Evidence CANs 2022 – Peter Sankoff

Table of Contents

GO TO TOP

GOTOTOP

Relevance and Evidentiary Discretion

Relevance

Relevance: Any item of evidence that has a *tendency* to increase or diminish the probability of the existence of a fact in issue. (***Arp***)

- Foundational proposition and LOW threshold – we let it in unless there is a good reason not to.
- Policy reasons:
    - **Outcome**: Irrelevant evidence distracts and may mislead the trier of fact
    - **Efficiency**: Time is money baby $$$$
- Can be broken down into:

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1) **PROBATIVENESS**
2) **MATERIALITY**

Materiality

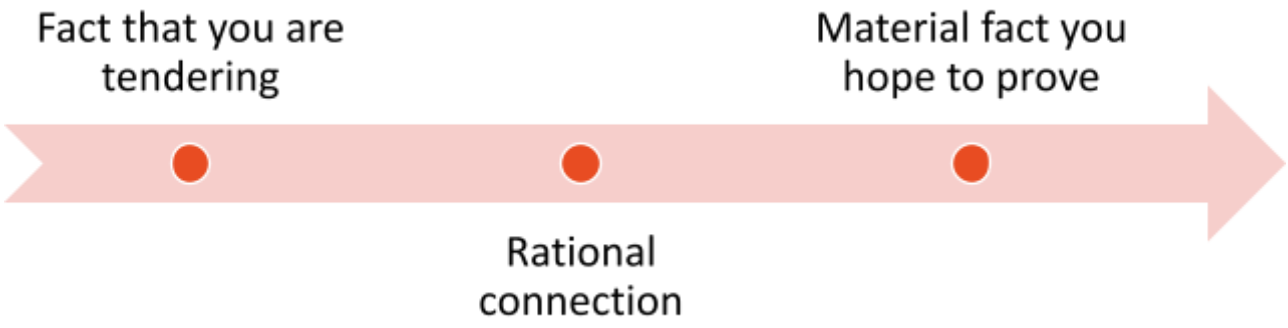
MATERIALITY: The fact you are trying to prove is in issue in the particular dispute between the parties.

1) **Primary Materiality:** facts that you need in order to win your case.
    a. Defined by:
        i. The matters in dispute (ex: in crim, framed in the indictment/information)
        ii. Governing law (ex: Criminal Code elements)
        iii. Facts arising at trial (ex: accused testifies that they were out of the country on the day of the murder, the passport of the accused is now relevant)
2) **Secondary Materiality:** any fact that has a bearing on the value of the person giving the evidence.
    a. Credibility
    b. Motive to lie

Probativeness

PROBATIVENESS: An actual, measurable tendency to increase or diminish the probability of the existence of a (material) fact.

- There is no scientific way to measure a tendency to increase or diminish the probability of the existence of a fact – judges use common sense and logic.
- Make a chain of reasoning to determine probativeness.



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Note: Particularize the inferences being made and the inferences that can be made to go to the root of the statement.

Ex: Beckett testifying that he had sex in a gay theatre.

What can this prove?

1) Beckett has sex in gay theatre
2) People who go to gay porn movies and have gay sex in them probably like gay porn movies and are gay.
3) Beckett is gay and likes gay porn. (THIS FACT IS IMMATERIAL)

Can this prove that Beckett was reckless at work?

1) Becket has sex in gay theatre
2) People who have sex in theatres are reckless with their health
3) People reckless in their personal lives are likely to be reckless at work (THIS IS TOO WEAK AN INFERENCE)
4) Beckett was reckless at work and that's why the firm fired him

****SO, Beckett having sex in a gay theatre is irrelevant because it can only prove facts that are immaterial to the case****

Evidentiary Discretion

Prejudicial Effect

Prejudicial Effect: the risk of an unfocussed trial and improper result (NOT the risk of conviction) the risk that admission of the evidence in question would lead to the trial being unreasonably diverted from its object of obtaining a just and legitimate result.

- MED: misleading, evocative, distracting
- Types of PE:
    1) Emotional: raises sympathy, contempt, or horror for a particular witness. Evokes emotional reasoning, not logical reasoning.
    2) Hunch: causes a jury to act out of common sense inferences that tap into myths and stereotypes.
    3) Distraction: probative value which a jury of laymen is likely to ascribe to the evidence is greater than the PV it actually warrants.
        a. Apologies inadmissible – s 25.1(3) of the Alberta Evidence Act and s 23.1(3) of the Canada Evidence Act.

GO TO TOP

4) Inefficient: too expensive compared to its importance (more of a civil issue)

Discretion to Exclude

This is the core of evidentiary based reasoning – comes back to PV vs PE.

- Crown evidence is assessed on an equal balancing test – if PV < PE, it's inadmissible.
- Defence evidence is owed greater deference. PE must substantially outweigh PV to be excluded. (***Seaboyer***)
- We don't like to bar good, probative evidence from coming in. If the PV is high but the PE is higher, the trier of law may issue a jury charge or a self-direction to reduce the PE of the evidence and allow it in.
- Conclusions:
    - Evidence is excluded primarily in cases where PE cannot be controlled with a charge to jury or where the PV is so low it's not worth it to try.
        - Major disagreement at the heart of the law of evidence:
            - Dickson approach: let it in with a jury charge
            - Arbour approach: Evidence needs to be excluded in appropriate cases.
    - Evidence with PE is regularly admitted.
    - We do not exclude large amounts of evidence with this test.

Relevant Cases

- ***Johnstone v Brighton:*** rare case in which expert evidence was not admitted due to financial and complexity concerns.
- ***Davies v Clarington (Municipality):*** Damages disputed in an injury case – P sought to call 29 medical professionals. "A party cannot simply, in this day and age, expect to call every witness they want in a civil trial, even if that witness may have relevant evidence." (judge did not actually rule on the issue though).
- ***Podolski***: TJ can control length of cross to ensure trial fairness to the accused, the witnesses, triers of fact, the judge has an obligation to ensure that a trial concludes in a reasonable amount of time (cites *Jordan*).
- ***JJ***: When assessing PE of admitting evidence, trial judges should consider its effect on all aspects of trial fairness, including …. "fairness to the witnesses".
- ***Ferris***: "I killed David" – not admissible. Goes equally to the inference that he killed David and the inference that he was telling his dad that the cops THOUGHT he killed David.

GO TO TOP

- ***Schneider***: brother overhearing phonecall with AC's wife. "You know that missing Japanese woman on the news" "I did it/I killed her". ADMITTED. Distinct from Ferris – context is important. The brother was there, AC had just confessed to hiding the body, not an abstract conversation – a fragment of an ongoing conversation/interaction.

Character Evidence

"Proof of general disposition is prohibited. Bad character is not an offence known to law… The Crown is not entitled to ease its burden by stigmatizing the accused as a bad person." ***Handy***

Witness credibility and PV

Credibility: the extent to which the witness should be believed – issues with the witness themselves (mental illness, propensity to lie, motive to lie, etc.). Goes to WEIGHT.

- Witness credibility is not factored into the assessment of PV, it is a question of weight.
    - Some ambiguity in the case law on this but most courts see it this way. ONCA has had some troubling decisions in the other direction and it can be different if Parliament has altered the distinction between TJ and jury as it has in sexual assault (***Darrach***).
    - Sankoff's view is that it's risky to leave this to the TJ – too many pre-trial applications for exclusion. Should ultimately assess the prejudice of the evidence.
- This comes down to the roles of the trier of law (TJ) and the trier of fact (jury).
- The TJ's role is to act as an arbiter by making rulings on questions of law and to ensure the process functions correctly. Assessing the strength of evidence is the role of the trier of fact/jury. (***Mezzo***)

Reliability: some aspect of the evidence itself is not believable. Can go to admissibility because PV is lowered. PV must be substantially diminished or PE must be high to warrant exclusion.

- Ex: an expert testifies that there's a 99% match between the AC's blood and the blood on the scene – or 75%, or 50% or 25%.
- Ex: a confession made during a Mr. Big operation (***Hart***). The chain of reasoning is dependent on an assumption that someone wouldn't confess unless they were telling the truth. If this link is in question because the confession was given under duress, the PV is reduced. Consider:
    - Length of operation
    - Number of interactions between police and accused
    - Nature of relationship between the undercover officers and the accused
    - Nature and extent of inducements

GO TO TOP

- Presence of threats
- Conduct of the interrogation
- Personality of the accused (age, sophistication, mental health)

The Nature of Character Evidence

Character Evidence: any proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in a particular behaviour.

