Evidence

SUMMARY

framework

(1) is evidence admissible or not?
- ➢ must be (1) relevant; (2) material; and (3) more probative than prejudicial [Palma]
- ➢ Crown must show more probative than prejudicial; defence must show that not significantly more prejudicial than probative [Seaboyer]

(2) types of evidence
- direct / circumstantial
- real / demonstrative
  - ➢ to enter **demonstrative** evidence, consider the Creemer factors: (1) accuracy; (2) fairness; (3) verification on oath by a person capable of doing so. [Penney]

(3) purpose for which evidence is entered (use, jury instructions)
- ➢ jury should always consider evidence as a whole, not in isolation (Miller error), on the reasonable doubt standard [Robert]
- ➢ NG can be found on evidence that is neither credible nor reliable [Baltrusaitis]

(4) weight (reliability, credibility)

(5) when can evidence be led

(6) whether evidence will be led

witness testimony

- ➢ broad right to cross-examine, particularly for defence [Titus, Cullen]
- ➢ competence governed by CEA s13-16, low threshold [JZS]
- ➢ compellability of spouses governed by CEA s4

expert
- ➢ governed by CEA s7, CC 657.3
- ➢ (1) reliable / relevant; (2) necessary (outside common knowledge [Graat] [DD]); (3) a properly qualified expert; (4) no exclusionary rule [Mohan]
- ➢ should be clear what facts the opinion is grounded on [Bleta]; scientific basis must be factual but may be hearsay this goes to weight [Palma]
- ➢ N/R are stricter the closer to the ultimate issue [Mohan]
- ➢ must not amount to an opinion on another witness's credibility [Llorenz]
- ➢ problems (a) usurp jury; (b) highly resistant to cross-examination; (c) usually derived from inadmissible evidence that must be led; and (d) time-consuming and expensive. [DD]
- ➢ (1) preconditions: (proper subject for expert evidence; qualified expert; no exclusionary rule; logically relevant); (2) P/P – necessity, reliability, accessibility, cost, bias, time [Abbey 2009]
- ➢ nature and scope should be properly delineated [Abbey 2009]

- **novel**?
  - ➢ considers Mohan on strict N/R and requires a sufficiently reliable science (tested, error rate, peer review, accepted by scientists, foundational validity) [JLJ]

eyewitness
- reliability
  - ➢ focus on possibility for mistake; consider: did witness know accused; lighting; time of sighting; identification of descriptive features; contemporaneity between sighting and giving description; stress; intervening circumstances; independent confirmation [Gonsalves]
  - ➢ prior identification outweighs present identification [Swanston]
- jury instructions
  - ➢ (1) history of wrongful convictions; (2) facts to consider when weighing accuracy; (3) identifying the accused should not be done in court, and if it is done it has little to no weight; (4) should focus on the description of the accused that the witness gave shortly after the crime occurred [Gonzales]

Vetrovec
- reliability

- still presumptively admissible [Murrin]
- jury instructions
  - (1) special attention must be drawn to the problematic testimony; (2) an explanation why the witness is problematic; (3) warning the jury that although they can convict on unconfirmed evidence it is dangerous to do so; (4) in determining credibility the jury should look for independent and material corroborating evidence. Overall requirement of proportionality between corroboration of and problematic nature of the testimony. [Khela]

procedural

- order / follow through of calling is at counsel's discretion [Jolivet / Smuk]
- leading questions
  - may not lead own witness, may lead other sides
  - exceptions: (1) for the purpose of identifying persons or things, may directly indicate; (2) "did the other witness say such and such" (3) when a witness is hostile to the party who called them at judicial discretion; (4) defective memory; (5) when the matter of interrogation is complex. [Maves]
- forgetfulness
  - present memory revived – can trigger memory
    - (1) alert the judge and remove the witness; (2) may get permission to be a bit more leading; (3) if (2) fails the counsel should state that they are making an application for PMR; (4) provide the judge with a copy of the document you are intending to use; (5) judge examines the document to see if it is reliable enough to be put before the witness (ie proximity to witness and contemporaneity to event), judge will also consider the witness and the circumstances; (6) bring witness back; (7) explain to witness what is happening, and draw their attention to the relevant portion of the PMR material but do not read it to them; (8) hope a memory is triggered; (9) opposing counsel may examine the document and cross-examine the witness; (10) jury should be instructed that prior statements are not considered to be proof of their contents, that they could not be used to enhance credibility through consistency, and that the sole purpose of allowing the witness to view the previous statement was to refresh present memory. [Shergill]
  - past recollection recorded – can admit past statement, a type of hearsy
    - requires (1) reliable record; (2) contemporaneity, event must have been fresh in their mind with they made the statement; (3) witness must be able to give a present voucher under oath of the truthfulness of the statement; (4) accuracy [Fliss, JR]
- cross-examination
  - CEA s10: when pointing out witness statement inconsistencies must draw witness's attention to them
  - a hypothetical question can be put even if it cannot be proved, as long as there is a good faith basis for doing so [Lyttle]
  - Browne states that "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," this is limited to key points that were not implicit in questioning [Carter
- re-examination
  - may be done only on matters arising in cross-examination. [Moore]
- rebuttal evidence
  - may be led only if (1) there is a new issue raised; (2) that could not have been reasonably anticipated; (3) and this new evidence goes to a substantive issue. [Krause]

getting out of court evidence in

extrinsic misconduct of the accused

- similar acts presumptively inadmissible
  - reasons:
    - relevant but highly prejudicial; dangers to the trier of fact: (1) that they find the accused is a "bad person" and therefore guilty; (2) that they punish the accused for past misconduct; or (3) that they are distracted from the main issue [Arp]
  - exceptions:

        - ➢ specific propensity requires high similarity (timing, AR, circumstances, number of incidents) [Handy], but may not work if past acts worse
        - ➢ if entered for a purpose other than bad character (narrative) [Cuarda, BFF]
- previous convictions
    - ➢ if an accused testifies their criminal record is admissible by statute [CEA 12], but judge has discretion, this considers: temporal proximity, effect on veracity, similar offence, is defence targeting Crown witness records [Corbett]
- post offence conduct
    - should not be examined on reasonable doubt; must only pass P/P test [White]
    - may go to innocence [SCB]
    - is not relevant in determining levels of culpability [White], but is relevant for rebutting defences [Peavoy]

statements

- for prior consistency
    - ➢ only if it goes to the narrative [Ay] or opposition alleges recent fabrication [Stirling]
- for prior inconsistency
    - CEA s9 gives counsel the ability to cross-examine and attack the credibility of their own witness; brings in past statements but they remain inadmissible for truth / credibility
        - s9(2) arises when a witness has been inconsistent in a prior written statement
            - ➢ procedure: (1) counsel should advice the Court that a s9(2) application is being made; (2) dismiss the jury; (3) explain the circumstance to the judge and produce the written statement; (4) judge determines if there is indeed inconsistency; (5) counsel must prove the written evidence, either through a witness affirmation or through supporting evidence; (6) if the statement is proven, the other side may cross-examine about the circumstances in which the statement was made in order to establish that it would be improper for the 9(2) cross-examination to occur; (7) judge must decide whether there will be cross-examination before admitting the jury; (8) jury is admitted; (9) cross-examination. After a unsuccessful s9(2) cross-examination, if the witness still problematic, counsel may make a s9(1) application. [Milgaard]
        - s9(1) is a broader cross-examination right that arises when a witness is adverse
            - ➢ adversity considers whether: (a) the alleged prior statement was made; (b) the prior statement is substantially important and substantially inconsistent with current testimony; (c) the demeanour and behaviour of the witness; (d) if a s9(1) cross examine would be in the interest of justice. [Wawansea]
            - ➢ adversity may arise if a witness changes their story for no reason [Cassibo]
- for the fact they were made
    - are not hearsay, rather are circumstantial evidence of state of mind
        - examples
            - ➢ accused was acting weird [Baltzer]
            - ➢ victim was upset [Ratten]
            - ➢ victim was afraid of the accused [Griffin]
- for their truth value
    - hearsay

hearsay

- presumptively inadmissible because no oath, no cross-examination [Baltzer]
- hearsay checklist for the principled approach: [B(KG)]
    - is it wanted for its truth? [Subramaniam]
    - is it otherwise admissible?
    - no state coercion?
    - statutory exception
        - CEA 30 allows documents produced in the ordinary course of business
    - common law exception (presumptively in place [Mapara])
        - dying declarations
        - res gestae
        - statements of intent
        - business records

        - ➢ (1) original record, (2) contemporaneity, (3) in the routine of business, (4) by a recorder with personal knowledge of the thing recorded, (5) who had a duty to make the record and (6) who had no motive to misrepresent [Wilcox]
      - declarations against your own interest
        - ➢ only if they are (1) to your immediate prejudice; (2) and made in circumstances where you believe that you are putting your liberty at risk. [O'Brien]
      - if borderline may use N/R as determining factor [Wilcox]
    - necessary and reliable, established on BoP by party seeking to lead
      - necessity
        - ➢ has a high standard and should be assessed by the trier of fact if possible [Parrot]
        - ➢ does not apply to uncooperative witnesses [Pelletier]
      - reliable
        - ➢ circumstantial guaranteees include (1) oath – may have something that shows they understood the seriousness of the testimony; (2) presence – audio / video very good substitute; (3) ability to cross-examine original speaker. [B(KG)]
        - ➢ consider: (1) the circumstances in which the statement came about; or (2) the fact that the statement can be sufficiently tested for its truth and accuracy even though it is hearsay. [Khelawon]
        - ➢ threshold considerations: circumstances in which is made; trustworthiness of the source; narrative; contemporaneity between the statement and the event; leading questions; corroborating evidence; obvious areas for cross-examination. [Khelawon]

admissions

- ideology is that when an accused admits something, even if out of court, they cannot then challenge its reliability [Palma]
- may be formal
  - increase trial efficiency
  - CC s655 any fact alleged against a party may be admitted
  - an allegation is required for there to be an admission [Castellani]
- must have context [Hunter] and should be complete [Allison]
- must be voluntary
  - involuntariness may arise out of or promises; oppression; lack of an operating mind; and police trickery [Oickle]
  - but this only applies when an accused reasonably believes they are interacting with state agents, because is aimed at state coercion [Grandinetti]
- are only admissible against the accused who made them, not any co-accused [Grewall]
- may be edited if necessary for admission
  - (1) must not affect the tenor of a relevant statement; (2) must be free from unnecessary prejudice and retain proper meaning; (3) should be limited to maintain context in order to aid truth evaludation; (4) even though substantively irrelevant, contextual evidentiary relevance may allow admission; and (5) the extent of the admissibility of that contextual evidence and probative value must still be weighed against prejudice. [Grewall]

Charter rights

- s10b is the right upon detention to obtain counsel without delay, imposes duty on police
- s8 is the right against unreasonable search and seizure given a reasonable expectation of privacy
- a breach may require exclusion of evidence
  - ➢ once a **breach** has been found, 24(2) test must be applied; three factors to be considered in admissibility: (1) the seriousness of the infringing state conduct; (2) the impact of the infringement on the rights of the accused; (3) the interests of society. [Grant]
- s7 is coupled with but does not replace the CL right to silence
  - ➢ CL right to silence applies upon detention and goes to voluntariness, it is not the right to not be spoken to [Singh]
  - ➢ s7 means that a party not in detention also has the right to remain silent [Turcotte]
  - ➢ CC 83.28 compells testimony but this is constitutional becase it also offers complete protection against use and

derivative use of compelled statements which goes beyond s7's protection which allows the inevitable discovery exception [Application under ...]

- s13 states that a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
  - ➢ different trials on the same charge are multiple proceedings,
- can this testimony be used for credibility?
  - ➢ distinction between going from a witness to an accused and being an accused throughout
  - ➢ a witness is compellable and receives the full immunity of s13
  - ➢ an accused is not compellable and therefore when being retried on the same indictment, s13 doesn't apply; the s7 protection against self-incrimination will apply if the accused chooses not to testify in later trials (ie if accused doesn't testify in a later trial their statements in previous trial cannot be brought in). [Henry]

privilege

- a matter is covered under solicitor-client privilege if the party is (a) making a communication to their lawyer; (b) which is intended to be in confidence; (c) and is based on a legal matter. [Shirose]
- s/c privilege may be breached if
  - ➢ c waives right, uses it offensively, refers to content [Shirose]
  - ➢ **Innocence at stake test**: (a) information is not available from any other source, breaking privilege is the only way to obtain this information; (b) must establish that their could be information that could raise a reasonable doubt (police notes, another witness, etc); if this is satisfied it goes to the trial judge; (c) trial judge must determine if it is likely to raise a reasonable doubt and if it is the only way to reasonable doubt. [Brown]

CHAPTER 1: PROOF IN JUDICIAL DECISION MAKING

- Evidence is key to the actual result of a case by recreating the past
- Better evidence -> better odds of conviction
- When can evidence be used: **admissibility**
- Common law is the origin of most evidentiary rules
- Some rules of evidence in statutes, such as the Canada Evidence Act and the Criminal Code
- Some constitutional aspects:
  - Charter directly impacts the admissibility of statements and physical evidence
  - and has an indirect impact on the other rules
    - need to interpret statute / common law within the constraints of Charter values
    - movement towards a principled (as opposed to rules based) approach to admissibility
      - rules based (may be influenced in development by principles) creates very specific rules for specific situations (advantage of clarity, predictability)
      - principled approach (still likely to have rules) dislikes strict rules, instead focuses on the broad principles that (pre existing) rules represent and looks at multiple factors to be considered (ideological advantage, but less predictable)

A Qualified Search for the Truth

Overall theory of evidence: a framework

1. is evidence admissible or not?
   - fair trial
     - evidence should be led in a search for the **truth**
       - is the evidence relevant for this purpose?
     - **justice** is a broader value than truth
       - prevents illegal search and seizure, torture... even if they lead to the truth
     - **probative value vs prejudice**
       - will a given piece of evidence do more good for truth and justice than bad?
       - will it help figure out something important for the case?
       - will it prejudice the search for the truth or the justice system
       - prejudice can be against the accused or against others / society / values
       - large degree of discretion for the trial judge
2. purpose for which evidence is entered
   - how can evidence be used?
   - how to direct the jury?
3. weight
   - reliability and credibility
4. when can evidence be led
   - as much as possible (re admissibility) determined before trial
     - two advantages: (1) predictability; (2) in constructing an argument
     - pre-trial hearings are critical, but you cannot predict everything that will happen at trial
5. whether evidence will be led
   - many fundamental aspects of evidence are determined by counsel (deciding what evidence to call, discretion & responsibility)
   - advantage of adversarial system (cross-examination)

R. v. Noel (Page 1-001)

Rules of evidence based on "a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth." This search for the truth must be qualified by other principles: desire for a fair trial, deterrence of police misconduct, and preservation of the integrity of the system of justice. Prohibition against self-incrimination aids this search to the truth. Juries are a valuable part of the criminal justice system.

The Adversarial System of Trial

R v Swain (Page 1-004)

Issue: the right of the Crown to raise the defence of insanity in criminal proceedings over the accused's objections.

Appellant argued that the "functioning of the adversarial system is premised on the autonomy of an accused to make fundamental decisions about his or her defence." The adversarial system helps guarantee a court's ability to resolve disputes by ensuring that issues are fully argued by parties who have a stake in the outcome. Respect for individual autonomy is a foundational principle of our legal system. These dual principles imply that the principles of fundamental justice require that an accused person have the right to control their defence.

Court concluded that the Crown can't force an accused to run a mental disorder defence. But if an accused opens the issue by making an argument relating to state of mind (in this case no MR), the Crown can use it to raise a mental disorder defence. If you open an issue, the other side can use it.

Discovery in Criminal Cases

Disclosure

Disclosure is "the basis upon which the parties make evidentiary determinations." In a typical case there will be lots of potentially relevant evidence.
In a civil context there may be bidirectional disclosure. The parties involved must exchange potentially relevant materials to make decisions about what evidence to call and how to structure your case.
In a criminal context, all Crown evidence must be turned over to the accused. This disclosure includes anything that has a reasonable possibility of aiding the defence in making full answer and defence. Privileged documents may be dealt with through undertakings (lawyer's promise). This is a lot of information, because an investigation tends to generate a lot of police documentation. Ultimately the trial judge decides the case, but this has a problematic aspect to it because the judge is less familiar with the case than the investigators. Defence can attack a problematic investigation but this may give Crown the ability to raise issues (character evidence) that hurt more than help. Flawed disclosure may be grounds for appeal if there is a reasonable possibility that it would have changed the result. Key issues (1) diligence of defence in asking; (2) importance of content. This may also be relevant when CoA is looking at an unreasonable verdict. Disclosure may lead to a guilty plea.

