453 Evidence

TANGENT CITY

CH 1: INTRODUCTION

Basis of Evidence

Most cases turn on disputes about facts (Who did what? Who should you believe? What were SH told?)

- Evidence = data that TOF uses to resolve factual controversies
- TOL determines Laws of Evidence for TOF to utilize (gatekeeper/referee)
    - Unlike inquisitorial process where judge determines things, the TOL is quiet/referee

Primarily based on CLaw = weird mish-mash (contrast w/ ARC) → driving factor in development is ensuring TOF makes only permitted inferences in drawing conclusions, but also are rooted in patriarchal, racist, and classist way of thinking

> *"[T]he law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions."*
>
> - per Dickson J in R v Graat, [1982] 2 SCR 819

Challenge = infinitely variable facts = application requires judgement

Phillips v Ford Motor Company, [1971] 2 OR 637 (CA)

- Assumption - fully/diligently present all material facts w/ evidentiary value
- Facts considered in a dispassionate and impartial way to arrive at the truth
- Trial - forum to provide justice (not a scientific exercise) → Looking for the truth, disregarding non-truth
- Some flaws re: procedures that inhibit ultimate truth

Imperial Oil v Jacques, 2014 SCC 66

- Seeking truth is cardinal principle in civil (alongside proportionality and efficiency)
- Judges may intervene, but not in seeking the truth

Nowadays

Rules are grounded in jury trials and jury procedure → But large majority of criminal proceedings are judge-alone

- W/in Alberta's Jury Act, Alberta Rules of Court, and associated regulations
    - Six jurors; need not be unanimous (five out of six)
    - Jury trials are available for certain torts (defamation, false imprisonment, etc.) and tort/contract actions that exceed $75,000
    - But party requesting a jury trial must "deposit a sum of money that the clerk considers sufficient to pay the expenses of conducting the trial by a jury" (Jury Act, section 17)
    - Has not been a civil jury trial in Alberta in over a decade

Trend away from strict rules and towards "balancing tests"

- Purposive: < technicalities (Prioritization of solving sexual offences (R v Khan), Charter, access to justice),
- Development of general exclusionary discretion - judges can do the cost-benefit analysis themselves
- > Admissibility re: efficiency - not getting bogged down
- Technology - judicial notice has allow this

Tension between certainty/efficiency and truth-seeking/other values (e.g., changes to SA prosecutions – impact on trial efficiency vs. effects on complainant dignity)

[CLaw] trend to admission; < pigeonholes/strict rules CONVERGES W/ [Civil] > formalized rules

In practice

Generally evidence must be received in open court

- Credibility: Quality of the witness? e.g., Bias/partiality? Reason to lie?
- Reliability: Quality of the witness's evidence? e.g., Strength of opportunity to observe? Ability to recall?
- Conditional admissibility: may eventually become relevant
- Limited admissibility: share, but used for only specific purposes ()

e.g. Accused Criminal Record only re: credibility

Can be used for impeachment only Permitted reasoning: Accused has committed dishonest acts in the past → ∴ accused > likelihood of dishonesty when testifying	Cannot be used to prove accused is guilty of the crime charged Forbidden reasoning: Accused is the kind of person who breaks the law → ∴ accused > likelihood of breaking law on this occasion

e.g. Prior statement of an accused/witness	
Can be used for inconsistency Permitted reasoning: Accused story has changed → ∴ accused > likelihood of dishonesty when testifying	Cannot be used to prove fact asserted in statement Forbidden reasoning: Accused said this outside of court → ∴ accused did that thing

e.g. Statement of a co-accused	
Can be used against co-accused Permitted reasoning: Accused said the other did action → ∴ co-accused may have done action	Cannot be used against accused who made statement Forbidden reasoning: Accused said the other did action → ∴ accused also did action

e.g. Evidence of animus against victim	
Can be used for motive Permitted reasoning: Accused is a hateful towards victim → ∴ the accused has a reason to commit crime	Cannot be used to show that accused is the "type of person" Forbidden reasoning: Accused is a hateful person → ∴, b/c hateful people do bad things, accused did bad thing

Overall, excluding evidence relates to [mislead > instruct] or [prejudicial > probative]

- we should not rely on prior bad conduct to convict

Principle of access to evidence is key - but there are competing policy, as right above

Examples of evidence in practice

Relevant evidence examples could ≈ … always relate to AAMOCLAS

- YES - Police had quota of tickets → Alleged thief is an art collector → Someone was "in-town" the day the house burned down" → Cannot afford "vacation" where they just happened to have drugs in their bag → Reaction after murder → Moving stop sign after crash
    - Specific to AR - If it'sm a strict liability offence and evidence's purpose is ≈ to MR, inadmissable
- No - Negligence x insurance (but more of a matter of exclusion b/c it's about mis-use) → Crazy murder lyrics (prejudicial > probative)

Criminal process → more strongly fortified than civil because of liberty at stake

Investigation - e.g., right to remain silent (re: incrimination)	Arrest & Charge (Information Sworn)	Bail (Judicial Interim Release) - rules relevant to strength of case (< strictly enforced here though)	Crown Disclosure - e.g., informant privilege	Guilty Plea? - e.g., more flexible rules about character, hearsay
Preliminary Inquiry? - e.g., more flexible rules about hearsay	Defence Notice? - e.g., alibi evidence, sexual assault cases	Trial - exclusionary rules, exceptions (character, hearsay, opinion, privilege) >>> application	Sentencing? - e.g., character, hearsay	Appeal? e.g., significance of not objecting at trial

- Also Voir dire? - meant to resolve subsidiary legal disputes re: complex evidence issues

Civil process

Pleadings: Statement of Claim / Defence	Affidavits of Records & Exchange of Documents e.g., solicitor-client privilege, litigation privilege	Questioning (Examination for Discovery) e.g., permissible questions during examination
Settlement? e.g., use of statements made in course of settlement negotiation	Pre-trial motions? Summary Judgment? Summary Trial? e.g., hearsay	Trial? e.g. use of expert evidence to prove liability, rules of competence/compellability

Other differences between Criminal and Civil

- E.g. self-incrimination only applies in criminal
- E.g. hearsay is > allowable in extradition cases, where courts are just looking for a fair outcome in the context

- E.g. sentencing vs criminal trial
- E.g. voluntariness rule does not apply in hearings re: whether Charter rights violated, since it is focused on guilt

Types of rules

Process	Presentation to TOF, communication in court	oath, questioning, presentation of exhibition
Basic Admiss	1. Relevant or material evidence only (necc, ~~suff~~) ● Purpose @ admission = @ application 2. Exclusionary rules 3. Prej v Prob	Qualities of the evidence itself

Subequently → Weight (does admitted evidence support what's admitted to support) to be determined primarily by TOF

- Legal relevance should not be included in whether to admit, this is cleaner (Candir) - we don't want to complicate things by evaluating whether evidence is sufficiently probative

Admissability

Materiality - "Does it relate to live issues?" √ substantive law and the question at issue

- E.g. raising self-defence changes the relevance of the history between parties (prior assault - two separate occassions would not, as matter of logic and reason, matter)
- Can be…
    - Primary - relevant to proposition that is directly at issue - i.e. guilt
    - Secondary - whether we rely on individual raising a proposition - i.e. credibility/reliability

Relevance - "Evidence is relevant where → tendency MOLAHE to make proposition > likely than w/out it."

- Irrelevant evidence excluded: Facilitate truth-seeking, Avoid TOF confusion/distraction, Avoid Δt waste
- NOT about proving issue! All about increasing probability, no minimum (R v Arp)
- E.g. Matter of specificity - Downloading a map is relevant vs Downloading a movie about robbing is NOT

Relavance = Material + Probative → A RELATIVELY LOW THRESHOLDS some "logical link" as per AMOLAHE

Difficulty → AMOLAHE → everyone's human experience is different → WE CANNOT RELY ON STEREOTYPES

- Relevance depends on context (R v Truscott)
    - "Vacuum cleaner was hot and in basement" + *vacuum cleaner was not hot* → Taken together, accused lied (R v Monteleone)
    - "(inaudible) I KILLED DAVID (inaudible)" actually ≈ "They think I killed David, but I did not" (R v Ferris) → Inference is unreasonable, it is speculative

Direct vs Circumstantial Evidence

relevance is self-evident → If believed, TOF believes a fact in issue	Relies on an inference to prove fact in issue
Generally, witness testimony about matter in question: "I saw Mr. X point the gun and shoot"	Fingerprint evidence, evidence of means, motive, opportunity "After the fact" → can be both + (asserts innocence) or - (acts guilty)

Overall → informs whether evidence can be admitted, as it factors into what it is material to

- Purpose of the evidence needs to be ennunciated clearly (R v Gilbert) | Demeanour evidence is risky (R v Wall)
- Lies/false alibis cannot be used unless deliberate falsified and accused supported this
- Silence means nothing re: guilt, they have the right to remain silent (R v Henry)
- Evidence can be used to support competing inferences, but is generally NOT used to support guilt/not guilt, must be tied to other things (R v Khan)

Narrative evidence

Contextual info for material events → MUST EDIT → SHOULD NOT be relied upon on its own as proof

- Exception to rule against prior consistent statement (showing difference between positions)

- Describe irrelevant information that aids presentation of evidence
- Can be > prejudicial, but only allowed where significant testimony cannot be recounted meaningfully

Results of determining admissibility

Rules can restrict admissibility, w/ limiting instructions

- 1) Rules of practical exclusion - support efficiency (<# of experts, or collateral facts rule limits scope of trial)
- 2) Rules of subordinated evidence - competing considerations (solicitor-client privilege, unconst obtained)
- 3) Rules of non-evidence - unhelpful to TOF, it's not really evidence - experience shows use that prej>prob
- Then there are instructions on how to use
    - BOP/SOP, evaluating certain kinds of witness evidence (chirldren), certin forms of proof is dangerous, limiting admissibility for only certain inferences

Enforcing Laws of Evidence

Self-policing - ethical requirements limit, counsel objects, TJ has responsibility to enforce, check in w/ counsel before

- To object - stand and wait to be noticed (imperfect, if too late)
- Evidence can be admitted if not objected to, the tactical decisions of counsel will be defered to BUT…
    - TJ/DM can be held to accountable for wrong move via appeal
        - If party appealing objects (and submit that evidentiary rule breached) - this is a legal error - only does not move forward if harmless (CC s 686, proviso/curative provision) ≈ similar for civil
            - Law of evidence is reviewed correctness on appeal - but there is a lot of discretion that is imbued here
        - If party appeal did not objec, there are options (unlike USA)
            - Only waive appeal if failure to object re: statement is based on no voir dire and voluntary
            - Two trends
                - Unreasonable to appeal (estoppel) - Need > error…
                    - Not simply tacitcal/conscious decision
                    - Not using same evidntiary approach to their own advantage or
                    - Not if objection prevented full engagement
                - Immateriality vs Materiality
                    - Im - minor and no objection, it is not important (harmless)
                    - M - allow appeal if risk of miscarraigh of justice (even in absence of objection), "tactical" nature of a decisions is not regarded as above if the evidence is very damage

CH 2: BASICS OF ADMISSABILITY

General rule → all relevant evidence is admissible (so long as AMOLAHE)

Standards of admissible evidence

Just because evidence must prove something BARD ≠A must be proven BARD re: admissibility questions

General	Testimony only needs to pass regular test - LHE Authentic document → TOL needs SE that it is what it purports to be → TOF then weighs
BOP	SCP must prove following; communication, confidential, and ≈ legal advice Litigation privilege → TOL needs proof on BOP that "dominant purpose" for creating document was re: litigation Hearsay exception - party calling evidence has to prove out-of-court statement is probably reliable before admitted (R v U(FJ)) SFE - R needs to connect accused to other acts w/ suffic evid of link that reasonable tof could rely on (**different standard than others)
BARD	Apply when evidence would have conclusive impact on guiltiness → some evidence is terminal, but not conclusive - e.g. DNA evidence that lead to overwhelming odds Statement to authority - BARD that voluntarily made (R v Pickett)

	- Youth - BARD that voluntarily made AND that statutory requirements of YCJA have been meet (right to have rights explained to them, right to have parent/support there), OR BARD that youth waived these Presumptions (where 1 fact proven, subsequent fact presumed to exist by TOF - Breathalyzer) - normally BOP, but BARD where the subsequent fact proves guilt

Basic common law rules of exclusion re: nature/effect of evidence - Rules ✓ nature of evidence - no standard required

- Question is leading or ~~leading~~ = no evidence required to prove that this is the case
- Prejudicial outweighing probative = no evidence re: proof → just judge nature of evidence in context
- Unconst obtained evidence is excluded where admission = brings admin of justice in disrepute = no evidence re: proof, it is a matter of legal characterization

Statutory modifications - where they apply, they govern

Residual Discretion (prejudicial-vs.-probative)

Question for the TOL (i.e., trial judge) → b/c it's QOL → Want to be cautious about taking away from TOF (WEIGHT)

- Prejudicial/probative is not about vetting weight → it's about putting together all the truth
    - Probative = 1. **Importance** of related material fact | 2. **Strength** of evidence proving material fact
    - Prejudicial = 1. **Moral** - distorts TOF's reasoning | 2. **Reasoning** - time/expences/fairness
        - **Other** prejudice (R attempts to submit transcript → R made unavailable for testimony, per Potvin)
        - Prone to misuse, reliability untestable, operate unfairly, produces problematic collateral costs
    - Generally can include…
        - evaluating believability/credibility (Hall, Handy), Opinion can be excluded = misleading (Mohan)
- Balancing - TJ ~~speculating~~ - consider actual/likely costs (practicalities, fairness, distorting effects)
    - Judgment call - ad hoc process (Pilon)
    - Could theoretically render all rules obsolete BUT restraint ≈ basic principle of access, respect for jury
- Can be admitted and then edited/warned | Legal relevance ~~included~~ re: whether to admit b/c cleaner (Candir)
- Can be excluded if…
    - Unfairness if admitted (Charter related, often ≈ unfairly or illegally obtained)
    - Admission cannot justify negative effects
    - It passes statutory rules of admissibility (CC s 715, 715.1, CEA s 12)
- No such thing as inclusionary discretion - can't include if it doesn't meet the rules

Rarely raised → safety valve + should be used in extreme cases (Barton would've been a good opportunity to employ this)

Note: Admissibility rules/exceptions "embed" this prejudicial-vs.-probative balancing (SFE, Expert Opinion, Principled)

R v Seaboyer, [1991] 2 SCR 577

Ratio - recognizes that discretion exists to exclude defence evidence - though probative <<< to prejudice

R v Felderhof, 68 OR (3d) 481

Ratio - technically possible to allow inadmissible to be received re: Charter as a remedy to state action

R v Shearing 2002 SCC 58

Facts

- Accused is charged with historical SA → complainant's diary from relevant times, omits mention

