EVIDENTIARY ISSUES RELATING TO HEARSAY STATEMENTS PREVIOUS CONSISTENT STATEMENTS, USE OF TRANSCRIPTS TO IMPEACH WITNESSES, AND CROSS-EXAMINING ON POLICE OFFICERS' NOTES[1]

INTRODUCTION

The common thread running through the topics presented here is that each in its own way deals with the problem of separating truth from falsehood or, better, the perception of truth from the perception of falsehood. And although the evidentiary issues relating to these topics are many and sometimes complicated, skillful counsel inevitably demonstrate mastery in understanding and applying them in individual circumstances.

With regard to hearsay evidence, for example, the Supreme Court of Canada has in the last few years developed a new, "principled" approach to the determination of admissibility, an approach which has tended to impose upon counsel the burden not only to recognize hearsay in the first instance, but also to call or to challenge evidence of "necessity" and "reliability" concerning out-of-court statements sought to be admitted for their truth. Given the major role that hearsay statements will continue to play in the outcomes of trials, especially in light of this newly formulated "principled" approach privileging the concepts of necessity and reliability, I prefer to begin my analysis there.

HEARSAY STATEMENTS

Hearsay evidence is an out-of-court assertion of a person who is not the witness, which is being offered in court as proof of the truth of the fact or facts asserted. Down through the years, courts have held that whether a statement is hearsay depends on the particular purpose for which the proponent offers it. If its proposed use is to establish the truth of what is contained in the statement, then it will be caught by the rule excluding the hearsay use of evidence.

The stable, abiding nature of the rule is somewhat surprising in view of the fact that within the last 25 years alone it has been subjected to extensive review by both the Canada and Ontario Law Reform Commissions as well as by a Federal/Provincial Task Force on Uniform Rules of Evidence.[2]

Stating the rule, as I have done here, is not difficult. Understanding its application, however, has proven to be quite another matter. The truth is that the rule governing hearsay is perhaps the most misunderstood, and misapplied, rule in all the law of evidence. Some believe that witnesses may never testify as to something told to them by someone else. Others think that a witness may testify as to an utterance made directly

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[1] By Patrick Ducharme prepared for the L.S.U.C Continuing Legal Education program "Recent Issues and Developments In Criminal Law" September 6, 1997.

[2] See the Law Reform Commission of Canada, Report on Evidence (1975), p.68-70; Ontario Law Reform Commission, Report on the Law of Evidence (1976), c. 1 & 2; Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982).

to that witness, provided that what was said is relevant and material to the issue before the court. According to this view, the evidence should be admitted because it was the witness, after all, who heard the utterance and the witness is present and available for cross-examination, even if the person who spoke or wrote the words is not. Unfortunately, neither of these positions reflects a full or adequate understanding of the hearsay rule.

(a) Hearsay as a Rule of Exclusion

The first principle to be borne in mind is that the hearsay rule is one of exclusion. It bars the evidence of a witness who is the recipient of written or oral or communicated conduct, *if* the purpose of the evidence is to establish the truth of what is contained in the evidence. The emphasis in the preceding sentence should fall on the word "if": *if* the evidence is intended to prove the truth of the fact or facts asserted, then presumptively it will not be admitted. Because the admissibility of the evidence is conditional upon the purpose for which it is being adduced, it should be clear that not all out-of-court written or oral statements or conduct will be caught and excluded by the hearsay rule. The best way to understand the rule's operation is to ask: why is the party seeking to rely on the evidence introducing it? Again, if the purpose is to prove the truth of the out-of-court statement or conduct, the evidence is hearsay and presumptively inadmissible. Then it will only come in if it can somehow be justified as an exception to the rule requiring its exclusion.

(b) Exceptions to the Rule

For years, the exceptions to the hearsay rule fell into rather neat, discrete categories, all of which, however, revealed a common theme: the idea that, for some articulable reason, the hearsay statement or conduct had inherent guarantees of accuracy and trustworthiness. The very reason for the hearsay rule, of course, is to prevent or at least guard against the possibility of inaccuracy and untrustworthiness, because the actual declarant or actor is not in court subject to the scrutiny of cross-examination and not available for the trier of fact to see and assess as to credibility.

Over time, the permissible number of exceptions to the hearsay rule has grown, and each of them has been justified or legitimated on the ground that, despite its hearsay nature, the evidence proposed is accurate and trustworthy. Dying declarations, for example,[3] are admissible because the dying declarant is thought to be a person unlikely to speak falsely at the very moment she or he faces up to the settled hopeless expectation of death. Inherent in the dying declaration, of course, is the presumed assurance of accuracy and trustworthiness. The poet Matthew Arnold said it well: "Truth sits upon the lips of dying men."

(c) The New "Principled" Approach to the Determination of Admissibility

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[3]Other notable exceptions include declarations against interest, declarations in the course of duty, declarations concerning family history (pedigree), declarations as to public or general rights, and ***Res Gestae*** utterances.

The most important recent development regarding hearsay occurred about seven years ago when the Supreme Court of Canada authorized the use of a judicial discretion to admit otherwise inadmissible hearsay evidence where it satisfies the conditions of *necessity* and *reliability.* The case was ***R. v. Khan***.[4]

In ***Khan***, a 3-1/2-year-old girl went with her mother to her family doctor for a routine general examination and immunization. The doctor examined her first in the presence of her mother, and then asked her to wait in his private office while he examined her mother. The doctor and child were alone in his private office for about five to seven minutes while the mother undressed and put on a hospital gown. Then, while the doctor examined the mother, the child remained alone in the office for another fifteen minutes. During that time, she apparently had no contact with any other person. When the mother rejoined her daughter, she noticed that her daughter was picking at a wet spot on her sleeve.

