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UNIVERSITY OF ALBERTA

# THE "NEW APPROACH" TO THE ADMISSION OF HEARSAY EVIDENCE

BY

KEVIN P. DOYLE

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of **MASTER OF LAWS.**

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "The "New Approach" to the Admission of Hearsay Evidence" by Kevin P. Doyle in partial fulfillment for the degree of Master of Laws.

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Date Nov.12 , 1993.

I dedicate this thesis to my parents Len and Armida, my sisters Ann, Karen, Marina, Arlene, Brenda and Barb, and my brother John, who continually remind me of what is important in life and whose unconditional love gives me the confidence to strive to achieve it.

I also dedicate this thesis to my chosen family Katrysha, Heather and Craig, who constantly challenge me to think and continue to grow, and without whose constant support I might never have completed this dissertation.

Thank you, I love you all.

## ABSTRACT

Recently the Supreme Court of Canada radically reformed the law as it relates to the admission of hearsay evidence. No longer is hearsay admissible only if fits within one of the traditional categorical exceptions. The principles now governing admissibility of hearsay are Wigmore's twin criteria of "necessity" and "reliability". This thesis analyzes and critiques this "new approach" to the admission of hearsay, assessing its impact on the "old categorical approach", and evaluating its ability to protect the accused's rights in the criminal trial.

Chapter Two traces the historical development of the hearsay exclusion rule and its exceptions to identify the rationale underlying the rule's existence, as well as the protections it seeks to afford. Preserving the party-litigant's opportunity to test the credibility of witness under cross-examination is the primary reason for the continued existence of the rule. Cross-examination tests for the presence of four testimonial dangers: insincerity, misperception, faulty memory and ambiguity of language. Traditional categorical exceptions are supposedly based upon the circumstances being such as to obviate any concerns as to the presence of these dangers. Cross-examination would serve no useful purpose in that case; therefore, if the hearsay is necessary, it will be admitted in evidence.

Chapter Three scrutinizes three categorical exceptions allowing for the admission of inculpatory hearsay evidence: the dying declaration, declarations against interest and the *res gestae*. It appears that these exceptions provide few assurances that none of the testimonial dangers are present. Thus, it cannot be said that cross-examination would serve no useful purpose. Also, it is questionable whether there is a "necessity" for the admission of this type of evidence in certain circumstances. Thus, hearsay may be admitted pursuant to these exceptions despite its failure to satisfy the twin criteria.

Chapter Four analyzes and critiques the "new approach" to the admission of hearsay evidence. While this approach provides more flexibility, we conclude that the principles of "necessity" and "reliability" are too vague and require further clarification. Also, the trial judges' discretion to determine which factors are relevant to "reliability" is too broad and some limitations should be imposed on it. We also conclude that this

"new approach" overlays and limits the application of traditional categorical exceptions. Thus, hearsay satisfying the preconditions attached to a firmly-rooted exception must also satisfy the twin criteria of "necessity" and "reliability" before it will be admitted against an accused in a criminal trial.

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## TABLE OF CONTENTS

## CHAPTER THREE

## AN ANALYSIS OF THREE EXISTING COMMON LAW EXCEPTIONS: DYING DECLARATIONS, DECLARATIONS AGAINST INTEREST, AND THE *RES GESTAE* CATEGORY . . . . . 59

## CHAPTER FOUR

## RELIABILITY AND NECESSITY: THE APPLICATION OF *KHAN/SMITH* FRAMEWORK AND A CRITIQUE OF THIS NEW APPROACH TO THE ADMISSION OF HEARSAY . . . . . 114

# CHAPTER ONE

# INTRODUCTION AND OVERVIEW

> "The reason why this evidence is maintained to have been inadmissible is that its cogency depends on hearsay. The witness could only say that a record made by someone else showed that, if the record was correctly made, a car had left the works bearing three particular numbers. He could not prove that the record was correct or that the numbers which it contained were in fact the numbers on the car when it was made. This is a highly technical point, but the law regarding hearsay evidence is technical, and I would say absurdly technical". - Lord Reid in *Myers* v. *Director of Public Prosecutions*.[1]

## I. STATEMENT OF THE PROBLEM

In two recent decisions, *R.* v. *Khan*[2] and *R.* v. *Smith*,[3] the Supreme Court of Canada has signalled an end to the traditional common law categorical approach to the admission of hearsay evidence. Hearsay evidence, henceforth, will be admissible pursuant to the twin criteria of "necessity" and "reliability", the very same principles which have long-since been identified by such esteemed academics as J.H. Wigmore[4] and J.M. Maguire[5] as underlying most, if not all, of the firmly-rooted hearsay exceptions. No longer are courts constrained by the technicalities of the common law as it related to the admission of out-of-court declarations. Trial judges now have the flexibility to admit hearsay in new and novel situations, so long as the evidence is both necessary and reliable. In the wake of *Khan* and *Smith*, there appeared to be much to rejoice about,

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1. (1964), [1965] A.C. 1001 at 1019, [1964] 2 All E.R. 881 (H.L.).

2. [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 113 N.R. 53, 41 O.A.C. 353, aff'g (1988), 27 O.A.C. 143, 64 C.R. (3d) 281, 42 C.C.C. (3d) 197.

3. [1992] 2 S.C.R. 915, aff'g (1990), 75 O.R. (2d) 753, 61 C.C.C. (3d) 232, 2 C.R. (4th) 253, 42 O.A.C. 395.

4. J.H. Chadbourn, ed., *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown & Co., 1974) at 251ff.

5. *Evidence: Common Sense and Common Law* (Chicago: Foundation Press, 1947) at 147.

especially considering that this much-needed reform permitted the admission of out-of-court disclosures by child-complainants in sexual assault cases.

However, after a thorough analysis of Justice McLachlin's decision in *Khan*, I began to question whether the admission of hearsay evidence pursuant to the reasons espoused there was as "principled" as Chief Justice Lamer, in *Smith*, later claimed it to be. While I had no doubts respecting the need for flexibility in the law of hearsay to permit the admission of out-of-court disclosures by child-complainants in sexual assault cases, I began to question whether the rights of the accused could, in fact, be adequately safeguarded under the framework propounded by Justice McLachlin. This caused me to inquire into what exactly were the rights and protections the hearsay exclusion rule sought to preserve for the accused. Why was this evidence withheld from the trier of fact, especially considering how much we depend upon this type of information to manage and run our every-day affairs? What dangers did the admission of hearsay in the criminal trial present? Why did the common law permit the admission of hearsay evidence in certain circumstances and not others? What were the judicial rationales, asserted or implied, for these categorical exceptions?

As my research progressed and I began to understand the reason and purpose behind this exclusion rule, I became concerned about the validity or adequacy of many of these firmly-rooted categorical exceptions allowing only for the admission of inherently reliable evidence. It appeared that many of the rationales underlying these common law exceptions were archaic and no longer cogent or convincing in today's society. Surely *Khan* and *Smith*, despite all of my concerns, represented a vast improvement to this area of the law of evidence? Thus, the choice of topic for my graduate thesis was born. The fundamental questions which acts as the foundation and unifying thread throughout the analysis in the pages following is: Do either the 'new approach' as set out in *Khan* and *Smith*, or the 'old categorical approach' adequately safeguard and protect the rights of the accused when inculpatory hearsay evidence is admitted in the criminal trial? What possible modifications or reforms to either approach would better safeguard and protect those rights?

## II. On the Organization of the Thesis

The thesis is divided into five chapters, including this introductory one. Each of the three middle chapters is a distinct and almost autonomous essay, complete with a comprehensive conclusion. However, each chapter builds upon the principles elucidated and examined in the previous one, culminating in our critique of the *Khan/Smith* framework in Chapter Four. The subject matter and scope of each of these chapters is as follows:

Chapter Two lays out the groundwork for our analysis and critique of the hearsay exclusion rule, its firmly rooted exceptions and the 'new approach' to the admission of hearsay adopted by the Supreme Court in *Khan* and *Smith*. It begins by propounding, after some debate, a definition of 'hearsay' and a statement of the exclusion rule. We then trace the historical development of both the rule and its exceptions. The primary objective of the chapter is to identify the purpose and reason for the continued existence of the rule. What are the dangers to the accused which the admission of inculpatory hearsay evidence presents, and what procedural safeguards does this rule seek to preserve? Under what circumstances are concerns as to the presence of these dangers or the need for these procedural safeguards obviated, such that hearsay evidence is admitted into the criminal trial? Must each and every one of these potential dangers or procedural safeguards be addressed? Is there truly one all-encompassing rationale common to most or all of the exceptions recognized at common law? Answering these questions provides us with the necessary tools to evaluate and critique the admission of hearsay evidence pursuant to both firmly-rooted categorical exceptions and the *Khan/Smith* framework.

An analysis of three firmly-rooted common law hearsay exceptions allowing for the admission of inculpatory hearsay evidence into the criminal trial then follows in Chapter Three. The rationales underlying these and the preconditions necessary to trigger their application are extracted from the case law. In many cases, both the

rationales and preconditions have evolved and changed over time. Keeping in mind the dangers inherent in hearsay and the procedural safeguards protecting the accused which the exclusion rule seeks to preserve, we then assess the validity of the exceptions' rationales and preconditions. It soon becomes apparent that several of these age-old categorical exceptions do not necessarily preclude the admission of either unnecessary or unreliable hearsay evidence. Thus, the rights of the accused may not be adequately safeguarded when inculpatory hearsay evidence is admitted pursuant to one of these exceptions.

In Chapter Four we critically examine the 'new approach' to the admission of hearsay evidence set out by the Supreme Court of Canada in *Khan* and *Smith*. We begin the chapter by reviewing the judgments of Justice McLachlin and Chief Justice Lamer and attempting to extract a coherent set of principles upon which the trial judge may determine the admissibility of hearsay. We scrutinize the decisions for any inconsistencies within and between the two judgments? We inquire as to whether or not the principles set out in *Khan* and *Smith* are compatible with the rationale underlying the hearsay exclusion rule. Most importantly, throughout this chapter we constantly ask whether this 'new approach' ensures that only inculpatory hearsay evidence which is both necessary and reliable is admitted in the criminal trial.

Having surveyed and examined both *Khan* and *Smith*, we then examine the subsequent application of this framework by the lower courts. Clarification and further refinement of the twin criteria of "necessity" and "reliability" - the principles governing admissibility - was left to the trial courts and provincial courts of appellate jurisdiction. However, our analysis demonstrates that the interpretations and further elucidations of these principles by the lower courts have, in some instances, been inconsistent with both the purpose and reasoning underlying the continued existence of the hearsay exclusion rule, as well as the rationale underlying this 'new approach' as expounded by Chief Justice Lamer in *Smith*. In addition, the trial judge has been provided with a broad and, practically, unfettered discretion to determine what factors are relevant to the circumstantial trustworthiness of hearsay. Our analysis of the factors considered by the

lower courts relevant to this "reliability" assessment demonstrates that this discretion is too broad, and that it requires some guidelines or limitations be imposed upon it.

In the final section of Chapter Four we assess the implications of *Khan* and *Smith* on firmly-rooted hearsay exceptions. Do the twin criteria of "necessity" and "reliability" overlay existing common law hearsay exceptions, such that the circumstances must satisfy not only the preconditions traditionally associated with the particular categorical exception, but also the twin criteria set out in *Khan* and *Smith?* Does the *Khan/Smith* framework represent a minimum constitutional threshold for the admission of inculpatory hearsay evidence in a criminal trial, the failure to satisfy which results in a denial of the accused's right not be deprived of his or her liberty except in accordance with the principles of fundamental justice? If either of these questions are answered in the affirmative, then the *Khan/Smith* framework represents a complete and radical restatement of the law as it relates to the admission of hearsay evidence.

In our concluding chapter, having just identified and reviewed weaknesses and criticisms of the *Khan/Smith* framework in the previous chapter, we make recommendations intended to alleviate or address these concerns. We conclude that, after having implemented these recommendations, the *Khan/Smith* framework would best protect and preserve the rights of the accused when hearsay evidence is tendered for admission in the criminal trial process. In the latter part of the chapter we revisit some of the firmly-rooted hearsay exceptions which were scrutinized in Chapter Three. Applying the principles of "necessity" and "reliability", as they have been elucidated in Chapter Four, we suggest that many of these firmly-rooted hearsay exceptions may no longer have validity or be available for use by either the accused or the Crown. We suggest that the admission of inculpatory hearsay against the accused pursuant to one of these categorical exceptions is likely to result in an infringement of a right protected under the *Canadian Charter of Rights and Freedoms*.[6] Thus, it appears that many of these common law exception must either be modified so as to comply with the

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6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

*Khan/Smith* framework, or face being declared unconstitutional and of no force and effect.

# CHAPTER TWO

# HISTORICAL DEVELOPMENT OF HEARSAY EXCLUSIONARY RULE AND ITS EXCEPTIONS

> "The evidence thus admitted is hearsay and the person on whose credit it rests is beyond cross-examination and is not even seen by the jury. The ground is that it is very unlikely that a man would say falsely something as to which he knows the truth, if his statement tends to his own pecuniary disadvantage. As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth century philosophy." - Lord Justice Hamilton in *Ward v. Pitt (H.S.) & Co; Lloyd v. Powell Duffryn Steam Coal. Co.*[1]

## I. INTRODUCTION

In an oft-quoted passage, J.H. Wigmore describes the hearsay exclusionary rule as "that most characteristic rule of the Anglo-American law of evidence - a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure".[2] But to understand the present day application of this acclaimed rule and the ongoing development and refinement of exceptions to it, some regard must be given to the historical origins of both the rule and its exceptions. In this chapter we attempt, first, to provide a working definition of 'hearsay' and to set out and expound the hearsay exclusionary rule. We then trace the origin and development of the rule over the past three centuries, identifying factors which

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1. [1913] 2 K.B. 130 at 138, rev'd on other grounds (*sub nom. Lloyd v. Powell Duffryn Steam Coal Co.*) [1914] A.C. 733, [1914-15] All E.R. Rep. Ext. 1329 (H.L.) [hereinafter *Ward* cited to K.B.].

2. J.H. Chadbourn, ed., *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown & Co., 1974) at 28 [hereinafter *Wigmore on Evidence*]. Note this opinion is not shared by every member of the judiciary. Lord Reid in *Myers v. D.P.P.* (1964), [1965] A.C. 1001 at 1019, [1965] 2 All E.R. 881 [hereinafter *Myers* cited to A.C.], described the rule as absurd, a view also shared by Lord Diplock in *Jones v. Metcalfe*, [1967] 3 All E.R. 205 at 208, [1967] 1 W.L.R. 1286 at 1291.

have influenced it, and gleaning from ancient to modern precedent the rule's ever-evolving rationale.

An analysis of the purpose and reason for this exclusionary doctrine then follows. What makes the admission of hearsay evidence more dangerous to the intergrity of the trial process than *viva voce* evidence, such that hearsay evidence warrants exclusion? The dangers inherent in testimony and the trial procedures which test for their presence are examined and assessed as to relative importance. It soon becomes evident that one particular trial procedure, cross-examination, plays a dominant role in testing the credibility of witnesses. Thus, it will be argued that preserving the party-litigants' right to test a witness' veracity, perception and memory under the microscope of cross-examination is the predominant reason for the rule's continued existence today.

An historical overview of the creation and development of exceptions to the hearsay exclusion rule follows. The courts' lack of consistent and coherent reasoning in formulating new exceptions makes itself apparent. In the face of this haphazard approach, we attempt then to identify a general rationale which explains the diverse number of the hearsay exceptions existing at common law. Wigmore's twin principles of "necessity" and "reliability" are set out and adopted as the most persuasive and comprehensive rationale.

## II. HEARSAY EXCLUSIONARY DOCTRINE

### A. What is Hearsay - What is the Rule?

#### 1. Definition of Hearsay

Any discussion of the hearsay rule must certainly begin with a definition of hearsay, as, at first glance, the rule appears to be simply that hearsay is inadmissible.[3]

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3. Note the use of such phrases as "The Hearsay Exclusionary Doctrine" and "The Rule Against Hearsay" encourages this inference. See, for example, the use of "The Rule Again Hearsay" as chapter headings in both M.N. Howard, P. Crane & D.A. Hochberg, eds., *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) [hereinafter *Phipson on Evidence*] and R. Cross & C. Tapper, *Cross on Evidence*, 7th ed. (London: Butterworths, 1990).

Thus, defining hearsay essentially expounds the substance of the rule. However, some definitions simply describe "hearsay" as any out-of-court statement or assertion offered in court.[4] This definition must certainly be inadequate for the purposes of the above pronouncement of the rule, as out-of-court statements are routinely admitted into court without their falling under a recognized hearsay exception. The resolution of this anomaly lies in the fact that there appears to exist two distinct approaches to defining hearsay.

The first approach, set out in the previous paragraph, simply focuses upon the qualities of the evidence tendered. If the evidence relates to some assertion or statement, whether oral, written. or implied by conduct, which was not made in the courtroom during the proceedings, it is hearsay. The alternate approach builds upon this definition and further distinguishes between out-of-court statements or assertions on the basis of the purpose for which the statement or assertion is tendered in evidence. Only those statements or assertions offered for the purpose of establishing the truth of their contents are hearsay.[5]

Professor McCormick, for example, provides the following definition epitomizing the latter 'purposive' approach:[6]

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4. The Concise Oxford Dictionary defines "hearsay evidence" simply as "evidence given by a witness based on information received from others rather than personal knowledge".

5. J.B.C. Tregarthen, in *The Law of Hearsay Evidence* (London: Stevens & Sons, 1915), dedicates an entire chapter in his book to this distinction. He states: [*Ibid.* at 10]

> It is of the first importance to establish as precisely and definitely as possible the distinction between a statement which is original evidence and a statement which is hearsay. A statement is original evidence when the fact that it was made is relevant to the issue independently of the truth or honesty of the statement. A statement is hearsay when only a fact dependent on its truth or honesty is relevant to the issue.

6. As cited by R.J. Delisle in *Evidence: Principles and Problems* (Toronto: Carswell, 1984) at 203. Phipson concurs with this definition: [*Phipson on Evidence, supra* note 3 at 559]

> Out-of-court statements may constitute either original evidence (where the statement is in issue, or relevant, independent of its truth or falsity), or hearsay (where it is used as an assertion to prove the truth of the matter stated). The key to the above distinction is the purpose for which the evidence is tendered.

> Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value on the credibility of the out-of-court asserter. [Emphasis added.]

Thus, the use made of this type of an out-of-court statement becomes a definitional element of the concept. The Privy Council in *Subramanian* v. *Public Prosecutor*[7] supports this interpretation:[8]

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made. [Emphasis added.]

Unfortunately, these two approaches produce some confusion as courts and commentators sometimes fail to state clearly upon which definition they are relying, or worse, waiver back and forth between the two approaches without comment. For example, immediately after citing with favour the above-quoted passage from *Subramanian*, E.G. Ewaschuk states in his article "Hearsay Evidence":[9]

> Admissible hearsay which is not tendered to establish the verity of a statement is termed 'original' evidence. [Emphasis added.]

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7. [1956] 1 W.L.R. 965 [hereinafter *Subramanian*].

8. *Ibid.* at 969. See *R. v. Douglas*, [1992] B.C.J. No. 908 (S.C.) (QL), where Perry J. uses almost the identical language in stating when "[e]vidence made to a witness by a person who is not himself called as a witness may or may not be hearsay". See also the oft-quoted decision of Justice MacDonald in *R. v. Baltzer* (1974), 27 C.C.C. (2d) 118 at 143 (N.S.C.A.):

> Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristics but the use to which it is put. Whenever a witness testifies that someone said something, immediately one should ask, "what is the relevance of the fact that someone said something". If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence - the truth or falsity of the statement is of no consequence: if the relevance of the statement lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is. [Emphasis added.]

9. (1978) Osgoode Hall L.J. 407 at 408.

Under the 'purposive' approach adopted by the Privy Council in *Subramanian*, out-of-court assertions "not tendered to establish the verity of a statement" are, by definition, not hearsay, let alone "admissible hearsay".

While there may be valid arguments for and against adopting either approach, for the purpose of this thesis, we do not adopt the purposive approach. This approach buries within the definition of hearsay an important element of the exclusionary doctrine which, in this author's opinion, is better placed within the statement of the rule. Surely any analysis of the hearsay rule, the "most complex and most confusing of the exclusionary rules of evidence",[10] would benefit from keeping definitions simple and clear.[11] For this reason, admittedly not of overwhelming persuasive merit, for the purposes of this thesis "hearsay" and "hearsay evidence" mean: any out-of-court assertion, express or implied, whether made orally, in writing, or by conduct. In keeping with the above-stated approach, we will discuss use of hearsay as original evidence under a separate heading following our statement of the hearsay exclusion rule.

