Evidence/Ben Perrin/Fall 2011

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# BASIC FRAMEWORK

* Admissibility of evidence is always a question of law - this means standard on appeal is correctness
* **Reasons for excluding evidence**
  + If it distorts the fact finding process - ie. tends to cause the trier of fact to reason irrationally or inappropriately
  + If it makes the trial too lengthy or confuse the issues (eg. bringing in evidence that proves the other party's witness was lying about something irrelevant)
  + Undermines some constitutional/important value
  + Inconsistent with the nature of the trial process
  + Probative value outweighs prejudicial effect

## Principled Approach

* Trend in evidence law to go back to the principles (before,

Can see it fold out in *Vetrovec*:

1. Elaborate on the original rule & identify its purpose/basis
2. Attack the rule, identifying situations where the rule applies but undermines the purpose
3. Modify the rule

Source and Goals of the Law of Evidence

* Main goal of evidence law: Find out the **Truth** in a **Fair** and **Efficient** manner, subject to some other values
* How does our system of evidence cope with these sometimes competing values?
  + Expert evidence – limiting the number of experts, cross examining the expert
  + Exclusionary rules – excluding otherwise relevant information because it is prejudicial (unfair) to the accused
  + SFE – including otherwise inadmissible ev when the truth seeking function is so bolstered by the ev
* Sources of evidence law: CL (mostly), statute, aboriginal law, constitution
* *Stinchcombe* – disclosure requirements
* CEA - federal jurisdiction
* BCEA - all proceedings and other matters for which the legislature has jurisdiction
  + Section 40 - for technical issues, prov evidence law continues to apply even for federal matters as long as they are not in conflict with the CEA

## Relevancy

* 2 Distinct approaches: civilian inquisitorial system vs common law adversarial system
* Civilian system has one main rule - If it is relevant, it is admissible
* Adversarial system - if it is relevant, it is admissible unless it is excluded (our system is based on excluding relevant evidence) - rule applies regardless of whether it is a trial by judge only or by judge
* Relevance → does it have ANY tendency to show that the accused did the crime (established by party who wants the evidence admitted - low threshold)
* Need factual & legal relevance:
  + Factual relevance – makes the fact more likely to be true based on logic + human experience
  + Legal relevance (aka materiality) – does it have bearing on the issues at trial?

R. v. Watson – no minimum probative value for ev to meet relevancy requirement

**Facts:** 3 guys in a factory, 2 guns, 1 ends up dead. Another injured with a gun. Crown’s theory was that both Cain & Headley shot the deceased, but Headley also accidentally shoots Cain. (Watson is outside guarding the door) Defence: Watson is not standing guard & there was no plan to kill victim. Spontaneous gun fight broke out btwn Headley & the deceased. Putting a gun in the hands of the deceased helps the defence case

**Issue:** The trial J did not admit ev that showed the deceased routinely carried a gun. Is this ev relevant?

**Held:** *R v Morris*: "There is no minimum probative value… any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible, subject to…"

Here the routine gun carrying is not direct ev of a spontaneous gunfight (need some inferences first). But lack of a direct connection does not determine relevance. If it did, most circumstantial evidence would be inadmissible.

Chain of inferences: deceased always carried a gun→ more likely that the deceased had a gun that day + if deceased had a gun that day→ more likely that a spontaneous gun fight just broke out btwn deceased and Cain

With circumstantial evidence, need to 1. believe the witness and 2. believe that the chain of inferences lead to the ultimate proposition. Thus, 2 types of potential errors with circumstantial evidence:

* + - Assessment of credibility
    - Drawing of inferences

But - don't think that direct evidence is better than indirect evidence - direct ev may be very bad.

## Probative Value and Prejudicial Effect

* Prejudice = improper use of the evidence; probative value = proper use of the evidence
* Trial judge has to weigh the risk of the improper use and the proper use
* Prejudice here does NOT mean that it "hurts the case" - prejudice means the tendency of the trier of fact to improperly use the evidence - something that can be used to convict (ie hurt the accused's case) can be admitted
* Crim law Test: **Prejudicial effect must substantially outweigh the probative value**
* Much harder to exclude evidence led by defence; easier to exclude prosecution's evidence
* Trial J can also consider if the ev is likely to confuse the jury or its time consumption is not warranted
* Connections btwn the items in the Basic Framework?
  + Relevance tied to probative value
    - In relevance, no minimum required. But here, trial J can assess the degree of relevance/probative value
  + Prejudicial effects tied to limiting instructions
    - Limiting instructions are meant to mitigate or get rid of prejudicial effects
    - Even if there is GREAT probative value and a small prejudicial effect, the judge still needs to explain it to the jury or address it in the decision
* *R* *v Morris* [1983] SCC: Accused charged with conspiring to import heroin from Hong Kong. Police discover undated newspaper clipping describing events in the heroin trade in Pakistan, entitled "The Heroin Trade Moves to Pakistan". Is the clipping relevant?
  + SCC - relevant - inference could be drawn from the unexplained clipping - shows the accused had an interest in and informed himself on the trade
  + Dissent - relevant, but it should have been excluded because it went to disposition
* *R v Terry* (1996) SCC: Accused charged with 1st degree murder. Had told friends that he dreamed he killed the deceased & police find poem in his room about killing someone. Is the evidence of the dream and poem relevant?
  + Dream is irrelevant - UNLESS the dream correlates to the actual murder in details
  + Poem is irrelevant - UNLESS we accept that the accused wrote it, and wrote it after the murder
  + SCC - poem's probative value is not great but prejudicial effect is great. However, concerns were alleviated on the limiting instructions - jury was told that the poem could not be used as direct evidence, but could conclude that it represented a lamentation by the accused (ie someone who laments over a killing is more likely to have killed someone). Dreams were admissible - could draw inferences.
* Conclusion from *Morris* & *Terry*? No minimum probative value - test for relevance is very low
* Ok to admit low probative value, high prejudicial effect evidence, as long as the limiting instructions can bring the prejudicial effect down to the probative level
* Trial judge can exclude relevant evidence when its prejudicial effect exceeds its probative value (*Gray v ICBC* 2010 BCCA)
* Exception: excluding defence evidence in crim cases - prejudicial effect must substantially outweigh probative value (*R v Seaboyer* [1991] SCC)

R. v. Seaboyer [1991] SCC – s. 7 fair trial rights & admitting relevant evidence are linked.

Note: this case was when the defence of mistaken belief of consent only required subjective belief (no reasonableness required)

**Issue:** Does the “rape-shield” legislation violate s. 7 or 11(d) of the Charter? Defn of consent is different now - had very basic mistaken belief of consent law

s.276 provided that no ev could be adduced re: the complainant’s sexual activity with anyone other than the accused unless it was: to rebut crown’s ev of the complainant’s sexual activity, ev to show the identity of someone else who could have been the perpetrator, ev of sexual activity on the same occasion as the one in the chg

277: evidence of sexual reputation cannot be admitted for challenging the complainant's credibility.

**Majority:** 277 ok, but 276 needs to give the trial J some discretion for other circumstances where ev of prior sexual conduct could have a legitimate purpose & prejudicial effects don’t significantly outweigh the probative value.

Purpose & goal of the rape-shield laws

* + Get rid of ev that is detrimental to the truth seeking function of the trial (Stereotypes of the "good" v "bad" woman not helpful in assessing credibility. Also, women who consented in the past are not more likely to consent again)
  + Encourage reporting of crimes
  + Privacy protection to complainants

Argument against 276 was that it eviscerates the defence of honest-but-mistaken belief in consent by taking away its building blocks because it prevents admission of ev of sexual activity that didn't take place on the same occasion of the charge.

McLachlin's hypotheticals:

* + Mistaken but honest belief situation
  + To prove motive of animus (L'Heureux Dube says no, it could come out in rebuttal or in the identity evidence)
  + To explain the physical evidence of force (ie Seaboyer - saying that the bruises on complainant were done by someone else. L'Heureux Dube says no, this would come up in identity evidence)

Limiting instructions will limit prejudice - fair trial rights of the accused trump the privacy rights of the complainants (wrongful convictions etc) - Court is very reluctant to exclude defence evidence

**Important:** Relevance & s. 7 → excluding relevant evidence impedes the truth finding function of the trial.

This constitutionalizes relevance - without a justifiable reason, excluding relevant evidence is violating s. 7

"A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial"

*Seaboyer* may be your "biggest gun" in attacking any exclusionary rule - Without a CLEAR ground of policy or law to exclude relevant evidence, s.7 rights are violated (note: no case yet where a violation of s. 7 has been justified under s.1)

But - "clear ground of policy or law" - policy = common law based on policy reasons/principles

Lots of s.1 will be built into this.. Can bring oakes test into this Seaboyer test

**Policy discussion:** Do you agree with the constitutionalization of evidence principles?

* + - BEFORE Seaboyer’s constitutionalization: CL/statute could take away discretion of trial judge
    - Gives another avenue for appealing decision to exclude
    - Note - admissibility is not constitutionalized - this is a one way principle - talks about rules that exclude evidence - excluding, not admitting
    - Does this flow from the 1st step that relevant evidence is admissible unless there is a clear ground of policy/law?
    - Tied to fair trial
    - Other cases have spoken about fair trial to everyone involved - this one is more about rights of the accused
    - What about limiting instructions? Doesn't talk about it here

**Notes:** If bringing a constitutional challenge for over-reaching legislation, need to show reasonable hypothetical - ie someone somewhere will have their Charter rights infringed due to this law - ie evidence can be excluded under this law which should be admitted

This judgment is based on the law of consent at that time – ie. the accused could say that he subjectively believed the complainant consented because he knew of her prior sexual conduct. This evidence would be admitted because the defence at that time was mistaken but honest belief. How, under the current law of consent, would *Seaboyer* play out?

**Dissent**: L'Heureux Dube

* + Empirical evidence shows - juries more likely to acquit if sexual history evidence is admitted
  + So - juries are ignoring limiting instructions
  + Contradictory assumptions can be held by ppl at the same time (reporting by complainants)
  + Disregards McLaclin's hypotheticals

Basically saying that all the ev excluded by 276 is either irrelevant or its prejudicial effect significantly outweighs its probative value.

## Evidentiary and Persuasive Burdens

* Persuasive burden - on the party which is required by law to prove the cause of action
  + Ie the burden of proving the issue which is the cause of the judicial action (generally plaintiff/crown)
* Evidentiary burden of proof is on the party whose duty it is to raise an issue (Ie the burden of adducing enough evidence to justify a finding)
* The party who bears the persuasive burden doesn't necessarily bear the evidentiary burden on all issues
* The party wanting to admit evidence has to prove **relevance**
* The party wanting to exclude the evidence has to prove that the evidence falls under an exclusion rule

**Evidentiary Burdens:**

|  |  |  |  |
| --- | --- | --- | --- |
| An accused's **confession** made to a person in authority is inadmissible unless | The **Crown** can prove | **BARD** | That the stmt was made voluntarily |
| **SFE** is inadmissible unless | **Crown** can prove | On a **BoP** | That the probative value of the sound inferences exceeds any prejudice created |
| Ev obtained during a **charter violation** is admissible unless | The party seeking to exclude the evidence can prove | On a **BoP** | That the reasonable, dispassionate person who is informed of the circumstances of the case (& knows about the charter would find that admission would bring the administration of justice into disrepute |

## Burden and Degree of Proof in Civil Proceedings

* Motion for non-suit (rule 12-5 of BC Supreme court rules): can choose one of 2:
  + No evidence to support the P's case
    - Then not necessary for the D to elect to call/not call evidence
  + Insufficient evidence to make out the P's case
    - Then the D must elect to not call evidence (unless the court otherwise orders)
* Judge should not, of his own motion, undertake to non-suit
* Proof on a BOP
  + Some talk of requiring more than BOP on more serious civil suits (allegations of fraud, sexual assault, etc)
  + But SCC in *FH v McDougall* [2008] SCC - only one standard of proof in civil proceedings
    - "context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities of the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof"
  + What exactly is this saying? Has a potential to corrupt the fact finding process - not supposed to consider the consequences (ie if the legal consequences are greater, find for the D? no.)
  + An attempt to do 2 things at the same time.. BUT this is very helpful to civil defendant - stay close to this language, and can bring in evidence of consequences
* Motion for summary judgment (Rule 9-6 & 9-7 of BC Supreme court rules)
  + Not a trial on the merits. Generally just written evidence. Used when either pl or def want to see whether or not it is worth it to have a trial
  + Moving party is saying that the responding party's case is so weak that it is not worth bringing to trial
  + Happens when there is a disagreement about facts
  + Matters of credibility should always go to trial (and therefore the motion for summary judgment would fail)
  + What is the purpose behind the summary judgment rule? Expeditious efficient trial system
* *Pizza pizza* - summary judgment must be made sparingly and judiciously
  + Objective is to screen out claims that ought not to proceed to trial because they cannot survive the good hard look. Not sufficient for the responding party to say that more and better evidence will be available at trial - occasion is now. Matters of credibility requiring resolution in a case of conflicting evidence ought to go to trial.
  + Why credibility getting singled out? Because credibility is assessed in trial through examination and demeanor

### Irving Ungerman Ltd. v. Galanis – issues of credibility should always go to trial

**Facts:** No legal issue, just factual issue - Was the cheque received? Motions judge grants summary judgment

**Held:** CA disagreed. Issue of credibility should always go to trial

Some inconsistencies - cheques out of sequence

Summary judgment should be sparingly applied (even if there is a very remote chance of P winning, should have trial on the merits)

## Burden and Degree of Proof in Criminal Proceedings

**Directed Verdict of Acquittal**

* Why does this exist? Burden of proof - same thing as motion for non suit - flows from the fact that the P or the Crown has the burden of proof in proving their case
  + Also - presumption of innocence , fairness, could be in custody (liberty)
  + Ending the jeopardy that the state has placed you in as early as possible (stigma, pressure)
  + Less confusion for juries
* Test: where there is NO admissible evidence, whether direct or circumstantial, which if believed, by a properly charged jury acting reasonably, would justify a conviction, the trial judge should direct a verdict of acquittal
  + BUT you don't want to usurp the role of the jury
  + What is "acting reasonably"?
  + For direct evidence, if it is believed, then the case is closed. But for circumstantial evidence, there are inferences that need to be made - so there is a bit of weighing in cases where there is ONLY circumstantial evidence
* Arcuri - 2001 SCC case - standards for determining charges in a prelim inquiry
  + Corollary - where the crown adduces direct evidence for each element of the offence, the case must go to trial
  + It does not matter that there is a very very strong defence case - the case must still go to trial
  + However, where the crown's evidence consists of or includes circumstantial evidence, the judge must engage in a limited weighing of the whole of the evidence (including any defence evidence) to determine where a reasonable jury properly instructed could return a verdict of conviction
  + But this limited weighing happens right after the prosecution’s case
* In reality, very few preliminary inquiries

**Putting a defence in issue**

* Air of reality check - is there any evidence of each element of the defence? Ie need an evidentiary basis
* *Pappajohn* case - general test - assuming evidence that supports the defence is true, is it sufficient to justify putting the defence tot the jury
* *Cinous* case - evidentiary foundation - should keep those defences from the jury which lack an evidentiary foundation. Assume that it is true- is there enough evidence to establish the essential elements of the defence.
  + If accused meets this evidentiary burden, then the crown has the persuasive burden (ie needs to disprove one of the elements BARD)

### R. v. Lifchus – proof for crown is BARD

Proof standard for crown: BARD

Burden of proof always rests on the prosecution and never shifts to the accused.

Lifchus defines proof BARD by what it is not…and then says it is based on logic and reasoning

**Note *Starr*** case - even though SCC said example of instructions in Lifchus was a guideline, should probably just follow them very very closely. (but, can still have errors in a jury charge even if you read Lifchus verbatim).

## Appellate Review of Factual Findings

### Stein v. The “Kathy K.” [1976] SCC - appellate review

**Facts:** Trial judge decided 75-25% apportioning of liability in a sailboat-tugboat accident. Appellate judge reapportions liability - there is fresh evidence on appeal and appellate judge notes right of way on the water etc.

**Held:** SCC - the appellate judge should not have said "I disagree with how the BOP was applied in this case" - basis is whether the verdict was CLEARLY wrong.

Appeal is not a re-trial. Can use documentary evidence only - can't cross-examine or assess credibility of witnesses

Factual findings can only be reversed if there is some palpable and overriding error

**Note:** *Housen v Nikolaisen* [2002] SCC

A palpable error is one that is "plainly seen" & have some sort of effect on the outcome of the case

Reasons for deference on findings of fact:

* + 1. Judicial resources (appellate courts supposed to be deciding on questions of law)
    2. Promotes autonomy and integrity of trial proceedings (trial judges have an interest in having their decisions respected)
    3. Expertise of trial judges, advantageous position and benefit of *viva voce* evidence

Should a lower standard apply when ev at trial is largely documentary? Well… a) and b) still apply even if c) not applicable

### R. v. Biniaris [2000] SCC – appellate review std

**Issue:** Was the jury verdict reasonable? - R v Yebes [1987] SCC - whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered

**Held:** it requires not merely asking whether 12 properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience

Did the SCC change the Yebes test in Biniaris? (yes, made it more stringent for the appellate court to review the jury findings)

What is the Biniaris test trying to get at? Why would one want to interfere with the trial outcome from a jury when there weren't problems with the trial (ie evidence issues etc)?

