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# Evidence

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# EVIDENCE

*Neil Brooks\**

## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	601
II.	COMPETENCY OF WITNESSES . . . . .	602
	A. <i>Perceptive Incompetencies</i> . . . . .	602
	1. <i>Mental Incapacity</i> . . . . .	602
	2. <i>Religious Belief</i> . . . . .	604
	B. <i>Policy Incompetencies</i> . . . . .	605
	1. <i>Jurors</i> . . . . .	606
	2. <i>Lawyers</i> . . . . .	607
	3. <i>Spouses</i> . . . . .	609
III.	QUESTIONING OF WITNESSES . . . . .	611
	A. <i>Role of the Judge</i> . . . . .	611
	1. <i>Judge's Right to Call Witnesses</i> . . . . .	611
	2. <i>Judge's Right to Question Witnesses</i> . . . . .	612
	3. <i>Judge's Right to Vary the Order of Calling Witnesses</i> . . . . .	613
	4. <i>Judge's Right to Control Cross-Examination</i> . . . . .	614
	B. <i>Direct Examination</i> . . . . .	615
	1. <i>Leading Questions</i> . . . . .	615
	2. <i>Refreshing Memory</i> . . . . .	615
	C. <i>Cross-Examination</i> . . . . .	616
	1. <i>Right to Cross-Examine Co-Accused</i> . . . . .	616
	2. <i>Limits of Cross-Examination</i> . . . . .	617
	3. <i>Effect of Failure to Cross-Examine</i> . . . . .	617
	D. <i>Exclusion of Witnesses</i> . . . . .	618
IV.	CREDIBILITY OF WITNESSES . . . . .	620
	A. <i>Impeaching One's Own Witness</i> . . . . .	620
	B. <i>Prior Inconsistent Statements</i> . . . . .	621
	C. <i>Collateral Fact Rule</i> . . . . .	622
	D. <i>Supporting Credibility: Recent Complaints</i> . . . . .	624
V.	HEARSAY . . . . .	627
	A. <i>Hearsay Rule in Quebec</i> . . . . .	627

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B.	<i>Definition of Hearsay</i>	628
C.	<i>Admissions</i>	632
1.	<i>Definition</i>	632
2.	<i>Implied Admissions (Silence)</i>	633
D.	<i>Former Testimony</i>	637
1.	<i>Conditions of Admissibility</i>	637
2.	<i>Criminal Code, Section 643</i>	638
E.	<i>Statements Against Interest</i>	639
F.	<i>Hospital Records</i>	640
G.	<i>Statements of Family History</i>	642
H.	<i>Declarations of Public Rights</i>	643
VI.	<b>CORROBORATION</b>	644
A.	<i>Witnesses That Need To Be Corroborated</i>	644
1.	<i>Accomplices</i>	644
2.	<i>Unsavory Witnesses</i>	645
B.	<i>Function of Judge and Jury</i>	645
C.	<i>Definition of Corroboration</i>	645
D.	<i>Mutual Corroboration</i>	647
E.	<i>Corroboration in Civil Cases</i>	648

### I. INTRODUCTION

In 1974 over three hundred Canadian cases were reported in which issues of evidence were raised, and often as many as five or six issues of evidence were dealt with in one case. Consequently, because of this surprising number, this survey only covers those cases reported in 1974 that fall within the areas mentioned in the outline above. These areas seemed to be the ones of most topical interest. The leading cases in other areas of evidence will be discussed in a subsequent survey.

No new trends in evidence law or the approach to evidence law are discernible from the cases reported during the year. This is unfortunate, indeed depressing. The habit of judges at least since the turn of the century has been to determine the admissibility of evidence by pigeon-holing offered proof into one of a number of arbitrary categories. The ordinary usage of the term describing each category determines its scope. No thought is given to the purpose of the category or to the objectives of the rules of evidence. The conditions that precipitate the invocation of a particular category are determined most frequently by referring to one of the editions, often not the most current, of that much maligned English textbook, *Phipson on Evidence*. Indeed, Phipson's statements of the law, or the statements of his editors, (no one bothers to distinguish between them), are treated as legislative fiats. In one of the most perceptive but unfortunately neglected

articles on evidence law, Dean Wright accurately described the evolution of most present day evidentiary doctrine:

[B]ooks like Phipson disclose that the past history of this part of the law has been to treat evidence in the same manner as the law of real property—to categorize and classify rigidly and to develop those categories sometimes, one would be tempted to say, merely for the sake of mediaeval logic. If common sense, used in this field to denote what a reasonable man would consider as something normally of probative value, rebelled against too rigid categories, there was always the normal legal method of making a new category in which one could classify anew what he could not force into another mold.<sup>1</sup>

Wigmore, in the preface to the first edition of his treatise on evidence, quoted a then recent President of the American Bar Association who criticized the unthinking reliance on precedent in even stronger language:

A judge may decide almost any question any way, and still be supported by an array of cases. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns.<sup>2</sup>

The cases reported this year confirm that this ostrich-like approach to evidence law is still rampant. To paraphrase a well-known aphorism: "The rules of evidence are beneficent. They prevent men from thinking."

## II. COMPETENCY OF WITNESSES

The word competency has not over the past two hundred years acquired a precise legal usage. In general it refers to the characteristics of a person that may disqualify him from giving testimony at a judicial trial. For clarity, the concept may be subdivided into those characteristics of a witness that render his testimony of such slight probative value that it is not worth the court's time to listen to it, and those characteristics of a witness which for other policy reasons make it undesirable that he should give testimony in a particular trial. The term perceptive incompetencies is sometimes used to refer to the former characteristics; policy incompetencies to refer to the latter.

### A. *Perceptive Incompetencies*

#### 1. *Mental Incapacity*

A witness may by reason of mental deficiency lack capacity to perceive,

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<sup>1</sup> Wright, *The Law of Evidence: Present and Future*, 20 CAN. BAR. REV. 714, at 716 (1942).

<sup>2</sup> Preface to I J. WIGMORE, *WIGMORE ON EVIDENCE* at XV (3d ed. 1940) [hereinafter cited as WIGMORE].

recollect or narrate effectively, or to testify truthfully. Older authorities would suggest that witnesses, if their competency was objected to, must demonstrate that they possess some undefined but apparently real level of ability with respect to each of these testimonial elements. But Wigmore concluded: "The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible."<sup>3</sup> In view of this trend, challenges to a witness's perceptive competency are rare. However, in *Regina v. Hawke*,<sup>4</sup> apparently such an objection was made. The key prosecution witness was a suspected eye-witness to a killing which formed the basis of a charge of murder; indeed, initially she had been jointly charged with the accused. She had a history of mental illness. It is not clear from Mr. Justice Haines's reasons for judgment what the precise objection to her testimony was. He states: "Counsel for the defence objected to her as being incompetent to take an oath."<sup>5</sup> Under section 14 of the Canada Evidence Act,<sup>6</sup> somewhat surprisingly, a witness can be objected to as incompetent to take an oath. The objection appears to be a vestige of the common law rule that a witness was assumed to have the capability of testifying truthfully only if he believed that divine punishment would follow false swearing. However, since a witness who is incompetent to take an oath can still give evidence by making an affirmation, it is difficult to understand why counsel would ever press the objection, except perhaps to gain what might be a tactical advantage of having a witness, who is testifying against the accused, do so before the trier of fact without the imprimatur of giving testimony under oath. Mr. Justice Haines did rule that the witness could not take the oath, and she gave her testimony after making an affirmation, so this must have been one of counsel's objections to her testimony. But, as well, he probably objected that she was incompetent to testify even after making an affirmation because her mental deficiencies affected her capacity to perceive and recall events accurately. As mentioned above, Mr. Justice Haines ruled that she was competent to testify. Her mental condition would be relevant in assessing her credibility. In support of Mr. Justice Haines's ruling on this aspect of the case and because this matter may arise again, it seems appropriate to quote from McCormick:

Disqualification for mental capacity or immaturity would doubtless have long since been abandoned, except for the presence of the jury as the trier of facts. The judges distrust a jury's ability to assay the words of a small child or of a deranged person. Conceding the jury's deficiencies, the remedy of excluding such a witness, who may be the only person available

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<sup>3</sup> II WIGMORE § 501, at 594.

<sup>4</sup> 3 Ont.2d 210, 16 Can. Crim. Cas.2d 438 (High Ct. 1974).

<sup>5</sup> *Id.* at 214, 16 Can. Crim. Cas.2d at 442.

<sup>6</sup> CAN. REV. STAT. c. E-10 (1970).

who knows the facts, seems inept and primitive. Though the tribunal is unskilled, and the testimony difficult to weigh, it is still better to let the evidence come in for what it is worth, with cautionary instructions. As already indicated mental derangement, where it affects the ability of the witness to observe, remember, and recount, may always be proved to attack credibility.<sup>7</sup>

## 2. Religious Belief

The influence of the religious qualification of witnesses is also reflected in the statutory rules relating to the testimony of children. Section 16 of the Canada Evidence Act provides that a child of tender years may give evidence if he is "possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth". However the testimony of such a child must be corroborated unless the judge finds that the child "understand[s] the nature of an oath".<sup>8</sup> Thus much of the testing of a child's ability to testify turns on the requirement that he understands the nature of an oath. The questions traditionally put to a child in order to determine this question have bordered on the ludicrous.<sup>9</sup> At one time it was held that the answers to the questions must reveal that the child understands both the nature and the consequences of the oath. However, perhaps embarrassed by the metaphysics and futility of an inquiry about the "posthumous theological consequences of lying"<sup>10</sup> and aware that "[t]he common law deserves better than that at the hands of the judiciary in the 20th century . . .",<sup>11</sup> recent cases have held that if the child understands the nature of the oath that will suffice to qualify him.<sup>12</sup> Once this was settled, the question that naturally arose was: what is the difference in the apparently important distinction the section makes between a child who "understand[s] the nature of an oath" and a child who only "understands the duty of speaking the truth" and whose testimony must therefore be corroborated? In *Regina v. Dinsmore*,<sup>13</sup> in reasons for judgment in which he exhaustively reviewed the English and Canadian cases, Mr. Justice McDonald concluded that the following questions qualified a child to take the oath: "Q. How old are you . . .? A. I'm 12. Q. Do you know what it means to take an oath? A. Yes, to swear to tell the truth. Q. What happens if you don't tell the truth? A. You can be punished. Q. By whom? A. The law."<sup>14</sup> Mr.

<sup>7</sup> C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 140-41 (2d ed. 1972) (footnotes omitted).

<sup>8</sup> CAN. REV. STAT. c. E-10 (1970).

<sup>9</sup> See examples in Bigelow, *Witnesses of Tender Years*, 9 CRIM. L.Q. 298 (1966-67).

<sup>10</sup> *Regina v. Dinsmore*, [1974] 5 W.W.R. 121, at 123 (Alta. Sup. Ct.) (McDonald, J.).

<sup>11</sup> *Regina v. Horsburgh*, [1966] 1 Ont. 739, at 755, 47 Can. Crim. 151, at 166-67 (1965) (Laskin, J.A.).

<sup>12</sup> The leading case is *Regina v. Bannerman*, 55 W.W.R. 257, 48 Can. Crim. 110 (Man. 1966).

<sup>13</sup> *Supra* note 10.

<sup>14</sup> *Id.* at 122.

Justice McDonald stated that he was prepared "to hold that the child may be sworn if the inquiry reveals that he understands the *temporal* consequences of not telling the truth when under oath".<sup>15</sup> Mr. Justice McDonald has, it seems, equated the two requirements, and while purporting to follow the previous Canadian cases, notably *Regina v. Bannerman*,<sup>16</sup> he has obliterated a distinction drawn in those cases. When the section says that to give any testimony the child must "understand the duty of speaking the truth", the section would appear to be referring to a secular responsibility. A child could reveal this understanding by stating the secular consequences of telling a lie. When the section requires that the child "understand the nature of an oath" before being sworn, the section could perhaps be interpreted to mean that the child must understand his moral obligation to tell the truth. In *Bannerman*, unlike *Dinsmore*, the child, admittedly by simply assenting to a leading question, nevertheless agreed that it was "bad" to tell a lie. This additional question might be necessary to reveal that the child understands his moral obligation to tell the truth, and hence the nature of the oath. Mr. Justice McDonald said:

The judge must be satisfied that the child understands the nature of an oath in that he *understands the moral obligation to tell the truth*. If, as in *Bannerman*, the judge may be so satisfied if the child acknowledges that it is "bad" and "wrong" not to tell the truth, then it is surely sufficient if the child, using his own and not the judge's words, says that he knows that taking an oath means "to swear to tell the truth" and that if he does not tell the truth "You can be punished . . . (by) the law."<sup>17</sup>

Although one could quarrel philosophically with his assertion that there is no difference between understanding "the nature of an oath" and "a duty to speak the truth", hopefully McDonald's judgment will be accepted, and judges will not waste any more of their time debating this question. The moral development of a child does not reveal itself to the clumsy kind of ritual that lawyers or judges employ in attempting to qualify a child, nor is it likely that lawyers or judges are capable of making that judgment without expert assistance even after more prolonged questioning.

#### B. *Policy Incompetencies*

Reasons unrelated to the probative value of offered evidence frequently account for its exclusion. Whether a rule which excludes evidence for such reasons is called a privilege or a rule of competency is perhaps unimportant. At least the clarity in thinking that would result from mutually exclusive and functional definitions of rules of privilege and of rules of competency, if it were possible, would probably be outweighed by the confusion it would create in the minds of those familiar with past usages. Therefore conventional usages will be used here. One functional distinction between rules

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<sup>15</sup> *Id.* at 130.

<sup>16</sup> *Supra* note 12.

<sup>17</sup> *Supra* note 10, at 130 (emphasis added).

of policy incompetencies and privileges that might be made is that generally rules of incompetency are designed to protect essential process values, whereas rules of privilege are designed to protect other social values. But the incompetency of spouses is an obvious illustration in which current Canadian and English usage does not conform to such a functional definition.

### 1. *Jurors*

At common law, a juror was incompetent to give testimony that would impeach the verdict of a jury of which he was a member. However, Lord Mansfield, who formulated this rule, left open the possibility that a third person who saw or overheard a jury engaging in improper conduct during their deliberations, could be called to give testimony that would impeach the jury's verdict.<sup>18</sup> In 1974, the Saskatchewan Court of Appeal held that in Canada even this ubiquitous other person is incompetent to give testimony to impeach a jury's verdict.<sup>19</sup> Thus a juror's verdict is now indeed as "inscrutable as a billiard ball". The court reasoned that if a third person could give testimony tending to impeach the jury's verdict, a juror might have to be called to give rebuttal testimony. However, that is precluded by section 576.2 of the Criminal Code<sup>20</sup> which makes it an offence for a juror to disclose any information relating to the proceedings of the jury.

Jurors must be protected from undue harrassment, and their verdicts must obtain some measure of finality. On the other hand, if a person is convicted as a result of the flip of a coin, because of threats made upon a juror, or because the jurors agreed that a majority vote would decide the fate of the accused so that they could return home—as apparently happened in the Saskatchewan case—the accused by any standard has been denied procedural due process. Surely some balance could be struck between these competing interests, and might be required by the Bill of Rights. Many American courts and recent codifications in the United States have provided that while a juror may not testify about the effect of anything upon his mind as influencing his verdict, he is competent to give evidence of any misconduct or irregularity occurring outside the jury room that might have influenced the verdict. There is a legion of American cases and articles dealing with the problem.<sup>21</sup>

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<sup>18</sup> *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). Three jurymen submitted affidavits alleging that their verdict was based on chance. Lord Mansfield held: "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means."

<sup>19</sup> *Regina v. Perras* (No. 2), [1974] 5 W.W.R. 187, 18 Can. Crim. Cas.2d 47 (Sask.).