### a) Inclusion of Non-assertive Conduct

By including the words "express or implied" in our definition of hearsay, statements or conduct which unintentionally imply an assertion are caught under the rule. A great deal of controversy exists over whether such inclusion within the hearsay definition casts the doctrine's 'net' too widely.[12] Owing to the length of this chapter and

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10. D. Byrne & J.D. Heydon, *Cross on Evidence*, 4th Australian ed. (Sydney: Butterworths, 1991) at 799.

11. For an example of a complex and cumbersome definition, see J.M. Maguire, "The Hearsay System: Around and Through the Thicket" (1961) 14 Vand. L.Rev. 741 at 769 [hereinafter "Through the Thicket"], where he proposes a definition which requires an entire page containing six paragraphs and numerous subparagraphs. The definition itself has its own definitional section.

12. Cross, *supra* note 3 at 529-33, argues that the hearsay rule applies to conduct intended to be assertive, such as nods, head shaking, signs and other gestures, (Cross cites *Chandrasejara v. R.*, [1937] A.C. 220, [1936] 3 All E.R. 865 (P.C.)) but does not extend to conduct which is not intended to be assertive. E.M. Morgan in "Hearsay and Non-hearsay" (1935) 48 Harv. L. Rev. 1138 at 1158-60, J.M. Maguire in "Through the Thicket", *supra* note 11 at 768-73 and S. Schiff in "Evidence - Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Can. Bar Rev. 674 [hereinafter "A Functional View"], argue that admitting such evidence offends the rationale underlying the hearsay exclusion rule; therefore, such

considering the profusion of literature on this particular subject, this author does not propose to examine and critique every argument put forward on each side of the debate. Rather, what follows is a overview and analysis of some of the more persuasive arguments which have been advanced.

Those in favour of limiting the application of the hearsay rule, so as to exclude non-assertive conduct from the purview of the rule, focus primarily on the fact that the declarant has not intended to communicate the implied assertion; therefore, there is little or no risk of insincerity on the part of the declarant. With the danger of insincerity removed, the risks and prejudice of admitting such evidence no longer outweigh the benefit of having this relevant evidence before the trier of fact.

However, proponents of the inclusion of non-assertive conduct within the doctrine's regime contend that the veracity of the declarant is not the only component of credibility.[13] Three other testimonial dangers have been identified with respect to *viva voce* evidence: (1) perception - did the witness accurately perceive what in fact occurred; (2) memory - does the witness now accurately recall what he or she perceived to have occurred; and, (3) ambiguity of language - does the trier of fact's understanding of the occurrence based upon what the witness has stated accurately reflect what the witness intended to communicate?

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conduct should be included within the definition. Against including such conduct within the scope of the hearsay rule are: C.T. McCormick, "The Borderland of Hearsay" (1929-30) 39 Yale L.J. 489 at 502-04, and J.F. Falknor, "Silence as Hearsay" (1940), 89 U. Pa. L. Rev. 192 at 206 and C.B. Mueller, "Post-Modern Hearsay Reform: The Importance of Complexity" (1992) 76 Minn. L. Rev. 367 at 373. These authors are convinced that veracity of the declarant is guaranteed; therefore, there is no reason to exclude this relevant evidence.

13. It is evident from the arguments of the those propounding the limitation of the scope of the hearsay doctrine so as not to include non-assertive conduct that, of the four testimonial factors, veracity or sincerity of the witness is believed to be of paramount importance. See comments of Dickson, J. [as he then was], in *R.* v. *Abbey*, [1982] 2 S.C.R. 24 at 41, 68 C.C.C. (2d) 394, 29 C.R. (3d) 193, [1983] 1 W.W.R. 251, 39 B.C.L.R. 201, 138 D.L.R. (3d) 202 at 216 [hereinafter *Abbey* cited to S.C.R.]. There are persuasive arguments against the paramountcy of veracity as a testimonial danger which are discussed later in this chapter.

The presence or absence of each of these testimonial dangers is tested by cross-examination of the witness.[14] Thus, even if the court finds that the declarant's conduct can support only one inference as to beliefs held,[15] the declarant's perceptive or mnemonic abilities relating to that implied assertion may still be suspect.[16] Just as importantly, the belief held may not be based upon actual first-hand observation.[17] Failing to include such communicative conduct within the hearsay definition denies the court any framework within which to determine whether any of the testimonial dangers are present and operative such that the evidence should be excluded from the trier of fact.[18]

Prior to delving any further into this debate, some attention should given to the House of Lord's decision in *Wright v. Doe d. Tatham* (1837).[19] This case, described by its detractors as "old and unsatisfactory",[20] squarely addresses the applicability of the

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14. As discussed later in this chapter, the loss of this opportunity to cross-examine by the opposing party-litigant is the principal reason for the continued existence of the hearsay rule.

15. See discussion of *R. v. Wysochan*, 54 C.C.C 172 (Sask. C.A.) [hereinafter *Wysochan*] in Chapter III. In that case, the court appears to have failed to consider that the conduct of the murder victim in calling for her husband might reasonably have inferred some other factual assertion than that her husband was innocent of the murder.

16. This is precisely Schiff's criticism of *Wysochan*. See discussion in "A Functional View", *supra* note 12.

17. Thus, the testimonial danger of insincerity, as well as misperception and faulty memory, on the part of the informant may come into play.

18. One might ask why it is not enough that the court address these dangers in assessing the weight of the evidence. However, it is this author's contention that where circumstantial guarantees of trustworthiness relieve concerns with respect to only one of the testimonial dangers, the court has no ability to assess the risk of the remaining three. How can transplanting this assessment from the 'determining-admissibility' phase to the 'give-the-evidence-its-appropriate-weight' phase make this determination less an arbitrary act. Also, one might argue that when the trier of fact is a jury, these lay persons are less qualified or equipped with the skills necessary to make this assignment of weight. However, how is it possible that a judge can better assess weight than a jury member when in both cases they have no logical basis upon which to ascribe weight?

19. 7 Ad. & El. 313, 2 N. & P. 305, 7 L.J. Ex. 366, 112 E.R. 488 [hereinafter *Wright* cited to E.R.].

20. Cross, *supra* note 3 at 517.

hearsay rule to non-assertive conduct and represents the *locus classicus* in this area. It also provides an excellent framework within which to flush out and analyze the arguments on either side of this debate.

### (1) *Wright v. Doe d. Tatham*

Sir Rupert Cross claims there is no clear authority for treating conduct not primarily intended to be assertive as hearsay in English law[21] and "might never have arisen but for some remarks of Parke B. in *Wright v. Doe D. Tatham*".[22]

The issue before the House in that case was whether the will of the deceased testator, John Marsden, was valid. This depended on whether or not Marsden was found to be mentally competent and of sound mind at the time of the execution of the will. The party-litigant upholding the validity of the will attempted to introduce into evidence three letters addressed to Marsden which were found amongst his possessions after his death. All were written by different persons who, at the time of their writing,[23] would have been well acquainted with Marsden. All of the writers were deceased at the time of the trial.

From the subject matter and language used in the letters, it was apparent that each of the three writers believed Marsden possessed reasonable intelligence.[24] The letters

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21. *Ibid.* at 533. Phipson also derided the importance of this decision. He wrote in an earlier edition of his text: "In England the doctrine of *Wright v. Tatham* on this point has apparently never been followed, acts of treatment being admitted or excluded on grounds of relevancy only and not of hearsay." [See *Phipson on Evidence*, *supra* note 3, 6th ed., at 210.] However, subsequent editors of *Phipson on Evidence*, *supra* note 3, found no cases which support Phipson's rejection of the doctrine and prefer to explain the admission of certain instances of conduct as either being within the *res gestae* or as particular exceptions to the doctrine of *Wright*.

22. Cross, *supra* note 3 at 517.

23. Marsden died in 1826. The letters were dated respectively 1784, 1786 and 1799. Note some issue was made of the fact that it was evident that one of the letters was forwarded on to Marsden's attorney. Tindal, C.J., found that this demonstrated that Marsden had recognized by the subject matter of it to put it into the hands of his attorney; therefore, he exercised some act of judgement or understanding of it and "though in ever so small a degree", acted upon it. [*Wright*, *supra* note 19 at 523.]

24. So held the Baron Parke, *Wright*, *supra* note 19 at 515: "Each of the three letters, no doubt, indicates that in the opinion of the writer the testator was a rational person". However, this author would strongly disagree that the beliefs of the letter writers as to the testator's capacity are so clearly and unquestionably demonstrated by their conduct. Is it not possible these authors were merely ingratiating

were tendered for the purpose of establishing not only that the writers had this opinion but that Marsden was, in fact, mentally competent at the time the letters were written.[25] The House of Lords held that the letters were inadmissible for that purpose because they fell within the class of evidence which the hearsay rule was designed to exclude.[26] If one of the writers had expressly stated that they believed Marsden to be mentally competent, there would have been no question as to the inadmissibility of that opinion. The assertion would not have been given under oath, nor subject to cross-examination to test both the credibility of the writer or the qualifications of the writer to give such opinion evidence. Each letter was merely evidence of the writer's opinion embodied in an act, and thus, properly excluded as hearsay.[27]

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themselves by treating the testator as their equal, or knowing that someone would read and interpret their letters to the testator? Possibly they knew that one particular man-servant controlled and ran the life of the testator (in fact, this is what the party-litigant contesting the will claimed); thus, they were writing at the man-servant's level of intelligence rather than the testator's.

25. Some commentators have questioned the relevance of the mental competence of the testator twenty years prior to the execution of the will. (See J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 167, and Cross, *supra* note 3 at 518.) However, it appears that the party-litigant opposing the validity of the will argued that Marsden had been somewhat of an imbecile from his childhood. Thus, evidence of Marsden's mental competence in his adult life would certainly undermine this theory and therefore have relevance.

26. Four of the six Law Lords agreed that at least two of the letters were inadmissible hearsay. Tindal, C.J., believed one was admissible, as Marsden had acted upon it and forwarded it to his lawyer.

27. J.M. Maguire, in "Through the Thicket", *supra* note 11 at 751, notes that the House of Lords was inconsistent in its application of this principle. The House did allow evidence to be received that Marsden was treated as a child by his own menial servants, that he was called "Silly Jack" and "Silly Marsden", and that boys shouted "There goes crazy Marsden" and threw dirt at him, requiring Marsden to stop a passerby to seek assistance getting home. However, as we have no record of the context in which this evidence was adduced before the court, it is impossible to ascertain whether the reception of this evidence was inconsistent with the opinions expressed by their Lordships. If the witness tendering this hearsay evidence also provided evidence of Marsden's reaction to this conduct, as appears to be the case in the last example, it is possible to infer Marsden's incompetency without offending the hearsay rule. The evidence of the out-of-court statements falls under the category of original evidence previously discussed in this chapter. It is not tendered for the truth of its contents, but rather, to establish that it was, in fact, said. Marsden's reaction to the statement is what is relevant. For example, if a menial servant said to Marsden, "Get out of the way you stupid ass" and Marsden simply moved but appeared completely oblivious to this insult, it would be possible to infer Marsden was not of sound mind without offending the hearsay rule.

Critics of *Wright* point out that the decision resulted in the exclusion of evidence which raised no concerns as to the presence of any of the testimonial dangers previously discussed. The authors of *The Law of Evidence in Canada* pose the following questions in their text:[28]

> It is true that the writers of the letters were not under oath and their testimonial factors could not be tested by cross-examination, but how serious was this in the context of the present case? Can it seriously be urged that all three writers may have been insincere?

The authors go on to demonstrate that the letters in question did not raise concerns as to the writer-declarant's perception or memory.[29]

However, surely the classification of these assertions as hearsay is not where the fault lies in excluding this evidence; rather, any criticism that necessary and reliable evidence has been improperly excluded should be directed at the failure of the common law to provide an exception to the hearsay rule in such circumstances. Assessment of the reliability of any assertion should not necessarily precede and determine the classification of an assertion as hearsay. The logical place to consider whether or not the rationale underlying this exclusionary doctrine is served in the given circumstances is within the framework of the rule and its exceptions.

As the implied assertions in *Wright* were each contained in writings, it has been claimed that the ratio of the case is confined to assertions implied by written or oral acts. Both Cross and Phipson differentiate between non-assertive conduct and non-assertive written or oral acts, and maintain that each warrants different treatment under the hearsay rule. Cross attributes the cause of this "unfortunate expansion"[30] of the hearsay exclusion doctrine to a statement of examples given by Baron Parke in *Wright*:[31]

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28. Sopinka, *supra* note 25 at 166.

29. It is interesting to note that Sopinka does not discuss the fourth factor, ambiguity of language, with respect to this decision, which may be the most serious problem with this decision.

30. Cross, *supra* note 3 at 517.

31. *Wright*, *supra*, note 19 at 516. Sopinka and Phipson cite basically the same passage [Sopinka, *supra* note 25 at 168, *Phipson on Evidence*, *supra* note 3 at 579].

> ... [T]he supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of sea-worthiness, who, after examining every part of the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statement not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.

While it is conceded that these examples deal with non-assertive conduct, as opposed to writings, they do not represent any expansion whatsoever of the principles set out in *Wright*.

In the case of any implied assertion, whether by conduct, writing or speech, courts must certainly employ a two-step process.[32] First, they must attempt to ascertain the beliefs held by the declarant at the time in question. The method by which they accomplish this is to examine the conduct, writings or oral assertions, and then speculate as to beliefs held by the declarant which would provide a reasonable explanation for such conduct, writing or oral assertion.[33] So long as only one proposed belief appears consistent with the conduct, the court advances to the second step, which is simply to infer that these beliefs are, in fact, true.

As with other forms of hearsay, courts are loath to take into consideration beliefs of a witness as to the existence of a material particular without first providing an opportunity to the party-litigant against whom the evidence is tendered to cross-examine that witness to test the reasonableness of the belief held. Did the witness accurately perceive what was going on at the time of the occurrence? Does the witness accurately

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32. Note this is based upon this author's intuitive logic, as courts rarely deconstruct and articulate their thought processes.

33. This appears remarkably similar to the "*state of mind*" hearsay exception. State of mind may be relevant on its own account. However, while non-assertive conduct may imply a state of mind, the declarant can also deliberately express his state of mind. By definition, an assertion implied by non-assertive conduct cannot be deliberately expressed.

recall what he or she perceived at that time?[34] Did the witness base his or her belief on some other individual's opinion or what someone else had claimed to observe? However, the focus is clearly centered on the reasonableness of the beliefs held by the declarant, not the vehicle by which that belief is unintentionally revealed. The mode by which this belief is conveyed is irrelevant. Thus, there appears to be no persuasive reason for treating assertions implied by conduct, writing or speech differently under this exclusionary doctrine.[35]

### 2. The Rule

Our statement of the hearsay rule builds upon our definition of hearsay and is as follows:[36]

> Any out-of-court assertion, express or implied, whether made orally, in writing, or by conduct, cannot be given in evidence if the purpose is to tender the assertion as evidence of the truth of the matters contained therein.

The underlined portion of this statement highlights a conceptual aspect of the rule which has confused law students and courts[37] alike in correctly applying this exclusionary doctrine.

#### a) The Admission of Hearsay as Original Evidence

The purpose for which a hearsay statement is tendered determines whether the hearsay exclusion rule applies or not. As noted under the heading "Definition of

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34. Note ambiguity of language is not raised here. It must be intuitively accepted that if any ambiguity exists, then there can be no chance of admitting this evidence, as it would not get past the first stage in our two-step process.

35. See T. Finman, "Implied Assertions As Hearsay: Some Criticisms of the Uniform Rules of Evidence" (1962) 14 Stan. L. Rev. 682 at 691-92, 708. Finman argues that non-assertive conduct should be treated as hearsay, as should unspoken beliefs, and proposes an exception allowing to the judge to admit such evidence upon concluding that cross-examination would not have been helpful.

36. Taken in part from *Phipson on Evidence*, *supra* note 3 at 219.

37. For an example of where a court has failed to appreciate this, see the decision of the courts below in *Subramanian*, *supra* note 7 at 969.

Hearsay", hearsay is often admitted in court without it appearing to fall under any of the exceptions to the hearsay rule recognized at common law. P.K. McWilliams, in his text *Canadian Criminal Evidence*,[38] explains this apparent anomaly:[39]

> Statements tendered as original evidence, that is, for some other purpose than to prove the truth of the assertion, do not infringe the hearsay rule, and therefore are not strictly speaking an exception.

For example, evidence from a bystander that the victim, just prior to the alleged assault, shouted: "I'm going to kill that God damned little bastard"[40] would be admissible evidence, relevant to reasonableness of the accused's belief that he was about to be attacked and that the the assault was in self-defence. What is important is the fact that the statement was made by the victim and heard by the assailant, not that the declarant actually intended to carry out the threat. Numerous other examples can be found in cases dealing with civil or criminal prosecutions where the fact that a certain statement was made is a necessary element of the particular tort or criminal offence. The plaintiff in a defamation action must establish that the libelous statement was made and heard, not that it was true. In fact, establishing the truth of the contents of the defamatory statement is a complete defence to a libel suit.

### B. Historical Development of the Rule

As Cross states, "[n]o aspect of the hearsay rule seems free from doubt and controversy, least of all its history".[41] Some legal historians ascribe the development of

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38. 3rd ed. (Aurora, Ont.: Canada Law Book, 1992).

39. *Ibid.* at 8-48.2. See also *R. v. O'Brien* (1977), 35 C.C.C. (2d) 209 at 211 (S.C.C.), where Dickson J., as he then was, states almost same verbatim:

> It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. [Emphasis added.]

40. See *R. v. Cadwallader*, [1966] 1 C.C.C. 380 (Sask.Q.B.).

41. Cross, *supra* note 3 at 510.

the rule predominantly to distrust of the capacity of the jury to evaluate hearsay evidence,[42] while others attribute it mainly to the unfairness of depriving a party of the opportunity to cross-examine the witness.[43] It does, however, seem to be agreed that the rule developed at the same time as did the modern form of trial. In the following section we discuss the historical development of the hearsay exclusion rule at common law.

### 1. Response to Changing Role of Jury and Witness

J.H. Wigmore, following in the footsteps of his mentor J.B. Thayer, claims that the hearsay rule, as a distinct and living idea, emerged in response to the development and maturation of the modern trial process, specifically the changing roles of the jury and witness.[44] As a result, this exclusionary doctrine finds its genesis in the mid-1500s,[45] but does not become permanently fixed and consistently followed until the early 1700s.[46] Following is a historical overview of the transformation in responsibilities of the jury and witness and the effect these changing roles had on the formulation and recognition of the hearsay rule.

#### a) The Evolution of the Modern Jury

R.W. Baker, in his treatise *The Hearsay Rule*,[47] adopts the theories of Thayer and Wigmore relating to the effect of the emergence of the modern trial process on the formulation of the hearsay rule. In a chapter entitled "The History of the Hearsay Rule",

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42. Holdsworth, Thayer and Wigmore

43. Morgan.

44. *Wigmore on Evidence*, *supra* note 2 at 12ff.

45. *Ibid.* at 12. Thayer locates the rule's origin a century earlier, in the 1400s, in the rule limiting what attesting witnesses could give testimony about.

46. *Wigmore on Evidence*, *supra* note 2 at 18:
No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place.

47. R.W. Baker, *The Hearsay Rule* (London: Sir Isaac Pitman & Sons, 1950) at 7ff.

he traces the development of the jury in England from the Norman Conquest to the early 1800s.

After the Normans had imposed a solid military grip on the country they set to work on establishing their own administrative system, an essential part of which was the jury. This embryonic jury, copied from the Franks, provided a means of trying public issues and obtaining information for the central government. The jury was composed of men from the neighborhood with which the inquiry was concerned. These person were most likely to know the facts which were in dispute and could increase their individual knowledge by listening to others and by familiarizing themselves with any local customs which were relevant.

Until the late 1400s,[48] it appears no one within the legal community considered it necessary to call witnesses to the stand to give evidence under oath; thus, the jury usually relied on private sources of information, including rumor and hearsay, no matter how untrustworthy. No one knew, except the jurors themselves, upon what sources of knowledge their decision rested.[49] As stated by Sir F. Pollock & F.W. Maitland in *The History of English Law Before the Time of Edward I*:[50]

> Some of the verdicts that are given must be founded on hearsay and floating tradition. Indeed, it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony... . At the least a fortnight had been given to them in which to "certify themselves" of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants... . Separatively or collectively, in court or out of court, they have listened to somebody's story and believed it.

