credibility assessment
  + AND => there was also no limiting instruction to the jury

1. **NOVEL SCIENTIFIC EVIDENCE**

* *BASIC ISSUE: RELIABILITY*
  + Reinforces *Mohan* re: basic reliability and ultimate issue concerns (i.e. stricter threshold re: ultimate issue)
  + The expert is in court to assist, not to tell trier of fact what to do: role is to *present RELIABLE data which the trier of fact uses to draw inferences*
* **TEST:** new forms of science must be regarded with **special scrutiny**, the question iswhether the science **sufficiently reliable** to put before the court – FACTORS:
  1. **Whether the theory or technique can and has been tested**;
  2. **Whether the theory or technique has been subjected to peer review and publication;**
  3. **The known or potential rate of error or the existence of standards; and,**
  4. **Whether the theory or technique used has been generally accepted**

***R. v. J-L.J.***

(1989) BCCA

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| **FACTS** | * + - A charged with sexually assaulting his young child     - Trial judge denied admissibility of D’s expert psychiatrist who conducted various tests which concluded that the A did not display characteristics identified as being held by the perpetrator \*but could not est. A standard profile of individuals who commit the offence in question\*     - These tests included a test of personality traits, as well as a test that looked at biological sexual preferences and found none deviant (plethysmograph)     - CoA agreed => inadmissible b/c science had yet to identify a standard profile for individuals who commit sodomy on young children; so did not fit within the “distinctive grp” exception recognized in Mohan |
| **ISSUE** | * Should his testimony have been admissible? At what point is scientific evidence reliable enough to be admissible? |
| **HOLD** | * + - NO |
| **REASON** | * *Need to exclude “junk science” from courtrooms => importance of the trial judge’s role as “gate-keeper” and protect again “undue weight” being given to evidence “cloaked under the mystique of science*”   *Examination of the evidence in relation to Mohan Criteria*   1. **Subject matter of the inquiry**: YES => “special knowledge” is required 2. **Novel science?** \*if yes: subject to special scrutiny => Is there a “reliable foundation”?\* YES   *(1) has the theory/technique been tested?*  *(2) subjected to peer review?*  *(3) what is the know potential rate of error?*  *(4) has it been generally accepted?*   1. **Does it approach the ultimate issue**? => the closer it does = the more scrutiny needed (YES) 2. **Is there an exclusionary rule?** (in this case, “distinctive group exception” allows evidence of general characteristics/propensity)    * + PROBLEM HERE: distinctive grp exception lmtd to cases where the offence is the kind committed ONLY by members of the distinct grp and that the grp have a “standard profile” (to prevent ad hoc gathering of characteristics) 3. **Properly qualified expert?** : YES 4. **RELEVANCE of testimony**    * + NO distinctive grp. standard profile; could only testify to characteristics found “frequently, not absolutely”      + Specificity of tests and their design was not ideal; not designed to measure what they were being used to measure in this case      + Error rate of the tests: 50% of tests were false negatives 5. **Assist ToF?** \*NOT substitute the ToF, but assist them by proving specialized knowledge necessary to decide ultimate issue\*   *CONCLUSION*: trial judge had “good reason” to be sceptical of the value of the testimony => WOULD distort the fact-finding process (failed basic reliability test and some of the factors from Mohan, \*too close to ultimate issue\* => standards not clear & analysis not readily available) |
| **RATIO** | * **Importance of the court’s “gate-keeping” role** * **Est. test for new/novel expert evidence & whether it is sufficiently RELIABLE to admit** |

1. **LIMITING ADMISSIBILITY**

* **critical statement** from the court: trial judge should take seriously its gatekeeper role
  + Proliferation of expert evidence and concerns re: junk science and preserving the role of the trier of fact
* *TEST:* Criteria for reception are relevance, reliability and necessity measured against the counterweights of consumption of time, cost, prejudice and confusion.

***R. v. D.D.***

(1989) BCCA

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| **FACTS** | * + - Crown attempted to admit evidence to inform jury that children who suffered sexual abuse respond differently w/ respect to disclosing it; NOT specific information abt C, general applicable to all children |
| **ISSUE** | * When is the admissibility of expert testimony limited? |
| **HOLD** | * + - Inadmissible; failed to meet necessity requirement |
| **REASON** | * Mere relevance or “helpfulness” is not enough => ***must be NECESSARY to:***  1. Appreciate the facts due to their technical nature 2. Form a correct judgment on a matter if ordinary person are unlikely to do so w/out assistance of person w/ special knowledge  * DISCRETION of TJ: ***\*\*balance need vs. Potential to distort fact-finding process (usurping role of ToF\*\****   + - Content of the expert evidence in this case was NOT unique or scientifically puzzling => unnecessary * ***Preferable sometime to introduce the concept via jury instruction*** b/c (1) saves time & expense (2) given by an impartial judicial officer * *Dangers of expert evidence:*   + - Take over from ToF, resistant to cross-E by non-experts, opinions derived from out-of-court statements, time, expense |
| **RATIO** | * **Expert opinion evidence is not necessary when the subject matter is something the jury is capable of understanding alone with a simple jury instruction** |

* *NIKOS:* if you are at a quandary at some of the Mohan criteria, error on the side of NOT admitting evidence (not question of weight)
  + Most attackable- **necessity** in assisting the trier of fact

**CH.4: EXAMINATION OF WITNESSES**

* *STARTING POINT:* Are they allowed to testify in the courtroom?
  + (1) *COMPETENT TO TESTIFY?*
  + (2) if competent => are they *COMPELLABLE?*
    - * overwhelming presumption in our courts is that almost everybody is competent and compellable (part of civic duty as society) \*importance of the search for the truth\*
      * one person who is NOT compellable is accused

*Minimum standards:*

* 1) CL: ***witnesses need to be under oath*** \*CEA: s.13-15 can take traditional oath or make solemn affirmation (procedure flexible)
  + - * PURPOSE: moral obligation in this setting to tell the truth—particularly important, one of the basic reasons why we prefer people to come to court and testify instead of just giving their statement (under oath, process, difference in this form)
* (2) Is the witness ***able to communicate*** the recollections they have? (age, mental capacity)

***Canada Evidence Act:***

* 16(1): If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
  + (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
  + (*b*) whether the person is able to communicate the evidence.
* appears there’s a “right to challenge”
* **NATURE OF OATH TEST**: ***do they understand the difference between a truth and a lie and the importance of telling the truth in this environment*** (not a strict test)
* **COMMUNICATION OF EVIDENCE TEST**: not a high threshold but involves a certain level of cognitive function in ability to ***perceive, remember and communicate*** what you remember (not just ability to speak in courtroom and be understood, but remember, etc.)
* Section 16.1:
  + (1)A person under fourteen years of age is presumed to have the capacity to testify.
  + (2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
  + (3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
  + (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
  + (7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
* are they *able to understand and respond to questions*—lower standard to be met than communicate
  + difficult to challenge under the threshold “understand and respond to questions”
  + no challenge to “telling the truth” (some form of intimidation of witness to ask them, bias that the law used to have against children)
* judge has power to run courtroom so there’s fairness to all parties including witnesses—when test for children was mental capacity judge would let counsel tell him what they wanted to be asked and judge runs the show, they ask the basic questions and doesn’t allow counsel to be involved…

1. Order of Calling Witness and Obligation to call Witnesses

* *Potential Danger* of having witnesses testify who have heard other witness’s evidence can be problematic => witnesses may think they should make their story consistent
* *SO, practically:* to get around this lawyers and PO careful, separate witnesses, or order excluding witnesses from the courtroom itself—except can’t kick accused out, constitutional right to participate in the proceedings, know the evidence against him or her (some rare exceptions we may touch on in “privilege”…)

***R. v. Smuk***

(1971) BCCA

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| **FACTS** | * + - D tried to call a witness other than the A first, Crown objected stating that A must be called first     - Judge ruled that although there is no rule that A may go first, if he were called first he would not consider his evidence “too strongly” b/c if A is allowed to sit in courtroom and listen to the other witnesses his story becomes “suspect” => D appealed |
| **ISSUE** | * Must the A testify first, before other witnesses are called? |
| **HOLD** | * + - NO; appeal allowed & new trial ordered |
| **REASON** | *Trial judge acted improperly b/c:*   1. Cannot judge the weight of the evidence before all of it is produced 2. Placed an improper restriction on the A to make a full answer and defence |
| **RATIO** | * **There has never been a rule that A must be called first; A is completely free to decide whether he/she will testify and to decide in which order** * **The court cannot insist that an A testify first nor can the court prejudge the A’s testimony because of the order in which he/she testified \**credibility CANNOT be pre-judged*\*** |

* Importance of tactical decisions remaining in the hands of counsel

***R. v. Jolivet***

(1989) BCCA

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| **FACTS** | * + - Crown failed to call an important witness at trial after indicating on two separate occasions that this witness would be called to corroborate important admissions     - The Defence wanted to comment on this in his jury address but was prevented so by the judge, who also declined to give instruction on the point, saying that Crown is under no obligation to call every witness and it is his practice to instruct so     - Que. CoA allowed appeal and ordered a new trial |
| **ISSUE** | * Should the defence have been allowed to comment on the “missing witness”? If not, should have it been a part of the jury instructions? |
| **HOLD** | * + - TJ did error in preventing DC from commenting, HOWEVER: not enough to change verdict |
| **REASON** | * Importance of counsel avoiding leading the jury to anticipate more than they can deliver   *Crown has NO obligation to call witnesses*   * + - Possess a great deal of discretion; however, must prove case BARD which requires sufficient witnesses!   *Crown’s conduct did not amount to abuse of process \*onus on A on BoP\* \*imp. of prosecutorial discretion\**   * + - Provided a good reason for not calling the witness (concerns abt the truthfulness of their testimony)     - An adverse inference is not justified b/c provided an explanation * ***ERROR: D WAS entitled to comment on Crown’s change of position \*IMP: the very lmtd nature of his comment***, basically: why?\* => essential to ensure a fair trial & should only be lmtd for good/sufficient reason   + - Judge’s reaction equated the role of Crown with that of the D => “equally open for D to call the witness” \*\**D not obliged to call him at all; no obligation to lead evidence, up to Crown to prove BARD* * Rarely appropriate for a judge to comment on crown’s failure to call a witness => a lot of discretion = here, dealt with the warning via V warning = “w/in his ambit of discretion\*   *Is there any reasonable possibility the verdict would have been different had the error not been made?*   * Did A suffer sig. prejudice b/c of the error? => \*speculative, jury warned via other means- no reasonable possibility |
| **RATIO** | * **The Crown is under no obligation to call witnesses => rarely appropriate for trial judge to comment on the failure to call witnesses (i.e. ask for inference to be drawn) \*deference to trial judge\*** * **While D can comment on Crown’s change of position => this is VERY LMTD** * **If TJ made a wrong decision: STANDARD => “reasonable possibility to verdict would have been different?”** |

* *Distinguish b/w*
  + (1) don’t call a witness => ask for an order to force them to call the witnesses
  + (2) legal consequence => ask for jury instruction
* *KEY*: to ***Crown’s advantage to call certain witnesses***, for BOTH (1) the strength of their case (2) to ensure a proper narrative of events
* **Dangerous when inferences are asked to be drawn when witnesses are not called** => ***TJ’s decision/discretion***
  + (1) *Smuk* idea🡪 tactical stuff is left to counsel
  + (2) with modern disclosure rules—less likely to be taken by surprise, get paperwork from each side about what that witness would have said
  + (3) power for counsel to call witnesses who would be in the “other camp”, if the witness has relevant evidence you can call them, nothing stopping the other party from calling the witness
* **Adverse inference instruction:** \*don’t need abuse of process finding for this\*
  + not sufficient evidence here for adverse inference—where counsel does not call a witness you expect them to call, can offer explanation and as long as that explanation is credible you won’t have adverse inference (demeanour, concern about credibility, etc.)
  + *LMTD*: defence must be careful!
* application of “**curative provisio**” (got rolling with this case) what happens if there’s a wrong decision at trial?
  + Onerous issue—was error reversible? Or can the error be cured by s.686(1)(b)(3)—did the error make a difference?
  + ***BURDEN:*** evidentiary error had a significant impact on the trial—show why error that could have led to a different result at trial

1. Direct Examination
2. **LEADING QUESTIONS**

* If are ***your own witnesses -> CANNOT ask leading questions*** (those which necessitate only yes/no answers)
  + *IDEA*: want them to draw on their recollection \*BUT: doesn’t mean you just turn the witness loose, understand how to logically help break up their testimony—provide logical flow to their testimony\*

***Maves v. Grand Pacific R.Co***

(1913) Alta. SC

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| **FACTS** | * + - Trial judge prevented DC from asking leading questions of a forgetful witness on direct examination |
| **ISSUE** | * Did TJ err in not allowing DC to ask leading questions on direct examination? |
| **HOLD** | * + - YES; however, it did not affect the outcome of the trial |
| **REASON** | * On MATERIAL points, you must not lead your own witnesses (but can for your adversary’s witnesses):  1. Supposition that the witness has a bias in favour of the party bringing him forward 2. Party calling witness has advantage of knowing their story beforehand 3. An innocent, honest witness may assent to a leading question which fails to express its real meaning  * However, for INTRODUCTORY matters => can lead own witness   *What is a leading question?*   * + - When it suggests an answer, as opposed to merely directing the witness to the subject   *EXCEPTIONS to the rule against leading*   1. For the purpose of identifying persons or things 2. Where one witness is called to contradict another 3. When the witness demonstrates a clear bias -> can be declared hostile 4. Defective memory -> must first ask witness to repeat the conversation, possibility repeatedly, if fails, can then ask a Q that refers to subject matter, if that fails, then can refer to subject matter direct (all at discretion of the trial judge) 5. Complicated matters |
| **RATIO** | * **CANNOT lead own witness on material points (some exceptions, including on introductory matters)** |

* *STRATEGIC TOOL:* 
  + least invasive method first, leading🡪 revive memory (document to do that), present memory revived, use something to assist the person to remember and then they testify, doc not admissible evidence at that point, still regular witness, doc not coming in as their evidence 🡪 try and revive and doesn’t work, can statement be entered as evidence as if you were testifying on the stand?

1. **REFRESHING A WITNESS’S MEMORY**

* Witnesses have certain important memory which they can no longer recall. \**SO: prior memory can be preserved in a number of ways, and brought up at trial:*\*
  + (1) at some point prior to trial, written down
  + (2) creative ways to try and bring it about through leading questions
  + (3) invoke the principle of ***present memory revived*** (using something- possibly that prior record- and putting it before the witness to spark their memory) => using it to make independent recollection \*preference to get it under oath vs. simply bringing in the document\* (*evidence need not be admissible itself*)
  + (4) OR if remember nothing, ***past recollection recorded***
* *RATIONALE*: **in the interests of justice to try and get this memory back** 
  + = FLEXIBLE POLICY: while we would much prefer testimony in the courtroom HOWEVER will not create an absolute rule that a prior statement can never be used
  + BUT: *are extraordinary procedures! => so must be done carefully to prevent tainting*
  + KEY: *will effect WEIGHT*

**PRESENT MEMORY REVIVED:**

* *BASIC IDEA:*
  + a document / evidence contemporaneous with the event allows witness to regain the memory and the witness actually provides the testimony in court
  + seeing a document revives the witness’ memory and they give oral evidence
* KEY: the document itself is not the evidence it just assists - the document is ***not admissible for its truth***, although it will be marked for identification \**SO: evidence need not be admissible itself*\*
* *DANGER:* of tainting; esp. if other factors, such as someone else wrote the document, or a more indirect statement
  + - * + \*\**TJ’s decision:* what can be put in front of the W?