Fifteen minutes after leaving the doctor's office, the mother and child had a conversation during which the child alleged that the doctor had placed his penis in her mouth, perhaps ejaculating, and had offered her candy. Forensic examination of the sleeve determined the spot to be a deposit of semen.

When the matter came on for trial, the child was 4-1/2 and called upon to testify. But the trial judge questioned her and concluded that she was not competent to give unsworn testimony. The child's statements to her mother fifteen minutes after leaving the doctor's office thus became key to the court in deciding the issue of the accused's guilt or innocence. The trial judge held that the child's statements to her mother did not meet any of the established hearsay exceptions, including the exception for spontaneous declarations. They did not constitute a *spontaneous* declaration because they were not made until fifteen minutes after the mother and child had left the doctor's office and about a half-hour or more after the alleged offence.

Against this factual backdrop, the Supreme Court of Canada pronounced its judgment in the case, and used the occasion to put aside the long history of strictly defined exceptions to the hearsay rule and to adopt instead a general rule of principled exceptions. The Court held that if relevant evidence could be shown to be at once "necessary" and "reliable," it would still be admissible even if it was hearsay. Delivering the judgment of the Court, Madame Justice McLachlin wrote:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's *viva*

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[4]See ***R. v. Khan*** (l990), 59 C.C.C. (3d) 92 (S.C.C.)
R. v. Smith (l992), 75 C.C.C. (3d) 257 (S.C.C.)
R. v. B. (K.G.) (1993), 79 C.C.C. (3d) 257 (S.C.C.)
R. v. U. (F.J.), [1995], 3 S.C.R. 764
R. v. Rockey (1996), 110 C.C.C. (3d) 481 (S. C. C.)

> *voce* evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of sexual acts imbues her statement with its own peculiar stamp of reliability. **Finally, her statement was corroborated by real evidence.** Having said this, I note that it may not be necessary to enter the statement on a new trial, if the child's *viva voce* evidence can be received as suggested in the first part of my reasons. [emphasis added]

McLachlin J. thus took note of the fact that the impugned evidence fit well with other real, corroborative evidence before the court and used this connection in determining that the evidence in question was reliable. But McLachlin J.'s statement of the new rule in ***Khan*** gave no hint of what was to become yet another important development, this time bearing on the meaning of the term "reliability." The new development occurred on November 28, 1996, when the Supreme Court of Canada released its decision in ***R. v. Hawkins***.[5]

In ***Hawkins,*** the Court said that reliability is established not when the hearsay evidence fits with other real evidence in the case, as had been suggested in ***Khan***, but when the evidence manifests sufficient indicia of reliability in and of itself to afford the trier of fact a satisfactory basis for evaluating its truth. The Court held:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial Judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the Judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. **The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact.** [emphasis added]

Thus, on the issue of the "reliability" of hearsay evidence, the Court's approach from ***Khan*** to ***Hawkins*** reflects a shift from a consideration of how the hearsay evidence fits with the real evidence before the court (the test in ***Khan***) to a consideration of "threshold reliability" only, the ultimate reliability of the evidence being left to the trier of fact.

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[5] ***R. v. Hawkins*** (1997), 111 C.C.C. (3d) 129 (S.C.C.)

Following its decision in ***Hawkins***, the Supreme Court of Canada declared in ***R. v. Rockey***[6] that trial judges may not assume the presence of the requirements of necessity or reliability and are not entitled to conclude that the prosecution's decision not to present a child witness is sufficient to satisfy the necessity requirement. In ***Rockey***, the central issue was whether the trial judge had erred in admitting into evidence prior statements of a child of 2-1/2 years pursuant to the new principled framework established in ***Khan***. At the time of the trial, the child was just over 5, and the prosecutor elected not to call him to give *viva voce* testimony. Instead, the prosecutor presented a psychologist to address the issue of necessity. Among other things, the psychologist testified to the likely trauma that would be suffered by the child witness if he was required to testify. The evidence was uncontradicted. The child had made seven out-of-court statements, and on the *voir dire* to determine the admissibility of those seven statements the psychologist testified on the issue of necessity.

The trial judge found that the requirement of reliability had been satisfied in two of the seven statements but ruled the remaining five statements inadmissible. Ironically, on further argument from the defence, based on new information received concerning the five inadmissible statements the judge reconsidered the earlier ruling and decided that the defence could use some of these additional statements to challenge the consistency of the complainant's allegations. Then the prosecutor, without objection from the defence, led evidence not only on the two statements earlier ruled admissible, but also on the five inadmissible statements, as well as on other statements which had been neither the subject of the initial *voir dire* nor the subsequent reconsideration.

McLachlin J., for the majority of the Supreme Court, ruled that the trial judge had erred in presuming the element of necessity to have been met simply because the prosecutor decided not to call the complainant. She stated:

> It should not lightly be assumed that they [i.e. the requirements of reliability and necessity] are present, even where the statements are those of a young child. There is no presumption of necessity; it must always be considered on the circumstances of a particular case. The Crown must decide whether to call the child or not. In the event it decides not to call the child and to tender hearsay statements instead, the judge must determine whether the child could not have testified, making it necessary to call substitute evidence.

Rockey thus clearly establishes that trial judges must consider and rule on whether the requirements of necessity and reliability are met on a case-by-case basis.