Issue/Holding - Admissible? ***YES → though it could be differently decided today***

Analysis

- Defence - AAMOLACS, it seems less likely that she was abused re: diary
- Crown response - Prejudicial > probative
- TOF is precluded from assuming that abuse would always be in diary (stereotype) BUT, doesn't preclude - THIS complainant would have, on specific facts of this case
    - Accused permitted to cross-examine complainant using diary
    - To exclude defence evidence, prejudicial effect must substantially outweigh probative value (Seaboyer)

Ratio - Defence evidence can be excluded, evidence ✓ stereotype inferences can be edited

R v Effert, 2011 ABCA 134

Facts

- Pictures shown is tremendously disturbing → relevant? She already admitted → only very tenuous evidence

Issue/Holding - Admissible? ***NO*** → ***ABCA overturns ABQB, which is very rare***

R v Barton, 2019 SCC 33

Facts

- Way this injury occured → physical evidence is relevant → probative → but prejudicial? Not in the common sense

Issue/Holding - Admissible? ***NO***

Analysis

- Should've considered; dignity of victim, impact family, other options, vicarious trauma

Third party suspect evidence

Redirect attention to someone who is not a party as the potential perpetrator

Example of defence evidence exclusion - basically a Reverse SF - Defense only has to prove BOP "maybe it was another"

- Probative = tenuous – simply pointing to other unsolved cases with some vague similarities to the present case
- Prejudicial = significant – reasoning prejudice concerns about consumption of time, potential to distract the jury

2 options re: whether the third party is someone known or some mystery person

- Rule (known) - only admissible where some evidence tending to connect third party and teh crime (Grandinetti)
- Rule (unknown) - probative value must be anchored in sufficient similarities between two crimes/one individual (Seaboyer, per Grant)

R v Grant, 2015 SCC 9

Facts

- Accused charged with murder of a 13-year-old girl who died almost 23 years prior
- Accused wanted to tell jury about other abduction → suggest that same person may have committed

Issue/Holding - Admissible? ***YES***

Analysis

- Defence evidence, so PE must substantially outweigh PV
    - Factors going to probative value → how similar were the two offences?
    - Factors going to prejudicial effect → reasoning prejudice

Ratio - Const protect to "full answer" means we must accept a certain amount of complexity, length, and distraction

R v Schneider, 2022 SCC 34

…

CH 3: CHARACTER EVIDENCE

Generally - any proof establishing (personality/pscych state/attitude/capacity) to (engage in a particular behaviour)

Overview of routes - Risk here - we're not wantring to put someone's who life on trial | Generally excluded

- (1) Accused's use of good character evidence - unusual, spurs the other side
- (2) Crown's use of bad character evidence (extrinsic misconduct).
    - (2a) EXCEPTION - When the accused puts character into issue → below in yellow
    - (2b) EXCEPTION - Use of accused's criminal record at trial → use Corbett Applications
        - If accused denies having record? Other party can prove record exists BUT edited so ~~propensity~~

        - Goes to 2ndary materiality – believability of accused's claims
    - (2c) EXCEPTION - "Similar fact evidence" rule Δ
- (3) Accused's use of the character of third parties
- (4) The special case of the accused's use of information about a complainant in a sexual assault prosecution
- (5) A word about character evidence in civil cases

Breakdown

- Rationale - AAMOLAHE - we know people tend to act consistently
- Types
    - Direct opinion → one about 1 person "Alice is a thief."
    - Reputation → one on behalf of the community about 1 person → "Everyone thinks Alice is a thief."
    - Prior incidents → one about 1 person past tense "Alice stole my skidoo two years ago."
- Secondary and primary
    - Supports prim. material inferences about how likelihood of certain behaviour ≈ SPECIFIC CHARGE
    - Supports 2nd material evidence about how trustworthiness of witness evidence ≈ WITNESS RELIABLE
- Character and Habit
    - Habit = regular tendency of person to engage in particular behaviour (~~relate~~ to broader character)
        - Rationale to admit - > specific = < likely to lead to prohibited inference
        - "Habit" includes someone's "routine practice" in a professional context
        - If habit can reflect on the "kind of person" someone is, character evidence rules apply
- Often ≈ prejudicial effect → pejorative and judgmental → more heat than light
    - Moral - "Type of person" or > weight on "good" | Reasoning - distraction, complication, expensive
- Weight differs based on context
    - SA - trust/authority can be acquired via showcasing GC (Profit), but can't be ignored (Norman)
    - Protection of this evidence at CLaw - but some limits on presentation re: Δt
    - Inadmissible (i.e. X-examine R witness to elicit answers → R cannot rebut, TOL tells TOF to disregard (Close, Demyen))

1) Accused's use of good character evidence

Exculpating evidence → reasoning path = accused lakcs traits/disposition that would make them commit → < likely accused commits offence ∴ could be negative (a suicidal person wouldn't steal) → can include…

- Reputation witness - regarding community standing - concise (not wanting to create mini-trials), only those who are in a relevant circle of acqaintences (Levasseur), must be relevant (Lizzi)
- Expert testimony - distinctive characteristics that < likelihood of committing offence (Mohan)
- Accused accidentally puts character at issue - door to below is tricky - sometimes tone/WC open
- SFE → NEEDS > specificity
    - Proving general trait - ~~enough~~ - need to demonstrate specific disposition that suggests accused may have acted innocently on occasion in question (Morrisey - tried to commit suicide on two prior break-ups)
    - differs from R SFE evidence b/c there is only narrow general judicial discretion

Profit [1993] 3 SCR 637

Ratio - sexual conduct occurs in private = means public notoriety doesn't matter too much

2) Crown's use of bad character evidence

Test - Would an ordinary person disapprove of this conduct/character/trait? Likely to consider morally objectionable?

- If no - rule not engaged
- If yes, ALLOW - if evidence ≈ offence conduct**
- If yes, DISALLOW - if evidence =/= general offence conduct (other behaviour)
- EXCEPTIONS if yes
    - Accused puts character in issue - to rebut, to attack credibility of accused BUT ONLY for this purpsoe
        - Examples of putting in issue

- In general: "By initiating evidence intended to suggest he is not the kind of person to have committed the offence."
- E.g. of putting at issue - "I did not and would not" → tone (H(ED)),
- E.g. "I have a 19 year old daughter" (M(G))
- E.g., "My mandate was to run the company legally."

■ DENIAL does NOT put at issue (P(NA)), other defence witnesses (b/c accused have opportunity to choose whether to put at issue) (A(WA)), assertions of good character to police outside of court (Wilson)

○ Relevant to material issue (SFE Rule) - e.g. ~~burgling generally~~, but burgling/leaving lip-stick on the mirror

■ Generally, bad name - not just "sim facts," not a rule - it's propensity evid that's specific enough

■ Applies to R only → attempts to prevent prohibited inference (against accused)

■ Key aspects below

- 1) Bad Character - Presumed inadmissible
- 2) Evidence of prior discreditable relevant to live issue (> prohibited inference)
  - Is it connected to accused AND to the issue
    - MR → showing a mindset
    - AR → showing a recurring action/response
  - Issue was courts relying on precedent
- 3) R must rebut BOP by showing PR > PE (Handy)
  - i) Weigh probativeness
    - Strength of evidence
      - Proven convict BARD - enhancing, certificate/transcript available (Jesse)
      - ~~Convict~~ (not proven)
        - Acquittal cannot be dredged back up - no re-litigate
        - Stay cannot be brough back up - issue estoppel
        - Exceptions - Proving accused's state of mind ≈ subsequent chage (Ollis), multi-count indictment (Arp)
      - Contested evidence - reliabiliity/credibility assessed - TOL questions "is this evidence worth of consideration"
        - Sub-issue of collusion (Handy) - R must only prove on BOP that there is no tainting, nothing more than the opportunity for collaboration
        - Some communication did not prevent proving on BoP (Shearing)
    - Strength of connection to accussed
      - ID - some evidence (mere possibility is not enough)
        - Part 1 - Assess degree of similarity, >>>> similarity required (Arp) - must rely on the acts themselves, not other evidence
        - Part 2 - SOME evidence linking the accused to the similar act (Fletcher)
      - Connectedness to inference (often the deciding factor)
        - R purpose is key here
          - Estab MR - Evidence disproves MOF (Francis)
          - Estab AR - coincident improb (Shearing, Handy)
          - Credibility of complainants - inde allegations similarity defying common sense - therefore enhances credibility (G(MA)), but only a few similar features is not enough (Shearing)
          - Alleged Victim - demonstrat strong disposition to act violently against victim shows disposition

acting this way to the victim and can be used for MR/AR (H(J))
- Materiality of matter
  - ✓ strength of evidence re: occurrence, extent of supporting inference, extent of this ≈ live issue
  - Other evidence supporting case can have no bearing - shouldn't be unduly anti-septic
- ii) Prejudicialness
  - Moral prejudice ≈ prohibited inference
    - If evidence is "morally repugnant" → PR >> PE (Shearing, Handy)
  - Reasoning prejudice - distracts, confuses, disproportionate focus, accused cannot respond
    - Problem if SFE more complex than offence (Mcdonald)
- Balancing - Difficulty here - PR/PE are not inversely related - deference, bearing in mind SFE is PF inadmissible

- Complex scenario - Multi-count indictments
  - Sever if…
    - If counts used as SFE, favour joint-trial
    - If counts ~~used~~ and no compelling reason (i.e. meaningful legal/factual nexus, risk of inconsistent verdicts, potential reasoning prejudice)
  - If not severing and…
    - SFE can use on assessing credibility (C(PE))
    - Appeal likely UNLESS intent made known and accused had opportunity to respond (Tsigirlash)
- Complex scenario - Mr. Big - It's both very probative and very prejudicial
- Complex scenario - Co-accused - Remember the usual rule: tried alone, typically, this evidence would not be admissible at the instance of the Crown (propensity reasoning)
  - Test - Accused is free to introduce evid of BC, to suggest they are the true perpetrator BUT: doing so puts own character @ issue + TOF can only rely on evidence for defence
- Broader procedural is R applies for this → overall process (related to larger test) is…
  - 1) Relevance → 2) Exclusion (BC, rebutted by SFE if PV>PE) → 3) Broader PV>PE
  - Ultimately there is a lot of deference here
- Classic e.g. → Brides in the bath, Baby farm
- Limiting instructions generally focused on preventing prohibited inference, avoid punishing for past conduct
  - Problem → evidence goes in without further comment, no weighing

If BCE allowed → *prohibited inferences instructed by TOL*

If GCE admitted, BCE can be admitted to rebut

R v Handy, 2002 SCC 56

Ratio - Bad character is not an offence at law, only creates moral prejudice

R v Michaud, 2011 NBCA 74

Example case → Inadmissable b/c ~~relevance~~ beyond inference accused was "sort of person" to commit offence

R v Calnen, 2019 SCC 6

Ratio - TOL provided limiting instructions and appellate court splits on whether instructutions good enough

R v Phan, 2020 ONCA 298

Issue - evidence of accused belonging to gang SFE re: retaliation for earlier killing?

- Is this "bad character" evidence and does not relate in live issue? **Yes**

- Is this "similar fact" in the sense of a "striking similarity"? **No**
- Is it relevant to some live other issue at trial? **Yes**
    - Motive and "animus" – **yes, the motive to kill tied up in gang warfare**
    - Narrative – impossible to "tell story" of homicide without incidentally mentioning membership in gang
- Does the Crown still need to establish PV > PE? **Yes**

3) Third party CE

Eaiser to lead bad character evidence against not accused because only the accused is at risk of moral prejudice

IF CO-ACCUSED - ADMIT/EDIT - when saying bad things about co-accused, it goes to <u>your defence</u> but <u>not their guilt</u>

IF 3RD PARTIES - accused can introduce so long as probative value is not <u>substantially</u> outweighed by prejudice

- Examples
    - Responding in self-defence - can admit knowledge that attacker (who became the victim) was violent, since this is is pertinent to the substantive law → must apply, present evidence, need AOR
    - Consider moral/reasoning prejudice - inflammatory (Pilon)
    - Past racial profiling by cop (Khan)
- You don't lose bad character shield until you say "they always commit crime" or "they're violent (and dead)"
    - You can't only learn about the alleged victim, then you must learn about the other (only exception, where prejudice outweighs provative (Williams)
    - **Solely neutralizing purpose though

<u>R v Grant, 2015 SCC 9</u>

Ratio - Allowed to point to another murder → striking similarity + AOR, probative is ~~substantially outweighed~~ by prejudice

<u>R v Varga (2001)</u>

Ratio - "Attacks on the character of the deceased are often easy to make, risk conclusion that it is a defence to a murder charge to show that the deceased's demise was a civic improvement" → too vigorous, may put client's character @ issue

Corbett Application re: admitting Criminal Record

<u>R v Corbett, [1988] 1 SCR 670</u>

Analysis - in order to Charter compliant - infer ability to exclude some or all → considerations

- How recent was the record? How similar is the record to the offence currently charged?
- Are these offences of dishonesty (e.g., theft, fraud, perjury, public mischief)? ≈ credibility
- Has the accused attacked the character of Crown witnesses (fairness concerns)?

<u>R v King, 2022 ONCA 665</u>

Analysis - makes a Corbett application because PE>PV → how should indigenousness have on this?

- Account for distortions ≈ possibility of stereotype/systemic biases = < reflective disregard for truth/contempt
- When calibrating prejudice that could result from admission of prior convictions, TJ must account for racism

4) Complainant in SA

It's not just "bad character" evidence - it's here due to history of CLaw/SA (Krausz case)

BC vs 276 (draws a line around certain evidence, special process for screening- twin myth reasons never allowed)

- Scope of statute → ~~Absolute bar~~ on BC re: complainant in a SA prosecution → <u>Lim to specific forms of evidence about sexual reputation/prior sexual activity</u>

CC s 277 - evidence of sexual reputation, whether general/specific → ~~admissible~~ for the purpose of *challenging or supporting* C's credibility

CC s 276 - <u>evidence that the complainant has engaged in sexual activity</u> (w/ accused or with any other ~~admissible~~ to support an inference that, by reason of the sexual nature of that activity, C… [TWIN MYTH REASONING]

PERMITTED - other relevant inference, four requirements per 278.93-278.94

- 1) Not for purpose of twin myth
- 2) Relevant to an issue at trial
- 3) Specific instance of sex - Friends with benefits (Goldfinch), having sex around Δt of becoming pregnant (RV)
    - "Sexual activity" - any comm made for sexual purpose or whose content is of a sexual nature (per CC 276)
- 4) Probative >>> prejudicial

CC s 276(2) → only applies to defence evidence, CLaw rule re: other party → voir dire and four steps

- Written application → specificity → voir dire hearing
    - Purpose - context, narrative, credibility (Goldfinch) - NOT invoke a prohibited inference
        - Examples of non-twin myths of non-twin myth uses of prior sexual activity (Seaboyer)
            - (1) Honest but mistaken belief in consent – accused's belief could arise, in part, from other instances of sexual activity known to accused
            - (2) To explain physical conditions relied upon to establish the assault (e.g., existence of semen, pregnancy, injuries) → *it's not me, it's someone else*
            - (3) To explain how a young complainant could provide such a detailed narrative of SA
        - ∴ old provision needed to be struck down - problem isn't prior sexual acts per say, it's about how it's gets used

- Section 276(2) – prohibits use of prior sexual history except in the listed circumstances – recall 3 steps:
    - (1) **Relevance**
        - ***Built right into the 276 exception***
    - (2) **Exclusionary rule**
        - ***Creates new process***
    - (3) **More prejudicial than probative**
        - ***Built right into the 267 exception***

276(2) … [N]o evidence shall be adduced … that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, … unless the judge … determines, **in accordance with the procedures** set out in [*the sections that follow*], that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);
(b) is of specific instances of sexual activity;
(c) **is relevant to an issue at trial**; and
(d) **has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice**.