Sometimes there are things that a jury just cannot do without judicial training (eg understanding witness testimony, weighing evidence)

Distrust of juries - because they don't have as much experience/training as judges - black box vs well reasoned decision

\*\*Perrin thinks this could be dealt with in limiting instructions. Should leave the appellate standard alone.

Curative proviso - Trochym - not to be so bold as to how a jury may have reacted

## Additional Reading: Report on the Prevention of Miscarriages of Justice: Chapter 4 (Tunnel Vision)

1. What is it?
   * Preconceived notion of who is guilty - taints subsequent views of the evidence
   * Report: Tunnel vision has been defined as “**the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one’s conduct in response to the information**.”
   * Eg: paperbag bandit - some similarities btwn a number of bank robberies
     + Police can pin Hill to 2 of several bank robberies
     + Connect him to all others
     + Police gets additional evidence that says Hill isn't connected to some of them..
     + But still connects him to all the others
     + \*\*CLASSIC tunnel vision\*\*: disregard evidence which is inconsistent with the theory
     + Hill gets convicted
     + More robberies! Must be copycats of Hill… <-- extreme tunnel vision..
   * Byproduct of Tunnel vision: Noble cause corruption
     + The belief that the accused is guilty anyways → cutting corners in procedures or deliberately doing something that will help the case (extreme)
2. How does it occur?
   * Pressure from the public on the police to solve a case (especially high profile ones) - speed becomes major factor & investigative team focuses prematurely
   * When there is a blurring of the lines btwn investigators & prosecutors
   * Isolation from other investigators
   * Closeness with the victim
   * (Biases & general stereotypes of investigators)
   * (Primacy & recency)
3. Why is it a problem?
   * Not being objective & can lead to wrongful convictions
4. How can we overcome tunnel vision?
   * Constant checks & balances - procedure & in final decision (eg. charge approval)
   * Education about tunnel vision (police & lawyers) - reminding self of possibility
5. How could knowledge of tunnel vision be important of the law of evidence?
   * Reasons to be critical of certain evidence
   * Inter-relatedness btwn admissibility/admissibility of evidence & the checks and balance
   * Potentially other evidence that doesn't even make it into court
   * If you see warning signs of tunnel vision -
     + Cross-examination of the investigator -go through the recommendations - advise the court of tunnel vision
     + Ask for jury instructions re tunnel vision

# TYPES OF EVIDENCE – Witness Testimony

## Overview

* 2 main issues: competence to testify and compellability to testify
* Before, CL provided that some classes of ppl were inherently liable (eg. spouses, previously convicted felons) Statutory amendment changed the rule for felons, not for spouses.
* Witness testimony can be entered either via **oath**, **solemn affirmation**, or as **unsworn evidence**
* Rationale for an oath? To grab hold of the witness’ conscience (*Bannerman*)
* Requirements for an oath: understanding a moral obligation (*Bannerman*)
* Requirements for a solemn affirmation: promising to tell the truth (*Walsh*)
  + Note the CEA has no general rule of inquiry into whether the W understands the solemn affirmation.

## The Oath, Solemn Affirmation, & Unsworn Evidence

### R v. Bannerman (1966) Man CA – testing for competence to take an oath

**Facts:** 13 yr old (gr 4) brother of the complainant answered some questions by the court and by the defence counsel. He seemed to know it would be “bad” to lie, but couldn’t speak to the consequences of lying.

**Held:** Only the knowledge/understanding of a moral obligation is required. W doesn’t have to know about the consequences of lying (Dickson JA – lying ≠ hell anyways). Give deference to the trial judge.

**Notes:** SCC approves of this approach. Knowledge of a moral obligation is sufficient. But don’t confuse with ordinary social conduct. It is an added responsibility to tell the truth above and beyond the duty to tell the truth as part of the ordinary duty of normal social conduct.

### R. v. Walsh [1978] Ont CA - Solemn affirmation (appreciation of social duty to tell the truth is not required)

**Facts:** W was a satanist – wouldn’t take an oath but willing to solemnly affirm. Told judge:

* + He would not swear on the bible
  + He understood what perjury was
  + He did not feel obligated towards the public to tell the truth
  + He would tell the truth because otherwise he would not be able to live with himself (ie agreed to a solemn affirmation)
  + Hypothetically, if it would benefit him to lie, he would do it

Trial judge ordered him incompetent to testify, quoting *R v Hawke* as saying that the W must appreciate the duty of speaking the truth before the W could be affirmed.

**Held:** *Hawke* deals with someone whose mental competency is at issue - not the same thing here. Appreciating a social duty to tell the truth is not required. An inquiry into the knowledge of penal consequences (perjury) is not required. Only requirement is the willingness to solemnly affirm (ie promising to tell the truth)

R. v. Khan [1990] SCC – unsworn ev from young children

**Facts:** W was 3 yrs old at the time of the incident & almost 5 at court. Defence sought to enter W’s testimony as unsworn evidence. Old provision of the CEA provided that a child of tender years could give unsworn evidence if she did not understand the nature of an oath, but she could communicate the evidence & understood the duty of speaking the truth. Also corroboration was required. Trial judge held W incompetent to give testimony.

**Held:** Trial judge erred – he applied *Bannerman* which is for oaths & emphasized too greatly that the child did not know what it meant to lie IN COURT. The trial judge recognized sufficient intelligence and consequences of telling a lie

**Notes:** Consequence of excluding witnesses from young children 🡪 Incidents would not get prosecuted

Concerns of allowing children 🡪 Could be coached & very young children don't always understand the difference between make believe and real life & ability to perceive and remember events

**New provision in CEA: 16.1:** person under 14 is presumed to have capacity to testify. Child won’t take oath or solemn affirmation. Std is that the child can understand & respond to questions (low std).

### R. v. Marquard [1993] SCC –ability to communicate evidence (old CEA provision) = ability to perceive, remember, & communicate

**Facts:** 3.5 yr old testifying as to how she sustained severe burns to her face. Old CEA provision required inquiry into whether W understands the nature of an oath/SA & whether the W is able to communicate the evidence. If able to communicate but can’t understand nature of oath/SA, can give unsworn evidence on promising to tell the truth. Trial judge allowed the unsworn testimony of the child - she was able to say that she should tell the truth

**Held:** Testimonial competence includes:

* 1. The capacity to observe (including interpretation)
  2. The capacity to recollect
  3. The capacity to communicate

Inquiry should be looking at the witness' **capacity to perceive, remember, and communicate***,* not whether the witness actually perceived, etc. - ie look into whether the evidence is admissible, not whether it is credible/reliable. Threshold of ability to communicate is pretty low.

**Dissent** by L'Heureux-Dube - should only require capacity to communicate - capacity to recollect/observe should be dealt with in weight of evidence, not admissibility. Requiring capacity to perceive/remember erodes the presumption of admitting the evidence.

**New legislation:**

* Is 16(3) any different from a solemn affirmation? Only if we say that a solemn affirmation requires knowledge of some sort of consequence if the witness lies.
* 16(1)- ability to communicate the evidence – can probably still use *Marquard* test
* 16.1 requires an ability to understand & respond to questions instead of ability to communicate the evidence
* Policy issues:
  + Should there be an oath anymore? Why have 2 different tests?
  + Should the level of ability to communicate the evidence or to respond to questions depend on the nature of the evidence? (eg. testifying on emotional state 🡪 need EQ)

## Examination of Witnesses

* Only **open ended questions** are allowed for **direct examination**
  + Can ask specific questions as long as they are not leading
  + Why? Building a narrative
* **Cross examination** - **leading questions** are allowed. Why?
  + Leading questions allowed because it facilitates the discovery of evidence
  + May lose a lot of info if the narrative is given by counsel instead of the witness
  + Answers to open-ended questions are more believable - leading questions are less persuasive
* On cross examination, can ask questions relevant to the facts of the case OR regarding matters of discreditable conduct, etc (unless the W is the accused)
* If the W is the accused, generally can’t cross examine on discreditable conduct or on conduct relating to his constitutional rights (eg. remaining silent when arrested)
* Be careful about asking too many or the wrong questions – never know what the W will say!
* Refreshing memory:
  1. *R v Fliss* – a W is allowed to refresh his memory by any means (even if the item would not be admissible, because the W’s recollection is what becomes evidence, not the item)
     + What if other party wants to cross examine W on *how* they refreshed their memory? Should the item then become admissible?
  2. *R v Meddoui –* if a W can’t recall the events, he may testify from a record of his past recollection. This is not the same as refreshing memory. If a W wants to admit a past recollection recorded, need:
     1. The past recollection must have been recorded in a reliable way
     2. At the time, it must have been sufficiently fresh & vivid
     3. W must be able to assert that he “knew it to be true at the time”
     4. The original record itself must be used, if it is procurable

1. *R v KGB* – verbatim transcript of an out of court stmt made to a police officer (KGB stmt) may be admissible – used in many domestic abuse cases

* Duty to cross examine - what is the scope of this in Cdn law?
  + Why is there a duty? - should allow jury to examine witness. If there was a need to cross examine, don't want to miss this & have to cross examine again
  + CL regards the cross examination as the most important way of casting doubt on a W’s testimonial factors
  + Duty to cross examine if you intend to contradict the witness (*Browne v Dunn*), otherwise, the witness will not be able to explain. “Essential to fair play & fair dealing with Ws.”
    - Possible consequences of not doing so: recall the witness or a special instruction to the jury

R. v. Lyttle question can only be put to witness in cross examination when there is a good faith basis. Wide, but not unbridled. Can't mislead + other restrictions.

Counsel may put matters to the W in cross examination that are disputed/unproved, so long as there is a good faith basis for doing so (how else will counsel prove the unproved?). Good faith basis is a function of the info known to the examiner, his belief in its likely accuracy, & the purpose for which it is used. Purpose of the question must be consistent with the lawyer’s role as officer of the court – to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions.

## Matthew Nathanson, Criminal Defence Lawyer - Cross Examination

* Cross examination is a means to gather the evidence that you want for your closing argument
  + You want to be able to get facts that logically lead to your stmt.
* 3 key ways to cross examine a W:
  1. Internal consistency – did the W say something different before? If you put it to the W, the W can either adopt it (then becomes part of the evidence) or reject it (then it is an inconsistency which goes to their reliability)
  2. Consistency with other evidence – compare a piece of undisputed evidence with the W’s evidence.
  3. Establishing external inconsistency (eg. friend talking about other friend’s alcohol consumption. If W will lie about this under oath, what else might W lie about?)
* When cross examining non-accused W on a prior criminal record, can attack credibility & character and can bring details of the offence into the cross-examination
  + Eg. *R v Rojas* – impaired driving conviction wouldn’t normally say much, but in this case, the W had tried to blame a car crash on his gf (said she was the driver) who ended up injured.
* Collateral issue rule - if a witness denies something on a collateral issue (something that only goes to credibility, not anything else) during cross examination, can't do anything. Can't call other witnesses to contradict the witness.

### R v Rowbotham –basic functions of cross-examination – credibility of the ev, bring out additional facts

Cross-examination is recognized as fulfilling three basic functions:

* 1. To shed light on the credibility of the evidence given in examination in chief;
  2. To bring out additional facts related to those elicited in examination in chief; and
  3. To bring out additional facts which tend to elucidate any issue in the case.

Cross-examiner given a wide latitude because of these functions, but there are some restrictions. Protracted and irrelevant cross-examination not only adds to the cost of litigation but is a waste of public time.

### R v Titus – D can cross-examine on the W’s current charges (for the purpose of showing a possible motivation to seek favour with Crown)

**Facts:** W for the crown. At trial, D was not allowed to cross examine on whether the W was, at the moment, facing a serious criminal charge laid against him (motive to give ev for crown). Trial judge relied on *Koufis* & s. 12 of the CEA

**Held:** *Koufis* doesn't apply because it refers to cross examination of the **accused** with regards to **prior convictions** & s. 12 has to do with cross examination of Ws with regards to **prior convictions.** Functions of cross-examinations + presumption of innocence + std of BARD → accused may employ every legitimate means of testing the crown evidence .. Including the right to explore circumstances which indicate a motive for a Crown witness to favour the Crown's case. Questions were proper and admissible for the purpose of showing a possible motivation to seek favour with Crown.

## Credibility of Witnesses

**Assessing Credibility – Testimonial factors**

* “Is the witness telling the truth?” (reliability – most important issue during the trial) vs “Is the witness a truthful person?” (credibility – collateral issue but still important)
* Testimonial factors:
* Language
* Sincerity - how sure is the witness (do they believe what they are saying? Is there another reason for saying what they are saying?)
* Memory - age, time delay btwn event & testimony, intervening events, anything that can taint the memory?
* Perception - did anything enhance or inhibit the ability to perceive? (light levels? Ability to see? Intoxication? Vantage point?)
* Demeanor - calmness? Evasive? Reaction to questions? - classic function of the trier of fact
* *R v Norman*: Consider general integrity and intelligence – powers to observe – capacity to remember – accuracy. Determine whether he is honestly endeavoring to tell the truth: sincere – frank – biased – evasive? DEMEANOR, however, is not enough – you must ask if his evidence is reliable.
* What assumptions are embedded in the idea of "testimonial factors"? Are there issues with relying on them?
  + Cultural assumptions in demeanor
  + Views about memory
  + They don't catch the witness who truly believes his testimony

### R v WR [1992] SCC - Guidelines for assessing credibility of child witnesses

* + Make allowances for the way a child would perceive the world
  + Flaw or contradiction should not be given the same effect - use common sense (but not prejudices or stereotypes)
  + Mental development, understanding, ability to communicate should be taken into account
  + Adult Ws testifying as to childhood events should have adult std for credibility, but inconsistencies (eg. time/location) should be considered in the context of the W’s age during the events

**Deference of appellate courts to findings of credibility at trial**

* + Reason for deference = trial judges have more experience assessing credibility & they can look at demeanor of witnesses (*R v Buhay* [2003] SCC)
  + But appellate court CAN still overturn a finding of credibility OR a verdict based on a finding of credibility if it concludes that the finding/verdict is unreasonable
    - Test: could a jury/judge properly instructed and acting reasonably have convicted? (apply the test with great deference)

**Limits on Supporting Credibility – Rule against oath-helping**

* Examination of witness usually starts with questions to "accredit the witness" – admissible
* Rule against oath-helping: Generally, other evidence to support credibility or evidence of prior consistent stmts is not admissible
  + Why? Oath/affirmation means the W is already bound to tell the truth.
  + Oath-helping evidence is relevant but very inefficient
  + Until W’s credibility is challenged, assume he is telling the truth.
* 4 exceptions:
  + - **Expert evidence** may be admitted to assess credibility when assessment may be beyond common experience
    - Defence in a crim case may lead evidence of an **accused's good character**
    - Some situations where a **prior consistent stmt** is admissible (eg. to support some aspect of the testimony, to rebut implications of recent fabrication, as part of the witness' narrative)
    - Where credibility is attacked, can adduce evidence in **rebuttal** to support credibility

**Prior Inconsistent Statements**

* Prior inconsistent stmts of other party's witness?
  + Procedure in cross-examination set out in statute – CEA s. 10 & 11
  + May be used to undermine credibility (eg. an inconsistent stmt in the examination for discovery – W is lying under oath either before or now)
* Prior inconsistent stmts of own witness? 3 options:
  1. CL: declaration that a W is hostile 🡪 can cross-examine on PIS
  2. Statute: s. 9(1) CEA – declaration that a W is adverse 🡪 can cross examine on PIS
  3. Also, 9(2) CEA – allows the court to grant counsel leave to cross examine on PIS even if the W has not been proven to be adverse (and court may use that cross-examination to decide whether the W is adverse)
     + Ie. Can use 9(2) to show that the W is adverse, then apply 9(1) – but 9(2) is not the only way to show that a W is adverse
  + The PIS works to discredit that testimony, but not to attack the credibility of the W unless the PIS was made under oath. (if the PIS was not made under oath, then W can say that they are telling the truth now)
  + PIS may not be admitted for the truth of its contents because it would become hearsay
    - Corollary: if stmt is necessary & has adequate indicia of reliability to overcome the hearsay dangers, then the PIS may be admitted for the truth of its contents (*R v KGB*)
* Adverse = hostile (or at least a subset of hostile – courts have gone both ways)

### McInroy and Rouse v The Queen [1979] SCC – 9(2) is a separate route from 9(1) (adverse W) for counsel to cross examine their own witness on a prior inconsistent stmt

**Facts:** Crown W had given police a stmt about how the accused confessed to her about a murder. At trial, W said she could not recall that conversation. Crown was permitted to cross-examine her on the PIS before the jury. Jury was instructed not to use PIS for the truth of its contents, but just to test her credibility. W was never declared adverse.

**Held:** for Crown. Crown had made an application under 9(2) which does not require the W to be declared adverse. It gives the trial judge discretion to permit cross-examination as to the PIS.