The majority's decision in ***Rockey*** further establishes that necessity will be established in one or more of the following circumstances:

1. if a child witness is incompetent or unable or unavailable to testify;

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[6] ***Supra***, note 3

2. if the trial judge is satisfied based on psychological assessments that requiring a child witness to testify may be traumatic or harmful to the child; or

3. if a child testifies and the trial judge is satisfied that out-of-court statements are necessary to provide a full, frank account of the child's version of events.

Ultimately, the majority in ***Rockey*** concluded that despite judicial error the statements of the 2-1/2-year-old were admissible for two reasons:

1. there was uncontradicted evidence of a psychologist suggesting that trauma to the child would result from testifying; and

2. the child was unable to meaningfully communicate the evidence.

In arriving at this determination, the majority paid great deference to the uncontradicted evidence of the psychologist presented by the prosecutor. But what if the expert's testimony had in fact been counterbalanced by expert defence testimony? Would that have made a difference? Can the reasoning in ***Rockey*** be interpreted to mean that counsel will be allowed to have psychiatrists and psychologists interview potential child witnesses so as to be in a position to contradict such evidence on a *voir dire*? If not, how is the defence to overcome the obvious burden of this testimony?

In ***R. v. C.(D.)***,[7] the Court of Appeal for Ontario was asked to decide whether a trial judge had improperly used the out-of-court statement of one accused to convict a co-accused. The out-of-court statement in question was given by one of the co-accused to the police. This accused then recanted his written statement when he testified at trial. But the trial judge used the truth of the contents of that statement as part of the evidence to convict the other accused.

The Court of Appeal concluded that the trial judge had erred in using the out-of-court statement to convict the declarant's co-accused, Finlayson J. A. saying as follows:

> The out-of-court statement in the case on appeal does not fit in any of the traditional hearsay exceptions. Moreover, the flexible approach adopted by the Supreme Court of Canada in recent cases such as ***R. v. Khan***, ***R. v. Smith***, and ***R. v. B.(K.G.)*** would not support the admission of such a statement as proof of the truth of the contents thereof. The new approach emphasizes necessity and reliability as well as fairness to the accused. Assuming such evidence could be shown to be necessary, which is doubtful in the present case since the Crown could have severed the charges against the two young offenders and made K. a compellable witness against B., it is obvious that the out-of-court statement of one accused implicating another is not reliable. An accused could have

[7] ***R. v. C.(D.)*** (1993), 80 C.C.C. (3d) 467 (Ont.C.A.)

> many personal reasons for wanting to implicate another, particularly when he is first arrested.

Here, now, Finlayson J.A., even while explicitly recognizing the new "flexible approach" emphasizing necessity and reliability, appears to take a different view from that expressed in such cases as ***Khan*** or ***Hawkins***. In ***R. v. C. (D.)***, Finlayson J.A. held that the very fact the declarant was a co-accused was reason enough to render the statement unreliable.

In the ***Hawkins*** case, the hearsay evidence in question was not that of a co-accused but of a girlfriend of one of the accused. Under oath and cross-examination at a Preliminary Inquiry, she made a number of statements incriminating her friend, then requested a second appearance and recanted her story. Eventually, before the trial, she married the accused. Arguably, then, she could very well have had, in Mr. Justice Finlayson's words, "many personal reasons for [not] wanting to implicate another [i.e. her husband]." On Mr. Justice Finlayson's analysis, should her evidence not have been rejected as inherently unreliable? To the contrary, the Supreme Court of Canada decided otherwise, holding that her evidence could be admitted for the truth of its contents through a principled exception to the hearsay rule.

In ***R. v. U. (F.J.)***,[8] the Supreme Court of Canada again considered the distinction between ultimate reliability and threshold reliability, this time on the issue of whether or not to admit prior inconsistent statements for the purpose of proving the truth of those statements to the. The court held that the *voir dire* conducted by the trial judge for this purpose was a vehicle for determining threshold reliability only. Lamer C. J. wrote:

> The trial Judge at this stage is not making a final determination about the ultimate reliability and credibility of the statement. The trial Judge need not be satisfied that the prior statement is true and should be believed in preference to the witness's current testimony.
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> If the trial Judge determines that the statement meets the threshold reliability criterion and is thus substantively admissible, he or she must direct the trier of fact to follow a two-step process in evaluating the evidence. The trier of fact must first be certain that the statement which is being used as a reliability referent was made, without taking into account the prior inconsistent statement under consideration. Once the trier of fact is satisfied that the other statement was made, the trier of fact may compare the similarities between the two statements and, if they are sufficiently striking that it is unlikely that two people would have independently fabricated them, the trier of fact may draw conclusions from that comparison about the truth of the statements.[9]

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[8] ***Supra***, note 3

[9] ***Supra***, note 7 at p. 795

In this case, the Court found to be true an accused's admission to the police that he had had multiple acts of sex with his 13-year-old daughter; it arrived at this conclusion by comparing his statement to the police with his daughter's statement to the police, although at trial both father and daughter stoutly denied the truthfulness of the contents of their statements.

R. v. U. (F.J.) is an important case insofar as it illustrates the Supreme Court's current inclination to move beyond a fixed and stable regime of exceptions to the hearsay rule to a still unfolding body of principled exceptions. In time, the current judicial activism in pursuit of principled exceptions to the hearsay rule may wane and the more traditional exceptions may once again hold sway. For now, though, that does not appear likely, and we can only watch as the highest court in the land tinkers with and adjusts its own understanding of principled exceptions, one case at a time.