=> diverse views: anything to spark memory *vs.* Should be restricted to highly reliable recollections(trustworthy & contemporeanous)

***R. v. Shergill***

(1997) Trial Court

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| **FACTS** | * + - During examination in chief, Crown sought to refresh a witness’ memory by referring to a statement the witness gave to PO (6yrs after event, made by someone else) and a transcript of the prelim |
| **ISSUE** | * Should the trial judge permit Crown’s request to use the transcript? |
| **HOLD** | * + - YES |
| **REASON** | 1. *The witness need not request to refer to the document to refresh their memory*    * + Not necessary b/c often the witness does not realize they missed something 2. *Contemporeanity is NOT required for documents used to refresh memory at trial?*    * + KEY: distinction b/w situation where a witness is simply refreshing their memory and a situation where a witness has no present memory (here: past recollection recorded is necessary)      + The requirement of reliability and thus contemporeanity is esp. important for past recollection recorded, but ***can be relaxed with a witness needs to simply refresh their memory*** (WILL affect WEIGHT though)      + \*\**principled approach*: deference to trial judge to consider the need for refreshing memory and to decide which device may be used 3. *Procedure*  * (1) counsel seek permission from TJ before attempting to refresh memory (w/o jury) * (2) witness be excluded * (4) identify document and passages and what subject matter they want to elicit \*evidence of prior recollection & allows judge to take a look at document\* \*crt says don’t just engage in this procedure, eg PO asking “permission to use my notes” = very quick present memory revived application * (4) TJ consider whether or not the memory of witness is exhausted (could relax rule re: leading questions first, b/c less risky than using prior statement) \*is this a premature application? * (5) TJ determines whether refreshing memory or past recollection recorded \*difficult distinction b/c is a continuum\* * (6) TJ determines if document is appropriate to use \*weighing\* => i.e. contemporeanity/reliability are taken into consideration (i.e. summary vs. Verbatim records) * (7) TJ \*discretion\* to determine if improper motive or other circumstances which make unacceptable (even if usual criteria are met) * (8) TJ uses discretion to allow refreshing “according to the circumstances and the attitude of the witness” (9) Jury recalled and explained what is happening * (10) Doc places before witness and asked to read passages with omitted matter * (11) Doc taken away and non-leading question asked about the matter \*document is NOT admissible now; was a TOOL\* => be careful re: potential prejudice that jury may put too much weight on it * (12) Cross-examination * (13) Jury instruction; prior statement not itself evidence => it is the current statement that is evidence |
| **RATIO** | * **For refreshing memory => does not have to be highly, highly reliable, but obviously if made contemporaneously, can put more weight \*will not put everything before a witness; can be too risky to tempt witness to start reading what is in the summary\*** * **Emphasis on trial judge’s discretion to decide appropriateness to use, what can be used & how it should be dealt with/instructed** |

* What factors will be considered by the judge?

1. Contemporaneity: an important factor, but not strict necessity that it was created right after
2. Author: does not necessarily have to have been created by the witness (i.e. minutes from a meeting would probably be okay)
3. Mislead / Reliability: Will the document mislead witness into thinking they remember: document must have some general reliability

**PAST RECOLLECTION RECORDED**

* *BASIC IDEA:* witness has no current memory and the actual document is entered as evidence capturing the past recollection; substituted for the testimony
  + Memory has not been and cannot be revived, BUT: the witness can say under oath (1) remember making the statement and (2) being honest at the time
* *\*\*CL EXCEPTION: but, few applicable statutory provisions in* ***Criminal Code***
  + **s.715** where a witness provided testimony at preliminary hearing but is then not available for trial (dead; insane; really ill; absent from Canada) you can bring in the preliminary hearing testimony in the trial – unless accused can prove they did not have a full opportunity to cross the witness at the preliminary hearing (which can happen if D counsel went easy at prelim to set a record to destroy witness at trial)
  + **715.1 and 715.2** ability for young complainants in sexual assault trial to have videotape taken soon after and it can be entered if adopted under oath

***Fliss v. The Queen***

(2002) SCC

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| **FACTS** | * + - PO obtained prior judicial authorization to record a conversation b/w the A and an undercover PO; at trial, was found to have been improperly granted and was excluded \*Mr. Big\*     - However: trial judge admitted the viva voce evidence of the PO, who “refreshed” his memory in the witness box from the excluded transcript (basically equivalent to an “indirect reading of the transcript”, often was word for word) \*reasoning: he was a party to the conversation     - CoA dismissed appeal, but a judge dissented saying that the viva voce evidence would have been inadmissible \*\**reasoning of maj*: the confession was not dependant on the existence of the invalid authorization; *reasoning of min*: if allowed this, then what would be the purpose of requiring a warrant to wear a wire? “makes a mockery of the authorization process” |
| **ISSUE** | * Should the PO have had access to a transcript of a conversation which was taped improperly? * Could the Crown find another justification for “reading the transcript”? Do other circumstances exist to allow the Crown to do this? \*\*should it be allowed as past recollection recorded?\*\* |
| **HOLD** | * + - Appeal dismissed |
| **REASON** | * *Four basic criteria:*  1. **Recorded in a reliable way** (audio/video/written record) 2. **When recorded must be sufficiently fresh & vivid** (contemporeanity => certain flexibility depending on the nature of what is remembered: licence plate vs. less specific/more unusual details) 3. *Absence of memory* 4. **Witness must now be able to assert under oath that they knew it to be true** *\*\*trying to transport the oath into the statement, at least having witness verifying under oath that they recollect that they were attempting to be truthful at the time\*\** 5. \*not required\*if have original use it (best evidence rules apply)  * CLEAR that jury was entitled to hear from PO about the conversation & that he was entitled to refresh his memory   + - *PROBLEM*: *what was given as testimony was MUCH more than what he could recall* (at both trial and at the time he proof-read the transcript) *\*\*process was not simply what he could remember on his own\*\** * The incentive of police to seek authorization to protect privacy would be diminished if could be side-stepped by allowing an officer to verbatim read the transcript * ***Verbatim reading cannot be justified*** simply b/c officer had “substantial recollection of parts of convo”  1. The wealth of detail b/c of reading the transcript was adduced to persuade the jury as to the truth of the confession => instead, the purpose of it should have been to stimulate the officer’s own memory (which it failed to do) 2. Does NOT qualify for admission as “past recollection recorded” (3rd requirement of being able to assert to its truth is not met; no evidence was lead re: accuracy of the statement- admitted to only partial recall) 3. The issue is NOT simply form => are matters of substance! |
| **RATIO** | * **This is going to be an EXCEPTIONAL procedure => the requirements need to be strictly complied with \*must be clearly satisfied; HIGH threshold\*** |

***R. v. J.R.***

(2003) Ont. CoA

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| **FACTS** | * + - 3 A convicted of 1st degree murder=> appealed based on admissibility of a statement under the past recollection recorded exception to the hearsay rule & manner in which jury was instructed     - A C was permitted to “refresh” her memory at trial when crown directed her to a statement she made to the police approx. 16 hours after the incident, which she was unable to remember at trial or at any previous court proceedings (doesn’t remember the specific admissions)     - The point at issue was only brought up in her 2nd statement, after she had spoken to another victim, but there was no evidence of collusion |
| **ISSUE** | * What are the standards for allowing witnesses to refresh their memories via past recollections recorded? |
| **HOLD** | * + - Appeal dismissed; evidence properly admitted & instructions sufficiently addressed potential prejudice |
| **REASON** | *Admissibility*   * Past recollection recorded is an EXCEPTION to the hearsay rule, conditions: \*all met in this case\*  1. ***Reliable Record***: either witness prepared it personally, or review it for accuracy, AND original record must be used if it is available (\*case: audio-recorded) 2. ***Timeliness***: reviewed/made w/in a reasonable time; strict contemporeanity not req. \*depends on circumstances of the case (\*case: 16hrs => flexible tool depending on facts of case; look for factors to suggest the passage of time affect their ability to recall the events-i.e. someone providing info to them that was then picked up upon) 3. ***Absence of memory***: at time of testifying, must have no memory of the events \*either devoid OR imperfect, ok if remembers something\* (\*case: although she remembered something => more flexible threshold, not all or nothing = ok if only a portion forgotten 4. ***Present voucher as to accuracy***: must be able to say was truthful at the time of the assertions  * ***PRINCIPLED APPROACH***: (*starr*)   + - \*traditional req. Emphasized, are often indicative of admissibility anyways => \*threshold reliability? * KEY: *must distinguish admissibility and weight* => if reliability at issue, but sufficient to gain admissibility, then goes to WEIGHT   *Jury Instructions \*must address the potential prejudice\**   * Judge specifically mentioned that the evidence satisfied “conditions” to suggest that it can be relied upon => better if TJ had not mentioned the criteria governing admissibility |
| **RATIO** | * **About filling in something now forgotten, NOT wanting to simply “improve” their testimony** * **Statement is actually used as evidence after => ToF can use directly in deliberations (\*\*IF witness adopts it)** |

1. Cross Examination
   * + Essential to a fair justice system \*huge tool for seeking the truth\*
     + **Very broad** right of cross-E (***Lyttle***) \*CL and under s.7 & 11(d)
       - Can put leading Q’s, scenarios,
       - Broad does not necessarily mean you must or it needs to be long
     + *KEY*: lvl. of knowledge makes a good cross \****knowledge = power b/c know the file so well***\*
       - \*\*focus on undermining the witness’:
         * (1) ***credibility***: i.e. criminal record? Relationship b/w them & A? Bias? Prior statements (inconsistencies?) Illogical?
         * (2) ***reliability***: circumstances surrounding recollection, vantage point (distance, night, hearing, misunderstanding)
       - Difficult to plan exactly how you will conduct it=> depends on how their direct examination unfolds
     + *LIMITS:*
   * ***Lyttle***: probative value must be outweighed by prejudice \*cannot be misrepresentations, harassing, repetitive,
   * In past, *proposed that there had to be a factual/evidentiary foundation for substance of cross-E* (assumption was that you were going to call that evidence later if you hadn’t already \*at some point, there was going to be an admissibility evidentiary process to lead the evidence)
     + - * So could be left in a difficult position if witness was not giving you anything \*\**BASIS:* little probative value to bring in ideas with little factual foundation, confuse ToF\*; unnecessary risk\*
         * *PROBLEM:* only way you can get this foundation is from the witness => **need more wiggle-room**! (often their testimony is the only place you can get the evidentiary foundation you need for an additional credible)
   * Must be FAIR (***Carter***)
     + *CAREFUL*
       - Watch the COMPOUND Q! Too complex and can have two different answers!
       - Make sure you create an accurate record (i.e. witness points somewhere => where?)
       - Watch questions the reverse the presumption of innocence (i.e. Crown in cross-E of A => cannot put to A an onus to explain way a witness is not being credible)

* ***CEA***, section 10
  + Where you want to cross on a previous statement and intend to contradict, must call attention to statement where you intend to contradict
  + Give them warning: basis => fairness to witness

***R. v. Lyttle***

(2004) SCC

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| **FACTS** | * + - Early on in investigation two officers suspected assault on victim was over a “drug debt” => although this theory was later dismissed by subsequent officers, it remained the defence theory at trial     - TJ held that to cross-E witness on their theory D required a substantive “evidentiary foundation” for it (threatened mistrial if put to witnesses)     - As a result, D was restricted in its cross and had to call the original officers who had those suspicions (otherwise, would have called no evidence)     - CoA dismissed appeal found that A’s right to cross-E was unduly restricted but that the error was harmless |
| **ISSUE** | * Did the TJ unduly restrict the right of A to conduct full & proper cross-E? 8can this alternative scenario be put to the victim? * **Must there be a factual/substantive basis for cross-E?** |
| **HOLD** | * + - YES, but disagreed w/ CoA => was NOT a harmless error; appeal allowed & new trial ordered |
| **REASON** | * D has a right to cross-E witnesses “*w/out significant & unwarranted constraint*”   + - *WHY?* \*essential to making a full answer & defence & essential for determining credibility\* & protected by **7 & 11(d) of the Charter**     - ***HOWEVER: importance that it not be abused \*i.e. harassment, misrepresentation, overly prejudicial*** * *STANDARD:* need not be proved independently/factual foundation \* “**good faith basis**”   + - Cannot be INCOMPLETE/UNCERTAIN/INADMISSIBLE => “***honestly advanced on the strength of reasonable inference, intuition or experience”***     - \*cannot be reckless/known to be false\*     - *TJ: balances fair trial w/ need to prevent unethical cross \*can conduct a voir dire to determine whether good faith basis exists\** * Error was Not harmless b/c:  1. TJ’s ruling intimidated defence, disrupting her rhythm of cross & its scope 2. It obliged defence to call certain witnesses as her own, thus forfeiting the last word to jury |
| **RATIO** | * **As long as counsel has a good faith basis for asking an otherwise permissible question in cross-E, should be allowed (so need not be proved independently) \*\*BASIS: may extract evidence that is important that may not otherwise be able to prove\*** * **SO: scope for cross-E very broad \*\*but w/ important limitations\*\*** |

* Must be careful with going too far \*can lose trust from the ToF\*

***R. v. Carter***

(2005) SCC

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| **ISSUE** | * If one is going to challenge a witness with contradictory evidence, must they be given a change to address the evidence while in the witness box? |
| **HOLD** | * + - YES |
| **REASON** | * ***The Rule in Browne v. Dunn***: if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box. *\*if you want to dispute what the witness says => NEED to have PUT ISSUES TO WITNESS to let them provide an explanation* * *POLICY:* fundamental proposition that a court of law must treat all persons who come before it in any capacity fairly; cannot cast doubt without allowing witness chance to respond & prevents ambush * *PENALTY:* can be blocked from making the submission OR could be direction given to jury that they can weigh that the scenario put forward by D went unchallenged * HOWEVER: ***this rule is NOT absolute*** => depends on circumstances of the case (holistic analysis) \*factors such as: nature of matters on cross-E, tenor of cross-E, overall conduct of D\*   + - \*\*DISTINGUISH W/: failure to ask about significant matters upon which you will ultimately attempt to rely (which will engage the rule) vs. failures to put details to a witness * **SO: Can jury make inference re: fact that witness was not confronted? \*\*only in clearest of cases!\*\*** |
| **RATIO** | * **General duty to be fair to the witness => if you intend to dispute what they say, witness must have an opportunity to provide an explanation** * **BUT: leeway (\* i.e. whole cross looked at as a whole\*)=> ONLY in the clearest of cases can the jury be instructed to make an inference re: non-confrontation** |

* + - Can use the opportunity to talk about prior statement => if they confirm their statement & truthfulness, can lead up to what you eventually want to show is an inconsistency
    - If just call contradictory evidence called or if issue raised first time in admission when ask ToF not too rely:
      * (1) undermine witness \*don’t give them chance to explain\*
      * (2) potentially given a distorted story \*threatens fair trial => deprived trial of an explanation!
    - *HOWEVER: court wants to be careful to not too quickly apply this rule*:
      * (1) hesitant to visit the mistakes of counsel on clients (could have been an honest mistake)
      * (2) rule applied too simplistically =>
        + Can exert too much control over cross-E (i.e. some counsel may not direct address the issue, w/out it being in a blatant Q) \*must look at cross as a whole => did witness have an opportunity to respond & address D position?

1. Re-Examination

* *BASIC IDEA*: **Party who led witness wants to re-examine following the other party’s cross** \**to be used sparingly*\*
* *LIMITS*: on what can be re-examined on & when you can
  + - * (1) ***only if there has been cross-E*** \*so only on matters raised for first time in cross=> must be something new\*
      * (2) must be confined to matters arising in cross (BUT: ***judge has discretion => to allow other party to re-examine on new facts (then other party gets right to cross again!)***
        + \*must ask leave first => up to ToF who would weigh it depending on facts of case

***R. v. Moore***

(1984) SCC

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| **ISSUE** | * Does Crown have the right to re-examine a witness if that witness did not give evidence in cross-E? |
| **HOLD** | * + - NO; some discretion to trial judge |
| **REASON** | * Right to re-examine ***only exists where there has been cross-E and is limited to matter arising in cross-E***   + - New facts CANNOT be introduced & leading questions may NOT be asked * However, TJ does have discretion to allow the introduction of new matters (which the opposite party may then re-examine) |
| **RATIO** | * **Can only re-examine on NEW matters arising in cross-E \*beyond that: discretion of TJ\*** |

* *RATIONALE*: Allows you to re-examine witness on a new issue brought out in cross so trier of fact has more info and may rehabilitate witness on issue

1. Rebuttal Evidence

* *BASIC IDEA:* Possibility of Crown to add more evidence later on \****STRONG PRESUMPTION against this***\*
  + - Concerns:
      * Efficiency of trial
      * Ability of A to make full answer & D: If case split => don’t have the chance to address during original cross
* General rule: ***Crown cannot “split its case”*** *=> must enter in own case and relevant evidence it intends to rely on upfront =>* BUT:
  + (1) **sometimes, unexpected events can occur** 
    - * + a new defence that Crown did not know if, therefore did not address) => *Can do their best to cross-examine, but that may not be sufficient (i.e. a rebuttal expert witness to rebut the A explanation)*
  + (2) **Interests of efficiency => cannot be on collateral matters**
    - * + sometimes something particular comes up in the A’s testimony & you want to attack this (i.e. not a defence, but a different set of facts, i.e. A blames it on someone, wants to call evidence to contradict this testimony that was not at issue before) \****to contradict an important point by a D witness***\*
        + BUT: then a trial could go on forever! \****so must limit the subject matter=> in this case, can cross-E, but cannot allow a rebuttal witness***

***R. v. Krause***

(1986) SCC

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| **FACTS** | * + - Trial judge permitted Crown to introduce evidence in rebuttal on collateral matters re: A’s credibility under s.11 of the CAE |
| **ISSUE** | * Can Crown introduce collateral matters re: A’s credibility on rebuttal? |
| **HOLD** | * + - NO; appeal allowed and new trial ordered |
| **REASON** | * Are exceptions to the “no rebuttal evidence rule” => **TEST:**  1. Issue that ***could not have been reasonably anticipated*** or expected \*must be new issue\* (cannot simply confirm/reinforce earlier evidence) 2. Cannot be a collateral (not material) issue \*new issue MUST go to the centre of the case & CANNOT be purely a credibility issue |
| **RATIO** | * **THEME: search for the truth, so a “half-perspective; distorts the picture => the other side must have the chance to present their side if could NOT be reasonably anticipated & important enough** |

* + - *KEY*: concern re: efficiency => do not want the trial to go on forever!
    - *LESSON:* may want to error on the side of caution b/c difficult to call rebuttal BUT on other hand, to say something could be “reasonably anticipated” can be difficult \*can be risky to assume to wait for other party to bring it out!