<sup>20</sup> Can. Stat. 1972 c. 13, § 49.

<sup>21</sup> See Palmer, *Post-Trial Interview of Jurors In The Federal Courts—A Lawyer's Dilemma*, 6 HOUSTON L. REV. 290 (1968); Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1957-58).



## 2. Lawyers

Many reasons can be advanced for holding that a lawyer who is acting as counsel in a case should be incompetent to testify as a witness in the same case: the embarrassment of a lawyer arguing the credibility of his own testimony before the trier of fact; the unseemliness of a lawyer contradicting on the witness stand a witness whom he had previously attempted to impeach on cross-examination; the unfairness of putting opposing counsel in the position of perhaps having to challenge his credibility; and the unfairness of saddling a client with an obviously partisan witness. On the other hand, the necessity for a lawyer to take the stand on behalf of his client may not arise until the litigation has begun; and in a rare case, not only might the testimony of a lawyer be essential to protect the interests of his client, but this need may have arisen at a time when the lawyer's withdrawal from the case would work a substantial hardship on his client and might prejudice his case. Therefore, although the cases are impossible to reconcile, the better view would appear to be that while counsel is not necessarily incompetent to appear as a witness on his client's behalf, such a practice should be strongly discouraged, and if counsel deems it essential to testify, the trial judge has a discretion to ask him to withdraw from the case, a discretion which he should exercise after weighing the considerations mentioned above.

In *Phoenix v. Metcalfe*,<sup>22</sup> the British Columbia Court of Appeal went even further, and suggested that while as a matter of propriety counsel should generally not give evidence, the trial judge cannot require him, in any circumstances, to elect either to give evidence or to continue as counsel. The counsel for the plaintiff in the case had called his law partner to the stand and during his examination it became apparent that the defendant's counsel would probably have to give evidence for the defendant at the trial. At this point in the trial, the trial judge ruled that both parties should retain different counsel. The defendant did retain another counsel, and therefore the Court of Appeal's ruling on counsel testifying is obiter. Since the defendant did not appear on the appeal, the Court of Appeal invited the views of the Benchers of the Law Society on the matter. The court simply adopted the opinion submitted by the Benchers that a trial judge cannot require a counsel to elect either to give evidence or to continue as counsel. However, in a case reported in 1974, the Supreme Court of Canada, without citation of authority, suggested that the trial judge does have the right to require counsel to withdraw if he appears as a witness. In *Maryland Casualty Co. v. Roland Roy Fourrures Inc.*,<sup>23</sup> counsel for the plaintiff took the stand to explain that the discrepancy between the plaintiff's evidence on discovery and at the trial was due to a misunderstanding of a question on discovery that his client had informed him of immediately after the discovery. It appears from the Supreme Court's reasons for judgment that the trial judge in finding against the plaintiff ignored this testimony given by his counsel.

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<sup>22</sup> [1974] 5 W.W.R. 661 (B.C.).

<sup>23</sup> [1974] Sup. Ct. 52, 35 D.L.R.3d 591 (1973).

The Supreme Court held that the trial judge should have taken the testimony into consideration in reaching his decision, but Mr. Justice Pigeon went on to say: "Counsel for the appellant was correct in saying that counsel in question ought to have refrained from taking any part in the trial . . . . Nor should the judge have tolerated such participation."<sup>24</sup>

The issue that was directly before the British Columbia Court of Appeal in *Phoenix v. Metcalfe*<sup>25</sup> was whether a law partner of counsel is a competent witness; or, to put it another way, whether a counsel can continue in a case if his law partner becomes a witness. The court not only held that a law partner of counsel is a competent witness, but also said "there is nothing reprehensible or improper in a solicitor giving evidence on behalf of his client even though the solicitor be a partner of the client's counsel".<sup>26</sup> Although the court's holding seems sensible, the court's suggestion that it is not improper for counsel to call a law partner to the stand without withdrawing from the case is contrary to the Code of Professional Ethics adopted by the Canadian Bar Association just last year. Rule 3 in Chapter VIII of the Code provides:

The lawyer should not submit his own affidavit to or testify before a tribunal in any proceedings in which he appears as advocate, save as permitted by local rules of practice or as to purely formal or uncontroverted matter. This also applies to the lawyer's partners and associates: generally speaking they should not testify in such proceedings except as merely formal matters . . . .<sup>27</sup>

It is unfortunate that neither the British Columbia Court of Appeal nor the Canadian Bar Association felt the need to discuss the considerations that led to their respective conclusions. Although counsel's partner is likely to be a biased witness in the sense that he has an interest, monetary and otherwise, in the outcome of the case, most of the dangers that are present when counsel himself takes the stand are not present when his partner takes the stand. Since the giving of evidence by counsel appears to be a matter of increasing concern, this situation will undoubtedly arise again in the near future, particularly in a situation where a counsel who must become a witness wishes to turn the case over to a partner.<sup>28</sup>

One of the inevitable consequences when cases are decided on the basis of factual differences in prior cases, rather than by the application of policy enunciated in or discernable from prior cases, is that distinctions arise in the cases that are difficult to support on principle. Thus, while many cases have held that counsel may give evidence as a witness at trial,<sup>29</sup> the cases are almost unanimous in holding that counsel cannot submit his own affidavit

<sup>24</sup> *Id.* at 56, 35 D.L.R.3d at 594.

<sup>25</sup> *Supra* note 22.

<sup>26</sup> *Id.* at 663.

<sup>27</sup> CANADIAN BAR ASSOCIATION, CODE OF PROFESSIONAL ETHICS (1974).

<sup>28</sup> For a discussion of the American position, see Sutton, *The Testifying Advocate*, 41 TEXAS L. REV. 477, at 492 (1963).

<sup>29</sup> See cases cited in *Phoenix v. Metcalfe*, *supra* note 22.

in support of a motion. This line of cases was followed in *Baydon Corp. v. du Pont Glore Forgan Canada Ltd.*<sup>30</sup> Mr. Justice Henry in that case held that an affidavit submitted by counsel in support of a motion to amend the pleadings in the case was inadmissible even though both sides consented to the introduction of the affidavit. He reasoned that the affidavit should be inadmissible since the court might wish to cross-examine the deponent and "to subject a deponent to such searching inquiry while he is at the same time fulfilling the role of counsel is not in keeping with the respect that should be accorded counsel who is actually conducting the case as an officer of the Court".<sup>31</sup>

Related to the competency of counsel to appear as a witness is the question of whether counsel who does appear as a witness can argue the case on appeal. In *Imperial Oil Ltd. v. Grabarchuk*,<sup>32</sup> the Ontario Court of Appeal reaffirmed "a well-settled rule which the Court has strictly enforced over the years",<sup>33</sup> that counsel who appears as a witness at trial cannot appear as counsel on the appeal. While it is difficult to see that any great dangers arise when a witness at trial appears as counsel on appeal, presumably it is felt that any embarrassment that might be caused can be avoided by the slight cost of instructing a different counsel on appeal. The case is otherwise interesting because the appeal was from an order dismissing an application to have a default judgment set aside in which both counsel filed affidavits. While the headnote of the case in the Ontario Reports reads that it "is improper for the deponent of an affidavit to act as counsel and rely upon the affidavit",<sup>34</sup> the Court of Appeal in their reasons for judgment made no mention of such impropriety.

### 3. Spouses

Section 4 of the Canada Evidence Act<sup>35</sup> dealing with the competence and compellability of spouses has not often been the subject of judicial interpretation. It appears that in spite of the thirty-three exceptions to the general rule that spouses are not competent to give evidence against each other, the prosecution seldom calls them. In *Regina v. Lonsdale*,<sup>36</sup> the accused was charged with attempted murder. After the incident giving rise to the charge, but before the trial, the accused on the advice of counsel married the victim. The wife, when called by the prosecution at the trial, stated that she did not wish to testify, and the judge sustained her request. Two questions thus arose on appeal: (1) whether spouses who are married at the time of trial are incompetent to give testimony against one another even though their marriage took place after the commission of the alleged

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<sup>30</sup> 4 Ont.2d 290 (High Ct. 1974).

<sup>31</sup> *Id.* at 299.

<sup>32</sup> 3 Ont.2d 783 (1974).

<sup>33</sup> *Id.* at 784.

<sup>34</sup> *Id.* at 783.

<sup>35</sup> CAN. REV. STAT. c. E-10 (1970).

<sup>36</sup> 24 Can. Crim. (n.s.) 225 (Alta. 1973).

offence; and (2) whether a spouse who is competent at common law to give evidence against his or her spouse is also compellable. Relying on prior decisions, the Court of Appeal answered both questions affirmatively.

The present law with respect to the competence and compellability of spouses is so arbitrary that it is difficult to rationalize any decision in this area by reference to the policy of the common law or the legislature. However, the court might have begun such a rationalization. The common law rule that one spouse cannot testify against the other rests on the assumption that the exclusion of such testimony is necessary to preserve the harmony of the marital relationship, and on the judgment that the preservation of the marriage in question is more important than the introduction of relevant evidence.<sup>37</sup> Where one spouse is accused of having committed a direct offence against the other, the common law so-called "necessity exception" provides that the spouse alleged to be the victim is competent to testify against the accused spouse. Whether the exception also renders the victim spouse compellable to testify against the other depends logically upon the justification for the exception. If the exception was designed to protect a weak and malleable wife against her husband, then perhaps it makes sense to require compellability. A wife who needs such protection would be easily intimidated into not testifying voluntarily. Another theory of the exception might be that it was necessary to vindicate the state's interest in the prosecution of crimes. The victim spouse will often be the only available witness to an offence committed by one spouse against the other. Again, if this rationale were accepted, the compellability of the spouse could be justified. On the other hand, a more likely purpose of the exception to the privilege was simply to provide a wife with the means of protecting herself against her husband. All that is necessary to fulfill this purpose is that the injured spouse have the option to testify. Compelling her to testify cannot be justified. This approach would also be more consistent with the purpose of the privilege itself. If a wife refuses to testify against her husband, that is strong evidence that there is a marital relationship worth protecting (unless it is assumed that a wife is under the total sway of her husband).

The rule that spouses need not testify against each other is arbitrary in its application. The court does not inquire into the circumstances of a particular marriage to see if in fact it is a viable relationship worth protecting. Therefore, it seems consistent to hold that even if the parties married after the commission of the offence the court will apply the privilege. However, in *Regina v. Lonsdale*, the court might have inquired into whether or not the marriage itself was a sham. If the marriage was a sham, entered into without any intention of living together as man and wife, the policy of the privilege obviously does not apply, and the court might have been justified in disregarding the legal status of the parties.

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<sup>37</sup> VIII WIGMORE § 2228, at 213-22.

## III. QUESTIONING OF WITNESSES

A. *Role of the Judge*

In an adversary proceeding, the primary responsibility for calling and questioning witnesses must rest upon the parties. If the judge limits his role in the conduct of the proceedings, it is assumed that his ultimate decision will be more acceptable to the parties, that the parties will be more motivated to diligently seek out and present all relevant evidence, and that the judge will reach a more accurate decision because it will not be biased by his participation. On the other hand, it has long been recognized that unrestrained adversary proceedings might be self-defeating. Therefore the judge has an affirmative responsibility to ensure that the proceedings are conducted fairly and expeditiously. The judge's primary role in the trial is thus defined by a delicate balancing of these interests.

The judge's right to call a witness not called by the parties, to question witnesses, to order the accused to testify before other witnesses called by him, and to control the questioning of witnesses, are four areas in which the question of the judge's role in the presentation of evidence arose this year.

1. *Judge's Right to Call Witnesses*

It is settled law that the trial judge has the right in criminal cases to call a witness not called by the parties. There are, however, several limitations upon this right, one of them being that the judge should not call a witness after the defence has closed his case unless the need to call such a witness arose unexpectedly. Judge Ó Hearn of the County Court of Halifax, Nova Scotia found that such a situation arose in *Regina v. Bouchard*<sup>38</sup> and consequently called three additional witnesses after the close of the defence's case. The accused had called a psychiatrist to support his defence of automatism to the charges of impaired driving and refusing to supply a breath sample. The psychiatrist based his opinion that the accused was in a state of automatism following the accident which led to the charge in part upon what others had told him about the accused's behaviour at the time, and in part upon an oral report given to him by a doctor who had examined the accused after the accident. At the close of the case, Judge Ó Hearn was troubled about the accuracy of some of the matters upon which the psychiatrist had based his opinion of automatism. Therefore, since they had not been called by defence counsel, he called the doctor who had examined the accused after the accident and upon whose opinion of the accused's condition the psychiatrist had relied, and two additional eye-witnesses to the accused's behaviour following the accident. Judge Ó Hearn felt that the necessity to call these witnesses arose *ex improviso* because he might have led defence counsel to believe from his ruling on the admissibility of the psychiatrist's evidence that it was not necessary to call these further witnesses.

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<sup>38</sup> 12 Can. Crim. Cas.2d 554, 24 Can. Crim. (n.s.) 31 (N.S. Cty. Ct. 1973).

The author of an annotation following the report of *Regina v. Bouchard* in the Criminal Reports was critical of Judge Ó Hearn's handling of the case.<sup>39</sup> Judge Ó Hearn, the author alleged, should have invited defence counsel to call the witnesses rather than calling them himself. This criticism seems to result from a concern for the form of the adversary system rather than its substance. If at the end of a case the judge is in doubt about some specific matter in the case and thinks that a witness not called by the parties could shed light on the matter, calling the witness himself, and then permitting each counsel to examine the witness on the matter, as Judge Ó Hearn did, would in most cases be the most expeditious manner of proceeding. Indeed it is difficult to see the justification for the rigorous requirement that a matter must have arisen *ex improviso* before the judge can call a witness after the close of the case for the defence. The question that the judge should be concerned about if he calls his own witness at the close of the case is whether both parties can be given a fair opportunity to reply to any new evidence elicited.

## 2. Judge's Right to Question Witnesses

It is of course primarily the function of counsel to question the witnesses called at trial. However, the trial judge has a responsibility to question witnesses if such a course is necessary to clarify testimony, or to elicit relevant evidence because counsel's examination has been ineffective.<sup>40</sup> The extent of his questioning is limited by the fact that excessive questioning by him will endanger the interests that the adversary system is designed to enhance. For instance, the adversary system permits the judge to maintain an appearance of impartiality throughout the trial. If he questions witnesses excessively, the danger arises that he will appear partial to one side. This danger arose in *Johnson v. Nova Scotia Trust Co.*<sup>41</sup> where a trial judge asked a witness eighty-two questions, and at times allegedly argued with her. Although the Nova Scotia Appeal Court stated that a trial judge should not question a witness in a manner which might upset her, or which might be taken to be an attack on her credibility, in the particular case the trial judge's intervention was not reversible error.

This same danger that results from the trial judge's excessive questioning, that the judge's appearance of impartiality will be endangered, was also stressed in an Ontario case.<sup>42</sup> In their reasons for judgment, the Ontario Court of Appeal also reviewed other dangers that the trial judge must guard against when questioning witnesses: the danger that the jury will be unduly influenced by the manner in which the judge questions a witness, either by giving the witness's testimony undue emphasis, or by as-

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<sup>39</sup> Stenning, "One Blind Man to See Fair Play": *The Judge's Right to Call Witnesses*, 24 Can. Crim. (n.s.) 49 (1974).

<sup>40</sup> *Cf. R. v. Torbiak*, 18 Can. Crim. Cas.2d 229, 26 Can. Crim. (n.s.) 108 (Ont. 1974) (Kelly, J.A.).

<sup>41</sup> 6 N.S.2d 88, 43 D.L.R.3d 222 (1973).