PRIOR INCONSISTENT STATEMENTS USED FOR THEIR TRUTH: THE *K.G.B.*[10] EXCEPTION

In ***K.G.B.***, the Supreme Court of Canada, following ***Khan*** and ***Smith*** said that in certain circumstances prior inconsistent statements may be used for more than simply attacking a witness's credibility. The Court held that in certain limited circumstances a prior inconsistent statement could be used for its truth if it was found to be necessary and reliable. The Court was careful to point out, however, that a higher standard of reliability had to be met to permit the admission of such statements for their truthfulness because of their inherent unreliability. The Court established three preconditions to their admission:

(a) they must be given under oath;
(b) the declarant must be given a warning regarding perjury; and
(c) the statement must be videotaped.

The Court left open the possibility that other forms of evidence might be used and might be considered as acceptable substitutes by a Court as indicia of reliability. Since ***K.G.B.***, police services routinely videotape statements by important witnesses on serious cases, and indeed these statements are often referred to by police officers as "*K.G.B.* statements". The plan, of course, is that if the prosecution witness in "goes bad" by changing his or her story or by recanting the earlier statement in whole or in part, the videotaped statement can then be used not merely to challenge the credibility of this witness, but also to ask the Court to accept the truthfulness of the earlier "reliable" statement rather than the present testimony.

PREVIOUS CONSISTENT STATEMENTS

The General Rule

[10] ***Supra*** note 3

The general rule governing the evidentiary use of previous consistent statements is that evidence of a witness's prior out-of-court statement, offered to bolster the witness's credibility because of its consistency with the witness's testimony, is not permissible. The reason for the rule is that our system clearly privileges oral testimony, subject to the scrutiny of cross-examination. In the circumstances of a trial, then, a prior consistent statement is superfluous. It also poses inherent evidentiary dangers. A witness anticipating an attack on her credibility could travel the province making statements generally supportive of later evidence. The rule, often referred to as the rule against self-serving evidence, thus prevents witnesses from manufacturing or inventing evidence to serve their own interests. It also prevents a witness who is also the accused from neatly avoiding having to take the witness stand.

Exceptions to the General Rule

(a) Use by the Prosecutor

The rule does not apply when the prosecution chooses to make the accused's explanation part of its case. Several years ago, a man was charged with three counts of first degree murder. The Crown alleged that he had set fire to a house in which three people, a mother and her two children, died. Upon his arrest the accused made exculpatory statements to the effect that he had simply come upon the fire and that he had made valiant efforts to save the three persons inside the house but to no avail. The prosecution led as part of its case the apparently exculpatory statement of the accused, because it believed it could prove that a large part of the accused's statement was false and that the falsity of the statement would prove his guilt. The example illustrates well the first exception to the rule. If the defence had attempted to elicit the accused's statement from investigating officers, it would have been denied the opportunity because of the rule excluding self-serving statements. But once the Crown decided to introduce the statement it was admissible for all purposes even if it was or was seen to be self-serving.

(b) Evidence of prior identification

Despite the rule against the admission of prior consistent statements, evidence is admissible to show a consistency of a prior out-of-court identification by a witness, provided that the witness also identifies the accused in court. This circumstance most commonly occurs when the police have had a witness, prior to trial, view a series of photographs or attend a line-up. The purpose of the exercise, of course, is to see if the witness is able to identify a suspected offender. When the suspected offender is identified and the matter later goes to court, so long as the witness is also able to identify the accused in court, evidence of the prior out-or-court identification is admissible even though the witness is clearly giving evidence of a prior consistent statement. Similarly, when police officers testify in court that they were present when the witness viewed the series of photographs or attended a line-up during which the witness identified the accused, they too are being permitted to offer hearsay the evidence of a prior consistent statement.

> In ***R. v. McGuire***[11], Robertson J.A. said :
> It is...elementary that if the person does not himself give evidence, evidence of his earlier identification cannot be given. By the same token, if at the trial the person does not identify the accused, evidence that he did identify him on an earlier occasion cannot be admitted except by way of cross-examination of the person himself as to credibility, and even then is not evidence of the content of the earlier statement.

The rules governing the admissibility of prior consistent statements apply equally to both the defence and the prosecution. Thus, the out-of-court statement of an eyewitness exonerating an accused is likewise admissible under the exception. For instance, a witness who at trial identifies the accused as the guilty party may be cross-examined on that witness's prior attendance at a photo lineup and on his or her failure to identify the accused in a photograph.

(c) Evidence to Rebut the Suggestion of Recent Fabrication

When a judge rules that an opposing party has attacked a witness's testimony directly or indirectly as "recent fabrication", the judge may permit a prior consistent statement to be adduced to rebut the suggestion of recent fabrication. Any mode of impeachment, then, carries with it by way of rebuttal the possibility of adducing proof of a prior consistent statement.

The connotations of "recent" in the term "recent fabrication" can be confusing. Recently fabricated evidence is generally regarded as testimony the witness makes up after the event. "Recent" does not necessarily mean "freshly" made up. It is best to think of this exception to the rule as permitting counsel to elicit a prior consistent statement wherever opposing counsel has directly or indirectly alleged fabrication or contrivance on the part of the witness.

In ***R. v. O'Connor,***[12] the conduct of defence counsel in cross-examination of a complainant was held to have opened the door to the admission of prior consistent statements by the complainant to other persons to rebut the implicit allegation of recent fabrication and the implicit allegation that she had made no complaint prior to the police being told. However, in ***O'Connor*** the Court of Appeal for Ontario approved only the trial judge's use of the fact of the complaints, not the truth of their contents, in assessing the complainant's credibility.