**CH. 5: STATEMENT EVIDENCE**

* Evidence of Prior Statements
* *GENERAL RULE*: ***prior statements not admissible for their truth*** \*\*but are exceptions\*
  + Already saw one exception: past recollection recorded
  + **BUT: if used: LIMITATION => not for their truth** (BUT: if witness adopts prior statement => then yes; so not independently admissible, but if adopted and brought into current testimony)

1. Admissibility of Prior Consistent Statements

* Do these have any potential probative value? \*\**GENERALLY INADMISSIBLE*\*\*
  + Rationale for inadmissibility: tends to ***oath-help***
* BUT: **are exceptions**: may in some cases be some reason to refer to the prior statement of a witness
  + NOT probative for its truth, but for ***NARRATIVE PURPOSES***
    - * + Want the ToF to understand the course of events that lead to the allegations coming to court
        + SO: cannot get into substance (b/c this does not assist in the narrative)
  + To ***rebut allegations of fabrication***
    - * + Then may come down to issues of credibility => two different stories?
  + ***Previous Identification***
  + ***THEME*: purpose you bring it in for will regulate how you can use it** (so have to think about the purpose before you lead the evidence)
* **MUST: have clear instructions to jury RESTRICTING how they can use the evidence**

***R. v. Ay***

(1994) BC CoA

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| **FACTS** | * + - Conviction on charges of indecent assault appealed; the evidence at trial was contradicted by each side \*SO: credibility the major issue to decide\*     - Allegation: Inadmissible statements of complainants prior out of court statements went before the jury and the trial judge failed to properly instruct the jury on the uses they could make of the evidence |
| **ISSUE** | * Are prior consistent statements admissible? * If so, must he jury be instructed on the proper use that can be made of them? |
| **HOLD** | * + - YES if fit an exception & jury MUST be instructed re: lmtd use |
| **REASON** | * *CL rule: evidence of prior consistent statements NOT admissible* (repetition does not make it any more true!)=> HOWEVER: are **exceptions to that rule**:  1. Recent fabrication is alleged 2. Admitted as part of the narrative 3. Recent complaints in sexual assault cases 4. Statements on arrest 5. Statements made on recovery of incriminatory articles 6. Statements made w/ respect to previous identification of A  * ***CLEAR: CANNOT be admitted to assert/prove the TRUTH of those statements*** * Narrative exception applied here: used to understand whether the CONDUCT of the complainant was consistent with record of what occurred   \*\**LMTD SCOPE*: can only describe it in general terms & cannot contain details (So as to NOT infer truthfulness) \*whether it was made/when/why/why not => all relevant\*   * IMP.: if admitted => ***JURY MUST BE WARNED***: must be aware of the limited use they can make of the prior statements   + - Where credibility is imp: must instruct that RD applies to that credibility     - i.e. ***R v. W(D)*** MUST acquit if believe A or if do not believe A but still have reasonable doubt |
| **RATIO** | * **(1) admissible to draw inferences relative to credibility of witnesses’ evidence BUT NOT to determine consistency/truth of their evidence & (2) instruction must be given** * **SO: can refer to it (i.e. for narrative purposes) but CANNOT get into the substance of the statement** |

* IMP: discussion of reasonable doubt
  + i.e. if more likely than not Crown case is true = NOT enough! \*BARD\*
  + ***W.D***. => formula for ToF in criminal cases to apply when applying credibility to the standard
    - * + ***If believe***: acquit
        + ***If don’t believe, but A raises reasonable doubt:*** acquit
        + ***Don’t believe A’s testimony: is Crown’s evidence a scenario you are sure is true and credible?***

May be situation where Crown’s theory is plausible, but does not meet reasonable doubt standard

* + *Nikos:* problematic when/if *WD* encourages ToF to look at evidence too much in isolation & compartmentalize the evidence (vs. Looking at the case as a whole)

***R. v. Stirling***

(2008) SCC

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| **FACTS** | * + - Issue at trial: who was driving the car => evidence of prior consistent statements admitted     - Allegation: TJ used them erroneously for the truth of their contents |
| **ISSUE** | * Did the trial judge use the statements for the truth of their contents? |
| **HOLD** | * + - Appeal dismissed -> reasons must be read as a whole to determine how TJ used the statements |
| **REASON** | * Prior consistent statements are inadmissible \*lack probative value and are self-serving\* => but are several exceptions, including if there are suggestions of fabrication   + - *FABRICATION EXCEPTION*: (1) an actual, express allegation of fabrication need NOT be made & (2) the ‘fabrication’ need NOT be particularly recent (just at some point after subject of testimony occurred) * *LMTD USE*: cannot be assessed for the truth of their contents * *HOW to determine HOW judge used the statements*: must look at reasons as a WHOLE => clear was aware of lmtd value (esp. if certain aspects were ambiguous)   + - **\*\*CAN USE to support a witness’ credibility\*\* => not necessarily more true** |
| **RATIO** | * **KEY: limiting instruction necessary to ensure not used for truth, but can be used for CREDIBILITY** |

1. PRIOR IDENTIFICATION

***R. v. Swanston***

(1982) BCCA

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| **FACTS** | * + - C testified that he identified the D on two previous occasions (police line-up and pre-lim) but that he could not say for certain whether it was him at trial     - Crown tried to call police witnesses to testify that the A was the person identified by the C on these two previous occasions but judge refused relying on case law |
| **ISSUE** | * Can evidence of previous positive identifications be admitted? |
| **HOLD** | * + - YES => judge erred in law in not allowing supporting evidence of PO’s; appeal allowed, new trial ordered |
| **REASON** | * Case law used by TJ was erroneous; additional case law supports Crown’s proposal \*some cases distinguished b/c the witness in those had since changed their story since the previous identifications * *RATIONALE:* unlike other prior consistent statements => prior identifications STILL HAVE PROBATIVE VALUE (perhaps even more than an identification made in court) \****the failure of a witness to repeat the extra-judicial identification in court does NOT destroy its probative value***\* |
| **RATIO** | * **An exception to the inadmissibility of prior consistent statements** |

* + - May even be MORE reliable!!

1. Attacking the Credibility of Party’s own Witness

* ***Typically, cannot cross-examine your own witnesses*** (then: could call adverse witnesses and then be given free rein to cross-E then; subverts entire adversarial process!)
* *HOWEVER:* **what if W presents NEW testimony**? \*natural to be concerned\*
  + - => now you have to deal with the inconsistency!
    - Even if the court allowed you to present witness to support the original account => not much you can do to save your case! \****quite damaging***\*
* SO: as a matter of principle => if have a prior record that indicates one direction and they change that
  + (1) GIVE opportunity for party to call witness to start making inquiries into the change of story &
  + (2) maybe even to call them “hostile” to try and undermine their credibility

*STATUTE:*

* ***CEA, s.9:***
  + *(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.*
  + *(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.*
* 9(2) => less invasive then use 9(1) later if justified
* *To invoke 9(2):*
  + (1) a prior statement in writing/tangible form (or reduced to writing/audio/video)
  + (2) and it has been inconsistent \***must be a clear, significant inconsistency!\***
    - **NOT for simply “improving their testimony”**
  + *NOW: allowed to do a* ***lmtd cross-E*** *pursuant to the statement: what is the reason/basis for the change?*
    - limited to the existence of the prior statement, the inconsistencies, and why they may have changed their statement
    - *NOTE:* statement is NOT being put for its truth
* *To invoke 9(1):*
  + SAME as above BUT => WITNESS becomes ADVERSE or HOSTILE and seems to be turning on counsel
  + *NOW: more leeway* => ***general cross examination*** *of the witness*

***Regina v. Milgaard***

(1969) CoA?

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| **FACTS** | * + - Crown witness first testified to seeing A kill the victim, the statement was recorded => in trial, denied making such statement, was declared hostile and cross-E on these statements |
| **ISSUE** | * Did TJ err in allowing Crown to cross-E on a previous statement? |
| **HOLD** | * + - Allowed! |
| **REASON** | * *Relationship b/w 9(1) & 9(2)*    + - 9(1) => NO declaration of witness as adverse = cross-E lmtd to statement => then can use cross-E to have witness declared adverse to expand boundary of cross     - 9(2) permission to cross without declaration of hostile \*\**LMTD: confined to the inconsistencies as disclosed in the statement*\* * ***NOT an ABSOLUTE RIGHT***! \*\*TJ has discretion\*\* * *PROCEDURE:*  1. Counsel should advise court of the application 2. If court is advised, jury should be retired 3. When retired, counsel should notify judge of particulars of application and *produce statement* 4. TJ reads statement to determine if there is ***inconsistency*** => if so, must call counsel to prove statement “exists” in writing 5. Counsel must prove statement; ***either witness adopts it or proof by other evidence*** (i.e. person who took statement) 6. Opposing counsel has ***right to cross-E***; i.e. what under what circumstances was the statement made? \*maybe circumstances that would render a cross-E improper despite the inconsistencies\* 7. Judge decides; jury recalled  * ***Importance of careful jury instructions*** => limited use they can make of the statement (NOT in evidence) |
| **RATIO** | * **Unless witness s declared hostile, the cross-E is limited to the inconsistencies in the statement** * **\*TJ has discretion\* => NOT an absolute right “*interests of justice*”** * **Importance of LIMITING use => always a danger that it will be used for its truth** |

* **Judge maintains discretion** not to allow this process if he/she believes this is not in the interests of justice
* *NOTE*: s.9(1) does not require the prior statement to be writing so it should be used when there was an oral statement.

***Wawanesa Mutual Insurance Co. v. Hanes***

(1963) Ontario CoA

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| **ISSUE** | * How is a witness declared adverse? |
| **RATIO** | * **The judge should consider: testimony of witness and the statement, the relative importance of the statement, and whether it is ‘substantially inconsistent” => Must also consider the “surrounding circumstances**   + - This should be done in the absence of the jury * ***TEST*: “ends of justice attained by admitting it”** * ***NOTE*: “adverse” includes a hostile witness, but also one who is “unfavourable” in that they assume a testimony opposite of the party calling him** |

***Regina v. Cassibo***

(1982) Ont. CoA

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| **FACTS** | * + - A convicted of incest; two complainants in the case testified that they told their mother about the incidents on two different occasions (say abuse stopped after the 2nd time they told her)     - The mother was a Crown witness => she denied in court that such statements were ever made to her => crown wants to cross-E her (her prior statement was supportive of us, but not anymore)     - In a voir dire, the judge considered evidence of previous oral statements made by her to PO’s in which she said they did tell her, but these statements were not signed or acknowledged by her => judge allowed her to be cross-examined on this and for the PO’s to testify to the statements     - D: 9(2) of CEA inapplicable b/c the statement was not in writing, were only oral statements |
| **ISSUE** | * 1) was there evidence corroborative of each other? * 2) what to do when cross-E gets into a collateral issue? * 3) Prior consistent statements => is the complainant’s evidence of their previous statements admissible? * 4) 9(1) & (2) Did the judge err in allowing Crown to cross-E their own witness? In what circumstances can this be done? |
| **HOLD** | * + - Judge did not err in declaring the witness adverse and admitting her previous statement |
| **REASON** | 1. *Corroboration requirement*    * + Back then (NOT ANYMORE) in certain circumstances, there were corroboration requirement for certain offences (i.e. child sexual abuse allegations) 2. *Collateral matter*    * + The Complainant’s are being cross-E on a magazine that had an article on accusing dad of sexual abuse      + Judge intervene => getting into a collateral issue (voiced concern) => BUT: given a broad right to cross & the collateral issue is asking about something that is not relevant and then calling evidence to contradict them (SO: only engaged when later try to call witness to contradict them, then possibly engaging it)      + But here: was on a CORE (not peripheral) issue! SO: not collateral! 3. *Complainant’s prior CONSISTENT statements*    * + ADMISSIBLE b/c: \*\*part of narrative & to rebut an allegation of recent complaint 4. *9(1)*  * ***Importance of a voire dire*** => fairness requires that the witness be given the opportunity to admit or deny making the statement, or at least explaining the circumstances in which it was made (i.e. then if too prejudicial => its admittance can be prevented)   + - ***Discretion of TJ***: not all cases where an inconsistent statement is made will result in an adverse => What is their explanation for the change? (i.e. may consider other factors, motivation to lie?, provides a good explanation for the change)     - **KEY STEPS:** **(1)** prior oral statement? **(2)** inconsistent? \*heavy, not frivolous; changed to be more consistent with the other side\* **(3)** explanation for change? (i.e. motivation to lie vs. good explanation for the change- this could block a cross-E) * HERE: adverse b/c prior oral statement, inconsistent, and no explanation provided * ***Interaction b/w 9(1) & 9(2)*** => independent procedures   + - 9(2): permit cross-E of one party without seeking an adverse declaration => confined to the statement     - 9(1): can seek an adverse declaration => wider scope of cross-E allowed (ADVERSE: hostile to the party which called them, and looking at how their position flipped on a significant issue) * TEST: serve the administration of justice? |
| **RATIO** | * **Prior statements under 9(2) NEED NOT have to be in writing or reduced to writing; oral statements may be sufficient with corresponding verification** * **Have to read 9(1) & 9(1) more broadly => just b/c 9(2) talks about written statements, doesn’t mean that 9(1) requires witness** * **Inconsistency may not be enough on its own to find a witness adverse => TJ may have to look at explanations for them (i.e. a good explanation could block an application to cross)** |

* ***Strategy re: deciding b/w 9(1) and 9(2)*** => if want the rest of the witness’s testimony, do not want to undermine their credibility as a whole, so better to use 9(2) so it is not as much of an adverse/confrontational cross
* ***ADVERSE:*** 9(1) generally interpreted as you ***have demonstrated some hostile animus toward the party calling the witness – you have demonstrated you are adverse to their position***, you now seem to be supporting the position of the party against whom you were first to testify
* ***CONSIDERATIONS*** *for the judge re: declaring adverse per 9(1)*

1. demeanour;
2. did counsel calling the witness have fair notice of the witnesses change in story

* 9(1) is seen by the case law to cover surprises

1. how radical of a change;
   * the more substantial and unexplainable difference, the easier it will be to draw the inferences necessary to have them declared adverse
2. any evidence of why this change happened (i.e. medication, etc)
   * no evidence = strong inference that the witness is hostile