**Prior Convictions**

* Admissible to undermine credibility (is this rationale sound? Maybe need to reconsider)
  + In crim trials, crown may not admit evidence of prior convictions unless his credibility is brought into issue (and then only allowed to cross-examine about name, substance/effect of the crime, place of conviction, & penalty - no details (*R v Laurier* (1983) OAC))
  + Trier of fact is allowed to draw the inference that someone (W or accused) with a crim record is less credible than someone without a crim record
  + Improper purposes: inference that the accused is more likely to commit crime again & that the accused should be punished for prior crimes
* Juvenile record? (*Morris v The Queen* [1979] SCC)
  + Held: accused can be cross-examined on his record as a juvenile (5-4 split)
  + Majority: finding of deliquency is still a finding of a violation of the crim code. *Juvenile Deliquents Act* was upheld under federal crim law power
    - Distinction btwn cross-examination to weaken credibility & cross-examination to weaken the evidence
  + Dissent: court can't convict a child under the *Juvenile Delinquents Act* and therefore cross-examination of a juvenile record was not permitted under s. 12 of the CEA

### R v Corbett [1988] SCC – accused as W may be cross examined on prior convictions, with some restrictions

**Issue:** does s. 12 (Ws may be cross-examined on prior convictions) apply to accused as a W? Does s. 12 violate the constitutional right to be presumed innocent?

**Held:** s. 12 is constitutional, but some restrictions for accused Ws.

Generally, not allowed to admit character evidence – danger is that jury will use it as propensity evidence. But some concealing information from the jury which may help to assess credibility could leave the jury with an incorrect impression (esp when crown witnesses are cross-examined on their criminal records).

Alleviate the risk of the jury using evidence improperly by giving clear directions on the appropriate use. Should assume that the jury will follow directions given by the judge. S. 11(f) gives the right to trial by jury - would be contradictory to say that juries can't follow instructions. Also, there are other areas where evidence may be admitted for one purpose and not another.

Trial judge still has discretion to exclude evidence which is more prejudicial than probative. (in this case, trial judge should have excluded the murder conviction – more prejudicial than probative)

Limits on prior convictions of accused being admitted:

* + Only if the accused decides to testify
  + Limited to fact of conviction, not conduct that led to conviction
  + Cannot extend to discreditable conduct/associations (eg. gang murder - can only say it is murder)
  + May not examine accused about other times he was testified and was convicted
  + Convictions do not include conditional discharges where conditions have been fulfilled

La Forest dissents:

* + Shouldn't treat the accused like any other witness
  + Very difficult for ppl to distinguish btwn using evidence for credibility and for propensity
  + If there is the high standard of admitting prior convictions in SFE for probative to outweigh prejudicial, seems inconsistent to allow it for credibility so easily

**Notes:** this elevates the prejudicial<probative test. SCC used Charter to modify a statutory provision for the inclusion of evidence (like *Seaboyer* – but that was exclusion of evidence)

### R v Underwood [1998] SCC – procedure for the Corbett application to have accused’s record partially/wholly excluded

*Corbett* led to the "Corbett application" - ie applying to have part of or the entire record excluded

Procedure:

1. Application should be made by the defence and decided by the trial judge immediately after the close of the Crown's case
2. If necessary, voir dire should be held where defence discloses evidence it intends to call - not "defence disclosure" - but trial judge ruling may be modified if defence evidence "departs significantly from what was disclosed"
3. It is an error to wait until after the accused had testified to rule on whether their crim record will be used in cross examination

This procedure goes to fairness for the accused

**Corroboration**

Vetrovec v. The Queen [1982] SCC – Principled approach in looking at corroboration requirement for accomplices

**Facts:** V & G charged with conspiracy to traffic heroin. W, an accomplice to V & G, testified for the Crown. Trial judge outlines some evidence to corroborate L's testimony & tells jury that corroboration is required for accomplice testimony.

**Held:** SCC applies the principled approach:

1. What is the rule & what are the principles behind the rule?

The rule is that if an accomplice acts as a W, the judge is required to give the jury a warning that it is dangerous to convict based on the evidence of an accomplice unless there is corroborating ev. Then the judge must direct the jury to ev that may be seen as corroborating.

Whether a W is an accomplice + the possibly corroborating ev are questions of law.

R v Baskerville: corroborating ev = independent testimony which affects the accused by connecting or tending to connect him with the crime. ... ev which confirms in some material way that, not only was the crime committed, but that the accused committed the crime.

Principles behind the rule:

* An accomplice may be seeking immunity and thus give false testimony (but immunity is not always offered)
* An accomplice will want to make his role appear smaller, thus transfer the blame to others (but sometimes an accomplice openly admits his participation in the crime)
* An accomplice might falsely accuse others to protect his friends/true partners in crime (but friendship isn't always what bonds criminals)
* An accomplice should not be believed because he is a criminal himself and thus "morally guilty" (but this doesn't account for the differences btwn types of crimes.. Ie fraud vs assault)

1. What is problematic about the rule? Are there situations where the rule would apply, but its application undermines the principles?

* The reasons why accomplices are though of as untrustworthy do not always stand:

Immunity is not always offered

Accomplice may openly admit to his participation in the crime

Friendship isn’t always what bonds criminals

There are different types of crime which have different levels of “moral guilt”

* We also no longer exclude the testimony of previously convicted criminals & CL generally says that someone CAN be convicted based on the testimony of a single witness
* Judge has to figure out what evidence is capable of corroboration - particularly difficult in long/complex trials (Simple question of credibility turns into a huge task)
* Judge has to direct jury to evidence against the accused which is by definition cogent - ie HIGHLIGHTING evidence (possibly giving undue weight and attention to this evidence)
* Results in confusing and unintelligible instructions to the jury - told first that the person probably shouldn't be believed - and then told that there is all this corroborating evidence
* Definition of corroboration is very narrowly defined as evidence that tends to confirm the story of the accomplice (could have strong/weak corroborating ev)
* Don't want to have categories of witnesses - can't properly serve the underlying purpose with overly broad categories
* Opens another avenue of appeal - if the judge misses ONE item of corroborating evidence - then appeals can be launched since it is a question of law (no deference; law must be absolutely correct)
* Too much complexity around the basic rule that the evidence of some witnesses should be approached with caution

1. How should we change the rule?

* Accomplices should be treated like any other W.
* If a judge thinks a W’s credibility warrants a caution to the jury, then he may give a warning, regardless of whether W is an accomplice or not
* Ie. The "Vetrovec" or "unsavoury witness" warning = "A clear and sharp warning to attract the attention of the juror to the risk of adopting, without more, the evidence of the witness" … would be wise to look for other supporting ev … may also include examples of supporting ev.

**Notes:** this broadens the scope of the trial judge & allows him to do a preliminary test of credibility (though the ultimate burden lies with the jury). Great deference to trial judge to decide whether to give the warning & whether to point out supporting ev.

Should a *Vetrovec* warning be given for defence Ws? Presumption of innocence→ accused should be given the benefit of every reasonable doubt. But what about in a situation like *Corbett*? Where it comes down to the credibility of the Crown & Defence witnesses? If ONLY the Crown witnesses get a Vetrovec warning - seems highly unfair to the crown case.

**Post Vetrovec - some more guidance:**

***R v Chandra* 2005 BCCA**:

Generally, Vetrovec warning is required where the W’s ev is central to the Crown’s case & credibility issues are major. Object of the warning is to ensure jury is aware of dangers of the W’s evidence that they may otherwise not be aware of.

***R v Khela*; *R v Smith* 2009 SCC:**

Purposes of Vetrovec warning – to warn the jury + explain why + give jury tools to identify supporting ev

A proper Vetrovec warning involves:

* Drawing the attn of the jury to the testimonial evidence requiring special scrutiny
* Explaining why the ev requires special scrutiny
* A caution that it is dangerous to convict on unconfirmed ev of this sort, though the jury is entitled to do so if the ev is believed
* In determining the veracity of the ev, should look to ev from another source tending to show that the W is telling the truth

## Eyewitness Identification and Testimony - Report on the Prevention of Miscarriages of Justice

* 78% of wrongfully convicted ppl were due to faulty eye witness identification
* Ronald Cotton/Jennifer Thompson case - she was sincere, and said she examined his features
* Note an additional issue not mentioned in the report- ppl are generally very bad at identifying ppl of an opposite ethnic backgrounds - lots of studies to support this
* How can an eye-witness believe they are telling the truth, but be mistaken?
  + "Memory" changes over time - is constructive - and is NOT a tape-recorder.
  + Memory can be altered/shifted/tainted - and this can be done insidiously
  + Witness may feel the need to identify someone (particularly in high stakes cases)
  + Witness could be prone to "solidification of memory" - if witness is asked if they're sure repeatedly, they could become more sure of their memory (cognitive dissonance)
* How should evidence law respond to the problem that some eye-witnesses can be completely confident and sure in identifying an accused, but be wrong?
  + Disclosure - maybe of the photo line up procedures (did they follow best practices as outlined in the report?)
  + Vetrovec warning for eye witnesses? Having cautions for this kind of evidence?
  + But not all witnesses are unreliable - what if the eyewitness KNEW the accused?
* Indicia of reliability –

1. Was the suspect known to the W? (or a complete stranger)
2. Was the opportunity to see the suspect a fleeting glimpse or substantial?
3. What were the light and other physical conditions at the time of observation?
4. Was the description reduced to writing or reported in detail & in a timely fashion?
5. Is the description general and vague, or descriptive?
6. Was there a potential tainting or contamination of the identification?
7. Has the W described a distinguishing feature of the suspect?
8. Has the eyeW identification been confirmed in some particular way? (is it ok to consider this question? Is it too much like requiring corroboration?)

* Recommendations on obtaining identification evidence:
  + Police protocols for interviewing
  + Training for these protocols
  + Police should not give info/commentary to witnesses which may contaminate their account of the events
  + Crown should be educated on questioning techniques
  + Live line ups should:
    - Be conducted by a 'blind' investigator
    - Have more than 10 ppl who have the characteristics as reported by the witness
    - Anything the witness says should be recorded
  + Similar suggestions for photo line ups (present photos sequentially, not as a package, to prevent relative judgments)
  + At trial:
    - Jury should be instructed on the frailties of eyewitness identification (in particular that it has been a significant factor in wrongful convictions)
    - Admit expert evidence related to eyewitness identification
* An eyewitness' testimony which gets stronger with time could indicate post-event reconstruction
* But a jury is open to convict based on just one eyewitness testimony - despite the many problems with eyewitness testimony
* If an eyewitness lists many similar characteristics but has ONE dissimilar one, then there is NO identification without other evidence confirming ID
* Evidence of descriptions given by witnesses to police shortly after the crime are permissible - this is **an exception to the rule prohibiting prior consistent stmts**
* Prior out-of-court identification may also be admitted where the identifying witness is unable to identify the accused at trial, but can testify that he or she previously gave an accurate description or made an identification

# Types of Evidence - Real Evidence & Documents

* Real evidence = tangible things (*R v Wise*)
* Generally, real evidence needs to be authenticated by a *viva voce* W
  + Some exceptions – eg. Cdn statute law – balances truth-seeking function with efficiency
* Why are we concerned with documents being simply given to the trier of fact?
  + The item cannot speak for itself - who has touched the document? How did this document come into the hands of the law?
  + Allows the trier of fact to test the documentary evidence - its reliability, inferences that can be drawn from it etc...
* Many rules re: real evidence in the BCEA & CEA

Statutory Provisions: CEA, ss. 19-36, BCEA, ss. 25-52, 54-70

## *R. v. Bakker*: W-Five, “[Trail of a Sex Tourist: Canada’s Limited Success in Pursuing Pedophiles Abroad](http://www.ctv.ca/CTVNews/WFive/20090306/WFIVE_sex_tourism_090307/)” (March 7, 2009)

* Law punishing Cdns who travel overseas to have sex with minors came into effect in 1997, but as at 2009, only 3 offenders had been prosecuted.
* Canada has been doing very little to catch its sex offenders abroad (eg. John Wrenshall – US trying to extradite him..?)

Brian McConaghy, Founding Director of Ratanak International and former Forensic Scientist with the RCMP – evidentiary issues in real evidence

* Helped investigate Donald Bakker case
* Needed to show:
  + Age of children under 14
  + Location of assaults - was it outside Canada? Where?
  + Date of offence - were they post 2002?

Location

* Passport - visited Cambodia, Laos, Vietnam, Burma, Thailand, Korea, Philippines
* In some panels - could see a calendar (Cambodia - 2003), architecture, language of children
* Viewed NBC Dateline video -- it was the same building!
* Got to Cambodia. Negotiate with Cambodian police. -- but many of them are part owners of the brothels. Had to learn who to trust and who to avoid - got a search warrant.
* Had to show that the house they were in was the house in the video - needed 2 things –
  + Class characteristics: to show the house was like the house in the video AND
  + Accidental characteristics (features unique to that house): to show that the house WAS the house in the video
* Used pictures on the wall, structure, marks on the wall, wood rotting, marks on the ceiling

Time of offences

* Calendar - the page was on Jan/Feb 2003 - Then went to the distributor and printer company - these were printed in Dec 2002, distributed late 2002
  + KGB stmts taken in the Cdn embassy (ie Cdn soil) by the ambassador (commissioner of oaths) & admitted at trial

Age

* Medical expert identified children in video

**Notes from Perrin:**

* Bush administration funded tons of training - people in embassies trained to protect 3rd world citizens from American sex tourists
* Witness testimony can be remotely given - has not been done, but maybe in the future.
* What are the shortcomings of evidence law?
  + When talking about the std of BARD, Brian said it basically means you should make it ABSOLUTELY CERTAIN
* Some issues that came up:
  + Corroborating evidence (calendar - talked to multiple ppl, Identifying children - talked to multiple NGO's)
  + Having multiple sources may make evidence stronger, or some evidence may not be available (try to get a different source)
  + Class evidence + unique identification- but not enough - still need to explain how and why those marks got there - is it really unique? Also chronological - logical flow of how something, though it looks different, is still the same
  + Witness testimony - may be tainted with counseling
  + Confrontation clause in the US (must face your accuser) very different law around witnesses
  + Commissioner for oaths - ambassador taking stmts in the Cdn embassy
  + Age of the victims - very young - presumption in CEA of competence to testify
  + Information/evidence sharing btwn jurisdictions (see section in Maher Arar report about info sharing)
  + Translator needed btwn the child and jury - hard enough assessing non-verbal cues
* Evidence law imposes some restraints on investigators (costs, efficiencies, etc)
  + Eg. If investigator seizes a computer with child pornographic images - feels the need to look through every single image - because defence might say - why are these 100 images the only ones you are showing - etc.

# EXCLUSIONARY RULES

## Hearsay Basics

**Identifying Hearsay**

Definition: hearsay evidence is an out of court statement offered for the truth of its contents

Need to answer these questions:

1. What is the relevance of the evidence?
2. Identify witness
3. Identify declarant (if the W = the declarant, still hearsay & thus excluded)
4. Purpose of statement

Perrin’s test: would you still wish to admit this evidence even if you knew the stmt to be false? If so, then not hearsay

Subramaniam v. Public Prosecutor – identifying hearsay

**Facts:** Accused was charged with holding ammunition. Accused testified about the state of duress he was in - he was captured by terrorists who forced him to carry the ammunition. During his testimony, accused testified as to what the terrorists said - "I am a communist" ..."we will take you to our leader".. - the trial judge found this inadmissible as hearsay.

**Held:** This was not hearsay. Something is hearsay if the object of the evidence is to establish the truth of the stmt (trier of fact has to decide - is THIS STMT true?). Something is not hearsay if it is attempting to establish the fact that the stmt was made - ie part of the narrative (trier of fact has to decide - was this stmt MADE?).

**Rationale for Rule Against Hearsay**

* R v Blastland- on the 3 hearsay dangers (quoting *Teper v The Queen* (PC)):
  1. Not delivered on oath
  2. Declarant can’t be cross-examined for accuracy/truthfulness
  3. Can’t assess the testimonial factors
  4. Potentially unreliable
  5. Not the best evidence – should just try to get the declarant to testify
* Trier of fact would have to look at credibility of the W (ok) and then the credibility of the declarant
* Note exclusionary rule is CL. Civilian jurisdictions *do not* have a general exclusionary rule for hearsay evidence - trier of fact will just weigh the hearsay evidence
* A range of ways to deal with hearsay
  1. Admit all hearsay
  2. If the hearsay is reliable, relevant and necessary, and the hearsay dangers don't really exist (principled approach)
  3. Hearsay is generally inadmissible with narrow exceptions (old CL approach)
  4. Don't admit any hearsay
* Law in Canada right now is a hybrid between #2 & #3 - some principled approach and some old CL approach

## Hearsay - Traditional Exceptions

* Some common law & statutory exceptions to the rule of hearsay
* Should ask - how do these exceptions to the rule of hearsay address some of the rationales behind the exclusionary rule?