R. v. Taillefer; R v. Duguay (page 1-006)

Issue: the nature of the Crown's duty to disclose evidence in a criminal trial and the consequences of breach of that duty.

Appellants convicted of first degree murder and manslaughter respectively. Poitras conviction discovered that the police and the Crown had failed to disclose the existence of a considerable amount of evidence relevant to the charge or to the defence of the appellants.

Per Stinchombe, the Crown must disclose all relevant information to the accused, unless privileged or clearly irrelevant. All statements from person who have provided relevant information to police must be produced, even if they are not proposed as Crown witnesses. Better to error on the side of relevance and therefore disclosure when analyzing evidence. In this case, evidence was clearly relevant and should have been disclosed. Problem: the trial predates Stinchcombe. Crown argues that therefore they had a complete discretion to withhold evidence. No. Common law duty to disclosure as part the right to a fair trial and to make full answer and defence. Court concludes that "the appellants were the victims of a serious infringement of their right to disclosure of evidence."

Effect of the infringement: Court applies Dixon test: (1) Examine undisclosed evidence. Onus on accused to demonstrate reasonable possible of a different verdict but for Crown's failure to disclosure. Determine if there was a reasonable possibility that the jury, with the benefit of all evidence might have had a reasonable doubt. (2) Inquire as to whether there is a reasonable possibility that the failure to disclose affected the overall fairness of the trial. Should consider the potential usefulness of the fresh evidence to the defence and whether the failure to disclose deprived the accused of certain evidential or investigative resources.

Appellant Duguay raises another issue. Court identifies the test that applies when an accused seeks to withdraw a guilty plea on ground of previously undisclosed evidence. Accused must demonstrate, on an objective standard, that there is a reasonable possibility that the fresh difficulty would have influenced the decision to plead guilty.

Convictions quashed. New trial for Taillefer; stay of proceedings for Duguay under s24(1).

Probative Value, Prejudicial Effect, and Admissibility

R. v. Palma (page 1-014)

To be receivable in a criminal case, evidence must be (1) relevant; (2) material; and (3) admissible. Evidence is relevant if it tends to make any fact which it is offered to prove more or less probable. Evidence is material if it is concerned with an issue that is before the court. Materiality considers if a piece of evidence makes a relevant fact more or less likely. Evidence is admissible at common law if it is more probative than prejudicial; which must be demonstrated by the party seeking to call it.

Probative Value: If evidence has some minimal probative value it may be admissible, but there are degrees of probativity that are important to admissibility because it must be balanced with prejudice. One fact to be consider is how connected the evidence is to the specific case. This is why extrinsic misconduct / general propensity evidence has low probative value, because it is separate from the case being tried.

Prejudice: May be anything that impedes the administration of justice. General character evidence has high prejudice and low probative value, because it frequently distracts a jury from the issue at bar. Time and expense are other aspects of prejudice that may arise.

R. v. Arp (page 1-015)

Similar fact evidence is an "exception to an exception to the basic rule that all relevant evidence is admissible." Relevance has no minimum probative value. Evidence of propensity is thus relevant but highly prejudicial because it introduces three potential dangers to the trier of fact (1) that they find the accused is a "bad person" and therefore likely guilty; (2) that they punish the accused for past misconduct; or (3) that they are distracted from the main issue and give a verdict on the wrong matter.

The mechanics of balancing prejudice and probativity depend on who is leading the evidence. In a criminal trial, the Crown has to show that probativity is greater than prejudice, while the defence need only show that probativity is not substantially outweighed by the prejudice. The defence has greater discretion but this is not unlimited. Equivalently, to have their evidence excluded, the Crown's evidence must be more prejudicial that probative, while the defence's evidence must be substantially more prejudicial than probative.

R. v. Seaboyer (page 1-017)

Issue: whether section 277 of the CC infringed the principles of fundamental justice or the right to a fair trial.

Section 277, a "rape-shield" law, prohibits evidence of the complainant's sexual conduct from being used to gauge credibility in rape cases, reversing a CL presumption based on stereotypes about unchaste women. Three purposes for the legislation: (1) eliminate evidence with little to no probative value and a high degree of prejudice; (2) encourage reporting of rape; (3) protection of the witness's privacy

Appellants argue that this information is still relevant. Court holds that legal relevancy requires that evidence balance probative and prejudicial nature. Due to the presumption of innocence, for evidence called by the defence, prejudice must be substantially greater than probativity before a judge can exclude evidence relevant to a defence allowed by law. Evidence regarding a woman's sexual reputation, when used to gauge credibility, is both illogical and impractical. 277 by limiting the exclusion to a purpose for which the evidence is clearly illegitimate, does not infringe the right to a fair trial.

Regina v B.(F.F.) (Page 1-024)

Facts: Accused charged with abusing his nephews. Defence says complaints are not credible because they were not immediate. Crown responds with evidence of his tyrannical control over the family.

Issue: did the trial judge in admitting prejudical character evidence?

Holding: NT. The evidence had probative value, because it was not just about his character, it related to a specific element of the case. Defence had argued that the absence of early complaint suggested evidence was not credible; Crown replied that there wasn't early complaint because previous abusive relationship and authoritarian nature. SCC holds that the evidence was admissible (probative > prejudice), for the purpose of dealing with this argument by the defence. New trial needed because jury was not properly instructed as to what they could use the evidence for. Two or three lines of limiting instructions are sufficient but necessary.

R v Penney (page 1-030)

Law has recent leanings towards allowing all relevant evidence to be admitted at trial, holding that a limiting instruction is all that is necessary to control for prejudice. Introduction of the prejudicial effect of unreliable evidence may hurt the integrity of the justice system. Leaving all evidence to weight discards well-developed exclusionary rules which were enacted in part to deal with wrongful convictions.

Types of Evidence

Direct / Circumstantial

As jury will be instructed: **direct evidence** is made for direct use by the trier of fact. If accepted as true it can be used without inferences. Two potential sources of error: lie and mistake. **Circumstantial evidence** requires the trier of fact to draw an inference before the evidence can be used to find a result. Three potential sources of error: lie, mistake, and logical error / faulty inference. For the third reason, it is frequently left to the trier of fact to determine the specific inference. As long as one reasonable inference that might be drawn supports the litigator's argument it is generally enough for the evidence to be led at trial. More circumstantial evidence limits the number of reasonable inferences, lending support to claims that one specific reasonable inference should be made.

R. v. Dhillon (page 1-032)

Issue: was the instruction to the jury defective regarding circumstantial evidence in that it (1) did not specifically tell the jury there was no direct evidence; (2) was instructed / implied by the judge that in a circumstantial evidence case any reasonable doubt must be based on proven facts.

Jury instruction read, in part, "before basing a verdict of guilty on circumstantial evidence, you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts." BCCA held that the jury charge was standard and unobjectionable. Issue (1) was obvious and issue (2) was not supported by the facts. AD.

Use of Evidence

Des the evidence need to meet a certain quality to be used by the trier of fact? Should there be some basic threshold the evidence has to meet in order to be used for fact finding by the jury? Should the jury be instructed that it may reject certain evidence and therefore create a smaller pool of evidence to use when making findings of fact? NO.
Standardized jury charges are desirable, but this one is bad and exemplifies the **Miller Error**, limiting the jury's assessment of reasonable doubt to evidence found to be both credible and reliable

1. don't want to have juries look at evidence in isolation
2. reasonable doubt standard allows acquittal based on evidence that you don't believe or accept

This error has led to hundreds of new trials. The trier of fact has to look at circumstantial evidence as a whole and find that guilt is the ONLY reasonable inference to be drawn

R. v. Robert (page 1-035)

Issue: Did the trial judge effectively reverse the burden of proof.

Facts: appellant charged with arson. Crown contended that he intentionally lit the fire. He said that the fire was the result of him accidentally igniting spilled gas when his tractor backfired. The trial judge made his finding of guilt by examining the appellant's explanation for the fire and deciding if it was a reasonable inference that could be drawn from the proven facts.

Example of the **Miller error**. Judge said that accused's alternate explanation for the fire had not been proven by fact; but this is the wrong standard. It does not need to be proven, it just needs to be reasonably possible. Never should use the word "proven" regarding individual pieces of Crown evidence. The Crown need not prove pieces of evidence, but rather the overall verdict. The jury should **not** be instructed that individual pieces of evidence must meet a certain threshold to be accepted. (Some exceptions, if a case is based on one piece of evidence, reasonable doubt will depend on its credibility). CO.

Crown has a higher burden of proof, so when assessing whether the Crown has proven something beyond a reasonable doubt, it MAY be acceptable to limit evidence accepted in regards to credibility and reliability. Still problematic because of isolating types of evidence.

R. v. Baltrusaitis (page 1-042)

Issue: jury charge included the instruction that "Your acceptance of evidence as truthful and accurate transforms what has been evidence into fact. It is the facts upon which you base your verdict." Appellant argues that this led the jury to believe that a not guilty finding must be based on evidence found to be both credible and reliable.

This jury instruction was wrong. However, no merit to the appeal, because the charge as a whole established that the evidence should be considered as a whole on the reasonable doubt standard.

Real/Demonstrative

Refers to more tangible pieces of evidence (as opposed to witness accounts). Real evidence refers to a physical object. Demonstrative evidence refers to the representation of an object. The advantages of these sorts of evidence are that they can be inherently reliable and neutral, and therefore have a high probative value. Problems may still arise with admissibility and unfounded assumptions.

Videotapes

R. v. Penney (page 1-043)

Penney charged with inhumane seal killing. Segmented video footage, filmed by not credible witnesses who had film altering technology easily accessible. Don't know how long the gaps are. This lessens the value of the video as an unbiased witness. Footage can be authenticated but Crown did not discharge its burden of doing so in order to show it had not be altered or changed.

PP balancing must always consider the purpose to which the evidence is being put. Problem: this footage is fundamentally misleading. Segmented video footage valuable for issues of identity, but evidence is not being used for identity. It is being run to determine if the killings were inhumane. For this purpose it lacks probative value.

Shows us the dangers of assuming certain evidence will come in. When you think you have some relevant evidence and you want to enter it as evidence you must consider the Creemer factors: (1) accuracy; (2) fairness; (3) verification on oath by a person capable of doing so. SCC previously held that "once it has been established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence." Overall credibility should of course be considered by the trier of fact. This test is only to determine reliability. Fairness and absence of an intent to mislead must be established on a balance of probabilities. AA, CD.

In entering evidence there are essentially two questions: (1) Has it been authenticated? Authentication is the basic process of assuring that the demonstrative evidence is what it appears to be. Need to show the origin of the evidence. (2) Is it fundamentally misleading? There may be profound reliability issues that render it inadmissible (ie strange perspective; strangely cut)

Photographs

R. v. Kinkead (page 1-056)

Facts: Kinkead charged with a double murder of two sisters. Crown wants to enter several hundred photos into evidence; defence argues that some of them are too prejudicial. Prejudice has three factors in this context: it may (1) inflame or (2) distract (or confuse) the jury from the issue at bar; or (3) waste valuable court time.

Issue: given photographs with some probative value is there an issue with admissibility due to prejudice?

The photos are part of the narrative of the scene, but they have limited probative value if their only purpose is to show that they are dead in a gruesome fashion. Crown therefore has to show that there is additional probative value from the photos. That is the degree of animus towards one sister greater than the other as illustrated by wounds. Suggestion scene was staged requires detailed presentation.

Probative value can also be limited by admission the accused might make. Kinkead was willing to admit that the victim wore a specific necklace, therefore a photo of her wearing the necklace is less probative and more prejudicial. Certain admissions may change the probative value of pieces of evidence. (Agreed facts can be presented to the jury without needing to lead the prejudicial evidence)

Judge assesses each type of photo considering each side's arguments. The approach of the judge is not all or nothing. The judge assesses each type of evidence on its merits and open up the possibility of editing and reducing the quantity / nature. Lets in some, but not all, of the photos.

Documents

Authentication

Need to authenticate everything. Just because a document looks official is not sufficient. A document may be authenticated in many ways: by talking to the typist, the subject matter (parties), the signee... Regardless, someone has to come to court and explain where it came from and whether it is accurate.

Lowe v. Jenkinson (page 1-062)

Issue: admissibility of what the Crown "believes is a written version of what Mr. Jenkinson said to the adjuster in a telephone conversation which the adjuster tape recorded ... [that] was put into written form by an employee in the adjuster's office." Mr Jenkinson does not remember the conversation and can't verify the document. Neither can anyone else called. Document is not admissible.

Judicial Notice

Can the lack of evidence be sufficient evidence? Generally you need some evidence, particularly if you have the onus.

However there are some things that are so clear no evidence need be called. Instead "judicial notice" can be taken of a common fact. This may allow someone to rely on something without specific evidence, so as to save time. It often arises after evidence has been called because the judge can say yes or no. It may be done in pretrial hearings or conceded by the other side. It should be something that "would not be the subject of debate between reasonable persons."

Olson v. Olson (page 1-065)

Facts: child support case, turns on whether the son is a "child of the marriage" under s2 of the Divorce Act. This applies to children under 18 or in full-time attendance at a post-secondary institution [or ... *not relevant*]. Mother sought a finding that the son's sports training counted as post-secondary education.

Issue is whether judicial notice can be taken of the proposition that sports training leads to increased career opportunities but court is unwilling to do this (error by counsel). What is obvious can vary widely, should always be ready with evidence. In this case no supporting evidence shown. Trial judge erred. AA.

CHAPTER 2: EXTRINSIC MISCONDUCT EVIDENCE

Bad Character of the Accused

Character evidence is usually more prejudicial than probative. The general rule that general bad character (extrinsic misconduct) evidence is presumptively inadmissible. Admissibility is dependent on whether it has probative value beyond being illustrative of the accused's character.

General Admissibility

R. v. Cuadra (page 2-001)

In many circumstances this evidence never would have gotten in, but due to the particulars of the case, it did. One witness has powerful circumstantial evidence (sees accused and victim in a physical altercation, sees the accused with a knife before and shortly thereafter) but his early testimony was inconsistent, leading to key credibility issues (hadn't mentioned the knife before), classic cross examination

Crown wants to lead evidence of other violent incidents that Cuarda was involved in (that witness saw and was afraid of). very prejudicial. but also probative in explaining the witness's credibility issue (why he lied before). CoA finds that this significant probative value was sufficient because jury needed it to evaluate the credibility of the key Crown witnesses. But judge allows reports of only some of the previous incidents, in order to try and minimize the prejudice.

(Accused may also lead bad character evidence, "I was doing something else illegal at the time")

Similar Fact Evidence

Is preemptively inadmissible until the person who wishes to call it can show that its probative value outweighs its prejudice. A focus in determining probative value is the degree of similarity between the similar incidents.

R. v. Handy (page 2-014)

Handy accused of sexual assault of a one night stand. Crown led evidence of seven previous incidents wherein Handy was sexually violent during his long term relationship with his ex-wife. Other evidence showed that the complainant had communicated with the wife and there was a high probability of collusion but the trial judge refrained from considering this in admitting the evidence. Appellant Ct found this to be erroneous on multiple levels and ordered a new trial.

Creates framework to use specific propensity evidence. Sometimes even though evidence is very prejudicial, the similarity of past events to the current ones at issue may be sufficiently probative for similar fact evidence to be very prejudicial. Basic idea is about the unlikelihood of coincidences (thus the possibility of collusion has a high prejudicial effect because it counters this logic). Not general propensity but rather specific propensity to engage in specific conduct under specific circumstances.

In finding similarity can consider many factors, such as (1) temporal proximity / intervening act; (2) similarity of AR; (3) similarity of the circumstances; (4) number of incidents.

High degree of inherent prejudice but it can increase when (1) the amount of time that calling the evidence will take is prohibitive; and (2) the past incidents are more serious.

Prior to Handy it was unclear if the possibility of collusion affected the admissibility of similar fact evidence, given that generally collusion should be presented to the trier of fact. Handy held that if there was an air of reality to the probability of collusion, the onus is on the party presenting the evidence to convince the trial judge that on the balance of probabilities collision was not a live issue.