The ordinary witness, as we presently conceive him or her to be, did not become a common feature of jury trials until the very end of the 1400s.[51] After this time, we

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48. *Wigmore on Evidence*, *supra* note 2 at 134.

49. Baker, *supra* note 47 at 7.

50. vol. 1 (Cambridge: University Press, 1898) at 622.

51. *Wigmore on Evidence*, *supra* note 2 at 15.

find the jury depending "largely, habitually and increasingly"[52] on witnesses for their information,[53] to the point that the proportionate amount of information obtained from ordinary witnesses produced in court far exceeded the information obtained by the jury itself. As Wigmore states:[54]

> [B]y the early 1600s the jury's function as judges of fact, who depended largely on other persons' testimony presented to them in court, had become a prominent one, perhaps a chief one.

Note, however, while over the course of the next two centuries reliance by the jury on its own personal knowledge diminished greatly, almost to the point of non-existence, it was not until *R. v. Sutton* (1816),[55] that Lord Ellenborough impliedly laid down the rule that a jury could no longer give a verdict based in anyway upon their own privately obtained knowledge.

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52. *Ibid.*

53. See also J.B. Thayer, "Trial by Jury and Its Development," in *Preliminary Treatise on Evidence* (Boston: Little, Brown & Co., 1898). The authors of *The Law of Evidence in Canada* (Sopinka, *supra* note 25 at 156) attribute the increased dependence of the juror on the witness to the fact that, as society became more urban and industrialized, it became increasingly difficult to find jurors who had knowledge, either direct or indirect, of the facts in issue or the ability to find them out.

54. *Wigmore on Evidence*, *supra* note 2 at 15.

55. 4 M. & S. 532.

### b) The Role of Witnesses

According to Thayer,[56] during the 15th century there was an increasing trend to allow transaction witnesses to deliberate with the jury.[57] While these witnesses were dissimilar to the modern witness which followed later in that the evidence they provided was not normally given in open court[58] or subject to cross-examination, it is noteworthy that these witnesses were restricted to giving evidence of what they personally knew first-hand. Wigmore acknowledges the existence of this ancient class of witness:[59]

> In the days when proof by compurgation of oath helpers lived as a separate mode alongside of proof by deed witnesses and other transaction witnesses, "the witness was markedly discriminated from the oath helper; the mark of the witness is knowledge, acquaintance with the fact in issue, and moreover, knowledge resting on his own observation." Such a witness' distinctive function was to speak "*de visu suo et auditu*".

Thayer contends that as the jury began to rely more and more upon the evidence of other witnesses, that is non-attesting witnesses, it was a natural progression that this practise attached to this new type of witness. Thus, the hearsay rule was born.

Both Wigmore and E.M. Morgan[60] downplay the significance of this early practise of restricting attesting witnesses to what they knew first-hand in the development of the

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56. Thayer, *supra* note 53 at 519.

57. Note the attesting witness could not be a juror. The courts recognized that the two had different roles. See discussion in Thayer, *supra* note 53 at 498:

> It was already, even in those days, an ancient practice, when the execution of a deed was denied, to summon the attesting witnesses with the jury and to send them out to a joint deliberation. They were not regularly examined in court. In 1349, [23 Ass. 11] one of these witnesses had been summoned not merely with the jury, but on the jury panel itself. He was outsted, and Thorpe, C.J., said there must be a jury wholly separate from witnesses; and witnesses can only be joined to the jury, and testify to them the facts. It is the jury, itself, he went on, who render the verdict, and not the witnesses; the two have different oaths; the witnesses swear to tell the truth.

58. Note witnesses were starting to give evidence in open court at this time, as demonstrated by *Babington v. Venor* (1465), Long Quint 5 Ed. IV 58.

59. *Wigmore on Evidence*, *supra* note 2 at 12.

60. E.M. Morgan, "History and Theory of the Hearsay Rule" in E.M. Morgan, ed., *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Colum. U. Press: 1956) at 107-08 [hereinafter "History of Hearsay"].

hearsay rule. While acknowledging that the use of attesting witnesses was not uncommon during the latter part of the 1400s, Morgan argues that their testimony was regarded as of minor importance, as the jurors relied almost entirely upon what they knew or had learned from other sources. He emphasizes that the modern witness did not evolve from the transaction witness. During the 1400s, when the parties to a civil action acquired the privilege of offering evidence through witnesses,[61] Morgan asserts:[62]

> ... it may be probable, as Thayer believed, that these witnesses became confused with the earlier sorts of witnesses, and the court expected them to speak only of what they had seen or heard... . But if the witnesses were ever forbidden to testify to hearsay, the restriction was short-lived.

However, by the end of the 17th century,[63] the increased use of witnesses resulted in a more critical examination of the quality of their testimony. Undoubtedly, the dangers of hearsay became readily apparent. To regulate the quality of evidence that could be presented for consideration by the jury, the rule against hearsay was finally and authoritatively propounded.[64]

Initially, the rule continued to allow for the admission of hearsay where it was offered merely as corroborative evidence.[65] This continued up to the early 1700's,

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61. Note it was not until 1562 when a process was established by which a party-litigant could subpoena and compel a witness to give evidence in the proceeding. (Stat. 5 Eliz. I, c. 9 s.6 (1562)) Wigmore comments, in *Wigmore on Evidence*, *supra* note 2 at 15, that this measure was not the result of a feeling of necessity for having every informant testify before the jury, rather, "as a protection for the witness against the charge of maintenance".

62. "History of Hearsay", *supra* note 60 at 108.

63. Baker, *supra* note 47 at 9.

64. See Sopinka, *supra* note 25 at 156. As Wigmore points out, while the inherent weakness of hearsay evidence may have been recognized and its use discouraged: [*Wigmore on Evidence*, *supra* note 2 at 17]

> [t]hrough the 1500s and down beyond the middle of the 1600s, hearsay statements are constantly received, even against opposition.

Wigmore provides an extensive list of cases to support this proposition.

65. Wigmore attributes this to the survival of the notion of numerical sufficiency and quantity relating to the civil law. While hearsay is by itself insufficient as the sole foundation to condemn a man, thus excluded, it may be receivable to supplement other good evidence.

whereupon the use of hearsay as corroborative evidence began to disappear.[66] By the end of the 18th century[67] all the textbook writers speak of the general rule excluding hearsay as being firmly established, the only remaining question being the extent of the exceptions.

### 2. Other Factors and Influences

#### a) Rise of Adversary System of Justice

Professor E.M. Morgan in "Hearsay Dangers and the Application of the Hearsay Concept" (1948),[68] suggests that the synchronous development of the present day adversarial system of justice, along with the rise of the modern jury, compelled the development of this exclusionary rule. Since hearsay evidence, by definition, denies the opposing litigant the opportunity to contemporaneously cross-examine the declarant under oath, Morgan asserts that the rule was created to protect the litigant in an adversarial system of justice - to preserve his or her right to insist that evidence be given under oath and that he or she have an opportunity to cross-examine witnesses.[69]

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66. This can be gathered from a statement in Gilbert's *Treatise* (the first edition of which appeared about 1726) that "a mere hearsay is no evidence". It is interesting to note that many of the cases cited in *Wigmore on Evidence*, *supra* note 2 at 19-20, which allow for the admission of hearsay to corroborate other evidence, do not offend the hearsay rule. For example, in *Lutterel v. Reynell* (1670), 1 Mod. 282, 86 E.R. 887, the hearsay evidence was used to rebut the inference raised by the defence that the declarant's account had been recently fabricated. This is, in fact, using hearsay as original evidence.

67. *Wigmore on Evidence*, *supra* note 2 at 20:
> It is clear that its firm fixing (as observed) did not occur till about 1680; and so in the treatises of the early 1700s the rule is stated with a prefatory "it seems". By the middle of the 1700s the rule is no longer to be struggled against; and henceforth the only question can be how far there are to be specific excpetions to it.

68. 62 Harv. L. Rev. 175 at 179-83 [hereinafter "Hearsay Dangers"].

69. In support of this contention, Morgan, *ibid.* at 183-84, notes that unless the adversary objects, the court may admit inadmissible hearsay and the trier of fact may give it "such value as is within the bounds of reason". Also, the parties may agree to admit evidence which is hearsay. Note there is certainly some doubt whether this would be the case in Canada. See discussion in Chapter Four under heading "Agreements, Admissions of Fact and Failure to Make Timely Objection".

Morgan finds support for this proposition through an analysis of the modern day functioning of the trial process. First, he considers the essential purpose of the modern trial process:[70]

> We must concede that the trial is a proceeding not for the discovery of truth as such, but for the establishment of a basis of fact for the adjustment of a dispute between litigants.

The prime objective of our system of justice is to get as "close an approximation to the truth as is practicable". Morgan claims that this objective is met as a by-product of the fundamental principle of adversary system:[71]

> ... that each adversary because of his interest will be keen to discover and present materials showing the strength of his position and the weakness of his opponent's, so that the truth will emerge to the perception of the impartial tribunal.

The hearsay rule, where applicable, gives each party the right not to bear the risk that the trier of fact will be misled by the objectionable hearsay.[72]

Morgan finds further support by examining the situations where present-day courts allow the admission of hearsay or hearsay-like evidence. According to Morgan, admissions properly fall within an exception to the hearsay rule because they fit *prima facie* within the definition of hearsay - being out-of-court statements not subject to cross-examination and introduced as evidence of the truth of the facts contained therein. As

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70. "History of Hearsay", *supra* note 60 at 128.

71. *Ibid.* at 129. Though, as Morgan notes, the adversary can neither conceal or prevent disclosure.

72. Morgan concedes that the proceedings are not completely controlled by the adversaries. The adversary may waive his right that the witness be sworn and also his right to cross-examine, but the judge may insist that the witness speak under these prescribed sanctions. With respect to hearsay evidence, he states: [*ibid.* at 129]

> He may have it excluded, but he has no right that it shall be admitted when offered by his opponent. The judge may of his own motion properly protect the jury from misleading testimony. The control of the adversay over the reception of evidence and other aspects of the trial is still limited.

an exception to the hearsay rule, it is not justified on the usual ground of trustworthiness, but rather on the basis of the adversary theory:[73]

> The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under the sanction of an oath.

S. Schiff, in "Evidence - Hearsay and the Hearsay Rule: A Functional View",[74] while not necessarily agreeing with Morgan's historical analysis of the development of the hearsay rule, supports Morgan's view that the adversarial system explains the present-day existence of the hearsay exclusion doctrine:[75]

> [T]he hearsay rule bars the evidence to serve, not the interests of the trier of fact, but almost entirely the interests of the opposing party-litigant.

His analysis begins with an enumeration of all the demands placed on the witness in the witness box.[76] He notes that if any one of these is not satisfied, the witness' testimony about the relevant matter will not be heard.[77] Schiff deduces then that, functionally, the hearsay rule bars evidence of words offered to prove the matter they assert when none of the standard demands imposed upon testimonial evidence has been satisfied.[78] However, except for the requirement that evidence be given under oath, these demands can be waived by the party against whom the evidence is tendered. Thus, Schiff concludes:[79]

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73. E.M. Morgan, *Basic Problems of Evidence* (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1962) at 266.

74. (1978) 56 Can. Bar Rev. 674 [hereinafter "Hearsay: A Functional View"].

75. *Ibid.* at 679.

76. *Ibid.* at 677-78.

77. *Ibid.* at 679.

78. As a result, Schiff proposes that judges should admit hearsay when these purposes of the hearsay rule within our litigation system would be no more than barely served under the particular circumstances.

79. "Hearsay: A Functional View", *supra* note 74 at 679.

> ... the hearsay rule functions almost not at all to protect the trier of fact from making erroneous finds. It functions mainly to protect the opposing party against evidence of relevant matters presented in a fashion not satisfying the well-settled demands of witness examination in our trial system.

While the effect the rise of the adversarial system of justice had on the historical development of the hearsay exclusionary doctrine is debatable, it must be conceded that the continued existence of the hearsay exclusionary doctrine has much to do with the court attempting to protect and maintain the rights of the party-litigants in the trial process.[80]

### b) Civil System of Numerical Sufficiency

In addition to responding to the development of the modern jury and witness, Wigmore maintains that the formulation of the hearsay exclusion doctrine was influenced by a 'spill-over' from the civil and canon law, specifically the system of numerical sufficiency employed in those regimes.[81] He notes that in the 1500s and early 1600s there were a mass of rules in the civil and canon law about the number of witnesses necessary in given cases and the circumstances sufficient to complement and corroborate testimony deficient in number. A large proportion of legal profession was well-versed in these regimes and, considering the restrictions placed on the accused in mounting a defence and the limited number of defences available to the accused, it was inevitable that, sooner or later, the profession would attempt to inject these principles into the common law. This opportunity appeared to have presented itself during the state trials of the 1500s and 1600s. In these cases, one repeatedly finds examples of accused

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80. See *R. v. Streu*, [1989] 1 S.C.R. 1521, 70 C.R. (3d) 1, 48 C.C.C. (3d) 321, 97 A.R. 356, 96 N.R. 58, where an out-of-court admission was admitted, even though the party making it relied upon the information of others and possessed no personal knowledge of the facts contained therein. The only explanation for the admission of this hearsay is that, based on an adversarial system of justice, it is fair to assume that the party who made the admission has satisfied himself or herself as to the reliability of the statement or at least had the opportunity to do so. Thus, they are, in effect, estopped from claiming that the hearsay statement was unreliable.

81. *Wigmore on Evidence*, *supra* note 2 at 15-16.

persons insisting that one witness to each material fact is insufficient to convict.[82] As a result, a second witness was produced to give evidence on the material fact. However, often this second witness could only relate evidence which he or she had been told by someone else. Inevitably, it came to be asked whether a hearsay thus laid before the jury would satisfy the burden of proof imposed on the Crown. As Wigmore notes:[83]

> In spite of these repeated appeals to the numerical system of the civil law, they produced no permanent impression in the shape of specific rules, except in treason and perjury. But the general notion thoroughly permeated the times and barely escaped being incorporated in the jury system.

While in the past there had been no prejudice in utilizing information from persons not produced, suddenly this notion from the civil and canon law that the witness must be produced caused the jury to question the quality and quantity of the hearsay evidence upon which their verdict was based.

### C. Purpose and Reason: The Theory of the Hearsay Rule

Tracing the historical development of the hearsay rule and discussing the factors contributing to its formulation, inevitably, has caused us to touch upon many of its underlying rationales. However, it is necessary to enumerate and analyze the validity of each rationale to identify the purpose and reason for the continued existence of the rule,

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82 *Ibid.* at 16. Wigmore cites an example from *Lord Strafford's Trial* (1640), 3 How. St. Tri. 1427 at 1445: "He is but one witness, and in law can prove nothing".

83. *Wigmore on Evidence, supra* note 2 at 17.

as this is "the key to understanding the exceptions to it"[84] and crucial in formulating future exceptions.[85]

Lord Norman, in an oft-quoted passage from *Teper v. The Queen*,[86] provides a general overview of the rationales behind the hearsay exclusion rule:[87]

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanor would throw on his testimony is lost.

Justice Dickson, as he then was, in *R. v. Abbey*, echoes this:[88]

> The main concern of the hearsay rule is the veracity of the statements made. The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented.

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84. *Ibid.* at 251:

> The theory of the hearsay rule... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

85. See decision of Cheif Justice Lamer in *R. v. Smith*, [1992] 2 S.C.R. 915 at 932, aff'g (1990), 75 O.R. (2d) 753, 61 C.C.C. (3d) 232, 2 C.R. (4th) 253, 42 O.A.C. 395 [hereinafter *Smith* cited to S.C.R.]:

> However, *Khan* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and the exceptions to it. What is important, in my view, is the departure signalled by *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike... . Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.

86. [1952] A.C. 480, [1952] 2 All E.R. 447 [hereinafter *Teper* cited to A.C.].

87. *Ibid.* at 486.

88. *Abbey, supra* note 13 at 41.

### 1. Testimonial Dangers/ Credibility Factors

It is apparent from the first sentence in the above quotation that Chief Justice Dickson considered insincerity to be the principal danger inherent in witness testimony. Some controversy exists as to the paramountcy of veracity over the remaining three testimonial dangers (inaccurate perception, faulty memory and ambiguity of language),[89] and the adequacy of cross-examination to effectively disclose witness insincerity.[90] As discussed previously in this chapter, assigning greater importance to any of these testimonial factors often determines whether a court is prone to admit or exclude of hearsay or hearsay-like evidence in any particular circumstance.[91] In an effort to elucidate the purpose and underlying rationales of the hearsay rule, we must certainly start by asking the following question: what are the inherent risks with respect to trustworthiness of out-of-court statements?

#### a) Paramountcy of Veracity As Credibility Factor

Justice Dickson finds support for his assertion that veracity is the primary hearsay danger in E. Seligman's "An Exception to the Hearsay Rule".[92] After identifying three of the possible defects in witness testimony,[93] Seligman states:[94]

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89. McWilliams, *supra* note 38 at 8-8, adds a further concern, and that is depreciation arising from inaccurate transmission, repetition or recording of statement.

90. I.D. Stewart, Jr. "Perception, Memory, and Hearsay: A Criticism fo Present Law and the Proposed Federal Rules of Evidence (1970) Utah L. Rev. 1 at 9:

> On numerous occasions the Advisory Committee, in keeping with tradition, finds justification for admitting out-of-court statemetns, either by excepting them from the hearsay rule or by excluding them from the definition of hearsay, on the assumption that under the circumstances the declarant would not lie. Accuracy of perception and memory receive less attention in determining admissibility, even though errors and distortion in perception and memory are probably the most important source of conflict. [Emphasis added. Footnotes omitted.]

91. For example, if a court considers generally that witness insincerity is a paramount danger, far more harmful than inaccurate perception or faulty memory, then that court is more likely to admit hearsay in circumstances which appear to obviate concerns as to witness insincerity.

92. (1912) 26 Harv. L.Rev. 146 at 147.

93. Seligman omits ambiguity of language.

94. Seligman, *supra* note 92 at 153.

> When the testifier can be cross-examined, it is relatively easy to discover whether any of them are present. If, however, a man's declarations may be given in his absence, the danger of these defects makes the testimony of conjectural value. In particular, the third possibility, that of untruthfulness, constitutes a very great objection to receiving such evidence. Because of it the evidence may be as valuable for concealing, as for disclosing, the true facts. The harm done by the reception in some cases of untruthful testimony would be very great; great enough, it is considered, to outweigh the disadvantage of the loss of truthful testimony in other cases, and consequently to justify the exclusion of all testimony subject to the possibility of this defect. The other two defects often cannot possibly be present; for example, the statement of a present fact involves no memory, and the statement of mental condition involves no perception. [Emphasis added.]

Furthermore, Seligman adds, even when the testimonial dangers of inaccurate perception and faulty memory are present, they are unimportant in comparison to the danger of untruthfulness, "for at the worst they will merely lead to a slight misdescription of the true facts".[95]

One final argument in support of the elevated status of witness veracity over the remaining testimonial factors is that defects in perception and memory are more likely to make themselves apparent on the face of a witness' out-of-court statement. Erroneous testimony resulting from misperception or faulty memory involves no intentional deception, therefore, unlike the insincere witness, there is no attempt to cloak the untrue assertion in a mass of truthful, but incidental, factual assertions which might be corroborated at trial. If the witness' perception or memory is poor, he or she is just as likely to err with respect to the numerous incidental factual assertions surrounding the relevant assertion. Thus, even without cross-examination of the witness, inconsistencies may be evident that disclose poor perception or faulty memory on the part of the witness.

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95. *Ibid.*

However, some commentators are not persuaded that witness veracity merits such an elevated status. As J.M. Maguire states in "The Hearsay System: Around and Through the Thicket", after cataloguing the four dangers inherent in witness testimony:[96]

> In typical Anglo-American judicial discussions of hearsay and testimonial evidence at large, the third - sincerity - has received what may well be exaggerated emphasis; the fourth - inexact verbalization -is often passed over as of rare significance.

This exaggerated emphasis may result from the fact that concerns as to witness veracity appear to present themselves more often than concerns with respect to witness perception, memory or ambiguity of language.[97] However, the fact that defects in memory and perception "often cannot possibly be present", as Seligman claims, should in no way diminish their importance in circumstances where they possibly could be present.