- Risks of character evidence:
  - Naturally extremely prejudicial. Propensity based reasoning - most people make inferences based on character evidence all the time. If someone has done something once, we all infer that they are more likely to do it again.
  - Also prejudicial because it is likely to divert the trial from its ordinary course because each of the issues related to the accused character would need to be proved – evidence would need to be adduced.
- Therefore, "to infer guilt from a knowledge of the mere character of the accused is a forbidden chain of reasoning" (***Handy***)
- Character evidence is extremely complex and contested, mostly because it is both probative and prejudicial.
- Approaching character evidence:
  1) Is it *bad* character evidence?
     a. Neutral character evidence (the accused smokes darts) does not engage the same concerns as bad character.
  2) What is the bad character evidence being tendered to prove?
     a. Applied most stringently when evidence is being used against the accused in a criminal case or a party in a civil case.
  3) What is the evidence being used for?
     a. Character evidence can be tendered for a substantive purpose OR purely for witness credibility. Different rules apply depending on this purpose.
- **General rule (ACCUSED):** bad character evidence against the accused is prima facie inadmissible. In order to overcome this presumption, the Crown must demonstrate how the PV of the evidence outweighs its PE *without* relying on the prohibited line of reasoning.
  - Most commonly admitted in these scenarios:
    1) Where there is direct relevance to a material issue in the case
       a. Ex: ***R v BC SA***– Children's Aid Society worker testified that the accused made several admissions during an unrelated meeting with her. Bad

GO TO TOP

character because it shows that he was meeting with the CSA and was therefore in trouble. The admissions had direct relevance to the case and were too probative to exclude on the basis of bad character. Fixed with a jury charge.

b. ***ZWC:*** In cases of family violence or sexual violence, still need to start from the presumption that the evidence is inadmissible and only admit where PV exceeds PE. Vague terms like narrative and context cannot be permitted to serve as substitute for careful assessment.

2) Where it meets the rules governing the admissibility of similar fact evidence
3) Where the accused puts their character in issue.

- **Non-accused Character Evidence:**
  - Most commonly comes up where the accused alleges that a third party suspect is likely to have committed the crime or where the accused raises a claim of self-defence and wishes to show the character of the deceased/complainant.
  - Exclusion can only occur if the PE substantially outweighs PV. This is risky for the same reasons bad character evidence on the part of the accused is risky – can divert trial and lead to impermissible inferences.
  - Courts have tried to balance this by requiring that the evidence is sufficiently relevant to warrant the attention paid to it. Some examples of this:
    - Direct evidence from a third party admitting culpability
    - Proof of a third party's means, motive, or opportunity.

"The proponent does not get a free ride through the admissibility thicket upon mere announcement of "third party suspect"

- **Victims and complainants**
  - *o* General rule: character evidence cannot be used against the victim/complainant – that's not what the trial is about.
  - *o* Sometimes comes up where self-defence is concerned.
    - Easier when CO is testifying
    - If the CO is unavailable/dead it's more difficult. Must be a clear link to what the accused knew about the victim. If there is a clear link it is admissible because it helps assess the accused's mental state. (***Scott; Young***)
    - However, sometimes the evidence can get in even where the accused had no knowledge of the victim's disposition. This requires significant

GOTOTOP

probative value to prove a disposition for violence. Ex: testimonies of specific acts of violence or violent reputation in community (***Scopellitti***)

- **Civil cases:**
    - Generally, a restriction on bad character evidence in civil cases as it is irrelevant in the determination of most issues.
    - *o* Usually comes in through similar fact evidence – party trying to show a pattern of negative conduct. Or if it's a defamation case (based on the character of the plaintiff).

Cases

Sigurdson: alcoholism is bad character evidence

CJ: porn and phone sex are bad character evidence

Bishop: all negative characteristics – bad temper, violence, dishonesty.

Erez: gambling, borrowing money, and pawning did NOT amount to bad character.

Grandinetti: accused tried to bring character evidence about a third party suspect based on weak motive, opportunity, and propensity evidence. Motive: a threat made to the victim a year prior re: drug dealing stuff. Opportunity: third party had been released from jail three days before the killing. Propensity: previous gun and violent offences. "a chain of speculation joined by gossamer links"

Labbe: accused permitted to tender evidence about a third party suspect. Strong motive: recent threat to the victim about a jacket. Propensity evidence re: previous violence towards women. Opportunity (not strong): released from prison hours earlier and lived in the same building as the victim.

Similar Fact Evidence

Similar Fact evidence analytical framework:

1. How material is the issue its going to prove?
2. How strongly does it prove that issue?
    a. Frequency: the more an act occurs, the more strongly it demonstrates propensity.
    b. Connection: the more closely connected in time the more probative

GO TO TOP

c. Similarity: The more similar the better. Ex: Fighting (not that similar) vs beating up people who owe his boss money

d. Unusual nature: the more unusual the propensity, the more unlikely it is to be a common propensity. (ex: calling cards/trophies - always taking or leaving something at the scene)

e. Independent voices: the more people who claim the defendant has a particular propensity (5 victims vs 1)

i. COLLUSION - voices need to be truly independent.

3. How prejudicial is the evidence?

a. How bad is the act?

i. Absolute: Just a judgment call on how bad it is - child porn and beating puppies, objectively bad.

ii. Relative: Relative to what the accused is has admitted to/is on trial for. Ex: evidence of credit card fraud where accused has admitted to being a drug dealer

b. How clear are the allegations against the accused?

i. A prior conviction is one thing - an allegation is not as strong. Unproven allegations more likely to divert the trial, especially if contested.

ii. Canada does not allow evidence of previous acquittals or stays to be brought in.

Good Character Evidence

Admissible, but with some pretty strong limits that need to be considered:

1. Only applies in CRIMINAL CASES - a party in a civil case cannot say "I've never been negligent"
2. Because of time, accused can testify to good acts, but cannot call evidence to support.
3. Can call evidence of "reputation" for good character (rarely happens) "
4. Once accused has "opened the door", Crown can rebut with bad character evidence.

Good character evidence: opening the door

GOTOTOP

1. Cross-examination on the CHARACTER TRAIT
    a. If the accused says they're not violent, the Crown can bring up bad character evidence on that trait.
2. Rebuttal reputation (if reputation evidence is called)
3. Testimony that rebuts:
    a. Johnny says I've never done anything of this sort.
    b. Lenny is called to say "he beat my ass last week"
4. Section 666 of the Criminal Code
    a. "Where the accused adduced evidence of his good character, the prosecutor may adduce evidence of the previous convictions of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed."
    b. Sankoff says this allows the Crown to do too much:
        i. Ex: Johnny is charged with assaulting Bob in a bar. Johnny says he's not a violent guy.
            1. The Crown calls Jenny to testify that Johnny raped her last year. ADMISSIBLE AND SHOULD BE, Johnny has said he's not violent and rape is violent.
            2. The Crown calls Jenny to testify that Johnny defrauded her. ADMISSIBLE AND SHOULD NOT BE ADMITTED.

Splitting the Case

- Parties must adduce their whole case and cannot save portions for reply.
- A party does not split its case where it tries to tender evidence on a point that it could not have foreseen before the defence had started.
- Crown can almost never do this – plaintiff sometimes.
- Rule of ADMISSIBILITY.

Hearsay

Introduction to Hearsay

GO TO TOP

To qualify as **hearsay**, must be:

1) An out of court statement (OCS)
2) The OCS must be tendered **to prove the truth of its contents**.

Rationale: allowing hearsay in insulates the evidence from cross examination.

- Hearsay vs. Non-hearsay purpose:
    - Hearsay: "I heard Sam say that Johnny hates Bob."
        - The only purpose this could be used for is its truth – Johnny hates Bob and that's his motive.
    - Non-hearsay: "I heard Sam tell Johnny that Bob pushed him down the stairs."
        - Truth of the content doesn't matter – we don't care if Bob actually pushed Sam down the stairs, we only care that Sam TOLD Johnny this, because it provides motive.