Significant = raises a RD (per Darrach) → this departs from "substantially"

Examples in practice - some relevance beyond twin myths?

- (1) It never happened – denial of any sex → Credibility of complainant
- (2) It happened, but it wasn't me – identity → Reliability of complainant
- (3) Strictly platonic - they were engaged → Prior inconsistent statement
- (4) There was sexual activity, but there was communicated consent → Credibility/reliability
- (5) There was sexual activity, but I believed there was communicated consent, and I took reasonable steps to ascertain consent – "honest but mistaken belief" → THIS IS WHERE SEXUAL HISTORY MAY BE RELEVANT - though it isn't impled consent, but certain clear positive indicators of consent being practiced
    - Does nature of relationship ever change reasonableness of accused's belief? Does this limit the accused's ability to call evidence of "context" about the relationship? → Goldfinch provides an example of a relationship that doesn't imbue relevent details → needed to directly explain the prior sexual relationship in something like a "friends with benefits"

Collateral Facts Rule - designed to achieve trial efficiency (Darrach) - limits to what additional matters can be raised

- If you can X-examine on sexual history - CFR still applies - not credibility on trial

Commentary → 276 is unpopular because it departs so much normal rules of evidence that you can make on-spot decision or simple voir dire, it is a procedural quagmire

R v Krausz (1973)

Traditional rule - could cross-examine complainant on;

- 1) general reputation, 2) sex between CD, 3) sex between C/Others

- 1) and 2) → regarded at CLaw as relevant to whether complainant consented, 3) → irrelevant to consent, but relevant to credibility

R v A, [2001] UKHL 25

Ratio - believe that Canadian rule harms Human Rights because it makes it impossible to introduce relevant evidence

Barton

Barton failed the process - even though Crown didn't object, TJ should've played gatekeeping function

Though 276 does not apply to murder → "In respect of" should be given a broad reading

Are there any limits on the Crown introducing such evidence? → Barton

- Technically 276(2) doesn't apply → Seaboyer does!

Seaboyer

Ratio - General prohibition on all evidence of prior (other) sexual activity of the complainant, *unless* the Accused complies with the procedure to admit that evidence

Goldfinch, 2019 SCC 38

Ratio - assessment of evidence must be free of twin-myth reasoning → apply - should not have been privy

R v RV, 2019 SCC 41

Ratio - Accused wanted to cross-examine complainant about other potential sexual partners (re: virginity) – filed a 276 application → result very flexible - just name date/range

R v McKnight, 2022 ABCA 251

Ratio - TJ did not err by concluding that interactions that occurred "hours" earlier required a section 276 applicatione

5) Civil cases

Good character only called IF in issue OR criminal alleged (Plester v Wawanesa Mutual Insurance) → liberty not at stake

BC (presnted as circumstantial proof) must satisfy SFE (more generous operation) → Simply decide if relevant + PE/PR

- PJ in crime ≠ PJ in civil, Crime there is a prohibited inference, civil there is no presumption of innocence (moral prejudice is not as crucial a factor)
- SFE applies solely to the Crown, whereas in civil each party is more equal
- Divorce Act - shall not take into consideration the past conduct of any person unless the conduct is relevant (somewhat redundant, divorce proceeding is not an opportunity to sully character of those involved)

CH 4: HEARSAY

Intro

Out-of-court fact statement (No contemporaneous opportunity to cross-examine)

\+ offered to "prove truth of contents" (includes just words, or other testimony)

Hearsay (definition in R v Evans)

We're all about listening to evidence in court - Hearsay is not listening/testing evidence directly

- Declarent misperceives (unreliable), misremembers (unreliable), provides misleading narration (unreliable)
- Declarent knowingly made a false assertion (not credible)

Question ⇒ is it hearsay? ⇒ if yes, presume inadmissible ⇒ but does exception apply?

- Purpose here matters - may be used to prove WHY constable acted the way they did
    - "Icy steps" to prove steps were icy - violates rule, we can't test declarant
    - "Icy steps" to prove manager heard and did not respond - okay
    - "Brakes broken" to prove broken brakes - violates rule
    - "Brakes broken" to prove lack of response - okay
    - "The son said something, and then the father response" to prove something said - violates rule
    - "The son said something, and then the father response" to prove father motivated - okay
    - Police grounds for acting, if the grounds were challenged
    - Narrative - "evidence necessary to understand the unfolding of events surrounding the offence"
- A fact can be relevant for more than one reason - is introduced for reason OTHER THAN truth of facts
    - Potential backdoor
- TEST: Ask party introducing to explain relevance to party's case <u>even if out-of-court statement is untrue</u>
    - SOMETHING CAN BE UNTRUE - BUT MOTIVATE SOMEONE, OR PROVE THEY DID NOT RESPOND

Difficulties

- Automated processes? Fully = no concern | Human interference = concern, need to CE
- Implied assertions – behaviour not obviously intended to communicate something?
    - drug telephone calls or drug text messages - "Hello, I want to buy drugs" (~~CE caller~~, can't perception, memory, narration, or sincerity) ≈ was it a wrong number? A joke?

Additional: TJ provides limiting judgement to limit concerns ot TJ must explain how not relying

Subramaniam v Public Prosecutor

"Terrorists say we're going to kill you" - was about how the defendent felt

- Real issues were (a) whether threats were made, and (b) whether accused believed
- We can still investigate <u>*perception, memory, narration, and sincerity*</u> by cross-examining the recipient

R v Black

"Note says Chrissy" - inadmissible because we don't know what author of note meant? - BUT actually it's admissible <u>because Christina has access to building and we can infer complicity</u>

R v Collins

"Comments" - what was at issue was the officer's actions/perceptions

LeBlanc v R

out-of-court statements go beyond what is necessary to form context

Forms

Verbal - statement

Nonverbal - nodding, pointing, showing (intends communication)

Document - printout, diagnosis of injury, affidavit

Audiovisual - videotape, audio recording

NZ Evidence Act - Out-of-(this)-court = prior in-(other)-court to prove truth of contents? = admissible

Prior Statements of Witness: Absence of contemporaneous

Usually, not present (below)... but if present…

- Out-of-(<u>this</u>)-court = prior in-(<u>other</u>)-court to prove truth of contents? = inadmissible (R v Khelawon)
- Recanting witness
    - If they adopt their prior statement, it becomes their in-court statement
    - If they cannot remember, cannot say it is true, say they lied → this is hearsay
        - Two conflicting version - cannot test prior statement (could be under principled exception…)

Warning to TJ if out-of-court statement introduced to confront witness about difference between prior/current statement → <u>Cannot use for non-hearsay purpose</u>

R v Baldree, 2013 SCC 35

"There is no principled or meaningful distinction between (a) 'I am calling Mr. Baldree because I want to purchase drugs from him' and (b) 'I am calling Mr. Baldree because he sells drugs.'" → both are hearsay

Rule of thumb - Flaws exist? - 1. misperceived, 2. misremembered, 3. unintentional mislead, 4. Knowingly false assertion

Exceptions to exception → use principled exception

- Indicia of necessity and reliability may modify exception and allow it (rare)
- Indicia (lacking) of necessity and reliability may exclude it
- Indicia of necessity and reliability established via voir dire
- No evidence is hearsay on its face

Ask Marlee for Scenarios 2-4 (slides 100-102) from (4) Introduction to Hearsay on 230221

Principles underlying

WE'RE JUST SEARCHING FOR THE TRUTH

(0) Is it relevant?

(1) Is the impugned evidence hearsay? (out-of-court statement relied upon for truth of its own contents)

(2) Stat exception → admissible, but Charter challenge | CLaw exception → admissible, but challenged re: necc/relia

- Starr challenges res gestae exception (present state of mind re: suspicion!)

(3) Principled exception

Necessity - *ANY OTHER WAY?* reasonably necessary in order to obtain declarant's version of events ≈ receiving evidence untested OR losing it entirely *Dead, ill, incompetent, recanting (KGB)* Failure to take reas efforts to secure may undermine "reas"	**Threshold Reliability** - *IS IT LEGIT?* question - does the evidence demonstrate sufficient indicia of reliability 1. Inherent trustworthiness (think substantive) - Spontaneous, natural, without suggestion, contemporaneous, no motive to live, sound mental state, against own interest - Recipient is public official who can be cross-excamined - Declarant/recipient relationship is keey - Corrob evid (Khan) can't be overstated (Couture (2007)) - purpose matters - "Demonstrate statements that removes any real concern about their truth and accuracy." (Couture (2007)) 2. Testability (think procedural tests - adequate substitutes) - Substitute for X-examination? - oath, audio/video, originally cross-examined - no one factor determinative - Jury warnings are not enough here - you can't instruct on an un-evaluable statement (Bradshaw) NOT MUTUALLY EXCLUSIVE → BOTH PUT TOGETHER TO GET TO THRESHOLD, ONE CAN BE USED OVER OTHER Note: TJ is asking, "is this worthy for TOF" → Ultimate reliability is for TOF - this is about asking "DO I BELIEVE IT"

DPP → HL refuses new category	*Ares v Venner* → Creates business records exception	*Khan* → ~~"spontaneous declarations,"~~ (too late, no under pressure) rather principled approach	*Smith* → Principles do not just apply to children	*Starr* 1) Presume inadmissible (unless exception, traditional carries on) 2) Principles - necessity/reliability (can modify to bring into compliance) 3) Traditional exceptions do not need principle application - Consider PR vs PV | Onus on exclusion-seeker 4) No category - Voir dire - prove N/R on BoP

Whole history…

- ***R v Khan*, [1990] 2 SCR 531 – Original recognition of principled exception**
- *R v Smith*, [1992] 2 SCR 915 – *Khan* was not a one-off; principled exception exists → this is a triumph
- ***R v KGB*, [1993] 1 SCR 740 – Further development of principled exception for prior statements**
- *R v U(FJ)*, [1995] 3 SCR 764 – Substantive use of prior inconsistent statement (strikingly similar acts described - inherent prob of match)
- *R v Hawkins*, [1996] 3 SCR 1043 – Use of principled exception to admit evidence no longer available due to spousal incompetency
- *R v Starr*, 2000 SCC 40 – Framework for how traditional exceptions and principled exception interact
- *R v Mapara*, 2005 SCC 23 - Should co-conspirator's exception be modified after *Starr*
- ***R v Khelawon*, 2006 SCC 57 – Framework for applying principled except to evaluate threshold reliability (inherent/testability)**
- *R v Couture*, 2007 SCC 28 – *Hawkins* revisited; use of principled exception to undermine other rules
- *R v Blackman*, 2008 SCC 37 – Use of corroborative evidence in assessing threshold reliability
- *R v Griffin*, 2009 SCC 28 – Admissibility of "state of mind" evidence under principled exception
- *R v Baldree*, 2013 SCC 35 – Principled exception for "drug calls"
- *R v Youvarajah*, 2013 SCC 41 – Sufficient testability safeguards required when evidence is otherwise suspect
- *R v Burns*, 2016 SKCA 67 – Substantive use of prior inconsistent statement (text messages while threats occuring)
- ***R v Bradshaw*, 2017 SCC 35 – When evidence will be considered corroborative for the purposes of inherent reliability assessment**

Procedurally

- Calling party…
  - invokes CEA s 9 (voir dire) allows party to prove that witness called made prior inconsistent statement, if admitted, cross-examination allowed → KGB application is additional phase
  - states purpose of tendering statement → BoP re: Admissibility of Prior inconsistent statement for truth, establishes threshold reliability Case by case
- TJ modifies: if statement made to Authority figure, voluntariness must be proven BoP

R v KGB, [1993] 1 SCR 740

- If you adopt the statement → it is not hearsay → BUT HERE, the boys did not adopt it
- Default is usually → no adoption, no admission → BUT, here we have testability satisfied (oath, video), 4 cond…
  - 1) Oath 2) Existence of sanctions 3) Entire context videod 4) Opposing party has full opp to X-examine
- 4 cond not necessary (inherent trustworthiness is especially positively influential)
- Sneakily creates a 3rd req (necessity, threshold reliability) → voluntariness & no investigative misconduct

R v Khelawon, 2006 SCC 57

Analysis → inadmissible (middling case)

- (1) Testability (procedural reliability)? → Very limited
  - Videotaped, but S's statement not under oath
  - Most important – no opp to cross-examine declarant - sincerity/memory concerns cannot be tested
- (2) Inherent trustworthiness (substantive reliability)?
  - S claimed K threw S's clothes into bags → clothes found in bags → BUT ANYONE COULD
  - S claimed he was assaulted → bruises on his body → BUT OLD PEOPLE BRUISE

All relevant evidence is admissible - hearsay is exception to this → TJ is "gatekeeper" to this info

- Rationale - inability to test reliability, difficult to WEIGH
- Exception to exception if you can test trustworthiness/assessment

R v Bradshaw, 2017 SCC 35

Facts

- Video - Thielen told "Mr. Big" that he had shot both, then he said he shot one, Bradshaw shot the other
- EITHER WAY → HE'S IMPLCATED IN EITHER MURDER | But, in jail - you don't want to rat

Analysis

- Necessity → yes, refusal
- Reliability → Testing is low (no ability to cross), Substantive → ???
- R points to corroboration - Forensic evidence, weather, cell records → SCC stresses…
  - "What's the purpose?" - ID material aspect of hearsay "tendered for their truth"
  - ID potential danger of perception/narration/sincerity
  - ID potential alternative explainations (here, Thielen implicated Bradshaw to minimize own involvement)
  - DOES THE CORROB EVID RULE OUT THESE ALT EXPLANATIONS
- Potential issues
  - Concer re: sincerity = truthfulness | Concern re: memory, narration, or perception = accuracy

Ratio - Only likely explanation for corroborative evidence is that it is trustworthy – sets a very high standard for corroboration to make out substantive reliability

Exceptions - General

(1) Dying Declarations

(2) Admissions by a Party

(3) Declarations Against Pecuniary/Penal Interest by Non-Party

(4) "Res Gestae" (Spontaneous Statements, etc.)