Seligman's assertion that the potential harm done by the reception of untruthful testimony may be "very great" is not disputed. However, the contention that the admission of evidence which is tainted by the remaining testimonial dangers will merely "lead to a slight misdescription of the true facts" somewhat underestimates the effect of such testimony. E.M. Morgan, in *Some Problems of Proof Under the Anglo-American System of Litigation*[98] provides two examples from the infamous *Sacco-Vanzetti* case relating to language ambiguity and faulty memory[99] which had dire consequences for the two accused. It is this author's opinion that in circumstances where any or all of the testimonial dangers are operative, witness veracity warrants no greater emphasis.

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96. "Through the Thicket", *supra* note 11 at 744-45.

97. It is interesting to note that Morgan, in "Hearsay Dangers", *supra* note 68 at 188, claims that, while cross-examination occasionally does reveal insincerity on the part of the witness, its "most important service is in exposing faults in perception and memory." See also J. Allan, "The Working Rationale of the Hearsay Rule and Implications of Modern Psychology" (1991) 44 Curr. Legal Probs. 217 at 224-28, and L. Tribe, "Triangulating Hearsay" (1974), 87 Harv. L. Rev. 957 at 967. Both Allen and Tribe support the contention that cross-examination's greatest use is more to disclose misperception and faulty memory, than it is to disclose insincerity.

98. E.M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Colum. U. Press: 1956).

99. *Ibid.* at 120-22 (the language employed by Captain Van Amburgh giving ballistic's evidence) and at 123-24 (the memory of Harding and how it changed with respect to description of bandit).

## 2. Loss of Trial Procedures to Test Testimonial Dangers

### a) Absence of Oath

One of the earliest reasons provided for the exclusion of hearsay was that these statements were not under oath, thus they did not have the guarantee of veracity resultant from the declarant's fear of retribution from a divine being. This rationale can be traced as far back as 1684 at the trial of *Braddon and Speke* (1684)[100] where, in response to the accused's attempt to lead hearsay evidence, Jeffries L.C.J. stated:[101]

> Why, if that woman were here herself, if she did say it, and would not swear it, we could not hear her; how then can her saying be an evidence before us?

However, by 1790.[102] as *R. v. Eriswell (Inhabitants)* (1790)[103] demonstrates, it had been clearly decided that the hearsay exclusion rule excluded even prior statements given under oath:[104]

> Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending upon the parties to be affected by them, and where each has an opportunity to cross-examining the witness.

In more recent times the effect of the oath and the threat of perjury on witness veracity has been challenged.[105] Professor Morgan contends that it is the fear of cross-

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100. 9 How. St. Tr. 1127.

101. *Ibid.* at 1188.

102. Morgan, in "History of Hearsay", *supra* note 60 at 109-10, notes that even earlier cases rejected hearsay despite the fact that the statements were under oath. Jeffries L.C.J., in *Braddon and Speke*, apparently overlooked the case noted in *Rolle's Abridgement* in 1668 in which sworn hearsay was rejected because "the other party could not cross-examine the party sworn, which is the common course."

103. 3 Term R. 707, 100 E.R. 815 (K.B.), Lord Kenyon.

104. *Ibid.*

105. See *e.g. Wigmore on Evidence*, *supra* note 2 at 10, where the author states:
... it is clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule.

examination which compels the witness to tell the truth, not the fact that the statement is given under oath. He discounts the oath's efficacy in our modern secular society:[106]

> The deliberate expression by a witness of his purpose to tell the truth by a method which is binding upon his conscience probably still operates as some stimulus to tell the truth; but fear of punishment by supernatural forces for violation of an oath is generally regarded as virtually nonexistent; and the threat of prosecution for perjury has little effect.
>
> The fear that cross-examination may uncover falsehood, on the other hand, is a strong stimulus to sincerity for the average person.

In *R. v. K.G.B.*,[107] Justice Cory holds the same opinion as to the value of the oath in our modern secular society:[108]

> In medieval times the taking of an oath to tell the truth by placing a bare hand upon a sacred object was of fundamental importance. It was firmly believed that to defy the oath by lying would lead to divine retribution that would include punishment in this earthly life and eternal damnation in the hereafter. However, the medieval fear of damnation has diminished. Similarly the influence of religion in the affairs of men and women has decreased. There can be little doubt that the taking of an oath is frequently no more than a meaningless ritualistic incantation for many witnesses. In earlier times there may have been good reason for attaching greater weight to testimony given under oath than to unsworn statements given by the same witness. Today, an increasingly secular society simply attaches less significance to taking an oath. To many witnesses, the oath adds nothing to the reliability of their evidence.

Thus, it appears that the guarantee of reliability resultant from the taking of an oath is now accepted to be rather marginal. As a result, the absence of oath can no longer be considered as one of the primary reasons for the continued existence of the hearsay exclusion rule.

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106. "Hearsay Dangers", *supra* note 68 at 186.

107. [1993] S.C.J. No. 22. (QL).

108. *Ibid.* Note Chief Justice Lamer requires that there be some substitution for the oath. While recognizing the oath may not motivate all witnesses to tell the truth, "its administration may serve to impress on more honest witnesses the seriousness and significance of their statements, especially where they incriminate another person in a criminal investigation". Moreover, the Chief Justice is concerned about requiring the trier of fact to accept unsworn testimony over sworn testimony and having to convict solely on the basis of unsworn testimony.

### b) Lack of Cross-Examination

In perhaps his most famous remark, Wigmore described cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth".[109] As alluded to in the prior section, it is generally agreed that the loss to the litigant of the benefit of cross-examination of the declarant has emerged as the most powerful and convincing reason for the existence of the hearsay exclusion rule. Statements of this underlying rationale begin to appear in the early 1700s. In Hawkins' Pleas of the Crown we find:[110]

> It seems agreed, that what a stranger has been heard to say is in strictness no manner of Evidence either for or against a Prisoner, not only because it is not upon oath but also because the other side hath no opportunity of a cross-examination.

In *Craig dem. Annesley v. Anglesea* (1743),[111] a statement of deceased witness was tendered to prove a material fact. The court excluded it on the basis that:[112]

> ... hearsay evidence ought not be admitted, because of the adverse party's having no opportunity of cross-examining.

Wigmore suggests that cross-examination presently is, and always was, "the essential and real test required by the rule".[113] His esteem for the utility of this process is evident in the following:[114]

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109. *Wigmore on Evidence*, *supra* note 2 at 32.

110. Hawkins, *Pleas of the Crown* (1716), Book II, c. 46, s. 14. In Bacon's *Abridgement* in 1736, both lack of oath and loss of cross-examination were given as the reasons for rejecting "what another has been heard to say." Starkie in both the 1824 and 1833 editions of his treatise does likewise.

111. 17 How. St. Tr. 1160.

112. *Ibid.*

113. Wigmore, *supra* note 24 at 3 para. 1362

114. *Ibid.* at 32.

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

The importance and predominance this rationale to Wigmore is evidenced by the fact that he discusses all remaining hearsay dangers or rationales for the rule under the heading "Spurious Theories of the Hearsay Rule."

**(1) Contemporaneity of Cross-Examination**

While it appears universally accepted that the benefit of cross-examinations is the primary reason for the hearsay exclusion rule, the importance of the contemporaneity of the cross-examination is disputed, at least amongst academics.[115] Professor Morgan examines the issue[116] and provides an oft-quoted extract from a decision of Stone, J., of the Minnesota Supreme Court in *State v. Sporen* (1939),[117] which propounds the importance of contemporaneity of cross-examination:[118]

> The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and

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115. It is clear from the Supreme Court of Canada decision in *R. v. K.G.B.*, *supra* note 107, that while it would, of course, be better to have had contemporaneous cross-examination at the time the statement was made, this factor goes only to the weight afforded the evidence, not to admissibility. Chief Justice Lamer finds support in the United States Supreme Court decision of *California v. Green* (1970), 399 U.S. 149 where Justice White writes:

> It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position", but whether subsequent cross-examination at the defendant's trial will still affords the trier of fact a satisfactory basis for evaluating the truth.

116. "Hearsay Dangers", *supra* note 68 at 192.

117. 205 Minn. 358, 285 N.W. 898. Also discussed in *R. v. K.G.B.*, *supra* note 107, Lamer C.J.C.

118. *Ibid.* at 362 (Minn.), at 901 (N.W.).

> become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth.

Morgan responds by asking: "Why does falsehood harden any more quickly or unyieldingly than truth?"[119] Is not the opportunity for reconsideration and influence by others just as likely to color testimony given at a later trial?

J.M. Maguire, in *Evidence: Common Sense and Common Law*,[120] rejects the notion that the hearsay rule exists to preserve the litigant's "opportunity to cross-examine hot on the heels of an original testimonial assertion".[121] He notes that in practice, cross-examination with respect to a particular assertion is rarely contemporaneous with the testimony disclosing that assertion:[122]

> In complex litigation a witness may be on the stand for days or even weeks at a stretch, cross-examination being far removed in point of time from the primary testimony.

Considering the Supreme Court of Canada's rejection of the necessity of contemporaneous cross-examination in *R. v. K.G.B.*, a decision that has drastically changed the law with respect to admissions of prior inconsistent statements, for the purposes of this thesis it is accepted that lack of contemporaneity goes only to weight and not admissibility. As a result, it needs not be addressed in the formulation of hearsay exceptions.[123]

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119. "Hearsay Dangers", *supra* note 68 at 192.

120. (Chicago: Foundation Press, 1947).

121. *Ibid.* at 37.

122. *Ibid.*

123. Prior to *R. v. K.G.B.*, there was some question as to the need for contemporaneous cross-examination. See *R. v. Potvin*, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193, 93 N.R. 42, 47 C.C.C. (3d) 289 at 298-301, 21 Q.A.C. 258, 42 C.R.R. 44, where Madame Justice Wilson emphasized need for contemporaneous cross-examination. See also Madame Justice Helper's decision in *R. v. Laramee* (1991) 6 C.R. (4th) 277 at 294-95.

### c) Loss of Observation of Witness Demeanor

That "the light which [the declarant's] demeanor would throw on his testimony is lost" has also been consistently enumerated as a valid rationale underlying the exclusion of out-of-court statements by modern courts[124] and evidence text-writers.[125] However, providing even that one accepts that a trier of fact possess an intuitive ability to discern insincerity on the part of a witness,[126] James Allan in "The Working Rationale of the Hearsay Rule and Implications of Modern Psychology" (1991),[127] suggests that such reliance may, in fact, lead the trier of fact to give testimonial evidence greater weight than it deserves. Allan notes that most people would intuitively agree that there is some relation between the confidence and the accuracy of an honest witness. However, psychological findings show that the average layperson places too much value on the confidence exuded by witnesses:[128]

> ... [i]ndeed, the closer the studies come to representing real-world factors... the clearer the evidence becomes that eyewitness confidence is not useful as a predictor of eyewitness accuracy in criminal cases.

Allan persuasively argues that the only valid reason for our insistence that witnesses appear and give testimony at proceedings is to allow for cross-examination to test the witness memory, perception, and lastly and to a lesser extent, veracity.[129]

At best, the loss of observation of demeanor diminishes the trier of fact's ability to assess veracity; therefore, any hearsay exception which provides circumstantial

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124. See *R. v. Blastland*, [1985] 2 All E.R. 1095 (H.L.), Lord Bridge of Harwick [hereinafter *Blastland*], and *Teper*, *supra* note 86 at 486.

125. See Sopinka, *supra* note 25 at 157 and Delisle, *supra* note 6 at 202.

126. Whether current psychological findings support that any person has some innate ability to consistently discern witness insincerity is beyond the scope of this paper. However, see J. Marshall, *Law and Psychology in Conflict*, 2d ed. (Indianapolis, Bobbs-Merrill, 1969) for further discussion.

127. Allan, *supra* note 97 at 224-28.

128. *Ibid.* at 225.

129. Allan argues that while cross-examination is a powerful tool for disclosing possible errors in perception and memory, it is a less important role in exposing the dishonest witness. Allan finds support for this proposition in E.M. Morgan's, "Hearsay Dangers", *supra* note 68 at 186-88 and Tribe, *supra* note 97 at 967.

guarantee of reliability with respect to veracity adequately substitutes for observation of witness demeanor.[130]

### 3. Inability of Jury to Assess Appropriate Weight

The fear that the jury would attach undue weight to hearsay has, in the past, been put forth as the ground of exclusion of this evidence.[131] Lord Bridge of Harwick, in *R. v. Blastland* (1985),[132] discussed this concern:[133]

> Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination. [Emphasis added.]

Thus, in the words of Lord Norman from *Teper*,[134] the courts fear that the "untested hearsay evidence will be treated as having a probative force which it does not deserve".[135]

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130. Note the editors of *McCormick on Evidence* provide an additional theory of how the presence of the witness in the courtroom enhances reliability: [J.W. Strong, ed., *McCormick on Evidence*, 4th ed. (St. Paul, Minn.: West Pub. 1992) at 94]

> The solemnity of the occasion and the possibility of public disgrace can scarcely fail to impress the witness, and falsehood no doubt becomes more difficult if the person against whom directed is present.

131. See "Through the Thicket", *supra* note 11 at 753, where Maguire discusses both sides of the argument that the jury is not sophisticated enough to evaluate such hearsay evidence. Maguire provides extracts from the arguments made by Starkie and Cresswell in *Wright*, *supra* note 19 at 501-02, 504, that "in juryless ecclesiastical courts evidence more or less like that here considered might be safely received because of the more sophisticated character of the triers of fact".

132. *Blastland*, *supra* note 124.

133. *Ibid.* at 2012.

134. *Teper*, *supra* note 86.

135. *Ibid.* at 486.

Cross describes this idea that a jury is incapable of assigning appropriate weight to an out-of-court assertion as "both a doubtful proposition of fact and an historical rationalisation".[136] So far as the history of this rationale, Morgan has shown that "[w]hilst distrust of the jury had nothing to do with the origin of the hearsay rule, it has exerted a strong influence in preventing or delaying its liberalisation".[137] It is only in the nineteenth century that distrust of the jury is mentioned in the case law. Earlier judgments justified the exclusion of hearsay by reference to the absence of an oath or the lack of cross-examination.

In *R. v. Smith*,[138] Chief Justice Lamer, for the Supreme Court of Canada, concluded:[139]

> ... as this Court has made clear in its decisions in *Ares v. Venner*, *supra*, and *R. v. Khan*, *supra*, the approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the

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136. Cross, *supra* note 3 at 805. See also E.M. Morgan in "History of Hearsay", *supra* note 60 at 106-7. In response to Wigmore, Thayer and Holdsworth's claim that the law of evidence is the child of the jury, Morgan states:

> If it means that it was in the evolution of trial by jury in England that the testimony of witnesses in open court was first used as a means of furnishing jurors with the information to be used to reach a rational solution of the issue, and that rules governing the manner of giving testimony and its content were incidentally required, it is true enough. But if it means, as frequently interpreted, that the rules which exclude relevant information from intelligent persons, and particularly the hearsay rule, owe their origin to a distrust of the jury's capacity to evaluate evidence, it has little, if any, support in history. [Emphasis added.]

137. "Hearsay Dangers", *supra* note 68 at 32.

138. *Smith*, *supra* note 85.

139. *Ibid.* at 937. See also S.J. Helman, "The Reform of the Law of Hearsay" (1939) 17 Can. Bar. Rev. at 303:

> The basis of the difficulty in this regard arises, as do most of the problems encountered in the law of evidence, as a product of the jury system. These rules became crystallized at a time when the degree of intelligence of the average untrained juror was comparatively low. But now, with the great advance in general education, these restrictive rules may safely be relaxed provided proper safeguards as to the circumstances under which the hitherto questionable evidence is to be admitted are carefully indicated.

> criteria of necessity and reliability set out in *Khan*, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences there from.

Note, the Chief Justice does not espouse putting all manner of hearsay evidence before the jury, just that which has satisfied the twin criteria of "necessity" and "reliability", as set out in *R. v. Khan*.[140] Thus, the trial judge must find sufficient circumstantial guarantees of trustworthiness to satisfy a minimum "reliability" threshold before the jury is permitted to consider and weigh the evidence. As a result, it is not so much that the average juror has an inate ability to accurately ascribe weight to hearsay evidence,[141] but rather, that the trial judge has first satisfied himself or herself that this evidence can reasonably attract the full range of possible weight assignments. Thus, no injustice is caused by the jury assigning full weight to the hearsay evidence, nor by assigning less weight than it deserves, as it is still better to have admitted the evidence and assigned it some weight, than to have never admitted it at all. Undoubtedly, with neither circumstantial guarantees of reliability nor any means by which to test for the presence or absence of testimonial dangers, the "fear that the trier of fact will not understand how to deal with such evidence" would still have some validity today.

### 4. Miscellaneous Rationales

Five additional rationales, supplementing those discussed above, have been identified. They are: (1) the admission of hearsay evidence encourages the perpetration of frauds;[142] (2) it unduly lengthens trials;[141] (3) it offends the "best evidence rule"; (4)

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140. [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 113 N.R. 53, 41 O.A.C. 353, aff'g (1988), 27 O.A.C. 143, 64 C.R. (3d) 281, 42 C.C.C. (3d) 197 [hereinafter *Khan* cited to C.C.C.].

141. Surely, in the absence of any means by which to test the credibility factors, any assignment of weight to testimonial or hearsay evidence would be completely arbitrary.

142. Cross, *supra* note 3 at 805, has described this fear that the admission of hearsay evidence promotes fraudulent contrivances as:

it offends the accused's right to confrontation;[144] and, (5) it allows for the admission of evidence which may have been distorted through transmission and repetition. However, with the exception of fifth rationale, none of these miscellaneous rationales presents any new or addition arguments respecting the inherent unreliability and untestibility of hearsay evidence. The first two rationales focus primarily on the effect of the admission of hearsay on the efficiency and integrity of the trial process. The following two, that the admission of hearsay offends the "best evidence rule" and the accused's right to confrontation, are merely a compilation or merger of the rationales discussed in the previous sections. Only the last of these miscellaneous rationales, concerning the distortion caused by transmission and repetition of the out-of-court assertion, undermines the reliability of the statements and warrants further consideration.

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> ... simply one aspect of the great pathological dread of manufactured evidence which beset English lawyers of the late eighteenth and early nineteenth centuries.

In any event, this fear addresses the affect of hearsay statements on integrity of future proceedings and not the reliability of a particular statements being admitted.

143. Sopinka, *supra* note 25 at 157, includes as one of the reasons underlying the hearsay rule that the introduction of such evidence will lengthen trials. J.M. Maguire in *Evidence: Common Sense and Common Law*, *supra* note 120 at 149, appears to agree, and states that the hearsay rule is:

> ... more useful in limiting the length and breadth of testimony than in probing its depth... When you can hold a man down to his own doing you have a reasonably small area to explore. If you let him tell you what other people have told him you open up a vast field of inquiry.

144. McWilliams, *supra* note 38 at 8-7, identifies four elements absent in hearsay evidence: oath, confrontation, cross-examination, observation of witness demeanor. With respect to the right of confrontation, McWilliams states:

> The declarant must confront the accused in the courtroom. The necessity of the accuser having to face the accused will likely cause him to consider his oath and the accuracy of his testimony with care. This right is expressly provided for in the American Constitution by the Sixth Amendment. Although it is not expressly provided for in the *Charter of Rights* it is submitted that it is included by implication in s. 7 in its reference to the principles of fundamental justice and s.11(d) in its reference to a fair hearing.

### a) Distortion by Transmission & Repetition

As P.K. McWilliams notes, "[an] oral statement tends to become uncertain and garbled when heard, comprehended and then recollected by the recipient".[145] Anyone who, as a child, played the game where one whispers a sentence into the ear of the first person in a line-up, who then whispers it to the second person, and so on, will agree that the meaning of the original assertion often changes to an amusing degree once it gets to the end of the line. However, this distortion is the result of multiple hearsay to the point of absurdity, such that it is equivalent to mere rumor and gossip. While conceding that increasing the number of intermediaries between the declarant and trier of fact heightens the risk of distortion, in the case where the witness observed or heard first-hand the declarant's assertion this risk is minimal and assessable by the trier of fact.[146]

It will be a rare case where the hearsay assertion is so complex with numerous interrelated components such that skewing a single component substantially alters the import of the assertion. Often the substance of the entire assertion is directed to one relevant simple fact, for example, that the accused was the assailant or that a component of the *actus reus* was committed. The assertion may also have numerous redundant components which confirm the relevant fact asserted, for example, "Robert, my husband, did it. How could he shoot his own wife?. We've only been married six months." This declaration contains four elements of identification. It is extremely unlikely that through the process of transmission and repetition this assertion could be distorted to the point that it mistakenly identifies some other person as the assailant. In any event, intuitively, it must be recognized that the risk of substantial distortion of a hearsay assertion is a function of the complexity of the assertion and the presence or absence of redundant corroborative assertions contained therein. Such complexity and presence or absence of

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145. McWilliams, *supra* note 38 at 8-4. Note this concern is only relevant to oral assertions and assertions implied by conduct. In those cases where the assertion itself is written or recorded, there is no concern whatsoever of distortion through transmission and retelling.