(d) Spontaneous statements (***Res Gestae***)

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[11]***R. v. McGuire*** (1975), 23 C.C.C.(2d) 385 (B.C.C.A.)

[12]***R. v. O'Connor*** (1995), 100 C.C.C. (3d) 285 (Ont.C.A.), leave to appeal to S.C.C. refused (1996), 104 C.C.C. (3d) vi (note)(S.C.C.)

The ***res gestae*** or spontaneous statement exception permits the admissibility of evidence if it forms part of the facts surrounding or accompanying a transaction. For example, in ***R. v. Graham***[13] the Supreme Court of Canada held that an explanation given by an accused when he was first found in possession of stolen property was admissible as part of a spontaneous statement. The spontaneous statement, in conjunction with the same explanation given at trial, was permitted as proof of the consistency of the accused's evidence. Statements made, then, even after an event, may be uttered so clearly in circumstances of spontaneity or involvement in the event that the possibility of the concoction of the evidence is said to be eliminated.

(e) Evidence forming Part of the Narrative

Prior consistent out-of-court statements are admissible as exceptions to the general exclusionary rule when they are said to form "part of the narrative." Reliance on the narrative exception has become a common strategy of prosecutors when they present evidence about previous complaints by sexual assault complainants. In ***R. v. F. (J.E.),***[14] the Court of Appeal for Ontario found that in some instances the trier of fact must hear prior consistent statements if the story is to unfold naturally and intelligibly. But to qualify as "part of the narrative" the evidence must constitute relevant and essential facts that describe and explain the witness's experience as a victim of crime so that the trier of fact will be in a position to know how the matter came to the attention of the proper authorities. The Court of Appeal for Ontario was concerned to limit the purpose of such evidence: it is admissible not as proof of the truth of its contents, but as proof only of the fact that it was made. However, the practical effect of the admission of evidence of this kind may be quite other than its intended purpose. May the actual words of the complaint be given to assess the credibility of a complainant because of the similarity of those words with present testimony? Philp, J.A. for the Court of Appeal for Manitoba rejected this limitiation suggested by Finlayson, J.A. in ***F. (J.E.).***[15] Philp, J.A. suggested that our courts should recognize that the rule against admitting prior consistent statements simply should not apply to child witnesses in sexual abuse cases. Instead, we should accept the evidence of a child's account, including all prior complaints, because it is highly relevant to the task of assessing credibility.[16]

USE OF TRANSCRIPTS TO IMPEACH WITNESSES

(a) Impeachment by Confrontation

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[13]***R. v. Graham*** (1972), 7 C.C.C. (2d) 93 (S.C.C.)

[14]***R. v. F.(J.E.)*** (1993), 26 C.R. (4th) 220 (Ont.C.A.)

[15]***R. v. B.(D.C.)*** (1994), 32 C.R. (4th) 91 at pp. 102-103

[16]***Ibid.,*** at p. 107

A most powerful weapon of impeachment is a transcript in which is revealed a witness's bias, colourable motives, or lack of truthfulness. In a criminal proceeding, a primary source of inconsistent testimony is the preliminary inquiry transcript. For this reason, the very nature of cross-examination at the preliminary may differ greatly from the technique used at trial. At the preliminary, Counsel usually seeks to gather as much information as possible as part of an overall discovery process in the hope that some of the information can be used for impeachment later at trial. This is why the open-ended question in cross-examination at the preliminary is often a useful strategy in contrast with the tight, closed and pointed questions at trial. For example, at the preliminary it is not unusual to observe good counsel asking questions such as these:

Q. Describe in as much detail as you can the appearance of your assailant?

A. I believe he was approximately 6 feet tall, about 200 lbs. and he was wearing blue jeans, a sweatshirt and a cowboy hat.

Q. What about his facial hair?

A. I believe he had a moustache and a goatee and his sideburns were kind of long so that they were down below his ears.

Q. What unusual marks or scars did he have on his face?

A. None that I noticed.

Now at trial the questions will have a very different character: short and sharp, and their purpose will be to demonstrate that the accused could not possibly have been the assailant. They would look and sound perhaps like this:

Q. You did not see any distinguishing marks or scars on the face of your assailant?

A. No.

Q. When you look at the accused today, you can see that he has an obvious brown mole on the right side of his face?

A. Yes I see it.

Q. The accused does not have a moustache?

A. No

Q. You previously described your assailant as a person with a moustache?

A. Yes.

Q. Nor does the accused have sideburns below his ear?

A. Yes I agree with that, but he may have shaved them off.

Q. For the accused to match the description of your assailant, he would have had to remove the mole from his face and grow both a moustache and sideburns?

A. A man can easily shave his moustache and sideburns.

The example is one of impeachment of present testimony by prior inconsistent testimony. If the witness does not admit to the prior description as presented in cross-examination, counsel will simply advise the court that he intends to embark upon cross-examination based on what counsel suggests is prior inconsistent testimony at the preliminary inquiry. Then counsel will proceed as follows:

Q. Mr. White, do you recall being questioned under oath concerning these very matters on December 23, 1996 at the Ontario Court (Provincial Division) on Windsor Avenue?

A. Yes.

Q. At that time you were asked certain questions and gave certain answers?

A. Yes.

Q. And you gave those answers under oath?

A. Yes.

Q. Mr. White, I am going to read to you the following questions and answers from that preliminary inquiry, and after reading the questions and answers I will ask you further questions about your testimony then and your testimony now.

Counsel then proceeds to present the questions and answers, the contents of which support the physical description suggested in the earlier questions by counsel.