1. Admissions of a Party: *R v Terry* [1996] SCC
   * An admission made by a party in litigation is a well recognized exception to the hearsay rule.
2. Business Records: *R v Monkhouse*, [1988]
   * Admitting a record (receipt, bank stmt, etc) for the truth of its contents
   * Narrowly described. Requirements:
     1. Must be an original entry - no copies!
        + Originality in the electronic era is difficult
     2. Must be contemporaneous (issue is reliability)
     3. Must be in routine (every single time) course of business (issue is reliability - if someone does it every single time, can say that they did it that time)
     4. Is a record of business
     5. By a person who is since deceased (issue is necessity - if they were alive, would call them to court)
     6. By someone who has a duty to do the act and to record it
     7. By someone who has no motive to lie
3. Declarations against (pecuniary, proprietary, penal) interest: *R v Demeter* [1978] SCC; *R v O'Brien* [1978] SCC
   * Ie admissions/confessions
4. Dying declarations: *R v Schwartzenhauer* [1935] SCC
   * Must be:
     1. Declaration while dying
     2. By a person who is the subject of the trial (ie by the deceased in a murder trial)
     3. Declaration must be about the circumstances of the death
5. Prior Identification: *R v Starr* [2000] SCC
   * Prior stmts identifying/describing the accused are admissible if that declarant is able to testify at trial
   * Admissible if the declarant cannot identify the accused on the stand
6. Prior Testimony: *R v Hawkins* [1996] SCC
   * Prior testimony (under oath) is admissible
   * But only if the declarant is unable to attend the trial
7. Prior inconsistent statements: *R v B(KG)* [1993] SCC
   * Used when video stmt is taken, and the declarant is likely to recant
   * Needs to be under oath/solemn affirmation/declaration & the W is able to be cross examined at trial
   * Still is necessary even though the W is available to testify, because the evidence is unavailable
8. Public Documents: *R v Finestone* [1953] SCC
9. Ancient Documents: *Halfway River First Nation v British Columbia (Ministry of Forests)* 1999 BCCA
   * Ancient doc = more than 30 yrs old
   * Doc in proper custody (kept in a place where the doc might be found)
   * Presumed to have been signed, sealed, etc as purported
   * Is there any justification for allowing in a doc based on its age??
10. Res Gestae: *R v Ratten* [1971] Eng
    * *Gilbert* - SCC 1907
    * Based on experience, under certain external circumstances
      + Physical shock which creates
      + Stress of nervous excitement that
      + Removes control over your faculties
      + So that the things uttered and said are sincere
      + There is a brief period of time
      + When considerations of self interest are out the window
    * Ie. too shocked to lie - can't filter
11. State of mind, aka present intentions: *R v Starr* [2000] SCC
    * About what someone had going on in their mind, and they are now dead
    * Ie declarant is not available
12. Oral History - a special case: *Delgamuukw v BC* [1997] SCC
    * Multi-generational hearsay

### Ares v Venner - 1970s - category of CL exceptions remains open

**Issue:** Can the courts continue to identify new exceptions through CL? Because there was an English case saying courts will be reluctant to create more exceptions.. Will leave it to the legislature

**Held:**  category of CL exceptions remains OPEN

## Hearsay - The “Principled Approach” using Necessity & Reliability

* When reading these cases, keep track of
  + What does reliability & necessity mean?
  + When and where do these concepts come into play?
* Example of necessity: is the hearsay evidence reasonably necessary?
* What about reliability?
  + It’s all relative. Is it better to leave it to the trial judge?
  + Maybe should consider: intelligence and understanding, language used, lack of a motive to lie
* Also should consider countervailing factors -
  + Concerns of the accused
  + Quality of corroborating evidence
    - *Khan* talks about reliability as being relevant with respect to corroborating evidence
    - *Starr* will reject this approach
    - *Khelawon* will say *Starr* was wrong
* These principles informed the traditional exceptions, but those exceptions didn’t do enough

R. v. Khan [1990] SCC – intro into Principled Approach

**Facts:** 3 yr old at the Dr’s office. If mother wants to testify as to conversation with her child, that is clearly hearsay. Crown tried Res Gestae exception – but failed for lack of contemporaneousness and emotional intensity.

**Held:** Should hearsay rules be relaxed in the case of a child's statement?

Should have 2 general requirements: necessity & reliability.

* Here, nothing else was admissible → necessity
* Young child's stmt about a sexual offence might be MORE reliable because they are generally not able to concoct a deliberate untruth & fabricate tales of sexual perversion

Need to have more flexibility when it comes to children & sexual abuse.

**Notes:** Post Khan, not sure whether Khan just created a new exception, and if it did, how wide the exception was (ie. sexual abuse of young children, or young children in general?)

### R. v. Smith [1992] SCC – triumph of the principled approach

**Facts:** Accused charged with murdering K. K had made some calls to her mother the day of her murder - saying that the accused had left her at the hotel, that she needed a ride home, that the accused had come back for her, and that she was on her way home with the accused.

**Held:** Khan should be interpreted as doing away with the old categorical way of looking at hearsay - it is the triumph of the principled approach. (ie Khan did not just make a new exception. Evidence may be admissible under necessity & reliability)

Necessity = the alternative would be worse

* Ie. the relevant direct evidence is not available - should be given a flexible meaning
* Requiring it to be “necessary to the crown’s case” would create the absurdity where corroborated evidence (which is more reliable) is not admitted because it’s not “necessary” – note that Lamer CJ ties reliability & necessity together here.

Reliability is a function of the circumstances under which the statement was made - ie did the circumstances substantially negate the possibility that the declarant was lying or mistaken?

* Be careful here – don’t want trial judge to take over the jury’s role as trier of fact

**Conclusion:** 1st 2 calls met requirements for necessity & reliability. 3rd call met necessity but not reliability – the deceased had a motive to lie. 4th call not in dispute.

### R. v. Starr [2000] – Back to using traditional exceptions as starting point. Presence/absence of a traditional exception will determine admissibility of hearsay. Can use necessity & reliability to either include OR exclude evidence.

**Facts:** Deceased said to the W, his gf (sort of), that he was about to “go do an autopac scheme with” the accused. Crown theory – accused killed deceased because he was trying to leave the gang. Defence theory – the deceased was lying to the W because he was sitting in the car with another woman. Crown tried to use state of mind exception, but failed.

**Held:** Should not completely abolish the traditional exceptions; they do serve some purposes:

* + - Providing certainty & fostering judicial efficiency
    - Explanatory/educative function: instructing litigants & judges about relevant factors to consider when it comes to particular types of hearsay evidence & particular factual contexts (Use traditional exceptions as concrete examples of the application of the principle approach)
    - Instruct us on the types of situations that may produce hearsay that is the best evidence in the circumstances

Look at traditional exceptions first – if it fits in the exception then the evidence is presumptively admissible. If it fits but there are still issues with necessity & reliability, then can use them to exclude the ev. (Ie can use necessity and reliability to both **include and exclude** evidence)

**In a clear majority of cases, the presence or absence of a traditional exception will determine admissibility of hearsay**

Necessity: consider availability of the direct evidence and the quality of the evidence (can we get the same value from another source? If so, then maybe we don’t need it)

Reliability: 2 levels of reliability - threshold (is there enough reliability to allow the jury to view the ev) and ultimate (should this hearsay be believed and trusted?). The trial judge only looks to threshold, and so should not look at other evidence - ie presence/absence of corroborating ev, PISs, reputation

Conclusion for this case: Here, stmt was not reliable because deceased had reason to lie – his gf was angry that he was in a car with another woman - deceased followed her into an alley out of earshot of the woman.

### R v Mapara [2005] SCC: summary of SCC’s position post-Starr, pre-Khelawon

* Hearsay is presumptively inadmissible unless it falls under a traditional exception
* A hearsay exception can be challenged to determine whether it is supported by *indicia* of necessity and reliability required by the principled approach. The exception can be modified as necessary to bring it into compliance
* Can exclude evidence even if it falls into an exception, because the *indicia* of necessity and reliability are lacking in the particular circumstances (rare)
* If hearsay does not fall within an exception, it may still be admitted if *indicia* of reliability and necessity are established

R. v. Khelawon [2006] SCC – 3rd requirement added for hearsay. Traditional exceptions = conclusive. If you are going to challenge an exception, need to make a general case.

**Facts:** Retirement home manager (K) alleged to have attacked a senior. Crown tries to adduce 3 stmts.

1. S talks to the cook at the retirement home & tells her of an assault ("K beat me" - hearsay) and death threat ("I will kill you" – maybe hearsay).
2. Dr. was talking to S, but the cook was also present
3. S’s videotaped stmt to police (not under oath - but S knew he could be convicted if he lied)

S is unavailable to testify. S had been diagnosed with dementia & psychosis. However, PO talked to others in the home who spoke of similar events with K. Also Expert says S appears to be lucid in videotaped stmt. Dr says that S's injuries were possibly created by a fall, but were also consistent with an assault.

K alleges that the cook is acting out of spite - she was terminated before these allegations. Reliability concerns with both W & declarant (tainting by W)

**Held:**

Charron J (re)defines hearsay:

* 1. Out of court statement
  2. Offered for the truth of its contents
  3. No opportunity for a contemporaneous (at the time of the stmt) cross examination of the declarant.

Why this added requirement? The reason why we exclude hearsay is because of reliability & the s.7 right to a fair trial. We don’t want to hear evidence where if it lacks reliability. The adversarial system is based on the assumption that the best way to fairly test the reliability of testimony is to allow for cross examination. So, if there has been contemporaneous cross examination of the declarant, then reliability concerns are assuaged.

**Necessity:** founded on society's interest in getting at the truth - sometimes, even though cross examination is not possible, we don't want to lose the value of the evidence

**Reliability (usually met in 1 of 2 ways):**

* 1. Circumstances in which it was said make the stmt so trustworthy that cross-e would not add much (may as well not have this.. since you need to challenge the whole exception)
  2. The statement can be tested in other ways

Not helpful to look at ultimate/threshold reliability - should focus on hearsay dangers

* Charron J strikes out the corroborating evidence paragraphs in Starr (so now, judge IS permitted to consider confirming ev of the declarant’s stmt in determining reliability)
* Traditional exceptions? “**if the trial judge determines that the evidence falls within one of the traditional CL exceptions,** **this finding is conclusive** **and the evidence is ruled admissible, unless, in a rare case, the** **exception itself is challenged**” (strong language!)

**Current law as it stands:**

1. Is it hearsay? (3 requirements by Charron)
2. Does it fall within a traditional exception?

If so, this finding is conclusive, unless you can challenge the exception itself by using necessity & reliability – need to make a general case.

If not, then you can still go to a residual exception – the principled approach

**Issues with requiring a general argument against the traditional exception?**

* Charter rights are individual, not general
* Fair trial rights → defence counsel might have to exclude evidence that is a building block of the defence. If you can't challenge case by case, might be very difficult to challenge the exception

**Notes:**

Double hearsay is exponentially dangerous - steep hill to climb if you want to admit double hearsay

Some examples where (1) & (2) are met but (3) isn't, so it isn't hearsay:

* Testimony from a prior trial (but cross-examination by someone else is not the same as cross-examination by THIS defence counsel)
* Some crim code provisions allow someone to give a stmt under oath, videotaped, and cross-examined

Consequences of adding a 3rd requirement to finding hearsay?

Will allow things in without requiring necessity - could even use this "non-hearsay" when the declarant is available - could allow counsel to choose btwn an out of court stmt which has been cross examined and calling the declarant

**Summary of the Principled Approach Progression**

|  |  |  |
| --- | --- | --- |
|  | **Necessity is met when...** | **Reliability is met when...** |
| ***Khan***  Traditional exceptions based on necessity & reliability are not sufficient. | Nothing else is available. | A child speaks about sexual acts. |
| ***Smith***  The triumph of the principled approach. | The alternative is worse.  A requirement that it is necessary to the Crown’s case would result in absurdities. | The circumstances substantially negate the possibility that the declarant was lying or mistaken. |
| ***Starr***  Go to traditional exceptions first. Then can use necessity & reliability to include/exclude evidence. | Consider the availability of the direct evidence and the quality of the evidence (ie can we get the same value from another source?). | Trial J deals with threshold reliability (is there enough reliability to allow the jury to view the ev?). Ultimate reliability is left to the jury (should this hearsay be believed and trusted?). |
| ***Khelawon***  Traditional exceptions are conclusive unless the whole exception is challenged with necessity + reliability. | Society’s interest in getting at the truth requires the evidence to be heard. (?) | The circumstances of the stmt make it so trustworthy that cross-ex wouldn’t add much OR the stmt can be tested in other ways.  Overturns *Starr*’s threshold vs ultimate distinction. Hearsay dangers more important. |

## Opinion & Expert Evidence

General exclusionary rule for opinion evidence – basis? They are conclusions/inferences from facts.. Which is the job of the trier of fact - ie. it usurps the role of the trier of fact.

2 exceptions:

* 1. Permissible lay opinion: Matter is within common knowledge (eg. witness may testify as to age, speed, physical/emotional state)
  2. Qualified expert evidence: Matter is based on multiple perceptions that can best be communicated in a succinct way (ie. trier of fact requires assistance to understand the significance of the evidence or to determine what inferences can be properly made)
* Expert evidence was largely viewed as helpful to the jury.. Until Carl Smith (in Canada) + other high profile wrongful convictions in other countries
* Old rule (strict): cannot ask the opinion of a lay person or an expert on the **"ultimate issue"** of the trial
  + Concern: the only question the jury has to decide is whether or not they believe the expert. Don't want to take the case away from the jury.
  + But this rule doesn't exist anymore… how do we deal with this?
    - Cross examination - the primary thing we rely on to test expert evidence (the same thing we use to test reliability and credibility of other witnesses!)
    - There is a continuum existing btwn something completely incidental and the ultimate issue.. Should be more open towards allowing the jury to hear expert evidence that doesn't bear as heavily on the ultimate issue
* Other concerns of using expert ev:
  + Pitting experts against each other
  + Experts become adversarial in nature (become tainted through affiliation with the party that calls them.. Biases.. Conflicts of interest)
  + More/less experts may distort the process
* Remedies by other jurisdictions: Court appointed expert, parties agreeing on one expert, or disclosure of experts you have consulted who doesn't give you the right opinion..
* Canada: use a rigid test in allowing expert evidence (based on necessity + reliability)
* Sometimes hypothetical facts are given to the expert, but could be problematic if:
  + There is blending of the facts/opinion by the expert
  + Not all the facts were established - then the basis of the opinion cannot be relied on at all

R. v. Graat [1982] SCC – lay opinion is admissible when it is something that a lay person can speak to

**Facts:** PO were testifying as to a drunk driving charge. They witnessed G driving sporadically, stumbling, & smelled the alcohol on him. They also testified that G seemed to be impaired to drive by alcohol consumption (opinion!).

**Held:** Lay opinion admissible when it is something that a lay person can speak to.

* Lay opinion that is **part of ordinary human experience & knowledge** and is part of the narrative of the facts, & is valuable for the jury. (Jury can question or confront the ev, won’t be overwhelmed by the opinion. Also cross examination can be a safeguard.)
* Subjects that a witness can give a lay opinion on:
  + Apparent age
  + Identification of handwriting
  + Condition of a person - eg death or illness
  + Emotional state - eg. angry, affectionate
  + Condition of things
  + Value
  + Estimates of speed conditions
* Rejected counsel’s argument that opinion ev by non-experts is only admissible when necessary.
* Sometimes, distinction btwn fact & opinion is fuzzy. Ws sometimes need to provide opinion with fact because it is too difficult to parse out the exact facts that lead to an opinion.
* Excluding all lay opinion could also hurt the accused. Don’t want to exclude building blocks of a defence.
* **Trial judge has a large amt of** **discretion** when deciding whether or not to admit opinion evidence PLUS the discretionary probative vs prejudicial power to exclude

**Issues with Graat:**

* Lay opinion is allowed, but ignores opinion of the junior officer. Practically speaking, the "lay opinion" of the senior officer gets elevated a bit. This could be a problem if trial Js recognize these more *experienced* lay Ws

**Cautions:**

* Tendency to prefer PO’s evidence over other people's opinion evidence - they are not an "expert"
* The expert in lay witness clothes – when a party wants W to testify as to qualifications. Not exactly oath helping but close… Doesn't go to the credibility but goes to the experience… Trier of fact could end up giving their evidence undue weight
* Parties may be able to call a "lay person" under the categories created by *Graat*.. without having to go through the qualifications/limitations of admitting the expert opinion evidence

R. v. Mohan [1994] SCC - test for expert evidence admissibility – back to necessity + reliability

**Facts:** paediatrician charged with sexual assault. Defence wanted to admit expert ev (psychiatrist testifying that only a limited and unusual group of individuals would commit those offences, and M did not fall into that group). Trial judge - inadmissible. Ont CA – admissible.

**Held:**

*Mohan* test for admitting expert ev – 4 requirements:

1. **Relevance**: Q of law; probative vs prejudicial; value vs cost; reliability vs effect (especially this last one – “Expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact‑finding process, or will confuse the jury”)
2. **Necessity in assisting the trier of fact**: does it provide information which is likely to be outside the experience and knowledge of a judge/jury? Necessity should not be judged by too strict a standard.

Possibility of ev overwhelming & distracting the jury can often be offset by instructions

Assess this in the light of its potential to distort the fact finding process

The closer the ev is to an ultimate issue, the stricter in applying necessity

1. **Absence of an exclusionary rule**
2. **Properly qualified expert**: expert must have acquired relevant special or peculiar knowledge through study or experience (is this reliability?)