<sup>42</sup> *Regina v. Torbiak*, *supra* note 40.

sessing the witness's credibility by the manner in which the judge questioned him, and the danger that his questioning will disrupt an effective and pre-conceived line of questioning being pursued by counsel and thus prevent him from adequately presenting his case. In the present case, however, the Court of Appeal held that the trial judge's questioning was not excessive. They found that the trial judge asked his question in a fair and impartial manner. Unless it was simply a question requiring clarification of the witness's testimony, the judge did not intervene until both counsel had completed their questioning of the witness.

### 3. *Judge's Right to Vary the Order of Calling Witnesses*

The order in which witnesses are called is again a matter for counsel to decide. The adversary system assumes that both sides will present their strongest case; part of their strategy in doing so will invariably embrace the order in which they call their witnesses. The judge will in most cases be indifferent about the order in which witnesses are called since most witnesses will be excluded from the courtroom and thus each witness will give the same testimony irrespective of when he is called. However, the parties to a lawsuit are not excluded from the courtroom, and thus if counsel chooses not to call the party he is acting for as his first witness, the question might arise as to whether the judge has the right to compel the party to testify first so that he cannot tailor his evidence to conform to the testimony that he hears witnesses called by him give. In civil cases, under the rules of practice of most provinces, the trial judge is expressly given this authority.<sup>43</sup> A judgment of the Ontario Court of Appeal handed down in 1972, but not reported until 1974, held that the trial judge had this right at common law and therefore could compel the accused, if he chose to testify, to testify before other witnesses called by him.<sup>44</sup> Although no authorities are cited in the case, the holding is similar to a holding of the English Court of Appeal (Criminal Division),<sup>45</sup> but contrary to a holding of the British Columbia Court of Appeal,<sup>46</sup> and a holding of the United States Supreme Court<sup>47</sup> where that court held that requiring the accused to testify first was a violation of his privilege against self-incrimination and an infringement of his right of due process. The court clearly has an interest in obtaining testimony that can be easily evaluated and an interest in minimizing perjury. Requiring the accused to give his testimony before other witnesses called by him eases the evaluative task of the trier of fact by ensuring that the

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<sup>43</sup> See, e.g., *ONT. R.P.* r. 253(b).

<sup>44</sup> *Regina v. Archer*, 26 *Can. Crim. (n.s.)* 225 (Ont. 1972). *But see Campbell, The Order of Defence Witnesses*, 26 *Can. Crim. (n.s.)* 227 (1974), where the author suggests that the case might be narrowly construed to apply only to cases with similar facts; namely, where the accused has raised the defence of alibi and his counsel has stated in his opening address to the jury that the accused will be called as a witness.

<sup>45</sup> *R. v. Smith*, [1968] 2 *All E.R.* 115, 52 *Cr. App. R.* 224 (C.C.A.).

<sup>46</sup> *Regina v. Smuk*, [1971] 4 *W.W.R.* 613, 15 *Can. Crim. (n.s.)* 218 (B.C.).

<sup>47</sup> *Brooks v. Tennessee*, 406 *U.S.* 605, 32 *L.Ed.2d* 358, 92 *S. Ct.* 1891 (1972).

accused is not tailoring his testimony to that given by the other witnesses called by him. However, as mentioned earlier, one of the assumptions of the adversary system is that the truth is most likely to emerge if both sides present their most persuasive case. The order in which evidence is presented is clearly a factor that determines the persuasive force of proof. Thus requiring the accused to testify first will, in some cases, weaken the persuasive force of the defence's case. Furthermore, the accused may decide to exercise his right to silence if other witnesses called by him are effective in presenting his defence. If he is required to choose at the outset of his case whether he will take the stand or not, he might feel compelled to take the stand in cases where if he could have assessed the evidence of other witnesses called by him first he might have remained silent. Where the balance is struck between these competing interests will of course depend upon the court's view of the importance of the various values at stake. Since the question is an important one and since *Regina v. Archer* is undoubtedly a case that is being followed in Ontario, it is unfortunate that the Court of Appeal did not more carefully appraise the issue before them (the judgment was delivered orally).

#### 4. Judge's Right to Control Cross-Examination

The trial judge has at common law a broad discretion to control the conduct of cross-examination to ensure that the trial is conducted expeditiously and without the undue harassment of the witnesses. In *Regina v. Bradbury*,<sup>48</sup> the trial judge was held to have abused a discretion that he had exercised on both of these grounds.<sup>49</sup> The trial judge, after a long and exhausting cross-examination of an investigating officer, informed counsel that he had to complete his cross-examination within a prescribed period of time. The Ontario Court of Appeal held that this was an abuse of the trial judge's discretion. They said that although the trial judge has "[t]he right and indeed the responsibility . . . to control the proceedings before him to prevent conduct which may well be or become an abuse of the process of the court . . .",<sup>50</sup> he can only exercise his discretion to disallow vexatious and time-consuming questions after each question is asked. He cannot rule in advance that any further questioning was vexatious. Although it would undoubtedly be a rare case, one could conceive of a situation where counsel's questioning had become so repetitious, time-consuming, vexatious and unfruitful that in the interests of expedition and in protecting the integrity of the witness the trial judge should be able to rule that it come to an end. In such a situation, *Bradbury* should be confined to its facts.

The trial judge in *Bradbury* also ruled that the credibility of an important crown witness could not be impeached by questions relating to a police

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<sup>48</sup> 14 Can. Crim. Cas.2d 139, 23 Can. Crim. (n.s.) 293 (Ont. 1973).

<sup>49</sup> However, on the facts of the case, the abuse was held not to have caused a substantial wrong or miscarriage of justice.

<sup>50</sup> *Supra* note 48, at 140, 23 Can. Crim. (n.s.) at 294.



record that the witness had incurred when he was a juvenile. The Court of Appeal held that this also was an abuse of the trial judge's discretion to control the conduct of cross-examination. They stated: "We . . . are of the opinion that when questions are directed to a witness concerning his antecedents, associations or mode of life which would be likely to discredit his testimony or degrade his character or to show the untruth of statements he has made in the same proceedings, he enjoys no higher protection because of his status as a juvenile than is to be accorded to any witness in a like situation who is not a juvenile."<sup>51</sup> Thus, presumably the court was not denying that the trial judge has a right to prohibit generally questions that might embarrass the witness and are of little probative value. They were simply holding that in this case the questions were of probative value—the witness in his examination-in-chief had testified that he was unfamiliar with the police—and that the fact that the witness was a juvenile when he engaged in the alleged misconduct should not enter into the weighing of the competing interests. In deference to the general policy of the law to treat juvenile adjudications and juvenile delinquents under the theory *parens patriae*, the court might have been more sensitive to the admission of the misconduct of a person when a juvenile. Again, the case might be restricted to its facts, namely a situation where the witness in examination-in-chief denies that he has had any contact with the police.

## B. Direct Examination

### 1. Leading Questions

If counsel calls a witness favorable to the party he is representing, there is a danger that the witness might acquiesce in suggestions made to him by counsel. Therefore, as a general rule, leading questions are prohibited on direct examination. Although the rule is not always strictly enforced, counsel who elicits testimony on direct examination by asking leading questions runs the risk that such testimony may not be given much weight. Thus, in an action for misrepresentation, in finding that the plaintiff did not rely on the representations made by the defendant, Mr. Justice McFarlane, of the British Columbia Court of Appeal, noted that relevant testimony given by the plaintiff during examination-in-chief was elicited by leading questions,<sup>52</sup> presumably therefore giving the evidence less weight than it would otherwise have received.

### 2. Refreshing Memory

At least one recent Canadian case has held that if a witness refreshes his memory from a document out-of-court, that document must be produced

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<sup>51</sup> *Id.* at 142, 23 Can. Crim. (n.s.) at 295-96.

<sup>52</sup> *Contini v. Canarim Inv. Corp.*, [1974] 5 W.W.R. 709, at 715, 49 D.L.R.3d 262, at 268 (B.C.).

at trial at the request of cross-examining counsel.<sup>53</sup> Defence counsel, in a case reported in 1974, argued that the court should go even further and prohibit witnesses from refreshing their memory from any document, in this case the witness's testimony at the preliminary hearing, outside the courtroom.<sup>54</sup> Judge Graburn held that a witness could refresh his memory out of court by reading over his testimony given at the preliminary hearing, but that if the witness also read the testimony of other witnesses given at the preliminary hearing "it would be grounds for judicial censure and seriously affect the weight of the evidence, but not its admissibility".<sup>55</sup> The case is only interesting because the argument is so novel. Because the trial often takes place so long after the relevant events in dispute, and because our memory of events diminishes drastically over time, unless the trial is to turn into a test of memory, one would have thought that a counsel would be negligent in the discharge of his responsibilities if he did not invite witnesses to re-read before trial their previous testimony. Indeed it is common practice for witnesses to re-read before trial statements they may have given a lawyer or investigator following an accident or whatever, even though such statements were not made immediately after the event and therefore could not be used by the witness to refresh his memory on the witness stand. Until dispositions for trial are taken immediately after the event, such a course seems necessary and wise. Indeed it points up both the futility and the incongruity of not permitting witnesses to refresh their memory from such documents while on the witness stand.

### C. *Cross-Examination*

#### 1. *Right to Cross-Examine Co-Accused*

A party can normally cross-examine a witness called by another party, but the question of whether a party can cross-examine a witness called by a co-party has remained unsettled. In *Regina v. McLaughlin*,<sup>56</sup> the Ontario Court of Appeal settled the question in criminal cases by holding that an accused has an absolute right to cross-examine a co-accused who testifies on his own behalf. While the case has the support of recent English authority,<sup>57</sup> in principle an absolute right to cross-examination would appear to go too far. Where the interests of the co-accused are antagonistic, obviously one accused should be able to impeach the other and ask him leading questions in eliciting his testimony. But where there is an identity of interests between the co-accuseds, and the acquittal of one must carry the same result for the other, or where they are clearly favorably disposed towards one another, there would appear to be little justification for permitting

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<sup>53</sup> *Regina v. Lepine*, 39 W.W.R. (n.s.) 253, 38 Can. Crim. 145 (Sask. Dist. Ct. 1962).

<sup>54</sup> *Regina v. Husbands*, 24 Can. Crim. (n.s.) 188 (Ont. Cty. Ct. 1973).

<sup>55</sup> *Id.* at 193.

<sup>56</sup> 2 Ont.2d 514, 15 Can. Crim. Cas.2d 562 (1974).

<sup>57</sup> *R. v. Hilton*, [1971] 3 All E.R. 541, [1971] 3 W.L.R. 625 (C.A.).

one to cross-examine the other. Leading questions are prohibited because of the danger that if a witness is sympathetic to the party questioning him and desires to give only such answers as he believes will help the party, the witness may be susceptible to acquiescing in suggestions made by that party through his questions. If this danger is present, the judge, in principle, should be able to preclude an accused from cross-examining a co-accused.

## 2. *Limits of Cross-Examination*

Counsel on cross-examination may make insinuations about a witness's motives and character with such presence that even though the witness denies them the trier of fact will be led to believe they are true. Obviously such tactics can be gravely unfair to the witness. Since it is difficult for the trial judge to control such questioning, counsel must bear the responsibility, in discharge of his duty to the court, to balance the interest in seeking information from the witness against the interest in protecting the witness from unfair insinuations. In *Regina v. Bencardino*,<sup>58</sup> crown counsel in cross-examining a witness stated: "I put it to you, Paolo, that Bruno Pisani told you that you had to change your evidence on that one material point . . ." <sup>59</sup> The witness denied the allegation, and the prosecutor called no evidence to support it. Mr. Justice Jessup held that there was no illegality involved in putting the question. He quoted Lord Radcliffe:

An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth.<sup>60</sup>

The allegation made by crown counsel in *Bencardino* was a logical inference from the circumstantial evidence in the case. However if such was not the case, it would undoubtedly be improper for counsel to suggest that a witness had acted fraudulently or dishonestly unless he had reasonable grounds for believing that his insinuations were true.<sup>61</sup>

## 3. *Effect of Failure to Cross-Examine*

A point that is often ignored is that if counsel fails to cross-examine a witness he may severely prejudice his client's case. If he fails to cross-examine a witness on a matter, he cannot later contradict the witness on that point.<sup>62</sup> Some courts have gone even further and held that if counsel does not cross-examine a witness, the trier of fact must accept the testimony of

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<sup>58</sup> 2 Ont.2d 351, 24 Can. Crim. (n.s.) 173 (1973).

<sup>59</sup> *Id.* at 355, 24 Can. Crim. (n.s.) at 177.

<sup>60</sup> *Id.* at 356, 24 Can. Crim. (n.s.) at 179, quotation is from *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017, at 1023 (P.C.).

<sup>61</sup> W. BOULTON, *CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES* 75-76 (4th ed. 1965).

<sup>62</sup> *Regina v. Dyck*, 70 W.W.R. 449, [1970] 2 Can. Crim. Cas. 283, 8 Can. Crim. (n.s.) 191 (B.C. 1969).

that witness.<sup>63</sup> *Gagne v. Day & Ross Ltd.*<sup>64</sup> illustrates this danger of not cross-examining. The trial judge believed the testimony of the plaintiff in a motor-vehicle accident case and found the defendant 100 per cent at fault. The Court of Appeal reversed and found the plaintiff 100 per cent at fault. Mr. Justice Ryan noted in his judgment: "Had counsel for the plaintiff wished to challenge the testimony of [the defendant] he should have cross-examined him which he did not do."<sup>65</sup> While it is uncertain whether the court held in the case that if a witness is not cross-examined his testimony must be accepted by the trier of fact, it is clear from the case that the lawyer severely prejudiced his client's case by not cross-examining.

Another case reported in 1974 illustrates the importance not only of cross-examining, but of cross-examining effectively. In *Gavrilovic v. The Queen*,<sup>66</sup> Mr. Justice Branco of the British Columbia Court of Appeal stated that a "careful perusal of [the accused's] cross-examination shows that the appellant held firm to his narrative-in-chief and was quite unshaken. In such circumstances his evidence is entitled to some credibility".<sup>67</sup> The court held that because the accused was not broken down in any way in cross-examination, the explanation he gave in his defence to a charge of shoplifting should have been sufficient to raise a reasonable doubt. Therefore the accused's conviction was set aside and a verdict of acquittal entered.

The rule that counsel should cross-examine a witness on a matter that he regards as contentious embodies a basic requirement of fairness to the witness. If a witness who is going to be contradicted on a fact is given notice of such contradiction, he may be able to explain the contradiction or reword his testimony if it appears that he was misunderstood. To permit a witness to be discredited by another witness when in fact there was only a misunderstanding is obviously unfair. However, to apply a rule designed to alleviate this unfairness so as to require the trier of fact to accept the testimony of a witness who was not cross-examined goes too far. While such a preliminary foundation is desirable in principle, the consequences of a failure to undertake it should depend upon the facts of each case and an assessment of the seriousness in the case of the dangers that the rule was designed to minimize. In recent years the courts unfortunately appear willing to impart the rigidities that accompany the foundational requirement for prior inconsistent statements to all testimony given by a witness.

#### D. *Exclusion of Witnesses*

To enhance the probative value of testimonial proof, witnesses not testifying may be excluded from the courtroom to ensure that they are not influenced consciously or unconsciously by hearing what other witnesses say

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<sup>63</sup> See the cases cited in J. SOPINKA & S. LEDERMAN, *THE LAW OF EVIDENCE IN CIVIL CASES* 515-16 (1974).

<sup>64</sup> 8 N.B.2d 60 (1974).

<sup>65</sup> *Id.* at 65.

<sup>66</sup> [1974] 5 W.W.R. 262, 18 Can. Crim. Cas.2d 287 (B.C.).