Helpful way to think of this:

1) **Does the fact that the statement was made have its own relevance to matters in dispute?**
2) **Do we need to cross-examine the statement's maker to extract utility from the statement?**
    - Person who made the statement – HEARSAY
    - Person who heard the statement being made – NON-HEARSAY

Ex: Auctioneer testifying that a bidder said "I bid $1,000,000". NOT HEARSAY, doesn't matter if the bid was "true", matters that the statement (offer was made)

SAME logic goes to evidence of slander – doesn't matter if the statement is true, matters if you said it.

Difficult Applications of Hearsay

Relevant Non-Hearsay Purpose

- Evidence that looks like hearsay can be admitted if there is a relevant usage of the evidence aside from the truth of the statement. CAVEATS:
    1) TJ can exclude the evidence if PV of the non-hearsay use is outweighed by PE of the "truth of the statement"
    2) If evidence is admitted as non-hearsay, TJ MUST instruct jurors that they cannot use statement to prove truth of contents.

GO TO TOP

EXAM CAVEAT: If the non-hearsay purpose cannot be divined from the facts available to you, there is no non-hearsay purpose.

iMachines and Hearsay

- Basic Principles – you can only cross-examine a real witness. If there was no person involved in creating the content – no hearsay problem.

Implied Assertions

Implied assertion: It is not the words themselves that are critical in assessing the hearsay potential of evidence, but the intended meaning for which they are tendered.

Ex: cops bug an alleged drug dealer's phone and get a text saying that someone wants to buy drugs. They want to use it as proof that the owner of the phone is a drug dealer.

Non-hearsay argument: we don't need to know that the person actually wanted to buy drugs. We are using this as circumstantial, non-hearsay evidence that the owner of the phone is a drug dealer.

Hearsay argument: Sure, he says "I want drugs now" - you are tendering this evidence for its implied meaning that "you have drugs now". The hearsay dangers are the same as any other type of hearsay, you need to be able to cross examine the sender to find out whether they were texting the wrong number, whether they know the owner of the phone, whether they were playing a prank/being malicious.

Baldree: The Crown is tendering this for its **implied meaning**, that X has drugs. Allowing this to be non-hearsay would get overly semantic based on what exactly was said. If they said "Joe, you have drugs." Definitely hearsay. "Joe, I want some of your drugs." hearsay. "Joe, I want drugs now" maybe not hearsay? Doesn't make sense. ***Hearsay nature of evidence cannot depend on how the statement is framed.***

Difficult part is deciding when the implied meaning matters.

- Ask yourself - does the statement have **INDEPENDENT LEGAL RELEVANCE?**
    - Ex: I want drugs does not have independent legal relevance unless we assign to it the implied meaning that the recipient of the text has drugs.

GOTOTOP

- PV exception - one call or text may not do it, but if there are a bunch of texts or calls then it may be too reliable and be admitted under a hearsay exception.

Counter example: ***Black***: AC denied knowledge of a grow op but the cops found a note in his pocket that said "Johnny – the marijuana isn't doing well – water it." This statement has independent legal relevance because Johnny had the note in his possession so it suggests he is lying about having no knowledge of the grow-op. BUT, cannot be used for any implied purpose that Johnny was watering the plants.

Ratten: "Get me the police!" on a 911 call.

- Hearsay chain: she needed the police because her husband was trying to kill her. (Witness is the victim/caller)
- Non-hearsay chain: she was scared, which rebuts the accident theory. (Witness is the listener)

Implied assertion + conduct: testifying that someone outside was holding an umbrella when the only issue in the case is whether it was raining in Edmonton that day. Courts haven't decided whether this is hearsay yet.

Prior Inconsistent Statements

- NON-HEARSAY purpose of PIS:
  - A person who gives two versions of a story must be lying about one of them -> Bob is giving 2 versions -> Bob is a liar. Purpose: CREDIBILITY.
- HEARSAY purpose of PIS:
  - Bob actually meant what he said on the scene (he wanted to fight Johnny)
  - In some jurisdictions, this is not hearsay because the declarant is on the stand and can be crossed on it – NOT THE CASE in Canada. Can only come in through a hearsay exception.
- Important in the domestic violence context:
  - PIS from a CO – not helpful to use this for a non-hearsay purpose, we are not trying to prove that the CO is a liar, but COs often will go back on their stories on the stand to protect their abuser.
  - Crown can cross?
  - Will usually come in through residual exception as long as the prior statement was recorded and the witness has memory and is responsive. (If the witness has no memory of the events at all they can't really be crossed.

Teper: Accused charged with arson of building he owns, pleads alibi. Police officer wishes to testify to an unknown witness yelling "Your place is burning and you're running away" – Crown

GO TO TOP

argued that this was circumstantial evidence that Teper was on the scene. PC said no, HEARSAY – only purpose is for its implied meaning that Teper was on the scene.

Hearsay Exceptions

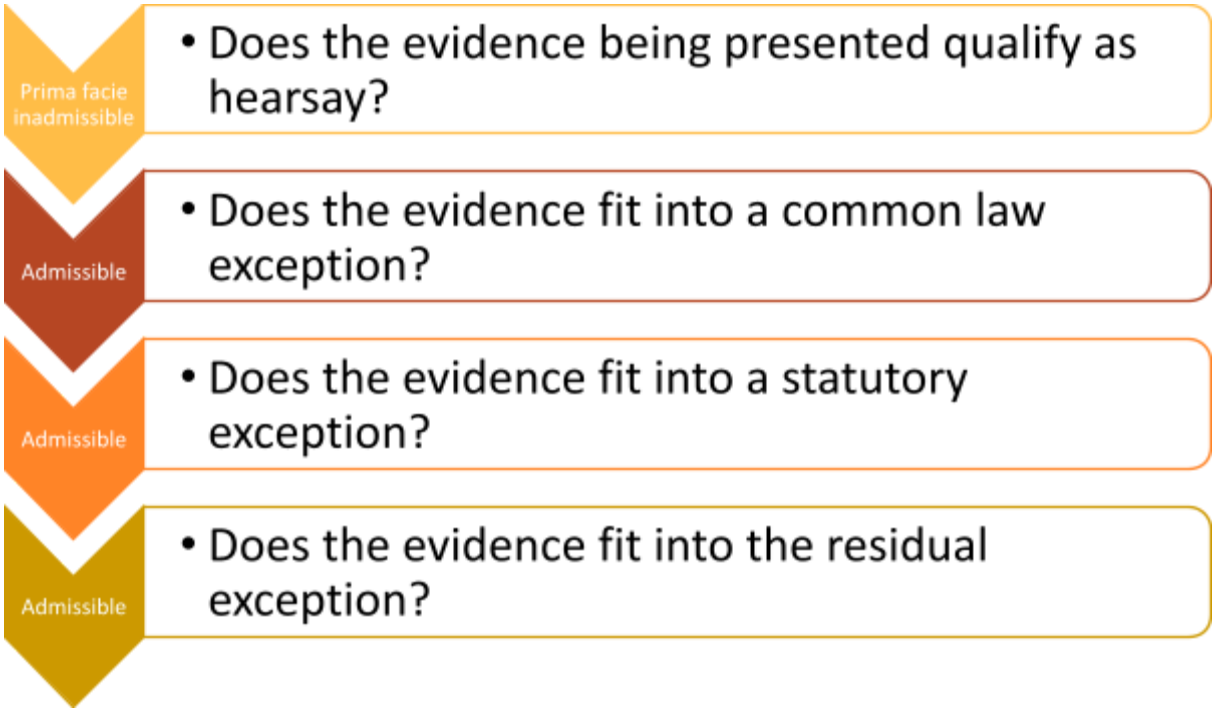
- Hearsay is is incredibly broad – need ways to separate the good from the bad.
- Some jurisdictions have abolished the rule – Canada has relaxed in some contexts (extradition, immigration, family court, small claims court)
    - Still applied fully in Canadian criminal and civil courts.
- Principle of Hearsay admissibility:
    - RELIABILITY: the statement is reliable enough to warrant admission
    - NECESSITY: the statement is necessary (we don't like hearsay, so it'd better be important)

Pigeon Hole approach to Hearsay Exceptions

- Hearsay exceptions created on a case-by-case basis.
- Over 100 common law exceptions.
- Issues:
    - Underinclusive: Precedent made exceptions formal – kept out good evidence.
        - Ex: Formal government documents could only be admitted if they were under seal
    - Overinclusive: Exceptions did not modernize with ideas about reliability – admitted bad evidence.
        - Ex: Anyone's present state of mind admissible, even if circumstances were suspicious.