**Notes:**

Dangers of expert evidence:

* + Distortion of the truth finding process
  + Evidence cloaked under the mystique of science + a W with some impressive credentials could confuse and not help the jury → viewed as infallible & given more weight than it deserves
  + Then, jury could just get tired of trying to figure out the evidence and defer to the expert.. Thereby relinquishing their constitutional duty. (but expert usually doesn’t even get facts)

Will need to alleviate concerns by limiting instructions + trial judge's discretion to exclude based on probative < prejudicial

Mohan test boils down to necessity & reliability - Relevance + absence of an exclusionary rule are not really part of Mohan.. They apply to everything!

* Result of necessity analysis? Possible to exclude relevant, properly qualified expert evidence. Why? Because of the dangers of expert ev & don't want the jury to simply become a referee

***R v Melaragni***– test of reliability for new scientific techniques or new body of scientific knowledge:

1. Is the ev likely to assist the jury in its fact finding or is it likely to confuse and confound the jury?
2. Is the jury likely to be overwhelmed by the mystic infallibility of the ev or will the jury be able to keep an open mind & objectively assess the worth of the ev?

**Post Mohan:**

***Trochym 2007 SCC***

In legal terms, “reliability” is a measure of:

* 1. the extent to which expert methods and techniques can do what they purport to do;
  2. the capacity of an individual expert witness to apply those methods and techniques; and
  3. whether an appropriately qualified expert witness has properly applied the appropriate methods and techniques in the particular case.

And these 3 things are considered in the necessity analysis. The 2nd is also applicable to the qualified expert requirement.

***Abbey,*2009 ONCA**

**Step 1: “Preconditions of Admissibility”**

*Party proffering evidence must demonstrate existence of certain preconditions*

1)   The proposed opinion must relate to a **subject matter** that is properly the subject of expert opinion evidence;

2)   The witness must be **qualified** to give the opinion;

3)   The proposed opinion must not run afoul of any **exclusionary rule** apart entirely from the expert opinion rule; **AND**

4)   The proposed opinion must be logically **relevant** to a material issue

Evidence tends, as a matter of human experience and logic, to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence

*Note:*Doherty J.A. cites the undisputed *Mohan* test for these preconditions, but has replaced the first one listed above with “Necessity in Assisting the Trier of Fact”. Doherty moves ‘necessity’ evaluation to the gatekeeping step.

**Step 2: “Gatekeeper” Component**

*Judicial discretion – cost/benefit analysis where benefit must be greater on balance*

**Benefit:**Evidence must be sufficiently probative to justify admission

Consider the probative potential and the significance of the issue to which evidence is directed

Potential probative value – look to **reliability** of evidence!

*Trochym* 2007 SCC

(a) extent to which methods work;

(b) capacity of expert to apply methods properly;

(c) whether, in this case, proper methods actually applied

**Cost:**Described by Binnie J. as: consumption of time, prejudice and confusion

Concerns of ToF role being usurped by deferring to expert opinion

Necessity in assisting the trier of fact is a key cost/benefit factor – if entirely unnecessary, then discretion guided to exclude b/c no benefit and high cost.

**Scope of examining or cross-examining an expert witness**

* Counsel calling the expert witness may give the expert facts which are not disputed. If the facts are in dispute, then the expert has to base his opinion on hypothetical facts
* Common to use a peer reviewed paper/work to cross examine
  + Only if the paper is authoritative and the witness agrees that the paper is authoritative, and knows of the paper (*R v Marquard*, note dissent preferred a more flexible approach so that the expert could not avoid cross-examination only by refusing to acknowledge a paper)
  + Really, should just disclose conflicting evidence if the expert is supposed to be independent and not adversarial

**Restrictions on Expert Evidence**

* England – some new rules in civil & crim procedures (no matter who retains the expert, the expert’s role is to help the court, and expert’s ev must be independent and uninfluenced by other considerations.
* Canada – obligation to tell the truth like other Ws. (some cases adopt English view)
  + Civil: eg. Ont *Evidence Act* –pre-trial disclosure of the expert report required if party intends to rely on it)
  + Criminal: both parties must disclose, but Crown required to disclose earlier. (exception to the rule that defence doesn’t have disclosure obligs)
* Some jurisdictions allow judge to appoint an expert to help the court – but this rarely happens

### JLJ [2000] SCC - trial judge, as gatekeeper, needs to scrutinize the evidence to exclude junk science & protect the role of the trier of fact

## Professor Emma Cunliffe, “The Reliability Challenge in Expert Evidence”

* Legal reliability - how can judges exercise their gate-keeping role (judge is the one that stands btwn the expert and the jury - what they can say and how they can say it)
* From *Abbey* (2009) forward: have encouraged judges to be increasingly robust in their gate keeping role - ie more intervenist in looking at expert
* Eg. *Smith* case: Charles Smith was tasked with many children autopsies where the death was suspicious- so by the time Smith was involved, there was already a suspicion of criminal activity in relation to the death
  + Smith had no training in forensics or in expert testimony & did some shoddy work
  + His testimony is said to have caused 14 wrongful convictions of parents
* Cunliffe studied why our trial system was so vulnerable to an unqualified expert

**Reliability & Mohan, 1994 SCC**

* The 4 criteria set out in *Mohan* as per Sopinka J does not include reliability!
  + Recall: Relevance, necessity, absence of an exclusionary rule, qualified expert
  + But reliability is mentioned in relevance: Ev is not relevant if it distorts the fact finding process → so trial J should apply a basic threshold reliability test to novel science – as per *Meleragni*
  + And further – “expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.”
* Problems with *Mohan*’s view?
* Uncertainty over whether reliability was needed at all in areas other than novel scientific evidence
* It created a 2 tier test - new ev was subjected to a stringent inquiry whereas established ev was not
* Also, novel scientific evidence isn't defined in Mohan
  + - Ie. Could be a new technique or novel application of an established technique or established technique that hadn't been to court yet

**Reliability & Trochym, 2007 SCC**

* + Reliability is always relevant, whether it is novel or not – it is part of the *Mohan* test
  + Trial judge asks: is there a fair challenge to the expert evidence? If so, then should seriously look at admissibility
  + In legal terms, “reliability” is a measure of:
  1. the extent to which expert methods and techniques can do what they purport to do;
  2. the capacity of an individual expert witness to apply those methods and techniques; and
  3. whether an appropriately qualified expert witness has properly applied the appropriate methods and techniques in the particular case.
* But where does reliability fit in in the *Mohan* factors?
  + Necessity - needed because of the technical information; needed because in the absence of the expert evidence, the trier of fact would arrive at a wrong conclusion; needed because the average person could be misled
    - Reliability seeps into this - if not reliable, then can't serve these purposes
  + Qualifications - the capacity of the expert (#2 in the measure of reliability)

**Application in *Abbey*, 2009 ONCA**

* + Expert = sociologist
  + Evidence = tear drop tattoo meant one of 3 things (one being that the gang member had killed someone, other 2 couldn't have applied)
  + Trial judge applied *R v J.-L.J* & *Daubert v Merrell Dow* - can admit expert evidence where It has been peer reviewed, the error rates are known, and has been tested
  + SCC: Trial J used the wrong yard stick. Need to use a measurement of reliability from the field where the expert evidence comes from
  + The party offering expert evidence must prove admissibility on the balance of probabilities.
  + **Step 1:** In every case, a trial judge should delineate the scope of the admissible opinion, including the terminology which an expert may or may not use in communicating that opinion. This may include providing context which will assist the trier of fact in assessing the meaning of other evidence in the case.
  + **Step 2:** The party tendering the evidence must demonstrate that the evidence meets four preconditions to admissibility:
    1. the opinion must relate to a subject that is properly the subject of expert opinion (replaces necessity);
    2. the witness must be qualified to give that opinion;
    3. the opinion must not contravene another exclusionary rule; and
    4. the opinion must have logical relevance to a material issue at trial (i.e. it must make a fact in issue more likely than it would be without that evidence). At this stage, probative value should not be considered.
* **Step 3:** The trial J must decide whether the benefits of the evidence outweigh its potential harms in the specific case (cost-benefit analysis):
  + - Benefits include the probative potential of the ev and the significance of the issue which the ev is for. This includes a consideration of reliability, broadly construed to include the subject matter of the evidence, the methodology used by the expert, the expert’s own expertise and the impartiality and objectivity of the expert.
    - Costs include “the consumption of time, prejudice and confusion”.
    - “Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence. … [T]he trial judge as ‘gatekeeper’ must go beyond truisms about the risks inherent in expert evidence and come to grips with those risks as they apply to the particular circumstances of the individual case.” [Abbey, para 90 and 92.]
    - The cost-benefit analysis brings necessity into the limelight. In considering necessity, the trial judge should also consider whether other procedures in the trial (eg jury instruction) provide the jury with more tools for fact finding.
* Trial judges should think about expert evidence on a case by case basis - should not just take the view that ALL expert evidence is dangerous
* Abbey picks up the fundamentals from Mohan and the additions from Trochym
* Note that on the exam: use *Abbey*! But be cautious in real life.. Leave to appeal to the SCC was denied but it doesn’t make it binding here.. judges are likely to follow *Abbey*’s expansion of *Mohan*

**Folbigg case study**

* Kathleen Folbigg had 4 children. Each died consecutively over a decade.
* 1st - SIDS
* 2nd - epilepsy
* 3rd - SIDS
* 4th - at 19 months old - smothering
  + Found myocarditis (swelling of the heart) - pathologist said if there wasn't prior deaths, may have attributed it to myocarditis
* Pathologists believe that 12months and younger, it is impossible to distinguish between smothering and SIDS - past this it may be possible to distinguish
* Also SIDS past 12 months is rare
* Diaries -- some passages where she appeared to feel responsible or to take the blame
* Convicted on all counts (1 manslaughter, 3 murder, 1 assault (causing the epilepsy))
* Folbigg's case is indistinguishable from other wrongful conviction cases related to expert evidence on pediatric pathology
* 3 important aspects of the evidence

1. Could the jury think about all 4 deaths together?
2. Pediatric association statement
3. What is SIDS and when is it proper to use SIDS as a diagnosis?

* Issues of legal reliability that arises:
  + How do you deal with what the expert (or field) doesn't know? (prosecution appears to push it beyond the expert’s/field’s limits)
  + Expert testimony is used to undermine/demean their qualification
  + How can lawyers know what the expert is purporting to know?
  + How do we find a hierarchy and what value do we attach to it?
  + What do we trust and how do we interpret expert knowledge
* How do we deal with these issues?
  + Cross examination - done well (and directed to the substantive testimony instead of directed towards undermining the expert), can help the jury understand the testimony and its limits
  + And don’t forget that experts have their job, and that we have our job to uphold the principles of law - make sure that the jury understands the burden of proof required, etc

## Statements by Accused Persons

**Introduction**

An accused person's confession made to a person in authority is inadmissible unless the Crown can prove BARD that the stmt was made voluntarily

**Rationale of the confessions rule:**

* One of the oldest CL rules - created when torture to obtain confessions was the norm. Back then, the rationale was based in reliability.
* Now, Canada doesn’t engage in torture. Yet, even when confessions can be corroborated (reliable!)- we may still want to exclude them. Why?
* Bringing in higher order of values regarding administration of justice
* Protecting people's rights
* Truth seeking function can't be sought at all costs
* It matters how we get the evidence (not just whether it is true)

**The Confessions rule within the Hearsay rule**

A confession by the accused would be hearsay (admitted for the truth of its contents), but there is a traditional exception to the hearsay rule: party admissions. Then the CL confessions rule is an exception to this exception.

1. Confession is relevant? Presumptively admissible
2. Confession = hearsay → presumptively inadmissible
3. Traditional exception for party admissions- presumptively admissible and is conclusive - unless you challenge the exception in general (*Khelawon*)
4. Exception - CL confession rule - inadmissible if accused makes a stmt to a person in authority, unless they are proven beyond a reasonable doubt to be voluntary

**Traditional view** – 3 ways to argue the confessions rule:

* + - Inducements
    - Operating mind
    - Oppression

**Principled/consolidated approach** developed in *Oickle* - boils down to **voluntariness**

* Need to say whether the person who heard the stmt is a person in authority
  + If yes - then
    - Crown proves BARD the stmt is voluntary → admissible
    - Crown fails to prove voluntariness BARD → inadmissible
  + If no - then exception doesn’t apply and we go back to presumptively admissible
* Remember these are all presumptively admissible… can also still bring Charter challenges etc

**Charter based rights & freedoms that the confessions rule is concerned with**

* + Security of the person (s. 7)
  + Right to remain silence
  + Right to counsel
  + Right to not self-incriminate

**Persons in Authority**

* *R v Grandinetti* [2005] - "a person in authority is generally someone engaged in the arrest, detention, interrogation or prosecution of an accused. Absent unusual circumstances, an undercover officer is not usually viewed, from an accused's perspective, as a person in authority"
  + Could say that there is an objective (engaged in the arrest…) + subjective (viewed from the accused) test
  + Subjective test still has a bit of objectiveness imported into it (must be a reasonable view)
* What about non-police officers?
  + Prison guard - yes - *Hodgson* case - automatically a person of authority solely because of their status
  + Complainant - *Downey* - person of auth only if the accused believed that the victim had the power to affect the criminal process (In Cdn law, the accused has influence, but no power in the process)
  + Social worker - if the person has a legal role/duty to report abuse - *Sweryda* (1987 ABCA) - social worker would be a person in the position of authority
  + Family of Complainant - *Wells* (1998, SCC) held that there should have been a voir dire to determine whether the parents of the complainants were persons in authority for the purposes of the conf rule
  + Psychiatrist - *Wilband* - authority if they say that they can persuade the Crown to do something
  + Parent - not persons of authority - even if they hold out sanctions against the child that are not penal (unless the child believes that the parent can affect the crim process)
* Very fact specific → high degree of deference for person of authority + voluntariness

### R. v. Rothman [1981] SCC – who is a person in authority? (not an undercover cop)

**Facts:** Constable spoke to R in undercover clothes while R was in a cell. R told Constable about his plan to sell the drugs found in his apt, how much he would have sold them for, etc.

**Held:** Constable was not a person in authority because the test is subjective - did the accused think that the constable had any power over him? No, the accused did not, so confessions rule does not apply & the ev is admissible.

Note: the accused did suspect the constable of being a “nark” – subjective test may be high.

Since there is no person in authority, the confessions rule doesn't apply and the evidence is admissible.

**Etsey J Dissent:** inadmissible because the police subverted the accused's express decision not to speak to them (undermined right to remain silent)

* + To be voluntary, accused must consciously have volition - not just in articulating the words, but in being aware of the circumstances in which the stmt is made
  + He had already explicitly refused to give a stmt to the police - then the police deliberately circumvented the accused's exercise of his legal right by using trickery
  + Rationale for the confessions rule has to include that the state has to observe basic rules, regardless of whether the stmt is true or not

**Lamer J concurring with the result but disagreeing with the reasons:**

* + There are situations in which a stmt should be excluded if what was said or done by the person in authority (while eliciting the stmt) would bring the administration of justice into disrepute (less concerned about whether the person is one in authority)
  + There has to be a clear nexus btwn obtaining the stmt and the conduct, and the conduct must be so shocking that it would bring the criminal justice system into disrepute (this case is pre-Charter!)
  + Ie. police may use trickery (some criminals are sophisticated), but should be careful.
  + In determining whether the conduct is shocking enough, judge should consider:
    - Circumstances of the proceedings
    - Manner in which the stmt was obtained
    - Degree to which there was a breech of social values
    - Seriousness of the charge
    - The effect the exclusion would have on the result of the proceedings

**Notes:**

* Privilege against self-incrimination only means that the accused, as a witness, has a right not to answer questions which may incriminate him (concerned with testimonial compulsion and not compulsion generally)
* Basis for requirement of a person in authority? A person in authority raises concerns of reliability + fairness.
* Later cases say - "authority" means authority over the criminal process

### Mr. Biggs scenario – example of something not falling under the confessions rule, but has significant reliability concerns

* Undercover cops pretend to be gang members and try to extract info from the accused (will protect you, will make tons of money, etc.)
* These pretend-gang members are not "persons of authority" - so evidence is presumptively admissible under the “party admissions” exception to the hearsay rule
* But clearly there are reliability concerns…
* Could either:
  + Use *Khelawon* to attack this exception – in order to enhance reliability, need to modify/update, or
  + Use the residuary discretion - probative value of this Mr. Biggs confession is much lower than the prejudicial effect (Except that the prejudicial effect must be legal prejudice - ie an improper inference could be made from the evidence)
* No SCC case decided on Mr. Biggs… with the right case, expert evidence, could probably challenge the Mr. Biggs rule

**Voluntariness – Inducements**

* The fact that an inducement is true or that the police acted with good intentions does not matter - it doesn’t make the stmt more voluntary

**Findings of involuntariness:**

* *R v LeBlanc* (1972) BCCA- accused charged with theft, testified he was told by police - "until we get some sort of answers where the stuff come from.. We just can't get no bail"
  + Classic inducement
  + **Nexus** - the inducement needs to be held out by the person in authority
  + **Temporal connection** btwn stmt + inducement matters
    - But Crown’s has to prove BARD voluntariness, so.. maybe it doesn’t matter that much
* *R v Letendre* (1979) BCCA - charged with stolen stereo equipment, denied it; one officer said "well I'm getting mad" other officer says he doesn't like to see his partner get mad. Accused got scared and said "I stole the stuff myself ok"
  + Quid pro quo = threat of harm
* *R v SSL* (1999) (Alta CA) - PO: the only way you can better is by telling me the truth - you're not on the right track

**Findings of voluntariness:**

* *R v Hayes* (1982) (Alta CA) - "It wouldn't be very good if you're telling us a story now, and it turns out that you're lying"
  + Borderline - greater deference to the trial judge
    - Trial judge has more expertise
    - May see videotaped confessions
    - Trial judge may have more experience with those police officers
* *R v Reyat* (1993) BCCA
  + Mentioned position in the community & kids – possible threat of public embarrassment
  + But these are all implicit
  + Court found this was a voluntary stmt - std of appellate review is very deferential – requires a palpable and overriding error

Ibrahim v. The King [1914] - Inducements

**Facts:** An officer was murdered in the army. 15 min after the officer was shot - a commander saw Private Ibrahim in shackles and asked why he did it. Ibrahim says he killed the officer

**Held:** There was no inducement here – the stmt is admissible.

Rule: Confessions by the accused are inadmissible unless Crown shows it was voluntary in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage **exercised or held out** by a person in authority.