<sup>67</sup> *Id.* at 268, 18 Can. Crim. Cas.2d at 293.

on the stand.<sup>68</sup> While it appears settled that the exclusion of witnesses is not a right of the parties, but is a matter within the trial judge's discretion, it is still not clear what the sanction is for a refusal to obey an order for exclusion, other than, of course, a citation for contempt. Wigmore was of the view that the majority of courts had properly held that the trial judge could disqualify a witness who had breached the order from giving evidence.<sup>69</sup> However, in spite of suggestions to the contrary,<sup>70</sup> modern Canadian and English authority are almost unanimous in holding that the trial judge cannot exclude the testimony of a witness who has remained in the courtroom contrary to an order for exclusion.<sup>71</sup>

Although it would appear that he cannot prevent a witness who has not obeyed an order for exclusion from testifying, recent cases seem to hold that the trial judge should direct the jury, or instruct himself, to consider the fact that a witness has remained in the courtroom when assessing the weight to be given to the testimony of such a witness. In *Regina v. Dobberthien*,<sup>72</sup> the Alberta Court of Appeal held that if the trial judge expressly instructs himself on this point with respect to one witness, it will be assumed that he considered the matter in assessing the weight to be given to the testimony of another witness in the same case who also remained in the courtroom after an order excluding witnesses had been given. Insisting on the ritual, Mr. Justice Sinclair, dissenting, argued that it was reversible error for a trial judge not to expressly instruct himself about this matter when considering the testimony of each such witness. The Nova Scotia Court of Appeal would appear to be less strict in requiring judicial comment about the presence of a witness in the courtroom. In *Regina v. Wilson*<sup>73</sup> that court held that in a jury trial it was not essential that the trial judge comment in his instructions to the jury on the presence of a witness in the courtroom during the trial, particularly since the judge had remarked on the presence of the witness in the courtroom at the closing of the cross-examination of the witness. Hopefully the courts will follow the lead of the Nova Scotia Appeal Court and not erect another rigid requirement as to what must be included in the trial judge's instruction to the jury.

In principle, the order of exclusion should continue to apply to witnesses who have been called to give evidence since they might be called again in

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<sup>68</sup> For a general discussion of the probative purposes of the exclusion of witnesses, see Sinclair, J.A., (dissenting) in *Regina v. Dobberthien*, [1973] 6 W.W.R. 539, 24 Can. Crim. (n.s.) 245 (Alta.).

<sup>69</sup> VI WIGMORE § 1842, at 365.

<sup>70</sup> See Allen, J.A. in *Regina v. Dobberthien*, *supra* note 68, at 541-42, 24 Can. Crim. (n.s.) at 247-48.

<sup>71</sup> *Regina v. Warren*, 6 N.S.2d 323, 24 Can. Crim. (n.s.) 349 (1973); *Regina v. Wilson*, 6 N.S.2d 395, 25 Can. Crim. (n.s.) 47 (1973); see cases cited by Sinclair, J.A. (dissenting) in *Regina v. Dobberthien*, *supra* note 68. In some provinces the rules of practice purport to give the trial judge the authority to exclude the testimony of a person who does not comply with an order for exclusion: e.g., ONT. R.P. r. 253.

<sup>72</sup> *Supra* note 68.

<sup>73</sup> *Supra* note 71.

rebuttal. Although in practice an order for exclusion is not strictly applied to such witnesses since it may be very improbable that they will be recalled, *Dobberthien*<sup>74</sup> held that the same rules do apply.

As well as the parties, and the investigating officer,<sup>75</sup> expert witnesses are frequently exempted from the order for the exclusion of witnesses. However unless the expert must base his opinion on the testimony of witnesses given at trial, it is not an error for the trial judge to exclude the expert from the courtroom until he testifies.<sup>76</sup>

#### IV. CREDIBILITY OF WITNESSES

##### A. *Impeaching One's Own Witness*

Generally a party cannot impeach the credibility of his own witness. One of the absurd consequences of this common law rule was revealed in a case reported this year, *Regina v. St. Pierre*.<sup>77</sup> So that the trier of fact would not conclude that he was trying to hide something from them, the accused wished, in his examination-in-chief, to disclose that he had a prior criminal record. The trial judge apparently ruled that this evidence could not be elicited as being relevant to his credibility because it would run afoul of the rule that a party cannot impeach the credibility of a witness called by him. Therefore, if it was elicited, it would only be admissible as circumstantial evidence of his guilt. The accused thus decided not to lead the evidence since if the Crown questioned him about his record on cross-examination the jury would be instructed that they could only use the evidence in assessing his credibility, and could not use it to infer that he was the kind of person who might commit the crime with which he was charged. The Ontario Court of Appeal reversed the trial judge, holding that it was the practice in Ontario "on the basis of its fairness"<sup>78</sup> to permit the accused to be examined about his prior record on direct examination. If the accused did not bring out his record on direct examination, "[t]he jury may have concluded that his failure to do so was in itself a reflection on his credibility".<sup>79</sup> The court further held that where the accused revealed on direct examination that he had a prior record, he was not putting his character in issue. Therefore, the jury should be instructed that they could use that evidence only in assessing the accused's credibility as a witness. This case is another illustration of the court reaching a right result but being unable to rationalize it in terms of established evidentiary doctrine. Rather than inquiring into the validity of the rule or rationalizing their decision in terms

<sup>74</sup> *Supra* note 68.

<sup>75</sup> *Cf. Regina v. Wilson, supra* note 71 (Coffin, J.A.).

<sup>76</sup> *Regina v. Warren, supra* note 71, at 343, 24 Can. Crim. (n.s.) at 367.

<sup>77</sup> 3 Ont.2d 642, 17 Can. Crim. Cas.2d 489 (Ont. 1974), *applied in Regina v. Macdonald*, 20 Can. Crim. Cas.2d 144, 27 Can. Crim. (n.s.) 212 (Ont. 1974).

<sup>78</sup> *Regina v. St. Pierre, supra* note 77, at 653, 17 Can. Crim. Cas.2d at 499.

<sup>79</sup> *Id.*, 17 Can. Crim. Cas.2d at 500.

of its policy, they simply ignored it. Indeed it would have been hard to rationalize in terms of present rules since if the accused argued that he was not attacking his own credibility, but simply rendering the Crown's attack less effective he would run afoul of another rule—generally the credibility of a witness cannot be supported until it has been attacked.

### B. *Prior Inconsistent Statements*

An exception to the general rule that a party cannot impeach the credibility of a witness called by him is provided for in section 9 of the Canada Evidence Act.<sup>80</sup> Pursuant to that section, a party calling a witness may impeach his credibility "if the witness, in the opinion of the court, proves adverse" by proving that the witness made at other times a statement inconsistent with his present testimony. In determining whether the witness is adverse and whether the prior statements are inconsistent, the judge will normally examine the prior statements. In *Regina v. Sinclair*,<sup>81</sup> the issue arose as to whether the opposing counsel as well could examine the statements on an application under section 9. Mr. Justice Wilson of the Manitoba Queen's Bench held that he could. Such an examination seems essential if counsel is to intelligently oppose the application. Since the matter arose at a preliminary hearing, the presiding provincial judge had apparently felt that the accused could not compel production of statements in possession of the Crown. He was apparently confusing the production of statements under section 10 of the Evidence Act, which the Supreme Court has held does not apply to preliminary hearings, with the foundational requirements of section 9.

A fairly elaborate body of jurisprudence is building up around the use of prior inconsistent statements to impeach a witness's credibility. It is surprising that there appears to be so much difficulty with what should be a common sense procedure. This year the Quebec Court of Appeal on appeal from a trial that had lasted five weeks, felt compelled to order a new trial because the trial judge had insisted that before defence counsel could cross-examine the Crown's witness about prior statements he had made, counsel had to satisfy the judge that the statements were inconsistent with the witness's present testimony.<sup>82</sup> Section 10 of the Canada Evidence Act clearly provides that "a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing . . ." <sup>83</sup> The only relevant question is, do the prior statements impugn the witness's testimony. They may do so even though not inconsistent as that word is ordinarily used. The trial judge was apparently confusing section 10 with section 9 of the Canada Evidence Act. Section 9 provides that if a witness called by a party proves

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<sup>80</sup> CAN. REV. STAT. c. E-10 (1970).

<sup>81</sup> [1974] 6 W.W.R. 719, 19 Can. Crim. Cas.2d 123 (Man. Q.B.).

<sup>82</sup> *Cormier v. The Queen*, 25 Can. Crim. (n.s.) 94 (Que. 1973).

<sup>83</sup> CAN. REV. STAT. c. E-10 (1970).

adverse, the party "may prove that the witness made at other times a statement inconsistent with his present testimony . . . ." <sup>84</sup>

In two cases reported this year, the courts reiterated the common law rule that unless the witness admits on the stand that a prior inconsistent statement made by him is true, the statement is only admissible for the purpose of impeaching the credibility of the witness and not as evidence of the matters asserted in it. In both cases, the prior statement was an important part of the prosecution's case. In *Regina v. Moir*,<sup>85</sup> the statement was made by the passenger of an automobile identifying the accused as the driver. At trial, the witness admitted making the statement but denied it was true. In *Regina v. Jackson*,<sup>86</sup> the statement was made by the victim of an assault identifying the accused as his assailant. At trial, the witness denied making the statement. In both cases, the Court of Appeal reversed the convictions on the grounds of insufficient evidence. One of the arguments often made for admitting prior statements as substantive evidence is that earlier statements made by a witness are usually more trustworthy. In both of these cases, one has the feeling upon reading the reasons for judgment that indeed the earlier statements were more reliable. It is unfortunate that a rigid application of the hearsay rule prevents the trier of fact from giving such evidence whatever weight it rationally deserves.

### C. Collateral Fact Rule

Every trial lawyer knows that a witness cannot be contradicted on a collateral matter, yet few can explain precisely when a matter is collateral. The common way of stating the rule is to say that a witness cannot be contradicted on a matter that is not relevant to the issues being tried, and then to list a number of exceptions; namely, if the matter relates to the witness's (1) character trait for untruthfulness, (2) prior inconsistent statement, (3) previous conviction, (4) bias, interest or corruption,<sup>87</sup> (5) perceptual abilities, and (6) opportunity to observe. Indeed the definition of the rule is so elusive and the exceptions so numerous that the courts would probably save a great deal of time and senseless bickering if they were to simply apply the rationale of the rule rather than attempt to apply a definition of the rule or one of its countless exceptions. Thus the rule could be restated: "A witness cannot be contradicted on a matter unless the probative value of the contradictory evidence outweighs the probability that its admission will necessitate the undue consumption of time or create substantial danger of confusing the issues. Ordinarily, if the contradictory evidence is not relevant to a fact in issue or to the witness's credibility except to the extent that

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<sup>84</sup> *Id.*

<sup>85</sup> 15 Can. Crim. Cas.2d 305 (Ont. High Ct. 1974).

<sup>86</sup> 6 N.S.2d 434 (1973).

<sup>87</sup> *Regina v. Bencardino*, *supra* note 58, at 358, 24 Can. Crim. (n.s.) at 181 (the fact that a witness was intimidated into changing his testimony could be proved by extrinsic evidence).



it shows that he might be mistaken about the matter, it should be excluded." McCormick describes a fact that a witness might be contradicted upon even though it has no probative value independent of the contradiction, as a fact about "the background and circumstances of a material transaction, which as a matter of human experience he would not be mistaken about if his story were true".<sup>88</sup> Indeed, the courts have perhaps unwittingly reached this point. There appears to be a recognized exception to the collateral fact rule that the contradictory proof is admissible if the probative value of the contradiction outweighs the danger of the undue consumption of time and the confusion of issues.<sup>89</sup> The exception would appear to be destructive of the rule. Yet the courts cling to the rule, defining it, refining it, creating exceptions to it, and sometimes ignoring it.

A case from British Columbia, *Regina v. Porter*,<sup>90</sup> illustrates the kind of trap the courts can get into while attempting to determine the limits of the rule about collateral facts by reference to prior cases. The accused upon being stopped by the police and questioned about a stolen motorcycle gave a false name, David Peterson. At trial he testified, upon cross-examination, that he had never used the name Dave Peterson before. The Crown wished to call rebuttal evidence to show that the accused had used the same alias on a previous involvement with the police at Calgary. Defence counsel objected to the evidence on the grounds that the Crown was attempting to contradict the witness on a collateral issue. The trial judge reviewed three recent cases dealing with collateral facts and concluded on the basis of the facts and decision of each case that whether a fact is collateral depends upon who raised it. If a matter is raised by a witness in his examination-in-chief, it can always be contradicted. If it is raised on cross-examination, it cannot be contradicted. The case is a perfect example, and there are many in the cases on evidentiary matters, of a court formulating a rule from factual distinctions of prior cases without any reference whatsoever to the purpose of the rule. If the purpose of the collateral fact rule is to protect the court from the needless confusion of issues and the unjustifiable consumption of time, it is obvious that the factual distinction made by the trial judge is irrelevant. The judge undoubtedly derived the distinction from some remarks that were made in *Regina v. Gross*.<sup>91</sup> Mr. Justice MacKay stated in that case: "Evidence-in-chief, to be admissible, must be relevant to the issues being tried and reply evidence may be called in respect of any matters that counsel in examination-in-chief elect to introduce."<sup>92</sup> But in fact often in direct examination counsel elicits, or the witness volunteers, background facts that are irrelevant to the issues in the case. In *Gross*, the fact introduced was that the accused was a successful businessman and thus unlikely to have

<sup>88</sup> C. MCCORMICK, *supra* note 7, at 99.

<sup>89</sup> See cases cited in S. SCHIFF, EVIDENCE IN THE LITIGATION PROCESS: A COURSE-BOOK IN LAW 590 (draft ed. 1974).

<sup>90</sup> 16 Can. Crim. Cas.2d 422 (B.C. Prov. Ct. 1974).

<sup>91</sup> 9 Can. Crim. Cas.2d 122 (Ont. 1972).

<sup>92</sup> *Id.* at 124.

engaged in the offences charged, the making of counterfeit money. This fact relating to the witness's motive or lack of it for committing the crime, is clearly probative, and its contradiction would thus be equally probative. The fact it was elicited in direct examination is unrelated to its probative value. If on cross-examination questions were asked about the accused's financial condition and he replied that he was a successful businessman, surely the contradiction of that fact would be just as probative as would its contradiction if it was elicited on direct examination. The argument might be that the collateral fact rule should not apply to matters raised on direct examination since a witness cannot contend that he would be unfairly surprised if the matter were contradicted. However, that is probably not true, and furthermore unfair surprise, at least in most modern jurisprudence, is not accepted as a reason for the collateral fact rule.<sup>93</sup>

In *Regina v. Darwin*,<sup>94</sup> the British Columbia Court of Appeal held that the fact that a witness had engaged in a criminal course of conduct involving drugs was collateral and therefore inadmissible. While the decision is correct in law, the court appealed to the wrong rule to justify it. A person's character trait for truthfulness as tending to prove his credibility is not collateral, or if it is collateral there has always been an exception to the collateral fact rule permitting its proof. However, a rule even older than the collateral fact rule, and based on slightly different policy grounds, forbids the proof of character by specific instances of past conduct. A witness can be discredited by reputation evidence or in some circumstances opinion evidence which tends to prove he is the kind of person who should not be believed under oath, but specific instances of his past conduct are inadmissible for this purpose. The exclusion of such specific instances has nothing to do with the collateral fact rule.

#### D. *Supporting Credibility: Recent Complaints*

Normally, a witness's prior statements consistent with his testimony are inadmissible. Such statements are excluded because in most instances they are irrelevant. The fact that a witness has repeated out of court the testimony he gives at trial generally does not increase the probative value of that testimony. And whatever probative value it might have is outweighed by the time that would be wasted if evidence was lead proving and disproving consistent out of court statements. However, in some situations prior consistent statements do have probative value, and therefore the law has recognized a number of exceptions to this general rule. One of those exceptions, the subject of a number of reported cases in 1974, is recent complaints.