Hearsay: The Common Law Framework

GO TO TOP



Admissions Exception

Admissions exception: Any oral or written statement (or conduct) by an adverse party to the case.

- Plaintiff and defendant can tender each other's statements; prosecution can tender accused's statements.
- Exception based on FAIRNESS, not reliability.
    - **Rationale:** It would be ridiculous to object when the Crown tries to tender a confession by saying "I can't cross examine the declarant" when it is the declarant's trial and it is within their control whether or not they testify.
- Not always admissible – other rules of evidence at play (confessions rule)
- Co-accused confessions can ONLY be admitted against the declarant (by the Crown). So if X confesses that X and Y committed a crime, it can only be used against X – against Y it is hearsay.
    - Where there is a video statement in which one party makes an admission and the other party does not respond, it's a little murky.
        - Classic position: admissible if it would be reasonable in the circumstances to expect a response.
        - ***Scott:*** Accused must adopt statement in some way for it to be admitted (conduct counts but it is a high threshold)

GO TO TOP

- Both positions agree, where silence comes from questioning by police – no admission EVER. (Right to remain silent makes this inference impossible).

RES GESTAE

Rationale: res gestae statements are made in situations where the declarant has little time to fabricate or concoct.

1) Statement of bodily condition: Describing your own bodily state
    a. Reliable because you are generally seeking help/no reason to lie. If litigation is already a reality, not reliable.
2) Statement of intention/state of mind: can relate to feelings OR plans of action ("I am going to the park today") but CANNOT prove what others did ("Johnny and I are going to the park today" can only be used to infer that the writer went to the park). Must relate to CURRENT state of mind.
    a. Ex from class: Double hearsay when mom testifies that her daughter (dead) said that her husband (AC) told her "you will not leave me". Can't be admitted as an excited utterance – it was not stated during the events. BUT, can be admitted as state of mind. Shows that she was afraid (rebuts temporary insanity). **Cannot be used to infer the accused's action. Any issues with reliability could impact admissibility – like if there is evidence that the CO exaggerated stories to make her mom pity her and buy her gifts.
3) Excited utterance
4) Present sense impressions

To bring res gestae in, the reviewing court must scrutinize:

- Was the statement made naturally or in response to questioning?
- Contemporaneity to events
- Declarant's relationship to events in question – victim or bystander (***Slugoski***)
- Was the statement recorded? (we can assess tone and content of call)
- Is there evidence that the declarant has motive to fabricate?

****Also consider the inherent RELIABILITY OF THE STATEMENT – is there any reason to believe the statement maker would be wrong about their perception****

Possibility of DISTORTION usually goes to weight

Possibility of CONCOCTION goes to admissibility.

GOTOTOP

Cases:

Khan: "Where the spontaneity of the statement is clear and the danger of the fabrication is remote, the evidence should be received."

Sylvain: the mere making of a 911 call does not necessarily bring the call within the exception – content, timing, and circumstances must be assessed.

Griffin: State of mind – "I am terrified of Richard, if anything happens to me, it was him". Admissible – probative to show the nature of the relationship between the declarant and Richard.

Declarations against Interest

Rationale: People do not normally say things that are against their own interests unless they are true.

Pecuniary Interests

- To operate:
    1) Witness must be suitably unavailable. (Dead, ill, insane)
    2) Statement must be made against the interest of the maker in some way and the declarant must have known that the statement was to their own disadvantage at the time of the statement.
        a) Receipt of payment – etc
- Can operate even where a statement has elements that are advantageous and elements that are disadvantageous (***Carr's Estate***)

Higham v Ridgway: admitted an invoice from a doctor about payment for a baby being born being received. Hearsay, but admitted as statement against pecuniary interest.

Penal Interests

- To operate (Demeter):
    1) Apprehension of vulnerability: declarant should have known that the statement could make them vulnerable to penal consequences; (most important)
        a) Statements made in confidence to friend/family member/lawyer unlikely to be admissible – declarant would not think these statements would make them vulnerable.
    2) Remoteness: Vulnerability to penal consequences must not be remote;

GO TO TOP

a) ***Kimberley***: declarant already serving life sentence – vulnerability too remote.

3) Consideration in totality: if the weight of the declaration is in the declarant's favour, cannot be admitted (different from penal);
4) Other evidence: in a doubtful case, a court might consider whether there are other circumstances connecting the declarant with the crime, and whether there is any connection between the declarant and the accused;
5) Necessity: declarant must be unavailable to testify (dead, insane, ill).

Business Records Exception

Business Records Exception: based on the idea that records made routinely in the course of some everyday business are likely to be true because there is no reason to misrepresent facts in such circumstances.

- The only hearsay exception that allows double and triple hearsay/
  - Ex: an inspection report that relied on previous reports from numerous people.

Common Law Scheme: To be admitted, the evidence must:

1) Be an original entry
2) Be made contemporaneously
3) In the routine
4) Of Business
5) By a recorder with personal knowledge of the thing recorded as a result of having done or formulated it;
6) Who had a duty to make the record; AND
7) Who had no motive to misrepresent.

****COMMON LAW EXCEPTION GOVERNS IN ALBERTA FOR NON-CRIMINAL/FEDERAL MATTERS**

Statutory Scheme:

- Most provinces have their own statutory schemes that govern.
- Criminal/Federal matters governed by s 30 of the Canada Evidence Act.

Inadmissible under the CEA:

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

GO TO TOP

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

Ares v Venner: the P had been admitted to a hospital after a skiing incident – nurses made notes about his leg (swollen, discoloured). Attending doctor did nothing and gangrene set in – leg had to be amputated. - *"Hospital records, including nurses' notes, made contemporaneously by someone having personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein."*

PRINCIPLED/RESIDUAL EXCEPTION

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Reliability

1) Understand why hearsay is excluded;
2) Focus upon the person making the statement, not the person testifying;
3) Look for matters that would be tested in cross examination;
4) The standard is NOT perfection.

Considerations:

1) Nature of the Statement
    a. Documented or oral?
    b. Second-hand hearsay?
    c. Could it have been tampered with?
    d. Did people have access to it?
2) Contents of the statement:
    a. Is it internally consistent?
    b. Are the contents "fantastic"?
    c. Does it describe something in the present?
    d. Is it comprehensive?
    e. Are the contents confirmed by other evidence? (***Bradshaw***)

GO TO TOP

i. Ex: "I saw a blue car drive by my window at 8 PM when there was music playing outside." From this, we need to prove that there was a blue car driving by at 8PM (this is a matter in issue).
ii. Do we have other evidence that says there was music that started playing at 8PM - this fact acts as a guarantor that the rest of the statement was true. **This is VERY controversial.**
iii. Courts are concerned about "bootstrapping" - slapping in shitty evidence based on other evidence. Bradshaw sets a VERY high threshold - confirmatory evidence needs to eliminate any other explanation. Appellate courts don't really hold this standard.

3) Circumstances of the making of the statement:
    a. Was the person excited, surprised?
    b. Were they under oath or other possible penalty (via a duty)
    c. Were they induced or drunk?
    d. What was the nature of the relationship between the statement maker and the witness?
    e. How short was the time period between the facts and the statement describing those facts?
4) Truthfulness of the maker:
    a. Is the person known for making fabrications?
    b. Did they have a motive to fabricate?
5) Observation:
    a. Where was the declarant?
    b. What was their relationship to the events?
    c. Could they have known otherwise about the issues at stake?
6) Adequate substitutes:
    a. Is the statement recorded?
    b. Was cross-examination available?

Necessity

- Satisfied where witness truly unavailable (dead, insane, gravely ill)
- Possibly satisfied where witness absent (proof generally required)
- Satisfied where evidence required to supplement testimony (partial or complete lack of memory)
- Possibly satisfied where need is relative; would take too much time or expense to prove.

Hearsay: Overall Framework for Analysis

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Is it hearsay?

- Is it an **OCS** tendered to prove the **truth of its contents**?
  - WHO is the real witness
  - What is the relevance of the evidence
  - Do we care about WHAT was said or WHY it was said?