(Accused can run more general propensity evidence but other specific factors they must meet which will be discussed later)

Post-Offence Conduct

Traditionally post offence conduct may be useful in determining guilt. This evidence is based on a simple premise but exhibits a number of complexities. It is a form of circumstantial evidence that arises after the incident and may be relevant in determining whether the accused committed the crime or tort. In theory, people who appear to be acting out of a desire to avoid arrest, may be exhibiting consciousness of guilt. In practice, people who aren't guilty may also wish to avoid appearing suspicious. This is a very prejudicial and problematic area of evidence. It is a leading cause of of new trials and mistaken convictions. It may be overemphasized by the trier of fact, who needs to draw a reasonable, not speculative, inference from the the accused's conduct.
What if there are two reasonable inferences? Before White, post-offence conduct was (1) only considered to have probative value if there was only one reasonable inference that could be drawn from the conduct; and (2) considered to be a special (determinative) type of evidence that should be individually examined on the reasonable doubt standard.

White v. The Queen (page 2-051)

Accused (White & Cote) fled town after allegedly shooting someone. One reasonable inference – they did it. Their defence: we were involved in some robberies at the same time the murder occurred and those were why we fled town. Does this negate probative value? No. It is for the trier of fact to determine which inference is correct. However as a practical matter post-offence conduct may be the major piece of Crown evidence that thus would need to be believed beyond a reasonable doubt for a finding of guilt.

Issues: (1) did the confession of the accused to another culpable act explain their post-offence conduct such that the judge should have told the jury said conduct had no probative value; and (2) should the trial judge have told the jury that post-offence conduct evidence must in itself be examined on the RD standard?

R v Arcangioli stands for the proposition that a piece of evidence should not be put to the jury unless it is relevant to the determination of a live issue in the case. It established that post-offence conduct was not helpful in determining the level of culpability. (ie for murder vs manslaughter ~MR) Logically, any amount of culpability for the impugned act could explain “guilty” post-offence conduct. However post-offence conduct may be helpful in rebutting defences (specifically insanity, self-defence)

This case differs from Arcangioli in that the defence related to a different crime than the charge, and therefore the argument with regard to levels of culpability didn't apply. The jury was correctly instructed that flight or concealment does not mean the accused is guilty, merely that it is one circumstance that may be considered. Post offence conduct does not need to be accepted on the reasonable doubt standard and a judge should make no such jury charge. This judge It is not a special category of evidence, and like all other evidence should be considered as part of the overall picture. AD.

R. v. Peavoy (page 2-077)

Accused killed someone, cleaned up the scene, avoided police. Running defences of self-defence and intoxication. Convicted at trial.

Issues: (1) whether the Crown's address resulted in the appellant not receiving a fair trial; (2) whether the jury was properly charged regarding post-offence conduct

The Crown, in their jury address, invited speculation and misstated the evidence in a fashion (a) not supported by pathologist's evidence (b) that the Crown had previously not tried to support through cross-examination. Furthermore they framed the appellant's constitutional right to diclosure as a factor that made his testimony inherently suspect, raising, for the first time in their closing address, the possibility that the appellant had used disclosed evidence to concoct his narrative of events. The trial judge made no jury address on the Crown's improper remarks, and erred in law by not doing so.

An intoxication defence means no MR. This is inconsistent with the post-conduct evidence. Crown can call this evidence to rebut the intoxication (or SD) but the jury cannot use it to determine level of culpability, per Arcangioli. In the address to the jury the Crown implied that the jury could use it for this purpose. Therefore in the jury instructions it was important the the judge specifically negate this possibility in his jury instructions and he failed to do so. NT

Case law has traditionally excluded post-offence conduct as evidence of innocence. This is reflected in the historic term for post-offence conduct, that is “consciousness of guilt” evidence. The new name implies that post-offence may also suggest innocence. This is supported by the rise of the principled approach, which takes the more logically consistent view where post-offence conduct can be used to infer innocence as well as guilt.
The usefulness of an act in suggesting innocence depends on the specific action taken. Actions such as avowing innocence; offering to take a polygraph; and offering DNA when well known that crime scene was cleaned are legally useless.

R. v. S.C.B. (page 2-089)

Facts: The complainant was beaten and sexually assaulted. The only issue at trial was identity. The complainant identified the respondent to the police. There was some supportive circumstantial evidence. The respondent plead not guilty and led supporting evidence, including (1) expert evidence from a psychiatrist that he is not the type of person who would commit this attack; and (2) his cooperation with the police and willingness to (a) give DNA sample, and (b) take a polygraph test. Acquitted at trial.

Issues: (1) admissibility of the expert evidence of the psychiatrist; (2) admissibility of the offer to take a polygraph test; (3) reasonable possibility verdict would be different.

Mohan criteria for expert evidence states that for this sort of psychiatric evidence to be admissible, the scientific community must have developed a standard profile for the an offender who commits this sort of crime. Otherwise it is insufficiently reliable. In this case, the psychiatric evidence merely stated that the hypothetical exhibited certain features consistent with a person who suffered from on of two recognized types of mental disorder. He in no way asserted that this view was generally accepted in the psychiatric community. The evidence should have been excluded.

Trial judge used evidence of the respondent's cooperation with the police to either bolster his credibility or as circumstantial evidence against guilt. If this cooperation had only included an offer to take a polygraph test that would have been incorrect, as taking such a test risks nothing and is not admissible. The immediate offer of DNA evidence was probative given the accused knew he was charged with a sexual assault where such physical evidence could easily link the perpetrator to the crime. Court recognized that the use of post-offence conduct to support an inference that the accused was not guilty, has some probative value, and should be approached on a principled basis, that is, it should be admissible unless significantly prejudicial or excluded by statute. The fact that multiple inference may be drawn, not necessarily favourable to the accused, is no bar to admissibility. The Crown also did not object to admissibility of this evidence at trial, and there is no indication of prejudice which could result. Note that while cooperation of the police may be admissible, non-cooperation is a constitutional right and should not be admissible.

The Crown met the onus to show that the psychiatric evidence may have affected the verdict. NT.

Bad Character of the Witness

Goes to credibility, but has the issue of invading privacy. Driven by both CL and statute

Prior Convictions

Statute states that prior convictions are relevant to credibility (suggests witness may be less truthful). The reasoning behind this is rather dubious. May a be problematic form of similar fact evidence, when the accused appears as a witness on their own behalf.

Canada Evidence Act (CEA), Section 12

"A witness may be questioned as to whether the witness has been convicted of any offence"

R. v. Corbett (page 2-102)

Corbett convicted of second degree murder at trial. Appeals, alleging that s12 of the CEA deprived him of his 11d right to a fair trial by introducing evidence of his earlier conviction for non-capital murder.

Courts find that on the facts of this case, a serious imbalance would have been arisen had the jury not been apprised of Corbett's criminal record. Two of the lead Crown witnesses had significant criminal records which the defence used to vigorously attack their credibility. To omit the records of the accused would provide the jury with a very distorted picture. Given strict limiting instructions, that the record can be only used in assessment of credibility, the information clearly needs to be provided to the jury as part of a complete picture on which they must rule. Moreover we should trust juries.

Statutory interpretation used to interpret the statute as giving judicial discretion for when a conviction should be excluded as evidence. Factors to consider: (1) temporal proximity (helps Crown); (2) does it go to veracity (helps Crown); (3) similarity of the offence (hurts Crown); (4) is the accused targeting the Crown witnesses' criminal records? Overall can ask the accused about previous convictions, subject to judicial discretion and strict limiting instructions.

Other Discreditable Conduct

At CL, witnesses other the the accused are permitted to have more discreditable conduct evidence adduced. This is still limited on strategic and probative grounds. Still limits – strategic, judicial determination that prejudice > probative. This is relevant though, in many areas: relationship to accused / prosecution; past dishonesty / inconsistency; reliability / plausibility issues. Traditional area for broad right to cross-examination.

R. v. Cullen (page 2-113)

Appellant convicted of assault. At trial the judge erroneously (1) ruled that information that the complainant had received a conditional discharge for her possession of burglar's tools was inadmissible upon defence cross-examination; and (2) admitted evidence that the appellant had previously been acquitted of a similar charge. While 12(1) limits cross-examination of the accused

regarding previous offences, it opposed no such limitations on the witnesses. Defence traditionally has a broad latitude for cross-examination, particularly in cases such as these where credibility of the complainant is a key issue. NT.

Titus v. R (page 2-115)

Accused convicted of second degree murder. At trial, defence was not permitted to cross-examine a Crown witness about an outstanding indictment for murder that he was under investigation from by the same police department as had investigated the accused. SCC finds this cross-examination was clearly important in showing that the witness had a possible motivation to seek favour from the prosecution. Defence is "entitled to employ every legitimate means of testing the evidence called by the Crown," as part of the presumption of innocence. NT.

The Vetrovec Witness

What if the reliability issues surrounding a witness are severe? Ie the witness has previously been convicted for perjury / they are the alternate suspect / they've changed their story seventeen different times. Three basic policy options: (1) exclude them; (2) do nothing (rely on cross-examination); (3) allow the evidence to be led but put it in a special category (Canadian option). Huge issue because Vetrovec witnesses strongly linked to wrongful convictions, but still want to find the truth. A standardized set of special jury instructions developed amid controversy, and were settled in Khela.

R. v. Murrin (page 2-117)

Crown proposed to call as witnesses six "in-custody" informers who claimed to have hear Murrin make incriminating statements. Defence asked for this evidenced to be excluded. Canada has not chosen exclusion as a regular option, but these were special circumstances. Jailhouse informers are the most dangerous type of Vetrovec witness – they may explicitly and implicitly be looking for a deal; they may have severe credibility issue; they are a large cause of erroneous convictions. Yet there is often a huge pressure on the state to accept this evidence to tie circumstantial cases together.

Court rejected attempt, saying that the system of trial by jury depends on a division of duties. "The jury are to weigh the evidence and make findings of fact within a legal framework given to them by the trial judge. Neither is to trespass on the province of the other." It is better to error on the side of inclusion, not exclusion. Ultimate reliability should be tested by the jury. However, because this evidence is so dangerous, special instructions to the jury are necessary in order to ensure the evidence correctly used.

Evidence that is based on events that actually happened is presumptively admissible. Other types of evidence that are excluded because of reliability issues (hearsay and expert evidence) are opinion based and presumptively inadmissible.

R. v. Khela (page 2-125)

Accused was convicted on the testimony of two Vetrovec witnesses, who were alternate suspects for the murder. Two female witnesses though not identified as Vetrovec were problematic because they were involved with the Vetrovec witnesses and their was a possibility of collision. Jury instructions identified all of this testimony as problematic evidence that required consideration in light of all the other evidence.

Defence appealed, alleging that the instruction to the jury at trial had been inadequate. The SCC dismissed the appeal.

Vetrovec witnesses are classed as witnesses that are "unreliable;" that is "all witnesses who because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth. Identifying a Vetrovec witness must be done on a case specific basis. Once a Vetrovec witness has been identified, a special jury charge must be given. This charge must fall into a framework containing four elements: (1) special attention must be drawn to the problematic testimony; (2) an explanation why the witness is problematic; (3) warning the jury that although they can convict on unconfirmed evidence it is dangerous to do so; (4) in determining credibility the jury should look for independent (not influenced / tainted by the Vetrovec eyewitness; should warn that a significant possibility of collusion makes evidence no longer independent) and material (not peripheral) corroborating evidence. Although the testimony may contain confirming evidence, this can be too easy to fake, specifically if the witness was involved in the crime. Overall requirement of proportionality between corroboration of and problematic nature of the testimony. Thus external evidence should be looked at.

The fourth instruction is controversial (see Deschamps dissenting) because of (a) disagreement as to what sort of external evidence can be corroborating; and (b) is this a redundant instruction considering the inherent duty of a jury is to weigh all the evidence. Can corroborating evidence be any evidence or does it have to directly support the specifics of the witness's account? Court tries to balance. Evidence doesn't need to support the most important aspect of the evidence only enhance overall credibility, possibly by supporting other aspects of the evidence.

In Vetrovec the court rejected the second method, saying it was too narrow and focused on whether evidence fit the proper form whether than whether it bolstered the credibility of the accused. Kebla affirmed that idea; however the dissent argued that the fourth element of the framework had the consequence of narrowing Vetrovec and returning to a more formulaic approach (independence and materiality as intractable concepts that distract the jury from specifically focusing on credibility).

(Second ground of appeal was that the jury had been incorrectly instructed that it could only draw inferences from defence evidence based on proven facts. Though some error was found, in the context of the charge as a whole is was found it would be

unreasonable to conclude that the error could have affected the verdict.)

R. v. Dhillon (page 2-147)

Jailhouse witness BS said they heard a confession – cornerstone of Crown's case. Some other evidence on the accused. Corroborative evidence required. Judge gives jury examples of what be confirmatory evidence. Six out of the seven are wrong. (1) Common background – might make a confession more likely but does not strengthen witness credibility ~ too peripheral; (2) BS getting a reputation as a rat; (3) plausibility; (4) seeming abscene of benefits to BS; (5) frequent guilty pleas; (6) BS was a "highly experienced" inmate therefore accused might find him trustworthy.

Other problems with this case. Defence wants to run an "other suspects" argument, saying that the police didn't do a sufficient investigation. Danger is that this allows the Crown to present the reasons why the police focused on the accused which opens the door to other bad character evidence. Problem – this evidence is not admitted to be used to blacken the accused but rather to rebut the allegation – requires specific limiting instructions. Also in this case the defence was not running a harsh argument against the police investigation, more that the victim was the sort of person many people would want to kill. Any discussion of propensity (of the victim or the accused or of other suspects) opens the door. Allowing this evidence, the trial judge ruled, inevitably meant that other previously inadmissible evidence could also be led. Crown led highly prejudicial hearsay evidence about the appellant's past.

Other Dangerous Evidence

Eyewitness: Unlike Vetrovec witnesses where the main issue is credibility; the primary issue for eye-witnesses is reliability. Eyewitnesses are frequently bystanders with no bias and therefore inherent credibility. However, when the accused is a stranger that the witness only saw briefly, there is a significantly possibility their identification is mistaken. Eyewitness evidence requires very specific jury instructions which should include (1) the large history of wrongful convictions; (2) facts to consider when weighing accuracy, such as time, strangeness, lighting; (3) identifying the accused should not be done in court, and if it is done it has little to no weight; (4) should focus on the description of the accused that the witness gave shortly after the crime occurred, and the similarity of the accused to that description. Gonsalves deals with the specific precautions that need to be taken to use a photo lineup.

R. v. Gonsalves (page 2-157)

The two witnesses were robbed by three strangers. Each complainant subsequently identified the accused as one of the robbers in a photo lineup conducted by the police.

Court speaks to general principles regarding eyewitness identification evidence. It is notoriously unreliable. Questions to ask in measuring reliability include: was (a) the accused a complete stranger or known to the witness; (b) sighting brief or long; (c) sighting under darkness of night or in well-illuminated conditions; (d) view under circumstances of stress; (e) a description written or given to the police in a timely way; (f) the description general or specific and does it include distinctive features corresponding (or not) to the accused; (g) there intervening circumstances that could have tainted the description; (h) identification independently confirmed?

Police should "exercise the utmost care to ensure that the identification of persons suspected of crimes is made unassisted by witnesses who are uninfluenced by any suggestion direct or indirect, which may prevent the identification from being independent and unbiased. Evidence tainted by improper procedures is not automatically inadmissible, but it does have lesser weight.

The photo line-up process should (a) include photos of persons approximately the same age and colour as the accused; (b) be sequential not a photo spread; (c) contain at least ten subjects; (d) be recorded; (e) be done by an officer who does not know who the suspect his or if he is in the line up; (f) record in writing any comments of both the witness and officer and be signed by both; (g) not be commented on afterwards by the police officers.

On this facts of the case the procedure was not optimal (on d and e) but it was sufficient. The witnesses had lengthy time to view the suspect in daylight, their contemporaneous descriptions match the suspect; had no possibility of exclusion. This was sufficient to ensure reliability and admit the evidence.

One controversy is that people have wanted to call experts to explain why an eyewitness could be confident about the ID and be wrong. Courts are really hesitant to do this (too many experts). Instead it's in the jury instructions but still the question is if that is a sufficient warning.