The doctrine of the admissibility of recent complaints generates as many appeals as any other evidentiary rule. This seemingly innocuous rule

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<sup>93</sup> III A WIGMORE § 1007, at 979-81.

<sup>94</sup> 13 Can. Crim. Cas.2d 432 (B.C. 1973).

is based on a sound premise of human behavior—a person who has been the victim of a crime is likely to complain about it on the first reasonable opportunity. If he fails to so complain, one natural inference from such failure is that a crime was not committed. Thus a recent complaint, by rebutting this inference, has probative value and should be admitted into evidence even though it is a prior statement consistent with the witness's testimony at trial. Unfortunately most of the jurisprudence about the doctrine has arisen out of recent complaints in rape and other sexual cases in which women are the victims, suggesting perhaps that if men are the victims of crimes of violence no adverse inference should be drawn against them if they fail to immediately complain since men are generally credible about such matters. The rationale of the admissibility of recent complaints clearly would extend to all crimes in which the victim could be expected, as a matter of ordinary human behavior, to immediately complain about the incident.

In order to be probative, the complaint must have been made at the first reasonable opportunity. Since the issue is whether the victim in the particular case could have been expected to complain earlier if his allegations were true, the test of whether the complaint was made at the first reasonable opportunity should obviously be a subjective one. This test, as opposed to an objective test, is now generally accepted by the courts.<sup>85</sup>

The courts have also held that only the first complaint made by a victim is admissible.<sup>86</sup> Normally a second or even tenth complaint will be of little probative value. However, more than one complaint will be admissible if the complaints form "a reasonable sequence of steps in a single continuous complaint". In *Regina v. Volk*,<sup>87</sup> the victim complained of a sexual assault to two men who picked her up on the highway and at her request drove her to the police station, and then upon arrival at the police station to the police. The trial judge excluded the evidence of the complaint to the police since it was not the first complaint. The Alberta Court of Appeal, however, held that the second complaint was part of "a reasonable sequence of steps in a single continuous complaint"<sup>88</sup> and therefore should have been admitted. It is puzzling why the courts have such a great need to conceptualize and pigeon-hole evidence. On the question of whether the second complaint should be admissible, surely the question is quite simply: "Does it have any probative value?" The need to analyze and characterize it as part of a "reasonable sequence of steps in a single continuous complaint" seems unnecessary and likely to lead the court to miss the point of why or why not it should be admitted. Incidentally, in *Regina*

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<sup>85</sup> See *Regina v. Bell*, 6 N.S.2d 351, at 359-60, 14 Can. Crim. Cas.2d 225, at 232 (1973).

<sup>86</sup> *Id.* The court held however that the Crown does not have to prove beyond a reasonable doubt that the complaint they are offering into evidence is the first complaint.

<sup>87</sup> [1973] 6 W.W.R. 29, 24 Can. Crim. (n.s.) 166 (Alta.).

<sup>88</sup> *Id.* at 34, 24 Can. Crim. (n.s.) at 170.

v. *Volk*,<sup>99</sup> the Alberta Court of Appeal directed a new trial because the trial judge had excluded evidence of the second complaint. Since it was a trial by judge alone, and since the trial judge had heard the offer to prove the second complaint, the Court of Appeal appears to have great confidence—more than most people—that when a trial judge hears evidence but then rules it inadmissible and directs himself to ignore it, he in fact ignores it. The Court of Appeal stated that they were directing a new trial because the second complaint might “have assisted [the trial judge] in forming an opinion as to the credibility of the complainant’s evidence . . . .”<sup>100</sup> The accused who presumably had to go through the agony of a new trial in this case probably wishes the trial judge who had acquitted him in the first instance had simply asked himself whether the second complaint would have so assisted him rather than, presumably, whether the statement formed “a reasonable sequence of steps in a single continuous complaint”.<sup>101</sup>

As mentioned earlier, a witness’s prior consistent statement is generally excluded because it is superfluous. Whatever probative value it possesses is outweighed by the time that its proof and disproof will consume. As Lord Pearce said in a slightly different context: “Many controversies which might thus obliquely throw some light on the issues must in practice be discarded because there is not an infinity of time, money and mental comprehension available to make use of them.”<sup>102</sup> This being the reason for the exclusion of recent complaints, one would have thought that if inadvertent mention was made in a trial of a complaint that was held not to be recent, the logical way to cure the error would be to permit the other side to contest the existence of the complaint if it was of any probative value whatsoever. If the complaint was made so long after the event to be of no probative value, then of course an inadvertent mention can do no harm whatsoever. Yet the court’s continue to order new trials if a complaint that is not recent is mentioned during the course of a trial. In *Regina v. Reinson*,<sup>103</sup> a police constable, when asked if he saw anyone at a service station he was directed to go to, replied: “Yes, we saw the young lady who had phoned in previously complaining of rape.”<sup>104</sup> The trial judge interrupted the police constable and upon finding that the complaint he mentioned was not recent, ordered a mistrial. Ordering a mistrial when evidence is admitted, that to save the time of the court should have been excluded, would appear to simply compound the effect of the error.

The judge in *Reinson* justified his decision to order a new trial by stating: “Anyone on that jury who cannot fully disabuse his mind of what was said by the officer will undoubtedly say here is a girl who says that she

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*, 24 Can. Crim. (n.s.) at 171.

<sup>101</sup> *Id.*, 24 Can. Crim. (n.s.) at 170.

<sup>102</sup> *Toohy v. Metropolitan Police Comm’r*, [1965] A.C. 595, at 607, [1965] 1 All E.R. 506, at 511.

<sup>103</sup> 16 Can. Crim. Cas.2d 415 (B.C. Sup. Ct. 1973).

<sup>104</sup> *Id.* at 416.

was raped and that is clear-cut evidence that she was, and she told that to this policeman."<sup>105</sup> How is it that judges and lawyers realize that a complaint that was not made fairly soon after an alleged crime is of little probative value, but jurors are so unintelligent that they cannot be disabused of the notion, even after being instructed by the judge, that such a complaint is almost conclusive evidence of the accused's guilt? Fortunately the danger of misleading the jury is not often given as a reason for excluding complaints that are not recent.

If a complaint is made as the result of questioning by a third person, it is frequently excluded. The alleged victim, particularly if he is a young child, might be led to acquiesce in the suggestions made to him, and thus such a complaint is of little probative value. Although some courts strictly apply the rule that a complaint elicited by questioning is inadmissible, in *Regina v. Bell*,<sup>106</sup> the Nova Scotia Appeal Court recognized that the question is really one of the probative value of the complaint, and thus they held that a complaint was admissible even though it was made after repeated questioning since the victim's initial silence could be explained by her state of fear.

## V. HEARSAY

### A. Hearsay Rule in Quebec

Although the practice in Quebec has always been to apply the hearsay rule, it was not until this year that the Supreme Court was called upon to decide whether the hearsay rule, in law, applied in Quebec. In *Royal Victoria Hospital v. Morrow*,<sup>107</sup> Justice Pigeon, delivering the judgment of the Court, reasoned that although there was no express provision in the Quebec Civil Code or the Quebec Code of Civil Procedure, certain articles in those Codes implied that the hearsay rule governed the trial of cases over matters in which the Province of Quebec had jurisdiction.

Justice Pigeon found an implicit exclusion of hearsay evidence in Article 294 of the Code of Civil Procedure. That article provides: "Except where otherwise provided, in any contested case, the witnesses are examined in open court, the opposite party being present or duly notified . . ." <sup>108</sup> Justice Pigeon reasoned: "By admitting hearsay evidence, not only is the provision requiring examination of witnesses in open Court evaded, but that requiring an oath or solemn affirmation as well, to say nothing of the right to cross-examine." <sup>109</sup>

An argument by deduction from a statute is always difficult, and one would have felt a little more comfortable with Justice Pigeon's argument if

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<sup>105</sup>*Id.* at 418.

<sup>106</sup>*Supra* note 95.

<sup>107</sup>42 D.L.R.3d 233 (Sup. Ct. 1973).

<sup>108</sup>Code of Civil Procedure, Que. Stat. 1965 c. 80.

<sup>109</sup>*Supra* note 107, at 237.

his judgment had revealed an examination of the history of the article. He notes that it was essentially the same as article 363 of the 1867 Code. The history of that article was in turn not explored. It might well have emerged from the ascendancy of the principle of publicity over the principle of secrecy in continental civil procedure; an ascendancy which was clearly not intended to bring the hearsay rule in its wake.<sup>110</sup>

Justice Pigeon found further support for his argument by deduction from specific sections in the Codes that appeared to create exceptions to article 294. For instance, article 320 provides for the admissibility of testimony that corresponds with the common law hearsay exception for former testimony. If there was no hearsay rule in Quebec, article 294 would be "deprived of any meaning", Justice Pigeon reasoned.

In view of the above two articles in the Code of Civil Procedure, and the reasoning applied by Justice Pigeon, one might have supposed that the hearsay rule applied in civil litigation in Quebec, and that the only exceptions to it were those expressly provided in the Code. However, Justice Pigeon went on to hold that the hearsay rule as developed in England was adopted in Quebec in all its aspects. He deduced this from article 1206 of the Civil Code which provides: "When no provision is found in this code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England."<sup>111</sup>

There are two readily apparent problems with the application of this section to the case before the Supreme Court. Firstly, it is expressly restricted to commercial matters; the case before the court involved a civil matter. Justice Pigeon got around this by reasoning that to interpret the provision as applying only to commercial matters "would be to run counter to general principles".<sup>112</sup> Secondly, Justice Pigeon had earlier held that article 294 of the Code of Civil Procedure impliedly excluded hearsay testimony. Surely article 1206 should not be read to hold that if a provision in the Code excludes testimony, but the common law would admit the testimony, the common law rule of admission overrides the Code's rule of exclusion.

Perhaps the best one can say is that any argument from deduction from a Code that is the obvious result of ad hoc judgments is going to be tenuous. Therefore, it is unfortunate the Supreme Court did not reason from the legal culture in Quebec, the history of rules of procedure, and the efficacy of the hearsay rule.

## B. *Definition of Hearsay*

While the hearsay rule may be, as Wigmore declared, "that most char-

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<sup>110</sup> Millar, *The Formative Principle of Civil Procedure—III*, 18 ILL. L. REV. 150, at 156 (1923-24).

<sup>111</sup> QUEBEC CIVIL CODE.

<sup>112</sup> *Supra* note 107, at 239.

acteristic rule of the Anglo-American law of evidence",<sup>113</sup> except at the most elementary level it is also the most misunderstood. Indeed, it is perhaps not too much to suggest that the only reported case in which the question of what is hearsay was intelligently addressed by the courts took four separate trials lasting eight years and involved the participation of most of England's greatest jurists.<sup>114</sup> The House of Lords eventually held in that case that conduct from which the actor's belief was to be inferred was hearsay; thus, the fact that certain persons had written the deceased testator letters from the contents of which it could be assumed that they regarded him as sane and rational was excluded as proof of the fact that he was sane and rational. Judges seldom recognize the problem that evidence of conduct might be hearsay, thus there is no Canadian case where *Wright v. Tatham* has been applied. But the problem probably arises more frequently than generally assumed. For instance, this year in *Re Beukenkamp*,<sup>115</sup> evidence that a person did not complain of non-delivery was admitted without discussion as tending to prove that certain shares were delivered. If the person who was alleged to have received the shares had made an out-of-court statement to the effect that he had received the shares, his statement would be clearly recognized as hearsay. To prove delivery, he would have to take the witness stand. A strong argument both in principle, based on the dangers that the hearsay rule is designed to minimize, and on the authority of *Wright v. Tatham* could be made for holding that the person's silence from which the court is being asked to infer that the shares were delivered is equally hearsay.

The problem of whether certain evidence was hearsay also arose in *Regina v. Bencardino*.<sup>116</sup> A witness initially gave evidence for the Crown. Later he was recalled by the defence and repudiated everything that he had testified about on behalf of the Crown. On cross-examination, he denied that he changed his testimony as the result of threats. To prove that the witness had changed his testimony as the result of threats that were made to him while he was in prison, the prosecution wished to offer the following evidence. The witness's lawyer (the witness was also involved in the crime charged but had been previously convicted) had approached the prosecutor and asked him if his client could be transferred to another prison. He informed the prosecutor that his client told him that he had been approached on a number of occasions and had been threatened with respect to the testimony he gave at the trial. The prosecution wished to call the lawyer to the stand to give this testimony to prove that the witness had been threatened. One of the important issues in the case was to what extent this offered evidence was hearsay.

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<sup>113</sup> V WIGMORE § 1365, at 28.

<sup>114</sup> *Wright v. Tatham*, 5 Cl. & F. 670, 7 Eng. Rep. 559 (1838). For detailed history of the case, see Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, at 749-60 (1961).

<sup>115</sup> [1973] F.C. 1401, 43 D.L.R.3d 118 (T.D.).

<sup>116</sup> *Supra* note 58.

The trial judge ruled that the lawyer could not testify as to what the witness had told him about threats that he had received, but he could testify as to what, as a result, he had told the Crown prosecutor, including the fact that the witness had said he was threatened. The ruling brings to a logical conclusion the common sophistry surrounding the hearsay rule that a person cannot tell the court what another person said to him, but he can testify as to what he did as a result of what that person said to him. In this case, as a result of what the witness told him, the lawyer went to the prosecutor and told him what the witness had said to him. The ruling that what the lawyer told the prosecutor is admissible is a triumph of form over logic, reason, experience and substance. The Court of Appeal, fortunately, did not appear to have too much trouble concluding that "what [the lawyer] said to [the prosecutor] is not evidence of anything".<sup>117</sup> The Court of Appeal then went on to hold that what the witness told his lawyer about his "plight" in the prison was itself directly admissible. The court stated: "No question of hearsay will arise because the evidence will be received not to prove the fact of intimidation but rather to prove [the witness'] state of mind of fear."<sup>118</sup> Although it appears for a moment that the court understands the hearsay rule, such optimism is dashed in the next line. In support of their holding that the statements made by the witness to the lawyer are not hearsay, the court first cites *Subramaniam v. Public Prosecutor*,<sup>119</sup> in which the Privy Council held the statements in issue in that case were not hearsay since they were being tendered not to prove the truth of the statements, but simply to prove they were made, and then Wigmore whom the court says "classifies such evidence as an exception to the hearsay rule".<sup>120</sup> In fact the evidence that Wigmore classifies as an exception to the hearsay rule in the chapter cited by the court,<sup>121</sup> is very different than the evidence dealt with by the Privy Council in *Subramaniam*.

It is unclear from the Court of Appeal's reasons for judgment in *Bencardino* the exact evidence that the lawyer will give at the new trial. However, by exploring the possibilities, the confusion in the Court of Appeal's judgment can best be exposed, and, incidentally, the inconsistencies in the hearsay rule. In analyzing offered evidence, it is of course always necessary to be precise about the purpose for which the evidence is being offered. In this case, the Crown wishes to prove that the witness had changed his testimony as the result of threats.

Firstly, for the purpose of proving that the witness was threatened, the lawyer might testify, and it appears from the report that this at least in part would be the substance of his testimony, that the witness told him: "I have been threatened with respect to the testimony that I have given at trial."

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<sup>117</sup> *Id.* at 358, 24 Can. Crim. (n.s.) at 180.

<sup>118</sup> *Id.*, 24 Can. Crim. (n.s.) at 181.

<sup>119</sup> [1956] 1 W.L.R. 965, 100 Sol. J. 566 (P.C.) (Malaya).

<sup>120</sup> *Supra* note 58, at 358, 24 Can. Crim. (n.s.) at 181.

<sup>121</sup> See *Wigmore on Evidence*, 3rd ed., vol. 6, sub-title 2, topic 13 (as it was cited by the court): VI WIGMORE §§ 1714-40, at 57-130.