Does it fall within a statutory exception?

- Is it a **business record**?

Does it fall within a common law exception?

- Is it an **admission**?
- Is it a **spontaneous utterance**?
- Is it reflective of **state of mind or physical condition**?
- Is it a **declaration against interest**?

Does it fall within the principled/residual exception?

- Do the surrounding circumstances help assure its **reliability**? (see considerations above)
- Is the witness **unavailable** to testify?

Adducing Proof

Admissions, Judicial Notice, Witnesses, and REal Evidence

Admissions

Important to keep in mind that our justice system is ADVERSARIAL. Dispute-focused.

- What is "true" is what is proven in court to an appropriate legal standard (BOP, BRD, AOR)
- The court is only interested in proving what is ACTUALLY alleged. (material)

Good place to start - NOTHING IS ASSUMED, everything needs to be proven.

- Admission: parties can admit to any fact in issue.
- Proof: Parties can prove facts through admissible evidence.
  - **Result: Everything that is NOT admitted, must be proven.**

GO TO TOP

But, **the more time we waste on things that are silly and barely in dispute, the more prejudice through time wasted**. Let's get to the juice of the dispute - make the admissions that should be made.

Formal admissions:

1. Designed to narrow the issues in dispute - reduce length of trial
2. Encouraged in criminal cases – but defence cannot be compelled to make ANY admissions.
3. Compelled in civil cases (punishment of cost sanctions if not)

Evidentiary implications of formal admissions:

1. Difficult to retract (less so in crim)
2. Unless retracted, they **determine** the factual matter admitted to.
3. Determine materiality of other evidence:
    a. Evidence that is only material to something that has been admitted won't be admissible.

Alberta Rules of Court:

13.6(2): Pleading must state all facts

13.12(1): If the other party doesn't specifically admit to a fact that fact is denied.

6.37(1): A party can call on another party by Form 33 notice to admit any fact stated in the notice

6.37(3): Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed denies the fact or sets out an objection

Criminal Context:

- Mostly informal admissions:
    - S. 655 of the code
    - One way procedure: Crown can request admission but need not take one.

Impact of an admission:

1. Binding on a legal/factual issue
2. Affects admissibility of other evidence

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3. No fact can be tendered for sole purpose of proving/refuting an admitted matter
4. Remember! Accused CANNOT force Crown to accept admission.

Withdrawing an Admission:

- Usually permissible by the defence in criminal cases. Court ultimately does not want a miscarriage of justice to occur.
- More challenging in civil cases.
    - Parties are equally matched and are in an adversarial process. Dependent on:
        - **When?** (earlier is better) - longer it goes the more prejudice to the other side.
        - **Why?** (simple error/previous counsel more likely)
        - **What?** (Clearly wrong and will mislead the court?)
        - **Biggest factor:** Will the other party be prejudiced - or can costs award fix it?

Judicial Notice

Judicial Notice is taken of facts that are not proven or admitted but are so obvious that it would be ridiculous to require them to be proven. HIGH THRESHOLD (ex: gravity)

Three types of Judicial Notice:

1) **Judicial notice of the law:** You don't need to "prove" the law, it is expected that judges know the law, so you can recite it back to them.
2) **Judicial notice of legislative facts:** facts that are merely used to interpret or develop the law do not need to be proven (ex: legal journal articles, Hansard)
3) **Judicial notice of adjudicative facts:** SO notorious, well-known, or clearly established that virtually everyone would agree upon it.
    a) Ex: It's hot in July
    b) Ex: It is from an indisputable source (Bank of Canada records to verify the interest rate at any given time)

NOTE: The more central the fact is to the issue, the more unassailable and indisputable it must be. For example – in one case whether the Holocaust happened was so central to the issue the judge did not take JN.

Witness Competence and Compellability

GO TO TOP

Bulk of evidence comes from *viva voce* witness testimony. Witnesses are the "gasoline" of the trial system. We need to be able to call them to volunteer to give evidence or to force them to give evidence.

- **Competence**: The witness is eligible to testify (assuming they have relevant and admissible information to offer)
- **Compellability**: The witness can be FORCED to testify, even if they would prefer not to. As such, a non-compellable witness is someone who CANNOT be forced to testify.
- **Privilege:** The witness can be forced to testify, even if they would prefer not to. BUT they may be able to resist answering certain questions that qualify for a type of privilege. (no material evidence to offer)

Ex: Johnny charged with assaulting Bob in a bar.

At common law: Johnny would be incompetent to testify even on their own behalf because the common law said they're "interested parties" so they're unlikely to give reliable evidence. **This has been wiped away. It is now a question of credibility for the trier of fact to consider.**

We still respect that he has an important interest to protect though, the interest to avoid self-incriminating. SO, **accused people are not compellable** - they are allowed to refuse to testify to protect their right against self-incrimination.

Now competence comes down to whether the witness has at least a MINIMAL capacity to:

1. Observe
2. Remember
3. Communicate
4. Understand the obligation and speak truthfully

This is a **very low bar** - we want these witnesses to testify, any issues with their competence goes to weight. (This mostly comes up with kids or adults with cognitive delays)

Canada Evidence Act s. 16.1 (Kids testifying)

CEA s. 16 (mental capacity)

- If kids/adults with MC issues can't understand an oath the CEA allows them to avoid taking an oath

Problems of Compellability:

1. **Accused:** right against self-incrim.

GO TO TOP

2. **Opposing lawyer:** Not fully immune. If you want to call an opposing lawyer as a witness you must show that its absolutely essential. If this happens, usually the lawyer will be removed as lawyer of record. Complicated area but this is the basis.

3. **Minister/Politician:** very complex area. Not immune from being called as witnesses but they have Parliamentary Privilege which allows them to delay testifying.

4. **Judicial Officer (judge):** judges cannot be called to explain their judicial reasoning.

What binds these people together is strong POLICY REASONS not to call these people.

Limits on Enhancing Credibility

Oath Helping Rule

Oath Helping Rule: You cannot call evidence with the **sole** purpose of bolstering witness credibility.

- Forbids a wide range of evidence, including polygraphs, psychiatrists testifying to a person's credibility, etc.
- Comes down to PV<PE
- ***W(PA):*** Mom saying "I knew she wasn't lying" – INADMISSIBLE – only bolstering daughter's credibility.
- BUT, you can admit it if the credibility is a secondary purpose.
    - Ex: psychiatrist giving evidence about a victim's conduct that is related to symptoms of abuse. Primary purpose is to connect the behaviour to the known symptoms, but also bolster's the child's credibility because it's confirming what the child has testified to.

Prior Consistent Statements

Prior Consistent Statements are the most common form of oath helping. Inadmissible in both criminal and civil trials – exceptions are narrow.

"I told Lenny I shot Bob in self-defence right after the shooting" or "Johnny told me he shot Bob out of self-defence"

Rationale:

1) **RELEVANCE:** drawing an incorrect inference between someone consistently stating "I didn't do it" and their credibility.
    a. Exception: there may be some situations in which the story is so complex that repeating it does bring an aura of credibility.
2) **PREJUDICE:**

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a. Illusion that there's a lot of evidence when really it is all stemming from the same source.
b. PCS take a lot of time to prove – if someone told the story to 100 people calling all 100 would be time consuming and extra inflationary.
c. Encourages people to create evidence by telling a story and sticking to it.

Exceptions

1. To be admitted, a PCS must have added PV:
    a. Independent value beyond credibility
        i. Prior identification: technically, having an officer or complainant testify at court that the complainant identified Johnny as the assailant is a PCS - but this has independent value because the identification in a line up close to the time of the event has more PV than the complainant identifying Johnny in the courtroom.
    b. Necessary to correct misimpression
        i. **Correcting a PIS**: Witness on the witness stand says "it was B" but out of court they said "it was A" (PIS), but on two other out of court occasions the witness said it was B - in this case the PCS becomes useful to show that the witness has said the same thing on past occasions even if they deviated once.
        ii. **Recent fabrication.**
            - **To arise, must be a SUGGESTION that the witness is lying/mistaken AND the OCS must logically rebut whatever suggestion was made in examination.**
            - Witness says Johnny beat up Bob. Defence lawyer says "you're mad at Johnny because he beat you up last week, so you're lying about this. Witness says that's not true. What can rebut the motive the defence lawyer is asserting? A prior statement (from before Johnny beat Witness up) that alleges the same thing. In this case, the PCS would be admissible.
            - **Steps:**

1) Identify the MOTIVE
2) Identify WHEN the motive arises
3) Resolve whether the OCS was made BEFORE the motive formed.

iii. **Narrative exception** provides that there is some relevance to the fact that an original complaint was made:

Ex: victim starts explaining how she came to decide she was going to press charges even though the SA happened 5 years ago. Concern here is that the jury will draw an inference and think that its problematic that she waited 5 years. Only way to correct this may be to admit PCS - ex: a conversation she had with her psychiatrist in which the psychiatrist told her she had been SA'd and told her to talk to the police.