***McInroy and Rouse v. R.***

(1978) SCC

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| **FACTS** | * + - A Crown witness testified re: her contact w/ A’s after the incident => crown applied under 9(2) to cross-E her using her previous statements to the police in which she basically heard confessions from the A     - During the voir dire the witness testified she could not recall making the statements, but that at the time, she was telling the truth \*statements were reviews & signed by her at the time they were made\*     - RJ followed procedure set out in Milgaard, decided to allow the cross, but limit it to cross on the statement only (so statement not as evidence before the jury)     - TJ instructed jury re: lmtd use of cross-E & statement => only credibility = do not form part of evidence     - CoA said TJ erred => witness had said nothing damaging to crown’s case, so not a proper case to do a broad cross-E (simply didn’t come through, didn’t actually DAMAGE the case |
| **ISSUE** | * What constitutes inconsistency? What if the witness simply “completely forgot”? |
| **HOLD** | * + - Appeal dismissed; TJ was correct |
| **REASON** | * Importance of following the procedure in Milgaard * *CoA misinterpreted* => the witness need not necessarily be adverse to be cross-examined, there simply needed to be inconsistencies b/w her testimony and her statements to PO \*which there were\*   + - *However: leaves open the standard: does it really have to be damaging to case (what if isn’t?)* * *DISTINGUISH:* a ***witness is trying to be honest, and is making honest mistakes*** (i.e. completely forgot) ***VS. Witness has motivation to lie and change testimony \*deliberate & dishonest\**** => significant difference re: are they credible witnesses?   + - In this case => couldn’t be believed that she “honestly forgot”, incident had only occurred 6month before; looked more like a deliberate change in their evidence * *TJ DISCRETION:*   + - Can always disallow cross in “***the interests of justice”*** (i.e. may be certain cases where there was clear notice that they would change their story “on full notice & so their choice to call them)     - Importance of limiting instructions to the jury \*\*cross-E may often only be used to test credibility\* |
| **RATIO** | * **Always discretion of TJ to find that all the criteria are met but that a cross should NOT be allowed “in the interests of justice”**   + - SO: while legitimate loss of memory my result in inconsistencies, possible that no cross-E allowed, BUT if the lack of memory is feigned or fake, that is a circumstance where you can find there is an actual conflict in the testimony and calls for cross examination under 9(2) |

* Left with one “hanging issue” law still struggles with today

**CHAPTER 6: HEARSAY**

* KEY: can use prior statements against W to REDUCE CREDIBILITY => but not admissible yet for its truth!!
  + ***= so HOW can they be admitted for its truth so that it can be used to convict*** (can rely on it as if it was provided by a witness in court)? \**HEARSAY!!\**

***STEPS IN A HEARSAY ANALYSIS***

1. *KEY Q:* ***Does it need to be used for its truth? (vs. the fact that it was said)***
2. *IF YES => is there an exception?*

* ***CL categories => Principled approach***
  + *BEFORE*: if didn’t fit into a CL exception; couldn’t bring it in (*CONSEQ*: maybe larger leeway for “truth of its contents” => tried to argue this more b/c CL definition are rigid)
  + *CL categories*: Past recollection recorded, Dying declaration (“hopeless expectation of death” and indicate who it was, admissible based on “air of reliability”), Spontaneous declarations (tied with the act that made the declaration => no realistic ability to make up what was going on; declaration flowed from a physical event)
* ***\*REALIZATION: NEED greater FLEXIBILITY***
  + KEY: realized principles of reliability & necessity drove the CL exceptions => SO NEED to include other prior statements that *didn’t fit into rigid CL categories but meet the underlying criteria of necessity and reliability*\*

1. NOW: key steps in analysis:

* *(1)Initial Threshold: (KGB)*
  + - * *A) \*Would it OTHERWISE be ADMISSIBLE? =>* would have been admissible as actual/sole testimony? (i.e. other exclusionary rule?)
      * B) No strong indication statement was product of coercion, threats, excessive pressure can be a factor in reliability analysis
* (2) ONUS for necessity/reliability: on party who wants to use the statement for its truth on BoP
* (3) *NECESSITY*
  + - * CLEAR: if person dead, uncommunicative, or doesn’t meet the criteria for the oath
      * HOWEVER (*Pelletier, Parrott*) => need to have made reasonable efforts \*fear/disinclination to testify is INSUFFICIENT (*Pelletie*r) => at least have the person try (i.e. in voir dire) \*give them a chance\* (*Parrot*)
      * *NOTE:* If there is a significant change in the evidence => (b/w current evidence and prior statement) can be an example of necessity
* *(4) RELIABILITY*
  + - * *First cases:*  focus on oath, presence and cross-E problem \*\*balancing of these 3 requirements\* => *are there adequate substitutes for these things?* \*spectrum of how good these substitutes are!\*
      * *NOW:* expanded to larger context => go to inherent trustworthiness (content/nature of maker)
      * Put them together => weighing!

1. **Final probative vs. prejudicial weighing**
2. **IF ADMITTED => weight up to ToF**

*MAPARA*

* **Framework for balancing the traditional exceptions with the principled approach FOUR PARTS**
  1. hearsay is presumptively inadmissible unless it falls under an exception: the traditional exceptions remain presumptively in place
  2. A traditional exception can be challenged to determine whether it is supported by indicia of necessity and reliability: the exception can be modified as necessary to bring it into compliance with principled approach
  3. In “rare cases” evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking the particular circumstances of the case
  4. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*

1. What is Hearsay?

***An out of court statement entered for the truth of its contents***

***Subramaniam v. P.P.***

(1956) JCPC

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| **ISSUE** | * What is hearsay? |
| **RATIO** | * **HEARSAY: evidence of a statement made to a witness by a person who is not himself called as a witness, BUT:**  1. ***HEARSAY* (=> inadmissible) if object of evidence is to est. truth of what is contained in the statement** 2. ***NOT hearsay* (=> admissible) if proposed to est. the fact that the statement was made and NOT its truth \*often relevant for conduct/mental state, etc.\*** |

* *Tends to arise:*
  + 1) when person who provided evidence is physically unavailable
    - * + i.e. a simply statement to someone or a pre-lim situation where they reverse what they are saying
  + 2) when person who provided evidence changes/forgets their story (past recollection recording is an example) \*LAMER: “holding the justice system hostage”
* ***Presumptively inadmissible*** => built on the purpose of the courthouse \*if only out of court statement were used, what is the purpose of court? \****want the benefits of court testimony***\*
  + WHY? b/c in COURT = (1) get them under oath; seriousness of telling the truth (2) can personally witness demeanour & see interaction w/ the questioner (3) Contemporaneous Cross-E
* If admitted => very powerful \*cannot be cross-examined!\* => but also a danger re: wrongful convictions...

1. Non-Hearsay uses of Out of Court Statements
2. CIRCUMSTANTIAL EVIDENCE OF STATE OF MIND

***R. v. Wysochan***

(1930) Sask CoA

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| **ISSUE** | * Can hearsay be admitted as a lmtd exception to est. state of mind? |
| **HOLD** | * + - YES |
| **REASON** | * Hearsay may be admissible as circumstantial evidence going to speaker’s state of mind (inquiring as to where her husband is) => can make inferences based on what they said   + - Esp. imp. In cases where the defence may be that the incident was an accident * ***LMTD USE: NOT for their truth, but to circumstantially support an inference of their state of mind*** |
| **RATIO** | * **EXCEPTION to hearsay rule: “utterances as indicating circumstantially the speaker’s own state of mind”** * **KEY: lmtd to circumstantial use (vs. Testimonial)** |

* It would inconsistent to seek them out if he were the shooter => circumstantial evidence of state of mind (inconsistent with him having been the shooter)

***Ratten v. The Queen***

(1972) JCPC

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| **FACTS** | * + - A convicted of murdering his wife; ***defence was that it was accidental***     - Evidence of a phone call made from their residence via a telephonist was adduced -> who testified to what the caller said \*caller was hysterical\*     - Defence objected on grds that it was hearsay evidence |
| **ISSUE** | * What this hearsay evidence and thus inadmissible? |
| **HOLD** | * + - NO |
| **REASON** | * *DISTINGUISH*: inadmissible vs. Admissible hearsay; mere fact that evidence of a witness includes words spoken by another does not = an objection to its admissibility \*\*objection only arises if are relied on “TESTIMONIALLY” (to est. a fact) * SO: admissible if simply evidence to explain and complete the fact that the call was made/words were said |
| **RATIO** | * **\*circumstantial evidence that there was an altercation going on => used NOT for their truth, just for the fact that they were said \*\*if upset => infer that there was a fight going on\*** |

* May be able to restrict what the witness ‘expands upon” if it cannot be used for its truth, but nevertheless want to ***lead it to show emotion/state of mind***
  + i.e. if in this example also said, my husband is waiving a gun at me => that would not be allowed, but may be able to still testify that the witness was upset without mentioning the specific words

1. Exceptions to the Hearsay Rule

*COMMON LAW EXCEPTIONS*:

* **The Dying Declaration**
  + Must show subjective perception that death is imminent
  + Inferences about this subjective perception can be drawn from external circumstances (ie level of injury)
  + Can be sometime between statement and actual death, as long as at the time of the statement they had a **hopeless expectation of imminent death**
  + (necessity = not available to testify as they are dead; reliability = thought people will not lie in last moments)
* ***res gestae***
  + a **sudden statement intrinsically tied to an event**
  + a close contemporanety is required
  + (reliability = little time for calculated insincerity; no problem of faulty memory as it happens at the same time as the conduct, and you get a great insight into perception as there is an immediate description of physical experience)
* **Present Statement of Future Intention**
  + **a present statement of future intent without any circumstances of suspicion**
  + someone states that they are currently expecting to do something at a certain point, you can believe the truth of that persons statement that they did indeed follow through (ie I am going to meet Bob at the gas station)

1. NECESSITY & RELIABILITY

***R. v. B. (K.G.)***

(1993) SCC

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| **FACTS** | * + - Victim was attacked by a group of young men & stabbed by one     - The three others came forward and made voluntary statements, which were videotaped to the police stating that the A made statements that he had stabbed the A     - In trial, these witnesses refused to adopt their earlier statements, explaining that they only wanted to prevent themselves from getting in trouble \*said they forgot or never heard anything\*     - TJ held that the only use that these statements could have was w/ respect to their credibility (despite finding that they were “obviously and deliberately untruthful”     - After the A was acquitted, the three witness plead guilty to perjury |
| **ISSUE** | * Substantive admissibility of prior inconsistent statements => Should the CL rule limiting the use of these statements be replaced? |
| **HOLD** | * + - YES => new trial ordered to test admissibility under new test |
| **REASON** | * Orthodox rule: why limited to credibility?   + - \*\*rests on the hearsay rule => “hearsay” dangers of lack of oath, inability of ToF to assess demeanour and inability to contemporaneously cross-E     - HOWEVER: the orthodox rule has eroded! * *NEW ADMISSIBILITY RULE \*principled basis\**   + - ***KEY: threshold matter => only admissible if would have been admissible as the witness’ sole testimony & NOT result of trickery/coercion*** (i.e. a confession must adhere to voluntary rule)  1. **Reliability** 2. ***OATH*** \*to diminish the critical difference b/w sworn and unsworn testimony => witness must “understand that moral obligation to tell the truth” \*witness should be aware of conseq.\*  * Help ToF: (i) not have to accept unsworn testimony over sworn (ii) eliminates explanation of offered for recantation (iii) sworn testimony always highly persuasive  1. ***PRESENCE*** \*important for assessing credibility\* => can be overcome by requiring videotape of statement \*NOTE: testimony from indep., 3rd party may suffice in exceptional circ.\* 2. ***CROSS-E*** => most easily remedied here b/c witness is present at trial 3. **Necessity** \*imp. Of a flexible def\* (***Khan***)  * Necessity ≠ unavailability -> “reasonably necessary” in the circumstances * In context of prior inconsistent statements => ALWAYS necessary b/c evidence of same value could not otherwise be obtained * *All of this is completed in a VOIR DIRE*   + - Same procedure as orthodox rule => but if party gives notice that they want to make SUBSTANTIVE use of the statement => voir dire must continue to determine if RELIABILITY requirements are met ***\*BoP\****     - ***TJ always has the discretion to nevertheless prevent substantive use via prejudicial/probative weighing*** (i.e. looking at circumstances in which statement was made)     - KEY: NOT making determination as to ultimate reliability/credibility of statement (that is up to the ToF)     - If it does not meet the reliability thresholds, may meet the 9(1) or 9(2) requirements and be tendered as evidence under the orthodox rule   \*\*Concurring Judgement => requirements were too restrictive\*\* |
| **RATIO** | * **Must have sufficient circumstantial guarantees of reliability to allow the jury to make SUBSTANTIVE use of the statement** * **Important threshold criteria: (1) if that witness could come to court => would be admissible anyways (2) that it not be the result of trickery/coercion** * **\*\*Can we find alternatives/replications for the things that are missing that make in-court statements reliable => oath, presence, cross-E \*\*KEY: look at circ. In which statement was given\*\*** * ***IMPORTANT*: a balance of all 3 reliability criteria! \*look at them holistically\* => Not all necessarily have to be met => but are important criteria** |

* If Crown has concerns that they later may turn => do a “BKG statement” videotaped evidence!
* Specific circumstances:
  + the recanting witness other than the accused
  + If a witness rejects their prior statement and radically changes their testimony at trial this may satisfy the necessity requirement to bring the prior statement in through hearsay evidence.
  + Any argument re: pressure to make the original statement is dealt with in reliability
* KEY: If there are ***strong substitutes for each of the three criteria it will presumptively meet the test***

***R. v. Parrott***

(2001) SCC

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| **FACTS** | * + - A convicted of sexual assault and kidnapping; the complainant had severe down’s syndrome and in statements made after the incident, was largely incoherent and had difficulty answering simple questions, but did make some incriminating remarks     - At trial, a voir dire was held to determine the admissibility of her previous statements => declared admissible by TJ despite the Crown not calling the complainant herself, but only hearing from PO’s and experts testifying re: her inability to verbally communicate(but that she would not suffer trauma)     - A convicted & D appealed: statements should have been inadmissible b/c were unnecessary in light of the complainant’s availability to testify => CoA ordered a new trial |
| **ISSUE** | * Was the necessity requirement met to admit the complainant’s out of court statements? |
| **HOLD** | * + - NO, Crown’s appeal dismissed \*strong dissent; 4 vs.3\* |
| **REASON** | * There was *NO basis to admit the statements w/out hearing from the complainant* \*not “necessary”   + - Complainant clearly able to testify and no suggestions that she would suffer as a result of it     - recog. that must be “flexible” but ***an exploration of whether the witness is capable of perceiving/remembering/communicating events should include hearing from the complainant herself***     - previous SCC case, even where witness called, statement inadmissible b/c TJ failed to adequately pursue why child was unable to provide her recollection     - Crown argued that evidence was tendered re: trauma, but court felt that this is best not left to inference   *\*\*DISSENT:*   * + - Need to be more flexible => not obliged to have complainant testify; here, it would have served no real purpose to do so \*trial record fully supports her incapability of testifying and the lmtd amount of info she could have provided\* |
| **RATIO** | * **Ultimately inadmissible b/c failed on necessity => if witness is available and there is no suggestion would suffer trauma, TJ should hear witness before deciding on whether statements are admissible** |

***R. v. Pelletier***

(1999) BC CoA

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| **FACTS** | * + - A convicted of murder after evidence of an out-of-court statement to a witness that supported the crown’s theory was admitted as an exception to the hearsay rule     - TJ ruled that the evidence was admissible b/c the necessity requirement was met by the fact that PO’s considered it “pointless to try and interview him”     - D: appealed on basis that necessity was not met, that at least, the PO’s should have testified under oath => pointless ≠ necessary |
| **ISSUE** | * Did TJ err in admitting evidence as hearsay; did the witness being “pointless to try and interview” meet the necessity test? |
| **HOLD** | * + - Test NOT met; appeal allowed and new trial ordered |
| **REASON** | * “necessity” can still be met if witness is available in “physical” sense, but if is unavailable due to death, illness, insanity * LIMITS: simply a fear or disinclination to testify = ***INSUFFICIENT; Crown must demonstrate more than the witness was simply adverse or disinclined to testify*** |
| **RATIO** | * **“Necessity” is NOT met by a witness’ disinclination or fear of testifying => Crown needs to go through the process of at least trying to get them to court** * **\*(1)reasonable efforts to get evidence in regular way or (2) demonstrate to court why you were unsuccessful\*** * **No presumption of necessity => should NOT be lightly assumed** |

***\*\*RELIABILITY: SITUATION BEFORE KHELATOWN:***

* *BKG* => “governing criteria” = could not be matched by subsequent cases (Khan, Smith) = *“relaxing” of the criteria*
  + No presence and no cross => but still admitted \*COURT: ***looked more at the circumstances in which the statement was made***
  + = confusing situation!
    - * + Would go through KGB => then would argue if didn’t meet it, could you say it was like some of the cases where they seemed to make exceptions => \*\***absence of an overall framework**\*\*
* *Khelawan*: time to broaden our view of reliability => includes an analysis if the circ. in which the statement as given (BKG) but also of ***OTHER FACTORS*** (can put them under an umbrella of “inherent trustworthiness”)
  + Neither are exclusive water-tight compartments