146. Note with respect to double-hearsay, the risk may stil be significant.

redundant corroborative assertions is assessable by the trier of fact. Thus, the trier of fact has adequate tools by which to assign the appropriate weight to such evidence.

Additionally, usually the recipient-witness before the court is the sole intermediary between the trier of fact and the declarant. Any distortion from what the declarant actually said to what is presented in court is a function of this intermediary. He or she is subject to cross-examination to provide the opposing party-litigant with the opportunity to expose the possibility of mistake or distortion. Does the witness have good hearing? How close to the declarant was the witness at the time the declaration was made? Did the declarant speak clearly? Did the declarant repeat the assertion more than once? The answers to such questions would allow the trier of fact to assess the credibility of the recipient-witness and to gauge the risk of distortion of the hearsay declaration.

Depending upon the circumstances in which the assertion was communicated, the clarity and complexity of the assertion, and the purpose for which the assertion is tendered as evidence, the risk of the accidental distortion can adequately be addressed by cross-examination of the recipient-witness and the trier of fact's according appropriate weight to the evidence.[147]

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147. See *R.* v. *Andrews*, [1987] 1 A.C. 281, [1987] 1 All E.R. 513 (H.L.), where the two police officers heard two different last names when the victim identified his attacker. The court took into consideration that the victim had been drinking excessively and that he had a thick Scottish accent in according the out-of-court identification evidence the proper weight.

## III. Exceptions to the Hearsay Exclusionary Doctrine

### A. The Historical Development of Exceptions

In *Myers* v. *D.P.P.*,[148] Lord Reid discusses the haphazard approach historically taken by courts in developing exceptions to the hearsay exclusion rule:[149]

> The rule has never been absolute. By the nineteenth century many exceptions had become well established, but again in most cases we do not know how or when the exception came to be recognized. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle. This kind of judicial legislation, however, became less and less acceptable and well over a century ago the patchwork which then existed seems to have become stereotyped. The natural result has been the growth of more and more fine distinctions... .

E.M. Morgan agrees that the approach could hardly be described as 'principled':[150]

> Before the early 1800s there was practically no attempt to support the rulings which received such evidence by reasons specifically applicable to the utterances in question.

To admit hearsay, one needed only refer to a prior case in which a similar type of evidence was admitted. The wisdom or correctness of the prior decision was seldom questioned or challenged.

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148. *Myers, supra* 2.

149. *Ibid.* at 884. See also: E.M. Morgan & J.M. Maguire "Looking Backward and Forward at Evidence " (1937) 50 Harv. L. Rev. 909 at 921:

> There is in truth no one theory which will account for the decisions. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court's distrust for the jury; in others only the adversary notion of litigation can account for the reception; and is still others either the absence of a motive to falsify, or positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception itself is built. In short, a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.

150. "History of Hearsay", *supra* note 60 at 118.

For example, in *R. v. Eriswell Inhabitants* (1790),[151] the members of the Court disagreed as to whether a sworn out-of-court statement was properly admitted at trial. Not one of the Justices discussed the inherent reliability of the tendered hearsay, nor whether the circumstances were such that it was more or less easy to appraise than ordinary hearsay. Rather, the court directed its full attention at whether or not any prior court had admitted a hearsay statement in similar circumstances. The debate then was whether the evidence presently before the court was of a similar kind as that admitted in the earlier case. No consideration was given to the validity of the rationale underlying the admission of the hearsay assertion in the prior case, nor to the appropriateness of applying that same rationale in the present case. The court expressed complete confidence in the rectitude of such precedent and saw its role as that of guardian and protector of the existing common law:[152]

> All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded; they are not rules depending on technical refinements but upon good sense; and the preservation of them is the first duty of judges.

In some cases the existence of certain preconditions relating to admission of specific types of hearsay, rather than originating from "good sense" and the "wisdom of ages", was merely the result of historical accident. For example, the limitation on the admission of dying declarations to the murder or manslaughter trial of the dying declarant finds its genesis in Serjeant East's *Pleas of the Crown* (1803).[153] East, in his chapter on homicide, simply drew attention to the fact that dying declarations were a cogent form of evidence in a murder trial. This was subsequently misconstrued to stand for the

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151. 3 Term. R. 707.

152. *Ibid.* at 719.

153. See *Wigmore on Evidence*, *supra* note 2 at 277.

proposition that the admission of hearsay under the dying declaration exception was strictly limited to homicide trials.[154]

Additionally, many of the exceptions and their preconditions evolved in civil cases and "in a milieu which has little relevance to the principles on which hearsay should be admissible in contemporary criminal proceedings."[155] For example, in *Cross on Evidence*, under the heading "Declarations Against Interest",[156] practically all the authorities mentioned are from civil cases, though they equally govern criminal cases.

### 1. Twentieth Century Developments

Despite a long-acknowledged need for a restatement of the hearsay rule to address, for example, modern business realities in today's computerized, automated and mass-produced society,[157] courts have been reluctant to create new exceptions or modify old ones. Even in circumstances where the out-of-court assertion would have undeniably been more reliable than *vive voce* evidence from the declarant, the courts have refused to admit hearsay evidence if it did not fit within one of the existing categories. In England, the matter of judicial reform of the hearsay rule and its exceptions was effectively closed by the decision of the House of Lords in *Myers*.[158] In that case, the

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154. See *R. v. Mead* (1824) 2 B. & C. 605, Abbott C.J., where the dying declaration of the declarant was held inadmissible in the case of perjury. This general acceptance of this rule was furthered by its inclusion in S. Greenleaf's *A Treatise on the Law of Evidence* (Boston: Charles C. Little & James Brown, 1842) at 186.

155. Cross, *supra* note 3 at 637.

156. *Ibid.* at 638.

157. See *Ares* v. *Venner*, [1970] S.C.R. 608, 14 D.L.R. (3d) 4 at 14 [hereinafter *Ares* cited to D.L.R.].

158. *Myers*, *supra* note 2. Note, however, *Phipson on Evidence*, *supra* note 3 at 572ff, demonstrates that numerous English courts have effectively ignored this prohibition and created and perpetuated new hearsay exceptions. See *R. v. Patel*, [1981] 3 All E.R. 94 (C.A.), where the absence of a man's name from the Home Office records of legal immigrants was admissible to prove he was illegal immigrant, and *R. v. Shone* (1983), 76 Cr. App. R. 72 (C.A.), where the absence of an entry on a stock record card relating to certain vehicle springs admitted to prove vehicle stolen.

accused was charged with frauds involving passing off stolen cars as models re-built from wrecks. The prosecution tendered micro-filmed copies of record cards from automobile manufactures to establish that the serial numbers on the engine blocks in these cars belonged to cars reported as stolen. The original record cards which passed along with the cars on the assembly line had long since been destroyed. It was not denied that the records were inherently reliable, nor that any assembly worker, if he or she could be identified and located, could give any credible testimony relating to the serial numbers. However, the House of Lords found that these records were inadmissible as they amounted to hearsay evidence and fell under no exception recognized at common law.

The majority of the House was of the opinion that it was not the role of the judiciary to further expand or modify existing hearsay exceptions or to create new ones; rather, that was within the exclusive jurisdiction of Parliament. Lord Reid declared:[159]

> I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation; and if we do in effect change the law, we ought in my opinion only do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of parts of the existing law of hearsay susceptible of similar treatment,... The only satisfactory solution is by legislation following on a wide survey of the whole field... A policy of make do and mend is no longer adequate.

This decision immediately prompted passage of special legislation providing for the admissibility of business records in criminal proceedings.[160]

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159. *Myers*, *supra* note 2 at 1021-22.

160. In fairness to their Lordships, is must be noted that at the time *Myers* was being decided, there was already a Parliamentary Committee reviewing and proposing reforms to the laws of evidence, including the rules relating to the admission of hearsay. This committee's work eventually resulted in the passage of the *Civil Evidence Act 1968*.

In Canada, *Myers* has not been followed. Rather, in *Ares v. Venner* (1970),[161] Justice Hall favored the minority opinions in *Myers* of Lords Donovan and Pearce, and introduced a new common law business records hearsay exception into Canada. Lord Donovan and Pearce were of the opinion that the need to restate the hearsay rule to meet modern conditions was one which should be met by the Court: "[t]he common law was moulded by judges and it is still their province to adapt it from time to time".[162] In the words of Lord Pearce, adopted by Justice Hall:[163]

> I find it impossible to accept that there is any "dangerous uncertainty" caused by obvious and sensible improvements in the means by which the Court arrives at the truth. One is entitled to choose between the individual conflicting obiter dicta of two great judges and I prefer that of Jessel M.R. [cites passage from *Sugden v. Lord St. Leonards* reproduced in following section which sets out the principles underlying all hearsay exceptions.] On that expression of principle he admitted the extension which has been acted on ever since in the Probate Division.
>
> That, I respectfully think, is the correct method of approach, particularly to a problem that deals with the court's method of ascertaining truth. As new situations arise it adapts its practice to deal with the situation in accordance with the basic and established principle which lie beneath the practice. To exalt the practice above the principle would be a surrender to formalism.

Justice Hall rejected the majority view that legislative reform was the only route by which to make further improvements on the law of hearsay. Such an approach would be saying, in effect: "[t]his judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job".[164] Having established that the hospital records at issue in this case met both Wigmore's twin criteria of "necessity" and "reliability", discussed further in the next section of this

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161. *Ares*, *supra* note 157.

162. *Myers*, *supra* note 2 at 1047, Lord Donovan.

163. *Ibid.* at 1040-41. Adopted by Justice Hall in *Ares*, *supra* note 157 at 15.

164. *Ares*, *supra* note 157 at 16.

chapter and, at length, in Chapter III of this thesis, Justice Hall allowed the appeal and affirmed the trial court's decision to admit the hospital records.

**B. General Underlying Rationale: Necessity and Reliability.**

Numerous judges and academics have attempted to formulate a comprehensive rationale which explains in retrospect the creation and continued existence of the firmly rooted hearsay exceptions at common law. Inevitably, however, each formulation carries with it a caveat that the proposed set of principles explains, at best, the majority of exceptions in this 'hodge-podge' collection.[165] However, imperfect as it may be, some principled framework must be adopted to critique and propose reform in this area. The preeminent statement of principles explaining the existence of most hearsay exceptions, one which has repeatedly been favored and adopted by the Supreme Court of Canada,[166] is Wigmore's twin criteria of "necessity" and "circumstantial probability of trustworthiness".[167]

As stated by Wigmore and adopted by Chief Justice Lamer in *Smith*, the purpose and reason of the hearsay rule "is the key to the exceptions to it".[168] Wigmore goes on to set out the general rationale for the vast majority of hearsay exceptions:[169]

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165. See *Wigmore on Evidence*, *supra* note 2 at 254, under heading "Incomplete application of the two principles":

> The two principles - necessity and trustworthiness - are only carried out in the detailed rules under the exceptions. It would be strange if it were otherwise in a legal system formed as our is, partly on precedent and partly on principle, at the hands of judges of varying disposition and training. The two principles are not applied with equal strictness in every exception; sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking. [Emphasis added.]

166. See *Ares*, *supra* note 157, *Khan*, *supra* note 140, *Smith*, *supra* note 85 and *R. v. K.G.B.*, *supra* note 107.

167. In *Evidence: Common Sense and Common Law*, *supra* note 120 at 130-47, Maguire discusses three "motives" for creation of hearsay exceptions: reliability, necessity and adversary practice. The third motive underlies treating admissions as exceptions to hearsay rule.

168. *Wigmore on Evidence*, *supra* note 2 at 251. Adopted by Chief Justice Lamer in *Smith*, *supra* note 85 at 929.

169. *Wigmore on Evidence*, *supra* note 2 at 251.

> The theory of the Hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is far from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of the death of the declarant -, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape.

Thus, these two ingredients - a circumstantial probability of trustworthiness and a necessity for the admission of the evidence - are the essential elements for admissibility and what the preconditions of each firmly entrenched hearsay exception seek to establish.

Wigmore makes no claim to have been the first to identify these principles as the unifying thread which interconnects all common law hearsay exceptions.[170] Jessel M.R. in *Sugden v. Lord St. Leonards* (1876)[171] stated as follows:

> Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested, that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me to be one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.

On that expression of principle Jessel M.R. created a new hearsay exception relating to wills and codicils applied ever since in the Probate Division.[172] Justice McLachlin, in

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170. *Ibid.* at 252. For example, Wigmore cites the same passage from *Sugden v. Lord St. Leonards* as does this author.

171. 1 P.D. 154 at 241.

172. Note it was also the last significant extension of an existing exception or creation of a new exception to occur in England.

*Khan*,[173] summarizes and condenses the four tests identified by Jessel M.R. into the two general principles of "necessity"[174] and "reliability".[175]

### 1. The Necessity Principle

With respect to the consideration of "necessity", Wigmore states:[176]

> Where the test of cross-examination is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statement without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative... . [I]t is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception. [Emphasis in original.]

The scope of this principle is further defined in that the necessity for the evidence must arise from the fact that either:[177]

> (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or *otherwise unavailable* for the purpose of testing...[178] [or]
>
> (2) The assertion may be such that we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources... [Emphasis in original.][179]

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173. *Khan*, *supra* note 140 at 101.

174. "Necessity" becomes the first of the *Khan* twin criteria.

175. The "reliability" principle is the result of a merger of the second, third and fourth test.

176. *Wigmore on Evidence*, *supra* note 2 at 253.

177. *Ibid.*

178. The "dying declaration" and "declarations against pecuniary or proprietary interests" are, to name a few, some of the hearsay exceptions which require that the declarant be dead. The "declaration against penal interests" exception merely requires that the declarant be out of the jurisdiction or unavailable.

179. This would explain the existence of numerous *res gestae* exceptions where the declarant may be available at trial.

This statement of the necessity principle was adopted by Chief Justice Lamer in both *Smith* (1992),[180] and *R. v. K.G.B.* (1993).[181]

### 2. Circumstantial Probability of Trustworthiness

Of the companion principle of "reliability" - sometimes known as the circumstantial probability of trustworthiness - Wigmore finds that the existing hearsay exceptions ensure that circumstances exist which provide a practicable substitute for the ordinary test of cross-examination:[182]

> There are many situations in which it can be easily seen that such a required test would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance) in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.

However, identifying the numerous circumstances which promote reliability and determine the required degree of trustworthiness presents some difficulty. Any further clarification of this principle is not forthcoming from Wigmore:[183]

> This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which the circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation. [Emphasis added.]

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180. *Smith*, *supra* note 85.

181. *K.G.B.*, *supra* note 107.

182. *Wigmore on Evidence*, *supra* note 2 at 252.

183. *Ibid.* at 253.

Wigmore does, however, outline three different classes of reasons which would promote such reliability:[184]

a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations such as danger of easy detection or the fear of punishment would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

Most of the exceptions relevant to our discussion rest entirely on one of these reasons; for example, "declarations as to contemporaneous bodily or mental sensations or conditions", "spontaneous exclamations", and "declarations against interest" rest entirely on the first category; while "dying declarations" supposedly rests on the second category (the fear of divine punishment). It is interesting to note that, after acknowledging the existence of "many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion", the first two of the above classes of reasons provided by Wigmore merely address veracity of the declarant. Only the last enumerated class addresses the possibility of misperception and faulty memory. However, this reasoning relates primarily to "declarations as to reputation", "declarations as to pedigree" and "declarations as to public documents", rarely used hearsay exceptions, especially in the criminal proceedings. Also, the efficacy of this rationale to promote reliable hearsay evidence has been soundly criticized, especially as it relates to public documents.[185]

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184. *Ibid.* at 254.

185. See *Sopinka*, *supra* note 25 at 232-33, and Baker, *supra* note 47 at 137.

## IV. Conclusion

In this chapter we began by setting out the meaning of the term "hearsay" to be employed in remainder of this thesis. We noted there were two approaches to defining hearsay which has lead to some confusion, both in the case law and the legal literature. The first simply includes any out-of-court assertion, whether oral, written, or implied by conduct, which is tendered in evidence. The second further distinguishes hearsay from other out-of-court assertions based upon the purpose for which the evidence is tendered. Only if it is to be received for the purpose of establishing the truth of its contents, is it hearsay. For the sake of simplicity and to avoid further confusion of an already complex area of the law, we rejected the latter approach. We concluded that it buried within the definition of hearsay an important element of the doctrine which is best left in the statement of the rule.

A review of the arguments for and against including non-assertive conduct within the ambit of the hearsay definition then followed. As the declarant does not intend to communicate in these circumstances, any concerns as to veracity of the declarant appear to be obviated. Thus, proponents of exempting non-assertive conduct from the hearsay rule suggest that the risk and prejudice of admitting such evidence no longer outweighs the benefit of putting all relevant evidence before the trier of fact. However, we concluded that such an exemption failed to address and give adequate consideration to the possibility that other testimonial dangers were present and operative with respect to non-assertive communicative conduct.

To further elucidate the arguments on both sides of this debate, the House of Lords decision of *Wright* v. *Doe d. Tatham* was examined. This case marked the beginning of the controversy as to whether non-assertive conduct should be included within the ambit of the hearsay exclusion doctrine. The Court concluded that each letter tendered was merely evidence of the writer's opinion embodied in an act, and thus properly excluded as hearsay. The declarant's belief as to the existence of a material particular, which is inadvertently disclosed by his or her conduct, is just as susceptible

to the dangers of misperception and faulty memory as is any out-of-court verbal communication. There is also a concern that the belief held by the declarant is not based upon first-hand observation. Thus, we concluded that non-assertive conduct should be included in the scope of the exclusion doctrine. Any criticism that necessary and relevant evidence of non-assertive conduct may be excluded which raises no concerns as to the existence of any testimonial dangers must be directed at the common law's failure to provide an exception to the rule in those circumstances. Having adopted a working definition for hearsay, we then set out our statement of the hearsay exclusion rule: Hearsay is inadmissible if the purpose is to tender the assertion as evidence of the truth of the matters contained therein. The admission of hearsay evidence for some other purpose characterizes its use as original evidence, for which it is always admissible.

Under the heading "The Historical Development of the Rule" we examined the historical factors and parallel legal developments which effected the pronouncement and recognition by the courts of the hearsay exclusion rule. The evolution of the modern jury trial had a significant influence, with the transformation of the jury from an investigatory body to a trier of fact wholly dependant on the evidence presented by witnesses in court for its verdict. The rise of the adversarial system of justice also had some effect on the pronouncement of the doctrine. The rule safeguarded the right of each party-litigant to insist that evidence be given under oath, and that he or she have an opportunity to cross-examine witnesses. Other factors, such as the civil system of numerical sufficiency, likely had some influence, though of lesser importance.

In the section entitled "Purpose and Rationale: The Theory of the Hearsay Rule", we attempted to extract the modern-day rationale underlying the continued existence of the hearsay exclusion doctrine. We identified and reviewed the four testimonial dangers or credibility factors (insincerity, misperception, faulty memory and ambiguity of language) which cross-examination tests for and upon which the trier of fact makes its assessment of weight accorded the evidence. We contested the elevated status of witness veracity over and above other testimonial dangers. If the witness either misperceived the

events or suffers from a faulty memory, there is a danger that inherently unreliable evidence will be received into the criminal trial.

We then reviewed the trial procedures, which supposedly bolster the credibility of a witness' testimony or test for the existence of any testimonial dangers, which are lost as a result of admitting hearsay evidence. We concluded that preservation of cross-examination was the most powerful and convincing reason for the existence of the hearsay rule. As witness confidence can often mislead the trier of fact in assessing credibility, the loss of observation of the declarant's demeanor was held to be of relatively minor importance. The absence of oath and inability of the jury to assess weight were considered to be of little persuasive weight in today's secular and educated society.

In the final section of this chapter, we reviewed how courts have historically developed hearsay exceptions in a haphazard manner. While acknowledging the difficulty of gleaning a comprehensive rationale from such a hodgepodge of principles, we reviewed some attempts by academics and courts to do just that. We adopted Wigmore's twin criteria of "necessity" and "reliability" as the underlying rationale which most persuasively explains of the bulk of the hearsay exceptions existing at common law. The "necessity" principle requires either that the hearsay evidence be the only viable means by which the matters asserted in the hearsay can be established, or that the hearsay evidence is such that we cannot expect, again, to get other evidence of such value. The companion principle of "reliability", also known as circumstantial probability of trustworthiness, ensures that the circumstances provide a practicable substitute for the ordinary test of cross-examination.