GO TO TOP

iv. **Statements on Arrest** (ONLY ACCEPTED IN ONTARIO, new rule from 2010 (***Edgar***))

1. "did you speak to the police right after the shooting?" "yes" "what did you tell them" "that it was self-defence" (Cop will also need to testify to this.)
2. Argument is that " from the very beginning they have been denying" Sankoff doesn't like this argument. People often deny right from the beginning that doesn't mean they're not lying.

SH: Where PCS are admitted the TJ should direct the jury not to use the PCS as hearsay and that it is also impermissible to use consistency between testimony and prior statements as proof of the truthfulness of testimony or to treat a PCS made by a witness as corroborating that witness.

Direct and Cross

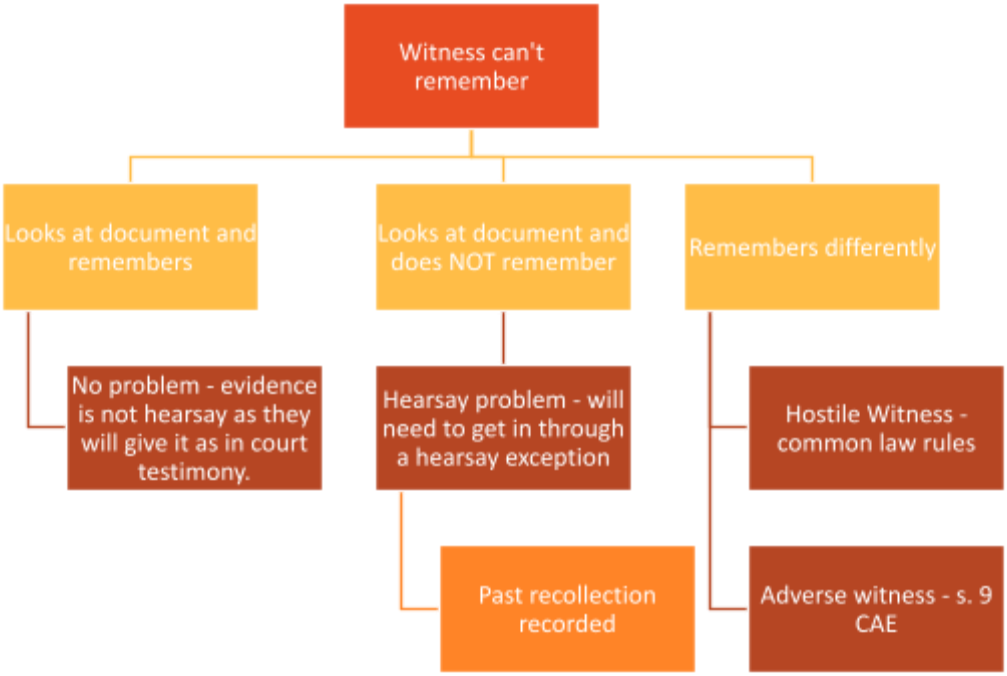
Direct Examination

Cardinal rule: You cannot lead a witness in direct. No questions that suggest the answer.

Rationale: Witness should be telling their own story, you shouldn't be guiding them.

- Process:
  - You call your witness. You have one shot to get the evidence out that you need.
  - The opposing party now gets to cross your witness.
  - You can re-examine, but the rules are much more narrow than those on direct. You can ONLY respond to unanticipated matters that were raised in cross.
- Exceptions:
  - Uncontested matters: ex: introducing the witness.
  - Children: tough to ask general questions.
- Situations where this becomes problematic:
  1) Forgetful witness
  2) Adverse witness
  3) Hostile witness
- On memory: trial is NOT a memory contest. We can allow witnesses to refresh their memory before and during trial. Refreshing of memory goes to WEIGHT, not admissibility.
  - Witness can refresh memory with just about anything pre-trial
  - Extent to which memory is real is a question of weight
  - Legitimate area for cross examination
  - Exception: evidence remembered through hypnosis is inadmissible (***Trochyn***)

GOTOTOP



Past Recollection Recorded

- **Past recollection recorded** – witness made record or was in presence of someone who made the record when the memory was fresh.
- Sometimes dealt with as an independent evidence rule but realistically it is a hearsay exception.
- Happens where a witness looks at a statement they previously gave and cannot remember it (this conjures necessity).
    - Witness now asserts record was accurate at the time. (if not, we don't have sufficient reliability.)
- Classic example: witness hit by a car and wrote down the license plate number at the time.
- You can't write something down 6 hours later and you can't have someone else write something down for you and never look at it (police at the scene) - this is a narrow exception

Hostile Witnesses

- To have someone declared a **hostile witness** they need to show that they have a **disrespect for the court process.** "Screw you, lawyer"
- If you can have someone declared a hostile witness, you can cross on ANYTHING except character. (Common law rule)
- This doesn't happen often.

GO TO TOP

Adverse Witnesses

- **Adverse witnesses** are witnesses that have a PIS that runs counter to what they say on the stand.
- To have someone declared an adverse witness, you need to put the PIS to them.
    - If they admit to making it and adopt it – no issue. They are not adverse.
    - If they admit to making it and change their story, you can cross examine them for the purpose of showing that the statement is adverse.
    - If they deny making the statement, you have to prove it. S. 9(1) and (2) of the CAE.

Remember, you called this witness so the OCS was the statement you needed. Therefore, your goals are to:

1) Try to minimize the wrongful impact on your case.
2) Admit the OCS for its truth – will need to go through hearsay exception.
   **Note for principled exception – reliability helped if the witness has a good memory of the events. You can cross them on it (substitute for crossing at the time of the statement)

Cross examination

Goal is to test the credibility and story of the witness by putting as many suggestions to them as you want.

How and Who?

- Any party that does not call the witness has the ability to cross examine (STARTING POINT)
- Exception: courts have residual discretion to limit cross examination in situations where co-defendants in a civil action are aligned in interest and therefore being allowed to cross each other would be unfair (leading witness to get evidence they want out on what is essentially a direct examination - **SWEETHEART** cross examination) (this is exceptional)
    - ANY hint of adversity and the courts will allow cross.

Rules

- Good faith basis: More of a rule or ethics than a rule of law. But courts have pretty much brought this in (***Lyttle***).
- Law Society Rules of Upper Canada: 4.01(2)(g) (Alberta rule 4.01)
    - When acting as an advocate a lawyer shall not knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence.

GO TO TOP

- Without this the only bounds would be your imagination. Relevance couldn't bound this because being a satanic cult member is probably relevant to credibility and therefore would always be relevant, but you can't just ask people if they're satanic cult members, Gretchen.

The Duty to Cross Examine (Browne and Dunn)

- Based on the idea that witnesses should be able to refute a challenge brought against them.
  - Unfair to witness
  - Unfair to the party that called the witness because they are unable to call evidence to refute the claim
    - Neither can respond to the allegation against credibility
- Classic formulation - if you don't cross examine, you accept the evidence of the witness.
- SO, if you don't cross Bob on Johnny's assault against him being self-defence, you accept Bob's side of the story (and he won't say that its self-defence)

Why is Browne and Dunn stupid?

1. You don't need the rule because failures to CE will be points of great concern for the trier of fact. (Adverse Inference)
2. You could address this by asking the witness in reply. This is way easier and fairer than adopting B & D.

Modern case law does not GENERALLY harsh with B & D but it does happen sometimes. Modern courts generally look to whether the witness has been "effectively given a chance to tell their story." Also whether they KNEW that they would be contradicted.

Sank thinks the choice should come down to counsel - B & D rule allows counsel to take advantage of a highly technical rule.