This testimony clearly would be hearsay. *Subramaniam v. Public Prosecutor*, cited by the court, would not support its admissibility. In that case, like the present case, a person's state of mind was in issue (in that case the accused's, in the present case a witness's), and therefore the truth or falsity of the threats was irrelevant. However, in *Subramaniam*, a person who heard the threats, namely the accused, testified that the threats were in fact made. In *Bencardino*, no one with personal knowledge testified that the threats were made. The lawyer's testimony that the witness told him: "I have been threatened . . ." is hearsay.

Secondly, for the purpose of showing that the witness changed his testimony because he was in fear of what might happen if he did not, the lawyer might testify that the witness told him: "I am in fear of my life because of threats made to me respecting the testimony I gave at trial." At least part of this statement might be admissible as being a declaration of the witness's mental state. This is the exception to the hearsay rule that Wigmore discusses in the chapter referred to by the court as authority for its holding. The nuances of the exception would take a separate article to explore.

Thirdly, the Crown might attempt to show the witness' state of mind by leading circumstantial evidence from which his state of mind could be inferred. For instance, the lawyer might testify that when he saw his client he acted in a fearful manner and asked to be transferred to a safer place, and perhaps said things such as: "I should never have given the testimony I did." From this evidence, it could be inferred that he was fearful of life unless he changed his testimony. Such non-assertive conduct would be held to be hearsay according to the reasoning of *Wright v. Tatham*. However, all subsequent cases would hold that no hearsay problem arises since no direct assertions by the witness of fear or threats are being admitted.

This breakdown perhaps reveals the inconsistencies of the hearsay rule as it is presently applied. All three kinds of evidence are being admitted to prove that the witness changed his testimony out of fear for his life—all suffer the same frailties, although perhaps to different degrees. Therefore, there is a strong argument to be made that all the evidence mentioned should be excluded by the hearsay rule, or at least an examination made of each offered item of evidence to determine the degree to which the hearsay dangers are present.

The case reveals that an analysis of the definition of hearsay based on rigid classification is doomed to sophistry. If we are to retain a hearsay rule, at the very least the courts ought to adopt an approach to defining and therefore excluding testimony on the grounds that it is hearsay which involves an analysis of the dangers stemming from its admission.

In *Bencardino*, the witness had denied on cross-examination that a third person told him that he had to change his testimony. An interesting question arises, aside from the hearsay question, as to whether the lawyer can take the stand and testify, in effect, that the witness had told him that someone had so approached him. It is clearly a statement that is inconsis-

tent with the witness's present testimony and that does not relate to the subject matter of the case, as required by section 10 of the Canada Evidence Act.

Testimony is more clearly not hearsay when its probative value in no way depends upon the veracity of an out-of-court declarant. A criminal case from Prince Edward Island illustrates the admissibility of a statement that is clearly tendered for a non-hearsay purpose. The accused received a package of marijuana in a letter and had the package, unwrapped, in her pocket when arrested for possession of marijuana. The letter did not refer to the marijuana and the accused sought to have it introduced at trial as tending to prove that she did not realize that the package contained marijuana. The letter was not of course being introduced to prove the truth of the matter asserted in the letter, but rather to support the accused's testimony that she had no knowledge that marijuana was contained in the package. The court admitted the letter.<sup>122</sup>

### C. Admissions

#### 1. Definition

If a person makes an admission, such evidence is admissible despite the fact that the statement was made out of court. Commentators have debated whether admissions are admissible because they constitute an exception to the hearsay rule, satisfy the hearsay rule, or are essentially circumstantial evidence and consequently lie outside the hearsay rule.<sup>123</sup> The courts have never analyzed the admissibility of admissions in these terms. This is unfortunate since the rationale for the admissibility of admissions resolves many practical questions; for instance, what is an "admission"? The rationale of the admissibility of admissions should of course determine what is an admission. Without exploring here the various theories frequently advanced, it is probable that the only explanation of their admissibility that can adequately justify the peculiarities of their admissibility, namely that they are admissible even though self-serving when made, even though the party had no personal knowledge of the fact he admitted and even though he phrased his admission in terms of an otherwise inadmissible opinion, is the psychological explanation advanced by McCormick:

This notion that it does not lie in the opponent's mouth to question the trustworthiness of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason. The feeling that one is entitled to use the opponent's words is heightened by our contentious or adversary system of litigation.<sup>124</sup>

<sup>122</sup> R. v. Partridge, 5 Nfld. & P.E.I.R. 420, 15 Can. Crim. Cas.2d 434 (P.E.I. 1973).

<sup>123</sup> C. McCORMICK, *supra* note 7, at ¶ 262.

<sup>124</sup> C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, ¶ 239, at 503 (1954). This insight into the explanation of the admissibility of admissions, like many others of McCormick's sometimes subtle but always thought-provoking insights into the rules

This being the rationale of admissions, it follows that anything that a party says out of court should be able to be used against him, if relevant, at trial.

In *Royal Victoria Hospital v. Morrow*,<sup>125</sup> Mr. Justice Pigeon held that a statement made by the doctor-defendant before an allegedly negligently conducted operation was not admissible against him since it was not an admission. That, he said, "is not doubtful".<sup>126</sup> However, unless a rationale for the admissibility of admissions is postulated, then it is difficult to perceive why it "is not doubtful". If the rationale suggested above is accepted then, as mentioned, anything a party has said out of court should be able to be used against him. Justice Pigeon assumed that a person could only make an admission with respect to an act after the act had occurred. Even as a matter of ordinary usage it is difficult to see why this should be so. In ordinary usage an admission means an acknowledgement or an acceptance that something is true. If a person can admit a fact after an event from which it can be inferred that he performed an act in a certain fashion, why cannot he admit a fact before the event from which it can be inferred that he performed it in a certain fashion?

## 2. *Implied Admissions (Silence)*

A party may expressly make an admission, or he may by his conduct imply that he accepts as true a statement made by some other person, and thus make what has been called an adoptive admission. Most of the cases that arise with respect to admissions involve adoptive admissions. The question in issue is usually whether or not a party or the accused's conduct following a statement by another person amounted to an adoption of it. Silence in the face of an accusation may be found to be conduct amounting to an acquiescence in the truth of the accusation, and three cases this year dealt with this problem.

The theory of accepting silence, without more, as evidence of the acquiescence in an accusation is that normally a person would deny an accusation if it were untrue. The fact that he remained silent is thus evidence from which it can be inferred that he admitted the allegation. A reply that does not amount to a denial can also be treated as an acquiescence since it is the lack of denial that is significant. In civil cases, the courts have not experienced great difficulty in evaluating all the circumstances surrounding a particular case and determining whether the silence of one of the parties amounted to an adoption of a statement made in his presence. In *MacKenzie v. Commer*,<sup>127</sup> the plaintiff alleged that the defendant had sold him a stolen car. As evidence tending to prove that the car was stolen, the

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of evidence, was left out of the second edition of McCormick. The editors of the second edition simply conclude: "On balance the most satisfactory justification of the admissibility of admissions is that they are the product of the adversary system . . .", MCCORMICK, *supra* note 7, ¶ 262, at 629.

<sup>125</sup> *Supra* note 107.

<sup>126</sup> *Id.* at 240.

<sup>127</sup> 6 N.S.2d 707, 44 D.L.R.3d 473 (1973).

plaintiff testified that when he telephoned the defendant and informed him that the police had seized the car alleging it was stolen the defendant replied "go pile sand". The court found that this amounted to an admission by the defendant that the car was stolen. Chief Justice MacKeigan reasoned: "One would expect a normal honest vendor, when told that he had stolen goods, to deny the allegation vehemently . . . . Under these circumstances, [the defendant] must be taken to have impliedly admitted the truth of the allegations."<sup>128</sup>

In criminal cases, one might have supposed that the courts would be much more reticent to rule that the accused's silence in the face of an accusation could be regarded as an admission. The accused has a right to remain silent, use of his silence as an adoptive admission seems inconsistent with this right and indeed seriously erodes its value. Furthermore, people's reaction to a serious accusation, particularly by the police, is unpredictable. Also there is a danger of prejudice to the defendant's case if the jury hears that he remained silent in the face of an accusation and that they can use such evidence for the purpose of inferring that he admitted the accusation. In spite of this, the courts have been extremely liberal in admitting silence as evidence of an adoptive admission in criminal cases. The leading case is *The King v. Christie*, where Lord Reading stated:

If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanor from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether.<sup>129</sup>

If the accused expressly denies an allegation made to him, it is difficult to conceive of conduct on his part which might imply that he was at the same time accepting the statement. Yet, in *Christie*, in spite of a denial, the statement was admitted.

A similar case, except it did not involve an accusation made by the police, was reported in 1974. In *Regina v. Thompson*,<sup>130</sup> the accused was charged with rape. Evidence was led that shortly after the rape was reported the accused's father had asked him: "Did you hurt Karen?" The accused replied: "No, Dad, I didn't." Following this conversation, the accused's father left the house, and the accused turned to some other people in the room who had overheard the accused's conversation with his father and said: "Guess what everyone, Dad thinks I hurt Karen." The trial judge admitted this evidence as an implied admission by the accused. The Court of Appeal, citing *Christie*, upheld the trial judge's ruling. They held that if there was "any evidence in the accused's words, conduct or demeanor from which a jury would conclude that the accused, despite words of denial, really acknowledged or admitted the truth of the statement . . .",<sup>131</sup> the trial judge

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<sup>128</sup> *Id.* at 710, 44 D.L.R.3d at 475.

<sup>129</sup> [1914] A.C. 545, at 565, [1914-15] All E.R. Rep. 63, at 71.

<sup>130</sup> 8 N.S.2d 417, 26 Can. Crim. (n.s.) 144 (1974).

<sup>131</sup> *Id.* at 424, 26 Can. Crim. (n.s.) at 150.

could admit the evidence. Since they could not say that there was no such evidence, the Court of Appeal upheld the trial judge's ruling. The Court of Appeal did not say what in the case amounted to some evidence of adoption. In an extract from the transcript reproduced in the reasons for judgment of the Court of Appeal, it appears that a witness who had been in the room with the accused at the time the statements were made testified that when the accused said, "Guess what everyone, Dad thinks I hurt Karen", he looked "Kind of choked up. He was scared".<sup>132</sup>

The decision is troubling for two reasons. Firstly, it is difficult to conceive of a less equivocal denial than "No, I didn't". If such a statement can be turned into an admission of guilt because one witness (three witnesses heard the accused make the statement and only one recalled his unusual demeanor) testifies that when he said it he looked choked up and scared, the accused has little protection against the admissibility of out-of-court accusations made against him, no matter by whom or how speculative they are when made.

Secondly, the case continues the view that the question of whether the accused admitted by his conduct the truth of an accusation made to him is a question of conditional relevancy. That is to say, in order to admit the evidence, the judge need merely find that there is sufficient evidence to support a finding of adoption. He need not himself find that there was such an adoption, that question he leaves to the jury. Indeed the Court of Appeal said that the trial judge's responsibility in admitting the evidence was only to find if there was "any evidence" of adoption,<sup>133</sup> although probably the judges equate "any evidence" with evidence sufficient to support a finding. While this holding has the support of all the authorities on the point, perhaps because of the prejudicial nature of such evidence, the trial judge should exercise more control over its admissibility. A judge must of course find that a confession was made voluntarily before it is admitted into evidence. Perhaps the same standard of proof should apply with respect to the admissibility of adoptive admissions, namely that the trial judge must find that the accused admitted the accusation made to him before it is admissible.<sup>134</sup> Chief Justice MacKeigan writing the judgment of the court suggested that in *Regina v. Thompson* the trial judge "could and in my respectful opinion should have excluded the evidence as being of trifling probative value and gravely prejudicial to the accused . . ."<sup>135</sup> If his suggestion were to be followed in future cases, perhaps the same result would be reached, and the accused granted some protection from the admissibility of such prejudicial evidence. Showing their real concern over the admissibility of this type of evidence, the Nova Scotia Court of Appeal while upholding the admission

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<sup>132</sup> *Id.* at 421, 26 Can. Crim. (n.s.) at 148.

<sup>133</sup> *Id.* at 424, 26 Can. Crim. (n.s.) at 150.

<sup>134</sup> See *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, at 1039 (1966); Maguire & Vincent, *Admissions Implied From Spoliation or Related Conduct*, 45 YALE L.J. 226, at 259 (1935).

<sup>135</sup> *Supra* note 130, at 424, 26 Can. Crim. (n.s.) at 152.

of the evidence in *Regina v. Thompson* ordered a new trial because the trial judge did not sufficiently explain the frailties of the evidence to the jury.

Another case reported this year also illustrates how far the courts have gone with the notion that the accused can be taken to have admitted his guilt in certain circumstances by remaining silent.<sup>136</sup> This case is much more troubling than the *Thompson* case because a policeman was involved; the accused had been charged with the offence, indeed was in the courtroom waiting for the trial to start, when the statements were made; none of the statements were made directly to the accused, rather he simply overheard them; and because Justice Martin who dealt with this aspect of the case in the Ontario Court of Appeal showed none of the misgivings in holding the evidence admissible that Chief Justice MacKeigan revealed in *Thompson*. The accused and a co-accused were sitting in the prisoner's dock waiting for the opening of the court. The co-accused beckoned to a police sergeant to come over to the prisoner's dock. The co-accused then had a conversation with the police officer in which he admitted certain facts related to the charge. Some of the statements made in the conversation also implicated the accused. While the accused took no part in the conversation, he was present throughout it. Those parts of the conversation implicating the accused were admitted against him on the grounds that by his silence and conduct he had admitted their truth. On appeal, defence counsel argued that the silence of the accused did not indicate acquiescence, but rather could have been explained by a number of factors, including the advice from his counsel. Mr. Justice Martin, however, held:

There is much to be said for the view that [the accused's] mere silence in the circumstances under which the statements were made would not warrant an inference that he assented to their truth. The admissibility of the incriminating statements as against [him], however, does not rest solely upon his silence. There is evidence which, if accepted, would support an inference that [the accused] by his conduct and demeanor assented to the statements which were made and which incriminated him.<sup>137</sup>

We are not told in what way the accused revealed his assent by his conduct or demeanor.

These cases make a mockery of the accused's right to silence. It would appear that a lawyer should advise his client that if anyone makes an accusation against him, within his hearing, he should immediately deny it and look the person straight in the eye; he should not blush (from anger or embarrassment) as it will be taken as a sign of guilt; he should not smile (at the ludicrousness of the idea) as it will be taken as a sign of guilt; he should not get angry (because such an unfounded allegation would be made) or it will be taken as a sign of guilt; and, he should not appear nervous (at the thought of such an allegation) or it will be taken as a sign of guilt. Upon reflection I wonder if looking a person straight in the eye is not a sure sign a person is guilty, but trying to bluff his way out.

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<sup>136</sup> *Regina v. Govedarov*, 3 Ont.2d 23, 25 Can. Crim. (n.s.) 1 (1974).

<sup>137</sup> *Id.* at 63-64, 25 Can. Crim. (n.s.) 45.