**Note:** Inducement (fear of prejudice *or* hope of advantage) - must be held out by the person in authority

If arguing inducement, need to identify the *quid pro quo* –the thing that the accused is given in exchange for the confession.

**Voluntariness – Operating Mind**

Ward v. The Queen – Operating Mind

**Facts:** Car crash - man + woman in car. Man wakes up from being knocked unconscious - police get statement from him. The stmt was excluded by the trial judge because the man was in a state of shock and not fully conscious. Concern about a lack of reliability.

**Held:** Not admissible. Need an operating mind for reliability and for the declarant to be able to choose, voluntarily, to make the stmt.

Now with the right to silence → even stronger case for the operating mind

### R v Whittle [1994] SCC – an operating mind requires voluntariness. Not about whether it is a good choice to speak

* The operating mind doctrine requires that the accused "possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused."
* "…no inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his or her interest."
* Seems like a low standard - just need to be voluntarily speaking to police

**Voluntariness – Oppression**

* Oppression is about voluntariness but also about police conduct.
* Policy: should we punish police directly instead and still admit ev? Courts say no – the best way to get police to behave properly is by throwing out the ev.

R. v. Serack [1974] BCSC

**Facts:** From7:30am-3:30pm - accused's clothing was taken for testing, just given a blanket. Accused is questioned - and confesses.

**Held:** No deliberate breach or intention from police to create an oppressive environment. However, stmt not admissible because environment of oppression was created. Power of imbalance here.

**Voluntariness – Consolidated Approach**

* *Oickle*: absence of oppression matters when it comes to voluntariness
* *Hobbins v The Queen* [1982] SCC - Laskin - "an atmosphere of oppression may be created in the circumstances surrounding the taking of a statement"
  + "an accused's own timidity or subjective fear of the police will not avail to avoid the admissibility of a stmt unless there are external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness of the stmt…. It of course does not matter that the police did not commit any illegality"
    - Pulls out subjectivity and unreasonable fear → what about someone who has had terrible experience with the police?
    - Might not still reflect good law - *Oickle* allows us to use more subjective fear factors

### R. v. Oickle [2000] SCC - Consolidated approach to confessions rule

**Facts:** Oickle is a volunteer firefighter charged with arson. 6:30pm - confesses to 1st fire.. Then confesses to 7. 1:00 am - get a written stmt, returned to cell at 2:45am. For extra assurance, PO get re-enactment at 6am.

**Held:** SCC found this stmt voluntary. Questioning was persistent and accusatorial - but never hostile, aggressive, or intimidating.

**Notes on False confessions:**

* + Voluntary confessions are *ex hypothesi* not the result of police interrogation (not really true..)
  + Need to be sensitive to the particularities to the individual suspect – some are especially vulnerable to giving a false confession because of their background, characteristics, etc
  + False confessions are rarely the product of proper police techniques; **“in most cases, a false confession takes prolonged questioning, intense pressure, strong incentives. … Only under the rarest of circumstances do an interrogator’s ploys persuade an innocent suspect that he is in fact guilty & has been caught“ ….** This seems to indicate a high standard
  + Twin goals of the confessions rule: protecting rights of the accused without unduly limiting society’s need to investigate & solve crimes.

**The contemporary confessions rule:**

* Inducement & oppression can operate together to exclude confessions. Trial Js must be alert to the entire circumstances surrounding the confession
* Doctrines of oppression & inducements are concerned with reliability
* Operating mind doctrine demonstrates that the rule also extends to protect a broader conception of voluntariness, focusing on the accused’s rights and fairness in the criminal process
* Analysis under the confessions rule must be a contextual one – has to make sense – trial J has to understand the circumstances of the confession, including oppression (or lack thereof), inducements/threats, operating mind, & police trickery
* High level of deference to the trial judge

**Summary:**

* Was the will of the accused overborne? Look at all of the circumstance to determine voluntariness.
* Can have involuntariness due to operating mind, inducement, or oppression, OR any combination of them - can be combined to operate together

**Notes:**

Police are allowed to downplay the moral consequences of the conduct, but not legal consequences & trickery is allowed.. to an extent.

Para 42: Several themes emerge… sensitive to the particularities of the suspect..

Courts will want to use objective subjective test - objective analysis but pay attn to subjective characteristics. Entirely subjective fears will probably not work

Did Oickle change the law? If so, how?

## The “Confessions Rule” and the *Charter*

### R v Spencer [2007] SCC – Applying Oickle. Comparing Oickle to Ibrahim.

**Facts:** Some bank robberies. Arrest Spencer & his gf. Spencer tries to arrange a deal to keep his gf out of the investigation. Police say no but if you “clear the slate” then you can talk to her.

Trial judge found - voluntary - it was an inducement but it was a lesser inducement which wouldn't render the stmt involuntary. Need to consider whether the 3rd part whom the inducement is held out for has a strong enough relationship with the accused to make the stmt involuntary. Even if Spencer suggests the arrangement, this doesn’t make the inducement void.

**Held:** Voluntary stmt. High deference given to the trial judge (probably highest level of deference given to trial judges on these rulings).

**Majority – Deschamps:**

The only issue is whether the trial judge had the correct law (and if there are no palpable and overriding errors of fact).

Significance of Oickle? Recast the law relating to the voluntariness of confessions.

Oickle gave us 2 possible inquiries:

1. Inducement, oppression, & operating mind factors should be considered together & not divorced from the rest of the confessions rule – goes to voluntariness & reliability
2. Use of police trickery to obtain a confession is a distinct inquiry – specific objective of maintaining the integrity of the criminal justice system.

Conflict btwn Ibrahim & Oickle → Oickle prevails.

A quid pro quo may establish the existence of a threat or promise, but it is the strength of that quid pro quo that is important in the contextual analysis

Search for inducement is now the starting point for the voluntariness approach - not the end point. Can't just say that there is an inducement and therefore the evidence should be tossed out

When alone or with other factors, the inducement is enough to render the stmt involuntary, then ev is inadmissible

Recall the standard is reasonable doubt about voluntariness - Was there a reasonable doubt that your will was overborne

From Oickle: police often offer some inducement to get a confession, question is whether the accused's will was overborne

**Dissent – Fish:**

Oickle affirmed Abrahim & didn’t change the law

Std of will being overborn - that comes from a case on operating mind (*Paternak*)

Applying this test to the whole voluntariness thing is an error of law

Deschamps says that Oickle was used in the judgment all over the place. But trial judge says Paternak and uses the will being overborne test

Trial judge doesn’t see an inducement where the constable said that he could speak to Crown (while talking about the gf)

**Note:** the lesser inducement is followed almost immediately by the confession.

Under Abrahim, this would be inducement

Under Oickle → need to look at the other factors - was there oppression? How strong was the relationship btwn the gf & accused? How long had the interrogation gone on for?

Failure to consider relevant factors could lead to appeals now (post-Oickle)

Looking at the factors, decide whether the factor supports or undermines voluntariness

### R v Singh 2007 SCC – s.7 + the Confessions rule

**Facts:** Singh speaks to a lawyer, and repeatedly asserts his right to silence (18xs). Then Singh admits to some things – not a confession, but enough to convict based on admissions (admissions subject to the same voluntariness analysis as confessions). Does this make it more likely it was voluntary/involuntary?

* + Voluntary: Singh knew his rights
  + Involuntary: despite attempts to stand against the interrogator, you start to believe that resistance is futile. The questioning will go on and on until there is a confession

Defence counsel admits the stmt is voluntary at CL (maybe a mistake), but say - this is a violation of s.7 rights to remain silent. Right includes the right to stop being asked questions, & a waiver should be required when waiving the right to silence.

**Held:**

3 ways to view this:

1. CL confessions rule and s. 7 is the same right - If the confession is admissible by CL and passes the voluntariness test, then that means no s.7 rights have been infringed
2. CL & S. 7 overlap - You may have voluntariness but s. 7 rights may still be infringed
3. CL confessions rule encompasses s. 7 right to silence. They are largely the same
   * + "functionally equivalent" in a specific context - when someone is detained
     + Proving something was voluntary BARD means the s. 7 right has not been infringed on a bop
     + Oickle was made with the Charter in mind

**Majority:** 3rd view.

Functionally equivalent when it comes to detention - if you can prove voluntariness BARD under CL, then there is no violation of s. 7 right to remain silent (Ie as soon as voluntariness is met - don't need to go through s.7)

Voluntariness under CL is better for the accused because:

* Burdens of proof - CL gives crown the burden BARD; Charter gives accused proof on a BOP
* Automatically excluded if CL; still need to argue exclusion if Charter

Would Rothman be decided differently post-Singh?

* + - * CL is predicated on the person being a person in authority
      * Para 46 of Singh - referring to *Hebert* - nothing in the rule to prohibit the questioning of the suspect after receiving the right to retain counsel. If the police are not posing as undercover officers, then there is no violation of the charter. Undercover operations prior to detention - no s. 7. Undercover operations after detention - will offend s. 7. Cannot really assert right to remain silent after detention if you don't know that the person is acting for the state.

**Dissent – Fish:**

Proper diagram is the second one. Some overlap btwn CL and s. 7 charter

* + Voluntariness from Oickle
  + s. 7 - *Hebert*: Accused must make a free and meaningful choice as to whether to speak to the authorities or to remain silent

***Post Singh:*** if a stmt is made under detention + to a person in authority (known to the accused), then if the stmt is found voluntary, there is no violation of s. 7

If stmt is made under detention + to a person in authority (not known to the accused), then s. 7 residual protection may apply.

## *Report on the Prevention of Miscarriages of Justice*: Chapter 6 (False Confessions) and Chapter 7 (In-Custody Informers)

**False confessions**

* Why does the phenomenon occur?
  + Person in interrogation wants to get out of the situation
* What do you believe would be the best approach to address this problem?
  + Strict guidelines
  + Video tape - Relates to hearsay approach - allows jury to assess the declarant
  + Don't allow police to present fabricated evidence or to continue questioning after continual resistance
  + Jury charges on false confessions
* Oickle: proper police conduct would not result in false confessions
  + But it also depends on the circumstances of the accused
  + Motive to lie may still be there even if there is proper police conduct
  + Really the concern is with reliability

**In-custody informers**

* Why does the phenomenon occur? Self-interest – finding favour with the Crown
  1. Relevance → admissible
  2. Hearsay → presumed inadmissible
  3. Traditional exception of party admissions (*Khelawon*)- presumed admissible (conclusive!)
  4. Is the person a person of authority? No → No analysis of voluntariness & the stmt is admissible
     + Then can we challenge the exception? - need to challenge the principle (the whole rule)
       - MAYBE you could say - there is a clearly defined category of Ws here – in custody informers – who undermine the exception. Not challenging the entire rule, but a large part of it.
* The reason this evidence is unreliable is not because of voluntariness → Would have to challenge the traditional exception in hearsay of declarations against self interest - bringing the rule into compliance, not striking down the entire rule
  + - * How would you argue that Khelawon should be reformed? How should the law be?
  + Blanket exclusionary rule?
    - Advantages: Get rid of bad evidence
    - Disadvantages: could be all that the Crown has to work with
* Could require corroboration
* A vetrovec warning to juries (some case law supporting this)
* Follow in the false confessions rule footsteps – require an analysis of whether there was inducement of the informer
* Note: could still exclude on prejudicial vs probative value

## Character & Similar Fact Evidence

**Overview – Character**

* Differentiate btwn habit & character (always late vs tardy)
* Why is character evidence dangerous? Because propensity and disposition reasoning are not permitted & we're trying people for the charged conduct, not for the type of person they are
* But… there are spheres in one's life where certain character traits may be displayed stronger
  + 3 ways to prove the character of the accused
  + Concern goes to probative value
* Defence is allowed to adduce character evidence for the accused for the purposes of:
  + Propensity reasoning – ie the accused is *not* the type of person who would commit the crime
  + Credibility - this is an exception in the rule against oath helping
* Crown can only lead evidence of bad character IF the character of the accused is put into issue
  + Purpose – to rebut the bolstered credibility only (if the evidence of bad character includes dishonesty, etc or shows that the defence lied under oath)- NOT for propensity
  + The only time propensity reasoning is allowed is in SFE
* Imbalance: reputation can only be used to raise a reasonable doubt. Can't be used to prove BARD. → Character evidence rules operate to benefit the accused
* If the accused does not put his character in issue, the crown may introduce evidence of prior bad acts if they fall within SFE
* Character may be a direct issue at trial- if so, then the character rules doe not apply
  + Eg. Civil action for libel/slander (need to prove that your reputation has diminished)
  + Eg. Criminal - dangerous offender application - it is about the kind of person that they are

**Putting Character in Issue**

* Rule: crown cannot adduce evidence of bad character unless the defence/accused puts the character of the accused at issue (once they open the door, it can’t be closed)
* Once door is opened, what can the crown do?
  + General principle: can only respond with something similar in nature (Ie. crown can't put EVERYTHING to the jury)
    - Rationale for general principle: accused shouldn't have to defend self against everything - could become an unnecessary distraction
  + Go back to the basics - relevance? Probative value? Truth seeking function?
* Test for when the accused has put his character at issue: *R v McNamara (no. 1)* (1981) (Ont CA)
  + Accused puts his character in issue "if he asserts expressly or impliedly that he would not have done the things alleged against him because he is a person of good character"
  + The accused is not putting his character at issue by:
    - denying the charge,
    - repudiating allegations,
    - giving an explanation for matters essential to defence

R. v. McNamara et al. (No.1) (1981, ONCA)– accused can expressly or IMPLIEDLY put character at issue

**Facts:** M is the director of a co. Alleged tax fraud. Asserts “the company is run how it should be run legally”.

**Issue:** does the assertion put the accused’s character at issue?

**Held:** Accused impliedly put character at issue: asserted that the accused was law-abiding & honest.

Questioning of witnesses can also put character at issue if you frame your question in a certain way (advise your client to answer factually) Prosecution cannot cross-examine the accused to put his character in issue

**Proving Character of Accused – #1 Reputation**

* Witnesses give evidence of general reputation -
  + Generally, W is more reliable if he knows more people who know the accused
  + But - Hearsay dangers still alive
* *R v Rowton* 1865 – what is character evidence? It is evidence of general reputation, not evidence of disposition, and not individual opinion of the W. (this applies to both defence & crown)
  + Note this is amended.. disposition is ok when the accused himself testifies

R. v. Levasseur (1987) Alta CA – W testifying as to reputation must be in a distinct circle, where the accused has a reputation based on constant and intimate personal observation

**Facts:** Accused charged with breaking & entering vehicle. L argued she was told by her employer to move the car. Defence wanted to lead character evidence & brought in a subsequent employer to say that L is honest and law abiding. Trial judge excluded this evidence on the basis that the employer could not give ev on L’s reputation in her residential community, thus the W was just giving a personal opinion. (recall opinion evidence is excluded – subject to permissible lay & expert opinion)

**Held:** Traditional concept of a community was where you resided, but that concept is not justifiable in modern society. The rule should seek to provide the best qualified Ws. New test: there may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the person.

* Circles → reputations, not just one.
* No relation to each other → might not be very realistic, but is required under Levasseur

Majority: evidence admissible – new trial.

R. v. Profit (1992, ONCA) – Raises some serious concerns re: helpfulness of character ev

**Facts:** P charged with sexual & regular assault. D wants to bring in 22 Ws to testify about how P had never acted inappropriately. Trial J applied the Ws’ ev to credibility of the accused in his reasons for judgment.

Accused appealed on the basis that this character evidence should also go to disposition.