***R. v. Khelatown***

(2006) SCC

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| **FACTS** | * + - A number of elderly patients at a home accused the manager of assaulting them; however, by the time of trial, none were available to testify     - The statements from the complainants were assisted greatly by an ex-employee, who was said to have motive to “get back” at A \*D theory: she influenced the statements\*     - video-tape interview by PO was not under oath, and there were doubts as to the complainant’s mental health/state     - medical records demonstrated that the complainant was depressed, experienced psychoses, and was often “confused”     - TJ rules some of their prior statements sufficiently reliable to be admissible (relied on their “striking similarity” => conviction overturned on appeal b/c found unreliable |
| **ISSUE** | * 1) Are there difference b/w what should be considered during ultimate vs. threshold reliability? * 2) the limitation of the ‘strikingly similar” statements discussed in U(F.J.) * 3) What factors should be considered when determining reliability? Did the statements in this case have sufficient threshold reliability to be received in evidence? |
| **HOLD** | * + - Dismissed appeal; confirmed convictions b/c reliability requirement not met |
| **REASON** | *ISSUES:*   1. *The distinction b/w ultimate and threshold reliability*    * + *THRESHOLD*: TJ -> is there a circumstantial guarantee of trustworthiness?      + *ULTIMATE*: for the ToF to decide; weight/credibility, etc.      + Important distinction in terms of the standard that the TJ and then ToF must judge against => HOWEVER: one should not distinguish between the type of evidence to be considered in one vs. the other (NO categorical labels as evidence that relate to one and not the other)      + = A functional approach: \*\*ALL relevant factors should be considered; only tailoring the SCOPE of the inquiry to the specific evidentiary question\*\* 2. *U(F.J.) was incorrectly interpreted*    * + Desire to AVOID “pigeon-hole” analysis +> are no “categorical exceptions to the rule based on fixed criteria”   ***STEPS: (\*question 3)***   1. Recognize hearsay (a) what is the purpose we are using it for? (b) absence of opportunity for contemporaneous cross-E 2. Hearsay is presumptively inadmissible 3. Is there a traditional CL exception that can be applied? 4. Principled Approach to overcoming hearsay dangers    * + **two principled ways of satisfying the reliability requirement:**   \*\*A) ***Inherent trustworthiness***: demonstrate there is no concern b/c of the circ. In which the statement came about; i.e. negate the possibility of untruthfulness or mistake (i.e. made almost immediately after the event, striking similarities) \*NOT a final reliability analysis (for ToF => but are their indications that the content of the statement was true!)  \*\*B) OR from the fact that despite it being hearsay, ***its truth and accuracy can nevertheless be tested; i.e. are there adequate substitute for the traditional safeguards***? (i.e. witness testifies in court, so can be cross-E)  *Application:*   * + - *RELIABILITY NOT MET*: absence of opportunity to cross-E w/ no sufficient substitute to test the evidence (i.e. no pre-lim transcripts) => must rely on inherent trustworthiness (BUT: there is little, mental capacity at issue, possibility of collusion, striking similarities irrelevant b/c were between different complainants) |
| **RATIO** | * ***Inherent trustworthiness* = opens up analysis => factors: motivation to lie? Contemporaneity of statement to events, the flow of what was said (logic to it?), where there leading questions from the questioner? Suggestive? Motive to lie? Specialized knowledge articulated with statement \*CAN do some comparison of external evidence\*** * **KEY: can “mix & match” to make threshold reliability! \*NONE are determinative factors!** |

* Overruled ***Starr*** where it said that you cannot compare to external evidence for corroboration and that we do not consider the truth of the statement

***R. v. U. (F.J.)***

(1995) SCC

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| **FACTS** | * + - Allegations of sexual abuse made by complainant; audio-recording failed but notes & will-say made     - A admitted to PO, (no attempt to record statement, but made notes) A refused to sign written statement     - At trial, complainant recanted & A testified his confession was false     - TJ told jury that if C’s prior statement confirmed the A’s confession, they could convict => convicted     - CoA dismissed the appeal, but dissent said jury was misdirected on “substantive” use of statement |
| **ISSUE** | * Did TJ err in inviting jury to compare complainant’s prior inconsistent statement with the A’s statement (both un-adopted) in determining whether prosecution has est. guilt? |
| **HOLD** | * + - Appeal dismissed, improper jury instruction was not a miscarriage of justice; proper instruction would have lead to same result |
| **REASON** | * HOWEVER: *imp. to note that it can be difficult to distinguish using a statement for its truth and using it for probative value*   + - Court agreed that when comparing two statements, it is impossible not to look at them for their truth => so here: “every scenario in which the daughter’s prior inconsistent statement is probative leads necessarily to some inference about whether it is true” * Responsibility of judge to make a threshold determination of reliability => \*\*importance of flexibility: requirement can be met by appropriate police procedures and substitutes can be found  1. RELIABILITY => i.e. b/c of the fact w/ prior inconsistent statements, witness can be cross-examined, **statement may be admitted even in absence of oath/video record**  * OR: ***reliability can sometimes be est. when there are striking similarities b/w two statements (key: getting to root of why the similarities exist, coincidence vs. similarities too striking = highly unlikely that 2 people would have fabricated them independently*** * Jury instructions:   \*\*KEY: (1) ToF must 1st be satisfied that statements were MADE then (2) can compare the similarities between them then (3) can determine if are sufficiently striking as to not be coincidence  *Application*   * TJ held voir dire where witnesses cross-E => original statements contained striking similarities => statement substantively admissible at trial * While there were clear problems with the jury instructions => jury would have nevertheless been satisfied with their reliability |
| **RATIO** | * **Unduly restrictions on the admissibility for a hearsay purpose of prior inconsistent statements imposed in B(K.G.) => court encouraged a flexible approach to requirements & stated that reliability can be met with substitutes to the oath/video** |

* \*\* example of *inherent trustworthiness based on content with strong indications of truth*: here the recanting A’s prior statement was admitted because it closely matched details of complaint’s account

1. BUSINESS RECORDS & STATEMENTS IN THE COURSE OF BUSINESS

* *PRACTICAL PROBLEM*: many types of these records created in a uniform way, person testifying will likely, if ever, have a specific recollection of the event (ie sales receipts)
* *SOLUTION*: standardized procedures give certain indicia of reliability which may reach threshold
  + applicable to documents in general
  + a document is inherently hearsay (created outside of court)
  + establish authenticity for the purposes of determining its admissibility

***CEA: s.30:***

* + **30(1) basic rule:** documents can be admitted for the truth of their content “where a record is made in the usual and ordinary course of business”
  + **30(2)** can draw on document for truth of contents AND to draw inferences from things that are missing from the document (ie alleged to have bought 4 things but record only shows 3 things bought)
  + **30(10) limits** Records made in course of investigation or inquiry or in giving legal advice do not follow under this rule
  + **30(11)** statute does not derogate from common law rules, are in addition to them: can use common law or the statutory rules, depending on the circumstances
    - even if you meet the “usual and ordinary course of business” requirement there are some exceptions, record made during course of investigation or inquiry—out of usual and ordinary course, focused on specific task, not type of every day document we want used in the exception, contrary to public policy, covered by privilege—won’t be admissible

***Regina v. Wilcox***

(2001) NS CoA

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| **FACTS** | * + - D charged under the Fisheries Act; relevant to case was the business dealings of the company     - Judge excluded “the crab book”, a book used to write payments by a settlement clerk at the dock     - Crown appealed, saying it should have been admissible on either business record or principled basis |
| **ISSUE** | * How do the requirements of reliability and necessity interact? * Is the CL exception of Business records and statements in the course of business met in this case? * How do the CL and principled exceptions to hearsay interact? |
| **HOLD** | * + - TJ erred in not admitting the evidence; meets reliability & necessity threshold |
| **REASON** | 1. *CL business records exception to hearsay*  * REQUIREMENTS   + - A) original entry     - B) made contemporaneously     - C) in the routine (broadly interpreted)     - D) of business (broadly interpreted)     - E) by a recorder with personal knowledge     - F) who has a duty to make the record     - G) who had no motive to misrepresent * NOT met b/c was not part of his job & did not have a duty to keep the records \*made on own initiative\*  1. *CEA: “record made in the usual and ordinary course of business”*    * + \*\*no requirement that they be under a duty to make it      + \*\*too close of a case => so should rely on the principled approach\*\*   ***KEY: in situations where the evidence may not fit a CL exception or it is “too close to call” it is best to turn to the principled approach to determine admissibility***   * If cannot be admitted under traditional approach => may be if meets principle approach * BUT ALSO: if admissible under traditional approach but if this does not adequately reflect the requirement of reliability/necessity, may NOT be admitted  1. *Principled Approach*   \*necessity cannot be considered in isolation from reliability => i.e. if there is a high circumstantial guarantee of reliability, the threshold for necessity may not be as high   * routine nature of their creation, relied on for business purposes, absence of any motive to misrepresent the information recorded |
| **RATIO** | * **CL and statute NOT considered in isolation from each other**   + - Goes through the three potential avenues for getting document in **(1)** statutory exception; **(2)** common law exception; **(3)** principled approach |

1. DECLARATIONS AGAINST INTEREST

***R. v. Underwood***

(2002) Alta. CoA

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| **FACTS** | * + - ‘cast of unsavoury characters” in a murder involving drug trafficking     - TJ did not admit out-of-court statements by someone that made statements which were critical to the D that someone else committed the murder and relevant to the identity of the killer     - Statements: “they got the wrong guy” “oh jesus Christ, they found the gun” |
| **ISSUE** | * Where these statements “declarations against interest” and thus, should have been admitted as an exception to the hearsay rule? |
| **HOLD** | * + - TJ erred, statements admissible under both CL and principled exceptions = new trial ordered |
| **REASON** | *4 step process:*   1. ***Were the statements relevant and probative?***    * + YES! 2. ***If relevant, were they hearsay?***    * + Some were (i.e. some statement were NOT adduced for their truth, just for that fact that they were made) 3. ***If hearsay, are they admissible due to a exception to the hearsay rule? (a) traditional exceptions (b) principled exception***  * \*AGAINST PENAL INTEREST => must be considered in its totality (as factors rise, so does RELIABILITY)  1. Against penal interest 2. Made in circ. where declarant should have known it is against penal interest 3. Penal consequences were not too remote    * + Requirements met in this case \*need NOT be to his “immediate prejudice” \*TJ: too high of a standard\*  * Principled approach: necessity clearly met (he was dead), TJ: considered factors relevant to ultimate reliability (as opposed to threshold) \*i.e. corroboration is not important (*NOTE: later overruled*)\*  1. ***If admissible under a CL exception to hearsay, should they be excluded for being too prejudicial?***    * + TJ: discretion => weigh probative vs. prejudicial      + NOT too prejudicial: probative to find real killer |
| **RATIO** | * **The less likely the statements were against penal interest, the less reliable they are \*some reliability threshold criteria: spontaneous, against interest, not susceptible to an interpretation equally consistent to another hypothesis** * **Meeting the CL test is good BUT: not determinative => move onto the principled analysis** |

* POLICY BASIS of CL test: reliable as people do not usually lie about things that they could go to jail for
* ***Seaboyer* note:** A number of cases have said that there is ***somewhat greater discretion for D to lead hearsay*** evidence; this case emphasizes that C should not oppose hearsay in this situation because it is their job to get a truth not win; more likely to get evidence in if you are D, but must still meet some threshold

1. ORAL HISTORY IN ABORIGINAL TITLE CASES

***Mitchell v. Canada (Minister of National Revenue- MNR)***

(2001) SCC

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| **FACTS** | * + - Mohawk Canadian tried to bring goods into Canada without paying duty, claiming that there is an Aboriginal right that exempts them from paying duty => convicted, appealed |
| **ISSUE** | * What evidence must be adduced to establish an Aboriginal right? * What are the evidentiary concerns? (Admissibility and Interpretation?) |
| **HOLD** | * + - appeal allowed; new trial ordered |
| **REASON** | *Evidentiary concerns in proving Aboriginal rights:*   * + - “unique & inherent evidentiary difficulties” => (*Van der peet*) should approach rules of evidence with:   A)consciousness of the special nature of aboriginal claims  B) of the evidentiary difficulties in proving a right which originates in times w/out written records of the practices, customs & traditions engaged in  *ADMISSIBILITY*   * + - \**flexible application of the rules*=> applied purposively to promote truth-finding and fairness \*Should facilitate justice, not stand in its way”     - IMP. Ideas: \*KEY: resist facile assumptions based on Eurocentric traditions\*  1. ***Evidence must be useful*** => prove a relevant fact at issue  * Oral history useful b/s (a) offer evidence of ancestral practice and their significance that would otherwise be unavailable (b) may provide Aboriginal perspective on right claimed  1. ***Evidence must be reasonably reliable*** => inquire into witness’ ability to knew and testify to orally transmitted traditions 2. ***Even if reliable & useful, may be excluded if probative value is outweighed by its prejudice***   *INTERPRETATION*   * + - \*\*must ensure that Aboriginal oral evidence is “given its due weight by the courts”     - HOWEVER: does NOT negate operation of general evidentiary principles |
| **RATIO** | * **Importance of a principled/flexible approach = to facilitate justice/search for the truth** * **Oral histories are admissible as evidence where they are both useful and reasonably reliable & after a P/P analysis** |

* **Basic concepts underpinning our law of evidence**
  1. the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case
  2. the evidence must be reasonably reliable
  3. even useful and reasonably reliable evidence may be excluded in the discretion of the TJ if its probative value is overshadowed but its potential for prejudice

**CHAPTER 7: ADMISSIONS & CONFESSIONS**

* Statements of a party do not have to pass through hearsay analysis => are presumptively admissible, so can be lead by the opposing party
  + Not own party, b/c rules against leading prior consistent statements \****BUT: opposing party can lead admissions you have made out of court and not considered hearsay based on your unique ability to attack the reliability of what is being said***\*
    - * + Leading prior consistent statements of own party is not considered probative
        + Bare statements of innocence are generally not considered probative
* *Probative vs. prejudicial APPLIES*
  + \*Usually: if worried about reliability, but still has relevance, leave its weight to the ToF
  + BUT: ***One area where the probative/prejudicial gets more stringent***
    - * + \*\*PARTIAL OVER-HEAR (***Hunter***) \*context could change it from admission to exculpatory\* (what surrounded the statement that was heard?) \*Hunter extended the law\*

*NOTE: Particular rules for criminal cases => basis for excluding some of these statements*

* Instituted a couple of rules that can subject those statements to admission even though made it through probative/prejudicial test.
  + **Voluntariness** \*useful: (a) broad definition (b) exceptional standard of proof => Crown has to prove A statement to person of authority is voluntary BARD (or D must make a clear admission: not challenging the voluntariness)
  + *RATIONALE:* (1) need to ensure the reliability of the statement and (2) the need to ensure fairness by guarding against improper coercion by the state

*Crown considerations in leading a confession*

1. **Strategically, do I want to lead this evidence?**

* Cannot lead a partial confession – entire statement will come in
* There may be evidence harmful to Crown’s case
* may allow the D to run a positive defence without the risk of getting on the stand

1. **Will all or part be excluded via *Charter* or CL?**

* Can order the statement to be edited
* If confession is likely inadmissible, C needs to instruct the police to continue investigation and get other admissible evidence.

1. **What weight should be accorded to the confession?**

* Is the statement reliable?
* Is the declarant credible?
* Is there a reason that A would be boasting?

1. Admissions
2. FORMAL OR JUDICIAL ADMISSIONS

*Statement of Fact/Admissions*

* Q: are there any ***undisputed facts that can are conclusively proved and therefore, do not have to be litigated?***
  + *two basic procedures*: 1)counsel agreeing that certain facts are not going to be an issue, 2)agreeing on the wording of those admissions
* *RATIONALE*: in the interest in justice \*saves time, money, resources\*
  + *Strategic*: if awful evidence comes in using clean set of admissions, strategically may be better for the accused not to have jury hear every last detail of a horrible robbery
* *LIMITS*
  + Once you admit a fact you generally cannot take it back, but there is some judicial discretion
  + Need specific client instructions to make admissions
  + Judge cannot order admissions: **in the hands of the parties**
* *No one can be forced to make admissions*; and the Cr can still call evidence on a point if the A admits it, but the Cr thinks the sterile admission is not sufficient to provide all information (*Castellani*) but if the Cr insists on calling evidence in a certain form this can affect the P/P balance and weight

***Criminal Code s. 655***

* + ADMISSIONS AT TRIAL: Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of ***dispensing with proof thereof***.