Overview:

1) Did you fail to cross the witness?
   a. Did the witness "know" your point?
   b. Were they effectively crossed (even if the exact point wasn't raised)
2) If not, what should the remedy be?
   a. Can they be recalled?
   b. Should trier of fact be instructed to take the failure into account?

Collateral Fact Rule

Collateral fact evidence is evidence that is offered not in proof or disproof of the issues in the case but only to assist in the inference-drawing process – the collateral fact is the credibility of the witness.

GO TO TOP

- Credibility is always relevant because we depend on witnesses for evidence, BUT, full exploration of credibility would lead to never ending trials.
- A witness CAN be properly questioned as to any matter that is relevant to credibility, BUT, independent evidence CANNOT be introduced to contradict the answer that the witness gives. Any answer given by the witness is CONCLUSIVE.
    - Can be crossed on – just can't call other witnesses to contradict. (***Khanna***)
    - Only applies when credibility is the ONLY relevance of the evidence – if the evidence has relevance outside of the credibility of the witness, it is not collateral.
- Is it collateral or not?
    1) Does the question relate to a fact in issue?
        - If so, NOT collateral. Collateral facts are SOLELY about credibility.
        - To get around this, tie the evidence to some issue other than credibility. Need to be able to show that they are lying about something relevant to the case, not just that they're a liar.
        - Ex: Bob, did you steal something from Johnny on the day of the fight? – If he says no you can prove otherwise because it goes to MOTIVE.
        - NOTE: Being able to prove the witness is lying DOES NOT overcome the rule. (this feels wrong because perjury but ignore that impulse)
    2) Does it fall into an exception?

Exceptions to the Collateral Fact Rule

1. **Bias, motive, or interest against party OR system** are **ALWAYS** allowed to be explored fully.
    a. Ex: You are lying because Johnny dumped you.
    b. Ex: You are an anarchist and have vowed never to tell the truth in court.
    c. Ex: You're a racist and have always been a racist (if defendant is racialized)
2. **Prior convictions:** s. 12 of the Canada Evidence Act. (**ordinary witnesses not the accused)**
    a. Ex: You've been convicted of shoplifting?
    b. Reason for this is because prior convictions are so easy to prove, just tender the criminal record.
3. **Relevant mental/medical conditions:**
    a. Ex: You suffer from hallucinations
    b. Ex: You wear glasses normally?
        - You are not trying to prove that they're lying
4. **Witness's reputation for Truth telling**
    a. Ex: Does Anna have a reputation in the community for lying?

GO TO TOP

- This is extremely archaic and not often used. You can't explore the reasons for this reputation, but you can technically have other people testify vaguely to their reputation in the community.

FLEXIBLE TEST

Courts have suggested that proof of collateral facts may be admissible when:

1. The witness's veracity is essential to a resolution of the case;
2. The collateral fact is significant, and proof of it would impact on veracity; AND
3. Inquiry into the collateral fact will not divert the trial (substantially)

Sankoff says these factors are more helpful than just relating whether the evidence is a collateral fact. BUT, this is not exactly now the law works today.

- Example from class – police officer who took partial admission lying on the stand about being before a disciplinary tribunal for misleading the court.
    - Orthodox position: can't bring collateral facts to prove – not a conviction.
    - Flexible approach:
        - the witnesses veracity is very important
        - the collateral fact is significant – he's lied to a court before, similar to perjury.
        - Won't divert the trial substantially – easy-ish to prove.

PIS In Cross Examination

Prior inconsistent statement (PIS): An OCS that is inconsistent with what the witness is saying on the stand.

- One of the best ways to attack the credibility of a witness. If used correctly, can prove that the witness is lying or their memory is flawed.
- Of course, PIS cannot be used for the truth of its contents unless it can get in through a hearsay exception – but you usually don't need this, credibility issues are enough.

Relevant Sections of the CEA

Cross-examination as to previous statements

> ***10 (1)*** On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise**, relative to the subject-matter of the case (not a collateral fact)**, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the

GO TO TOP

witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

Cross-examination as to previous oral statements

11 Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

S 10 tells you about the PROCEDURE
S 11 is about PROOF OF CONTRADICTIONS

PIS Procedural Framework

1) Type of statement
    a) Recorded (s. 10)
        i) Can put this to the witness.
    b) Oral (s. 11)
        i) Need to call another witness to confirm whether the witness you are crossing said what you are alleging they said.
2) Witness **need not** be shown statement before attack on cross examination. (s. 10-11 make this clear)
3) Once witness made aware of the statement, it can go one of two ways:
    a) Admit making the statement
    b) Deny making the statement
4) IF ADMITTED: no more reference to s. 10-11.
        i) If adopted: Your work here is done. This is now the evidence. **(SIT DOWN)**
        ii) If not adopted: Statement can be used to impeach credibility. OH SO YOU'RE A LIAR THEN. **(CROSS EXAMINE)**
5) IF DENIED: Statement must be shown or circumstances of oral statement told to the witness before proof by other witnesses can be tendered. **(CEA RELEVANT)**
   ****S. 10-11 are NOT exceptions to the collateral fact rule, WATCH FOR THIS.**

Prior Convictions in Cross Examination (ACCUSED)

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****You can always ask about a regular witness' criminal convictions – they are relevant to credibility. ****

Relevant CAE Sections

Examination as to previous convictions

> ***12 (1)*** A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of previous convictions

> (1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

- Section 12 of the CAE read down to "MAY" be questioned because applying this to the accused was found to be in breach of the Charter (***Corbett***).

Relevant Alberta Evidence Act Sections

Proof of previous conviction of witness

> ***24(1)*** A witness may be asked whether the witness has been convicted of a crime and, on being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved.

- Section 24(1) read down in the same way as the CAE.

Corbett Exclusion

- Sankoff did a study on discretion to exclude under Corbett and found that exclusion is largely random.
- Some indicators:
    1) **Nature of conviction:**
        a) Reflects on honesty? (more probative)
        b) Disgusting? (more prejudicial)
    2) **Remoteness:**
        a) Old convictions less probative
    3) **Similarity:** The more similar the more prejudicial.
        a) This is different from the exception to admitting BCE, which relies on the probative value of previous convictions that are similar to the offence in questions. Here, **we are not determining whether the person is more likely to have committed the offence, we are talking about their CREDIBILITY.** SO,

GO TO TOP

we are more concerned with the PE associated with similar convictions (high) not the PV.

4) **Comparative credibility**: did the accused make case a "credibility contest?"
    a) Have they said that a Crown witness is the "type of person who would lie?" - in these cases we now need to know whether the accused is the "type of person who would lie" (DOES NOT NEED TO BE THE ACCUSED THEMSELVES, CAN BE COUNSEL FOR THE ACCUSED)

**NOT all or nothing. Judges should consider each conviction in light of the whole.

**Prima facie admissible

Admitting Convictions: Procedural Framework

1) During Crown case, can only come in through bad character.
    a) If admitted as part of Crown case, conviction can also be used to assess credibility.

CROWN CLOSES CASE

2) Defence must make Corbett application here (based on ***Underwood***, unfair to make the accused decide whether to testify before knowing if the convictions are coming in.)
    a) Judge goes through factors and decides which convictions will be excluded.
3) If accused does not testify, s. 12 does not apply (only applies to witnesses).
4) If accused does testify, either:
    a) Admit under s. 12 of the CEA (FOR CREDIBILITY ONLY – jury must be advised)
    b) Admit under s. 666 of the Criminal Code (if accused brings character into question) – ESTABLISHES CONNECTION TO ACT
5) Even if the court says convictions won't be admitted at the time of the Corbett application, this can change if the accused makes it a credibility contest. "CO is the type of person who lies" (Must be an attack on CHARACTER, not an attack on facts – she is lying vs she is the type of person who would lie)

Opinion Evidence

General rule: Witnesses may only give evidence of facts personally perceived and may NOT offer their opinion as to the meaning of those facts.