# CHAPTER THREE

## AN ANALYSIS OF THREE EXISTING COMMON LAW EXCEPTIONS: *DYING DECLARATIONS, DECLARATIONS AGAINST INTEREST, AND THE RES GESTAE* CATEGORY.

> "The theory of the hearsay rule... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test of security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of the death of the declarant - so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape." - J.H. Wigmore, *A Treatise On the Anglo-American System of Evidence in the Trials of Common Law*, vol. 5, 3d ed. by J.H. Chadbourn (Boston: Little Brown & Co. 1940) at 251.

### I. INTRODUCTION

This chapter examines three firmly rooted exceptions to the hearsay exclusion doctrine: the dying declaration, declarations against interest and the *res gestae*. The first two of these are analyzed and discussed under their own separate headings. The *res gestae* category is then divided into four separate subcategories: declarations as to contemporaneous bodily or mental sensations or conditions, declarations indicating state of mind or intention, declarations accompanying or explaining acts, and spontaneous exclamations. Each of the subcategories is treated as an independent hearsay exception and analyzed accordingly. Of the hearsay exceptions existing at common law, these were selected for analysis because of both their ancient origins and their potential, in this author's opinion, to permit unreliable or unnecessary hearsay evidence to be placed before the trier of fact in a criminal trial.

Analysis of the hearsay exceptions will begin, in most cases, with a brief history of the exceptions' historical development and evolution at common law. This will help us to understand and explain the present-day existence of certain preconditions and to expose some of the rationales underlying the exceptions. The present-day scope and limitations of the hearsay exception will then be set out. The preconditions necessary to trigger application of the exception will be identified. An attempt will be made to extract the rationale underlying the exception, both from its history and present-day application, as well as from any judicial comment on the reason or purpose for the exception. The twin criteria of "necessity" and "reliability", as discussed in the previous chapter, will form the framework of analysis for each rationale. Finally, an assessment of the validity of the exceptions' underlying rationales and preconditions will follow. This critique will focus almost exclusively on the admission of inculpatory hearsay evidence in the criminal trial where the accused has had no opportunity to cross-examine the declarant. The primary objective of this chapter is to demonstrate how many of these firmly entrenched hearsay exceptions fail to satisfy, in certain circumstances, the twin criteria of "necessity" and "reliability" as set out by J.H. Wigmore[1] and adopted by the Supreme Court of Canada in *R.* v. *Khan*.[2]

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1. J.H. Chadbourn, ed., *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown & Co., 1974) [hereinafter *Wigmore on Evidence*].

2. [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 113 N.R. 53, 41 O.A.C. 353, aff'g (1988), 27 O.A.C. 143, 64 C.R. (3d) 281, 42 C.C.C. (3d) 197 [hereinafter *Khan* cited to C.C.C.].

## II. DYING DECLARATIONS

### A. History

Like many of the other hearsay exceptions, dying declarations were routinely admitted in court long before the rule against the admission of hearsay was formulated and recognized at common law. An example of such a declaration being received is recorded as early as 1202.[3] The trial of the *Earl of Pembroke* (1678)[4] provides one of the earliest instances of a dying declaration being admitted after the hearsay exclusionary doctrine had become firmly entrenched. The Court in that case, however, made no comment as to the declaration's hearsay characteristics, nor regarding its admissibility pursuant to any recognized exception. The first reference to the dying declaration as an established and judicially recognized hearsay exception occurs in *R.* v. *Reason and Trantor* (1721).[5] However, a clear statement of this exception's rationale and preconditions is not found until the decision of Chief Baron Eyre in *R.* v. *Woodcock* (1789).[6]

### B. Scope and Preconditions

Cross provides a succinct statement of the exception and its preconditions:[7]

> The oral or written declaration of a deceased person is admissible evidence of the cause of the death at a trial for his murder or manslaughter[8] provided he was under a settled, hopeless expectation of

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3. R. Cross & C. Tapper, *Cross on Evidence*, 7th ed. (London: Butterworths, 1990) at 753.

4. 6 How. St. Tr. 1311 at 1333-34.

5. 1 Strange 499, 93 E.R. 659.

6. 1 Leach 500, 168 E.R. 352 [hereinafter *Woodcock* cited to E.R.].

7. Taken from *Cross*, *supra* 3 at 651.

8. *R.* v. *Mead* (1824), 2 B.& C. 605, 107 E.R. 509 at 510 (K.B.), appears to be the first reported case in which this limitation was imposed. Abbott, C.J., stated that "evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration". R.J. Delisle, in *Evidence: Principles and Problems* (Toronto: Carswell, 1984) at 235, notes that this limitation appears to have been the result of historical accident:

> Until the nineteenth century, the exception operated both in civil and criminal cases. The source of the restriction appears to be a statement by East in his chapter on

death[9] when the statement was made and provided he would have been a competent witness[10] if called to give evidence at that time.

In addition, the following propositions may be extracted from the case law which further define the scope of this exception. While the victim must have entertained a "settled, hopeless expectation that he was about to die almost immediately",[11] it is unnecessary that the victim, in fact, expire forthwith or within a short period of time thereafter.[12] The dying declarant is not required to state specifically that he or she knows they are about to die; it may be inferred by the nature, number and gravity of the injuries of the deceased and the conduct of the deceased.[13] The declaration can be evidence both for

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Homicide; in that chapter he noted that dying declarations were receivable in homicide prosecutions. By the next generation this statement had been interpreted to mean that dying declarations were only receivable in homicide prosecution.

Note in Canada a dying declaration can also be received in a trial for criminal negligence causing death, or where death of a person is a necessary element of the offence to which the accused is charged. See *R.* v. *Jurtyn* (1958), 28 C.R. 295, [1958] O.W.N. 355 (C.A.) [hereinafter *Jurtyn* cited to C.R.].

9. In *R.* v. *Errington*, (1838) 2 Lew C.C. 148, declarations were excluded because the deceased did no more than say that he regarded himself as in great danger. As stated by Justice Wurtele in *R.* v. *Laurin (No. 4)* (1902), 6 C.C.C. 104 at 106 (Que. K.B.) [hereinafter *Laurin*]:

> The person who makes the dying declaration must be thoroughly convinced that he is about to die; he must have no hope, nor glimmer of hope. It is not a matter merely of thinking, but it must be a matter of solemn conviction that he is going soon to die, and he must have no hope whatever of recovery.

However, it is immaterial whether another person in a similar situation would have had same feeling or that a physician would not have considered the situation hopeless.

10. *Chapdelaine* v. *The King* (1934), [1935] S.C.R. 53, 63 C.C.C. 5, [1935] 2 D.L.R. 132 at 136, Duff C.J.C. [hereinafter *Chapdelaine* cited D.L.R.]:

> Then, he must consider whether or not the statement would be evidence if the person making it were a witness. If it would not be so, it cannot properly be admitted as a dying declaration.

11. *Ibid.* at 136.

12. Note P.K. McWilliams, in *Canadian Criminal Evidence*, 3rd ed. (Aurora, Ontario: Canada Law Book, 1992), adds to his statement of the necessary preconditions that the victim must die within a reasonable time after the making of the declaration. However, the case law does not appear to support this proposition. See *R.* v. *McIntosh*, [1936] 3 W.W.R. 456, 51 B.C.R. 148, 67 C.C.C. 143 (S.C.), rev'd [1937] 2 W.W.R. 1, [1937] 4 D.L.R. 478, 52 B.C.R. 249, 69 C.C.C. 106 (C.A.) [hereinafter *McIntosh* cited to C.C.C.].

13. See *R.* v. *Mulligan* (1973), 23 C.R.N.S. 1 at 3-4 (Ont.H.C.), aff'd (1974), 26 C.R.N.S. 179, 18 C.C.C. (2d) 270 (Ont.C.A.), aff'd [1977] 1 S.C.R. 612, 9 N.R. 27, where Justice O'Driscoll, ruling on the admissibility of a dying declaration in relation to the deceased's seven stab wounds, states:

and against the accused[14] and may be in answer to leading questions or be obtained by earnest solicitations.[15] The declaration must be based upon personal knowledge or actual observation of the fact which the declarant relates,[16] and it must relate to injuries which are the subject of the charge.[17]

The Courts may, in some circumstances, relax the rules of evidence to allow admission of evidence undermining the trustworthiness of the dying declaration. This appears to be in recognition of the fact that the admission of a dying declaration can be highly prejudicial and may cause some unfairness to the accused. As a result, "the accused is entitled to every allowance and benefit that he may have lost by the absence

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> In my view, the nature of the injuries suffered by the deceased, the number of injuries suffered by the deceased, and the gravity of them would lead any reasonable person, in my view, to the view that they had a settled, hopeless expectation that they were about to die almost immediately.
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> . . .
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> I think each case must depend on its peculiar circumstances and, in my view, the nature and gravity of the injuries produced this expectation of almost immediate death which, in fact, did happen.

However, see *R.* v. *Presley* (1975), [1976] 2 W.W.R. 258 (B.C.S.C.) where, despite having three bullet holes in her abdomen, the circumstances were such that the required expectation of death could not be inferred. Note in *Presley*, the victim bled very little from the wounds, thus it was quite possible that she was not aware of the seriousness of her injuries.

14. See *Laurin*, *supra* note 9. However, as McWilliams, *supra* note 12 at 8-28, points out: "where the guilt of the accused depends upon statements made in a dying declaration any admissions before death tending to qualify or contradict the statements made therein are admissible". See *McIntosh*, *supra* note 12 at 118. See also *R.* v. *Marceau* (November 2, 1988), Doc. No. CA007595 (B.C.C.A.), where a suicide note of the brother of the accused was admitted in an attempt to exculpate the accused on a possession of narcotics charge. The British Columbia Court of Appeal held that the trial judge properly admitted the suicide note and gave it the appropriate weight. Note there is no consideration by either the Court of Appeal nor the trial court of the requisite preconditions for this exception. Clearly they would not have been met in these circumstances.

15. See *R.* v. *Picken* (1935), 52 B.C.R. 264, 69 C.C.C. 61, [1937] 4 D.L.R. 425 (C.A.), rev'd on other grounds [1938] S.C.R. 457, 69 C.C.C. 321, [1938] 3 D.L.R.; *R.* v. *Smith* (1873), 23 U.C.C.P. 312 at 316-17.

16. *Schwartzenhauer* v. *The King*, [1935] S.C.R. 367, 64 C.C.C. 1 at 3, [1935] 3 D.L.R. 711 [hereinfter *Schwartzenhauer* cited to C.C.C.]:

> Clearly, dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived.

17. See *Schwartzenhauer*, *supra* note 16, *R.* v. *Mead*, *supra* note 8.

of the opportunity of more full investigation by the means of cross-examination".[18] In *R.* v. *McIntosh* (1937),[19] this "allowance and benefit" resulted in the admission of hearsay statements of the deceased declarant which undermined the reliability of the dying declaration, but which fell under no recognized exception to the hearsay rule.[20] The British Columbia Court of Appeal received the evidence on the basis that "every principle of justice requires that every reasonable opportunity should be afforded the accused to answer accusations so difficult to meet as those made by a 'witness' from the grave".[21] Note, however, the evidence undermining the credibility of the dying declarant or declaration does not affect the admissibility of the declaration. This evidence goes only to the weight accorded the statement.

In some cases the admissibility of a dying declaration has been blocked despite all the preconditions of the hearsay exception having been satisfied. Wigmore cites numerous English and American authorities which appear to support the proposition that admission of a dying declaration can be challenged if the accused can demonstrate: (1) that the declarant had a "temporal self-serving purpose to be furthered" (i.e.: strong feelings of hatred or revenge)[22]

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18. *Ashton's Case* (1837), 2 Lew. 147, 168 E.R. 1109.

19. *McIntosh*, *supra* note 12.

20. In that case, the victim had died as a result of an infection caused by an unlawful abortion. Her dying declaration identified the accused as the abortionist. The hearsay evidence which was tendered by the accused was the statements made several days before the dying declaration by the victim to her husband. In those statements she claimed to have induced the abortion herself without the help of anyone.

21. *McIntosh*, *supra* note 12 at 109.

22. *Wigmore on Evidence*, *supra* note 1 at 302, cites *Tracy* v. *People*, 97 Ill. 101 (1880), where the deceased's swearing and use of profane language demonstrated "a reckless, irreverent state of mind, and entertained feelings of ill-will and hostility towards the accused". The rationale which guaranteed veracity did not obtain; therefore, his dying declaration was inadmissible. However, there appears to be an alternate explanation for the exclusion of the declaration in *Tracy*. The Court stated in that case: [*ibid.* at 106]

> The use of profane language immediately preceding the statement is hardly to be reconciled with the assumption that he was at the time of sound mind and impressed with a sense of almost immediate death... . It is hard to realize how any sane man who believes in his accountability to God can be indulging in profanity when at the same time he really believes that in a few short hours at most he will be called upon to appear before Him to answer for the deeds done in the body.

or; (2) that at the time of making the declaration the declarant had an irreverent state of mind and was not moved by the solemnity of his or her own imminent demise.[23] It must be emphasized, however, that the onus appears to be on the party against whom the hearsay is tendered to put enough evidence before the court to make this a "live" issue before the court will exclude the dying declaration.[24]

### C. Rationale

The rationale for the exception is expressed in the following oft-quoted passage from the judgment of Chief Baron Eyre in *R.* v. *Woodcock* (1789):[25]

> ... the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.

It is apparent that the Court assumes all declarants have a belief in God and a fear of divine retribution which compels them to speak truthfully.[26] The theory, simply stated,

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It is evident from this quotation that the Court believed either that the man was insane, and therefore not a competent witness, or that he was sane and he did not really believe that he was about to die in a few short hours, thus lacking the necessary apprehension of immediate and impending death. As a result, it is unnecessary to resort to Wigmore's gloss on this exception to explain the exclusion of this statement.

23. See discussion of *R.* v. *Pike* (1829), 3 C & P 598, 172 E.R. 562, in following section entitled "Rationale".

24. Neither Wigmore nor any of the cases located by this author discuss the standard of proof which the accused must meet to exclude the declaration. Must he raise merely a reasonable doubt as to the existence of the declarants revengeful feelings or lack of reverence? While in some cases hatred toward the accused may be infamous, and irreverence evident in the circumstances or on the face of the declaration itself, this is a significant evidential burden placed upon the accused.

25. *Woodcock*, *supra* note 6 at 352. It is noteworthy that the court felt necessary to point out that the deceased declarant, while a native of the East Indies, was a "baptized mulatto". *Woodcock* was followed in *R.* v. *Magyar* (1906), 12 C.C.C. 114 at 117 (N.W.T.S.C.).

26. D. Byrne & J.D. Heydon, *in Cross on Evidence*, 4th Australian Ed. (Sydney: Butterworths, 1991) at 891, cite a decision of the Papua New Guinea Supreme Court which demonstrates that this remains today the primary underlying rationale for the admission of this class of hearsay. In *R.* v. *Madobi* (1963), 6 F.L.R. 1, the court found the exception had no application in a community where the next life is believed

is that "no person who is going into the presence of his Maker will do so with a lie on his lips".[27]

The religious overtones of this rationale are further demonstrated in the decision of *R.* v. *Pike* (1829):[28]

> We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appears that the person making such declarations was then under the deep impression that he was soon to render an account to his Maker.

In that case, as the child was only 4 years old, the Court found that the child could not possibly have the requisite comprehension of the life hereafter so as to guarantee the sincerity of her declaration.[29]

It is also evident from the above-quoted passage from *Woodcock* that the solemnity of circumstances surrounding a dying declaration acts only as a substitute for the administering of the oath.[30] That the accused has been denied the opportunity to

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to be spent in comfort on a neighboring island and there is no sanction against lying at the point of death. For further discussion of this case see R. Eggleston, *Evidence, Proof and Probability* (London: Weidenfeld and Nicolson, 1978) at 49-50. Note in *R.* v. *Savage*, [1970] Tas. S.R. 137 at 145, Burbury C.J. rejected the views of the *Madobi* Court:

> The notion that the court should embark on an enquiry into the religious beliefs of a declarant in the life hereafter... should in my view be wholly rejected ... [Even if the declarant is] agnostic or even if an atheist I think [his or her] dying declaration is nevertheless admissible.

27. *R.* v. *Osman* (1881), 15 Cox C.C. 1 at 4. See also *Nembhard* v. *The Queen* (1981), 74 Cr. App. R. 144 at 146 (P.C.) [hereinafter *Nembhard*].

28. 3 C & P 598, 172 E.R. 562.

29. Note as the child was only 4 years old, she would not have been a competent witness to testify at the time she made the declaration; thus, it is unnecessary to explain the exclusion of her dying declaration on any other basis than the preconditions necessary to trigger application of this exception were not met.

30. See Baron Alderson's comments in *Ashton's Case* (1837), 2 Lew. 147, 168 E.R. 1109:
> When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath... .

See also *Nembhard*, *supra* note 27 at 146, per Sir Owen Woodhouse:
> For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man.

cross-examine the declarant to expose possible weaknesses in the declarant's perception and memory goes merely to the weight accorded the evidence by the trier of fact.[31]

While the assurance of veracity resulting from the above-stated rationale has rarely been challenged, some Courts have, nonetheless, insisted that necessity is the dominant principle upon which the exception is founded: "[i]t is not received upon any other ground than that of necessity, in order to prevent a murder going unpunished".[32] In the words of Sir Owen Woodhouse in *Nembhard* v. *The Queen* (1981):[33]

> There is a further consideration that it is important in the interests of justice that a person implicated in a killing should be obliged to meet in Court the dying accusation of the victim - always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment, by the jury.

Thus, "the ground of public necessity of preserving lives of the community, by bringing manslayers to justice"[34] counterbalances any residual concerns the Court might have as to the reliability of this hearsay evidence.

It is noteworthy that dying declarations are admissible only in murder or manslaughter trials and not in civil trials. The overriding societal need for the admission of such evidence appears only to obtain in the criminal context.

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31. In *Nembhard*, *supra* note 27 at 147, the Privy Council rejected the suggestion that some corroborative evidence is required to compensate for the loss of ability by the accused to cross-examine the declarant. This merely goes to the weight accorded the statement.

32. From editorial note of Redfield, C.J., in Simon Greenleaf's *A Treatise on the Law of Evidence* (Boston: Little & Brown, 1860) as quoted in *Wigmore on Evidence*, *supra* note 1 at 278. See also *Donnely* v. *State* 26 N.J.L. 601 at 617 (1857), Ogden J.:

> Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment. When a death-wound is inflicted in secret, as was done in this case, no person can be expected to speak to the fact except the victim of the violence.

See also *Jurtyn*, *supra* note 8 at 297:

> The admissibility of dying declarations under the requisite circumstances is an exception to the hearsay rule which appears to be founded mainly on the principle of necessity, since it frequently happens that there is no third person available as an eye witness. [Emphasis added.]

33. *Nembhard*, *supra* note 27 at 146-47.

34. S. Greenleaf, *A Treatise on the Law of Evidence* (Boston: Little & Brown, 1842) at 187.

**D. Critique**

That dying declarations are sometimes received with apprehension and reservation is evident in the following passage from the judgment of Justice Davis in *Schwartzenhauer* v. *The King* (1935):[35]

> In the words of Byles, J., in *Reg.* v. *Jenkins* (1869), 11 Cox C.C. 250, these dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected.

J.M. Maguire, in *Evidence: Common Sense and Common Law*,[36] concurs with respect to the danger of admitting such statements and challenges their inherent reliability:[37]

> ... [A]nybody will agree that the victim of a deadly accident or a murderous assault is often not the best observer of what happened to him and, even on the issue of sincerity, some folk carry grudges to their graves and may not be averse to exercising them with their dying breath. Moreover, in its traditional and still its most common form, this doctrine is not extended to civil cases, such as actions for wrongful death, but is confined to the trial of criminal prosecutions for the death of the declarants. The reason normally offered for this restriction is unreliability of the evidence.
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> When you come to think about it, such a restriction is quite astounding. Why admit against a criminal defendant, whose life may be at stake, evidence which would not be let in against the same man in a civil action for mere damages?

Unfortunately, dying declarants make a difficult class of persons to study, and it is impossible to set up controlled experiments which reconstruct the circumstances which supposedly guarantee the declaration's reliability.[38]

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35. *Schwartzenhauer*, *supra* note 16 at 2.

36. (Chicago: Foundation Press, 1947).

37. *Ibid.* at 133.