CHAPTER 3: OPINION EVIDENCE

Eyewitness opinions are permissible as long as they relate to something in the ordinary knowledge of persons and are not accepted on the legal standard. Expert opinion evidence is problematic because it comes from an 'expert' who did not witness the incident and is being paid to testify. Expert evidence is presumptively inadmissible. When specialized

knowledge is necessary to evaluate a case, expert testimony may be admitted at the judge's discretion.

CEA, Section 7

Expert witnesses: Where, in any trial or other proceeding, it is intended by any party, to examine as witnesses experts entitled 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.

Criminal Code, Section 657.3

Expert testimony: (1) In any proceedings, the evidence of a person as an expert may be given ... setting out, in particular, the qualifications of the person as an expert if

(a) the court recognizes that person as an expert; and

(b) the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence...

At CL parties who are strangers to an alleged event are generally not called. Expert evidence is an exception to this general rule and can be called but only under specific circumstances.

Common Knowledge

If an opinion is on a matter of common knowledge and admissible under the "compendious statement of facts" exception, it is admissible from any witness.

Graat v. R(page 3-001)

Issue as to whether opinion evidence as to the accused's state of intoxication could be admitted. Ground of appeal was that opinions were admitted from both the police and a lay witness. App Ct held that "I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived." Intoxication falls under common knowledge, and the evidence of all parties was admitted because they were eyewitnesses. Nothing about the police testimony deserved or required the categorization of expert evidence.

Expert Evidence

The General Rule

R. v. Mohan (page 3-008)

Accused, a paediatrician, convicted of sexually assaulting patients at trial. Ground of appeal was that the trial judge excluded a psychiatrist's evidence that the accused did not meet the psychiatric profile of either a paedophile or a sexual psychopath, both of which the culprit was. Overturned at ONCA, appealed to SCC.

Leading case in which the SCC speaks unusually favourably of expert testimony. Specific things to focus on for expert evidence are the notice requirements on the defence. Need to meet both statutory and common law standards to admit expert evidence. Probative > prejudice.

Admission of expert evidence depends on four factors: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; (4) a properly qualified expert. The degree of strictness in applying these principles is directly proportionate to the proximity that the expert opinion has to being an opinion on an ultimate issue.

(1) Relevance requires that the evidence be logically relevance and not more misleading than it is reliable. A major concern with expert evidence is that the jury will either (a) be confused or (b) substitute the expert's opinion for their own. The evidence must therefore be highly probative.

(2) Necessity as a consideration arises from the fact that the function of expert evidence is to provide the trier of fact with a ready-made inference which the trier of fact, due to the technical nature of the facts, is unable to formulate. For this reason if, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. This is a high threshold to meet because of the temptation that even in areas where expert evidence is not strictly necessary the trier of fact will be overawed by the expert's qualifications and refrain from critical evaluation. For this reason, expert evidence related to credibility or oath-helping is generally excluded.

(3) Expert evidence may not be admitted if it could not be admitted if it were not expert evidence.

The witness must be shown to have acquired special or peculiar knowledge through study or experience in respect of the matter on which he or she undertakes to testify.

Regarding disposition evidence, before an expert's opinion can be admitted, the judge must be satisfied that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material in determining innocence guilt. The scientific community must have developed a standard profile for the offender who commits the type of crime.

In this case the trial judge held that a person who sexually assaulted young women could not be said to fit a standard profile. The fact that the accused was a doctor was irrelevant because their is no standard profile on doctors who commit sexual crimes. No matter what the opinion of the psychiatrist, it is necessary that a profile be accepted by the scientific community before it can be considered reliable. The trial judge correctly found the evidence to be inadmissible. AA. CR.

The Hypothetical Question

This adds a fifth criteria for admission of expert evidence, which directly relates to relevance. Traditionally a hypothetical scenario is posted to an expert rather than asking for a direct opinion on the facts of the case. The hypothetical may be broad or narrow and will ask given certain facts how probable a certain result is. his allows the hypothetical to (a) maintain distance and not remove the decision from the jury; and (b) address unproven, irrelevant, or inadmissible facts of the case so that the opinion can stand as the trial evidence develops. Otherwise expert evidence may become inadmissible when trial proceeding establish that it relied on inadmissible facts and thus is no longer relevant or admissible. Note that just because some evidence that the opinion relied on is inadmissible or unproven doesn't mean that the opinion is inadmissible, it just reduces its weight.

Bleta v. The Queen (page 3-015)

Accused participated in a stabbing. Defence was that he had been in a state of automatism. He was acquitted of murder at trial. Crown appeals arguing that certain psychiatric evidence should not have been admitted. App Ct held that the psychiatrist "was improperly permitted to express an opinion based on his own assessment of the evidence."

With an automatism defence expert evidence is clearly required. The expert's opinion must address automatism generally and also have a foundation that allows it relate back to the actual facts of the case.

The question of whether or not an accused was in a state of automatism is a question of fact. The custom of asking counsel to frame their opinion in the form of a hypothetical has arisen because unless the proven facts upon which it is based have been clearly indicated to the jury it can only confuse the issue. If the facts are undebated this issue does not necessarily arise and a hypothetical may be unnecessary. As long as it is clear what evidence the expert is founding their opinion the lack of a hypothetical does not automatically make the opinion inadmissible. In this case it was clear the the psychiatrist was proceeding on the hypothesis that the appellant's blow to the head and ensuing behaviour were as described by uncontradicted evidence of Crown witness and his symptoms were as he himself described.

The decision as to whether a sufficient foundation has been laid for the admission of an expert opinion rests on the discretion of the trial judge, and deference should therefore be given to his opinion. The jury instructions made it clear that (1) they could reject the doctor's evidence in whole or in part; and (2) the doctor's opinion was founded on the evidence of the appellant's amnesia. AA. AR.

The Basis and Weight of Expert Opinion

(?)R. v. Palma (page 3-019)

As a general rule an expert's opinion may rely on a variety of sources, such as (a) the expert's first-hand knowledge or observation; (b) the evidence given at trial, usually put as a hypothetical question; and (c) information or data gather by the expert out of court, otherwise than by first-hand observation. Unlike the first two sources, (c) engages the hearsay rule.

In Wilband [1967], a chase involving psychiatric opinion evidence, the court held that: (a) the expert may form their opinion on a basis that includes hearsay; (b) the expert may give his or her opinion on that basis, repeating the out-of-court information; (c) the opinion is admissible; (d) the weight of the opinion may be affected by the extent to which it rests on second-hand information but not its admissibility; and (e) the opinion is not evidence of the truth of the (second-hand) information on which it is based.

The issue arose again in Abbey [1982], wherein the court held that (a) an expert opinion is admissible if relevant, even if it is based on second-hand evidence; (b) this second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based; (c) where the psychiatric evidence is comprised of hearsay evidence the problem is the weight to be attributed to the opinion; (d) before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. The court rejected the suggestion that before any weight could be assigned to a hearsay based opinion all of the facts relied upon must be proven by admissible evidence.

(Pay particular attention to Abbey case mentioned because it is significant for history of expert opinion)

Particular Matters

Credibility

Generally expert evidence is not accepted when it goes to credibility. It may remove the decision from the jury and fails the criteria of necessity. But what if there is a particular factor affecting credibility (ie psychiatric evidence) that the jury needs information about in order to make their own credibility assessment? Courts will sometimes admit this evidence. However it should be general not specific, and not amount to the expert's direct opinion on the credibility of a particular witness.

R. v. Llorenz (page 3-025)

Complainant alleged that appellant had sexually abused her. The allegation of sexual abuse arose out of a therapeutic program between the expert and the complainant. He treated her for it and encouraged her to go to the police. He was then called as a witness for the prosecution. Convicted at trial

Ground of appeals: was the psychiatric evidence properly admitted and was the jury adequately charged.

Oath helping, which is evidence about credibility, is inadmissible. Evidence about a feature of the witness's testimony may be admissible even though it will likely indirectly affect the trier of fact's determination of the question of credibility. Oath-helping evidence may still be admitted if it has some other legitimate purpose and passes the p/p test.

Portions of the psychiatric evidence were admissible. Although he could not speak directly to her testimony he could address a number of issues: (1) delay in reporting; (2) actions that suggest the complainant had been sexually abused (questionably necessary); (3) circumstances in which the allegation arose. However, he went beyond this.

He specifically described his diagnosis of the complainant, stating that her condition matched approximately 20 of the 24 factors he considered to be common in cases of sexual abuse. This had the effect of strongly implying that he found her complaint credible. The list was excessive and it was not a body of knowledge generally accepted by the scientific community. He did disclaim that this was all his opinion, but these disclaimers were insufficient because (a) they were not specifically directed at the dangers arising from oath helping and (b) there was a serious risk that the bulk and nature of the inadmissible evidence would swamp the disclaimers in the consideration of the jury.

These errors could have been fixed by appropriate jury instructions. The jury should have been specifically directed that the evidence could not be used to assess the complainant's credibility. Instead the judge actually implied it could be used for credibility and only stated that expert evidence was dependent on the facts it was based on. AA. NT

In this case if the crown had been more careful in how the evidence was presented it would have been admissible, but because they won't it wasn't. Evidence can be tainted by how it was presented. Could have been fixed by appropriate jury instructions but they weren't given. Note that the defence did not object to the expert evidence at trial, but that was not enough to save it on appeal.

Novel Scientific Evidence

A more rigorous reliability analysis must be done. Considerations: has the research been accepted by a relevant expert community? Or has it been subjected to peer review with good results. Does it have a known and low error rate?
There's a particular issue with research around propensity to commit specific crimes. This may be admissible as specific propensity evidence.

R. v. J.-L.J. [2000] SCC (page 3-034)

AC charged with sexually assaulting two boys. At trial wanted to lead psychiatric evidence that the offences were probably committed by a sexual deviant and that tests of AC had suggested he wasn't one. Evidence was excluded as disposition evidence with no distinctive group.. Convicted at trial. Overturned on appeal.

Issue: was the psychiatrist's new behavioural profiling technique admissible?

Failed distinctive groups exception; could not show that the crime could only have been committed by a person possessing traits that AC didn't. This was therefore a form of novel scientific methods. The expert brought no data for his testimony. When asked to explain said that it was too complicated for the judge to understand.

When addressing novel scientific methods, the basic Mohan factors are applicable, but as expert evidence becomes more prevalent (and more controversial) another test must be added for new forms of evidence lest they be later discredited. Shows courts beginning to require higher standards for expert evidence. Novel scientific evidence test asks (1) can it satisfy Mohan on a strict necessity and reliability standard? (2) is the science in question sufficiently reliable?. This considers many factors such as (a) has it / can it be tested; (b) error rate; (c) peer review; (d) accepted in scientific community; (e) validity of underlying assumptions.

The behavioural profiling technique was not reliable, had a high error rate, and was extremely close to the ultimate issue. So it failed Mohan and the new novel scientific evidence test. AA. CR.

Limiting Admissibility

R. v. D.D. [2000] SCC (page 3-056)

Issue of whether expert evidence may be admitted to inform the jury that children who have suffered sexual abuse respond in different ways with respect to disclosing the abuse. Majority concluded it was unnecessary; while a strong dissent felt otherwise. This case was a statement from the SCC that all expert evidence should be treated with suspicion. Court is trying to cut down on expert evidence.

Young complainant who when cross-examined revealed a long gap between the time of the incidents and the reporting. Crown led expert testimony that this has no bearing on credibility. App court found that this was unnecessary because it should be in the jury instruction. Experts should be avoided if possible.

"A basic tenet of our law is that the usual witness may not give opinion evidence ... Expert opinion evidence became admissible as an exception to the rule against opinion evidence in those cases where it was necessary to provide "a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate." ... the admissibility requirements of expert evidence do not eliminate the dangers traditionally associated with it. ... [T]he "professional expert witness" has emerged ... these witnesses frequently move from the impartiality generally associated with professionals to advocates in the case. In some notable instances, it has been recognized that this lack independence and impartiality can contribute to miscarriages of justice." Expert evidence (a) may usurp the role of the jury; (b) is highly resistant to cross-examination by counsel who are not experts; (c) is usually derived from inadmissible and uncross-examinable evidence that must nonetheless be led; and (d) is time-consuming and expensive. Therefore there is a need to raise the necessity threshold. AA. NT

Question remains: where to draw the line? What about when an area of expert evidence is controversial?

R. v. Abbey [2009] ONCA (page 3-063)

Gang killing as a result of a gang war. Following the killing the accused gets a teardrop tattoo on his face. Trial court excluded expert testimony about the meaning of the teardrop tattoo in a street gang. Accused was acquitted. App Ct finds that the court erred in law in excluding the evidence and ordered a new trial.

One of the most significant decisions in recent years: it reorganized the Mohan criteria and provided a practical test for omitting expert evidence. Expert opinion evidence is presumptively inadmissible. Trial judge is the gatekeeper. Test for admissibility is an adaptation of the Mohan criteria into a two step process: (1) first the party proffering the evidence must meet certain preconditions (proper subject for expert evidence; qualified expert; no exclusionary rule; logically relevant); (2) is the evidence more probative than prejudicial? Second factor allows consideration of further factors – necessity, reliability, accessibility, cost, bias, time...

Crown had proposed that the expert should primarily lead evidence that a teardrop meant he'd killed another gang member; or in the alternative that there were three possible meanings – a family or gang member had been killed; you just got out of prison; you killed a rival gang member. Trial judge rejected this evidence on reliability grounds: (a) qualitative research used for quantitative conclusions; (b) no error rate; (c) small sample size [300 gang members]; (d) clashes with authoratative texts; (e) suspect attempts at verifying truth-status of interviewees; (f) internally inconsistent; (g) he did not interview any members of the Malvern Crew [the accused's gang]; and (h) no peer review. The primary ground was (g).

App Ct found that if properly limited (Crown could lead alternative expert evidence and then evidence to eliminate two of the three possible meanings) the evidence should have been included and that not doing so was an error in law. Admissibility must be limited in nature and scope by the trial judge.

Trial judge erred in (a) not delineating nature and scope; (b) using inappropriate criteria to assess reliability while not using relevant criteria; (c) imposing too high a reliability standard, misapprehending the evidence, and considering irrelevant aspects of the evidence; (d) went beyond threshold reliability and encroached on the jury's role; and (e) holding that lack of peer review meant that his opinion was not based on proven facts. He did not deal with the Crown's alternative [admissible] position.

This does not mean that experts can never go to the ultimate issue. They can still address the specific facts of the case but this is in restricted circumstances (mostly medical where the expert has directly interacted with the plaintiff to come to their conclusion). However Abbey does suggest that if you can present expert evidence in a more general way you likely should do so.

CHAPTER 4: DIFFERENT EVIDENTIARY CONTEXTS

This chapters deals with the testimony (not opinion) of (non-expert) witnesses in a more specific sense. We have already considered how to determine if the content of their testimony is admissible. We must first consider if they are (1) competent to testify; and (2) can be compelled to testify if they resist.

Competence, Oaths, and Compellability of Witnesses

Competence – is the witness competent to testify? If the rules don't permit the witness to testify they can't even if they want

to. **Compellability** – can the witness be made to testify? If the witness doesn't want to testify can they be forced to? As a general rule every potential witness is both competent and compellable; this is part of a general civic duty. Exceptions: (a) compellability: an accused and their spouse generally cannot be forced to testify; (b) competence: must be able to take and understand the oath (or a promise to tell the truth) and communicate it but courts generally interpret these broadly not wanting to exclude certain groups from the courtroom. Even if found incompetent the evidence may be brought in another way (hearsay).
CL requires an oath; CEA section 14 allows a solemn affirmation to tell the truth instead. Goal is to ensure that the witness understands the moral obligation to tell the truth

CEA, Sections 13-16.1

Section 16 particularly deals with capacity to tell the truth. It outlines very low thresholds. This is a clear policy decision to not create barriers to this sort of witness.

16.1 creates a presumption that a person under 14 has the capacity to testify. Then must address the ability to communicate truthfully. Specifically the statute provides that the witness must be able to understand that they were asked a question and give a response. ss2 specifics that they need not take an oath or affirmation, but should instead give a promise to tell the truth (all are equivalent in law). A previous version of the CEA provided that there should be an inquiry as to whether the child could understand the concept of truth. Subsection 7 overwrote this completely; stating that their capacity, in regards to admissibility, could not be challenged on this abstract formulation. (They can still be cross-examined to see if they are telling the truth, it merely cannot go to admissibility).