- **Rationale**:
    1) Interferes with role of the jury (which is to draw inferences from the facts available to them)
    2) Wastes time and causes confusion

GO TO TOP

3) Can obscure "real" evidence, by allowing witness to blend opinion and fact

- Consider the definition of a "witness" – from the Olde English "witan" – **to know as fact, to perceive.**
- Ex: After hitting Dan with his car, Bob got out of the car, started dancing, and drinking champagne. Witness can testify to this, but CANNOT testify that Bob meant to hit Dan with his car.
- Two exceptions to the general rule:
  - Non-expert opinion
  - Expert opinion

Non-Expert Opinion Evidence

- For a whole host of trivial opinions, nobody cares.
  - Ex:
    - It was cloudy yesterday
    - He was smart
    - The house got very smoky
- First question of opinion evidence is always – DOES IT MATTER? (does it touch on a major issue that the trier of fact has to decide?)
  - If not, let it in.
- Important for two reasons:
  - Tells us when non-experts can give opinions
  - Delineates admissible opinion from the more rigorous test of admissibility: experts.

"There is little if any virtue in any distinction resting on the tenuous and frequently false antithesis between fact and opinion. The line between fact and opinion is not clear."

Test for admitting non-expert opinion evidence:

1) It must be a conclusion based on **PERSONAL PERCEPTION**.
2) Opinion must be **RATIONALLY** based on the perception.
3) Opinion is the only **REASONABLE** way of conveying the information, and the jury needs it; AND
4) Must be on a subject that is within the **GENERAL COMPETENCE** of most people.

Expert Opinion

- Why do we allow experts to give opinion evidence if forming an opinion is the job of the trier of fact?
  - Because in some situations it is NECESSARY to get to the correct result.

GO TO TOP

- Experts are the **only** witnesses specifically called to give opinion.
- Risks of expert evidence:
    - " There is always a real danger that expert evidence will be **misused** and **distort** the fact-finding process. There is the very real risk of human fallibility arising in assessing the **proper weight** to be given to evidence cloaked under the mystique of science. Dressed up in scientific language which the jury does not easily understand and submitted by a witness with impressive credentials, expert evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves." ***R v Mohan - SCC***
    - **Time and cost**
    - **Distorted value**
    - **Usurp role of trier of fact**
    - **Reliability**
    - **Hired guns – advocates pay more for better experts**

- TJ has an important **GATEKEEPING** function to only admit expert evidence where it is really essential to the purposes of the trial for which its being tendered.

Admissibility: LEGAL TEST

Step one: 4.5 Threshold requirements - not all required with every type

1. **Relevance:** Is the opinion relevant?
    - Opinion has to logically prove a material fact in the case
2. **Necessity:** Does the trier of fact need the evidence? **(HIGHEST BAR IN THIS TEST)**
    - **Necessity Test:** Does the trier of fact truly need the expert's testimony to decide the issue before them?
        - Is the information likely to be outside the knowledge and experience of the trier of fact?
        - Could an ordinary person come to a conclusion about this without the expertise?
    - Ex: no need to show that foreign caregivers are vulnerable
    - Ex: no need to show that accused sometimes makes false confessions
    - Ex: Q of law – CANNOT call expert. Judge presumed to know.
3. **Exclusionary rules:** Does it clash with any exclusionary rules (some in ARC re: expert reports, some in other rules - oath helping, bad character)
4. **Qualification:** Has the expert been qualified?
    - Experts cannot stray outside of the area of their expertise (Jordan Peterson rule)
    - A question of **admissibility and weight** - good enough to be admissible, but then after that the level of weight varies by how good of an expert you have
    - You must have "**specialized knowledge**" (can come from ANYWHERE)
    - Once you're over the threshold (admissibility) quality of the assistance goes to (A) the balancing test and/or (B) weight

GO TO TOP

- Bias is now a criterion of admissibility (***White Burgess***) - BUT biases or partiality almost always goes to weight, not admissibility (unless it's a family member or a personal interest).
- Exclusion should only occur in very clear cases in which the proposed expert in unable or unwilling to provide the court with fair, objective, and non-partisan evidence." Assess:
    - NATURE and EXTENT of connection, not mere fact of connection
        - Employment relationship not enough
        - Familial relationship might be
        - Direct financial interest in the outcome of litigation might be
        - Assuming the role of the advocate
- Rules of Court now have certain rules about this.
    - Expert report/stated foundation/signed statement of understanding

5. **Reliability:** Is the science sufficiently reliable? Will USUALLY go to weight
    - Novel science requires proof that the evidence is reliable enough to be admitted.
    - Some expertise doesn't come from science - ex how should a canoe be paddled.
        - Has the technique been tested?
        - Has it been peer reviewed?
        - Is it generally accepted?
        - Is there a high margin for error?
        - How has the data been accumulated?
        - Are the methodologies generally accepted?
        - NOT a checklist – sufficient indicia for judge to be comfortable with level of reliability?

Meeting the requirements does NOT mean its admissible.

Step two: Balancing test

There is an additional balancing requirement - essentially PV>PE

- Do the benefits justify the risks?
    - Measure the relevance, reliability, and need against the consumption of time, prejudice, and confusion.
        - How good is the qualification?
        - How biased are they?
        - How necessary is it?
        - Does it usurp the role of the jury?
            - **ULTIMATE ISSUE PRINCIPLE**: Closer the testimony gets to the ultimate issue, stricter the court will apply the admissibility rules.
        - How complex/time consuming?
        - How important is the issue it resolves?
        - How many of the underlying facts are established? (**EVIDENTIARY FOUNDATION**) – TENDS TO GO TO WEIGHT but if there is NO evidentiary

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foundation it is inadmissible (doc can't testify that Johnny was automatistic without him getting on the stand and providing a foundation for that claim)
        - How reliable is the underlying expertise?
    - Is the evidence sufficiently beneficial to warrant admission despite harm? (***Abbey***)
- Judge can exclude, tailor, or limit
    - More common to tailor/limit
- TJ's role is to ensure ALL expert evidence PV>PE

Facts upon which an expert can base an opinion

1) Personal Observation
    a. I examined the wound
2) Evidence given by other witnesses in court
    a. Witness X said he saw Y hit J in the face with a 2 x 4, is that the kind of thing that would cause a concussion?
3) Hypothetical questions
    a. If X had 10 beers and weight 170 lbs, what would their blood alc level be?
4) Certain OCS (facts of expertise)
    a. Studies, experience in their field.

EXAM TIP: When you are thinking about whether expert testimony should be excluded or just weighed less – think about whether cross examination could address some issues:

- You went to a shit med school yeah?
- You're not a specialist though?
- This survey is dog shit, right?
- You and Mary are besties, correct?

Privilege

Legal Advice Privilege

- **Test for legal advice privilege:**
    1) Client
    2) Lawyer
    3) Communication; AND
    4) Communication made for purpose of seeking legal advice.
- **Effect of the privilege:**
    1) It belongs to the CLIENT, not the lawyer.
    2) It lasts for life and death (also insanity)

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3) It is system wide and not restricted to the purpose for which it was sought. (You can't pierce the privilege of a real estate lawyer and client to prove motive for a murder trial.)

Rationale:

- Not based on PV>PE. This shit do be probative.
- Competing social interest strong enough to warrant excluding evidence despite PV.
- Law of privilege varies more by jurisdiction that any other law. (social interests vary)
- Legal advice privilege:
    1. Never confuse legal advice privilege with confidentiality.
    2. Sacrosanct: The most important privilege we have, courts will ALWAYS err on the side of inclusion.
- Why do we have it? What are the interests protected?
    - Clients seeking legal advice need to be able to speak openly with their lawyers, secure in their knowledge that what they say will not be divulged without consent (Smith)
    - This privilege is essential if sound legal advice is to be given in every field (A2J)
    - Without this, clients would never be candid and provide all relevant information required to properly advise clients.
- Confidentiality at the core – necessary precondition.
- **It is not easy to get around LA privilege**
    - NO: Can't get around privilege by breaching confidentiality - just because the police wiretap your convo with your lawyer doesn't mean privilege is pierced. If you have a reasonable expectation of privilege the conversation is privileged.
    - NO: Having other people in the room does not waive privilege (but being in an elevator with randoms might)
    - Privilege extends to where parties work together with shared interests.
        - **Common interest privilege**: Statement made in the presence or shared with person in "common interest" remains confidential. If all other conditions satisfied, privilege remains.
        - However, if they have a falling out they CANNOT use privilege against each other (never had confidentiality between each other). NEITHER can claim privilege in subsequent litigation. But they can still claim privilege against the rest of the world.

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