(b) Impeachment by Omission

At or near the end of a preliminary inquiry and before the completion of cross-examination of any particular witness, good counsel frequently ask the witness whether or not there is anything that the witness would like to add to her or his testimony. Most witnesses will decline to add anything, particularly if they have testified at length about an event. They are usually very happy to come to the end of the experience. So one last follow-up question cannot hurt:

> Q. To your knowledge, then, you have told us everything you can remember concerning this event?

If at trial the witness adds something to the evidence previously given, then he has opened himself for attack, an attack such as this:

> Q. You testified under oath just six months ago at a preliminary inquiry about this same event?
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> A. Yes.
>
> Q. You testified for over two hours answering many questions concerning the details of this event?
>
> A. Yes.
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> Q. You were then asked if there was anything you wished to add to your testimony, and you could not think of a single thing that you had omitted?
>
> A. I may have, but now I remember that the accused threatened me that if I told anyone he would hurt me.
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> Q. You would not have left out such an important detail during your prior testimony if in fact there had been such a threat?
>
> A. I just forgot.
>
> Q. You have added this allegation of threat to enhance your testimony?
>
> A. No I haven't.

In this way, it is possible to impeach a witness by way of omission, by way of what he or she has previously left out. The technique is particularly effective in the cross-examination of witnesses who may be expected to remember in great detail, either because the event described is a significant or traumatic event in the life of the witness, or because he or she has a duty or responsibility to remember or record all the details, as in the case of an investigating police officer.

(b) Use of Transcripts to Remind a Witness of Prior Testimony

When a witness testifies during a trial that he does not remember an incident or event but has previously testified under oath or given a statement demonstrating memory of that incident or event, counsel may show the witness a copy of the previous testimony to refresh the witness's memory. This is done not to discredit the witness, but to

assist the witness in remembering. In ***R. v. Coffin***,[17] the Supreme Court of Canada sanctioned a procedure perhaps best described as relaxation of the general rule prohibiting counsel from posing leading questions in examination in chief. Kellock, J. said :

> While, as a general rule, a party may not either in direct or re-examination put leading questions, the court has a discretion, not open to review, to relax it whenever it is considered necessary in the interest of justice, as the learned justice appears to have considered was the situation in the case at bar...Moreover, the authorities make it clear that a witness may be allowed to refresh his memory by reference to his earlier depositions and that it is only where the object of the examination is to discredit or contradict a party's own witness that Section 9 of the Canada Evidence Act applies. In the present case...Counsel did not wish...to discredit Petrie but to obtain from her the evidence she had given in her depositions if, on bringing the depositions to her attention, her memory would permit her to adopt them.[18]

Thus, the ***Coffin*** procedure is based on a common law principle, not on statute. To refresh a witness's memory either in examination in chief or in cross-examination counsel is entitled to use the previous testimony to call back the memory, perhaps by means of a series of questions such as this:

> Q. Do you remember testifying at the preliminary inquiry in October last year about this very issue?
>
> A. Yes.
>
> Q. Do you recall being asked questions and giving answers concerning this very matter?
>
> A. Yes.
>
> Q. Would you like to refresh your memory from that prior testimony?
>
> A. Yes.

Counsel now presents the prior testimony to the witness and asks the witness to read the testimony to himself, following which counsel resumes questioning:

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[17] ***R. v. Coffin*** [1956] S.C.R. 191

[18] ***Supra*** at pp. 22-23

Q. You have now read your prior testimony?

A. Yes.

Q. Do you recall having been asked those questions and having given those answers?

A. Yes.

Q. Are the answers that you gave at the time of the preliminary hearing true?

A. Yes.

Q. Now, having refreshed your memory from that prior testimony, are you able to answer this question...[and counsel now asks the question that the witness was previously unable to answer because of lack of memory].

(d) Transcripts other than Preliminary Inquiry Transcripts

Preliminary Inquiry transcripts are fertile grounds to till for relevant prior testimony. But there are also other useful transcript sources. Prior testimony may be obtained, for example, from transcripts of an examination for discovery, a judgment/debtor examination, and from proceedings before administrative tribunals or other courts. Affidavit evidence and examinations or cross-examinations during interlocutory proceedings also meet the standard of previous statements made under oath. A prior inconsistent statement made under oath becomes a deadly weapon in the arsenal of a skilful cross-examiner. The presumption is that a witness under oath knows the importance of accuracy and truthfulness and understands the thundering consequences of perjury. Perhaps the most compelling summary argument is one in which is highlighted the evidence of an adversarial witness who has been shown to have lied under oath on a previous occasion.

(e) Practical Problems Associated With Confronting Witnesses with Prior Transcripts

Before embarking upon the impeachment of a witness on the basis of prior testimony, counsel must be sure to establish that there is in fact a *real* inconsistency. Prior testimony merely *different* from the present will not suffice. The testimony must be not only different but also meaningful and relevant. Inconsistencies that are not meaningful or relevant are likely to strike the trier of fact as a manifestation of counsel's unfairness or pettiness rather than a true measure of the credibility of a witness. Human nature dictates that on minor or inconsequential matters it is perfectly understandable for a witness to be or become confused or inconsistent in recollection.

Moreover, counsel must first have "locked in" the witness to his present testimony before confronting him with apparent inconsistencies from prior testimony.