16 states that a witness aged 14 or older whose competence is in doubt may be challenged through an inquiry to ensure they can communicate truthfully and understand what it means to do so. They need not take an oath but should instead promise to tell the truth. This is a slightly higher threshold the for young children. However the SCC has essentially read in a similar provision to 16.1(7), giving it effectively the same threshold to 16.1.

R. v. J. Z. S. [2008 BCCA] (page 4-023)

Accused convicted at trial of sexually assaulting his son and daughter. At trial they testified on a promise to tell the truth, per CEA 16.1(7). They also used the presumptive right for child or vulnerable witnesses to testify behind a screen (use of testimonial aids: CC 486.2). This was a change to the CC, formerly not presumptive but if the trial judge found it necessary. Accused appeals alleging that this violated his Charter rights regarding full answer and defence and the right to a fair trial.

Courts have been very careful so say that while a trial must be fair, it does not need to favour the accused. The accused does not have a right to the most advantageous trial possible. This is part of a balance, wherein the right must be balanced with the ability of society to prosecute offences. Testimonial aids benefit the search for the truth greatly while only slightly limiting full answer and defence. Moreover the right to a fair trial does not include the right to physically confront your accuser (American ideology), only the right to cross-examine. Judges also have a discretion to remove the screen if they feel it is necessary. Research suggests that (1) A preliminary inquiry into the witness's understanding of the truth is unnecessary given that this can be dealt with in cross-examination and (2) This would frequently be detrimental through intimidation of the accused. Prior to 16.1(7) many child witnesses could not testify, not because they could not give honest and reliable testimony but because they could not articulate their understanding of abstract concepts such as “truth” and “oath.”

Spousal Competency, CEA, Section 4

At common law a spouse was incompetent to testify against another unless it was a case of alleged spousal abuse. This ideology has been preserved (desire to ensure marital harmony) but significantly narrowed.

Subsections 2 and 4 lay out a list of offences (mostly involving serious crimes and / or a child) for which the spouse is both competent and compellable. Subsection 1 provides that spouses can always be a competence witness for the defence. Subsection 3 (read in same-sex spouses) preserves the right to privacy as it extends to spousal (not common law) communiques (this is a right that may not be invoked).

CHAPTER 5: EXAMINATION OF A WITNESS

This goes straight to trial strategy. Frequently you don't want to call problematic witnesses unless necessary. Or want to start broad go narrow or vice versa. Can the judge interfere in order / presence of witnesses as it impacts this strategy?

Order of Calling Witnesses

Traditionally at counsel's discretion.

R. v. Smuk [1971] BCCA (page 5-001)

Appellant convicted of unlawfully assaulting a peace officer. At trial Crown requested that the judge rule that the appellant must testify before any other witnesses. He declined, but said that if the accused is going to testify they should do so first, and if they don't their evidence will be considered less credible. Concern is that witnesses will taint each others evidence. Frequently judges will order witnesses from the courtroom for this reason. But the accused has the right to be present for the whole trial.

App Ct finds this was wrong because it (1) interfered with defence strategy; (2) prejudged credibility. A right to cross-examine the accused in regards to going last is open to the prosecution anyways, so their lawyer might ask them to be outside the courtroom for those testimonies but this is at their discretion. There is no rule of law or of practice that allows the judge to rule on the order in which defence witnesses should be called. Defence is completely free to decide whether or when the accused will testify. By forcing the accused to testify first if he wished to appear credible, the trial judge removed this choice from the defence. AA. NT.

R. v. Jolivet [2000] SCC (page 5-006)

Respondent was convicted of murder at trial, largely based on the testimony of a specific witness R. This was a gang related killing with several Vetrovec witness, including two (R & B) who claimed to have heard the accused confess. Crown in opening address to the jury says they plan to call R and B. Defence's intended trial strategy was to highlight discrepancies in the two accounts. Crown calls R but never calls B. Defence applies to the judge that (1) either the Crown or the judge should call the witness; or in the alternative (2) an adverse inference jury instruction should be made, such as "you should presume that B's evidence would not have helped the Crown." Each of these has certain problems. Trial judge declined.

Issue: does the presumption of innocence mean that the Crown can be forced to call a witness / penalized for not calling a witness? Could only exceptionally be a remedy, after all the defence could call that same witness. Problems: (a) when calling a witness you have to lead their evidence, you presumptively cannot cross examine; (b) may have limited access to a hostile witness.

App Ct addresses the appropriateness of the proposed remedies and then whether the error was reversible. If the defence can show abuse of process, remedy (1) would be appropriate. However this is a very high threshold. Many reasons Crown might not call a witness – trial tactics, credibility... Crown is allowed to be tactical in their trial approach. In this case the Crown claimed they had credibility concerns following the prelim, but this was problematic because they had mentioned an intention to call him at the start of the trial; this is not enough to show abuse of process because there are still reasons that trial strategy would mean that the Crown would change their mind about calling a dubious witness. Had the Crown never mentioned B no remedy would be appropriate. He did though, so (2) was an appropriate solution; defence should be allowed a limited jury instruction mentioning that the Crown's witness had not been called. "The right of the defence to address the jury on what the Crown chooses to put before the jury is fundamental to a fair trial and should only be limited for good and sufficient reason." Trial judge erred.

An error is not enough to necessitate a new trial. It must be a reversible error: is there a reasonable possibility that the verdict would have been different? This may arise from trial strategy errors but it does not arise on the facts of this case. If not court can invoke 686(1)(b)(iii) of the criminal code. In this case, there is no reasonable possibility that the verdict would have been different if the judge had not erred. AD.

> 686. (1) On the hearing of an appeal ... the court of appeal (b) may dismiss the appeal where (iii) notwithstanding that ... the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred ...

Direct Examination

Once a party has called a witness direct examination occurs. Generally a party calls witnesses favourable to them and with foreknowledge of what they will say. The witness should still provide their own evidence in their own words.

Leading Questions

The general rule is that counsel should not lead a witness, that is providing information to the witness in the form of yes / no questions. Counsel can break up their story and ask for more explanations, but just can't tell them what to say by implication. Exceptions: can lead a witness (1) On uncontested / peripheral parts of their story; or, (2) with the permission of the judge and opposing counsel; or (3) with the permission of the judge when they are having trouble testifying; (4) where a witness appears to be forgetful. The last two are the most problematic, especially forgetfulness which, due to the length of the trial process, is a scenario that arises frequently.

Maves v. Grand Trunk Pacific Rwy. Co [1913] ASC (page 5-023)

Plaintiff won claim for damages when his horses escaped and were killed by the defendant's train. The defendant tried to prove that the horses escaped because of the plaintiff's negligence. Ground of appeal is that the defendant alleges the trial judge erred in preventing defence counsel from asking leading questions of a forgetful witness on direct examination. AD because no reversible error.

The chief rule which prohibits leading questions, is that "on material points a party must not lead his own witnesses, but may lead those of his adversary. This is for two reasons: (1) the witness is presumed to have a bias in favour of the party calling them; (2)

the party calling the witness has an advantage in knowing what the witness is expected to prove. This general rule also suggests that a party should lead their own witness on points that are merely introductory and form no part of the substance of the enquiry. Other exceptions include: (1) for the purpose of identifying persons or things the witnesses attention may be directly pointed to them; (2) where one witness is called to contradict another he may be asked directly "did the other witness say such and such;" (3) when a witness is hostile to the party who called them the judge may allow the rule to be relaxed; (4) the rule will be relaxed if the witness has defective memory; (5) when the matter of interrogation is complex.

Once a forgetful witness has tried to repeat the conversation including the forgotten statement from the beginning, and is unable to do so, then the trial judge may allow a question to be put to him regarding the forgotten statement. In the case under consideration, counsel should have been allowed to call the witness's attention to one of the topics of the conversation which according to the forgotten statement had occurred. Then counsel could try bringing their attention to other topics of that conversation. If that failed, counsel could read from his brief his instructions as to the conversation. Credibility could be thereafter evaluated by the trier of fact.

Refreshing a Witness's Memory

Two strategies are used to deal with forgetfulness "**present memory revived**" (sparking the memory so accused can testify orally) and "**past recollection recorded**" (if PMR fails then can enter past testimony in as evidence). Counsel can use these fundamentally different tools but only one at a time. PMR is better. PRR is a CL exception to hearsay.

R. v. Shergill (page 5-027)

The Crown sought permission to refresh the witness's memory regarding a previous statement to the police (given about 6 years after the offence and written by someone else) and their testimony at the preliminary inquiry (given about 6.5 years after the offence). The witness could not read English, so the Crown requested an interpreter translate the relevant portions of the statement and testimony. Defence objected to the request to permit the witness to refresh her memory but not the interpreter. Judge allowed it.

This case gives clear guidelines for the process and limits what sort of materials can be used for PMR without tainting the witness's memory. Best material is a statement made and written out by the witness in their own words shortly after the event. Generally judge has discretion about whether a given material can be used – no strict requirement that it be made by the witness or contemporaneous, but these are factors the judge will consider.

"Where it is a case of refreshing memory as opposed to introducing PRR, the witness usually does not realize she has omitted to mention the matter of interest and therefore would have no reason to ask. The counsel is the only one who realizes this and wants to job the memory of the witness."

Procedure counsel should fail: (1) alert the judge and remove the witness; (2) may get permission to be a bit more leading; (3) if (2) fails the counsel should state that they are making an application for PMR; (4) provide the judge with a copy of the document you are intending to use; (5) judge examines the document to see if it is reliable enough to be put before the witness (consider proximity to witness and contemporaneity to event, neither is necessary but it is beneficial), judge will also consider the witness, the circumstances, and if the witness's memory seems to be completely exhausted; (6) bring witness back; (7) explain to witness what is happening, and draw their attention to the relevant portion of the PMR material but do not read it to them; (8) hope a memory is triggered; (9) opposing counsel may examine the document and cross-examine the witness; (10) jury should be instructed that prior statements are not considered to be proof of their contents, that they could not be used to enhance credibility through consistency, and that the sole purpose of allowing the witness to view the previous statement was to refresh present memory.

R. v. Fliss (page 5-036)

If PMR fails then there is a possibility that PRR can be used. This is a slim chance because you're using a statement not a testimony under oath and entering it as evidence is risky.

Murder case where accused confesses to an undercover police officer an audio tape but his Charter rights are found to have been violated so the tape cannot be admitted as evidence and the officer tries to enter his transcript of the tape as his statement. Can't do this – officer has to testify from his memory.

SCC provides an overview of PRR and its very strict criteria which must be met: (1) must be recorded in some reliable way (clear record of the statement); (2) contemporaneity, event must have been fresh in their mind with they made the statement – no specific time record, relative to the type of memory (doesn't mean that non temporal material can't come in, merely that it can't come in on this heading; (3) witness must be able to give a present voucher under oath of the truthfulness of the statement (I remember making the statement and attempting to be truthful); (4) accuracy (original or verified copy thereof)

These are applied in the Fliss case and fail. To get in probably would have needed to be police officers personal notes at the time he got the confession. Instead he had looked at a transcript of the tape and then made a transcription and tried to fill in in-audibles from his memory of the interview. Just because he had a substantial recollection of parts of the conversation, does not mean he had the liberty to recite the whole transcript. Use of this transcript, even indirect use, constitutes a breach of the Charter.

R. v. J.R. (page 5-050)

Appellants conflicted of murder and other charges. Most significant ground of appeal relates to the admissibility of a PRR statement. AD.

Better example of when PRR can be used. Witness makes statement 16 hours after incident (kidnapping involving murder) and appears to have some memory of the events but not some specific parts thereof. Court looks at (1) reliable record (accurate transcript of an audio recording); (2) timeliness (within judicial discretion to find 16 hours close enough); (3) vouched for accuracy. Defence argued that because she could remember parts of the memory if not all the PRR should not be used. Court held that "the absence of memory requirement does not mean that a statement is admissible as PRR only where the witness has a total loss of memory regarding the relevant events." It is to be where a witness "is either devoid of a present recollection or possessed of an imperfect present recollection."

Trial judge satisfactorily addressed the possible prejudice of PRR, telling the jury that they needed to consider it very carefully and that it was a lower form of evidence because the witness cannot recall it and it was not given under oath.

In general PMR much more used, much more informally (ie police officer asks to use notes).

Cross-Examination

This is the flip side of a witness providing evidence. It may be controversial and unpleasant for witnesses, but it is a fundamental part of the search for the truth by addressing credibility, plausibility, reliability, and bias. Opposing counsel can ask leading questions – propositions, theories, pinpoint areas for scrutiny. The best crosses tend to be based on knowledge, the ability to specifically pinpoint discrepancies in statements. There is broad right to cross-examine which, extends to Crown and civil suits. It still faces some limits. When putting a scenario to a witness are you promising to the court that you will prove that scenario later? Are there times that you are obligated to ask a witness certain question and a failure to do so hurts you?

CEA, Section 10

When pointing out witness statement inconsistencies need to draw the witnesses attention to them.

R. v. Lyttle (page 5-058)

Issue: If you want to put a specific theory (alternate course of events) to a witness; do you need to have admissible evidence that you will later put to the court to prove it? Appellant convicted of assault. At trial the defence wished to lead a cut-throat defence – that the victim's beating was a result of an unpaid drug debt and that he had identified the appellant as the offender in order to protect his associates in a drug ring. Trial judge ruled that the defence could only cross-examine witnesses on this theory if it had evidence to support it, and that if no evidence later arose in the course of the trial, there would be a mistrial. As a result the defence was forced to call adverse witnesses, who described the original police theory of the drug debt as a disproved supposition, and lost their statutory right to address the jury last.

Charter guarantees a right to cross-examine, but this is not absolute. It must be relevant; and not harassment, misrepresentation, repetitious or more prejudicial than probative. This limitations are flexible and subject to the trial judge's discretion in order to ensure a fair trial.

Court held that the trial judge erred: "we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true without being able to prove it otherwise than by cross-examination." Cross-examination is often necessary to support an unproven theory of counsel. The cross-examination may be based on incomplete information, reasonable inference, experience or intuition. Good faith requires that the hypothetical not be put by counsel recklessly or if they know it to be false. This can be interpreted through the trial judge's discretion. The evidence that may be later adduced to support the theory should be admissible but need not have a substantial factual basis. Counsel may not mislead the witness or the court.

In this trial, the judge improperly interfered with an accused's right to cross-examine, infused a mistrial chill into the proceedings, and placed conditions on a legitimate line of questioning that forfeited the accused's statutory right to address the jury last. AA. NT

Howard, the basis for the trial judge's ruling, should be limited to expert witnesses. Its ratio is that counsel should not insert bias into the application of witness's expertise by being informed of a fact that is corroborative of one of the alternatives he is asked to "scientifically determine."

R. v. Carter (page 5-068)

Crown appeals based on 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." This is meant to be "a rule of fairness that prevents the "ambush" of a witness by not giving him an opportunity to state his position with respect to later evidence which contradict him on an essential matter." It's grounded in respect for the witness and the underlying principle of searching for the truth.

Issue: Are there certain questions you must ask the witnesses? There is an implicit weakness in your case if you later raise issues that you did not put to the witness. But what is the remedy? Need to balance. Don't want to limit defence's ability to cross-examine. Don't want to make accused pay for the errors of counsel. Brown v Dunn's rule may still apply, but it is limited to key points that were not implicit in the questioning.

In this case, while some of the matters raised by the appellant were not put to the complainant, they were merely details. The complainants were well aware that the defence was arguing that either the sexual events didn't happen or were consensual, and no unfairness resulted from the lack of cross-examination on details. Counsel should not invite juries to draw inferences against the credibility of a witness because of non-confrontation except in the clearest of circumstances.

Re-Examination

It is important that there be a certain orderly flow in cross-examination. Usually:(1) party with the onus (A) leads evidence and calls witnesses; (2) B cross-examines A's witnesses; (3) A closes case; (4) B leads evidence and calls witnesses; (5) A cross-examines B's witnesses; (6) B closes case.
It is very important that the defence know what the Crown's case is (as laid out in court, beyond disclosure) when deciding their trial strategy, including what evidence to call.
Two ways to interrupt usual flow: First, **re-examination**, when Crown calls a witness Z, defence cross examines, and Crown calls Z again. This can only occur if a new matter arises in cross-examination.