**Majority:** Trial J did not give maximum use to character evidence and did not even mention disposition.

**Dissent by Griffiths JA (accepted by SCC)**: There was lots of ev of good acts and only some ev that would be considered character (general reputation) evidence. The trial J believed the complainants, and chose not to use the smaller amt of character ev for propensity reasoning, which is reasonable in light of the possibility that sexual assault may be carried out by seemingly upstanding members of the community. Ie. Some crimes are shrouded in so much secrecy that propensity ev doesn’t help. (Griffiths JA noted recent cases of teachers, priests, scout leaders, etc. And the Task force on Sexual Abuse of Patients – commissioned by College of Physicians – data shows ev of good character does not have any bearing on the propensity of the accused. Abusers often build up good character to camouflage their abuse)

**SCC:** trial J allowed to give no weight to propensity ev. (ie if there was a jury, WOULD be an error not to instruct on all uses of the ev)

**Notes:** This case suggests that in some circumstances (some crimes maybe?), character ev has such low probative value that it doesn’t help the trier of fact very much. However, recall that prejudicial effect must substantially outweigh probative value to exclude Defence ev – here, since both are low, ev will probably go to the jury.

*Profit* is not authority for excluding evidence of good character evidence (even in cases of sexual assault) but is authority for judge to give a warning.

**Perrin thinks:**

* + Admit the ev. But limit the # of Ws - not everyone is a distinct sphere
  + Carve out ev of acts from character ev.
  + Here, could allow oath helping of the complainants.
  + If jury trial, judge should give instructions re: all the appropriate uses, but instruct on weight.

**Proving Character of Accused – Specific Acts**

* CEA s.12 - if accused testifies, may be cross examined on crim record
  + Evidence on details of the conduct underlying the convictions not permitted
* Crim code s. 666 - if accused adduces evidence of good character, evidence of prev convictions may be adduced
  + *R v PNA* (2002, ONCA) - accused may be questioned on the specifics – ie opening the door = opening the door to details under a 666
* 666 still allows for Corbett application - low probative and high prejudicial effect

R. v. McNamara – bad character ev serves 2 functions – rebutting claim of good character & credibility

**Issue:** Door has been opened for character evidence.What can crown do?

**Held:** Where character is put at issue by accused, proof of previous bad conduct can rebut the claim of good character (ie neutralize the propensity – not more – propensity reasoning is still not permitted) or demonstrate the credibility of the accused (either by showing that he lied under oath or by showing prior discreditable acts).

Is the rebutting evidence limited to specific bad acts or general reputation? Not answered here, but IF it was limited to general reputation ev, there are at least 2 CL exceptions – s. 666 CC & SFE.

**Note:** general reputation ev comes from community, ev of good acts comes from the accused. (→ accused must take the stand for this option)

Ev of a good act at some point → likely low probative value. Ev of good reputation → higher probative value.

**Proving Character of Accused – Psychiatric Evidence of Disposition**

* One of the ways to prove character - psychiatric evidence
* When will expert evidence of psychiatric disposition be admissible?
  + This is an opinion on their character
  + So has to make sense in the context of our opinion rules & character rules
  + Very rare for this to be admitted
* Need to ask: is this within the scope of expert opinion?
  + To answer this: is the crime peculiar? Or is it ordinary? (same words used in *Mohan*)
    - Distinctive features - must be within a specialized and extraordinary class and have special traits
    - Ie can't use this expert opinion on something that is in the normal realm of knowledge

R. v. Robertson – psychiatric ev of disposition

**Facts:** Accused charged with murder of 9 yr old girl which was particularly brutal. Accused wanted to admit expert ev to show he lacked the traits of someone who would brutally murder someone (ie a propensity for violence)

**Held:** Ev excluded. To admit ev under this, need expert to show:

1. That the person who did the crime was a member of a specialized & extraordinary CLASS of persons
2. The accused is not in that special class.

Normal acts of violence do not engage this. Ev of disposition for violence is not uncommon enough to be a feature characteristic of an abnormal group falling within the special field of study of the expert.

* Some ways to attack this kind of expert evidence - is the class overinclusive? Under inclusive? Aren't there exceptions?
* Should we allow more or less of this kind of evidence?
  + Expert dangers - jury might just defer
  + Or juries might not give this much weight
  + What happens when defence/crown hires an expert and the expert doesn’t say exactly what they want? - no disclosure requirement for defence, so they could pick and choose their reports - accused has to agree to assessment
  + If the person has no good acts, this kind of evidence could be all that the accused has to raise a reasonable doubt
    - But also this is pretty remote from the crime - it is circumstantial .. But not even related to the charge
* Example of a class based argument where you could make a clear argument - shooter kills 10 ppl with 10 bullets from 1 km away - then someone who has never handled a gun is very unlikely to be the shooter - this is saying that ONLY someone from very special class of ppl with special skills would be able to have committed the crime. Different from psychiatric evidence - but an example of how class based arguments can be handy

R. v. Mohan – perp/accused must have distinctive behavioural characteristics.

**Issue:** admissibility of expert ev on sexual assault perpetrators (“unusual & limited class” & that a physician who commits these acts would bring “an extra component for the abnormality”)

**Held:** not admissible. Test is, as a matter of law, whether “the perpetrator or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt”. Consider whether the scientific community has developed a standard profile for the offender who commits this type of crime?

**Proving Character of Victims – Bad Character**

R. v. Scopelliti – ev of bad character of 3rd party generally admissible on one condition

**Facts:** Accused owns a store. Shoots 2 teens. Accused claims self defence & wants to admit ev of prior bad acts of the accused to show that the teens have been aggressive towards him in the past. The only real live issue at trial is reasonable apprehension of harm for self defence. 2 types of ev sought to be admitted:

1. Scopelliti's own evidence - they have stolen from his store, broken lights, spit coke at him

Bolsters his subjective argument of apprehension of harm (experience of harm & escalation in the past)

Could also bolster reasonableness of apprehension of harm

2. Other Ws’ ev not known to the accused (not an argument about general reputation or SFE - just examples of prior bad acts)

Makes it more likely that the teens were the aggressor and that Scopellitti was telling the truth

Trial judge admitted both of these. Real issue is with #2.

**Held:** both were properly admitted. The reason propensity ev is excluded for the accused is because using propensity reasoning to convict is wrong. No such policy reason for 3rd parties. So if the propensity of a 3rd party to act in a certain way is relevant to an issue at trial, it should be admitted (same 3 ways – reputation, specific acts, or psychiatric expert on disposition).

Limitation: before admitting bad act ev of victims, where self defence is an issue, need the existence of some other appreciable evidence of the deceased's aggression. This prevents the defence from adducing all types of bad act ev of the deceased as an excuse for the murder.

**Criminal Cases – Similar Fact Evidence**

R. v. Handy (2002, SCC) – SFE is admissible if on a BOP, the similar act is so distinctive & similar that it would not be reasonable to say it was due to coincidence

**Facts:** Complainant says she consented to sexual intercourse with the accused but stopped consenting when he started to hurt her. Crown wanted to lead SFE of violence during sexual relations with the accused’s ex-wife - that the accused doesn't listen to "no".

If ev is held to be SFE, then it is admitted even if the D hasn’t put the character of the accused at issue.

**Held:** Ev was inadmissible.

General exclusion for ev of bad acts because of propensity reasoning & moral prejudice. Also policy reasons – don’t want to distract jury & consume time. Might encourage police to round up the usual suspects.

But there is a narrow exception for admissibility – in some cases, ev of previous misconduct may be so highly relevant & cogent that its probative value outweighs the potential for misuse. On the other side of the right to a fair trial, there is also a search for truth.

SFE admissible when: it would be affront to common sense to suggest that the similarities were due to coincidence (an objective test). Trial J must conclude on a BoP that the probative value of the ev exceeds prejudicial effects. 2 Q’s as per *B(FF):* Is the SFE relevant to some other issue beyond general disposition or character? Does the probative value outweigh the prejudicial effects?

**Difficulties in applying SFE:** what if the similar acts have never been proven? Then the scope of the defence goes beyond defending the acts in the charge, there is also defending these other acts.

**Factors to consider:**

* Degree of similarity
* Distinctiveness, uniqueness, distinct pattern of behaviour (Arp: if the issue is identification (vs, say Actus reus) the SFE must be so highly distinctive as to constitute a signature)
* How specific are the circumstances/acts?
* How close in time? Frequency of occurrence?
* What prejudicial effects are there? - inflammatory
* Necessity - is there a way for crown to prove their point without resorting to SFE?
* Will it distract the trier of fact or take up too much time?

**Notes:**

Probative value outweighs the prejudicial effects – same language as residual discretion, but there is a fundamental difference.

Residual discretion: “prejudicial effect” is concerned with all types of prejudice & the discretion is used to exclude

SFE: “prejudicial effect” is not concerned with propensity & the discretion here is used to include

**Trend**: seeing probative value vs prejudicial effect play a larger role in exclusionary rule

What if all of evidence boiled down to this rule? Probative value vs prejudicial effect?

**Civil Cases – Similar Fact Evidence**

Mood Music Publishing Co. Ltd. v. De Wolfe Ltd – eg of civil application of SFE. Can combine multiple instances to get higher probative value.

**Facts:** Pl has a copyright to a song. Claim that a song by Def is a copy of their song. Def says it is a coincidence. Pl wants to enter some SFE -

* + - 1. They set up a trap for def to copy some songs - Gets an agent to try to get def to take the recording
      2. 2 other songs of the def are very similar to songs that the pl has

**Held:** properly admitted. Might be mere coincidence in 1 similar song, but unlikely that there is coincidence in 4 cases. “The probative force of all the acts together is much greater than one alone” (citing *R v Sims*)

If logically probative, the court will take SFE into account - as long as it was not obtained oppressively and the other side has fair notice of the evidence.

## Privilege

2 major categories:

* Class - privilege applies prima facie to any individuals who have a certain relationship (Eg. solicitor-client privilege; informer; litigation - There are exceptions)
* Case by case - depends on the case

**Wigmore test for case by case privilege**

1. Communication must originate in confidence that it will not be disclosed -ie confidentiality
2. Confidentiality must be essential to full and satisfactory maintenance of relations btwn parties
3. Relation must be one that in the opinion of community ought to be sedulously fostered
4. Injury to the relation by disclosure must be greater than the benefit gained by correct disposal of litigation - ie balancing part

Confidence vs privilege (confidence necessary but not sufficient for privilege):

* Confidence: something said in confidence may not always be privileged
  + Ie there are many duties of confidentiality that do not end up in privilege
  + Confidentiality is one of 4 requirements for a communication to be privileged
* Privilege: Everything that is privileged, is also in confidence
  + Privilege can be waived by the holder of the privilege

**Rationale of privilege**

* Value in open communication in certain relationships
* Eg. multiple child sex offender convicted and has served jail time. Goes to a psychiatrist asking for help. Doesn't re-offend, maybe makes progress with psychiatrist. Then he gets charged for being within 100 yards of a school. The police can then subpoena the psychiatrist's records - not a protected relationship. But maybe we want to foster openness in such relationships.
* Evidence that falls in a class privilege relationship is presumptively inadmissible
* Class privilege - privilege already recognized
* Highest & best recognized - solicitor-client privilege (*McClure*)
  + Rationale: if a client was not able to speak with full candor - client would not be able to enjoy the full benefit of legal representation - heightened meaning in crim context. Also essential to legal system. (*Foster Wheeler Power Co v SIGED* [2004] SCC)

**Solicitor-Client Privilege**

* *Descoteaux v Mierzwinski*: should interfere with s-c privilege only to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation
  + Corollary - exceptions to the solicitor-client privilege are to be interpreted restrictively and narrowly
  + Shift from rule of evidence to a rule of substantive law
* Truth seeking function is the cost of privilege
* Lawyer’s bills *prima facie* privileged – party seeking disclosure must prove that production would not violate confidentiality of the relationship (*Maranda v Richer*)
  + This was qualified in *Cunningham*

### Solosky - Requirements of privilege:

* 1. Communication must be btwn the lawyer (agents/law firm included) and client
  2. Entails giving of legal advice
  3. Must be meant to be confidential
* Need these 3 before you can even say there is privilege (even if there is a class privilege relationship)
* When does privilege begin? - it exists independently of a privilege claim (Ie. as soon as the requirements of the *Solosky* test are met, there is privilege)
* Search warrants for law firm offices - very complicated
  + SCC have set out a very specific set of procedures around this

**Exceptions to Solicitor-Client Privilege**

### Descouteaux - Facilitating a criminal purpose

* + Eg. possession of stolen property or providing information on how to launder money
  + Accessory after the fact also falls under this
  + Tax lawyers also have to be careful with this

### McClure [2001] SCC - Innocence at stake exception

* The only way to prove someone's innocence is to break the solicitor client privilege
* No other way for information to be obtainable and no other way for accused to raise a reasonable doubt
* Info is not available from any other source
* Last and only chance to prevent a wrongful conviction

Should these exceptions to s-c privilege apply to all recognized forms of privilege? (note trade-offs btwn competing values.

### Campbell – facilitating a crime exception to S-C privilege

Destruction of the privilege takes more than the evidence of an existence of a crime and proof of an interior consultation with the lawyer. There must be something to suggest the advice facilitated the crime. Or that the lawyer otherwise becomes a dupe (one being used by the client) or conspirator.

Tells us what facilitating a criminal purpose is or is not

### Smith v. Jones (1999) SCC - public safety exception requirements

**Facts:** Accused charged with aggravated sexual assault - defence counsel hired psychiatrist in hopes a it could help with submissions on sentencing in the event of a guilty plea. Accused told psychiatrist in detail of his plans to murder a prostitute. Dr wants to disclose the threat; however, because Dr was retained by the defence counsel, he is under the solicitor client privilege (actually probably under litigation privilege)

BCSC said - privilege exists but he must disclose

BCCA said - privilege exists but he may disclose (permissive) - not compelled to disclose

**Held:** Public safety exception is satisfied

* Test: s-c privilege should only be set aside where there are "real concerns that an identifiable person or group is in imminent danger of death or bodily harm", but invade the privilege in the most narrow way - only to the extent necessary

Requirements:

* + 1. Clear threat (generalized threats do not fall into this)
    2. Serious threat
    3. Imminent threat (imminent ≠ immediate)

**Notes:**

* May choose to make disclosure by retaining another lawyer
* Not sure whether you have to tell your client that you made that disclosure
* No other alternatives: no criminal activity that has gone on, no threat (not said to the prostitute), not a confession (since nothing has been done yet)
* Importance placed in defence counsel to try to promote safety
* In rare cases where there is an instant risk (not imminent) such that an *ex parte* hearing is not possible, (ie can't get it to court) then warnings to police should be allowed

**Litigation Privilege**

* Designed to protect counsel's role & product - eg includes lawyer's correspondence with 3rd parties & work product of lawyers + 3rd parties
* Not permanent - litigation privilege is only limited to the litigation period (ie all appeals are done, all closely related proceedings are done)
* Who holds the privilege? Client definitely has some rights here.. But likely counsel has some interest in the product too

**Dispute Settlement**

* Communications made in an attempt to settle during negotiation/mediation are not admissible if the matter later goes to court
* Rationale - want ppl to settle outside of court
* "without prejudice" label - not admitting guilt when settling, just an economic decision
* To establish an exception, the party seeking production must show that a competing public interest outweighs the policy goals of encouraging settlement through open communications without fear of it being used in the litigation
  + Does this mean we need to carve out a grand exception (like the hearsay exception to exceptions?) or case by case? Probably case by case
* Statutory exceptions to this

**Informer Privilege read this**

* Purpose: Protects identity of the informer from retribution & encourage ppl to come forward
* Class based privilege
* Usually see them at the investigative stage
* May allow informer to waive privilege, but other interests of crown or police may say no waiver
* *Scott* - some exceptions:
  + Where the informer is a material witness to a crime
  + Where the informer is an agent provocateur - some argument about entrapment
  + Where the police want to say a search was not based on unreasonable grounds
  + Doesn't list innocence at stake, but see Leipert

R. v. Leipert [1997] SCC

**Facts:** Crimestoppers tip 🡪 police took the drug sniffing dog 4 times to the property. Leipert charged. Defence wants the entire tip sheet disclosed, relying on *Stinchcombe* - relevant things need to be disclosed as per s.7. Crown argues the whole thing is protected subject to "innocence at stake". Is there a middle ground? (eg. disclosing the tip sheet without the name/address)

**Held:** No requirement to disclose the tipsheet. The information in the tipsheet itself could lead the accused to find the informer. Trial judge gave insufficient weight to informer privilege and erred in trying to edit the tip sheet.

The privilege belongs to the crown, but crown can’t waive it without consent of the informer.

Innocence at stake is the only exception that could apply here. \*what about the exceptions listed in *Scott*?

Privilege applies both civilly and criminally.

**Exceptions?**

* Innocence at stake is really the only exception - inconsistent with Scott!
* Agent provocateur and material witness exceptions are just examples of innocence at stake
* Unreasonable grounds search is not discussed

So, disclosure right from *Stinchcombe* is not as strong as an informer privilege right

**Other Relationships**

### R. v. Gruenke [1991] SCC – Religious communications dealt with on a case by case basis

**Facts:** For 7 yrs, an older man acted as a father figure to Gruenke. Then, he began to make sexual advances - there is a struggle while G's bf is there. Accused charged with 1st deg murder. Contested evidence at trial: G has been going to a Christian church for emotional and psychological healing (note nothing about spirituality). A counselor from the church has been helping G get through some issues.