Patience is important here: the temptation is great to confront the witness quickly and dramatically with the apparent inconsistency. But a premature strike can blunt or vitiate the intended effect. Locking the witness to his present testimony prevents him from escaping from an apparent inconsistency with some explanation or rationalization for the inconsistency. To lock in the witness counsel asks a series of questions eliciting, for example, a date, place, time and circumstance so as to assure that the alleged prior inconsistent testimony is clearly highlighted. To use a very simple example, if a witness in present testimony describes a car's colour as light blue though in previous testimony he had described it as "dark" in colour, counsel may embark upon a series of questions such as the following to lock the witness into this one and only fact at issue and to prevent any escape route:

Q. You have described the car that was southbound as light blue in colour?

A. Yes.

Q. The other car involved in the accident was white?

A. Yes.

Q. There were only two cars involved in this collision?

A. Yes.

Q. To your recollection there were no other vehicles other than these two vehicles anywhere in sight?

A. Yes.

Q. This accident occurred on Saturday, July 15th, 1997?

A. Yes.

Q. This accident took place at the corner of Goyeau and Erie Streets?

A. Yes.

Q. You did not witness any other accidents in the whole month of July, 1997?

A. No.

Q. There was no vehicle involved in this accident that you would describe as dark in colour?

A. No.

Q. The southbound vehicle was light blue in colour, so you would never describe it as a "dark" vehicle, would you?

A. No.

Q. Of course you would not describe the white vehicle as a "dark" vehicle?

A. No.

The foundation having been laid, counsel will then set about confronting the witness with his prior testimony that the southbound vehicle was a "dark" vehicle. It would not be open to the witness to claim that he misunderstood which vehicle counsel was speaking about or that he was confused about the nature or timing of the accident.

CROSS EXAMINING ON POLICE OFFICERS' NOTES

Because most police officers are experienced at testifying under oath they are often difficult witnesses to cross-examine. The Guy Paul Morin inquiry and other recent revelations of police misconduct aside, the public generally continues to hold police officers in high esteem, so defence counsel face a special burden when they undertake the daunting challenge of dismantling the evidence of these persons in authority. Avoiding the challenge is not an option, because in virtually every criminal trial at least one police officer testifies on behalf of the prosecution. No. The cross-examination of capable, experienced witnesses whom the public generally regard as professional and unbiased in the discharge of their duties is definitely not an easy task.

But a measured approach can sometimes yield interesting results. The first step is to obtain every possible piece of information or disclosure concerning the investigation. In ***Stinchcombe v. R.,***[19] the Supreme Court of Canada held that the defence was entitled to all information in the possession of the prosecution unless the information was privileged or clearly irrelevant or unless its disclosure would impede completion of an investigation. The notes of police officers are therefore appropriately disclosed to defence counsel *upon request*.

If police notes are worth obtaining for possible use by the defence, then at the very least they must be decipherable. If the notes are illegible or cannot be decoded, then counsel should insist of the prosecutor that the notes be typed or transcribed so that every word, every abbreviation, every sign in them is clearly understood. Standard requests by defence counsel for disclosure should include not only requests for the police officers' hand-written notes but also for copies of occurrence reports, supplementary reports, and "scrap notes" from which finalized notes are prepared. A long time ago, Euripides, a non-lawyer, said it quite simply and profoundly (though he was talking about drama): a bad beginning makes a bad ending. As it is for theatre, so also for the

[19] ***Stinchcombe v. R.*** (1991), 68 C.C.C. (3d) 1

courtroom. Complete, comprehensive, full disclosure well before trial is a good beginning and an absolute pre-condition to cross-examining officers on their notes at trial.

(a) Cross-Examining the Police Officer who is not the Enemy

In some cases, a police officer's testimony is not actually detrimental and may even be helpful to an accused. With this witness counsel wants to develop evidence from which the trier of fact may infer innocence. For instance, in a domestic assault case a police officer may arrive at the scene, receive the information from the complainant, then charge the accused. But he may also have observed in his notes that the complainant suffered no apparent injuries, that none of the furniture in the residence appeared to be disturbed, and that the accused gave an exculpatory statement that was exculpatory. While in the cross-examination of this officer counsel for the accused is not permitted to elicit the self-serving exculpatory part of the accused's utterance unless and until there is a direct or implied suggestion of fabrication, he is certainly at liberty to adduce from the police officer, and confirm by his notes, the absence of injury and the absence of any physical signs of a struggle. The police officer's evidence is thus at least neutralized and perhaps even regarded as favourable to the accused.

On those occasions when the police officer's notes are helpful to the accused, counsel may want to bolster the credibility of the officer and the value of the officer's notes with a line of questioning such as this:

Q. You made these notes right at the time of your investigation?

A. That's correct.

Q. You investigate many instances where it is alleged that domestic violence has occurred?

A. Yes.

Q. You are trained to make careful observations of the people involved and the place where the violence is alleged to have occurred?

A. Yes.

Q. You made careful observation of both the complainant and the accused?

A. Yes.

Q. You made no note of any injuries to the complainant?

A. That's right.

Q. You have no independent recollection of any injury to the complainant?

A. Correct.

Q. In making your notes you attempt to record them as completely and accurately as possible?

A. Yes.

Q. You are trained to keep complete and accurate notes in order to assist you later in your testimony?

A. Yes.

The impression left is that of a well-trained officer familiar with allegations of domestic violence specifically looking for signs of violence but finding none and reducing to writing observations notable by the utter absence of signs of violence. All of this commends the officer's testimony to the accused's interests.