R. v. Moore (page 5-072)

At trial, the judge gave leave to Crown to re-examine Hogan on his initial police statement, which they did. Crown declined to cross-examine Hogan on his previous testimony as a matter of trial tactics. Defence counsel cross-examined regarding his testimony at his first trial, which he said he did not remember. Crown then applied to re-examine regarding that testimony and leave was granted. Was this proper? No.

"The right to re-examine exists only where there has been cross-examination, and must be confined to matters arising in cross-examination. New facts cannot be introduced in re-examination. The judge may ... grant leave to introduce new matters in re-examination and the opposite party may then cross-examine on the new facts." In the present case there was no basis for the trial judge to exercise his discretion to permit re-examination, because Hogan had revealed no significant evidence on cross-examination. He also neglected to charge the jury that Hogan's previous testimony under oath was not evidence against the appellant. Not a reversible error. AD.

Rebuttal Evidence

Second, **rebuttal evidence** arises when the defence raises a new issue. The need to find the truth requires that the Crown have the ability to lead rebuttal evidence. Rebuttal evidence is much more disruptive and problematic for trial strategy It creates a fundamental issue with the ability to make full answer and defence. Note that cross-examination may have a broad ambit, but this it not permitted in rebuttal, which must address a central issue.

R. v. Krause [1986] SCC (page 5-075)

Accused convicted of murder. AA, NT.

Crown generally cannot split their case. Rebuttal evidence may be led only if (1) there is a new issue raised by the defence; (2) that Crown could not have reasonably anticipated (defence is not required to give notice, except for experts or alibi, but they may anyways); (3) and this new evidence goes to a substantive or essential rather than a collateral issue.

In this case, if the evidence Crown wished to call was relevant and material, it should have been introduced in chief. If it wasn't, and did not become directly relevant to guilt or innocence or a defence, then no rebuttal evidence should have been permitted. Trial judge erred in permitting the Crown to introduce evidence in rebuttal on collateral matters concerning the accused's credibility.

CHAPTER 6: STATEMENT EVIDENCE

Often statements are the starting point for figuring out witness evidence. Figuring this out looks at prior statements usually written. These statements are not usually admissible except sometimes as PRR, but they can be key to trial proceedings. One of the most relevant uses is cross-examination of a witness on prior inconsistent statements. They may be inconsistent in details or in more substantial matters. In fact perfectly consistent statements can be suspicious. Important to assessing credibility. (Must give notice under CEA s10 before doing so) What can be important is not the existence of the inconsistency but the witnesses explanations thereof.

Admissibility of Prior Consistent Statements

Generally prior consistent statements have very limited probative value in assessing credibility. Huge possibility for waste of time. Prejudicial. Suggests consistency means truth which is dubious. Are there exceptions to this rule? What if you don't lead what was said just the fact that a statement was made.

R. v. Ay [1994] BCCA (page 6-001)

Accused convicted of several sexual assaults. The complainant testified that the assaults had occurred when she was between the ages of 5 and 17. She did not press charges until she was 30. At trial the complainant's testimony directly contradicts that of the accused and his friends.

In a sexual assault case, the fact of disclosure can be led and the fact of allegation being made. However you cannot lead the substance of the allegation. Its redundant and it invites the trier of fact to use consistency to assess credibility and the accused to lead more evidence. Useful for the **limited** purpose of narrative.

In this trial, evidence of the complainant's prior consistent statements was admitted as part of the narrative, but no limiting instructions were made. The trial judge erred.

R. v. Stirling (page 6-020)

Accused convicted of negligence causing death due to a MVA. Issue at trial was who was driving. Information arose during witness cross-examination suggesting that the witness (the other survivor) had a motive to lie. Judge admitted prior consistent statements to rebut that suggestion.

Issue on appeal: did the judge incorrectly use the prior statements for the truth of their contents?

Exception of "allegation of recent fabrication" (ie you made this up after a triggering event) can be rebutted if the prior consistent statement was made before the motive arose. This is its only probative value. Should not directly go to credibility, but it may indirectly if it rebuts the only alternative explanation. The judge did not err. AD.

Prior Identification

R. v. Swanston [1982] BCCA (page 6-026)

Respondent was charged with robbery. At trial the victim would have given a description of the man who robbed him two years ago, and testified that he had identified him on two previous occasions shortly after the robbery. When seeing the accused at trial, he said, "I see someone that resembles him. But..." Due to this uncertainty the Crown applied to call police witness who could speak to the witness's previous identification of the accused. The judge refused to admit the evidence based on case law that says a witness must be able to identify the accused at trial.

Court changes law. "Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial ... but as independent evidence of identity. ... the earlier identification has greater probative value than an identification made in the court room..." Given that the witness's previous identification of the accused was more reliable than his confusion at trial, the evidence of past identification should have been admitted, and not doing so was an error in law, based on case law which should no longer be followed. AA. NT.

Attacking the Credibility of Party's Own Witness

What about the witness who reverses their position? This means they are either lying now or were earlier. The general rule is that you cannot cross-examine your own witness. What to do? This is governed by statute. (not a witness improvement technique, testimony must be substantively different.)

CEA, Section 9

Gives counsel the ability to cross-examine their own witness and possibly attack their credibility. Usually start with 9(2) and go to 9(1) thereafter.

9(2) If they've been inconsistent in a prior statement may apply for leave to cross-examine **without** declaring the witness adverse. Checklist (1) written statement; (2) actually inconsistent (at judge's discretion). Limited right to cross-examine, specifically addressing the inconsistency. But in doing so you must bring in the prior statement. And the substance of the prior statement is not admissible for its truth or to go to credibility. So the jury is exposed to this but should be instructed not to use it.

Bridge to 9(1) cross-examination post inconsistent statement but want to go further. When can you use 9(1) which permits broader cross-examination usually in order to destroy the witnesses credibility. This is if the witness proves adverse. But what is an adverse witness? See Cassibo.

Wawanesa Mutual Insurance v. Hanes [1963] ONCA (page 6-030)

In determining whether a witness is adverse (ie whether a statement can be admitted under s9(1)) the court should consider whether: (a) the alleged prior statement was made; (b) the prior statement is substantially important and substantially inconsistent with current testimony; (c) the demeanour and behaviour of the witness; (d) if a s9(1) cross examine would be in the interest of justice. Admittance should not be indiscriminate. Jury must still be told that the prior statement is admitted for the purpose of showing that the sworn testimony given at trial could not be regarded as of importance. "It is for the jury, upon all of the evidence before them, to decide whether the prior statement had in fact been made by the witness, and if so whether it did affect the credibility of the evidence given at trial.

R. v. Milgaard [1971] SKCA (page 6-067) focus here

What is the procedure for a s9(2) application?

Milgaard convicted of murder. One witness signed a statement saying that she had seen him stab the victim. At trial she claimed to have forgotten both the contents and the making of the statement. The trial judge allowed Crown counsel to cross examine her in the presence of the jury before finding her adverse.

Under s9(2) a judge has the discretion to give permission to cross-examine on prior inconsistent statements without declaring the witness adverse. If counsel then applies to rule the witness adverse, the cross-examination may be considered evidence of adversity.

Procedure: (1) counsel should advice the Court that a s9(2) application is being made; (2) dismiss the jury; (3) explain the circumstance to the judge and produce the written statement; (4) judge determines if there is indeed inconsistency; (5) counsel must prove the written evidence, either through a witness affirmation or through supporting evidence; (6) if the statement is proven, the other side may cross-examine about the circumstances in which the statement was made in order to establish that it would be improper for the 9(2) cross-examination to occur (ie show that there is good reason for the inconsistency that suggests the previous statement is unreliable); (7) judge must decide whether there will be cross-examination before admitting the jury; (8) jury is admitted; (9) cross-examination. After a unsuccessful s9(2) cross-examination, if the witness still adverse, counsel may make a s9(1) application.

Trial judge erred by skipping step (6), but nothing arose in the cross-examination that wouldn't have if the correct procedure had been followed. AD.

R. v. Cassibo (page 6-031)

Incest case. Daughters testify that they had told their mother, twice and that the second time the conduct stopped afterwards. Crown calls mother as a witness and ascertain only basic biographical details. On cross-examination she states that the children never told her about the abuse. This counteracts a verbal statement that she previously made to the police. Now the Crown witness is instead actively helping the defence. A new issue was raised in cross which permits the Crown to re-examine and the Crown asks for permission to perform a 9(1) examination.

Trial judge calls a voir dire and simultaneously declares her hostile and permits Crown to perform a 9(1) cross-examination. Crown calls police as witnesses and they testify that the mother had previously made a verbal (not written because she was upset and said she would cooperate with the police) statement admitting the abuse.

Finding of adversity: subjective ruling which may consider factors such as attitude and motive to be adverse but focuses on the reasons for an inconsistent statement. If the reasons are illogical, a witness is more likely to be found adverse.

Grounds of appeal: whether the trial judge erred in (1) admitting the daughter's recent complaints evidence without a voir dire; (2) permitting the mother's cross-examination; and (3) allowing the testimony of police officers regarding the mother's previous statement.

App Court rulings: (a) girls corroborated each other; (b) cross-examination on credibility was permissible even if it had been a collateral issue, which it was not; (c) some error in admitting recent complaint evidence without a voir dire but not a substantial wrong because the evidence would be admissible anyways (i) as part of the overall narrative; and (ii) to counter the allegation of recent fabrication; (d) the threshold criteria for applying 9(1) is adversity, and a declaration thereof did not have to be made prior to hearing about the inconsistent statement but the existence thereof was a factor in finding adversity; (e) Mrs Cassibo had made a prior inconsistent statement; (f) although the trial judge did not officially declare her adverse he did find her hostile which is a higher standard; (g) adverse can be found solely on the basis of a prior inconsistent statement when a the reason for the inconsistency cannot be reasonably explained; (h) although the previous statement was not in writing which would have been necessary to apply 9(2), a written statement is unnecessary to apply 9(1), because a previously inconsistent oral statement goes to the issue of adversity; (i) Crown only brought the prior statement into issue after defence elicted the inconsistent testimony in cross-examination; (j) although the evidence of the inconsistent statement does not and cannot directly go to the daughter's credibility, rejection of the mother's testimony does so implicitly if merely by negating an inference that could otherwise be drawn.

"I cannot think that the administration of justice would be properly served by requiring Crown counsel to remain mute and to allow Mrs Cassibo's evidence that her daughters had never complained to her to go unchallenged, when he had in his possession credible evidence that she had previously made a statement to the opposite effect. ... The evidence to show the making of a prior

inconsistent statement ... did not ... violate any rule of fairness."

McInroy and Rouse v. R. (page 6-058)

Facts: appeal from a murder conviction wherein a key Crown witness who previously stated that the appellant had confessed to her said at trial that she didn't remember. Court found that she was feigning. She was vigorously cross-examined by Crown and did agree that she had signed and dated the statement and attempted to be truthful when making it.

The BCCA finds this cross-examination to be correct under 9(1). However, SCC finds 9(1) shouldn't have been applied because she wasn't adverse. Not helping the Crown is not the same as actively hurting it. No need for the Crown to destroy her credibility. This was a 9(2) cross and the appellant court need not go into the mechanics of 9(1). The BCCA's analysis of 9(1) is still good law because the SCC just said it was an unnecessary analysis, not an incorrect one. For cases going to higher courts: remember that not all the issues might go up so a case may still be binding on some issues but not all.

CHAPTER 7: HEARSAY

Prior statements relating to the events may be relevant at trial but are pre-emptively inadmissible for their truth value. The entire premise of the court system is that witnesses should be officially examined and cross-examined when under oath in front of the trier of fact to determine truth and credibility. Hearsay is the exceptions to this presumption, such as PRR and contemporaneous eyewitness evidence.
Hearsay is an out of court statement admitted for its truth value. Out of court statements may be entered only for the fact that they were said. These statements are not hearsay.

Subramaniam v. P. P. (page 7-001)

Accused possesses ammunition illegally. Accused's defence was that he acted under duress. He said that he had the ammunition because some terrorists threatened him. App Court rules this is not hearsay: "evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made."

Non-Hearsay Uses of Out of Court Statements

Circumstantial Evidence of State of Mind

Recognized use of out of court statements that is not hearsay.

R. v. Baltzer (page 7-005)

Appellant convicted of murder. Ground of appeal was that the trial judge would not permit the appellant to lead evidence of conversations between himself and other person, which he wished to lead as state of mind evidence. Trial judge ruled them irrelevant but did allow other state of mind evidence in.

Hearsay evidence is not admissible because (1) it was made by a person not under oath; (2) who cannot be cross-examined. It is not the form of the statement that establishes whether it is hearsay but the use to which it was put. In this case the appellant wanted to admit conversations "of a weird nature." Since the purpose of this evidence was to establish that the appellant said weird things, it was not hearsay, and should have been admitted for the consideration of the jury on the issue of insanity.

Ratten v. The Queen (page 7-007)

Accused shot his wife. Says that it was an accident while cleaning his gun. Evidence introduced: that immediately prior to the shooting in a phone communication with the witness she was crying and screaming. (Any statement she may have made would not be admissible for its truth, only admissible for the fact she was upset.) This allows the court to infer that she was possibly fighting with her her husband.

R. v. Griffin

History of a drug debt. Prior to being killed the victim had told his girlfriend "If I'm killed it's Griffin." Issue of admissibility. A traditional form of circumstantial state of mind evidence is statements of intention, where the victim said they intended to do something and had no motive to lie. From that a court could infer that the accused did do that something. Another traditional form of admissible evidence was circumstantial evidence that the victim was fearful of someone. Problematic – can't use this to infer anything about the accused's state of mind.

Common Law Exceptions

Law developed certain forms of hearsay exceptions for evidence that was reliable enough to override the presumption

otherwise. Any hearsay evidence that was admitted had to fall into one of these categories. Some categories include:

- Dying Declarations: Where a person has a hopeless expectation of death and states that a person caused the injury. No incentive to lie.
- Res Gestae: A concept where the words spoken are almost one and the same as an act that has happened. A spontaneous declaration during the event.
- Statements of Intent:

Limitations of this approach – inflexibility of rules. The law looked at the type of circumstances that hearsay usually applied to and began to develop a principled approach.

Exceptions to the Hearsay Rule

Principled approach. Threshold is not credibility but reliability. Ways to get otherwise inadmissible evidence in. B(KG) sets out pre-criteria to pass before focusing on necessity and reliability. Process thus (1) do you want it in for truth; (2) is it otherwise admissible (3) is it a blatant product of state coercion (usually would just be a factor in assessing reliability) (4) reliability and necessity must be established by the party seeking to lead the evidence on the balance of probabilities (degree more flexibility for the defence). Note that admissions are not hearsay.

Necessity and Reliability

Focus of the principled approach.

R. v. Khelawon (page 7-053)

Appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliable. What factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible? These factors cannot be categorized in terms of threshold and ultimate reliability. All relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

Five elderly residents of a retirement home told various people they had been assaulted by the manager of the home, the respondent, Khelawon. By the time of the trial, two and a half years later, four of the complainants had died and the fifth was no longer competent to testify. The issue at trial was whether the hearsay statements provided by complainants had sufficient threshold reliability to be received in evidence. The trial judge admitted them, because of the striking similarity of the complaints, which he considered to fall within the hearsay exception created in U(FJ), and four Khelawon guilty. ONCA excluded all statements and acquitted Khelawon.

Appeal focuses on the testimony of one complainant, Skupien. SCC finds his videotaped statement to the police inadmissible, because of reliability issues surrounding the conditions in which it arose.

Hearsay is an out-of-court statement adduced to prove the truth of its contents without any opportunity for contemporaneous cross-examination. It is presumptively excluded because it is difficult to test. tn extends to out-of-court statements tendered for their truth even when the declarant is before the court, through it may be less problematic if there is at least some opportunity to cross-examine.

Principled approach admits hearsay if it falls under an established exception or if it is sufficiently necessary and reliable. Neither B(KG) nor U(FJ) should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria; to do so would not be in keeping with the flexible case-by-case principled approach. Necessity and reliability should not be considered in isolation. Necessity helps in getting at the truth; reliability ensures the integrity of the trial process by considering the circumstances in which the hearsay. Even if evidence passes the n/r test it can still be excluded because it fails the p/p test.