***Castellani v. The Queen***

(1969) SCC

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| **FACTS** | * + - A convicted of murder; TJ refused to allow written admissions of facts into court on the basis that they had to be agreed upon by both D & Crown \*Crown object to one statement of fact\* |
| **ISSUE** | * Must Crown agree to admission of fact being entered into court? |
| **HOLD** | * + - YES => appeal allowed |
| **REASON** | * + - \**PURPOSE*: to “free” Crown of burden to prove certain facts = may admit to facts to dispense proof     - SO: D cannot make such an admission unless Crown is willing to accept it |
| **RATIO** | * **Cannot make an admission unless both sides agree => HOWEVER: counsel who are refusing to make reasonable admissions may be looked down upon** |

1. Confessions
2. PROBATIVE VALUE

* *GENERALLY:* considered to have **HIGH PROBATIVE VALUE** & questionable circumstances which give rise to issues of reliability and credibility go to weight and not admissibility (dealt with via instructions)
  + \*\****Reliability and credibility go to the jury => WEIGHT***\*\*
* **EXCEPTION:**
  + partial overhear b/c may not have sufficient context (*Hunter*)
  + Crown only wanting to lead part of the statement*(Allison)*

***Regina v. Hunter***

(2001) Ont. CoA

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| **FACTS** | * + - A being tried for 4th time, convicted & appealed on two grds: TJ erred (1) in admitting an utterance heard by a passerby by A to his lawyer “I had a gun but I didn’t point it”(2) in making comments to jury that undermined his right to silence |
| **ISSUE** | * + - (1) What is the standard for admitting an utterance (or admission)?     - (2) Can the TJ encourage conclusions based on the A’s failure to ask why he was arrested?     - (3)If an error was made, how is a remedy determined? |
| **HOLD** | * + - TJ erred in admitted the statement => stay of proceedings entered |
| **REASON** | 1. Admitting an utterance    * + \*\*KEY: understanding the context of an utterance that may be an admission => in this case, the passerby could not provide the court with the context (i.e. what was said before and after the statement)      + ***PROBATIVE vs. PREJUDICIAL*** => does not meet threshold for reliability b/c meaning cannot be determined without context and is thus speculative (SO: prejudicial > probative) 2. \*importance of right to silence => ***CANNOT use A’s exercise of his right to silence as evidence of consciousness of guilt*** 3. 24(1) remedies => take into consideration 3 of trials, strength of Crown’s case, amount of time A spent in custody to date => constitute an abuse of process? |
| **RATIO** | * **Importance of providing context to ToF when admitting spoken words => can phrase be put into a larger context that is exculpatory** * **Is there *sufficient context to give it strong probative value OR is there potential for misuse?*** * **Expands the law => b/c generally reliability left to jury, an exceptional area b/c more power taken away from ToF to exclude it b/c of lack of full context** |

* In this case, more difficult to put the statement heard in between words that make it exculpatory
  + APPLY the Ferris standard => ***on basis that we only had a snippet, not sufficient***
  + *In this case*: complicated that it may have been protected by solicitor-client privilege

***Regina v. Allison***

(1991) BC CoA

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| **FACTS** | * A charged with B&E; caught by officer inside premise and gave an explanation for why he was there => Crown did not lead this on direct and so D prohibited from asking on cross (only lead the bad part, and when D tried to talk about explanation, TJ wouldn’t allow) \*D had to put him on the stand\* * A convicted => appealed on basis that this forced A to testify when it was unnecessary |
| **ISSUE** | * Should A be prevented from cross-E a Crown witness on an explanation he gave at the time of arrest? |
| **HOLD** | * Appeal allowed; new trial ordered |
| **REASON** | * As a matter of fairness => the Crown ought not to be allowed to put only part of an explanation into evidence \*should tender the whole explanation\* * HARM: can then force the A to take the stand |
| **RATIO** | * **Crown cannot lead only half of a statement, cannot lead only a beneficial part of the statement and not the rest** * **once you lead the statement it ALL becomes admissible, entirety, including good and bad parts—statement comes in as a whole** |

\*\*importance of thinking through => do you want to lead it?

1. THE VOLUNTARINESS RULE

* *KEY for application of this rule:* 
  + ***only applies when making statement to state representative/person in authority (& KNOW that)***
  + so largely subjective test, but has an objective component \*must be an objective basis for the subjective response\*
  + \*\*Subjective analysis but is an objective ‘safety valve’ \*must be an objective basis for the A’s position
  + **Essentially a subjective test, however if you are inquiring as to whether the A thought something, there needs to be an objective basis for it in the police conduct**
* *Basic Idea*: Trying to get statements inadmissible make by coercion, through fear or favour
  + *JUSTIFICATION*: (1) connected to producing UNRELIABLE statements! (2) ensuring the AoJ does not go into disrepute (preventing WC) \*protecting integrity of system\*
* *Balancing two interests* 
  + **(1)** integrity of justice system – police should not act inappropriately and the use of threats and trickery derogates from the integrity of the justice system
  + **(2)** need to control crime: society’s need to investigate and solve crime
    - *Police need leeway is trying to get people to speak; using incentives is acceptable*
    - *TROUBLE*: determining if the fine-line was crossed
* ***KEY: in every case, Crown must prove BARD that the confession was VOLUNTARY***
  + *Q: is there a reasonable doubt that the statement was voluntary b/c of threats or inducements (on their own, or in combination with other circumstances?)*

***R. v. Oickle***

(2000) SCC

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| **FACTS** | * + - A was asked to voluntarily take a polygraph as part of an investigation of a number of arsons (some involving his fiancé and father in law)     - A was reminded on numerous occasion before and immediately preceding the exam (which he did not pass) that he was free to leave, of his right to silence and of his right to contact a lawyer     - After he failed the test he was questioned by numerous officers and after 2hrs confessed to committing one arson => was arrested and brought to the stations (warning continued)     - He indicated he was tired and wanted to go home, but the questioning continued     - At 11pm he confessed to 7 more fires; the statement was finished at 1am, followed by admin tasks and after a couple hours sleep he agreed to a re-enactment     - TJ found the statements were voluntary and admissible; CoA disagreed => appealed |
| **ISSUE** | * What is the standard for determining admissibility of statement to police? * How is a statement found to be voluntary? |
| **HOLD** | * + - Voluntariness test \*weighing 3 factors\* => Crown must prove BARD (here: voluntary) |
| **REASON** | * ***Importance of ensuring the reliability of confessions \*improper interrogation techniques have lead to false confessions in the past\****   + - *INTEGRITY OF SYS*: \*balancing act: protecting rights of A VS. not unduly limiting society’s need to investigate     - THEMES when looking at false confessions: (1) need to be sensitive to particularities of individual suspect (vulnerabilities) (2) danger of using non-existent evidence (3) danger of using threats and promises     - Common: shoddy police practice/police criminality \*importance of video-taping\* * ***CONTEMPORARY CONFESSIONS RULE: important factors to review***  1. **Threats or promises \*most classic voluntariness problem\***  * \*\*”fear of prejudice or hope of advantage”\*\* => *examine the entire context => REQUIRE: (1) threat/legal inducements/coercive circumstances (2) causative evidence (threat was the trigger to talk)*   + - KEY: if not made directly to/about the A may still be inadmissible => is the relationship with the person so close that they would untruthfully confess to conserve it? * \*\***Incentive**, more common\*\* *TEST*: are the inducement strong enough to raise RD abt whether the will of suspect has been overborne => ***subjective analysis*** (but w/out benefit of actual perceptions of A)   + - EX: inducements that minimize the potential legal consequences are inappropriate(lawyer, sentencing, legal charges) \*KEY: are in control of the PO\*(vs. those which minimize the seriousness of the crime) \**legal vs. moral consequences*\* => PO must steer clear (even if Q from A him/herself)     - SO: are certain proper incentives (i.e. nothing legalistic and are not within the control of the PO, i.e. MORAL inducement to confess)  1. **Oppression**    * + Distasteful enough conditions => may make a stress-compliant confession to escape      + FACTORS: depriving of food, sleep, clothing, water, medical attention; denying access to counsel, excessively aggressive/intimidating Q for long periods of time & use of non-existent evidence 2. **Operating mind**    * + \*knowledge of what they are saying and that they are saying it to a PO who can use it to his detriment\*      + \*broader principle of voluntariness\* 3. **Other Police Trickery**    * + DISTINCT INQUIRY: conduct that may “shock the community”? \*goal: maintain integrity of CJS\*  * ***OVERALL TEST: combine these factors to determine if a RD is raised as to its voluntariness (if yes => not admissible) \*contextual analysis\****   *Application:*   * NO “palpable and overriding error” = VOLUNTARY * Relevance of the polygraph test:   + - IMP: (1) will it shock the community? (2) if not, the use of deception is relevant to the overall voluntariness analysis     - CAREFUL: not to exaggerate the polygraph’s validity (Que case which said that representing it as infallible rendered a confession involuntary) => SCC: imp. To instead look at the proximity b/w the results and the confession (and although not determinative, imp. as part of entire analysis) |
| \*\**MINORITY:* *Disagreed w/ APPLICATION*: NOT voluntary => improper inducements, proximity & causal connection b/w the failed test and the confession |
| **RATIO** | * **Interplay between these factors => usually about threats promises, but these factors could also play into whether police trickery, oppression or lack of operating mind is also present (i.e. lack of operating mind creates more relevance in causation of factors such as inducements)** |

* *Basic analysis:*
  + (1) confession to a person in authority
  + (2) presence of above 4 factors?
  + (3) Causation => did factors lead to confession? (*PROXIMITY & CAUSAL* connection)

1. WHAT CONSTITUTES A CONFESSION?

* Uses a common tactic to get a confession => the undercover confession \*MR. BIG\*
* *DEF:* set of circumstances to give A a massive incentive to confess
  + (1) Takes a lot of police resources; a large operation; dangerous elements \*usually only triggered if they feel the person is a strong suspect
  + (2) context building exercise => usually not w/ sophisticated A, need to build trust & rapport
  + (3) bring the A a little more w/in the grp => opportunity to work w/in the organization
  + (4) crisis => we hear you are a suspect, bringing heat on us => problem \*key: answer problem is that they need to confess\*
* *BROADER LVL*: **serious reliability concerns** \*left with ToF\* (NOTE: all of this would be turned on its head if we engaged the voluntariness rule! Should this be the case? Then would not even be admissible!)
  + Engage principles of confession (incentives, threats)
  + Balancing: can be dangers with reliability, but are also a good tactic to solve crimes

***R. v. Grandinetti***

(2005) SCC

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| **FACTS** | * + - A convicted of murder after TJ admitted statements A made to undercover PO’s & prevented admitting of evidence of a 3rd party that may have committed the murder     - Mr. Big operation on A; basically said that they have connections and could ensure that the investigation is geared elsewhere \*reinforced their corrupt PO contacts, and tried to convince him to “come clean”     - At trial: D argued that they were “persons of authority” and therefore, the confession had to be voluntary and also that the TJ should have allowed evidence that support a 3rd party being the murderer |
| **ISSUE** | * (1) What is a confession to a “person in authority”? * (2) What is the standard for D admitting evidence that the crime was committed by a 3rd party? |
| **HOLD** | * + - TJ did not err => conviction upheld |
| **REASON** | * 1. *Confessions to person of authority MUST be voluntary* => if ***not to person of authority & reliability jeopardized, can object under CL abuse of process or Charter***      + Rationale: avoid abuses of state power      + A) evidentiary burden on A to demonstrate valid issue for consideration re: to “person in authority”      + B) burden then shifts to Crown to prove BARD that they did not believe they were a person in authority of that it was made voluntarily      + “**PERSON IN AUTHORITY**”: largely subjective, but objective in that must be reasonable \*\* “can influence that course of the prosecution” (agent of police or prosecuting authorities)   2. *THRESHOLD:* must be **relevant & probative** \****sufficient connection*** b/w 3rd party and the crime (if inferential, must be reasonable and not speculative)   *Application:*  Here, although argued that this was engaged b/c were working with rogue cops => rejected b/c rogue cops were no more than undercover cops \****someone with LEGITIMATE sway in investigate; using power of state in way it is intended to be used***\* |
| **RATIO** | * **Undercover confessions to people who are seen by the A to be ‘people on the street’ do NOT engage the “persons in authority” \*Rogue cops = outside the ‘state camp’, trying to obstruct what the state was doing, as opposed to using power as it was intended to be used\*** |

* Court leaves us with one exceptional way to try and exclude these (difficult to find an example)
  + *\*MOST EXCEPTIONAL CIRC:*

(1) the reliability is so jeopardized that it cannot go to ToF and the judge would exceptionally find that it must be excluded (example: actual violence perpetuated on person to force them to talk)

(2) power to exclude under Charter (not pursuant to traditional analysis) but simply to say that the methods used are so offensive that we are kicking it out under s.

* + - * + \*PO have a lot of leeway => i.e. very harsh, direct violence required for it NOT to be admissible
        + \*\****USUALLY: allow it and judge will instruct the jury***\*\*
* Third Party suspect = admissible?
  + Obviously (\*think abt *Seaboyer* standard) => very valuable evidence
  + BUT: danger that it is improperly lead \*\*too prejudicial\*\* SO : must be ***sufficient connection \*”air of reality” (TANGIBLE)***
  + THEN: *allowed to run general propensity evidence against 3rd party* (BUT: danger, opened door of propensity of people to commit crime, so must be careful, law not clear/consistent across Canada) \**WHY:* want to prevent jury getting a distorted picture\*

1. ADMISSIONS OF CO-ACCUSED

* What if the A confessed what their co-A did? \*b/c tried together\* (efficiency, etc.)

***R. v. Grewall.***

(2000) BC Supreme Court

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| **FACTS** | * + - Co-A were tried together for murder/conspiracy => one A confession (caught on wire tap) but the others did not (however, the confession detailed everyone’s roles) |
| **ISSUE** | * Is the admission of a co-A admissible in a case were co-A are tried together? * What use can the jury make of these statements? |
| **HOLD** | * + - Admissible, but use restricted |
| **REASON** | \*\**RATIONALE* of ensuring that a statement of admission is only admissible against the accused who made the statement: it is a statement against interest that falls w/in exception to hearsay rule   * KEY: ***must ensure that jury is instructed to the limited use they can make of it*** * Rationale of joint-trials: avoidance of inconsistent verdicts and economies of a single trial => vs. possible solutions: splitting trials (expensive!), editing the statement (if does not affect its meaning), instructions to ToF to ensure use is limited |
| **RATIO** | * **An out-of-court statement is only admissible against the A who made the statement \*NOT admissible against the co-accused\***   + - **admissible against the accused who made the statement because it is a statement against interest and falls within that recognized exception to the hearsay rule. Remains hearsay against the co-accused.** * **If a statement is edited => must not affect the tenor of the statement** * **KEY: LIMITING INSTRUCTION!!!** |

* *KEY: editing option* => can you edit it so A talks about them, but not mention B & C?
  + \*\*TEST: ***retain basic nature and quality of confession*** => but: courts will get quite creative, knowing the dangers of admitting the statement
  + Can ToF know that it has been edited? => danger: this may create speculation \*SO: usually, judge will not explain the editing/even let them know
* *CAREFUL*: effectiveness of limiting instruction?!?! (Tenuous!)