38. See L.R. Jaffee, "The Constitution and Proof by Dead or Unconfrontable Declarants" (1979) 33 Ark. L. Rev. 227 at 308-63, where the author concludes that psychiatric, psychological, experimental, statistical, medical and physical evidence "seems negative, unsupportive, ambiguous and insignificant"

While the rationale propounded by Chief Baron Eyre in *Woodcock* may have been valid in the eighteenth and nineteenth centuries, its legitimacy must certainly be questionable in today's secular society.[39] The influence of religion in the affairs of men and women has undoubtedly decreased.[40] Many people today give little thought whatsoever to their religious beliefs, while some are steadfast atheists. The rationale of "not wanting to meet your Maker with a lie on your lips" has little persuasive force when such persons are the dying declarant.

Providing the accused with the opportunity to adduce evidence to rebut the presumption that all declarants have some belief in a divine being is an ineffectual protective measure. Few people give any clear indication to the outside world of their theological beliefs. Many with negligible religious conviction regularly attend religious services simply for the social interaction or to maintain traditions in the family. Identifying, with any certainty, those to whom this rationale obtains and those to whom it does not - short of examining them on the witness stand - is next to impossible.

Even completely discounting the risk that a declarant has no belief in God or divine retribution, or assuming that everyone - atheist, agnostic and religious fanatic alike - is moved by the solemnity of their own imminent demise to speak the truth, the dying declaration exception still fails to address a number of testimonial dangers inherent in hearsay evidence. As discussed in the previous chapter, preserving for the accused the right to cross-examine the persons giving evidence against the accused is the principal reason for the existence of the hearsay exclusion rule. The general rationale supposedly underlying all hearsay exceptions is that the circumstances satisfy all the requisite preconditions to provide a practicable substitute for the ordinary test of cross-

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when offered in support of the dying declaration exception and recommends its abolition.

39. Note this rationale may no longer apply today even to persons who have strong religious convictions. The rationale is clearly rooted in ancient Judaeo-Christian notions of a merciless and vengeful God. Modern-day Judaism and Christianity teach of a more loving and merciful God.

40. *R.* v. *K.G.B.*, [1993] S.C.J. No. 22 (QL), Cory J.

examination.[41] As has been noticed, the rationale underlying the dying declaration exception makes no claim whatsoever to be a practical substitute for cross-examination.

Cross-examination tests all four of the testimonial factors: veracity, perception, memory and ambiguity of language. Some commentators have claimed cross-examination's greatest contribution to the ascertainment of truth is its effectiveness in disclosing inaccurate perception or faulty memory on the part of the witness.[42] The dying declaration exception provides circumstantial probability of trustworthiness relating only to sincerity. The risk of inaccurate perception and faulty memory goes merely to the weight accorded the evidence. However, as discussed in the previous chapter under the heading "Paramountcy of Veracity As Credibility Factor", there is no logic in according the risk of insincerity an elevated status above the other testimonial dangers. Where circumstances raise concerns as to perception or memory, the reliability of an out-of-court statement may be as suspect as if the declarant had been untruthful. Without cross-examination or other means to assess the degree of the risk of misperception or memory distortion, any allocation of weight to this evidence is arbitrary. Therefore, unless the circumstances present little or no risk of misperception or faulty memory, the dying declaration, which is in almost every case identification evidence, should not be received in evidence.

As discussed in the "Rationale" section, some would argue that the "public necessity of preserving lives of the community, by bringing manslayers to justice" counterbalances the fact that the rationale may not address every testimonial danger. However, admitting evidence of questionable reliability in a criminal trial to promote or address certain societal interests is strikingly similar to arguments normally made during

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41. See Chapter Two of this thesis for a discussion of this issue.

42. See E.M. Morgan, *"Hearsay Dangers and the Application of the Hearsay Concept"* (1948) 62 Harv. L.R. 177 at 188 [hereinafter "Hearsay Dangers"], where he concedes that, while occasionally cross-examination does reveal insincerity, "its most important service is in exposing faults in perception and memory". Most witnesses are quite sincere and cross-examination is not so effective as to reveal the falsity of a competent liar.

a section 1 analysis pursuant to the *Canadian Charter of Rights and Freedoms*.[43] Such an analysis follows only after an infringement of a *Charter* right has been found.[44] Can the admission of such evidence, gravely prejudicial to the accused, which by its very nature denies the accused of an effective opportunity to test three of the four testimonial dangers, be demonstrably justified in a free and democratic society? Arguably, a *Charter* challenge provides the proper framework within which to answer this question and to assess and balance the societal interests. Courts should not work backwards by first finding a societal interest which creates a "necessity" for this evidence, and then constructing a "reliability" rationale to allow its admission.

It is interesting to note that the reception of such evidence is restricted to the murder or manslaughter trial in which the declarant was the victim. Wigmore commented on the "crass stupidity of this limitation" and cites *State* v. *Bohan* (1875)[45] as an example of how illogical this can be. In that case, both T.A. and W.A. were shot by the accused. T.A. died immediately, but W.A. survived a few hours. At the trial of the accused for the murder of T.A., Kingman C.J. rejected the dying declaration of W.A., as W.A.'s murder was not the subject of the indictment. If either the reliability rationale or the necessity rationale discussed above are legitimate, there is no reason for such a limitation on the use of these declarations.

With respect to the fact that the declaration can only relate to injuries of the declarant which are the subject of the murder or manslaughter charge, D. Byrne and J.D. Heydon, in the Australian edition of *Cross on Evidence*, state:[46]

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43. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

44. That potentially unreliable evidence is admitted without the accused having any opportunity to cross-examine the declarant to assess his or her credibility, arguably, would infringe the accused's rights as protected under ss.7, 11(c) and 11(d) of the *Charter*. See further discussion in Chapter Four as to the constitutional ramifications of admitting unreliable hearsay evidence.

45. 15 Kan. 407 cited in *Wigmore on Evidence*, *supra* note 1 at 281.

46. Byrne & Heydon, *supra* note 26 at 860.

> It seems no more than an accident of history ... that a deceased person under the belief of his imminent demise would tell the truth about the identity of his assailant, but about nothing else. [Emphasis added.]

Such dying declarations cannot be used, for example, in a trial for kidnapping or sexual assault where the victim is subsequently murdered. Wigmore, again, sees no logic to this limitation, rather, he describes it as a "irrational and pitiful absurdity of this feat of legal cerebration".[47]

Finally, it is worthy of note that dying declarations are received even if other admissible evidence is available.[48] Thus, a dying declaration identifying A.B. as the murderer is admissible even if a number of other eyewitnesses to the murder were available, but not called to give evidence. Clearly, admitting hearsay when other sufficient and admissible evidence is available offends the "necessity" principle set out by Wigmore and adopted in *Khan*.

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47. *Wigmore on Evidence*, *supra* note 1 at 281. Wigmore also criticizes the fact that this exception does not apply to civil wrongs:

> ... the notion that a crime is more worthy of the attention of courts than a civil wrong is a traditional relic of the days when civil justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the king's name were zealously encouraged because of the fines which they added to the royal revenues.

It is interesting to note that s. 51(1) of the proposed *Uniform Evidence Act* would have extended the nature of the charge with respect to which dying declarations were admissible to attempts to commit murder or any other charge arising out of the transaction leading to the declarant's death or injuries (i.e.: kidnapping, sexual assault) that is joined with the main charge.

48. Wigmore condemns this rule in that, even if it is not needed because of other adequate testimony being available, the declaration is still admissible: "This again shows the historical unsoundness of the spurious principle..." (*Wigmore on Evidence*, *supra* note 1 at 284).

## III. *The Res Gestae*

The broad category of hearsay exceptions known as the *res gestae* is commonly broken down into four subcategories: (1) declarations as to contemporaneous bodily or mental sensations or conditions; (2) declarations indicating state of mind or intention; (3) declarations accompanying or explaining acts; and (4) spontaneous exclamations. Without commenting as to the appropriateness of this categorization, this framework is adopted for the purposes of our analysis. As some of the subcategories of the *res gestae* raise minimal concerns with respect to the twin criteria of "reliability" or "necessity, they are given relatively short treatment in comparison to others.

### A. Declarations of Contemporaneous Bodily or Mental Sensations or Conditions

#### 1. History

This subcategory of the *res gestae* finds its genesis in the judgment of Lord Ellenborough in *Aveson* v. *Kinnaird* (1805).[49] In that case, the Insurer resisted payout on a policy for the death of the plaintiff's wife on the ground that the deceased wife had failed to disclose her illness at the time of obtaining insurance coverage. Several days after the wife had been to a Doctor for the physical examination required by the Insurer, she was visited by a friend at her home. The friend found the wife in bed at eleven o'clock in the morning, whereupon the wife explained that she was ill and had been in a poor state of health since before the physical examination. Lord Ellenborough admitted the out-of-court statements made by the wife to the friend on the basis that they disclosed her physical condition and state of health,[50] thus forming part of the *res gestae*.

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49. 6 East 188 at 194, 102 E.R. 1258 (K.B.) [hereinafter *Aveson*]. Note in the *Earl of Pembroke's Trial* (1678), How. St. Tr. 1309, the murder victim's complaints of pain and statements as to the cause of the wound which were made to the victim's servants and doctor were received in evidence.

50. It is noteworthy that the relevance of the statement was not to establish her state of health at the time contemporaneous to her making the declaration, but rather to establish that she had been continuously ill since before receiving the physical examination. Thus, the case does not fit within the scope of the exception as it exists today.

However, it was not until the middle of the nineteenth century that the "declarations as to contemporaneous bodily or mental sensations or conditions" received judicial recognition as a distinct exception to the hearsay exclusion rule.[51] Up until that time it had been "merely an indefinite doctrine, not distinguished clearly between this and the exception for spontaneous declarations".[52]

### 2. Scope and Preconditions

As is implicit in the name of this subcategory of the *res gestae* exception, the declaration must relate to or disclose some bodily or mental sensation or condition. The assertion must also be made contemporaneously with the experience of the sensation or condition,[53] though the courts have been somewhat flexible with respect to this requirement. The passage of time does not necessarily destroy the contemporaneous character of the declaration[54] so long as the declaration does not amount to a narrative of the declarant's past symptoms.[55]

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51. *Wigmore on Evidence*, *supra* note 1 at 90.

52 *Ibid.* at 91.

53. Statements are admissible to prove either good health (*R.* v. *Johnson* (1847), 2 Car. & Kir. 354, 175 E.R. 146 (N.P.)) or poor health (*Aveson*, *supra* note 49).

54. Cross, *supra* note 3 at 675, suggests that with respect to the requirement of contemporaneity, "it is impossible to lay down anything in the nature of a rigid rule".

55. J. Sopinka, S.N. Lederman & A.W. Bryant explain in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 423, the relationship between contemporaneity and reliability:

> The circumstances of each case must be examined and if the statement is made at a time too remote from the actual experience of the bodily feeling so as to rob it of any contemporaneity and to amount only to an account of the past state of the declarant's health, it would be inadmissible.

See *Gilbey* v. *Great Western Railway* (1910), 102 L.T. 202 (C.A.), cited with approval in *Youlden* v. *London Guar. Co.* (1912), 4 D.L.R. 721 (Ont. H.C.) Middleton J., aff'd 12 D.L.R. 433 (Ont. C.A.) [hereinafter *Youlden* cited to 4 D.L.R.]. Note in *Aveson*, *supra* note 49, the Court admitted the hearsay statement of the deceased declarant to establish both her illness at the time of making the declaration and ill health for the 5 days previous.

In the United States there is an anamoly to this restriction in that accounts of past symptoms given by patients in consultation with a physician for the cure of the illness are admissible, even if statements are made *post litem motam*. See J.H. Chadbourn, ed., *Wigmore on Evidence*, vol. 6, rev. ed. (Boston: Little, Brown & Co., 1974) ss. 1719 - 1722 [hereinafter *Wigmore on Evidence*, vol. 6.] This exception finds its origin in the much-cited decision of Chief Justice Bigelow in *Barber* v. *Merriam*, 11 Allen 322 at 325

The out-of-court statements are not admissible for the purpose of proving the cause of the declarant's injury or malady, but only for the limited purpose of showing the existence of a bodily or mental sensation.[56] However, the statement may then become a piece of circumstantial evidence from which the Court infers the probable cause of the suffering or sensation.[57]

As is the case with all the hearsay exceptions discussed under the *res gestae* heading, it is not a precondition that the declarant be dead or unavailable at the time of the trial to admit the hearsay evidence.

### 3. Rationale

The rationale underlying this exception is based primarily upon the circumstantial probability of trustworthiness of such statements and, to a lesser extent, on the necessity of admitting these out-of-court statements. With respect to the "reliability" component, three of the four testimonial dangers (perception, memory, and veracity) are addressed. The risk of misperception is non-existent as the declarant truly has a "peculiar means of knowledge": nobody is better able to accurately perceive and identify sensations and feelings than the person experiencing them.[58] As the declaration is made at or near the

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(Mass. 1865). The Chief Justice believed such statements are less open to suspicion as "[t]hey are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to the truth".

56. See *R.* v. *Gloster* (1888), 16 Cox C.C. 471 at 473:

> The statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them or how they were caused.

See also *R.* v. *Read* (1982), 18 Alta. L.R. (2d) 188 at 192 (Q.B.). Note *Rodych* v. *Krasey*, [1971] 4 W.W.R. 358 at 363-66 (Q.B.), appears to go much further and admit the statement for the purpose of establishing the cause of the injuries. However, based upon the precedents cited by Justice Matas, and the Court's repeated reference to the *res gestae* hearsay exception, it is more likely that this evidence was admitted under the spontaneous exclamations subcategory of the *res gestae* class of hearsay exceptions.

57. *Youlden*, *supra* note 55. See also *Pinette* v. *Parsens*, [1990] B.C.J. No. 1503 (B.C.S.C.) (QL), where the fact that headaches of the infant plaintiff started occurring the day after the motor vehicle accident lead to the inference that the accident caused the headaches.

58. It is interesting to note that while the declarant may possesses a "peculiar means of knowledge" about his or her own senses, thus minimizing any chances of misperception, this "peculiar means of knowledge" also ensures there is no external source by which to test the veracity of the declarant. The

moment the declarant is experiencing the sensation, inaccurate recall does not raise a concern. Assurances of sincerity are present because the declarant is thought to have had little opportunity to fabricate or concoct as a result of the contemporaneity requirement being met.[59]

With respect to the "necessity" rationale, the exception is not dependent upon unavailability of the declarant.[60] Rather, it is believed that there is "a fair necessity, in the sense that there is no other equally satisfactory source of evidence either from the same person or elsewhere".[61] Thus, the supposed superior reliability inherent in such declarations, as compared to the suspect trustworthiness of testimony as to past bodily or mental sensations or conditions, generates the need to admit these statements. However, as stated by Bigelow, J., in *Bacon* v. *Charlton* (1851):[62]

> [The hearsay evidence] is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady.

### 4. Critique

Within the context of a criminal trial, the admission of hearsay evidence pursuant to this exception, as with the other subcategories of the *res gestae* class, does not operate

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declarant need not fear that any other evidence except that from his own mouth will disclose his insincerity.

59. Sopinka, *supra* note 55 at 242: "[T]he fact that the individual's description is uttered at the precise moment that he is experiencing the sensation provides some measure of sincerity". Note this rationale may have somewhat less force than the spontaneous exclamation subcategory. In that subcategory, not only is there contemporaneity with the event to reduce chance of fabrication, there is also an element of suprise or nervous excitement. Surprise or nervous excitement may not be operating at the time the person experiences pain.

60. Delisle, *supra* note 8 at 397.

61. *Wigmore on Evidence*, vol. 6, *supra* note 55 at 90. Note Wigmore suggests that this type of statement, made out of court and without obvious motive to misrepresent the facts, is more reliable than statements made at a later date by the witness on the stand.

62. 7 Cush. 586, as quoted in *Wigmore on Evidence*, vol. 6, *supra* note 55 s.1718.

unfairly against the accused when the declarant is called as a witness by the prosecution. In those circumstances the declarant is under oath, the court may assess the demeanor of the declarant, and the accused has the opportunity to cross-examine the declarant to assess the four credibility factors. While cross-examination contemporaneous with the making of a declaration is preferable, the loss in efficacy of cross-examination which occurs at later time is marginal.[63] Thus, our analysis in this section, as with all the "Critiques" under the remaining subcategories of the *res gestae*, is focused on circumstances where the out-of-court statement is admitted at trial and the declarant is unavailable or not called as a witness.

While the reliability component of the underlying rationale appears to address three of the four testimonial dangers (insincerity, misperception and faulty memory), an analysis of the rationale's logic raises concerns as to its inherent validity. The probability of veracity is bolstered, supposedly, by the lack of opportunity to fabricate or concoct. This reduced opportunity follows as a result of the requirement that the declaration be made contemporaneously with the experience of the sensation. If the declarant is indeed experiencing a sudden onslaught of sensation, it is not disputed that he or she would have limited opportunity to formulate some plan of deception and to make a false statement in furtherance of that plan. However, the validity of this proposition depends entirely upon the declarant, in fact, experiencing a sensation. Our only way of knowing that the declarant is experiencing a sensation is by the declarant's own statement or conduct. As a result, the rationale guaranteeing the veracity can be stated as follows: given that the declarant is telling us the truth about experiencing a sensation, it is likely that the declarant is telling us the truth about experiencing this particular sensation. The absurdity in this self-evident.

Of particular concern will be those situations where the declaration, while made contemporaneous with the experience of the sensation, is made at a point distant in time

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63. See *R.* v. *K.G.B.*, [1993] S.C.J. No. 22 (QL), where the Supreme Court of Canada uncategorically rejects the necessity of contemporaneous cross-examination. So long as the accused has an opportunity to cross-examine the declarant at some later time, there no unfairness to the accused.

from the occurrence of the injurious event.[64] When the declaration as to physical or mental sensation occurs at or near the time of an accident or assault, the rationale underlying the "spontaneous exclamation" hearsay exception is more likely to bolster the reliability of the statement. The pressure and intensity from the drama of the accident or assault operates to exclude the possibility of fabrication or concoction.[65] However, as the declarant can experience bodily or mental sensations some time after the injurious or dramatic event, the strength of this rationale diminishes as the interval lengthens between the dramatic event and the experiencing of the sensation.

With respect to the "necessity" principle, Wigmore argues that a "fair necessity" for admitting these statements results from the reliability of these declarations as compared to testimony given at a later date. He emphasizes, however, that this "fair necessity" is limited to situations where there is no "obvious motive to misrepresent".[66] Arguably, this demonstrates concern on Wigmore's part as to the circumstantial probability of trustworthiness inherent in these statements. The rationales underlying other hearsay exceptions, such as the dying declaration and declarations against interest, are based upon assumptions that the circumstances negate any fears that the declarant has a motive to misrepresent. If one has confidence in the circumstantial probability of trustworthiness, why is it necessary to inquire as to whether or not there is an apparent motive to misrepresent? Is it not just as likely that motives to misrepresent will be concealed or unseen? Is not one of the purposes of cross-examination to probe for and to disclose covert motives? Does the Court's questioning of whether or not there is an

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64. It must be remembered that the rationale underlying this exception is distinct from that underlying the spontaneous declaration exception. There is *no requirement that the declaration be made under* influence of "intensity and pressure" created by some startling or dramatic event. As the declaration is made closer to the actual dramatic event, the rationale underlying the spontaneous declaration hearsay exception operates to enhance the statement's reliability.

65. See *Ratten* v. *R.*, [1971] 3 All E.R. 801, [1972] A.C. 378 (P.C.) Lord Wilberforce [hereinafter *Ratten* cited to A.C.].

66. *Wigmore on Evidence*, vol. 6, *supra* note 55 at 90. Note in civil cases motive to misrepresent is not a bar to admission; rather, it goes to the weight given the evidence. See *Pinetter* v. *Parsons*, [1990] B.C.J. No. 1503 (B.C.S.C.) (QL).

obvious or apparent motive to misrepresent provide an adequate substitute for the cross-examination of the declarant? That the preconditions of this exception can be met and there still exist a need to inquire into the motives of the declarant, demonstrates a lack of confidence as to the sufficiency of the underlying rationale.

While declarations as to contemporaneous bodily or mental sensation or condition can only be admitted for a particular purpose, several commentators have questioned the courts' practical ability to restrict their use in this manner. The authors of *The Law of Evidence in Canada*[67] maintain "it is difficult to believe that a court is capable of restricting the use of the statement as proof of the physical symptom only and not extending it to its cause".[68] This concern is even more compelling considering that the court is permitted to use this evidence as a piece of circumstantial evidence from which to infer the probable cause of the suffering or sensation.