(5) Declarations in the Course of Duty (Business Records, etc.)

(6) Prior Testimony

(7) Prior Identification Evidence (8) Prior Convictions

History - exceptions to exceptions avoid the broad impact of the hearsay rule → DPP v Meyers (HL, 1965) – pigeonholes

- Eventually CLaw stopped and new exceptions should be left to parliament
  - Early-to-mid 20th Century – creation of new statutory exceptions
  - 1970s – willingness to create new common law exceptions (Ares v Venner)
  - 1990s – creation of principled exception (Khan, KGB, Khelawon)
- Some say there is no uniformity to exceptions, other say the common thread exists

Broad categories - Trad CLaw exceptions | Principled exception | Statutory exceptions

- Statutory exceptions - confusion here, they don't say that this evidence would otherwise be hearsay
  - CDSA s 51(1) **admissible in evidence in any prosecution for an offence under this Act** … and, ***in the absence of evidence to the contrary***, **is proof of the statements set out in the certificate or report**
    - Hearsay dangers?: Perception, memory, narration, sincerity → mitigated by giving notice
  - ARC s 13.18(1)(b) An affidavit may be sworn **on the basis of information known to the person swearing the affidavit and that person's belief**. **(3)** If an affidavit is used in support of an application that **may dispose of all or part of a claim**, the affidavit must be sworn on the basis of the **personal knowledge** of the person swearing the affidavit. …
  - CC 518(1)(e) Re: Bail TJ may receive/base his decision on **evidence considered credible or trustworthy**
  - CC 723 Hearsay evidence is admissible at sentencing, but the court may, if interests of justice, compel a person to testify where the person
    - (a) has personal knowledge of the matter;
    - (b) is reasonably available; and
    - (c) is a compellable witness.

EXCEPTION IF… other routes to assessing reliability + necessity to hear without declarant (dead, invalid)… → devel in CLaw

Dying Declaration Exception - rare exception

- Elements - homicide - Δt at near/certain death, settled exceptation of dying - describes death - statement admissible had deceased not deceased
  - "*While the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; the situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.*" *R v Woodcock* (1789)
- Concerns - necessity obvious - reliability heightened by circumstances
- Other rationales are silly → religious rationale re: eternal damnation
- Examples
  - R v Aziga (2006) – HIV case – statements 18 hours/18 days before
  - R v Nurse (2019) – victim w/ severed vocal cords points at his injuries and then points at accused

Admissions by parties introduced by other side - common exception

"Anything other side ever said/did" | Against interest | Any form of relevance → prove on BoP that party made admission

- (a) Statement made by the <u>opposing</u> party (most common)
  - IT JUST NEEDS TO BE RELEVANT | But, must be fair → put whole context
  - No need for → proving element of case, explicit admission of fault
  - Note: R Authority ← BARD
- (b) Act of the opposing party
  - IT JUST NEEDS TO BE RELEVANT
  - Remedial steps by defendant post accident? USA inadmissible, Canada admissible
- (c) Statement made by 3rd party that is expressly adopted by opposing party (or reas inf)
- (d) In some cases, "vicarious statements" by a third party
  - Elements: i) statement made by opposing party's agent ii) matter ≈ relationship iii) during relationshup

    - Right to admit comes from duties, ~~express permission~~ (no incentive for boss to express permission))
    - Note: Hard cases vicarious admissions - statement heard by third party between agency relationship
- (e) In rare cases, admissions by silence
    - 1) In presence of party | 2) In circumstances where party was expected to respond
    - 3) "Fails to respond" reas leads to inference that silence = adopting statement | 4) Probative>prejudicial
    - ~~Correcting nickname~~ indicates you accept nickname - must demonstrate present/heard (R v Sargeant)
- (f) Statement made by a co-conspirator, in furtherance of the conspiracy (will address this later)
    - … i have notes on this
- Mr Big (quasi-confessions) - CLaw rule developed - Presumptively inadmissible, R proves on BoP PRO > PRE

Concerns - reliability is handled by CE - though entire context needed

Formal/Informal distinction

- Formal = prepared to conced | CC s 655 Informal = Open to being contradicted/explained

Civil/Crim distinction

- ARC s 5.31(1) party **may use** in support of an application or proceeding or **at trial** **as against a party adverse in interest** **any of the evidence of that other party** in a transcript of questioning
    - If crim and to authority - must prove voluntariness BARD
- AEA 26.1(3) **evidence of an apology made by or on behalf of a person in connection with any matter** **is not admissible in any court as evidence of the fault or liability of the person in connection with that matter**.

Formal admissions use different processes under statute

- Criminal cases: guilty plea; s. 655 of CC ("Agreed Statement of Fact")
- Civil cases: Admissions of fact made within the pleadings (Rule 13.12), "Notice to Admit" (Rule 6.37)

Apology AEA 26.1 → ≠ express/implied admission of fault

Admissions against pecuniary/penal interest by <u>non-parties</u> - rare exception

"Against interest" nns = not harmful

Pecuniary elements → unavail | went against pecuniary interest | personal knowledge of facts

- Necessity = unavailable and Reliability = counter-intuitive

Penal elements → unavail re: illness/death | declarant understood conseq | conseq ~~remote~~ | marginal cases, re: context

- Reliability - Unlikely someone says something against their interest, unless true
- Concern - false admission

Res gestae (spontaneous) - multiple exceptions

"Facts surrounding or accompanying a transaction"

- *Declarant is saying something stimulated by their personal experience*
    - Reliability comes from strong link between statement/contemporaeous → no time for concoction
    - Necessity - cannot re-say what was said based on the live personal experience
        - Unavailability of declarant not a pre-requisite

1. "Statements of present physical condition" - *Person was experiencing the condition at the Δt and to establish duration*

- Declarant available to testify and can remember + litigation has started Samuel v Chrysler Credit, 2007 BCCA 431

2. "Statements of present mental state" (most confusing)

- *If statements are explicit statements of OWN state of mind - admit*
- Emotion/intent/motive/plan IF state of mind is relevant + natural statement (<u>no suspicion</u>)
- R v Starr - added requirement <u>natural/suspicion</u> component - cannot test the lying (Facts → GF had motive to lie)
- Belief in fact cannot be admitted → hearsay rule would be swallowed up…
    - BUT NO CONCERN if being introduced to support that declarant knew fact ≈ circumstantial evidence
- Purpose - to prove subjective belief in something

3. Excited utterances (

- *Statement following startling event/condition may be admitted IF made while declarant is under stress*
- Case-by-case assess - guarantee of trustworthiness, stress prevents the possibility of concoction
    - Sincerity → Little time for fabrication | Memory → Event still transpiring, lil risk of forgetfulness
    - Narration → Usually relates to straightforward facts | Perception → heightened by stressful event
- Some authority says, if declarant available - call rather than rely on hearsay
- R v Hartling - 911 Calls 15 min later - ~~strictly contemporaneous~~, stress is ongoing + no time to concot
- R v Nicholas - SA made 911 10 minutes after attack - could not tesitfy due to PTSD - audio tape permitted
- R v Nurse - stabbed victim gestures to perpetrator | R v Johnston - one hour later

4. Statements of present sense impression (USA focus, little Canadian authority)

- Excited utterances w/out excitement - still contemporaneously (reduces fabrication/forgetfulness)
- Statement describes/explains an event or condition made while the person was perceiving the event or condition, or immediately thereafter, may be admitted for its truth
- E.g.: Witness (recipient) overhears a bystander (declarant) say "that car is going really fast!" right before an automobile accident (but witness doesn't see car herself)
    - Exception would allow witness to testify as to what bystander said, for the truth of its contents??

Declarations in the Course of Duty (Business Records, etc.) exception

Hearsay dangers diminished

- Perception/narration concerns limited - routine prep/reliance,
- Memory concerns limited - contemporaneous | Sincerity concerns limited - no motive to lie

5 reqs - may need to explain record-keeping process

- (1) Statement/record is made reasonably contemporaneously | (2) In the ordinary course of duty
- (3) By persons having personal knowledge of the matters | (4) Who are under a duty to make the record or report
- (5) There is no motive to misrepresent the matters recorded

Some statutory exceptions (CEA s 30) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and **ordinary course of (not just made by)** business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

- Lack of personal knowledge by the maker is permitted, but this factor may erode weight

Ares v Venner, [1970] SCR 608

- Nurse makes notes after cast applied – patients toes are swollen/blue, can't move toes
- Could call the nurse? but we can't distinguish their handwriting

R v Monkhouse, 1987 ABCA 227

- Perjury case - R seeks to introduce business records
- Though time slips are an admission from INDIVIDUAL → they were compiled by OTHERS who were not called to trial → MISSING personal knowledge of the matters → RULE IS RELAXED BY ABCA …

    > *"[I]t is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records."* → reliability enhanced by fact accused was source of orig info

Ultimate use of hearsay

Should we accept/believe/rely upon the hearsay when fact-finding?

- Ultimate reliability - r

Hearsay evidence is weighed in the context of all admissible evidence

Prior testimony exception

CLaw (NARROWER) = (1) Witness is unavailable [NECC] (2) Parties are substantially the same**

(3) Material issues to which the evidence is relevant are substantially the same [RELIA]

(4) Party against whom evid is tendered had an oppurtunity to X-examine witness in earlier proceedings [RELIA]

**(2) is an onerous requirement → could try to fit under principled instead

CC s 715 = (1) Declarant's evidence given at accused's previous trial or preliminary inquiry

(2) The declarant either; Refuses/dead/too mentally ill/outside of Canada [NECC]

(3) Given in presence of accused, and accused had a full opportunity to X-examine the declarant [RELIA - TEST]

Potvin

Defense argued that inability to cross-examine re s 7 of Charter, SCC rejects.

Confirms that opportunity to cross-examine (here, was available in preliminary inquiry) - you have 1 chance, 1 opp

- 1 opp must be fair though

Daviault

Elderly complainant dies → 1st attempt at x-examination diff if defense knew about R's police statement, ∴ disallow

Prior Identification Evidence exception

Pointing out person in a "line-up" of suspects Declarant witness identifies the accused in an out-of-court statement

Typically there are three options - generally looking for earliest ID under fair circumstances

(1) In-court identification - ✓

(2) ~~In-court identification~~, but can testify that they (a) prev gave description, or (b) prev made an acc ID - ✓

(3) ~~In-court identification~~, and can't testify to the accuracy of a previous description or identification… - **X**

Properly conducted photo line-up – powerful! → any less is not good enough

Note: KGB exception does not apply if failure of memory or no prior identification

Prior Convictions exception

Historically: Crim convict ~~used~~ in subsequent civil proceeding as proof that accused committed Act - *No longer the case*

Often: Party to a civil proceeding proves other party (or third) convicted of a criminal offence ≈ some evid

- Can be used offensively (Simpson v Geswein) or defensively (Demeter v British Pacific Life Insurance Co)
- BUT, ~~relitigating~~ (Toronto v CUPE Local 79) → conditions to consider here; fraud, dishonesty, new evid, fairness
- Unfair to rely on issue estoppel, if original proceedings were minor (Becamon v Wawanesa)
- Acquittal ≠ proof that did not commit, because of the high standard proof

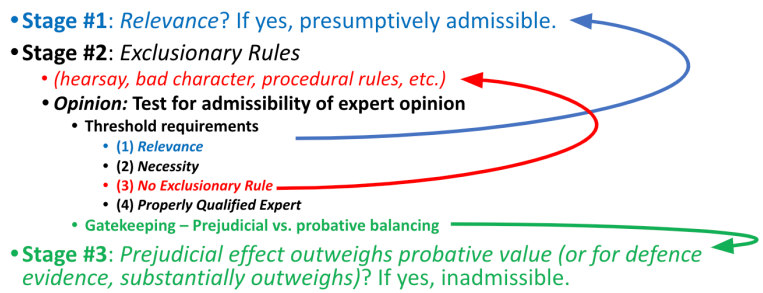
AEA s 26(2) admissible in evidence for the purpose of proving that the person committed the offence.

24(6)(4) [deals with defamation], weight determined by the judge or jury, as the case may be.

R v Khelawon, 2006 SCC 57

CH 5: OPINION AND EXPERT EVIDENCE

Overview of Fact/Opinion/Exceptions



FACT - ADMISSIBLE	OPINION - INADMISSIBLE	LAY OPINION EXCEPTION	EXPERT EXCEPTION (Expert can also give lay)
Observation of fact	*Judgement of situation*	*Opinion is only option, no other meaningful way to communicate*	*Judgement (opinion) requires specialized knowledge (acquired by special training/exp)*
Stab = in neck	Stab = life-threatening	Stab = bad	Stab = would result in death in 5-10 minutes, based on rate of blood loss
		Req: only ord evid - Child could deduce (R v Lee) ≈ adj/adverbs	Req: "beyond the ken of average juror" ⇒ NOT ALL info acquired via special instruction/experience
		In better position than TOF, simply *compendious mode of stating facts too subtle, complicated to be narrated (Graat)*	

Note: some appellate decisions → expert evidence admissibility rules ~~apply~~ to factual obs made by expert, ONLY opinions

Additional considerations

- No anecdotes - but can use general principles (Sekhon vs JR) ≠
- Admissibility and the foundation for an Expert Opinion
    - Experts may interview witnesses, offer opinion based on facts expert has found (hearsay) → BUT, TOF must receive admissible evidence that proves the truth of the hearsay information (Abbey) → Lavallee confirms there is just some admissibkle evidence to establish a foundation of expert's opinion (not all)
        - Mainly based on inadmissible? No. → essential foundations undercut? No.
    - Exception - if expert acts on info that is within expertise and not from litigation (even if it does not meet hearsay)
- Before any weight is given to "expert opinion based on factual assumptions", facts upon which opinion is based must be found to exist (and TOF must accept it)
- Presenting to juries - Must explain in layman's terms (Theriualt) → Judge doesn't do this, expert does

Graat v R [1982] 2 SCR 819

Compendious… → consider necessity

- Difficult for witness to express underlying facts that justify the inference
- Not a matter of scientific, technical, or specialized testimony
- Matter of common, ord knowledge whether person is so intoxicated that their ability to drive is made worse

Consider: can ordinary people make this conclusion (child)

Note: Specialized training of witness does not enhance weight

Ultimate Issue Rule

evidence can't express the verdict (for both expert/lay) → no longer applied as a strict/independent rule, we just need to have greater scrutiny when this comes up… however, cousins survive