**CHAPTER 8: EXCLUSION OF EVIDENCE UNDER THE CHARTER**

* *GRANT*: supposed to be a reaction to the regime that existed before (*BUT: is it really that different?*)
* *KEY Q: what do you do if the state has violated one of these rights and obtained evidence in the process?*
  + US: no specific clause => US SC read in, must be excluded OR: allow it anyways!
  + CANADA: neither extreme => s.24 = instructions to court re: what to do when evidence obtained through violation \***judge has the discretion to allow it or exclude it**\*
    - * + ***TEST: effect it has on the reputation of the Administration of Justice***

*Overview of 2 basic Charter Rights:*

* *SECTION 10(B) => retain and instruct counsel without delay*
  + - Arises upon detention (i.e. arrest)
    - MEANING: engages obligations of PO \*(1) must INFORM A(2) help facilitate the right (3) immediacy
      * Related to one’s *BROAD RIGHT AGAINST SELF-INCRIMINATION*
        + Right to keep your mouth shut and up to state to assist you in your case
        + This is made meaningful through 10(B)- lawyer helps you \*someone who in private talks to you, lets you know your rights
      * Very important time period before have exercised your right to counsel => PO cannot question you!!!
* *SECTION 8: UNREASONABLE SEARCH & SEIZURE*
* rights where have a reasonable expectation of privacy => state needs special grds to search it
  + - (1) PRIOR & (2) PROPER authorization => Must get a warrant “reasonable and probable grds”
* SO: have evidence obtained in violation of a charter right => what do we do?? \*24(2) analysis\*\*

*OLD SYSTEM:*

* + - Put the evidence into either:
      * (1) **conscriptive**=> ***evidence that emanated from the A*** \*duped into providing evidence that did not exist before; participated in giving evidence against yourself\* (most serious type of charter violation, covered statements) \***ALMOST ALWAYS EXCLUDED**\*
      * (2) **non-conscriptive** => “***real tangible evidence***” \*it had an independent existence, didn’t emanate from A, exists independent from charter violation\*(i.e. gun in A pocket, stolen money) \***PRESUMPTION of admissibility, but NOT a strong one**\*
        + Weight factors: how serious was the violation? (i.e. technical error, vs. flagrantly flaunting the charter)
    - Issue of ***derivative evidence =>*** indirect connection to the breach
      * + i.e. someone gives a statement without 10(b) rights => says money is in the safe
        + Money is real evidence, however it is connected to a Charter violation, i.e. it was obtained through the statement
      * *Pre-grant:* strong presumption of exclusion; didn’t want to PO to try and get people to talk so that you could get real evidence \*under the conscriptive umbrella\*
      * BUT: exception => “***otherwise discoverable doctrine***”: would inevitably going to search that area, so would have discovered it without the statement
    - *RESULT*: inconsistencies => problems/criticisms
      * Lack of balance => one, always out, but other careful balance = ***is this arbitrary labelling of the evidence?***
      * Definition of conscriptive evidence => blood or breath sample?? (can understand statements, b/c violate super-Charter right against self-incrimination)
        + Why do we have automatic exclusion for such reliable evidence?
      * ***Why are we excluding reliable evidence at all***? But if it’s reliable and this is really about a search for the truth, why are we doing this?

***GRANT****: these issues worked themselves up to the SCC*

* + - Really unknown what the court would do!
      * Some thought it would be all about reliability
    - How different is the new regime??

***R v. Grant***

(2009) SCC

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| **FACTS** | * A was approached by a number of officers when they felt he was acting suspiciously => they asked if he had anything he shouldn’t & he responded by admitting he had a firearm and drugs * At trial => allegations that the PO violated the Charter in gaining the evidence * A convicted at trial, upheld by CoA   \*\**NOTE*: case entirely turns on the admissibility of evidence\* |
| **ISSUE** | * (1) was a charter right engaged? What = detention? * If evidence was obtained by a Charter breach, should that evidence be admissible? If so, by what standard? |
| **HOLD** | * Yes, Charter right engaged => but no Charter BREACH |
| **REASON** | 1. **IS a charter right engaged?**  * Yes, wasn’t given right to consult with lawyer, BUT: was he detained?   + - Court takes a balanced approach to detention => point at which the state’s coercive pwrs are becoming more engaged \*look at a # of factors (manner of Q, surrounding circ.)\*     - TEST FOR DETENTION: Physical or psychological constraint: “***A reasonably believes that he or she has no choice but to comply with the PO***” (*could he/she have just walked away without consequence*?) * *APPLICATION*: at first initial questioning, then take additional measures (hands out, more officers, in tactical position) => was in detention = ***violated 10(b)***  1. **REAL evidence obtained by charter breach => admissible?**   \*\**KEY: evidence that is TEMPORALLY & CAUSALLY connect to Charter infringements*   * TEST: ***would, in all the circumstances, the admission of evidence obtained by a charter breach “bring the AoJ into disrepute”?*** (s.24(2) of the Charter)   + - Key: importance of maintaining the RoL and the integrity of the JS \***long term focus vs. immediate response to an acquittal** \*aimed at systematic concerns; broader impact than simply just cases that come before the court\*     - *STANDARD*: objective, a reasonable person   *CRITERIA: (vs. instead of immediately breaking up evidence into conscriptive/non-conscriptive)*   1. **The seriousness of the Charter-infringing State Conduct**  * The more severe/deliberate = greater need to exclude the evidence \*admission may send the msg that the state condones misconduct\* * Distinction b/w “*good faith*” or inadvertent violations and severe, deliberate, patterns of abuse, etc.   + - **good faith = not enough even if subjectively thought were not violating charter rights => KEY Q: were they “reasonable” mistakes??** * Other factors:   + - Were there *extenuating circumstances*; worried about evidence disappearing?     - Technical vs. blatant breach?     - Law settled in the area     - Degree of compliance => close to meeting state requirements? How far along to road of compliance?  1. **The impact of the breach on the charter-protected interests of the A**  * Some breaches will have a greater impact of A than others * *CAREFUL*: Admission may send the msg that individual rights count for little * *Para 77* => inherent seriousness of getting a statement in violation of 10(B) => what? We thought these categories were bad!  1. **Society’s interest in the adjudication of the case on its merits**  * ***Is the truth-seeking function of the criminal courts better served by the exclusion or admission of the evidence? OR does it extract too great a toll on the truth-seeking function?*** * *KEY FACTORS*: reliability of the evidence, the importance of the evidence to Crown’s case, seriousness of the offence at issue   + - If evidence is reliable => this will weigh heavily in favour of admission   *KEEP IN MIND:*   * + - ***The three factors must be weighed to come to a decision***     - If a TJ rules on this issue => deference must be given to the TJ   *Application:*   * + - *Balancing of factors weighs in favour of admitting the derivative evidence* => HERE: factor 1 outweighed other factor \*plus: reliability in factor 3 => high reliability of the evidence\*     - (1) not deliberate nor egregious; no racial motivations \*legitimately thought person was not in detention; reasonably thought there was no detention\*     - (2) serious impact, but not on serious end of the scale     - (3) highly reliable and essential to a determination on the merits * KEY: \*\*tipped the balance: the officers were operating in circumstances of legal uncertainty |
| **RATIO** | * **\*TEST for detention => once detained, require a 10(b) warning** * **ADMISSIBILITY test => very broad, how would it effect the reputation of the AoJ \*BUT: standard = reasonable, member of public aware of the case and role of Charter rights in our society** * **NIKOS: (1) & (2) combined => balance b/w seriousness of breach and society’s interest** |

* Court is basically saying that an automatic exclusion rule is consistent w/ 24(2) that talks about balancing all of the circumstances
  + *KEY* => broader impact on society \*many violations do not make it court; have to send a message to society\*
  + CANNOT take too narrow of an approach => *must consider the long term implications*
* COURT: dealt with various categories of evidence => **application of standard to different types of evidence: \*KEY: all are fact-specific determinations\***
* ***Statements by the Accused***
  + - *\*\*HIGH LVL of PROTECTION of right against self-incrimination*
  + Cornerstone of criminal law
  + Interconnected area of rights => protecting you from unrea/without free will participating in state’s investigation against you
    - *No absolute rule => BUT: presumption of exclusion*
  + \*\*lvl of police misconduct => generally, engages serious violation of A’s rights; without counsel, right to choose whether to speak is seriously undermined
    - NOT back to the old system => favour exclusion, but *NIKOS*: Crown has opportunity under 3rd factor to weigh it back to admission => Is SO reliable, should be admitted
* ***Bodily Evidence*** (s. 8 Charter privacy, bodily integrity and human dignity)
  + - *NOT everything that emanated from the accused will be AUTOMATICALLY excluded*
  + ex. DNA evidence and breath samples
    - 3rd factor => will weigh in FAVOUR of this type of evidence \*HIGHLY RELIABLE\*
    - SO: focus on the first two factors \*seriousness & impact\*
  + *IMPACT*: Different lvls of intrusion => taking blood = quite serious, but other are not as invasive (i.e. fingerprint, \*a breath sample\*)
  + *Other side*: will have to show some very serious misconduct \*SO: b/c reliability & impact can often weight against D; often, PO will have to really show that PO acted seriously with grave mistakes
* risk of error inherent in depriving the trier of fact of the evidence
* ***Non-bodily Physical Evidence*** *(NON-conscriptive)*
* *NIKOS:* basically recreated the factors that existed before
* Before though: reliability often viewed as one of many; NOW: viewed as one of three => so: potentially weighing stronger in favour of admission
* SO: reliability tends to weigh in favour of admission

* ***Derivative Evidence***
  + - *NOW:* more flexibility to admit a piece of evidence even if obtained through a statement
    - *TEST*: still have to run through criteria, but ***where there is a strong connection b/w the evidence and the improperly obtained statement, will likely weigh in favour of exclusion*** (for reasons above, importance of self-incrim)
  + HERE: can use *discoverability type analysis to evaluate the connection* (not as strict as before, not all or nothing) => but the more you can show the physical item was completely based on the statement real or physical evidence discovered as a result of an unlawfully obtained statement
    - SO: discoverability not determinative of admissibility
  + YET: Issue of discoverability *still has relevance b/c* it can affect the degree of link b/w the statement and the piece of evidence
* *BOTTOM LINE:* reliability favours admission

**CHAPTER 9: PRIVILEGE**

1. Privilege Against Self-incrimination
2. PRIVILEGED OF THE A & RIGHT TO SILENCE

* ***Sec. 7*** => **right to silence** \*not to talk and not to have silence used against you\*
  + \**GRANT*: special status, engages very serious breach if violated\*
  + *POLICY*: want to restrict coercive the state can be when in detention & want to prevent A having to incriminate themselves
* *Threshold issues to ensure before:*
  1. Voluntary? \*applies in and or out of custody\*
  2. NOW: Charter restrictions => positive duty to inform them of their right to counsel and give them a reasonable chance to exercise this
     + - * \*traditionally: were a further Charter right: Hebert => *right to silence when an A is in custody*
* *HIBBERT*: undercover officers in a jail cell
  + SO: while lot of protection under the voluntariness rule (often the way to toss out the statement)
    - * + But is also a *s.7 right to silence breach* => never threat/induce/coerce BUT: concerned about the amount of back & forth especially when the A keeps saying they do not want to talk \****MET w/ such constant disregard of their stated desire to remain silent***\*
* ***NOTE: Charter* and the common law rule of voluntariness have different ONUS and STANDARD:**
  + *Charter* breach – onus on accused to establish on BOP
  + Voluntariness – onus on Crown to establish on BARD

***R. v. Singh***

(2007) SCC

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| **FACTS** | * A \*given his 10b right\* & stated his desire to remain silent while in police custody; PO’s deflected these assertions and engaged him in conversation & he eventually made incriminating statements (identifying himself) \*18 times said he did not want to talk\* * TJ found statement voluntary; PO’s not overbearing D’s argument: right to silence = MUST not ask A any questions |
| **ISSUE** | * 1) Scope of detainee’s pre-trial right to silence under s.7 of the Charter \*what do we do w/ the back & forth?\* * 2) Relationship b/w Charter right to silence and confession rule \*right to silence = separate s.7 right or part of voluntariness? |
| **HOLD** | * Statement voluntary, appeal dismissed |
| **REASON** | 1. s.7: principle of self-incrimination = SCOPE?  * ***Right to REMAIN silent => NOT equivalent to having a right not to be spoken to*** \*importance of police questioning as an investigative tool\* * ***\*KEY: begin with a WARNING about their right to silence\**** *(if not, in “very risky territory”)* * ***TEST: focus on ability to exercise free will \*OBJECTIVE, but takes into consideration particulars of A\*=>*** *indication that your free choice was undermined?* * *DISTINCTION*: remaining silent is under the control of an A! * *IMPORTANCE OF CONTEXT*: will take into consideration persuasion used to convince A to speak after asserted right to silence; may raise voluntariness doubts * *NOTE:* However, what is said needs to be RELIABLE => role of confessions rule (to ensure reliability via voluntariness) = here comes in interplay w/ confessions rule  1. \****Functional equivalence of voluntariness and right to silence rule*** => if voluntary, cannot infringe on right to silence! \*law of voluntariness sufficiently broad to encompass the right to silence\*  * Got into trouble when talking about onus’ => now b/c within voluntariness, must Crown prove it BARD? (whereas, charter issue, onus is on A...?) (*\*SO: still unanswered => what is the threshold?)* * HOWEVER*: s.7 not subsumed by confession rule* b/c still has significance in various other circumstances other than situations of confessions/admissions * “residual protection afforded to the right to silence under s.7 will be of added value to the A in other contexts” \*i.e. s.7 only applies after detention |
| **RATIO** | * ***\*\*INTERPLAY*: voluntariness is determinative of the s.7 issue => if voluntariness proved BARD cannot be a s.7 issue** * **KEY: balancing between protecting individual rights (free choice) and society’s interest in investigative tools => police persuasion does not breach the right to silence** * **Q; OBJECTIVELY: did the A exercise free will by choosing to make the statement (context important; fact-specific)** |

* *NIKOS:* Problem w/ “shoving” it within voluntariness => is still simply a subset on its own within voluntariness \*BUT: ***conceptually now, part of the law of voluntariness, even though is a fairly distinct inquiry***!
  + SO: NOW => b/c Crown has to prove voluntariness BARD, has to also address right to silence within that analysis
  + BUT: *court not particularly helpful in dealing with HOW onus will work*! \*at some point will frustrate rule of voluntariness \*modified obj. standard\* => could help A b/c of difference in onus
  + Conceptually sound b/c if Crown proves voluntariness BARD, A could nor raise Charter issue on a BoP & conversely, if A raises s.7 BoP => Crown could not prove voluntariness BARD
* *FACTORS to look into*
  + How long it went on for (i.e. # of times asked)
  + Did the A get a right to silence at beginning (and continued throughout if going on for a long time)
  + Are their snippets of info that they are not getting their right to silence (i.e. not as obvious as “you must talk” => but language consistent with the idea that they do need to provide a statement)
* *KEY: no right to have your lawyer present!!*
  + NIKOS: violate int’l law conventions!? questioned for hours without your lawyer?!
  + SO: broad leeway (assuming you are not violating any other voluntariness)
* NOTE: Dissent: Would keep right to silence in s. 7 and says the to and fro violates 10(a) and (b) if the accused has received legal advice to be quiet – the repeated attempts denigrate the advice
  + There are a couple distance s. 7 issues which SCC cannot bring under voluntariness: undercover police officer in cell while waiting for lawyer – in the SCC splits the difference: state cannot elicit a statement by taking positive steps – can be passive listener (***Hibbert***)

***R. v. Turcotte***

(2005) SCC

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| **FACTS** | * A story: discovered 3 bodies, went to PO station voluntarily to report it, but refused to explain more when questioned by the police \*nothing past initial statements\* * At trial, TJ told jury that they could infer guilt from his refusal to answer questions b/c was “post-offence conduct” \**Crown wanted to use it as “post-offence conduct”\** * D argued that there was a reasonable explanation for his behaviour (didn’t trust PO) & wanted to restrict how the evidence could be used by the ToF * A convicted at trial, overturned by CoA & new trial ordered => Crown appealed |
| **ISSUE** | * To which use can evidence demonstrating an A’s failure to answer questions be put? Can it be used as an inference of guilt as evidence of “post offence conduct”? * Does the A have a right to silence in these circumstances? |
| **HOLD** | * Appeal dismissed; TJ allowed improper use to be made of the evidence in failing to give limiting instruction |
| **REASON** | * **STRONG CL right to silence that operates when you are NOT in detention (absent a statutory duty otherwise-** ICBC, Securities regulations, anti-terrorism**) \**refusing to speak is exercising this right*\*** * **Right to silence would be an illusory right if the decision not to speak could be used by Crown as evidence (albeit circumstantial) of guilt** * HOWEVER: *are circumstances where the right to silence must “bend”:*  1. If there is a conflict b/w right to silence and full answer & defence => BALANCE: silence admitted, but only to assess credibility and not infer guilt 2. Silence admissible with defence raises an issue that renders the A’s silence relevant 3. IF there is a connection b/w “post-offence conduct” and guilt => IF silence could possibly/logically serve as circumstantial evidence of guilt => SO: b/c the law imposes no duty to speak there cannot be any link b/w silence and guilt! \*LINK SEVERED\* 4. As part of the narrative => BUT: jury must be restricted re: its limitations of use \*failure to give limiting instruction = HIGHLY prejudicial  * HERE: were no strong limiting instructions |
| **RATIO** | * **One has a *BROAD CL right to remain silent*, therefore silence cannot be used to infer guilt b/c there is no connection b/w silence and circumstantial evidence of guilt** * **Silence CANNOT be categorised as “post-offence conduct” => CAN be admissible as part of narrative, but then limiting instruction is required** |

* Post 9-11 context => when court had chance to rule in favour of security, would rule in that way!
* ***CONTEXT importance***
  + Here: he was *NOT detained*!
  + SO: people out in public => do they have a right to interact with authorities even if don’t want to? NO!