Trial judge only decides whether hearsay evidence is admissible. It is crucial that questions of ultimate reliability be left for the jury, and not be prejudged before all evidence has been admitted. The reliability requirement in the n/r test is aimed at identifying the cases where the difficulty of testing hearsay evidence is sufficiently overcome to justify admitting it as an exception to the general exclusionary rule. There are two ways this can be done, through either: (1) the circumstances in which the statement came about; or (2) the fact that the statement can be sufficiently tested for its truth and accuracy even though it is hearsay.

Khan and *Smith* fell into category (1). In *Khan* the statement was contemporaneous, the child had no motive to lie and was speaking of something not in the usual experience of someone of her age., and there was confirmatory physical evidence. In *Smith* the first two phone calls were found to be reliable because there was no reason to lie, and there were no dangers of perception, memory or credibility; the Court looked at factors that would have been enquired into during the course of cross-examination, and concluded that the absence of the ability to cross-examine went to weight, not admissibility. The third phone call was inadmissible because it was untrustworthy: there was a possibility of mistake and a motive to lie, therefore it was impossible to conclude that the evidence would be unlikely to change under cross-examination.

R. v. B. (K.G.) [1993] SCC (page 7-011) is an example where threshold reliability was based on the presence of adequate substitutes for the traditional safeguards relied upon to test the evidence. The issue was the admissibility of prior inconsistent statements made by B's friends in which they told the police that B had stabbed the victim, after they recanted at trial. The most important contextual factor was that the declarants were available for cross-examination. Admissibility could therefore focus on whether the trier of fact could rationally evaluate the evidence, instead of whether there was reason to believe the statement was true. It is for this reason the B(KG) introduced substitutes for the process that would have been available had the evidence been presented in the usual way. It determined that necessity is based on the unavailability of the testimony not the witness before outlining "sufficient circumstantial guarantees of reliability:" (1) oath – may have something that shows they understood the seriousness of the testimony; (2) presence – audio / video very good substitute; (3) ability to cross-examine (the person who made the statement, not the person repeating it). None of these are absolute requirements. The trial judge retains the discretion to refuse to allow the jury to make substantive use of the statement even when all criteria are met, if there is a sufficient concern that the statements were produced by investigatory misconduct. [Facts passed on 2, 3, but not 1. NT to determine admissibility.]

R. v. U. (F.J.) [1995] SCC (page 7-028) also dealt with the admissibility of prior inconsistent statements. The complainant gave the police detailed evidence of how her father was molesting her. It was not taped because of equipment malfunction, but there were notes. The accused was immediately thereafter interviewed by the same officer, confessed, and gave evidence that was very similar to that of the complainant. Both recanted at trial. This failed on factors 1 and 2 of the B(KG) criteria. The court held that the reliability requirement was met by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and her father's were so compelling that the only plausible explanation was that they were both telling the truth. The very high reliability of the statement rendered its substantive admission necessary.

Hawkins exemplifies how in some circumstances the reliability requirement may be established solely by the presence of adequate substitutes for the safeguards traditionally relied upon to test trial testimony. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. That is, are the specific hearsay dangers raised by the statement sufficiently compensated for by the circumstances in which it was given. Generally a witness's testimony before a preliminary inquiry will satisfy the test for threshold reliability (per B(KG) factors)

Despite other case law, corroborating evidence is a preferred means of determining a statement's reliability.

What about the facts of this case? Remember that hearsay evidence is presumptively inadmissible. Necessity is conceded. No opportunity for contemporaneous cross-examination. No adequate substitutes for testing the evidence. A videotaped police statement is not sufficient. Skupien's mental capacity was at issue; his injuries were equally consistent with a fall; the witness who encouraged him to make a statement had an obvious motive to discredit Khelawon; Skupien himself had issues with the management of the home; it was unclear that he understood the consequences of his statement. The trial judge's focus on the striking similarity of the statements was erroneous both in that all the statements were problematic and it was unclear what the striking similarities were. Fails on reliability. AD.

This case firmly established that the criteria for reliability when admitting hearsay is a basic threshold reliability, not legal reliability. Prefers BKG to UFJ. Threshold reliability considerations: circumstances in which is made; trustworthiness of the source (does the person who made the original statement have a motive to lie? doesn't matter if witness quoting the first person has a motive because they can be cross-examined); narrative (is the story plausible / logical?); contemporaneity between the statement and the event; leading questions; corroborating evidence; obvious areas for cross-examination.

R. v. Parrott (page 7-038)

Shows that necessity test has a high standard. Crown leads evidence that the complainant, a woman with Downs syndrome, has communication issues. Trial judge accepts that as a matter of necessity her statement can be admitted as testify. App Ct finds this improper because the trier of fact should be able to assess the problematic communications issues themselves.

R. v. Pelletier (page 7-048)

Attempting to call hearsay evidence that a third party (Khan) was going to order a hit on someone. Crown argued Khan was unavailable and therefore it was necessary. No. Just because a witness will probably be uncooperative does not mean that it should be assumed they are unavailable. The fact that a witness will be hostile and not support the Crown's case, even if proven, is not enough to find them unavailable. Reluctance is not sufficient.

Business Records and Statements in the Course of Business

Suppose the purchase of a certain item from a certain place at a certain time needs to be proven. Sales clerk doesn't remember. Evidence – the receipt, credit card, bank statement, etc. This is a type of hearsay (as a comment on a first hand event). Certain types of records are more likely to be trustworthy due to the process which they are created by (ie birth certificates being inherently trustworthy.

CEA, Section 30

Generally documents produced in the course of ordinary business are admissible evidence subject to a number of exceptions.

***R. v. Wilcox (page 7-096)**

Facts: Business document produced which relates to the crab fishing quota. Record produced shows numbers caught. Recorder has no independent memory of the record's contents. Problems is that the record was not produced in the course of his usual job duties, but rather for his personal calculations. Issue: Is this in the course of ordinary business?

CL has a general business record exception which is not overriden by the statute. para 30 out lies the test: (1) original record, (2) contemporaneity, (3) in the routine of business, (4) by a recorder with personal knowledge of the thing recorded, (5) who had a duty to make the record and (6) who had no motive to misrepresent. Fails on count 5, which is a fundamental part of the CL because the theory is that the fact it was a duty motivated the recorder you to do it correctly at the risk of sanctions.

s30 test does not require a duty. It does require the course of ordinary business. Really hard to tell if this applies. So court decides to use N/R test as the deciding factor.

Declarations Against Interest

CL category based in an idea that this is circumstance where a party is more likely to be telling the truth. At CL this only applied to declarations against penunciary interest; SCC extended this to declarations against your liberty.

R. v. O'Brien (page 7-112)

Facts: two parties charged with drug offences, one flees and the case against him is stayed, the other is convicted. Afterwards the party who fled goes to his friend's lawyer and testifies that he did the crime alone, and that his friend was completely innocent. He refused to sign an affidavit but said he'd testify at appeal. Before case goes to appeal he dies. Lawyer wants to admit his admission as hearsay.

Declarations against your own interest only count if they are (1) to your immediate prejudice; (2) and made in circumstances where you would actually think that you were putting your liberty at risk. This case doesn't pass. His refusal to sign an affidavit while being willing to testify in court suggested that he was aware of the risk and wanted to arrange matters so he couldn't be charged.

Oral History in Aboriginal Title Cases

Mitchell v. Canada (page 7-123)

The existence of ancestral practice or convention must be proved to be essential to Aboriginal society and continuous to a day. Really difficult evidentiary burden. Courts have a more flexible approach to accepting evidence, most particularly in acceptance of oral histories. Needs also expert evidence to explain the process and importance of oral histories.

Common Law Exceptions and the Principled Approach

R. v. Mapara (page 7-128)

Court set up a role for CL test. Hearsay evidence is presumptively inadmissible unless there is an exception to the hearsay rule. CL exceptions remain presumptively in place. A hearsay exception can be challenged to ensure that it falls in the framework of necessity and reliability and then modified. In exceptional cases, evidence that would be presumptively admissible at CL may fail the N/R test and be rejected.

Review of the Hearsay checklist

(1) wanted for its truth value; (2) otherwise admissible; (3) no coercion; (4) statutory exception; (5) CL exception ; (6) n/r

CHAPTER 8: ADMISSIONS AND CONFESSIONS

Formal or Judicial Admissions

Formal admissions occur when a party in consultation with another party makes a statement that certain things are conclusively proven. Most cases begin with the judge being provided with a list of admissions. This saves a lot of time. Otherwise, for instance, in a murder trial Crown would always have to lead evidence that the person is dead. Goes to indisputable facts of the case. Pre trial the parties get together and discuss admissions. Jury instructions will include this admissions as facts that they cannot question. This has immense benefits to the interests of justice.
When to not make admissions: something that might not be conclusively proven; less impact on the jury as compared to calling evidence (this scenario reduces probative value);

Crown has a certain advantage because can lead accused statements without application of the n/r test. That is still limited by the p/p test. Reliability generally goes to weight, not admissibility. Crown is still limited by CL and Charter protections of the accused. If accused made the statement to a person in authority and knew they were doing so than it must pass a rigorous voluntariness. Some applicability of s7 to undercover confessions but very limited; again mostly goes to weight. Overall tend to error on the side of admission with particular limiting instructions.

Criminal Code, Section 655

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 [SCC 1969] (page 8-001)

Accused convicted of poisoning his wife. Appealed because he wanted to make an admission under CC s562 (now s655) that the Crown did not accept. The trial judge ruled that "while the Crown's case was being put in the defence did not have the right to make an admission unless the Crown were willing to accept it." SCC held that an "admission of an allegation involves action by two persons, one of who makes the allegation and another who admits." An accused can not admit a fact alleged until a allegation has been made and is bound by the wording the Crown frames the allegation in. Saying otherwise would introduce confusion, and ignore the purpose of 562 which is efficiency.

Probative Value

R. v. Palma (page 8-007)

Rationale for receiving admissions is different than for other hearsay exceptions. Admissible as an aspect of the adversarial system wherein a party who has made a previous statement cannot later complain about its reliability.

R. v. Hunter [2001] ONCA (page 8-008)

Accused convicted of three firearms offences. Two grounds of appeal: (1) that the trial judge admitted an utterance ("I had a gun, but I didn't point it," made from the accused to his lawyer and overheard by a passerby; (2) that the trial judge's charge to the jury undermined the appellant's right to remain silent.

(1) The Crown witness testified that he overheard an utterance while walking past the accused and his lawyer. He did not hear any context for the statement. The accused denied ever having told his lawyer that he had possessed a gun. The lawyer's evidence was to the same effect. ONCA agreed that (a) this did not meet the reliability threshold necessary for admission because it lacked context; and (b) the meaning was so speculative that it failed the p/p test. Without context, an overheard utterance is highly speculative and therefore has little probative value.

(2) In his jury charge the trial judge emphasized the fact that the accused never asked what he was being arrested for, and suggested that an innocent person would have asked. The appellant's use of his right to silence cannot be used as consciousness of guilt evidence. Nothing else in the charge neutralized the error.

Stay of proceedings entered (accused had already had four trials; been in custody for four years; and Crown's case was weak), because to order a new trial would constitute an abuse of process.

R. v. Allison [1991] BCCA (page 8-016)

Appellant convicted of B&E. Ground of appeal is that the accused's counsel was precluded from adducing evidence while cross-examining a police officer about an explanation the accused's allegedly made at the time of his arrest. This drove the accused into the witness box where he was disbelieved, when he should not have been obliged to testify. The police officer's evidence included information of some of the accused's actions / statements and the time of his arrest but not others. Defence argues that it is unfair for the Crown to only adduce part of an accused's explanation and then object to the admission of the rest. Crown says that the evidence was a spontaneous statement by a witness and inadmissible in any case, though this was not an issue raised at trial.

BCCA tends to agree with the defence, that as a matter of fairness, the Crown may tender either all (if ruled admissible) or none of the accused's explanation. The trial judge should have found the statement inadmissible or held a voir dire to determine its admissibility. The partial explanation given was relied upon in the reason's for judgement. Moreover if it had not been given the accused may not have had to take the stand and face cross-examination. AA. NT.

The Voluntariness Rule

R. v. Oickle [2000] SCC (page 8-020)

Accused convicted of arson. Appeals alleging that the police interrogation had resulted in an involuntary admission. AD. CU. Court

rules on the CL limits of police interrogation post-Charter.

The confessions rule held that no statement by an accused is admissible unless it is voluntary, or not obtained by fear of prejudice or hope of advantage exercised by an authority figure. This is a negative right. Later court recognized a broader approach, wherein the absence of threats did not necessarily mean the statement was voluntary, if the mental alternative of deciding between alternatives was absent. Courts also began to consider the coercive effect of "an atmosphere of oppression." The Charter does not subsume the CL confessions rule or vice versa, though each may guide interpretation of the other.

The confessions rule is concerned with voluntariness, broadly defined. It has the twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. Police questioning is necessary, but involuntary statements are not reliable.

False confessions have five types: (a) voluntary (not the product of police nterrogation); (b) stress-compliant (accused complies to stop the interrogation); (c) coerced-compliant (induced by threats or promises), (d) non-coerced-persuaded (interrogation persuades person they did it); and (e) coerced-persuaded (aspects of both c and d). This gives insight into several considerations for interrogations: (1) need to cater to the sensitivities of a particular suspect; (2) danger of using non-existent evidence; (3) dangers of offering *quid pro quo*; (4) importance of videotaping interrogations.

Threats or promises, that is, any *quid pro quo* offer, are of concern whether aimed at the suspect or someone they have a relationship with where "the immunity of one was such vital concern to the other that [they] would untruthfully confess to prevent it. Potential promises including lenient treatment, charge reduction, and possibly psychiatric treatment. Threats may include outright violence or more subtle threats – most notably the phrase "it would be better to tell." This phrase won't automatically require exclusion but it requires that the trial judge scrutinize the entire context of the confession, determine if there was an implicit threat or promise, and ask if there is a reasonable doubt that the resulting confession was involuntary. Confessions that are a result of an appeal to morality are admissible. Overall, inducements are problematic iff when considered alone or in the circumstances they are strong enough to raise a reasonable doubt about "whether the will of the subject has been overborne."

Oppression includes inhumane conditions, whether physically, through overly aggressive questioning, or through use of non-existent evidence. The operating mind requirement means that the accused must know what they are saying and that he is saying it to police officers who can use it to his detriment. Police trickery is of concern where it has the possibility to "shock the community" and bring the integrity of the criminal justice system in doubt.

In summary, "a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness." These circumstances may include threats or promises; oppression; lack of an operating mind; and police trickery. If a trial court considers the context properly, than a finding of voluntariness is a question of fact and should generally receive defence.

The present appeal suggests no involuntariness. Respondent knew his rights; questioning was not aggressive; he was not deprived of sleep food or drink; he was not offered any improper inducements. While the police minimized the moral significance of confessing to multiple fires they did not minimize the legal consequences. The police suggested psychiatric help would be a potential benefit of confession, but not that it was conditional upon receiving a confession. "It would be better" was used purely as a moral inducement. The promise to not polygraph his fiance (likely as an alibi witness) if he confessed was not a strong inducement, nor does the timing suggest it was a factor in his confession. The police creating a trusting relationship with the accused has no bearing on admissibility. The atmosphere was not oppressive; the police were polite, provided the accused with food, water, sleep, access to the bathroom, and kept him fully apprised of his rights. The lack of an oppressive atmosphere minimizes the weight of any (mild) inducements offered.

Although the inadmissible polygraph test was given exaggerated weight by the police in the interrogation, the accused was informed that it was inadmissible, and repeatedly stated his disbelief in its accuracy. Merely failing to tell a suspect that the polygraph is inadmissible will not automatically produce an involuntary confession; should consider (a) does police conduct shock the community; (b) deception as an aspect of the overall voluntariness test. Merely confronting a suspect with adverse evidence, even if given exaggerated weight, does not automatically render a confession involuntary.

The App Ct thought that a statement directly following a polygraph should be inadmissible due to context. The intervener argued police had two options: (1) to ensure the accused may consult counsel beforehand; or (2) to clearly delineate the polygraph and the interrogation. SCC doesn't want to limit police in this manner. Probativity outweighs prejudice.

[Dissent (1): statements should be inadmissible because of issues with the polygraph.]

Undercover Confessions

R. v. Grandinetti (page 8-044)

Appellant convicted of murder. Two issues: (1) whether inculpatory statements made by the accused to undercover police officers pretending to be criminals were properly admitted without a voir dire; (2) whether evidence that a third party committed the

murder should have been admitted. AD.