- Witness cannot offer opinion on pure quiestion of domestic law ⇒ b/c this is TOL job
    - Police officers don't attest re: opinion on G/I (R v Van, 2009 SCC 22)
    - Exception: foreign law
- Rule against oath-helping (i.e. adducing evidence to support/undermine witness credibility/reliability)
    - Concerns relevance tenuous, given more weight that it's worth
    - Rule not violated where testimony expressing own observation/opinion that tends to support
        - E.g. Expert says "Dementia messes with memory but doesn't create false memories"
    - Experts may offer opinion evidence relevant to cred/reliab of other Witnesses b/c ⇒ > TOF capacity
        - E.g. "Relevant" (okay) versus "about" (bad) - can educate on battered woman, but not apply
    - TJ obligations; confine credibility evidence to purpose, direct evidence

Expert Opinion Deep Dive

Presumptively inadmissible, admitted only if party attempting to introduce satisfies on BOP

- (1) Relevance: Is evid relevant? | (2) Necessity: Does TOF need evidence to cross inferential bridge?
- (3) No exclusionary rule | (4) Properly qualified expert… | (5) PR v PE
    - i) Qualified - no formal reqs, BUT > anecdote or transient experience
    - ii) Willing to give unbiased - must say "Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence" - not just weight (White Burgess)
    - iii) Not stray
- Gatekeeping - can admit, but limit

We don't get to exception if Δ

- the observation does NOT take special expertise to make/interpret/describe
- they have no special training

Concerns

- (1) Inflated or overstated credentials → Snake oil, rent-an-expert
- (2) Unreliable theory, process, technique, or knowledge → Snake oil, rent-an-expert
- (3) TOF will put too much weight on impressive-sounding evidence from impressive witness
- (4) Tendency for experts to *stray beyond areas of expertise*
- (5) Undue consumption of time and distraction of TOF

Process - Voir dire (party tenders witness in specified field → inquiry into qualifications) - mostly CC s 657.3

- Books/studies - allowed if expert agrees with them (makes them the expert's not the author's opinion)
    - Expert acknowledges authority, but rejects conclusion → can be asked about this, TOF puts this to weight
    - Cannot be faced with source unfamiliar with (Marquard)
- Limits on number of experts | report in lieu ✓, retain discretion to req witness

Major (SKCA)

collision reconstruction - downloaded data recorder from car - this is how fast the vehicle was going - Police could not explain software - you should probably qualify that person as expert - beyond the ken - "through my training/knowledge, i can operate the tool"

Trochym

Facts - Memory refreshed using hypnotism

(6) Novel Science, Challenged Techniques/Theories→ Consider Torchym (draws on Daubert factors)

- (1) Whether the technique can be/has been tested
- (2) Whether technique has been subject to peer review and publication
- (3) Known or potential rate of error
- (4) Whether theory/tech used generally accepted

R v Abbey, 2009 ONCA 624

Facts - gang tattoo

(7) Social science - Scientific validity is NOT CP - opinion flowed from his specialized knowledge gained through extensive research, years of clinical work and his familiarity with the relevant academic literature

R v Sekhon, 2014 SCC 15	*R v JR, 2018 ONCA 615*
Inadmissible - not logically relevant, does not speak to specific facts Customs officer could not draw opinion about someone not knowing they were trafficking cocaine - No General principles (Sekhon)	Admissible - Based on his expertise in understanding and treating burns generally, and in treating C.G.'s injuries specifically Burns did not constitute self-harm, per general characteristics of harm (JR)

Civil Cases

Rule 5.34: Form of expert report

Rule 5.35: Sequence reports are exchanged (first report, rebuttal, etc.)

Rule 5.36: Req to give notice of objections to admissibility of expert report

Rule 5.37: Possibility to question experts before trial

Rule 5.38: Expert has ongoing obligation to advise of changes in opinion

Rule 5.39: Possibility of entering expert report without calling witness

Rule 5.40: Ability to cross-examine experts at trial

Other rules

Rule 8.4(1)(3)(c): Party requesting trial must certify expert report process complete

Rule 5.41: Medical examinations by experts

Rule 6.40: Court-appointed expert

CH 6: PRIVILEGES

Concept	Adm, Access, or Both?	Holder	Class vs. Case-by-Case?
Solicitor-client privilege	Both	Lawyer's client	Class
Litigation privilege	Both	Lawyer's client	Class
Settlement negotiation privilege	Both	Lawyer's client	Class
Informer privilege	Both	Confidential Informant + Crown	Class
Marital communications privilege	Adm – access writings	Husband/wife as witness	Class
Psychiatric privilege	Probably both?	Patient	Case-by-case
Journalistic source priv CEA s. 39.1	Both	Journalist	Case-by-case
PI immunity – s. 37 *CEA*	Both	Not "owned," "official" can assertt	Case-by-case (sort of)

If privilege exists - not admissible → ~~truth-finding~~ OR public policy consideration → no privilege is absolute

- However ≠ non-compellability
- However again, evid (procedural protections re: collect/present info) + subst rule (beyond court-room)**

Types

- SCP** (Descôteux)
- Comms pre: litigation
- Implied undertaking rule - SCC ~~calls~~ privilege, but the texts do
- Statements re: settlements try
- Police informer
- Spousal (re: marital comms)
- Religious comms (maybe)
- Journal-source** (National Post)
- Public interest immunity

Distinctions

- Admissibility v access - privileges bars admissibility, but nns preventing access to info
- Class (PF applies - now only created in legislation) v case by case (balancing) Δ
- Protection v immunity
    - "Protection" – only prohibits disclosure/production prior to litigation, case-by-case
    - "Immunity" – enhanced (e.g. gov't doc) UNLIKE privilege, cannot be waived (not always true)
- Who holds it - party or individual
    - Held by R → Minister waives (Ostensibly it's GIC. but, instead it is usually delegated)
    - Complexity → Email account with multiple access
    - Class action – pleading = waiver because all taken to adopt, in interest of fairness (Lipson)

Claiming/waiving

- Denial may ≈ JR possible (can't put genie back in bottle)
    - Harmed? can appeal - denial = denied person, giving, but not needed = anyone (affects truth-finding)
- Whoever holds = waives (Except police - can only do so if in PI)
    - Express = 1. Knows existence 2. Voluntarily evinces an intention to waive
    - Implied = nns to prove implicit intention to waive - base on fairness/consistency
        - Fairness – partial waiving should not unduly benefit you based on lack of context
        - Consistency
    - Need some manifestation of voluntary intention (Youvarajah, ONCA),
    - > SCP, but <u>allege of ineptness on appeal</u> – SCP usually waived (Required to demonstrate issue, per Meer)
- Hem in re: purpose
- Inadvertent disclosure?
    - Rationale behind strict construction here

        - 1. Privilege protects SOURCE not information itself
        - 2. Narrow construction to minimize loss of evidence
        - 3. On privilege holder to protect
    - Considerations; Manner of release, prompt attempt to retrieve, timing in process, extent of audience, maintenance of privilege, perception/actual unfairness (Ward ONCA)
    - Consider; FAAD, SCP breach, unjustified/accidental infringement in Crim erodes confidence (Fink)

SCP

Big question - is this some piece of information that was created/communicated for the purpose of legal advice

Communication of confid nature related to seek/form/give advice this is indispensable to admin of justice

- Common-law creation + constitutional aspect (s 7 PFJ)
- Rationale - speak freely/candidly to support development of proper advice - req zone of privacy (evid+subst rule)
- Exception - criminal communications, public safety, establish innocence, wills (Geffen)
    - Crim - Future is ~~protected~~ – info client reveals about "past crimes" remains presumptively privileged
        - Exception MAY arise where effect prevents making full answer and defence (Shirose)
    - Absolute necessity test - Innocence at stake ⇒ info ~~avail~~ elsewhere + otherwise unable to raise RD
        - 1. Seek prod to estab evid basis (above 2 points) 2. If 1 yes, likely to raise RD? (Brown)
    - Public safety - 1. Clear risk to identifiable group/person 2. Risk of srs bodily harm/death 3. Imminence
    - Remember - law struck down re: anti-money-laundering (Chambre des notaires du Québec, 2016 SCC 20)
    - Fundamental principle is that interests actual furthered by SCP operation (Jack)
    - ~~Apply~~ to pure facts (Maranda v Richer) | ~~obs~~ of phys evid (if they give you evid, share re: COC, but lim)
- Wigmore conception

(1) Where legal advice of any kind is sought,

(2) From a professional legal advisor, acting in their capacity as such,

(3) The communications relating to that purpose,

(4) Made in confidence,

(5) By the client,

(6) Are, at the client's instance, permanently protected,

(7) From disclosure by himself or by the legal advisor,

(8) Unless the privilege is waived

- Perm protect - legal advice + professional acting in role + comms re: purp + confid intention + by client
    - INTENT - means 3rd party may undermine - must ensure independence, document role/understanding
    - Usually you can say who you represent - but - cases where this is protected (re: pot'l prejudice)
- Relations - can extend to 3rd parties - experts engaged in relationship
    - No need for formal retainer, > friend, confidant, business advisor, or manager
    - Info provided to support staff, other side of transaction (comm int) … so long as re: seek/obtain advice
    - Government/in-house - only to legal advice - info not automatically cloaked in SCP
    - ~~Priv investigators~~ = b/c not re: advice
- Hard scenarios - unsolicited emails, casual conversations, 3rd party providers
- Δt → until waived - presumes to survive death (Geffen exception), retainer letter may qualify thi

Ab (IPC) v U of C

Interpretive principle - SCP is > rule of evid → subst rule – legislature must EXPLICITLY override if they're going to do it

Litigation privilege

Comms when litigation commence/anticipate – dom purp of comms = prep/gather info for litigation

- Must investigate each document, not just the dominant purpose of the relationship (Suncor 2017 ABCA 221)
- <SCP b/c SCP ≈ relationship, while LP is temporary | LP ~~req~~ comm in confid
- LP requires adversariness (HBC Mining and Smelting Co v Cummings)
- Who? - Line is blurry re: third parties - Translator ≈ SCP | Investigator ≈ LP

Copies

- Privileged b/c counsel needs to prepare case w/ confidence (Hodgkinson)
- Truncates

- Non-privileged docs obtained w/out exercise of skill = not privilege
- Non-privileged docs obtained w/ skill = privilege

Security National Insurance v EPS, 2013 ABPC 188

EPS prod order for car owner's statement to insurer ⇒ Insurance company asks - permission to decline (asserts LP)

- (1) Was a litigious dispute ongoing (or reasonably contemplated) at the time the document was created? - YES
- (2) Was the dominant purpose of creating that document preparation for that litigation? - Limits breadth of applic

Implied undertaking rule

Compelled docs → info cannot be used by recipient for any other reason

- Not a true "privilege," but privilege-like: Juman v Doucette, 2008 SCC 8

Rationale - this is state-sanctioned invasion of privacy ∴ lim | protects impacted parties supporting more candidness

Exception - demons int of justice outweigh PRE – demons on BOP existence of > values of rule (privacy/efficient conduct)

Remedy for violation is contempt

Settlement negotiation rule

CLASS EX.!

Discussions during settlement negotiations re: purpose of settlement, w/ intention that ~~used~~ if process fails

- "W/out prejudice" - Common expression included on documents, meant to expressly signal party's intentions
- Other ways to capture this idea - contract, trust conditions, explicit undertaking

Rationale - encourage litigants to settle w/out need to go to trial, promoting candid discussions

Exceptions - existence of agreements/terms at issue, cause of action arises, compelling PI (Meyers v Dunphy - not closed)

- Q is "compromise agreement concluded?"
- Put aside re: misrep, fraud, undue influence
- Statement demonstrates propagation of action
- Exclusion = cloak to hide perjury, blackmail, impropriaty
- Explain delay/acquiescence
- Determine whether claimant acted reas to mitigate lose
- "W/out prejudice except as to costs"
- FAAD (Bernardo)
- Prove an offer to plead guilty to a lesser off
- Amended by CLaw (Union Carbide)

Settlement at issue – disclose | Harms admitters stance – don't disclose

3 Conditions (Sable Offshore Energy)

1. Litig dispute exists/contempl | 2. Comms made w/ express/implied intent | 3. Purp of comms to effect settle (Meyer)

Common e.g. – A sues B/C, C wants to know about A/B agreement – SNR protects

Informer privilege

Fixed rule - protects informer from disclosure in criminal/civil, more an "immunity" than a "privilege" - no balancing

- ~~Apply~~ if tip is meant to facilitate crime or interfere with admin of justice

Rationale - encourage informers to come forward (and ∴ PROTECTS ONLY IDENTITY – NOT INFO PROVIDED)

Exception - "Innocence at stake" (per Liepert process)

Who? Must be waived by R/Informer

Spousal privilege

No req to disclose any comm made to them by their spouse during marriage - testimonial only!

- Communication is not broad, does not include observations (Gosselin)
- Privilege is held by the person who listens!!!

Rationale (weak) - harmony between spouses, invasion of privacy, sharing confidences

History - pre-1800s = not competent, post = competent | CEA s 4(3)

Case-by-case

Law is suspicious of privileges – operates as a bar to relevant information and interferes with truth-seeking

∴ new privileges are "case-by-case" - case-specific, fact-specific eval of whether courts should recognize a privilege, e.g…

1. Psych/counsel - But, often demarcate extent of lim of confid
2. Religious communications
3. Journalists and sources
4. Emerg physicial - candidness is req to understand how to treat

Per Wigmore test

1. Communication originates in confidence that no disclosure
2. Element of confid ESSENTIAL to full/satis maint of relationship
3. Relation, in opinion of *community*, ought to be sedulously fostered
4. Injury > benefit of correct disposal of litigation (like a PRE v PRO)

Mere possib comms might have to be divulged ≠ not being made confid – absolute protection ~~req~~ (Ryan v M(A))

access to evidence is given priority over certainty (Jaffee v Redmond)

History - Journalist's Sources: R v National Post, 2010 SCC 16 → CLaw (Civil) → now it's in CEA s 39.1 (Criminal)

Public Interest Immunity

Balance between - PI in confid of info v PI in access

- NOT based on saving relationship, it's about protecting certain info - protecting free flow

CEA s 37 - minister (or some other official - broadly defined) may object

BC v Provincial Court Judges, 2020 SCC 20

Factors for Cabinet level

- (1) level of "decision-making process"; (2) "nature of issue"; (3) contents; (4) Δt of disclosure; (5) "importance of production re: admin of justice"; (6) "allegations of unconsc gov't behaviour"

Waiver of privilege

Can be; Express or implied 😕 | Full or partial

- Accid info release ≠ auto loss (LSA Code of Conduct Rules, too) But must take steps to "put horse back in barn"

Disclosure of records (Stinchecombe)

Per Stinchecombe, R has duty to turn over all relevant info in possession to defense

- NOT about R getting convict, it's about public seeing justice done
- Duty is ongoing – applies only to prosecutor, not to the entire gov'

2 assumptions for why accused req for FAAD - material is relevant + material likely to make case against accused

- Narrow except – irrelevant/privileged, or governed by law (protected by legislation) - can be overridden by "FAAD"

Per McNeil → before, applied solely to "fruits of investigation" now applies to all "obviously relevant"

- R obligations here - relevance (law errs to inclusion ≈ "clearly irrelevant") + privilege + stat lims
- R duty to inquire with police - not yet been fully explained

Per O'Conner (CLaw) - 3rd parties not under similar duties, defense needs to apply to court - weigh FAAD v right to privacy

- Apply for subpoena duces tecum under CC s 698/700
    - 1. Does R have? Would R need to provide? → If yes, don't do next step
    - 2.a. Screen (demonstrate to TJ likely relevant evid (low threshold)) → b. Inspection (TJ thinks about FAAD)
    - 3. 3rd parties demonstrate privilege?