#### D. Former Testimony

##### 1. Conditions of Admissibility

Statements given at any trial under oath and subject to cross-examination are likely to be more reliable than spontaneous exclamations, statements against interest, or for that matter almost any other kind of statement admitted as an exception to the hearsay rule. And yet such statements cannot be admitted at a subsequent trial unless numerous rigid conditions are met: the declarant must be unavailable; the party against whom it is offered must have had an opportunity to cross-examine the declarant at the earlier trial; the parties to the two trials must be identical or at least have privity; and the issues in dispute at the two trials must be substantially identical. The strictness with which the courts apply these conditions is illustrated in *Re G*.<sup>138</sup>

*Re G*. was a custody action which in part turned upon the paternity of the child. The mother of the child was dead. The applicant was the mother's first husband, the respondent her second husband. Although the child was conceived while the mother was married to the applicant, the respondent sought to introduce, among other things, testimony given at two prior trials in order to prove that the applicant was not the father of the child. Unfortunately it is not clear from the judgment exactly what testimony from these prior proceedings the respondent wished to introduce, nor the exact issues in those proceedings. In the first proceeding, the mother was granted a nullity of her marriage to the applicant. The second proceeding was a habeas corpus proceeding brought by the respondent against a relative of the mother to recover possession of the child. The judge dismissed the question of the admissibility of transcripts from either of these proceedings by simply noting that the parties in these proceedings were different than the parties in the present case.<sup>139</sup>

Although other reasons may be suggested for the strict pre-conditions for the admissibility of former testimony, to be consistent with the rationale of at least most of the hearsay exceptions, the conditions must be assumed to be required to ensure the reliability of the offered evidence. That is to say, the conditions ensure that the testimony at the previous hearing was thoroughly cross-examined. But that being so, then obviously the conditions are stated too narrowly. The previous testimony will be thoroughly cross-examined so long as the party cross-examining had the same motive and interest in cross-examining as the party in the present proceeding. Thus there would appear to be no reason why the parties in the two cases must be identical or even why the issues must necessarily be identical. It is no answer to this argument to say that the present party did not have the opportunity to cross-examine because he does not have that opportunity with respect to any other evidence admitted as an exception to the hearsay rule,

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<sup>138</sup> 1 Ont.2d 318, 40 D.L.R.3d 196 (Surr. Ct. 1973).

<sup>139</sup> *Id.* at 323, 40 D.L.R.3d at 203.

and that alone does not render it inadmissible. The arbitrariness of the conditions requiring the parties to be identical can be illustrated in *Re G.* by reference to the nullity proceeding. If the respondent wished to introduce testimony given by the mother in the nullity proceeding why should he be prohibited from doing so simply because he was not a party to that proceeding? If the applicant, who was defending the nullity application, had the same motive and interest in cross-examining the mother's testimony in the nullity proceeding as he would have in the custody proceeding, he can hardly be heard to complain that the testimony in the nullity proceeding is unreliable because he did not have the opportunity to cross-examine it. Unfortunately in *Re G.*, the judge never addressed himself to the rationale of the rule, he simply repeated the tired formula of the rule taken from *Phipson on Evidence*.

## 2. Criminal Code, Section 643

A statutory provision, section 643 of the Criminal Code,<sup>140</sup> provides, among other things, that if a person who gave testimony at a preliminary inquiry is unavailable at the trial of the charge, his testimony at the preliminary inquiry "may be read as evidence in the proceedings". An issue that has arisen fairly frequently is whether the trial judge has a discretion under the section to rule that such evidence is inadmissible even though all the necessary conditions in the section are satisfied. Two cases reported this year dealt with the issue. In *Regina v. Moore*,<sup>141</sup> Madame Justice Van Camp held that she did have a discretion under the section to exclude the testimony. She exercised that discretion in the case to exclude the testimony given by a rape victim at a preliminary inquiry. She did not feel that the credibility of the victim could be fairly assessed from the transcript of her former testimony and since it was the only significant evidence implicating the accused she concluded that it should be excluded. Madame Justice Van Camp rested her decision that the section confers a discretion largely on the basis of authority. However other aspects of her reasons for judgment are interesting. For instance she said that she did not feel bound to hold that the section did not give her a discretion to exclude the evidence because it has been held that other sections in the Evidence Act (perhaps section 12) that are similarly worded, have been held not to confer such a discretion. She stated that "each section and each Act must stand on its own".<sup>142</sup> This seems to reflect an enlightened purposive approach to statutory construction. She also distinguished the troubling case of *The Queen v. Wray*<sup>143</sup> on the basis that in that case "the Court was considering whether evidence should be rejected because it might bring the administration of justice into disrepute and because it was unfair".<sup>144</sup> Many judges have felt

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<sup>140</sup> CAN. REV. STAT. c. C-34 (1970).

<sup>141</sup> 17 Can. Crim. Cas.2d 348 (Ont. High Ct. 1973).

<sup>142</sup> *Id.* at 349.

<sup>143</sup> [1971] Sup. Ct. 272, [1970] 4 Can. Crim. Cas. Ann. (n.s.) 1.

<sup>144</sup> *Supra* note 141, at 350.



that *Wray* limits their discretion to exclude evidence in every case, but the case should be restricted to its facts.

Later in the year, the Ontario Court of Appeal overruled Justice Van Camp's ruling. In *Regina v. Tretter*,<sup>145</sup> Justice Martin delivering the judgment of the court held that section 643 of the Criminal Code does not give a trial judge the discretion to exclude the testimony of a witness given at the preliminary inquiry. The court reached this decision on the basis of a literal reading of section 643. Mr. Justice Martin pointed out that if the intent of the section was to give the trial judge a discretion it would provide: "The Court may permit the evidence to be read."<sup>146</sup> The section reads that the prior testimony "may be read as evidence".

It would be incongruous if the trial judge had the discretion to exclude former testimony under section 643 of the Criminal Code but did not have such a discretion with respect to other exceptions to the hearsay rule. The trial judge could perhaps exclude such testimony pursuant to an overriding discretion to exclude evidence that might mislead the jury. However the better approach would be for the trial judge to admit such testimony, but if at the end of the case it is the only evidence in the case implicating the accused to direct an acquittal on the basis that the evidence is insufficient to support a finding of guilty.

#### E. *Statements Against Interest*

One of the most difficult issues that arises with respect to a statement offered as a "statement against interest" is simply the determination of when a statement is against the pecuniary or proprietary interest of the declarant. This issue arose in *Gallant v. Burke's Estate*.<sup>147</sup> The court avoided the issue by assuming without discussion that the statement in the case was "a statement against interest". The plaintiff sued the estate of the deceased for services that he had rendered to the deceased before his death. The plaintiff alleged at trial that he had looked after the deceased, assisted him to bed nightly and performed other services on the understanding that he would be monetarily compensated. Another witness, however, testified that the deceased had told her that the plaintiff was rendering him services simply for the right to live on a lot owned by the deceased. One of the issues in the case was whether this statement made by the deceased to the witness was admissible. The judge held that the statement was "a statement against the interest of the deceased and for that reason falls under one of the exceptions to the "hearsay" rule".<sup>148</sup> As well as foregoing any discussion, the judge cited no authorities to support his holding. Even a superficial analysis of the rationale for the hearsay exception for "declarations against interest" would have led the judge to realize that the answer to the question posed

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<sup>145</sup> 18 Can. Crim. Cas.2d 82, 26 Can. Crim. (n.s.) 153 (Ont. 1974).

<sup>146</sup> *Id.* at 90, 26 Can. Crim. (n.s.) at 161.

<sup>147</sup> 5 Nfld. & P.E.I.R. 366 (P.E.I. Sup. Ct. 1973).

<sup>148</sup> *Id.* at 368.

in the case deserved more consideration. Statements against interest are assumed to be sufficiently trustworthy to qualify as an exception to the hearsay rule on the basis that people do not normally admit facts that are against their pecuniary interest unless they believe such facts to be true. In order to satisfy the rationale, then, the judge must find that at the time the statement was made it was to such an extent against the declarant's pecuniary interest that the declarant would not have made it unless he believed it to be true. The court did not seem to realize that the statement in issue in the case had a double aspect. If, when making the statement to the witness, the question was whether the deceased had agreed to give the plaintiff anything for his services, then his statement would be against his interest; if the issue was whether the deceased agreed to give the plaintiff a monetary compensation as well as the free use of his land, then the statement was not against his interest but self-serving.

Practical justifications—the difficulty of inquiring into the declarant's subjective state of mind at the time he made the statement—perhaps foreclose implementing in every case the rationale of the exception. However, accepting the rationale of the exception as being an accurate guideline for human behaviour, all that can be inferred from the deceased's statement is that the deceased had agreed to give the accused at least free rent for the services rendered. It should not be admitted for the purpose of showing that he did not agree to give a larger amount. Since this was the only issue in the case, the statement should have been excluded. Any intelligent layman would consider such a proposition nonsense and would urge that the statement and the surrounding circumstances should be admitted for what they are worth. However the rationale of the rule, that people are sincere only when making statements against interest, would foreclose use of the statement in the case for any purpose other than proving that the compensation was at the least free rent.<sup>149</sup>

#### F. *Hospital Records*

Under section 52 of the Ontario Evidence Act,<sup>150</sup> and under the Evidence Acts of most other provinces,<sup>151</sup> a party can introduce into evidence a medical report without having to call to the stand the medical doctor who prepared it. An issue that has been raised under the section is whether a party can have a medical report introduced into evidence pursuant to the section and still call at the trial the medical doctor who prepared it. In a case reported this year, Justice Brooke, writing the judgment of the Ontario Court of Appeal, held that normally a trial judge should require a party to elect as to which of the two courses he will follow.<sup>152</sup> So long as the judgment is read so as to permit a trial judge in his discretion to allow a party to both file a medical report as an exhibit and call the reporting doctor the

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<sup>149</sup> C. McCORMICK, *supra* note 7, at ¶ 279.

<sup>150</sup> ONT. REV. STAT. c. 151 (1970).

<sup>151</sup> See J. SOPINKA & S. LEDERMAN, *supra* note 63, at 90 n. 175 (1974).

<sup>152</sup> *Ferraro v. Lee*, 2 Ont.2d 417, 43 D.L.R.3d 161 (1974).

decision will do no harm. Unfortunately the whole thrust of Justice Brook's reasons for judgment is that such a course should be exceptional. Indeed he states: "This section was not to provide for the introduction into evidence of a medical report when it was the intention of a plaintiff to call the doctor to give *viva voce* evidence . . ." <sup>153</sup> It is unclear how Justice Brooke divined the intention of the section. Certainly there is nothing on the face of the section to suggest this was not its intention. Justice Brooke reasoned that the purpose of the section was "to do away with unnecessary surprise with respect to medical evidence, to dispense with unnecessary attendance of medical practitioners . . . to assure that the control as to when such reports might be admitted in evidence remained with the trial Judge". <sup>154</sup> However, surely one of the purposes was to ensure that medical testimony is presented in the most intelligible manner possible. One manner of achieving this purpose would be to file with the court for examination a medical report, and then call the doctor who prepared the report to take the stand to explain and clarify his report. Indeed anytime an expert is going to be called to give testimony, one would have thought it would be of great assistance to the trier of fact to be able to peruse a written report prepared by him. It would almost always be time-saving and create less confusion. That the intelligible presentation of medical testimony was one of the purposes of the legislation is clear from its legislative history, the practice in other jurisdictions with similar sections pre-dating the Ontario legislation, and the fact that the difficulty of understanding medical testimony was a frequent cause of concern prior to the introduction of the legislation. <sup>155</sup> Justice Brooke asks: "With respect, if the doctor's attendance is necessary to explain the report, what is the value in filing the report at all? It is in that event an incomplete statement . . ." <sup>156</sup> Surely the court could have taken judicial notice of the fact that an oral presentation is often much easier to understand if preceded by a written report. Has anyone ever suggested that counsel on appeal should be compelled to elect whether to make written presentation or oral argument? A trial judge always has a discretion to exclude evidence if he finds it superfluous or confusing. However, where a party has had a medical report admitted into evidence pursuant to section 52 and then wishes to call the doctor to the stand to give oral testimony explaining and clarifying the report, one would have thought that only in exceptional cases would the trial judge exclude this testimony. If the trial judge finds the oral testimony superfluous, he can always order the party calling the doctor to pay an appropriate amount as costs. <sup>157</sup>

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<sup>153</sup> *Id.* at 419, 43 D.L.R.3d at 163.

<sup>154</sup> *Id.*

<sup>155</sup> ONTARIO ATTORNEY-GENERAL'S COMMITTEE ON MEDICAL EVIDENCE IN COURT IN CIVIL CASES (1965).

<sup>156</sup> *Supra* note 152, at 420, 43 D.L.R.3d at 164.

<sup>157</sup> See *Snyder v. Siutters*, [1970] 3 Ont. 789, at 790, 14 D.L.R.3d 173, at 174 (High Ct.); *cited and disapproved* by Brooke, J.A. in *Ferraro v. Lee*, *supra* note 152, at 419, 43 D.L.R.3d at 163.

In a case decided four months before *Ferraro v. Lee*, the same panel of the Ontario Court of Appeal had held that a trial judge should not have permitted a doctor's report to be admitted into evidence after the doctor had completed his testimony.<sup>158</sup> The report contained material that the doctor had not testified about and which was very damaging to the opposite party. It is not clear from the case why the report was admitted into evidence after the doctor gave his oral testimony, or why the doctor did not testify about the matters in the report while giving his testimony, or why the matter could not have been cured by having the doctor recalled to be cross-examined on the material in the report. It is also interesting that the Ontario Court of Appeal did not decide the case on the general point, that normally a party cannot introduce a report and call the doctor.

### G. *Statements of Family History*

Family history, such as births, deaths, marriages and legitimacy are nowadays most frequently proved by the introduction of public records recording these events. However, occasionally a party has to invoke one of the numerous hearsay exceptions that evolved hundreds of years ago to assist in proof of these matters. This year, two cases dealt with the introduction of a statement of a deceased relative to prove pedigree.

Statements concerning family history by an unavailable declarant are one of the oldest hearsay exceptions. When public records were not kept, their necessity was obvious. As well certain conditions were established which purported to guarantee their trustworthiness. The major condition for reliability of the statement, and the condition which was in dispute in both of the reported cases, is the requirement that the statement had been made *ante litem motam* (before litigation was in contemplation). The meaning and application of this condition has resulted in much senseless litigation. Mr. Justice Dickson's judgment of the Supreme Court in *Porteous v. Dorn*<sup>159</sup> suggests that the courts might finally be taking a sensible approach to the issue.

The requirement that statements as to pedigree to be admissible must have been made before a controversy arises is based on the theory that statements made after a controversy arises are likely to be biased and unreliable. However, this objective, to exclude unreliable testimony, would be more nearly achieved if the test for exclusion was simply—was the statement made under circumstances such that the declarant had a motive for not telling the truth? This test would be easier to apply than the test of whether the statement was made *ante litem motam* and it would more nearly achieve the objectives of the requirement. In some situations, the application of the test would be broader than the strict common law requirement—

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<sup>158</sup> *Gazdig v. Desjardins*, 1 Ont.2d 457, 40 D.L.R.3d 649 (1973).

<sup>159</sup> [1974] 6 W.W.R. 176, 45 D.L.R.3d 596 (Sup. Ct.).

a declarant might have an obvious motive to lie even though there was no controversy; in other situations, its application might be narrower—even after a controversy has arisen a declarant might have no reason to falsify matters of pedigree.

In *Porteous v. Dorn*, in order to prove that the claimant's mother and father were never married, a statement of claim in which her mother had sued her father for wages as a housekeeper and a settlement agreement were introduced. Both documents were in effect statements by the parties that they were not married. The trial judge ruled them inadmissible on the basis that the statements in them were made *ante litem motam*. Justice Dickson, in holding they were admissible, found that there was no "lis mota" between the parties:

There was nothing to incline Mrs. Gulka to falsehood in casting herself in the role of housekeeper and employee, and every reason for Mr. Rosenmeyer to plead marriage in defence of the claim if the facts had supported such a plea. No such defence was raised. I find nothing in the circumstances surrounding the agreement to cast doubt on the trustworthiness or efficacy of that document in negation of a married status and would, therefore, hold it to be a declaration as to pedigree and admissible as such without limitation.<sup>160</sup>

If this is the manner in which the question of whether a statement was made *ante litem motam* will be decided in the future, then the courts might as well go directly to the issue of motive to falsify. In *Re G*,<sup>161</sup> statements as to pedigree made at a nullity action were held inadmissible because they were made *ante litem motam*. An analysis might have revealed that even though there was a controversy about the validity of the marriage of the two parties, neither party would have any motive to falsify evidence about the paternity of the child in question in *Re G*.