The counselor visits G after the incident, then pastor joins them. Crown wants to admit evidence from the counselor & pastor. Trial – admissible.

**Held:** Religious communications not subject to class privilege.

Policy: there may be a social purpose, but not inextricably linked to the justice system.

Court says moving away from class based privileges - want to be more flexible.

Case by case analysis allows court to exclude when the individual’s freedom of religion rights will be infringed.

4 qualifications:

* 1. Nature of the communication – must originate in confidence
  2. Purpose for which it was made – must be essential to full & satisfactory maintenance of relations
  3. Manner in which it was made
  4. Who were the parties to the communication?

Applying Wigmore test for a case-by-case privilege: confidentiality was not part of the agreement btwn G and the Ws 🡪 fails on first requirement of Wigmore

## Improperly Obtained Evidence

**Pre *Charter*: Common Law**

* *R v Sang* [1980] UK - if it is admissible evidence probative of the accused's guilt, it is no part of the judge’s judicial function to exclude it because he dislikes the way the evidence was obtained.
* *R v Wray* [1971] SCC - there is no existing authority at CL to exclude otherwise admissible evidence on the basis that it would bring the administration of justice into disrepute.
* Note that, in considering the confessions rule, Lamer’s judgment in Rothman alludes to a possible exclusion of ev based on police trickery – so maybe there was already a CL view on excluding ev.

**Post *Charter*: Section 24(2)**

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

### R. v. Edwards [1996] SCC – No exclusion when 3rd party’s Charter rights are infringed

**Facts:** Police obtain tip that E has drugs on his person and at his girlfriend's house. Arrest E for driving while suspended. Police go to E’s gf's apt - try to go in & search. Tell the gf some lies and half truths (eg. describe the search warrant as mere paper work and say they may not charge the accused if she allows them to go in). Gf is actually charged, but that is dropped. Clear violation of s. 8 rights against the gf. Home is a place with a high REOP. Does E have standing to argue admissibility of the evidence when a 3rd party’s charter rights have been infringed?

**Held:** No standing. SCC looked at language of the provision & decided that it had to be that person’s rights that were infringed for them to get the Charter remedy. If E had a low REOP at gf’s apt (eg. staying over some nights, keeping some personal things there), maybe it would work since the actions were so egregious – but he didn’t.

 Maybe if the extent of the privacy invasion was particularly egregious.. (eg. *R v Thompson* – wire taps on a pay phone) Possible that in even more flagrant/egregious violations, court will reject *Edwards*.

**Notes:** Implications of R v Edwards? Say there are 2 co-accused in a charge for conspiracy- each has an agreement on his laptop. Their laptops are seized while violating s.8 rights. Then accused has his charter rights protected in his own trial, but not in the other trial. Could still argue s.7 - abuse of process/fair trial - principle of fundamental justice could mean that allowing evidence which is blatantly unconstitutionally obtained offends the principles of fundamental justice

Primary purpose of 24(2) is not to incentivize police behaviour, but to protect the right.

**Excluding Evidence Under the Charter – Bringing Administration of Justice into Disrepute**

R. v. Collins [1987] SCC – test for when the administration of justice is brought into disrepute

**Facts:** police suspect that C has drugs. She immediately tries to put it in her mouth - police grab her throat. Clear violation of her s.8 rights. Then it turns out the drugs were still in her hand. Should this real evidence be excluded?

**Held:** SCC sets out the test for when administration of justice is put into disrepute.

The **purpose of s. 24(2)** is not a remedy for, or a disincentive for police misconduct – it is about **preventing any further disrepute** by admitting the evidence. (further disrepute may arise when the accused is deprived of a fair hearing or from judiciary condoning the misconduct)

The party seeking to exclude the evidence needs to prove on a **BOP** that the **reasonable, dispassionate person who is informed of the circumstances of the case** (& knows about the charter.. so pretty much.. an objective assessment by the judge) would find that admission would bring the administration of justice into disrepute.

Based on the French version of the *Charter*, “the admission of it in the proceedings **~~would~~ *could*** bring the administration of justice into disrepute.” – makes it easier to exclude

Need to consider:

* + What kind of evidence was obtained?
  + What charter right was infringed?
  + Was the violation serious or merely technical in nature? (there is a spectrum of infringement)
  + Was it deliberate, wilful, or flagrant, or was it inadvertent or committed in good faith?
  + Did it occur in circumstances of urgency or necessity?
  + Were there other investigatory techniques available?
  + Would the evidence have been obtained in any event? – discoverability (taken as showing a less serious infringement here, but since this case, importance has decreased since it can cut both ways)
  + Is the offence serious? (this factor eliminated in future because it can cut both ways)
  + Is the evidence essential to substantiate the charge?
  + Are other remedies available?

Factors get grouped:

1. Trial fairness - Consider nature of the evidence & right involved, but not the manner of the violation

Real (automatically admissible) vs conscripted (bodily – maybe automatically excluded)

Idea is that real ev is less likely to bring the administration of justice into disrepute

But there is such thing as real AND conscripted evidence

Also the idea that real ev is less serious of a violation doesn't hold water

1. Seriousness of the violation
2. Balancing btwn disrepute & admissibility of evidence

Apply test to the facts:

* Trial fairness 🡪 low
* Cost of excluding 🡪 high

Conclusion: exclude

R. v. Grant [2009] SCC – revised approach on test for when the administration of justice is brought into disrepute. 3 factors/steps.

**Facts:** POstopped G because of suspicions – tells him to keep his hands in front of him (because he was fidgeting) - G admits to having drugs and a revolver. PO then search & seize the drugs & revolver, and tell him his rights to counsel. G charged with possession of loaded firearm.

**Held:** There was an arbitrary detention & unreasonable search/seizure

*R v Mann* judgment on investigative detention & the grounds required for this (reasonable grounds to suspect the accused is involved in a criminal offence) comes out in 2004, after the incident of this case. However, law/standards of today apply when asking whether a charter right has been violated.

Stmts after right was violated are not admissible.

What about the real evidence of the gun? - admissible

Need a new approach because:

* *Collins* focused too much on trial fairness, didn’t measure the seriousness of the Charter breach. Also seriousness of the offence doesn’t help.
* *Stillman* –bodily ev was generally inadmissible & practically an exclusionary rule for non-discoverable ev

Fair trial should be viewed as an overarching goal. Need to have a fair trial in order not to have the administration of justice being brought into disrepute

* Fair trial is one which satisfies the public interest in getting at the truth while preserving basic procedural fairness to the accused. (*Harrer*)
* Truth seeking function can't be sought at all costs - need basic procedural fairness (not that every single right of the accused is protected to the max)

Revised approach: Adminstration of justice embraces maintaining the rule of law & upholding charter rights in the justice system as a whole

In considering "bringing the administration of justice into disrepute":

* + Long term & prospective
  + Objective inquiry
  + Focus is societal - not trying to punish the police or providing compensation to the accused, but rather at systemic concerns (ie concerned about society's faith in the system)

3 factors to consider in the new approach:

* 1. The seriousness of the charter-infringing conduct – focus on state conduct (what did they do? Why did they do it?)

Mitigated/aggravated by:

* + - Good faith/inadvertent ------ deliberate/flagrant/willful
    - Legal uncertainy ------ legal certainty
    - One time ---- part of a pattern/systemic problem
  1. The impact of the breach on the charter-protected interests of the accused – focus on the individual whose rights were infringed
     + Fleeting/Technical ---- profoundly intrusive
     + Need actual impact – not a general stmt of how ppl’s rights could be impacted
     + Need to identify what the interest is behind the right
  2. Society's interest in adjudication of the case on its merits
* Would the truth seeking function be better served by admitting or excluding?
* Consider necessity & reliability (generally not judge’s role but rights are at stake so ok)
* Probably less room for advocacy here than #1&2
* Seriousness of offence can cut both ways, so no need to consider it here

For each factor, court talks about:

* 1. What does the factor mean?
  2. Make a conclusion on whether the factor tends towards (in)admissibility
  3. Attempts to say how much the factor tends towards (in)admissibility

Application of factors to this case – close race but gun is admissible:

1. Police conduct not egregious
2. Impact significant but not at the most serious end of the scale
3. Value of the evidence is considerable

### R v Grant - Notes on application to different kinds of evidence:

Statements by the accused

* Stmts by accused engages the principle against self-incrimination (flowing from this: the right to counsel, right to remain silent, right to non-compellability, confessions rule, etc)
* This type of ev tends to be excluded under 2. 24(2) because the protected interest is very important (factor #2) and the stmts may not to be reliable (factor #3)

Bodily Evidence

* Stillman said that all bodily evidence is “conscriptive” (taken without consent?) and created a near-automatic exclusionary rule for bodily ev obtained contrary to the Charter
* But s. 24(2) mandates a flexible “in all the circumstances” test
* Also, conscripted ev is not the same as a stmt from the accused. Involves very different rights (compellability or right not to self-incriminate vs privacy & autonomy/dignity of the person)
* 3rd problem: leads to absurd results when not viewed in all the circumstances
* When looking at factors: #1 is fact specific – look at mitigating/aggravating factors; #2 – look at how much infringement; #3 – usually favours admission because conscripted ev is usually reliable & may lead to false outcome if trier of fact is deprived of the ev

Non-bodily physical evidence

* Pretty much the same as conscripted evidence – interest protected is privacy

Derivative Evidence

* Combination of both stmts by accused + physical evidence.. so harder to say one way or another.
* CL confessions rule only excluded the stmt, not the derivative ev, because the focus/basis of the rule was reliability – with derivative ev, society’s interest in getting at the truth with reliable derivative ev outweighed concerns of self-incrimination
* But s. 24(2) implicitly overrules this and asks if admission of the derivative ev would bring the administration of justice into disrepute
* 2 related concepts have been dominating cases on derivative evidence: conscripted ev (physical evidence that would not have been discovered but for an inadmissible stmt) which is inadmissible & discoverable ev (would have collected the ev anyway) which means likely admissible
* Using these 2 concepts has been criticized as being overly speculative & creating anomalous results
* Discoverability still useful in determining factor #2 – impact of infringement
* Applying 3 factors: #1 – fact specific; #2 –look at facts & consider discoverability – if the derivative ev was independently discoverable, then the impact of the breach is lessened; #3 – less issues with reliability, so favours admissibility

### R. v. Harrison – application of Grant test. Finding of inadmissibility despite being real ev.

**Facts:** Harrison + friend rented a car from YVR - packed it with drugs. Drove to TO. Toronto po saw that there was no front license. Turned out the driver's license was suspended. Search incident to "search for suspended license". Then found the cocaine. Should the real evidence - cocaine - be excluded? - trial judge excludes and enters an acquittal

**Held:** Application of test in Grant favours inadmissibility:

1. State Conduct:

* Grounds for search were not existence at all - different from insufficient grounds.
* Aggravated by officer's misleading testimony about searching for the suspended license
* Trying to enlist the court in continuing his misconduct - concrete example of further disrepute
* Routine occurrence but no profiling
* Settled standards, no uncertainty
* Blatant disregard but not deliberate 🡪Negligence (*R v Kitaitchik –* this is in the middle)

1. Impact on interests
   * s. 9 infringed - no grounds to stop the vehicle. Arbitrary detention
   * s. 8 - no grounds to search
   * Impact more than trivial but not egregious
2. Adjudication on merits of the case
   * Highly reliable & necessary
   * Real evidence
   * Seriousness of offence not very helpful

So only the 3rd factor goes to admissibility (only the truth seeking function served by admissibility)

Comparison btwn Harrison and Grant? Considerable legal certainty

R. v. Calder – shifting purpose not permitted for unconstitutionally obtained evidence

**Facts:** po are charging another po(C). Tell him he is being charged & what he says could be used against him – but do not tell him of 10b right to counsel. C says during the interview that he was not at location X on some date. But po know he was there. Crown sought to admit this ev for the purpose of incrimination (“consciousness of guilt” – lying = guilty). Trial judge said inadmissible. Then after C takes the stand & gives stmt contradicting his earlier stmt about being at X on some date, Crown sought to admit the ev to undermine C’s credibility (lying = you shouldn’t believe his testimony). Trial judge said inadmissible.

**Held:** Crown’s appeal dismissed. Once evidence which is tendered for one reason is excluded under 24(2), then it is excluded entirely. Reason: the effect on the repute of the administration of justice is by reference to the std of the “reasonable, well informed citizen” who represents community values, not the “carefully instructed juror”. Since the well-informed citizen will not have the benefit of being instructed the distinction made btwn the 2 purposes, the repute of the administration of justice is at risk. Ie. the taint by the unconstitutional method of obtaining the ev can’t be fixed by jury instructions.

*R v Kuldip* - makes a distinction btwn evidence offered to incriminate & evidence offered to undermine credibility. A PIS used to incriminate allows the jury to infer that the accused committed the crime. A PIS used to undermine credibility can only neutralize/nullify the testimony given by the accused, it does not make it more likely that the accused did the crime.

Could have a limited set of circumstances where unconstitutionally obtained ev COULD be used for a limited purpose. (La Forest doesn’t agree with this. What are these circumstances? Don’t know – maybe if Crown didn’t try to admit in examination in chief?

Dissent (McLachlin): SHOULD have admitted it. Where the accused chooses to take the stand & places his credibility at issue, it is more difficult to say that the crown is not allowed to cross-examine him on PIS. Unfair if crown can't cross examine to get at the true version of events & could lead to false outcomes. Truth seeking function & fairness - fairness is main touchstone for 24(2) . McLachlin echoes criminal record analysis - once accused starts to launch attack at other crown witnesses, accused starts to look like an angel (*Corbett*).

**Notes:** is the majority’s view inconsistent with other evidence law? If limiting instructions are given so much credit + juries are supposed to be able to understand & follow limiting instructions, why are they not enough of a ‘fix’ with 24(2) ev?

Calder was before Grant.

Probative vs prejudicial not playing a large role here. This decision is right in btwn Collins & Grant framework - mostly concerned with fairness.

## ~~Self-Incrimination~~

## EVIDENCE WITHOUT PROOF

**Formal Admissions**

* Purpose = efficiency + promote truth seeking function (narrowing issues in the trial)
* Formal vs Party admissions (party admissions usually made in court or through docs – what the other party did or said – is an exception to the hearsay rule)
* Criminal cases: Guilty plea = formal admission of the basic elements of the offence as set out in the charge (additional set of facts may be important to sentencing)
  + *Gardiner* - 1982 - additional facts can be proven by Crown during sentencing
  + Cannot plead guilty for a client if they do not admit to all the facts
* Civil cases - some incentives & penalties for not making formal admissions
  + *Tunner v Novak* (1993) BCCA:
    - New counsel on appeal are bound by the formal admissions by former counsel
    - Conclusive as to the matters to which they speak of - even if the evidence leads to different conclusion (so be careful of what you may be formally admitting to!)
    - Formal admission may be made by a stmt in the pleadings or failure to deliver pleadings, by an agreed stmt of facts, by an oral stmt made by counsel at the trial, by a letter written by counsel, by reply or failure to reply to a request to admit facts
* Should formal admissions "survive" if a new trial is ordered on appeal?
  + Why? New trial should only be to correct legal errors & palpable/overriding errors
  + Why not? Could probably think of some exceptional circumstances where it would be unfair to survive.
  + Open question - is probably presumed to survive, but could have exceptional circumstances where they don't

**Judicial Notice**

* Without it, wouldn't be able to have trials - it is always operating even when we don't know it
* Efficiency at stake + truthseeking function (allows notorious facts to be correctly decided)
* *Newfoundland v NAPE* [2004] SCC - purpose is to dispense with proof but also prevents court from reaching a completely inaccurate finding of fact
* Dangers - judges could go take judicial notice of things that SHOULD be proved
* *R v Find* [2001] SCC –test for when a judge may take judicial notice: the fact must be so notorious or generally accepted that it is not the subject of debate among reasonable people OR it is capable of immediate & accurate demonstration by resort to readily accessible sources of indisputable accuracy
* *Danson v Ontario (AG)* [1990] SCC - distinction adjudicative & legislative (later renamed “non-adjudicative” to include social+legislative) facts - **important for charter cases**
  + Adjudicative facts - must be proven by ev from the parties (who what when where) - those which are in dispute – concerns the parties involved
  + Legislative facts – establishes the background of legislation, ie its social, economic, & cultural context (less stringent admissibility requirements)
  + *Mackay v Manitoba*: Charter cases shouldn't be brought without adjudicative facts (ie they shouldn’t be made in a factual vacuum) except for simple questions of law (eg. imposing a state religion)
* Eg. does the word gypsy refer to an identifiable group of persons? (case against hate speech)
  + Can the judge take judicial notice of this?
* What should a trial judge do if they're not sure about taking judicial notice of something?
  + Ask for submissions & adjourn if necessary
* Parliamentary committee reports - can't take judicial notice of this.. But can take notice of commissions! Lesson: don't assume - get it in as evidence