Disclosure of records (re: SA, Mills)

Per Mills/CC s 278 - different standard re: SA

- "record" – "any form of record that contains personal info for which there is a reasonable expectation of privacy" … "but does not include records made by persons responsible for the investigation or prosecution of the offence"
    - Presumptive rule against disclosure in course of criminal proceedings
    - Important distinction: apply even if the Crown has document – diff than prior

- Prosecutor has a duty to give notice of possession of these documents to taccused
    - > 60 days notice - In camera hearing (unusual, against open court) | Application before TJ
    - Particulars of why info believed relevant, supported by affidavit
    - Record-holder/complainant ~~compellable~~ as witnesses @ hearing, have the right to counsel at hearing
- Records relating to complainant in Accused's possession - must apply for these records to be admitted - consider whether 276 applies, relevance, PRO v PRE, FAAD, potential PR of diginity/privacy bias/discrimination
- Process
    - (1) Application for production to TJ
        - 1a) Likely (reas possib - probative) - relev + 1b) Interests of justice balancing (diff than O'Conner)
            - Still err on the side of production, at least TJ should see (Mills)
    - (2) Inspection by trial judge & decision on production to accused

Use of private info already in accused's possession

- Normally no restriction on defence use of information already in its possession → qualified in SA
    - (1) Preliminary application – judge does threshold assessment of merits
        - Detailed written application served on prosecutor and clerk of court ≥ 7 days
        - Judge assess whether evidence is capable of being admitted (drafting error)
        - Could be heard orally or simply in writing (JJ), but held in private
    - (2) Hearing proper – prejudicial vs. probative balancing
        - Complainants have a right to attend and participate
        - If "records" also involve "other sexual history" (section 276), that regime applies too

R v JJ, 2022 SCC 28

Req defence to turn over records Charter-compliant here → Adv disclosure DOES NOT hurt truth-seeking, still x-examine

Critique - Problematic breadth of majority's definition of "record" - screening regime analogizes diff situations (health records vs text messages) in a way that's tough to defend

Third-party information in civil cases

Name right people, we can get the right info, make deal to access information and drop them from the style of cause

ARC 5.13 → compel non-party to prod if i) under their control ii) reas to believe relev/material iii) may be req to prod at trial

CH 7: Self-incrim

Wigmore triceratops - lie/tell truth/not responding all bad - ∴ we need a complex rule

Broad principle against - applies when state compels admission re: own guilt, disprove def (formal/informal applications)

- rests on privacy/dignity of indi, abuse of state power → it's all about choice, you choose to participate or not
    - 1) Competing considerations - rules cannot unduly frustrate investigation
    - 2) Does not apply to pre-existing items capable of being gathered
    - 3) Applies to evidence evinced re: INCRIMINATION

Spurs multiple privileges

- Testimonial
    - Right to choose to testify at their own trial + Right of any witness to refuse to answer
- Non-testimonial (blood sample, breathalyzer, police line-up) - Not as protected, b/c… authentic evidence is more likely to be true, does not invades the privacy of mind, does not create NEW evidence

Historic rules

- (1) Rule making accused incompetent to at own trial → right to choose to testify at own trial (non-compelable)
- (2) Privilege against self-incrimination: a witness (at someone else's trial)

(1) evolves as above, (2) is use immunity → Charter - adm brings admin of justice in disrepute

- Charter creates derivative use immunity - protects testimony AND non-testimony derived from testimony
- Principle against self-incrim applies to compulsion re: mind/products of body ≈ principled approach (R v B(SA))

- Backtrack, communicative forms warrant greater protection (R v Grant)

Non-compellability of accused at their own trial

Accused not compellable to testify in criminal trial or trial for offence under provincial enactment

Co-accused - cannot be forced to testify at their own trial - therefore would need to sever to compel co-accused

- CEA s 4(1) Every person charged … is a competent witness for def, whether charged solely/jointly
    - Lims ≈ "charged with an offence," "in proceedings against that person in respect of the offence"

Const immunity

Witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury/giving contradictory evidence

- "Other proceedings" is defined generously (R v Dubois)
- (Nedelcu) two preconditions
    - Accused must have been compatible to give the evidence at a prior proceeding
    - evidence must by its nature be incriminating

extends to provide complete immunity from testifying in proceedings re: obtain evid - accused must prove predom purp

Failure for accused to testify → cannot be relied upon by the R as evidence of the accused's guilt re: 11(c)

- Often strong "tactical compulsion" to testify - does not erode 11(c)
    - Choice to present evidence under CC 276.1 (and resultant testimony) is tactical, not legal (R v Darrach), or need to testify to furnish foundation for expert is tactical, not legal
- Judge may comment on absence of any reas expl for R case, where R's case otherwise proves allegations BARD

Self-incrimination protection for witnesses in formal proceedings

Old CLaw privilege against self-incrim: refuse to answer in a formal proceeding where answers would tend to incrim

Self-incrimination protection for witnesses in formal proceedings

Before Charter, CEA s 5(1) changed CLaw - CAN BE COMPELLED - BUT CAN'T BE USED AGAINST YOU ≈ use immunity

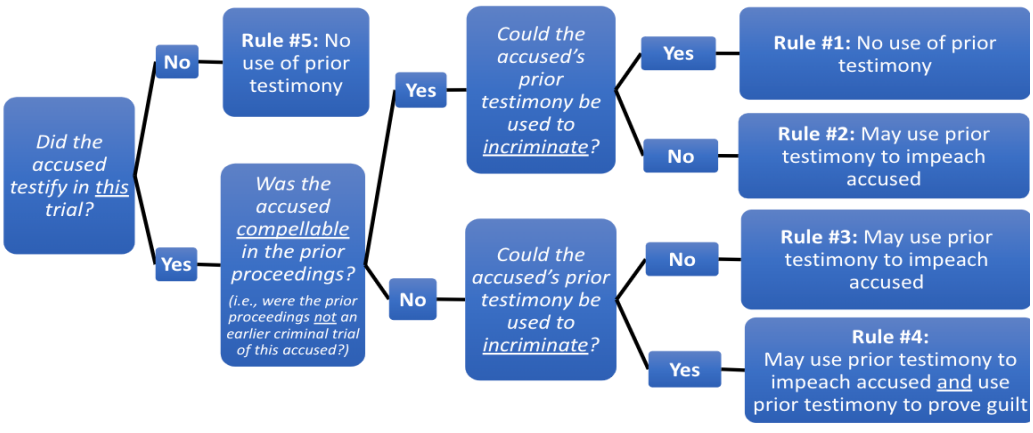
- Another way to slice it - "If required by statute, cannot be used against you"
- Issues - witness may be unaware and needs to invoke - provides only use (not derivative)

Post-Charter s 13 automatic protection for prior testimony in formal proceedings (except perjury)

- Advan - similar protection with needing to invoke, provides const use
- Disadvan
    - only protects against subseq use ("incriminate" - tense), only applies to evid in "formal" – "testifies"
    - ~~prevent~~ admin/reg/profess discipline ("Other criminal proceedings" - but does incl voir dire, or bail

1. Cannot	use accused's earlier testimony where they were	Compellable withness	incrimination
2-4. Can			discredit/impeach/incrim (so long ~~pot'l incrim~~)
		Directly prosecuted	discredit/impeach/incrim where incrimin is related
5. If accused does not testify, prior lack of 2testimony cannot be used			

** Exception is perjury



remove rule 3, it is just silly and unnecessary

CEA > Charter - Witness said soemthing incrim – CEA s 5(2) of prohibit use of prior testimony even to impeach

CC s 83.38 - protects answers from investigative hearing

Remedial exclusion of statements for breach of other Charter - waccused establishes on BoP that statement/real evidence was obtained in violation (right to counsel, result of arbitrary detention), 24(2) applies

Derivative use immunity

s 7 - PFJ - principle against incrimination - need to be cautious where the investigation is ongoing (St Lawrence)

- 1) show plausible connection between the accused's compelled testimony and discovery of evidence
- 2) onus to shift to R on BOP they would've found it without
- 3) R fails - excluded

Exclusion of the entire and voluntary statement as well as otherwise undiscoverable evidence found as result of confession (regardless it would have been excluded under Section 24(2) of Charter)

Pre-trial right to silence

Default rule - no obligation to say anything | Relates to principle legality - if there's nothing compelling you, you ~~need~~ to act

Important consideration is - Failure to warn of right to silence where police have reass grounds to believe offense (Singh)

No adverse inference can be drawn against an accused for remaining silent, or failing to cooperate with investigators

- Can be selective (no risk of adverse) ≈ R v Turcotte, 2005 SCC 50 ("send an ambulance") ≈ Fact you spoke selectively does not mean you waived it!
    - But… it can be narrative (report is limited), rebut lies (they say they speak when in fact they did not speak), or discrepancy in stories, Alibi cases
- Exception - failure to give alibi | Statutory exceptions - providing driving documents, taxation, securities
    - could not be used against her in proceeding, but CANNOT REFUSE TO MAKE STATEMENT (White)
- THESE *COULD* infringe PFJ s 7 - principle against self-incrim… b/c they're > specific protections of ss 11(c) & 13
- Adverse inferences should be drawn on appeal only where R presented strong/formidable case to answer

Line between diff branches (reg v invest) - if you tip into investigatory, then we start to engaged s 7 stuff - consider;

(1) Coercion? (2) Adversarial relationship (police/public)? (3) Risk of unreliable info (4) Risk of abuse of power?

Limits on use of pre-trial silence of accused by Co-accused → because it relates to FAAD → compromise between two values - CAN ONLY BE USED FOR CHALLENGING CREDIBILITY (NOT GUILT) + complex jury instruction

R v Porter, 2015 ABCA 279

When accused gives statement under compulsion, statement cannot be used against: R v White, [1999] 2 SCR 417

- Lawyer specifically notes the statement is given only because compelled by TSA
- THIS CAN BE USED CIVIL - remember, incarceration is different
- Factors
    - 1) Coercion - driving is a privilege - insurance is mandatory
    - 2) Adversarial relationship - not w/ insurance, but yes, with state
    - 3) Risk of unreliable - Significant incentive to lie to insurer if statement may be used against insured
    - 4) Risk abuse of power - allowing R to use - would be an end-run around white
- Result - s. 7 engaged, statement inadmissible

Voluntariness rule

Not on exam?

Voluntariness rule - At trial, if Crown wants to use statement made by accused to a person in authority, Crown must prove voluntariness of statement - prove voluntariness BARD silence overborne

- Consider
    - (1) Inducements (e.g., promises of leniency, threats)
    - (2) Oppressive circumstances (e.g., denial of food, physical abuse)

    - (3) Lack of an operating mind (e.g., intoxication, mental health concerns)
    - (4) Trickery/other conduct that could shock the conscience of the community
- "Mr. Big" statements – R v Hart
    - Special CLaw rule of evidence that applies to statements made as part of fictitious criminal enterprise
    - Statements are presumptively inadmissible
    - PRO v PRE
- Statements to undercover officers by persons who are detained - Rule against undercover officers actively eliciting statements from detainees - passively listen and have a natural conversation

Principled Approach

Check if we need to know this

CH 9: Methods of Obtaining Evidence

Getting the witness to court

Level 1 - Subpoenas (CC ss 699-708) → Level 2 - Witness Warrants (CC s 705 - prove service @ residence, age)

- Commission evideice (CC s 709) to get witness elsewhere (health/out of Canada)
- Video evidence (CC s 714.1)
    - Outside of Canada - presumptively videoconference admissible - unless witness says it violates PFJ
- TJ can order to separate concerns re: tainting, not to discuss during breaks

Oaths vs Affirmations

Swear Oath (religious) - Appeal to God in witness that a statement=true/promise= binding"*

Solemn Affirm (non-religious) - solemn promise, binding on conscience, but not religious/sacred*

Understand oath/affirmation - May testify → and if not possib - may promise to tell truth (affects weight)

Both punishable as perjury

R v TRJ, 2013 BCCA 449

Judges must assess sworn & affirmed evidence similarly

Competence

Old categ of non-compet: accused, Infamy, infancy, insanity, disbelief in Supreme being, and marriage → all gone now

Can you be called as a witness? = Capacity (can you do duty) + Responsibility (do you understand duty to tell truth)

- CEA s 3 - Not incompetent to give evidence by reasons of Interest or crime

14+ → presumption of competence Real basis for concern ⇒ voir dire (call witenss/those who know) ● Opposing party can challenge ● CEA s 16 - TJ assess if "able to communicate evidence" (capac to commun, capac to perceive/remember) ○ 2 big qs - understand oath, communicate? ● TJ can make jury leave - persons may testify in support Capacity/Responsibility Oath/affirm → promise instead	< or = 14 → presump of competence (pre-2006, there was this whole inquiry - it used to be really conceptual, too many formailities) ONLY promise to tell the truth (but same affect Real basis for concern ⇒ voir dire (call witenss, or those who know) ● Opposing party can challenge ● CEA s 16.1 - "Able to understand and respond to questions" Focus: understand/respond to qs? Nns understanding abstract concept

Parrot

Understanding whether they understand is very meat and potatoes, does not require expert

Marquard

Communic the evid ≈ Is witness capable of perceiving, remembering, communicating events to court

You don't have to pre-determine whether child recollects (you don't have to for adults)

Leonard

Understanding MORAL obligation; appreciate solemnity, understand added resp to tell truth (enhanced duty), understand what it means to tell truth/consequence in court

R v DAI

Simple promise to tell truth suffic, don't need to say you understand concepts like truth/a promise

Compellability

Can one be forced to testify?

- General rule - Court is entitled to evidence of every competent person ∴ all witnesses can be compelled to testify
- Except - accused in own trial (Charter 11(c), CLaw), complainants in SA (CC s 276.2), judges/gov't officials

Process

- Subpoena ad testificandum - req person attend to give evid
- Subpoene duces tecum - req person to attend to give evid + bring along anything that may be relev in possess

R v Legge, 2014 ABCA 213

Competence/Compellability are separate and related -

- Competency means a person may lawfully be called to give evidence; an incompetent witness cannot testify even if he or she wishes to do so.
- Compellable witness is one who may lawfully be forced to attend and testify, generally by subpoena, against his or her wishes."