#### H. *Declarations of Public Rights*

When a case involves historical facts, for instance a claim based on aboriginal rights which depends upon the historical use and occupation of land, the hearsay rule would obviously provide an insurmountable barrier to the determination of the facts since no living person would have personal knowledge of the facts in issue. Thus, in *Re Paulette*, Mr. Justice Morrow provided:

[I]n my treatment of the sometimes repetitious statement of the many Indian witnesses as to what their ancestors did, I have considered them as coming within the exception to the hearsay rule relating to declarations of deceased persons about matters of public and general rights: *Millirpum et al. v. Mabalco Pty. Ltd. et al* (1971) 17 F.L.R. 141).<sup>162</sup>

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<sup>160</sup> *Id.* at 181, 45 D.L.R.3d at 602.

<sup>161</sup> *Supra* note 138.

<sup>162</sup> 42 D.L.R.3d 8, at 19-20 (N.W.T. Sup. Ct. 1973).

## VI. CORROBORATION

Proof in primitive legal systems was largely determined by counting witnesses. Indeed, in some systems different weight was attached a priori to the testimony of different witnesses. The testimony of a landowner might be equal to that of three serfs, or as one Code provided: "In civil cases evidence is only valid if given by two males, or by one male and two females."<sup>163</sup> In a rational legal system, it would appear obvious that the weight to be attached to evidence should be a matter of quality not quantity, and class interests should not be reflected in the assessment. Tested against such criteria, our present system of proof totters mid-way between a primitive and rational system. While generally we trust the factfinder's ability to subjectively evaluate the evidence, the testimony of some witnesses must be corroborated, and the testimony of others must be the subject of a special cautionary warning to the jury. Typical of the common law, however, the rules of corroboration might serve their purpose of protecting the innocent in a round-about-way. The rules respecting corroboration have become so technical that it is a disingenuous appellate court judge who cannot find an error in the trial judge's charge to the jury with respect to corroboration. From a reading of the cases reported this year, one is left with the distinct feeling that a Court of Appeal is likely to order a new trial because of a misdirection relating to corroboration where they feel some sympathy towards the accused, or where his conviction appears to be against the weight of the evidence. Although this subterfuge perhaps achieves the purpose of the rules, it does so at the expense of candor and frankness in the judicial decision-making process.

A. *Witnesses That Need To Be Corroborated*1. *Accomplices*

Under common law, a jury must be instructed that it is dangerous to convict an accused on the evidence of an accomplice in the absence of corroboration. A perennial issue is—who is an accomplice? It was held in 1974 that an accessory after the fact is not an accomplice;<sup>164</sup> a person who might have been charged with another crime arising out of the incident, but not with the crime the accused was charged with, is not an accomplice;<sup>165</sup> and, a purchaser of narcotics while he might be guilty of possession is not an accomplice to an accused who is charged with trafficking in a narcotic.<sup>166</sup> Although the last two cases contain a fairly lengthy discussion of who is an accomplice, the only interesting aspect of all three decisions is that in prin-

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<sup>163</sup> Mejele, art. 1685, cited in Livneh, *The Law of Evidence (Amendment) Law*, 1968, 5 ISRAEL L. REV. 268 (1970).

<sup>164</sup> Regina v. Williams, 1 Ont.2d 474 (1973).

<sup>165</sup> Regina v. Quiring, [1974] 6 W.W.R. 13, 27 Can. Crim. (n.s.) 367 (Sask.).

<sup>166</sup> Regina v. Perry, 6 Nfld. & P.E.I.R. 133, 18 Can. Crim. Cas.2d 366 (P.E.I. 1974).

iple they are probably all wrongly decided. An accomplice's evidence is likely to be unreliable because as a result of testifying against the accused he might expect some favour or leniency from the prosecution with respect to his own involvement in the crime. Therefore, in the law of corroboration, the concept of an accomplice should be construed to include any person who might succumb to this temptation for lying. The material witnesses in all three of the cases reported in 1974 had this motive for lying, and yet in defining an accomplice the judges never once adverted to the reasons for the rule.<sup>167</sup>

## 2. *Unsavory Witnesses*

While it is difficult to find holdings on this point, there is often a suggestion in the cases that even though technically the witness's evidence does not require corroboration, if a witness is of unsavoury character, closely connected with the crime, or has a strong motive to lie, there is an obligation on the trial judge to direct the jury to view their evidence with caution. Such a suggestion was made in at least one case this year.<sup>168</sup>

## B. *Function of Judge and Jury*

Whether there is evidence in a case which amounts to corroboration is for the jury to decide. The judge however, as part of his general responsibility to ensure the jury acts reasonably, must make a preliminary determination of whether the evidence is sufficient to support a finding of corroboration. He must also inform them of all the evidence that is capable of amounting to corroboration; his failure to do so is a misdirection.<sup>169</sup> If there is more than one accused person, he must specify the guilt of which accused the evidence might corroborate.<sup>170</sup> Also if the law deems it dangerous to convict on the basis of the testimony of a particular witness, in the absence of corroboration, it is a misdirection if the judge tells the jury that they must convict if they believe the witness's evidence beyond a reasonable doubt.<sup>171</sup>

## C. *Definition of Corroboration*

What is the nature of corroborative evidence? Wigmore describes precedents on this question as "mere useless chaff".<sup>172</sup> The cases reported this year add to the stack. In determining whether evidence might be corroborative, most judges begin by quoting or paraphrasing *The King v. Bas-*

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<sup>167</sup> In *Horsburgh v. The Queen*, [1957] Sup. Ct. 746, 2 Can. Crim. (n.s.) 228, 63 D.L.R.2d 699, the Supreme Court of Canada sanctioned a purposive approach to the definition of an accomplice.

<sup>168</sup> *Regina v. Nalon*, 14 Can. Crim. Cas.2d 49 (Ont. 1973).

<sup>169</sup> *Id.*

<sup>170</sup> *Regina v. Lieberman*, 17 Can. Crim. Cas.2d 536 (Ont. 1974).

<sup>171</sup> *Id.*

<sup>172</sup> VII WIGMORE § 2059, at 334.

*kerville*.<sup>173</sup> For instance, in *Regina v. Quiring*, Chief Justice Culliton stated: "Evidence . . . to be corroborative, must be independent evidence and must implicate the accused."<sup>174</sup> The definition is usefully broken down into its two aspects. First, the evidence must be independent of the witness it is corroborating. Secondly, it must implicate the accused by proving the offence or the identity of the accused. While both the offence and identity, if disputed, must be corroborated at the end of the case to implicate the accused, one piece of evidence to be corroborative does not have to corroborate both facts.<sup>175</sup>

Since the need for corroboration is assumed to arise because of the unreliability of a particular witness's testimony, logically, corroborative evidence must be evidence that the witness could not easily, or is not likely to, fabricate. Posing the latter part of this statement as a question is a useful way of analysing whether evidence is independent of a witness's testimony. Thus, for instance, a bloody kleenex that the victim alleged the accused cleaned his nose with after she had struck him is not corroborative<sup>176</sup> since it is only significant if her testimony is believed. It would be easy for her to manufacture such a story to explain the bloody kleenex. If there were no other plausible explanations for the bloody kleenex, then such evidence might have been corroborative since it would be relevant independent of her testimony. This requirement that the evidence be independent explains why a recent complaint by itself is not accepted as corroboration.<sup>177</sup>

The evidence to be corroborative must also implicate the accused by tending to prove the offence or identity. It is unclear how probative the evidence implicating the accused must be before it can be corroborative. The courts require judges to instruct the jury that to be corroborative the evidence must be more consistent with the truth of the evidence of the witness whose testimony is in need of corroboration, than with its falsity.<sup>178</sup> So strictly is this requirement enforced that it is insufficient and a misdirection to instruct the jury "that evidence should be consistent with the truth of the accomplice's story on matters that are in issue",<sup>179</sup> or "[c]orroboration is evidence that supports, in this case, her evidence and implicates the accused in the commission of the crime".<sup>180</sup> Although the verbal formula required could be interpreted as simply restating the standard of relevancy, obviously the judges assume they are stating a higher degree of probative value than

<sup>173</sup> [1916] 2 K.B. 658, 12 Cr. App. R. 81, [1916-17] All E.R. Rep. 38 (C.C.A. 1916).

<sup>174</sup> *Supra* note 165, at 33-34, 27 Can. Crim. (n.s.) 367, at 389.

<sup>175</sup> *Regina v. Goforth*, [1974] 6 W.W.R. 119, 19 Can. Crim. Cas.2d 88 (Sask. 1974).

<sup>176</sup> *Regina v. White*, 16 Can. Crim. Cas.2d 162, 27 Can. Crim. (n.s.) 66 (Ont. 1974).

<sup>177</sup> *Regina v. Pelletier*, 12 Can. Crim. Cas.2d 5, 24 Can. Crim. (n.s.) 90 (Sask. 1973).

<sup>178</sup> *Regina v. Lieberman*, *supra* note 170.

<sup>179</sup> *Regina v. Nalon*, *supra* note 168, at 55.

<sup>180</sup> *Regina v. White*, *supra* note 176, at 167, 27 Can. Crim. (n.s.) at 70.



the one required to simply render evidence relevant. Independent evidence, even though relevant, has been held not to be corroborative. In *Regina v. Físico*,<sup>181</sup> on a charge of arson the Crown led evidence that the victim of the alleged arson had refused to buy more stolen merchandise from the accused. This evidence while relevant in that it revealed a motive for the crime—as being an act of vengeance—was held not to be sufficiently probative to amount to corroboration.

During the year, the following evidence was held to be or stated as being capable of being corroboration: on the issue of consent to intercourse, the physical and emotional condition of the victim following the alleged rape;<sup>182</sup> however, in one case the court said that if such evidence was accepted as corroboration the trial judge must “caution the jury in language appropriate to the case of the frailties inherent in a condition of distress arising from the fact that it may be feigned [may not be independent] or may have causes other than the alleged rape or indecent assault”;<sup>183</sup> on the issue of consent to intercourse, bruises and other physical injuries and torn clothing;<sup>184</sup> on the issue of consent, the victim’s screams heard by a witness;<sup>185</sup> on the issue of consent, the fact that the victim was let out of the accused’s truck some distance from home;<sup>186</sup> false and inconsistent statements made by the accused to the police;<sup>187</sup> the fact that a knife that the victim alleged was used to threaten her was found in the accused’s possession;<sup>188</sup> on the issue of whether the accused had intercourse with a female under fourteen, similar acts and evidence of opportunity combined with the most suspicious circumstances;<sup>189</sup> evidence that the accused attempted suicide after being questioned about the crime.<sup>190</sup>

#### D. *Mutual Corroboration*

An issue that frequently arises, and on which there are conflicting case

<sup>181</sup> *Regina v. Físico*, 15 Can. Crim. Cas.2d 20, 24 Can. Crim. (n.s.) at 207 (Ont. 1973).

<sup>182</sup> *Regina v. Lindsay*, 24 Can. Crim. (n.s.) 105 (Ont. 1970) (upon arriving home, the victim’s eyes were starry, her face dead white, she had blood on her forehead, and her face was streaked with dirt as if she had been crying); *Regina v. White*, *supra* note 176 (the victim was seen running out of a park in a hysterical and disheveled condition, her hair matted and full of pine needles, screaming for assistance with her alleged assaulters in pursuit); *Regina v. Bear*, 13 Can. Crim. Cas.2d 570, 24 Can. Crim. (n.s.) 393 (Sask. 1973) (victim in emotional and hysterical condition when interviewed by police officers, evidence of physical bruises and injuries).

<sup>183</sup> *Regina v. Boyd*, 17 Can. Crim. Cas.2d 6, at 11, 25 Can. Crim. (n.s.) 381, at 386 (Ont. 1974).

<sup>184</sup> *Regina v. Goforth*, *supra* note 175; *Regina v. Bell*, *supra* note 106; *Regina v. Tweedale*, 24 Can. Crim. (n.s.) 100 (Ont. 1973); *R. v. Lindsay*, *supra* note 182.

<sup>185</sup> *R. v. Lindsay*, *supra* note 182 (a witness heard screams coming from the place where the victim said she was forced into a truck).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; *Regina v. White*, *supra* note 176.

<sup>188</sup> *Regina v. Goforth*, *supra* note 175.

<sup>189</sup> *Regina v. Williams*, *supra* note 164 (evidence that under suspicious circumstances the accused and victim were found in a bedroom with the door locked).

<sup>190</sup> *Id.*

authorities on almost all aspects,<sup>191</sup> is whether a witness whose evidence must be corroborated can corroborate the evidence of another such witness. This year, the cases held that the wife of an accomplice is capable of corroborating his evidence;<sup>192</sup> the evidence of a victim of a sexual offence may be corroborated by another such victim;<sup>193</sup> and that an accomplice can corroborate the evidence of a rape victim.<sup>194</sup> The courts appear to be gradually liberalizing the rules of mutual corroboration. But they are moving cautiously, and in one case, while it was held that victims of a gang rape might corroborate one another, the court stated that the trial judge in such a case "should nevertheless warn the jury that the evidence of the complaints should be approached with caution because of the danger of their collaborating to fabricate their complaints".<sup>195</sup>

#### E. Corroboration in Civil Cases

The standard for corroboration in civil cases is much lower than the standard in criminal cases; the evidence merely has to support the case in some material way.<sup>196</sup> The provision most fruitious of litigation concerning corroboration in civil cases, is the requirement in virtually all provinces, designed to discourage dishonest or ill-founded claims against estates, that a party in an action against the personal representative of a deceased person cannot obtain judgment unless his evidence on any matter occurring before the death of the deceased person is corroborated. The Prince Edward Island Supreme Court held in 1974 that the establishment by the deceased of a joint bank account with the opposite party to the action was not capable of corroborating that party's testimony that the money the deceased put in the bank account was intended to be a gift to him.<sup>197</sup> The Nova Scotia Supreme Court, Appeal Division, held that a devise of land by will to the plaintiff, made shortly after an alleged oral agreement to convey the land, amounted to corroboration of the oral agreement.<sup>198</sup>

Most provinces also require corroboration of the testimony of the mother of a child in affiliation proceedings. The Newfoundland Court of Appeal held<sup>199</sup> that an admission by the alleged father that he had sexual intercourse with the mother of the child during the month in which she became pregnant is sufficient evidence to corroborate the testimony of the mother that he is the father.

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<sup>191</sup> Sheppard, *Mutual Corroboration*, 15 CRIM. L.Q. 62 (1972).

<sup>192</sup> Regina v. Nalon, *supra* note 168.

<sup>193</sup> Regina v. Fisico, *supra* note 181.

<sup>194</sup> Regina v. White, *supra* note 176; Regina v. Stewart, 14 Can. Crim. Cas.2d 97 (Sask. 1973).

<sup>195</sup> Regina v. Fisico, *supra* note 181, at 23, 24 Can. Crim. (n.s.) at 210.

<sup>196</sup> Johnson v. Nova Scotia Trust Co., 6 N.S.2d 88 (1973).

<sup>197</sup> MacLeod's Estate v. Bonnell, 4 Nfld. & P.E.I.R. 511, 39 D.L.R.3d 104 (P.E.I. 1973).

<sup>198</sup> Johnson v. Nova Scotia Trust Co., *supra* note 196.

<sup>199</sup> Buckman v. Griffin, 6 Nfld. & P.E.I.R. 104 (Nfld. 1974).