Grandinetti's aunt was murdered. Significant circumstantial evidence connected him to the murder. The police went undercover as members of a criminal organization. They eventually elicited a recorded confession by telling him that they had corrupt police contacts who could redirect the investigation against him. Defence argued that the undercover officers were “persons in authority” because Grandinetti believed they could influence the investigation against him and that the Crown therefore had to show the statements were voluntary. Trial judge held that “person in authority” must be limited to people the accused believes are collaborating with the authorities. Evidence against a third party, Papin, was primarily hearsay statements, and it was excluded after a voir dire where the trial judge ruled there was insufficient evidence of a link.

Person of authority rule based on the need to ensure (a) the reliability of the statement; and (b) fairness by guarding against improper coercion by the state. This test is whether the accused reasonably believes himself to be speaking to a person of state authority. It does not include someone working against state authority, because the coercive power of the state is not engaged.

The arguments against the third party were purely speculative. Although an accused may lead evidence that a third party committed the crime they are accused of, it still must be relevant and probative.

Admissions of Co-Accused

Just because accused are tried together, this doesn't mean that evidence which is admissible against one is admissible against the other. Ensured by limiting instructions. This becomes particularly tricky in regards to confessions and admissions. Rule is that A's confessions and admissions are only admissible against A, not against the co-accused B. Policy reasons – the statement may be biased, may not be cross-examinable. The confession by A may well contain evidence against B. This is traditionally dealt with through jury instructions. However if the confession by A includes very detailed (prejudicial) evidence against B, it may be necessary to exclude or edit the statement.

R. v. Grewall (page 8-056)

Balijit Grewall shot to death. Accused are Ajit, her husband, his son Sukhjit, and Sukhjit's friend Sonny. Strong circumstantial evidence. At issue is the admissibility of a recorded telephone conversation between the accused Sukhjit, his sister Kato, and his gilfriend, Sanjit.

In this phone call transcript, Kato states, regarding Sunny's statement, “He goes that dad said he was gonna pay him so much money that if he does it and then he goes that dad planned it, you pulled the trigger and he drove the get away car,” and Sukhjit responds, “What a guy! ... I'm gonna tell it how, why he did it and where he did it you know.” Should the evidence be included, excluded, or edited? Editing can be a nice middle ground but it possesses problems regarding (a) choosing what to edit; and (b) possibly producing a statement lacking so little context that it essentially false.

The general rule for joint trials, is that “the respective rights of the co-accused must be resolved on the basis that the trial will be a joint trial.” The trial judge retains the discretion to sever and it may be exercised “if it appears that the attempt to reconcile the respective rights of the co-accused results in an injustice to one of the accused. Case law suggests that even if the co-accused are waging “cut-throat” defences, there is a presumption that there should be a joint trial, but there is a heavy onus on the trial judge to issue jury instructions to protect the conflicting rights of the accused.

An out-of-court confession is only admissible against the accused who made the statement. It is not admissible against the co-accused, as it remains hearsay (strong rule, cannot get in on an exception). The trial judge must clearly instruct the jury that “only the statement made by the accused against himself is admissible against him, and his statement in turn is inadmissible against his co-accused. Kato's statement is plainly hearsay and does not fall under this exception; it is therefore inadmissible. The response of Sukhjit is admissible as evidence of probable participation in the conspiracy. Such statements are never admissible against another co-conspirator as they are not made in furtherance of the conspiracy but after it is completed. The jury must be told what they can and cannot use the statement for.

Editing of statements: (1) may be necessary but must not affect the tenor of a relevant statement; (2) must be free from unnecessary prejudice but the remaining portions should retian their proper meaning; (3) the jury should have as much as possible of a statement said to constitute an admission in order to place it into context for the purpose of determining its truth; (4) even though substantively irrelevant, contextual evidentiary relevance may allow admission; and (5) the extent of the admissibility of that contextual evidence and probative value must still be weighed against prejudice. Here editing is very important. Judge holds that removal of the above statement by Kato is sufficient and that the rest of the conversation should be entered in evidence.

Although there is a risk the jury might not follow instructions, our justice system requires that courts proceed on the basis that juries will accept and follow the instructions of the trial judge.

CHAPTER 9: EXCLUSION OF EVIDENCE UNDER THE CHARTER

The Charter rights of the accused are very important. What to do if evidence against an accused is obtained as a result of a Charter breach? To make Charter rights respected there has to be a consequence for when the state breaches them.

Overview of Sections 10(b) and 8 of the Charter

10(b) is the right, upon detention, to obtain counsel without delay. Detention can mean a broad range of things but for the purpose of this course we will limit it to when an accused is arrested. State is particularly engaging with the accused, so an obvious point to gain evidence but also obvious potential for Charter violations. For our purposes this right means: (a) the police officer is required to inform the person that they have this right immediately and help facilitate it; (b) the police should not question the accused between when the accused states that they wish to contact a lawyer and when they do so.

8 is the right against unreasonable search and seizure. An accused needs to show that they had a reasonable expectation of privacy in the place that they were searched (home, office). If the police want to search those areas they need to go and get a warrant from a judge after showing that they have reasonable grounds. (Accused and their immediate surroundings may be searched upon arrest.) Some emergency exceptions, but generally no (even if accused found bloody outside their front door).

In Canada this evidence is not automatically inadmissible (unlike US). s24(2) gives the judge the discretion to include or exclude evidence obtained in breach of Charter rights, depending on whether admission would bring the administration of justice into disrepute.

Historically 24(2) admission focused was on whether evidence could be described as conscriptive (excluded) or non conscriptive (presumption of inclusion). Conscriptive evidence arises when the accused participated in the process of their rights violations. The evidence is conscripted out of you because you aren't aware of your rights. Non conscriptive evidence is usually real evidence which existed without your participation. Theory was that conscriptive evidence was a much more egregious Charter violation. Non conscriptive evidence would apply a more principled Charter violation test. (a) Did the police know they were violating the Charter? (b) How detailed was the searched? etc. Definition shifted so that anything from the body / on the body was considered conscriptive evidence. Life was very hard for prosecutors. Focus for 24(2) had shifted away from the actual wording.

Idea began to arise that reliability should be the only factor. Problem: gives state no incentive to follow the Charter. Court begins to explicitly focus on the long term reputation of the administration of the justice system. (Not immediate reputation because susceptible to “witch hunt” behaviour with highly publicized trials.) s24(2) actually demands a very broad approach. A new test had to be developed.

R. v. Grant (page 9-001) ◙

Accused arbitrarily detained and not informed of his right to a lawyer. Said he had a gun, upon search police found a gun. Which of these is admissible?

Once a Charter breach has been found, 24(2) test must be applied. Court recognized three factors to be considered in admissibility: (1) the seriousness of the Charter infringing state conduct; (2) the impact of the Charter violations on the rights of the accused; (3) the interests of society.

(1) is an assessment of how bad the conduct was of those who did the Charter violation. Was it an understandable mistake by the police (objective and subjective test)? (ie the police had the wrong number for legal aid) Was it accidental or deliberate? Shifting assessment, as acts become dealt with in case law and become something the police should know.

(2) considers the breach from the perspective of the accused. It could be a violation where the police look through papers on your desk in your workplace vs when the police search your house and find your secret diary. Strip search vs something in the accused's pocket.

(3) society's interest in adjudication on the merits. Focuses on reliability of the evidence. If evidence seems reliable it weighs in favour of admission. The seriousness of the offence shouldn't be a weighing factor.

Court went through three types of evidence and how to apply the test: (a) statements; (b) bodily evidence; (c) derivative evidence.

(a) Court said that 10b is part of a larger principle; the right to protect yourself against self-incrimination. Your lawyer will inform you about your larger body of rights. Presumptively, statements are inadmissible, but this is not automatic. The first two factors will often weigh significantly against admission of the statement – police are well informed about their obligations; huge breach of the accused's rights by being tricked into self-incrimination. The third factor will often be weak because this sort of evidence is not necessarily reliable. Still no case law as to what should be done if the confession is highly reliable.

(b) Court removes presumption that bodily evidence is automatically out. Depends on how egregious the intrusion into bodily integrity (Blood is greater intrusion that breath) and the conduct of the police officers (Intentional vs unintentional breach). Weighs all the circumstances

(c) Not examinable. Evidence that is an indirect result of a 10b violation. Presumptively out, unless the Crown can establish that it would have been found anyways. Inevitably discoverable means that it less dependent on the Charter breach. Note that statues can compel out of court statements. s7 protects from direct and derivative use of these statements, but if the doctrine of inevitable discovery applies, the evidence might still be admissible.

CHAPTER 10: PRIVILEGE

Privilege Against Self-Incrimination

We've already seen two aspects of this rule – voluntariness; Charter. CL holds that the right to silence is an aspect of this.

Privilege of the Accused and the Right to Silence

Traditionally you are informed of your rights, may consult a lawyer, and then are brought into interrogation. (Unlike the states, lawyer does not have the right to be present for questioning.)

R. v. Singh (page 10-001)

Singh asserted his right to maintain silence eighteen times. Police continued questioning. Eventually identifies himself in a photo, which when combined with other circumstantial evidence is incriminating. Appealed saying right had been violated. AD.

(Mentions case (Hayver) in which a person in detention is tricked into speaking by an undercover police officer. While an undercover person may be placed in a cell they may not actively elicit a confession). The right to silence is a general right to choose whether or not to speak. If the state uses undue tactics this may infringe this right. Question: what are undue tactics? Many people assume that once you've asserted the right to maintain silence then the police should stop the interrogation. Dispute in the case law.

Court holds that your right to remain silent is not a perpetual right. Nor is it a right not to be spoken to. It is not a s7 right, it is a CL right under the voluntariness rule. The right to maintain questioning is incredibly important for police investigations into crime. While police should inform the accused of the right to remain silent, once they know about the right, they can still be interrogated as long as they are aware that you have the option to not speak. May still lead to voluntariness issues arising, but Singh's eighteen assertions of his right to silence was not sufficient to render his statement involuntary. Factors to consider: (a) number of assertions; (b) did the police in continuing the interrogations suggest to the accused that they had to make a statement; (c) impact of the interrogation on the accused (if they appear very vulnerable and like they emotionally have no choice but to talk); (d) if you ask for your lawyer. Unless there are fairly extreme circumstances; a five to six hour interrogation in isolated circumstances is permissible. Is a brief lawyer consultation prior to this really sufficient?

R. v. Turcotte (page 10-018)

What about when an accused is not in detention?

Accused finds a number of dead bodies near where he is working. Police get a person coming into the police detachment. He is not in custody so there are no 10b and CL voluntariness is not involved. Accused tells police to send a car to a particular area. He tells them his name; that he was doing some work in the area; that a police car and ambulance are needed; and nothing more. Crown can lead his statement, but Crown also wants to rely on his hesitance to speak as post-offence conduct as circumstantial evidence of guilt. Court ruled that, absent a statutory exception, any person, whether in detention or not, had the right to remain silent. That then engaged the issue of whether his silence could be brought in. No. Exercising your legal rights is not guilty behaviour. Issue in this case: had he waived his right by beginning the conversation? No. You can provide information and then stop. However it could be brought in as part of the narrative iff a proper jury limiting instruction was given.

Protection of a Witness

As a witness you may be compellable. Americans have the right to not testify. In Canada you can be forced to testify, but statements as a witness in court cannot be used against them.

R. v. Henry (page 10-031)

Two accused, Riley and Henry, on a re-trial for an unrelated reason. Riley states that he lied at his former trial. Could argue that using his prior testimony for the truth would be in his favour, or that the prior testimony was innocuous because in the first trial he made lesser admissions. Henry claims that his memory is worse than it was at the first trial. Are their previous statements admissible?

Discusses case law:

Section 13 of the Charter states that a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

This statute attempts to facilitate the pursuit of truth by compelling witnesses but also protecting their statements from being used against them later. Tries to make the witness feel safe enough to tell the truth. What are the limitations on incrimination? A witness shouldn't have complete immunity to lead one story as a witness and then another as an accused.

Lamer held that the prior testimony of an accused as a witness can be used to assess credibility. Their prior testimony can be brought in for comparison.

Kuldip identified two issues with the admittance of prior testimony: (1) a risk it would be used by the jury for its truth; (2) challenging to cross-examine – cannot search for truth, can only emphasize that the testimony has changed

Noel departed from Kuldip, holding that an accused's statements as a witness could come in on credibility but only if they were completely innocuous (cannot hurt the accused other than through their difference). s13 suggests that different trials on the same charge are separate proceedings, including retrials.

Court holds that by referring to their prior testimony (raising the issue) the accused had waived their s13 protections. There is a distinction between going from a witness to an accused and being an accused throughout. A witness is compellable and receives the full immunity of s13; prior testimony, innocuous or not can not even be brought in for credibility (concern as to whether jury would properly use it). An accused is not compellable and therefore when being retried on the same indictment, s13 doesn't apply. The s7 protection against self-incrimination will apply if the accused chooses not to testify in later trials.

Re Application under s. 83.28 of the Criminal Code (page 10-054)

This overrides the CL right to silence. A witness can be compelled or forced to come to an investigative hearing. They are not on trial nor are they an accused, but should they refuse they face sanctions. To later prosecute these witnesses based on their statements raises a s7 issue. s7 offers protection against use and derivative use of compelled statements. Legislation goes beyond this, offering complete protection against derivative use by making the inevitable discovery doctrine no longer applicable as an exception to immunity. The statute is constitutional because of this immunity.

When the govt attempts to compel evidence for the sole purpose of finding evidence against the witness s7 provides protection against this abuse of process. For the statement to be blocked there would need to be overwhelming evidence that it was being compelled for an improper purpose.

Privilege Attaching to Confidential Relationships

Privilege is one area where the search for truth is limited. Confidentiality is also an important societal value. This protects certain relationships, because if such relationships were not protected people would be less likely to consult professionals. For most relationship, for privilege to apply, one party must show at the trial that privilege should be upheld in this circumstance (case-by-case basis). Some relationship are automatically privileged, such as solicitor-client privilege.

Class Privilege: Solicitor-Client

Solicitor-client privilege is close to absolute privilege (one level above doctor-patient). It also engages certain Charter protections. The legal system needs lawyers and lawyers need their clients to be truthful. The criteria for a matter to be covered under this privilege is if the party is (a) making a communication to their lawyer; (b) which is intended to be in confidence; (c) and is based on a legal matter. The client may directly waive solicitor-client privilege, for example when bringing a case against their lawyer. A client can also implicitly waive privilege. By raising issues with the lawyer the opposing counsel is allowed access to relevant documentation and to interview the lawyer on that issue. This is the method of refuting / rebuttal. Legal advice cannot be used as both a sword and a shield, if you use it as one you lose the ability to use the other. If a client requests advice about committing a future crime this is not covered by the scope of privilege.

R. v. Shirose (page 10-068)

The defence is trying to get the case rejected because of state misconduct which would harm the integrity of the court. Police brought a reverse sting by selling drugs to the kingpins; this was contrary to the CC and SCC found it illegal. (Buying drugs is considered "taking possession of evidence" and not illegal. In this case the police consulted the DoJ. Court found this was protected by solicitor-client privilege – government lawyers are still lawyers. The fact that the police mentioned that they consulted a lawyer does not waive privilege. It was not used as a "sword," and did not trigger the waiver. The implicit waiver is trigger when the content of a consultation is referenced.

R. v. Brown (page 10-079)

Accused is charged with murder. There is evidence that implicates another suspect. This other suspect may have discussed it with his lawyer, according to his girlfriend. The competing value of preventing a wrongful conviction ("innocence at stake" exception) allows a breach of privilege, which extends to undertakings (Stinchcombe)

Innocence at stake test: (a) information is not available from any other source, breaking privilege is the only way to obtain this information; (b) must establish that their could be information that could raise a reasonable doubt (police notes, another witness, etc); if this is satisfied it goes to the trial judge; (c) trial judge must determine if it is likely to raise a reasonable doubt and if it is the only way to reasonable doubt.

In this case, the fact that the lawyer would be a better witness than the intoxicated girlfriend is not sufficient to breach privilege. Defence told to find other avenues. Note that telling others about discussions with one's lawyer may suffice to waive privilege

Another type of immunity is transactional immunity, which is complete and absolute. A party cannot be prosecuted for that transaction. Regular immunity only extends to the evidence compelled from the accused; they can still be prosecuted.