(c) The Police Officer who is the Enemy

There are many ways by which counsel may attempt to undermine the adverse or hostile police witness with his own notes. One way is to set off one officer's notes against another's. Whether the notes are virtually identical or wildly divergent, either situation may open up ground for cross-examination. Because police officers are called upon to investigate so many matters, the vast majority of them, despite their evidence to the contrary, actually testify with little or no independent recollection of the events in question. In other words, they rely heavily upon their notes and what is contained in those notes becomes their memory for the purposes of their testimony at trial. Because they tend to lack independent recollection, defence counsel has to develop leverage against their seemingly pat recollection of events, a recollection that is generally no more that a regurgitation of what they have recorded in their notes. If one officer's notes are strikingly similar to another's, a line of questioning such as this often proves interesting:

Q. You obviously conferred with Officer Smith before making your own notes?

A. No I did not.

Q. It is a coincidence, then, that you and Officer Smith have noted exactly the same times in your notes to describe 27 different events?

A. We may have discussed the times, but the rest of the notes are my own as to what actually happened.

Q. Both you and Officer Smith describe Mr. Jones as "plump, pleasant and 47 years of age"?

A. Yes, that's what he is.

Q. You must have conferred with your colleague in order to describe Mr. Jones in precisely the same words and precisely the same order?

A. I'm sure it was just a coincidence.

Some police officers, simply by acknowledging their common practice, may well readily admit that they in fact conferred with a colleague in making their notes but that the act of conferring did not in any way diminish their independent recollection of events. In these circumstances, they open up a line of questioning such as this:

Q. When you interview two persons who witness an event you always interview them separately?

A. Yes.

Q. You do so because you do not want one witness's version to influence the other witness?

A. Yes.

Q. You do not want the thoughts or recollection of one witness to influence the thoughts or recollection of another witness?

A. That's correct.

Q. This method, to your knowledge, is standard police practice?

A. Yes.

Q. But you and Officer Smith conferred with each other when making your notes?

A. Yes.

Q. You failed to ensure that he would not influence your thoughts and recollections by taking the same precautions that you routinely take with any other witness?

A. Maybe.

Sometimes the fact that police officers' notes are very different may assist in the cross-examination of either officer. Common sense ought to persuade most of us that police officers are biased in favour of the side on whose behalf they are called to give their evidence. It is a fact that police officers that have played a part in an arrest and in the formulation of the criminal charges often take a strong interest in the outcome of the trial.

Many officers, understandably, see effective information gathering as intricately bound up with successful prosecution and some of them attempt to use their record of convictions as a springboard to promotion and as a guarantor of status within the ranks. It is naive, therefore, to assume that police officers are simply governmental employees uninterested in or unaffected by the outcome of the trial, and unbiased or disinterested with respect to their own testimony. Given this reality, counsel ought to feel free to suggest to the adverse police witness that he or she has exaggerated the testimony in favour of the prosecution and against the accused and that the exaggeration and embellishment is easily demonstrated by the difference between the witness's notes and that of another police officer. The questioning might proceed like this:

> Q. In your notes you describe the accused as "staggering and stumbling"?
>
> A. Yes.
>
> Q. You also describe the accused as having "slurred speech"?
>
> A. Yes.
>
> Q. You describe the accused as "holding on to his car for support"?
>
> A. Yes.
>
> Q. In short, the accused, in your view, was extremely intoxicated?
>
> A. Yes.
>
> Q. Officer Smith, however, who was with you throughout this investigation, describes the accused as having "a moderate odour of alcohol on his breath, whose speech was fine and whose walking was normal"?
>
> A. Well maybe that's how Officer Smith saw him.
>
> Q. The best explanation for the exaggerated symptoms that you describe is that you have purposely exaggerated them.
>
> A. I disagree with that.

Even though Officer Smith may testify in the main that he also came to the conclusion the accused was impaired, his far more favourable description of the accused will undermine the credibility of his fellow officer.

(d) Other Possible Areas of Attack

In addition to testing the Officer's notes against his own occurrence reports or the notes or occurrence reports of fellow officers, counsel may also find inconsistencies

in subsequently prepared medical reports relating to witnesses, in accident reports filed with the Traffic Division of the same police service, in weather reports from local weather stations, and in municipal reports as to damage or lack of damage arising from the incident which gave rise to the charge. There are also several texts dealing with standard police investigative techniques and police procedural manuals outlining appropriate police procedures and practices. They may help to highlight and expose improper police conduct or inappropriate investigative techniques. Sometimes a simple perusal of a police services bulletin board may prove helpful. Several years ago, for example, a defence lawyer observed on a bulletin board in the lobby of a police service a notice that wherever possible on cases of impaired driving it was to be the practice of that department that a breathalyzer technician other than the one who made the arrest should conduct "independent" breathalyzer tests so as to avoid the suggestion of bias at trial. The information from that memorandum signed by the Chief of Police, undermined the evidence of an investigating officer/breath technician in circumstances in which it would have been easy to have an independent breath technician conduct the test. The presiding judge wondered why the Chief of Police's own procedural memorandum had not been followed by the officer and acquitted the accused based upon the discordance between the written testing procedure and the one actually used by the officer.

CONCLUSION

The topics touched upon in this paper inevitably play important parts in the outcome of criminal law cases. As all of us surely know, knowing how to make the rules relating to hearsay, previous consistent statements, prior testimony under oath and police officer's notes work to one's advantage is far more difficult than merely being able to state the rules. Mastery of these rules is impossible without training, practice, and trial-and-error experience. And experience is to be gained not only in the courtroom under the glare of the trier of fact. Experience in this context also means having or acquiring over time extensive knowledge of the business and affairs of everyday life. Freud wrote about the psychopathology of everyday life. Trials, especially criminal trials, are all about that. Only by acquiring a deep and respectful knowledge of the human condition do we ever dare hope to plumb the "truth" of the motives, interests, values, prejudices and passions of the witnesses we confront.