1. PROTECTION OF A WITNESS

* **ISSUE:** ***what if you are a COMPELLED witness***? = forced to made devastating admissions
  + No one would want to testify if this were the case!
* How can we get around this?
  + 1) allow them to not talk if it will incriminate them \*BUT: search for the truth take a big hit\*
  + 2***) Canada: s.13 of Charter*** => testimony provided in a different proceeding cannot be used to incriminate an A at his or her trial \*premium on search for the truth at that trial\*

*KULDIP:*

* Could bring it in for **lmtd purpose of evaluating credibility**
* *LED TO 2 potential problems*:
  + (1) NOEL: can we really ever tell a jury to use it for such lmtd purpose? Is this realistic?
  + (2) Crown had to be so careful on the way they cross (cannot test truth => use it to incriminate) \*defeat the purpose of cross-E!\* \*Crown got sloppy and was pushing the limits
* SO: could use it evaluate the credibility (but NOT to incriminate)

*NOEL:*

* *Kuldip* is gone => Crown was taking it too far \*risk to prejudice\*
* All SCC needed to say was STOP IT! (b/c although sometimes took it too far, also have an interest in making trial run successfully) & could fit a solution within Kuldip
* ***ONLY can use it for completely innocuous prior testimony***  \*worried about danger in jury being tempted to use it for its truth\* ***TEST***: “**NO POTENTIAL FOR PREJUDICE**”
  + Nightmare for Crown, how you ever be sure it will be completely innocuous?!
    - Crown: no point- suggests to jury that everything else is consistent, being too nit-picky and do not want to risk a re-trail \**Practically*: shut down the *Kuldip* idea for using it to test credibility\*
  + AND: secondary problem of having a distorted picture (inference by jury => that is all you have \**Corbett*\*)

***R. v. Henry***

(2005) SCC

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| **FACTS** | * Grow-op; did not mean to kill him; suffocated by duct-tape * A were re-tried and proceeded to tell a different story under oath than they did at the first trial (1st trial: no intent to kill & was drunk; convicted & overturned conviction based on improper intox. Instructions & 2nd trial: changed his story) * Crown cross-E them on their prior inconsistent statements from 1st proceeding => convicted * CLAIM: this violated their constitutional right against self-incrimination **under s.13** of the Charter (re-trial is considered “another proceeding”) |
| **ISSUE** | * Can an A be cross-E on their testimony at a previous trial on the same indictment if they choose to take the stand? Does this violate s.13 of the Charter? * If going to use the *Noel* standard, is there anything that could prejudice them? (b/c then would be improper) |
| **HOLD** | * YES => b/c are not compelled witnesses |
| **REASON** | *CROWN:*   * + - 1. Even if we accept *Noel* (no possibility of prejudice) => it met the Noel standard, could not have hurt them b/c admitted to more in 2nd trial than in the first (no risk of substantive use being prejudicial)       2. Even if *Noel* is correct, the A are the ones that put this at issue, *THEY* opened the door! In examination in chief, they made reference to first trial on their own!       3. Noel framework needs to be revisited, never really allows Crown to cross-E   ***PURPOSE of s.13****:=> protect individuals from being indirectly* ***compelled*** *to incriminate themselves*   * \*\**PURPOSIVE* analysis (otherwise: make distinctions that are now un-workable) => ***Preventing compelled self-incrimination*** * Role of policy concerns * Should not allow an A who decides to testify at his trial to tailor their testimony as successive trials on the same indictment \*Q’s the credibility of the trial process itself\*   *KEY POINTS:*   * Previous distinctions in case law distinguishing b/w the purposes of impeaching credibility and incrimination are illusory \*eliminate these distinctions \**SO: if compelled = ABSOLUTE PROTECTION*\* * **IMP**: ***distinction b/w a witness that is compelled and one that voluntarily testifies*** => SO: if A does NOT testify at retrial, Crown cannot recruit A to self-criminate to prove their case; HOWEVER: if makes CHOICE to testify ( = not compelled) = CAN use prior testimony to cross-E |
| **RATIO** | * **S. 13 is NOT available to an A who chooses to testify at his or her retrial on the same indictment; can be cross-examined broadly/aggressively on prior statements** * **\*BUT if compelled = is inadmissible for CREDIBILITY & INCRIMINATION PURPOSES\*** |

* Takes a “run” at Noel, even though not that old at the time => Court asks itself, did we go too far in *Noel* and not distinguish b/w compelled and not compelled testimony?
* Triggered by A being on the stand twice; if doesn’t choose to take stand again (i.e. 2nd trial) => Not an issue b/c not admissible anyways!
* *Nikos*: rather than the iron-clad system here; he would have like strong resumptions with the possible of exceptions
  + Especially when a Witness (as opposed to the A) at the first trial; might need to be a “noel” like rule in these circumstances \*not bad if this person cannot think like they have absolute complete immunity; more likely to have witnesses to falsely testify to protect others if cannot be used at all! \*more deterrence if exceptions can be made\*

\***CL right not to talk to the police** (*Turcotte*) => **BUT: can be overridden! Can be compelled to provide a statement**

*How to deal with this?*

1. Too bad!
2. Could have right not to have it used against you (US)

* NOTE: *83.28 doesn’t engage sec.13 b/c not a proceeding/not a “trial”*

***R. v. Application under s.83.28 of the CC***

(2004) SCC

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| **FACTS** | * S.83.28 of CC compels a witness to attend a hearing and answer questions => must have reasonable grds to believe that they know the terrorist will happen soon \*rationale: need more tools to combat terrorism * So: provision forces you 1) to talk to authorities & 2) to do it in front of a judge \*a bit of an interrogation setting\* (isn’t this inconsistent with the role of a judge?) |
| **ISSUE** | * Does this statutory compulsion to testify violate s.7 of the Charter? * Side issue: doesn’t it violate the independence of the judiciary? |
| **HOLD** | * NO=> does not violate the Charter |
| **REASON** | * *Diffuse the independence issue by saying the judge’s role is the “protector” to reign in the person who is questioning* * *Is the Charter engaged?* * YES => liberty is encroached the moment someone is compelled to testify; right against self-incrimination is a principle of fundamental justice * *Does it violate the Charter?* * NO => 83.28 has ***procedural safeguards protect the individual that is compelled to testify***   + - * 1. **USE IMMUNITY**: protects the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding         2. **DERIVATIVE USE PROTECTION**: insulates the individual from having the compelled testimony used to obtain other evidence \**unless discoverable through alternative means*\* * *Are these safeguards enough?* * NO => only provide protection for criminal proceedings => should be expanded to include extradition/deportation hearings |
| *DISSENT:*   1. Crown sought order for inappropriate purpose, so while 83.28 is constitutionally valid its use amounts to an abuse of process (b/c Crown is attempting to get a preview of what the witness will say in court) 2. It compromises judicial independence and is unconstitutional |
| **RATIO** | * A statutory exception to the common law rule not having to talk to police * **BUT: procedural safeguards in place when someone is compelled to testify that result in the requirement to testify not violating the Charter \**Importance of having use & derivative use protection*\*** * **Importance of context here: for security purposes, preventing terrorism \*need a good reason\*** |

* Practical issue: how will the information not be shared? \*prosecutor worried about arguments of derivative use\*
  + How to justify that you independently found the evidence?
* Different context than Grant: compelled to provide something, as opposed to it being taken
* *NOTE*: If the witness believes they are the actual target of the investigation they can apply for a Constitutional exemption on the basis that they have a s. 7 right to remain silent

1. Privilege Attaching to Confidential Relationships

* There are other forms of privilege than those noted here
* **RATIONALE:** when society says the search for the truth cannot be “pure”; what about confidential relationships? \*policy reasons to *foster these relationships*\*
  + Preservation of certain relationships will trump the search for the truth => if found to be privileged, counsel will not have access to it and it will not admissible in court
* *Are there context when we allow the privilege to be breached? Are there exceptions to privilege?*
* ONLY in certain circumstances: \*\****legal only***\*\* communications intended to be confidential and intending to provide legal advice
  + Usually: air on the side on privilege if is a close call
* *CLEAR exceptions:*
  + (1) **waiver:** client has right to waive the privilege \*explicit\*
  + (2) what about implied waiver?
* Client holds the privilege

SOLICITOR-CLIENT PRIVILEGE

* look more at the balancing at that needs to be done => where does the search for the truth need to be limited?
* *Understanding context of the case*: Section 8 issue => what if the police just didn’t do something wrong; but what if went beyond that – for instance, point at which ***we find the state conduct so offence, we cannot even have a trial here, need to through the entire case out***
  + *DONE* via s.7 of the Charter: trial must adhere to principles of fundamental justice
* *TEST*: rare, clear cases where “***FUNDAMENTALLY UNJUST TO CONTINUE THE PROCEEDINGS***”
  + \*must be the most severe misconduct, occurs in aggravating circumstances\*
  + *CONTEXT*: court says we need to assess how this breaking of the law was done- in *aggravating or mitigating circumstances?*
    - i.e. had knowledge of its problematic and went ahead anyways, potentially aggravating
  + *Process:* huge voir dire => Crown needs to somehow find aggravating circumstances
    - Advice from Crown => could potentially be both! (A: sent ahead anyways even after Crown said careful, or M: could have an “excuse” of relying on their advice)
* *Sec.7: two reasons why a proceeding may be contrary to the principles of fundamental justice:*

**(1) no longer able to have a fair trial** (i.e. lost evidence)

**(2) abuse of process**

* state misconduct so unbecoming that to continue would jeopardize the integrity of the justice system
* will require serious misconduct, almost always purposeful: this is an elevated threshold
* dependant on the particular circumstances of the case – how bad was the misconduct?
* police breaking a law is a factor, but not determinative – did the police seek legal advice?

*ANALYSIS for whether solicitor-client privilege attaches when the Crown gives advice to the police*

**(1) is the opinion relevant?**

**(2) is the opinion privileged?**

* Not all government / lawyer interaction will be privileged (this was though; “modern lawyer” works in all kinds of contexts)

**(3) if privileged – is there an exception?**

**(a) *innocence at stake***

* When the innocence of the accused turns on the privileged information there is an exception

**(b)** ***future crime***

* Communications regarding legal advice about a crime you are *going* to commit are excepted (\*here; more preventative, before went through with it, sought legal advice; want to encourage this!)

**(4) was privilege waived?**

* Can be explicitly and implicitly waived
  + *IMPLICIT*: party refers to legal advice in attempt to assist him/herself => once want to use it to assist your case, opened the door to it being admissible
    - Was it merely part of the narrative? Was anything said about the content of the conversation? Aggressive or defensive language used?
* Courts will not easily find that privilege has been waived

**(5) Extent of disclosure?**

* Courts will often limit disclosure to immediate issue because of the importance courts place on privilege

***R. v. Shirose***

(1999) SCC

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| **FACTS** | * PO wanted to undertake a ‘reverse-sting’ operation (offering to actually sell the drugs, trying to get to the ‘higher lvls’) and sought advice from Crown Counsel * After an operation lead to charges against two A, they sought a stay based on the argument that it amounting to an abuse of process * The RCMP tried to rely on a “good faith” defence and in support brought up that the sought legal advice & the A claimed that to rely on this defence they had to disclose the advice received |
| **ISSUE** | 1. Does privilege exist w/ respect to communication b/w PO and Crown in the course of a criminal investigation? 2. Does the situation fit an exception to the solicitor-client privilege rule? 3. Was solicitor-client privilege waived in these circumstances? |
| **HOLD** | * Privilege does exist, and exceptions is not met, but privilege was waived |
| **REASON** | 1. *Privilege?*  * Great importance that PO seek legal advice when conducting their investigations, and while not ALL conversations are protected, advice within the scope of the solicitor-client relationship is  1. *Exception?*  * ***FUTURE CRIMES***: doesn’t apply b/c of lack of criminal object by RCMP; believed it to be lawful * ***FULL ANSWER & DEFENCE***: not relevant at abuse of process application b/c innocence is not at stake  1. *Privilege Waived?*  * ARGUMENT: RCMP put the good faith belief at issue => chose to rely upon the communication to support their defence => b/c made that choice (was NOT required) \*waived privilege\* * NOT just part of the narrative |
| **RATIO** | * **Privilege can be seen to have been waived if they are relied upon to support a defence such as good faith IF disclosure was necessary to evaluate the defence** * **Cannot selectively waive privilege to create a distorted picture => if start to rely on it, can make what would be inadmissible admissible** |

* *NOTE:* all other arguments had failed, so if waiver hadn’t been made \*would have been protected\*
* *STRATEGIC DECISION:*  if Crown is required to disclose something but doesn’t want to, ***can just drop the case***
* ***What if there are no exceptions?*** \*weighing the values to permit the privilege to be pierced\* => then protect the person as much as possible!

***R. v. Brown-***

(2002) SCC

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| **FACTS** | * Information of a confession to a lawyer by another person is ‘out there’ |
| **ISSUE** | * When should privilege be broken in favour of an A’s right to full answer & defence |
| **HOLD** | * Only under rare circumstances & very stringent test |
| **REASON** | * RATIONALE: prevention of wrongful convictions tips balance slightly in favour of innocence at stake over privilege * KEY: only where core issues going to the guilt of the A are involved and there is a genuine risk of WC   *TEST:*   1. *Threshold test: A must est. that*   A) info not available from any other source &  B) A is otherwise unable to raise reasonable doubt   1. *IF satisfied =>*  * Application: A seeking to produce info must demonstrate an evidentiary basis to conclude that the communication ***COULD raise a reasonable doubt as to guilt*** * Then the TJ must examine the communication to determine whether it is in fact ***LIKELY to raise a reasonable doubt as to guilt (NOTE: higher standard)*** * Important ***limitations/threshold*** * Initial threshold for application: Must be able to demonstrate that there was communication and why it is important to your case \*COULD raise reasonable doubt?\* * *KEY:* cannot get information from any other source (to prevent breaking privilege) * *TIMING*: usually not until end of Crown’s case * *TJ must* A) determine which should be disclosed B) TEST: infringed as minimally as is necessary to allow A to raise RD * KEY: immunity of privilege holder => ***LMTD only to purpose of preventing WC***; cannot be used to incriminate (however => no “transactional immunity, i.e. immunity from future prosecution for crimes which may be subject to the privilege) |
| **RATIO** | * **Evidence of communication, info could raise reasonable doubt & cannot get it from any other source** * **Then info goes to judge \*likely to raise RD\*** * **RESULT: most stringent use immunity and derivative use immunity! (but not transactional)** |

* *difficult test to meet*
  + Not enough to say that “this would likely or significantly help me”
  + **STANDARD:** will make a difference re: guilt or innocence \*significantly risking a WC if we don’t use these procedures\*
* *PRACTICAL DIFFICULTY*: trying to make these submission without even having the material

OTHER CONFIDENTIAL RELATIONSHIPS

***Slavutych v. Baker***

(1976) SCC

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| **FACTS** | * Professor was asked to fill out an assessment for another’s’ tenure that was marked confidential & was assured it would be used in confidence and would be destroyed * He alleged serious misconduct and later was fired for the derogatory comments |
| **ISSUE** | * Should this have been protected and not admissible? What is the test? |
| **HOLD** |  |
| **REASON** | **TEST** (*WIGMORE*)   1. Communications must originate in a confidence that they will not be disclosed 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation b/w the parties 3. The relation ought to 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  * The document was privileged and the University could not use them against him b/c it have been obtained in confidence and there was no proof of his bad faith or lack of honest belief in the charges |
| **RATIO** | * **Can be other forms of privilege \*this is the test to est. it\*** |