Examination-in-chief (General)

FIRST! GOAL = PROVIDE EVIDENCE FOR YOUR CASE

Lawyer's questions ≠ evidence Witnesses' answers = evidence

Witness is telling a story structured by the lawyer (who is guiding for relevance, admissibility, strategic purposes

Method

- Primary = Open Ended (more credible/persuasive because they are natural/independent)
- Potentially = Leading (not so much exclu, less weight, but is a valid ground for objection)
    - 1. Suggesting answer - Did you check the mirror? vs Describe your actions as you changed lanes?
    - 2. Presupposing existence of fact - After checking your mirror, what happened? Were you still angry?
        - TJ may remove ban on presupposing questions we're necessary if in interests of Justice
    - Appropriate; introd/undisputed matters, ID of persons, contradict statements of others, Complicated/tech
    - Leave obtained; adverse/hostile, difficulty in answering (children)

Rat'l - when you're EIC, witnesses you call are favourable - you do not need to twist their arm

Rose

If trial judge allows egregious leading questions that contribute to substantial bias, may require neutral

Cross-examination

Accused has constitutionally protected right to z-examine witnesses (w/out significant constraint) – part of making FAAD

SECOND! 2 GOALS = BRING EVIDENCE FOR YOUR CASE + WEAKEN CRED/RELIAB OF WITNESS (SPNM)

Method - allows both open-ended and leading

- Concern – if witness seems partisan towards cross-examiner, leading qs may < weight placed on evid
- Concern - Can't advance questions that are no based on anything (but this is only place to discover)

∴ can ask qs so long as you have a good-faith basis to believe something may be true

Limits - follow normal rules of evid… Relev/material, balancing (cannot harass, misrepresent, repeat, PRE>PRO)

- ~~Contradict facts~~ unless there is a good faith basis - advance something that is based on reas inf/exp/intutiion
    - Must be consistent with role of lawyer as officer of court
    - Does not need to be based on admissible evidence
    - Only bars – recklessly/false evidence
- Tenuous? Voir dire
- Cutting it short – matter of discretion – no set consequence – nns result in loss of testimony already given – right to cross-examine is not limitless – consider
    - 1) reasons for incompleteness
    - 2) Impact of lack - how important, TOF evaluate, how much, significant areas unchallenged, able to cross examine on inconsistencies
    - 3) possible ameliorative action – less weight, explanation

Lyttle

Cannot cross-examine on irrelevant/inadmissable BUT you may discuss something that has not be proven as true

Real evid

Items/things the TOF can view directly

Judicial notice

Introduce data can be introduced that has not been presented as evidence - exception to rule that cases must be decided to evidence presented

Rat'l - speed things up + protect credibility | Process

1) Things everyone knows → "any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned"
2) Things anyone can find out → "any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned"

Adjudicative facts is the only one that matters - most intense application of test

- Verified by going to sources that ordinary reasonable people would consult – calendar, maps | E.g.s…
- MacIsaac – improper to take hockey strategy to then assess plausibility of testimony (~~notorious in community~~)
- Krymowski – roma, gypsy, interchangeable, based on dictionary definition

More central, distinct, extrajudicial, information, relied upon, more likely it is characterized as JN

Procedure: counsel asks TJ to judicial notice fact OR TJ asks if they should take judicial notice + invites submissions

Refreshing memory

Before court - do as you please, but discussion between witnesses are discouraged - you may be asked about processes you used and the TJ may allow documents

- Techniques that enhance memories – PF inadmissible – must demonstrate relevant technique possesses the threshold of reliability req for "novel science" in expert opinion evidence (Trochym)
- Problematic method can affect weight

During trial

- 1) Past recorded memory - Req = original + created @ Δt of reliability (Business records, memos, police notes)
    - Process: Must have no memory at time of trial (Richardson) → agree to this, then…
    - Fliss requirements – can indicate compliance via leading questions
        - 1) Past recollection captured in a reliable recording
        - 2) @ time of recording, memory is sufficiently reliable
        - 3) Witness able to assert that the record acc rep knowledge/recollection @ Δt of recording
        - 4) Original record must be used, if available

    - Record can provide the material info – witness can affirm ≈ Hearsay exception (but not operating like one)
    - Usually this is "read-in" though sometimes notes are admitted
- 2) Past recollection revived - TRIGGERS memory (handwritten statement, audio recording, video, transcript)
    - Δt
        - Notes – 6 mo later memo – can rely on memo (Heydon)
        - Before witness sees info that does not meet PRM (Shergill)
    - Process:
        - 1) Document assist witness (witness asked if they can refer or lawyer asks witness)
        - 2) Ask TJ/Def permission for witness to review the prior statement
        - 3) Witness reads (counsel may direct)
        - 4) Witness askws whether review has assists
        - 5) Witness answers question (with newly refreshed memory)
    - Answers must still be part of the witness's **present memory** - Note - they have to remember on the stand - if they don't, it's hearsay
    - "I would've been telling the truth here" is not enough (R v Kelly, 2011 ONCA 549)
- 3) Transcript/disposition - Similar procedure to present memory revived
    - No contemporaneity requirement, no accurate recording required
    - Witness reads silently from it then responds to questions
- Note: Refreshing memory w/ unconst obtained evid – in theory, treated the same as unconst obtained derivative evid (administration of justice into disrepute)

Special procedures for child witnesses and other vulnerable witnesses

CC s 486.2(1) - <18 or difficulty in communicating re: disability → provides supports unless it interfere w/ admin of justice

- Pre-2015 standard – order necessary for full and candid account
- Post-2015 standard – full and candid, or otherwise, in the interest of proper administration of justice
- Supports incl; excl public (CC s 486), support animal (486.1), lim x-exam (486.3), publication ban (486.31)

Admission of Child's Out-of-Court Statement

Rationales - concerns around SPNM

- 1) preserves child's evidence and enhances truth-seeking - b/c we know children's memory evolves
- 2) prevents a child from being victimized by the court process

~~Need~~ to estab necessity or threshold reliability, as this is statutoprily created - just req following via a voir dire

- 1) Witness < 18 @ Δt of alleged commission of offence (~~ΔT of trial~~, or even ~~when statement taken~~)
- 2) Statement must be video-recorded - testability
- 3) Video must be made w/in a reasonable time after alleged offence - substantive reliability (fresh memory?)
- 4) Witness must testify at trial (i.e., be physically present, theoretically available cross-examination) - testability
- 5) Witness must adopt the contents of the video
- 6) Judge has a discretion to exclude

No present memory of incident required! Enough that:

- (1) Child remembers giving the videotaped statement
- (2) Can say they were trying to be honest when they gave the statement

Taking a view - CC s 652

Dino Bottos did this once

TJ considers if impractical to bring to court –Fair/accurate representation? Realistic risk obs made by TOF that will no be apparent

Process

Order - defence first, because then TOF doesn't believe accused has tailored evidence

- But there's no hard-and-fast rule – accused's evidence isn't automatically entitled to less weight simply because accused doesn't testify first

Real evidence

INDE BASIS FOR INF

Same fucking process applies to this - relev/exclu/bal

- Circumst evid (a receipt may be "documentary" evid, but if it's used for a certain purpose - then it becomes real)
- Logical relevance (AMOHLAE) - Will only be relevant to the extent it is what it purports to be
    - REQ AUTHENTICATION - threshold is low - SE "it is what it purports to be"
        - Continuity of exhibits - how do we know it's legit, not contaminated - req notes
            - For documents…
                - Historic "best evid rule" - not much left (R v Betterest Vinyl Manufacturing (1989))

                  If an orig doc is avail, then it must be produced; copies are inadmissible
                - Also has been relaxed by statite
                - Now, if not original, you just need to explain why you aren't tendering it
                - Forms: Witness signing, witness proves handwriting, comparison, expert
                - ΔT - >30 years old – so long as no raised suspicion
    - Continuity can also impact weight (as a source of doubt)

Evid can be…

- Numbered - set - properly authenticated, fully considered by trier of fact
- Lettered - unsure where we will be at - not yet authenticated, but someone may need to refer to it

Photographs and videotapes

- Pre-Nikolovski – these are just "evidentiary aids" which themn becomes evidence *based on resultant testimony*
- Post-Nikolvski – not simply an aide to viva voche evid- now TOF can rely directly on it
    - In questioning re: photo taken by someone: "Is this photo a fair and accurate depiction of what you saw at the time you took the photo?"
    - Surveillance… no one saw… it's the syst… ∴ ask qs to estab angle, accuracy how it was stored
- TJ be CAUTIOUS! Consider; accuracy, fairness (absence of intention to mislead), oath (if possible) – AOR
- Other cases: Penney (no timestamp), Andalib-Goortani (no metadata)

R v Bulldog

Party introducing a photo/video does not need to prove that photo/video was not altered, so long as party establishes it is *"subst accurate & fair representation of what it purports to show"* ≈ probably SE

Electronic evidence

Parliament got ahead of this!! CEA s. 31.8 – "computer system" → CEA s. 31.8 – "data" → CEA s. 31.8 – "electronic doc" → Everything is an electronic document (Breadth is important because this is what triggers rules under CEA)

- 31.1 - "What it purports to be via" proof of integrity of system - Best evid rule in respect of an elec doc is satisfied
    - (1) Authenticity - "Some evidence" that electronic record is what it purports to be
    - (2) System integrity ("best evidence") - Usually satisfied with a shortcut that only requires "some evidence" that the system was operating properly ("functioning system" shortcut)
    - Doubts about authenticity and system integrity can then be considered by the TOF (weight of evidence)
- BUT satisfying CEA sections ~~makes~~ elect evid admissible - *Necessary, but not sufficient*

R v Andalib-Goortani, 2014 ONSC 4690 -

R satisfied burden of estab image had not been "tampered with or altered in some way"; SE of manip; inadmissible

R v Martin, 2021 NLCA 1

Facebook screenshot

- (1) SE this post was "what it purported to be" - Circumstantial evidence sufficient to meet low threshold
- (2) System integrity made out (i.e., system functioning properly) - "When considering system integrity, the issue is not whether a judge has a vague unease about the possibility of any device on which the tendered document is recorded or stored having the potential to alter, distort, or manipulate the tendered document in any way. "

Electronic documents

Prove BOP integrity

Presume integrity where – functioning system, party adverse in interest, business record, proof of electronic signature, Printed document relied on

Demonstrative evidence

ONLY OFFERED AS VISUAL DEPICTION OF FACTS PROVED BY EVID

Visual aids (not actually evidence) – charts, maps, model, replica - fair and based on otherwise admissible evidences

TJ must confirm it would assist in TOF understanding (TJ agrees)

Spoliation

- Civil - principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator.
- Criminal can show ~~FAAD~~ + unacceptable police negligence = may get a stay

R v Carosella, [1997] 1 SCR 80 & R v La, [1997] 2 SCR 680

Stay of proceedings after sexual assault crisis centre destroys records so they could not be accessed via a third-party records application in sexual assault case

Admissions and Agreed Statements of Fact

Now this is epic

CC s 655 - Where an accused is on trial for an indictable (or summary) offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

- Admissions may be formal (written, signed by parties), informal (simply on record, e.g., "identity is admitted")
- Once an admission is made, requires leave of the court to withdraw
- Admissions bind the Crown, too – sometimes helpful to accused
- Admissions bind the TOF even if there is some evidence to the contrary

ARC Notice to Admit - 6.37 - Request to admit true - 20 days pass and no response - admission presumed

- 5.15(2) a party who makes an affidavit of records … and a party on whom an affidavit of records is served are both presumed to admit that … a record specified or referred to in the affidavit is authentic … → speak now or forever hold your peace

CH 10/11: Evid about Cred/Reliab

Everything up to this point has been about ADM → then TOF decides what to do with it - believe some, all, or none

- Accuracy; consider CRED (honesty of witness) + RELIAB (accuracy of evid); C
    - Consider character, demeanor (compartment of witness), cond/capabilities, plausib of testimony, int/ext consistency of evidence, supporting info.
    - All of these are BASED on primarily material evidence
- X-EXAM APPROACH - derive 2ndarily material evid re: challenge MEMORY, present with INCONSIST, assert BIAS
- When asking q's purely on cred/reliab, answer = final
    - CFR - prohib presenting evid to contrad witness on collateral matter - if they give you answers you don't like, can you disprove - to an extent - but, sometimes you are "stuck with an answer" | Multiple views

        - Broader Rule (Phipson in England) – dom in Canada - Can only call evid to contrad witness <u>if you could have called this **contrad evid as part of your own case**</u>
        - Narrower Rule (Wigmore in USA) – some support in Canadian law - You're allowed to call the evidence contradicting the witness's answer <u>as long as it also has **2ndary materiality**</u>
        - Textbook - PRO>PRE
        - Exceptions (Krause)
            - Proof of bias/interest/corrupt - could prove they did have an interest in outcome
            - Previous conviction | Evid of reputation for untruthfulness | Expert evid cred/reliab
        - Add'l exception - X-Examine opposing Party's re: Prior inconsistent statements - Fairness demands that witness be shown prior statement - Only go to cred, not relied for as truth of their own contents (CEA s 10/11) - reqs - inconsistent/relev
            - If they accept = adopted
            - If ~~accept~~, you can bring an add'l witness to prove prior inconsistent statement was made
            - If accept, but adopt → goes to cred (need to find a hearsay acception)
                - Remember "party admission" hearsay exception → use this, but do 2 steps first
                    - (1) Voluntariness rule (if statement made to a person in authority) – Crown must prove voluntariness BARD
                    - (2) Principle that the accused knows the "case to meet" – should know what evidence is admissible against
            - Any prior statement made by accused/party are admissions and can be relied upon by opposing as proof of truth of their contents
            - Jury instruction - "Earlier statement may be used only in assessing the witness's cred."
            - Privilege - Does not prevent questions, prevents contradicting answers
        - Questioning on prior convict? Not prim material - goes only to cred
            - Any witness may be questioned prior conviction (CEA s 12 - allows any1 to be question)
            - But w/ accused, court has discretion to disallow where PRE>PRO (consider nature of conviction, similarity, age, fairness - Corbett factors - Voir Dire)
- LIMS ON R X-EXAM ACCUSED - R must be symbol of fairness (Loiacco)
    - Improper to ask about veracity of R witnesses - onus not on them to prove
    - Cannot challenge cred of accused w/ inadm BCE (GC exception does open the door, but not flood gates)
    - Must be a good-faith basis for asking question
    - To ask questions that undermine constitutional right is naughty

Rule in Browne v Dunn

Must direct Witnesses attention to that contradictory information during x-exam

> *"A party who intends to impeach significant testimony provided by an opponent's witness, with unanticipated evidence or argument on a matter the witness is not apt to know about, must direct the witness's attention to that contradictory information during cross-examination."* | Raise at earlier possible point

- (where you're really going to go in on this and their not apt to know)
- Rat'l - a witness should have an opp to respond if another witness will contradict their evid on a material point
- No set consequence - deference to TJ - may just impact weight
- Not a rule of admissibility, instead a rule of fairness - All about Fair confrontation
- Case law - it's not about defence counsel (in crim or civil) - you don't have to put every scrap forward - just diminish the surprise, just head down the road
    - B/c it's about fairness, it's not immediately diminishing weight (rather it's a permissive inference) - another resolution: allow the witness to return

2ndarily material

You've got options to support witness believablility (CRED/RELIAB)

- ROADBLOCK - Rule Against Bolstering the Credibility of Your Own Witness ("Oath Helping") - Party may not ask questions/present evid for sole purp of bolstering credibility OR asking witnesses about witnesses
    - Rat'l - wasteful with ΔT and distraction to TOF
    - BUT - Exception: GC is an indulgence for accused in criminal case
    - BUT - Exception: Expert re: cred (if beyond the ken)
        - BUT: Exception to exception - rule against oath-helping prevents the expert from going so far as to testify that the witness is likely to be telling the truth.
- ROADBLOCK - Rule Against Prior Consistent Statements - It's hearsay and it's not too probative
    - Examples
        - Obvious: witness testifies about what witness told someone else, before court
        - Less obvious: police repeats allegations, as relayed by complainant, to explain officer's actions
        - Subtle: police testifies that, after speaking with complainant, officer went looking for the accused and eventually arrested him for sexual assault
    - BUT - Exception: Certain Hearsay Exceptions - Probativeness does not depend on prohibited inferences
        - Principled or res gestae are good examples
        - 1. repeated story is more likely to be true | 2. corroborates testimony
        - AND - use limiting instructions
    - BUT - Exception: Circumstantial evidence of something relevant - NO ONE UNDERSTANDANDS THIS
    - BUT - Exception: Recent Fabrication - witness's evid is challenged as having been fabricated some Δt after events in question, may adm to rebut this suggestion
        - Relev NOT due to consistency, rather due to undermining suggestion
        - (Stirling) "All it tells us is that it wasn't fabricated as a result of the civil suit/dropping of crim charges.", but there is always a motive to lie
    - BUT - Exception: Statement re: possession - for truth of assertion ("it's not mine"), support accused cred
    - BUT - Exception: Statements Made Upon Arrest
        - (Edgar) can be shared so long as there is opp to x-examine
        - Big question - how long after arrest??
    - BUT - Exception: "Narrative" - allow a witness to tell their story in a natural way, understand other evid
        - Only where necessary - this is dangerous
    - AND - Limiting Instructions/Uses When Admitted
        - Key limits include
            - (1) Cannot be used to enhance the credibility of the person making statement
            - (2) Not inde, and therefore, do not corroborate a witness
            - (3) Unless hearsay exception, cannot be relied upon for the truth of their contents
- WINDOW - Rehabilitating Your Own Witness - only where attacked, can use folllowing techniques…
    - re-examining areas of attack | calling evid of a positive reput | calling witnesses to negate/weaken expert
    - (1) Rebuttal evidence - Respond to claims of lack of cred that arise from x-exam (or opponent's case)
    - (2) Softening the blow in advance
- BIG WINDOW - Challenging the Credibility of Your Own Witness - General rule - "the party who calls a witness cannot lead evid to show their witness is not a credible person" …
    - B/c implicitly vouch for their worthiness of belief (or at least not wholly unworthy) → ≠ party is req to argue that TOF should uncritically accept everything their own witness say; | Prohibs below…
        - Call evidence about their poor reputation or lack of trustworthiness
        - Cross-examine them about their criminal record in order to discredit them
        - Cross-examine them about their discreditable associations
    - BUT Of course, can call witnesses that contrad an unhelpful witness OR prefer one witness over another
        - "the witness is a liar" ≠ "the witness is lying on this occasion"
    - Need to ask yourself: Is this mere forgetfulness, or deliberate falsification? Ask for leave and go to ladder
        - (1) Gently leading questions? - What happened that brought you here today
        - (2) Present mem revived? → refreshing memory with a prior statement - Witness may refresh memory / adopt prior statement
        - (3) Past recollection recorded?

- (4) Transcript of earlier testimony, if avail? - THEN ASK FOR PERMISSION TO ASK LEADING Q
- OBTAIN LEAVE (5) X-examine own witness? Hostile witness? Adverse witness? CEA s 9(2)?
    - Here if; they won't refresh memory, didn't refresh it, or said they bumped their head
        - (1) X-exam at large (i.e., on any point) (CLaw)
        - (2) X-exam who has made a prior inconsistent statement about that (9(1))
        - (3) Proving witness has made prior inconsistent statement *(without cross)*
    - Paths to do above - TJ will grant permission

CLaw Hostile Witness	IF… do not wish to tell the truth b/c **motive to harm party/assist opposing**, they do not give evidence fairly, hostile animus Must apply → Hostility determined by - demeanour, attitude, substance of evidence, refuses to refresh Bigger opportunity to x-exam - at-large!!!!	
CEA s 9(1) Adverse Witness	IF… evid they give is unfavorable to party who called them (lower threshold) Must apply → Unfavourable determined pratically → declaration of adversity must be applied Smaller opportunity to x-exam - on statement	
CEA s 9(2)	IF… inconsistent statement (written, audio, video) in comparison to testimony (no adverse/unfavourable req) Apply for 9(2) voir dire (witness/jury excused) → ID inconsistencies → If Y, invited to prove statement was made… If witness admits → DONE If witness does not admit, may call other witnesses → opposing counsel x-exam, party may investigate new issues Voir dire part 2 - parties argue whether x-exam allowed - PRO/PRE balacing…. Below If allowed - witness still does not admit… only goes to credibility	
	Do the statements clearly conflict with each other, or are the differences marginal? How important are the issues in the statement to the case? How important are the inconsistencies to the witness's credibility? Is there a possibility cross-examination will change the witness's testimony?	Was the witness's statement obtained fairly, or was there trickery, inducements, oppression, or Charter breaches? Is there inadmissible/prejudicial information in the prior statement that will be exposed to the jury? Will this create a distracting side issue?

- (6) KGB statement/hearsay exception? Under principled exception -
    - necessity b/c hostility | testability b/c - recorded
    - Done after failed attempt to get witness to adopt prior statement, becomes inconsistent, proves necessity component - voir dire to prove reliability

Civil? OMG so much easier (CEA applies to criminal proceedings and non-criminal federal)

- 25(1) A party producing a witness shall not be allowed to impeach the witness's credit by general evidence of bad character but the party may contradict the witness by other evidence.
- 25(2) If the witness in the opinion of the judge … proves adverse, the party producing the witness may with the permission of the judge … prove that the witness made at some other time a statement inconsistent with the witness's present testimony.

CH 12: Rules About the Use of Evidence

It's BEEN ADMITTED!! Now TOF applies CSHE re: credibility/use (if any) of evidence → some conds on this broad process

Corrob

TOF may ~~rely~~ on evid unless confirm by other inde (not from same source) evid, capable of strengthening | 2 forms

- Mandatory - evid cannot be relied upon unless there is other, inde, confirmatory evidence
    - E.g. AEA s 19 - child of tender years unsworn evidence - must be corrob to be used as deciding factor (legally obliges TOF to reason in a certain way)
- Cautions - warning from TJ - can apply to many things
    - TJ must warn juries about witness danger using Vetrovec
        - Applies to; jailhouse informants, accomplices, witnesses of unsavory character (no precedents, just inbformative)
        - Reqs (not strict)
            - Plays > minor role | Obj suspect cred | frailities of evid not apparent
        - Warning includes

            - 1) ID need for special scrutiny | 2) ID characteristics that bring into q
            - 3) Caution of danger of acting | 4) Encourage look for other evid re: cred*
                - *Judge may point them this out - therefore the defence may NOT want this to be provided
    - TJ provide warnings re: ID b/c cred (trying to be honest, no motive to lie) but NOT reliable
        - Warning explains; cred ≠ reliab, ID pot'l stressors, inappropriate impacts on developing this evid
        - Cases covered
            - R v Hibbert, 2002 SCC 39
            - R v Atfield 1983, ABCA
            - R v Hanemaayer, 2008 ONCA 580
    - Warnings in lieu of discretionary exclusion → White: Ord flight is too ambiguous to lead to relevant inferences, so usually excluded, here it was included with a warning

SOMETIMES EXPRESSLY NOT REQUIRED - CC s 274 - re: SA, none req for convict

Presumptions

Rebuttable (∴ come w/ BOP being placed on one party, who will then have to acheieve certain SOP)

- Of Law - exist automatically as a matter of law
    - Of innocence
    - Of Judge knowing law
    - e.g., "Presumption of no mental disorder" under s. 16 of the Code - start w/ presump of NCR
- Of Fact - only exist if some triggering fact is proven
    - CC s 320.35 Sitting in driver's seat - if accused ~~disproves~~ intention on BOP, TOF must convict
    - CC s 348 Breaking and Entering - broke in, in absence of evid of contrary, proof they had intent
    - CC s 364 Passing Bad Cheque - [COMMIT OFFENCE]], n, in absence of evid of contrary, proof of fraud
    - 2 types - for both, evid need not come from accused case
        - Evidentiary burden - accused need only point to some evid in record that raises RD

            In the absence of evidence to the contrary
        - True "reverse onus" provisions - accused is obliged to rebut the presumption, on BOP

            Presumed ulesss the court is satified that one reasonably believed something

            Where they prove, the proof of which lies upon, he satisfies

            PF Charter violations - as something can raise a RD, but not on BOP
    - Permissive inf - TOF is invited to drawn based on circumstance - Intend nat'l conseq of actions
        - TOF is invited to drawn - something recently stolen, and you have it, TOF can draw
        - "Doctrine of recent posses" - have something recently stolen, could conclude
        - "Doctrine of Recent Complaint" - Cancelled by CC 1983 amendments

Const - concerns where factual presumption collides w/ presump of innocence

Oakes

"…if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged…" → struck down

Morrison

"... person was represented to the accused as being under the age of eighteen years … is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age" → struck down → no demonstration on part of Crown that, *absent the presumption*, the child luring provision cannot operate effectively

R v DD, 2000 SCC 43

TJ should instruct - there is no inviolable rule on how people who are the victims of trauma like SA will behave.

SOP/BOP

- BARD - TOF only convict if, re: all adm evid, w/out RD doubt on each of elements of offence, despite any defences raised by the accused (defined in Lifchus*, modified in Starr*)
    - Don't apply to single pieces of evid
- Persausive burden - does evid here prove case to necessary standard
- Evidentiary burden - enough evid here to leave issue w/ TOF

Lifchus

- "presumed to be innocent." - "remains until R puts forward enough evid to satisfy beyond RD re: guilt"
- "A reasonable doubt ≠ imaginary frivolous doubt" | "~~sympathy or prejudice~~" | "Based on reason/common sense"
- "probably/likely guilty ≠ sufficient." → must give benefit of doubt to accused, but we can't expect to prove certainty

[IS THERE NOT A LITTLE FRAMEWORK]

Starr

- TJ must explain < abs cert, > probably guilt | falls much closer to abs cert, than BOP

Weighing he said/she said (cred)

Believing one ≠ not believing other → we can have more than one thing occurring at once

TOF can believe some, all, or none

W(D)

If you believed the accused → ACQUIT

If you do not believe accused but are left with BARD → ACQUIT

If you are not left in doubt → ask on the basis of evid which you do accept, convinced by evid of guilt BARD

QUESTIONS FROM THIS

- What happens if you don't know who to believe?
- What happens if the evidence of innocence doesn't come from the accused, but from some other source?
- What happens if the accused's evidence is partially inculpatory and partially exclulpatory?

Ryon

- BOP re: BARD always on R, accused never has to prove innoncence/disprove evid led by crown*
    - Caveat - raising defences
- TOF believes accused evidence deying guilt OR not confident in R evid → ACQUIT
- TOF should attempt to resolve conflicting evid re: guilt/innonence, BUT a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true
- YOU CAN REJECT ACCUSED + NOT BE PERSAUDED OF R's evid!!

Weighing strength of inference

Direct versus circumstantial (must draw inference from evid to lead to desired conclusion)

Circumsstantial evidence creates Real risk that *"cloud of suspicion"* will cause the TOF to draw unwarranted inferences

- Hodge - whether guilt is the "only rational conclusion" that may be drawn from the evidence
- NOT ENOUGH for evid to be consistent w/ guilt → NEEDS TO BE ONLY REAS INF (e.g. they just touched the gun)

R v Villaroman, 2016 SCC 33

MLHE, is circumstantial evidence reasonably capable of supporting an inference other than that the accused is guilty

- Theoretical possibilities, which are unreasonable DOES NOT MATTER
- But, even if the inference is the most likely, EVEN other explanations may undermine

Civil

No shifting standard on seriousness of allegations (FH v McDougall, 2008 SCC 53)

TJ scrutinize relevant evid w/ care to determine whether it is more likely than not - base on;l nature of claim + evid

FILTER - PF Test

Screening process to see whether it is justifiable/sensible to have a case go to TOF to give an ultimate factual decision

- Is there enough evid to commit a person to stand trial at a preliminary inquiry?
- Is there enough evid to justify allowing the case to go to the jury, or should there be a directed verdict (nonsuit)?
- Is there enough evidence to justify ordering that a person be extradited?

EVID IN RECORD UPON WHICH PROPERLY INSTRUCTED JURY CAN RAT'LY CONCLUDE ACCESED GUILTY BARD?

R missing a whole element of offence? Epic fail. W/HOLD CASE FROM TOF.

TJ asks this question, with some restrictions

- TJ Cannot make findings of fact or credibility
- Not weighing relative strength of evid - subj to 2 further caveats
    - Diff btwn direct/circumstant evid - TJ may engage in a restrained eval of suffic of circumstantial evid
    - Hay: acquit if R evid consists solely eyewitness testimony that necessarily leaves RD in mind of reas TOF

FILTER - AOR Test

To rely on an affirmative defense, accused must meet an evidential burden before defense can be considered by TOF

EVID IN RECORD THAT I PROPERLY INSTRUCTED JURY ACTING REASONABLY COULD ACQUIT?

SE, for each element of offence, upon which TOF, if it believed, would acquit

Different burdens for difference defences - but SCC insists AOR is same for all

EOL if TJ do not put forward there is AOR | EOL if TJ does put forward w/out AOR

- Hard question: "reasonableness" often an element of a defence | Like circum evid, limited weighing
- Does extract some reas analysis from TOF, but this was a response to provocation being shared willy-nilly

Crown often argues, in judge-alone trials, there is "no air of reality" to a defence - Evid burden, ~~persuasive~~ burden