If one accepts that there is a risk the courts may admit such out-of-court assertions as evidence for one purpose and then inadvertently use them for another, the "fair necessity" of statements disclosing both the sensation and cause of the sensation becomes suspect. If the party opposing tendering the out-of-court statement admits that the sensation was experienced at the particular point in time[69] or other evidence establishes that the physical sensation was experienced at that time,[70] it is both unnecessary and prejudicial to the accused to admit the out-of-court statement which happens to contain a narrative component relating to the cause of the injury.

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67. Sopinka, *supra* note 55.

68. *Ibid.* at 241.

69. Thus allowing for the court to make circumstantial use of the evidence to infer the cause.

70. Witnesses may give evidence that the victim was in obvious pain.

### B. Declarations Indicating Contemporary State of Mind or Present Intention

#### 1. Scope and Preconditions

Whether statements or conduct indicating state of mind are hearsay evidence, as opposed to original evidence, is a fine distinction.[71] Where knowledge is relevant, for example on a charge for possession of stolen property, the prosecution must prove not only that the goods were stolen, but that the accused knew they were stolen. Knowledge is a fact in issue and may be proved by admitting an out-of-court statement of the accused which discloses his or her state of mind.[72] For this purpose, the statement would be admitted as original evidence.[73] However, admitting the statement for the purpose of proving that the goods were, in fact, stolen would offend the hearsay exclusion rule.[74]

State of mind must be a fact in issue or relevant to a fact in issue to trigger application of this exception.[75] Statements which are self-serving are inadmissible

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71. Cross, *supra* note 3 at 668, warns that the "line is thin" between state of mind evidence being original evidence and hearsay evidence.

72. Mellish, L.J., in *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154 at 251 [hereinafter *Sugden*], enunciated what is considered to be the true principle, *viz.* "that wherever it is material to prove the state of a person's mind, or what was passing in it and what were his intentions, there you may prove what he said, because that is (often) the only means by which you can find out what his intentions were".

73. See *R.* v. *Burnett and Ruthbern Holdings Ltd.* (1986), 25 C.C.C. (3d) 111 at 113, 54 O.R. (2d) 65 (Ont.H.C.J.) [hereinafter *Burnett* cited to C.C.C.], where Hartt J. states:

> Utterances made outside a particular proceeding have been received to evidence the declarant's state of mind, either testimonially under an exception to the hearsay rule or circumstantially as indicating the speaker's mental condition. In the latter case the statement is not hearsay; it is a verbal utterance employed indirectly, like wordless conduct, to indicate circumstantially a mental condition... .

74. See *Burnett*, *ibid.* at 144:

> Where the mental condition sought to be proved circumstantially is knowledge or belief, there is an increased risk that the evidence will be used for its hearsay value, particularly in a criminal case where the mental condition of the declarant is not itself an essential ingredient of the crimes charged. If the words are used to support an inference of knowledge or belief of certain events and the belief is in turn used to support an inference that those events occurred, the rule against hearsay is violated. [Emphasis added.]

75. *R.* v. *Blastland*, [1986] 1 A.C. 41 at 54 (H.L.), Lord Bridge of Harwick:

> It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind either of the maker of the statement or of the person.

because there is danger that an accused might manufacture evidence. The assertion cannot be admitted to establish some past act or event referred to in the utterance.[76] However, courts have often failed to recognize when a current state of mind has its genesis to a past act.[77] For example, P. K. McWilliams refers to the Saskatchewan Court of Appeal decision in *R.* v. *Wysochan* (1930),[78] and notes:[79]

> ... the statements of the deceased, about a half hour after having been shot, asking for her husband and for his help were admitted to show her state of mind that she did not regard him as being the one who had shot her. Clearly, the statements were not close enough in time to be admissible as part of the *res gestae* and they do not appear to have been admitted as a dying declaration. Ironically, an accusation by her against the accused would have been inadmissible and yet this implied assertion was!

This case raises numerous other concerns respecting the reliability of the implied assertion which are discussed later in this chapter.

Declarations or conduct indicating present intention, express or implied, can be admitted as circumstantial evidence from which the trier of fact may infer that the declarant, in fact, carried out the intended act. Though numerous Canadian authorities[80]

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76. In *Shepard* v. *U.S.* (1933), 290 U.S. 96, in a murder prosecution, the statement, "Dr. Shepard has poisoned me", was received as a dying declaration. On appeal, the prosecution sought to justify the evidence as indicating the deceased's state of mind which was then inconsistent with the defence of suicide. Cardozo, J., wrote:

> There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent... . The ruling in [*Mutual Life Ins. Co.* v. *Hillmon*] marks the high-water line beyond which courts have been unwilling to go... . Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

See also *R.* v. *P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.).

77. See McWilliams, *supra* note 12 at 8-57.

78. 54 C.C.C 172 (Sask. C.A.) [hereinafter *Wysochan*]. Note Chief Justice Lamer in *R.* v. *Smith*, [1992] 2 S.C.R. 915 [hereinafter *Smith*], also characterizes *Wysochan* as a "declaration indicating contemporary state of mind" case.

79. McWilliams, *supra* note 12 at 8-57.

80. See e.g. *Smith*, *supra* note 78 and *R.* v. *Moore* (1984), 15 C.C.C. (3d) 541, 5 O.A.C. 51 (C.A.), leave to appeal to S.C.C. ref'd. (1985), 7 O.A.C. 320. See also *R.* v. *P.(R.)* (1990), 58 C.C.C. (3d) 334

exist supporting this proposition, the *locus classicus* invariably cited is the United States Supreme Court decision in *Mutual Life Insurance Co.* v. *Hillmon* (1892).[81]

In that case, a wife was suing to recover on a policy of insurance for the life of her husband. The insurance company resisted payment on the ground that the body found at Crooked Creek, Kansas, was not that of her husband, but rather that of a man named Walters. The defendant's theory was that Mr. Hillmon had murdered a man named Walters so that Mrs. Hillmon could collect on the insurance policy. To prove that the body was that of Walters and not Hillmon, the insurance company tendered evidence of letters sent by Walters to his sister and fiancee.[82] In these letters, Walters expresses his intention to leave Wichita, Kansas with a man named Hillmon. The United States Supreme Court admitted the evidence of these letters on the following grounds:[83]

> The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.

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(Ont. H.C.J.) at 343-44, where Justice Doherty summarized the case law and outlined the scope of the exception:

> An utterance indicating that a deceased had a certain intention or design will afford evidence that the deceased acted in accordance with that stated intention or plan where it is reasonable to infer that the deceased did so. The reasonableness of the inference will depend on a number of variables including the nature of the plan described in the utterance, and the proximity in time between the statement as to the plan and the proposed implementation of the plan.

81. 145 U.S. 285, 12 S. Ct. 909 [hereinafter *Hillmon* cited to U.S.].

82. In fact, the letters were not tendered as they had been lost. The relatives gave testimony as to the contents of these letters.

83. *Ibid.* at 295-96.

While such statements are admissible to infer that the declarant acted in accordance with that intention, the statements are not admissible for the purpose of inferring that someone else acted in accordance therewith.[84]

### 2. Rationale

The rationale underlying this exception is similar to that underlying the "Declarations of Contemporaneous Bodily or Mental Sensations or Conditions" exception. The dangers of misperception and faulty memory are minimal for the reasons stated in the previous section. The fact that the statements are made contemporaneously with the existence of the state of mind provides some guarantee of sincerity on the part of the declarant.[85] The admission of the statements are necessary as they are often the best evidence upon which to establish the declarant's state of mind, especially where the declarant is deceased or unavailable at the time of the trial. In the absence of any evidence of the individual's conduct, such statements would be the only means by which the court could determine the declarant's mental state.

Unavailability of the declarant is not a prerequisite for admission of this evidence. As the out-of-court statement is more likely to disclose the declarant's true state of mind

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84. *R.* v. *P.(R.)*, *supra*, note 33. See also discussion of this issue by the Ontario Court of Appeal in *R.* v. *Smith* (1990), 2 C.R. (4th) 253, 61 C.C.C. (3d) 232, 75 O.R. (2d) 753 at 757:

> In *R.* v. *Moore*, *supra*, this court considered the earlier United States decision in *Mutual Life Insurance Co.* v. *Hillmon*, *supra*. The issue in *Moore* was confined to the admissibility of the declarant's statements of his intention to show his state of mind and intention. The evidence made no reference to any past act or any intention of any other person. It was not tendered as proof of such facts. We do not consider the reference in the *Moore* case to the *Mutual Life* case as authority for the extension of the doctrine to admit such statements to prove such facts. [Emphasis added.]

Note *Hillmon* has been heavily criticized for the broader proposition it appears to support that a declaration of intention can be circumstantial evidence that someone besides the declarant acted in accordance with that intention. See Cross, *supra* note 3 at 586-88, and E.W. Cleary, ed., *McCormick on Evidence*, 3rd ed. (St. Paul: West Publishing, 1984) at 848 [hereinafter *McCormick on Evidence*]. That *Hillmon* has been extended in the United States to allow such declarations of intention to implicate second parties, and to permit proof of declarations as to past facts, see: *U.S.* v. *Annunziato*, 293 F. 2nd 373 (2d Cir. 1961).

85. Sopinka, *supra* note 55 at 243.

at the relevant time than later *vive voce* evidence by the declarant, there exists a "fair necessity" for the statement's admission.

### 3. Critique

Many of the issues raised under the "Critique" heading in the previous section are again applicable here. That reliability is enhanced as a result of contemporaneity of the declaration with the experience of the state of mind presupposes that the declarant is, in fact, experiencing a state of mind. The supposition is the very fact which the admission of this hearsay seeks to evince. As evidence of state of mind or intention can only come from the declarant, the validity of this aspect of the underlying rationale is questionable.

Though unstated by the courts and absent from the preconditions enumerated by text-writers, it appears that presence of motive to misrepresent can disqualify a declaration's admissibility pursuant to this exception. This is demonstrated by the fact that self-serving statements are inadmissible. However, if we accept that statements as to state of mind are inherently trustworthy, why do we deny the accused the opportunity to put this exculpatory evidence before the trier of fact? Wigmore harshly criticizes the fairness of this limitation:[86]

> Because, (we say) this accused person *might* be guilty and therefore might have contrived these false utterances, therefore we shall exclude them, although without this assumption they indicate feelings wholly inconsistent with guilt, and although, if he is innocent, their exclusion is a cruel deprivation of a most natural and effective sort of evidence. To hold that every expression of hatred, malice and bravado is to be received, while no expression of fear, goodwill, friendship, or the like, can be considered, is to exhibit ourselves the victims of a narrow whimsicality.
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86. *Wigmore on Evidence*, *supra* note 1 at 160.

> There is no reason why a declaration of an existing state of mind, if it would be admissible against the accused, should not also be admissible in his favour, except so far as the circumstances indicate plainly a motive to deceive.

Notwithstanding the issue of fairness on the use of these statements, it is apparent that both the courts and Wigmore believe that the rationale underlying this exception does not preclude the existence of a motive to misrepresent nor ensure veracity in the face of a motive to misrepresent. Clearly the circumstantial probability of trustworthiness is not so compelling if we must make this inquiry into the declarant's motives. As discussed previously, does the court's perusal of the facts, to determine if "plain" or "obvious" incentives to deceive are present, adequately substitute for the protections furnished by cross-examination? In this author's opinion, it does not.

Probably the greatest erosion of principles upon which the hearsay exclusion doctrine is based is the use of out-of-court declarations of intention to infer that the declarant did, in fact, act on those stated intentions.[87] While no one would contest the Court's assertion in *Hillmon* that evidence of intention "made it more probable both that [Walters] did go and that he went with Hillmon, than if there had been no proof of such intention",[88] this same reasoning applies to many other types of hearsay regarding past events which is inadmissible. If Walters had written a letter from Crooked Creek, Kansas stating that he had left Wichita with Hillmon, the letter would undoubtedly be excluded. Yet no one would dispute that a written statement as to a past act surely makes it "more probable" that the declarant did what he or she claims to have done than if there had been no declaration as to past acts. In both the case of a declaration as to intention to do some future act and a declaration as to past acts, the existence of the hearsay increases the probability of the truth of the contents. However, the fact that a court is unable to measure or estimate this 'probability' should go to exclude this

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87. The *Hillmon* formulation of the declaration as to the present intentions exception does not appear to have been accepted into English law. See *R.* v. *Kearley*, [1992] 2 All E.R. 345 (H.L.).

88. *Hillmon*, *supra* note 81 at 295-96.

hearsay. If the court cannot ascertain the probability of such a fact having occurred, it has no logical method of according the proper weight to the evidence. Is this not one of the fundamental reasons we exclude hearsay? With respect to the fact that the declarant carried out his or her stated intention, there is no greater circumstantial probability of trustworthiness than any out-of-court assertion as to a past act.

This hearsay exception also raises a concern as to the court's ability to ensure that declarations as to state of mind are not admitted for the improper purpose of establishing the existence of past facts which are in issue. An example of this problem is found in the *Wysochan* case. The state of mind of the deceased wife after the shooting was completely irrelevant to any of the elements of the *actus reus* or *mens rea* of the offence. The only usefulness this evidence could possibly have had was to infer that the deceased wife believed her husband was not her assailant. Stanley Schiff in "Evidence - Hearsay and The Hearsay Rule: A Functional View"[89] identifies two of the dangers inherent in this inference:[90]

> The first is accurate communication of memory to the trier of fact: Did she really mean by her conduct what the Crown asks the jury to infer? The second, logically precedent, is perception or opportunity to perceive: did she even see who was actually holding the gun?

Clearly, the Court in this case extended the use of this hearsay exception beyond the scope of its stated rationale. The rationale, in these circumstances, could support no claim of providing circumstantial guarantees of trustworthiness as to the accurate perception by the deceased wife.

Finally, the authors of *The Law of Evidence in Canada* make one further observation comparing the inherent reliability of declarations of intention and declarations as to physical or mental sensations:[91]

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89. (1978), 56 Can Bar Rev. 674.

90. *Ibid.* at 682.

91. Sopinka, *supra* note 55 at 245.

> The state of mind of intention is troublesome. Should the court treat an expression of intention in the same way as a statement indicating bodily or mental feelings of pain or good health? The distinction between the two is that the former is usually a deliberate and calculated statement, whereas the latter is more often than not a reflex verbal action indicating the declarant's present mental attitude. [Emphasis added.]

How can the 'veracity-bolstering' component of the rationale, which depends entirely upon contemporaneity of making the declaration with the experiencing of the state of mind or sensation, operate with respect to intention? Intention does not usually form spontaneously; it often takes time and consideration. Enough time, certainly, so as to be unable to rule out concoction or fabrication.

### C. Declarations Accompanying and Explaining Acts

#### 1. Scope and Preconditions

Five preconditions must be satisfied to admit hearsay under this exception:[92] (1) the declaration must relate to the act in question; (2) the declaration must be roughly contemporaneous with the performance of the act; (3) both the act and the declaration must be made by the declarant; (4) the act in question must be a fact in issue or relevant to a fact in issue;[93] and (5) the declaration must explain or qualify an otherwise ambiguous or equivocal act.[94] It should be emphasized that declarations can only be used to explain the fact they accompany, not previous or subsequent facts.[95]

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92. Taken from Cross, *supra* note 3 at 658-59 and Sopinka, *supra* note 55 at 256. M.N. Howard, P. Crane & D.A. Hochberg, eds., *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) at 711 [hereinafter *Phipson on Evidence*], note that statements of opinion may be tendered under this head, provided the act which they accompany is itself relevant

93. *Hyde* v. *Palmer* (1863), 3 B. & S. 657, 122 E.R. 246 (K.B.).

94. *Freel* v. *Robinson* (1909), 18 O.L.R. 651 at 654-55 (Ont. C.A.), *Clowser* v. *Samuel* (1873), 15 N.B.R. 58 (C.A.).

95. *Phipson on Evidence*, *supra* note 55 at 710.

### 2. Rationale

As with the previous exceptions discussed under the *res gestae* heading, the underlying rationale rests on the assumption that contemporaneity of the statement with the act provides some guarantee of reliability and sincerity. In addition, "[n]ecessity has played a strong hand in securing the admissibility of such statements, for where the act which is in issue is ambiguous or equivocal, then words which accompanied it may be the only means affording an explanation of the act".[96]

### 3. Critique

The major difficulty with this exception is its application in circumstances where the "necessity" principle is not satisfied. Surely the declarant's testimony and cross-examination could only further elucidate and clarify the transaction or act, and possibly reveal alternate explanations. That this exception is open to abuse is made evident in *R.* v. *Graham*.[97] In that case the accused was able to admit a self-serving statement made to the police at the time he was found in possession of stolen property. Thus, the accused was able to provide an exculpating explanation without having to subject himself to cross-examination by the Crown.

In addition, the rationale which promotes reliability of the statements made upon arrest or during the commission of a crime is of questionable validity. In a civil action, the act or transaction which is ambiguous is usually the focus of the entire dispute, thus the declaration is invariably *ante litem motam*. There is simply no opportunity to fabricate or concoct. However, in the criminal context, it is often in the interest of the

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96. Sopinka, *supra* note 55 at 255.

97. [1974] S.C.R. 206, 7 C.C.C. (2d) 93 at 98, 19 C.R.N.S. 117, Ritchie J. [hereinafter *Graham* cited to C.C.C.]:

> Explanatory statements made by an accused upon his first being found "in possession" constitute a part of the *res gestae* and are necessarily admissible in any description of the circumstances under which the crime was committed... .

Note Sopinka, *supra* note 55 at 266, and *McCormick on Evidence*, *supra* note 84 at 860, categorize *Graham* as a spontaneous declaration case. While it is acknowledged the declarations made upon being found in possession of stolen property do not fall squarely within either of these *res gestae* subcategories, it is this author's opinion they fit more comfortably under the rationale for this subcategory.

criminal to keep the transaction ambiguous or equivocal as long as possible so as to maintain an avenue of retreat, should it become necessary. It would not be beyond realm of possibility for an accused to give some thought to the question: "What shall I say if I get caught by the police?" This contingency must certainly be foremost on the accused's mind during the currency of a criminal transaction. Thus, the validity of the rationale that contemporaneity of the declaration with the ambiguous transaction enhances reliability loses force in the criminal context.

It must also be noted that the precondition that an act or transaction be ambiguous or equivocal is often not satisfied on the facts. Recall that the ambiguity is what generates the "need" to admit the declaration so as to clarify the act or transaction. However, it appears in many cases that the declaration itself is what creates the ambiguity. For example, in *Beaton* v. *Hayman* (1970),[98] the plaintiff, an adopted son of the deceased, conveyed property to her in her lifetime. Upon her death, the property descended to the defendant. The plaintiff maintained that the deed was merely one of convenience to his mother and that he was to retain equitable title to the land. In support thereof, the plaintiff tendered hearsay evidence of a statement made by the deceased to the person who drafted the deed, to the effect that the deed was given to her to facilitate a loan to remodel the house. The statement was admitted to prove the truth of its contents pursuant to this hearsay exception. However, in the absence of the out-of-court statement, there was nothing ambiguous about the conveyance of the property. The hearsay evidence, itself, created the ambiguity.

### D. Spontaneous Exclamations

#### 1. History

The "spontaneous exclamation" hearsay exception can be traced back to *Thompson* v. *Trevanion* (1693),[99] an action for trespass of assault, battery and wounding. In that

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98. 16 D.L.R. (3d) 537, 3 N.S.R. (2d) 124, 171 A.P.R. 174 (C.A.).

99. Skin. 402, 90 E.R. 179 (K.B.).

case, Holt, C.J., admitted the hearsay statement of "the wife", presumably the victim of the assault and wife of the plaintiff, on the basis that any declaration made "immediate upon the hurt received, and before she had time to devise or contrive anything to her own advantage, might be given in evidence".[100] Over the course of the next century, the scope and limitations of this particular exception evolved and became firmly entrenched. However, the courts did not recognize the "spontaneous exclamation" as a distinct hearsay exception separate from the others subsumed under the *res gestae* until the early twentieth century. Thus, prior to that time, it was often difficult to determine under which of the sub-categories of the *res gestae* class the out-of-court statements were being admitted.

In the early 1800s, the necessity for the declaration to have been made while the event was transpiring was not yet firmly rooted. In *R.* v. *Foster* (1834),[101] the statements made by the victim after he had been run over were admitted to establish that the accused's cabriolet had knocked him down. However, in *R.* v. *Bedingfield* (1879),[102] a more restrictive test, requiring exact contemporaneity of declaration with the currency of the criminal transaction or startling event, was propounded. In that case the accused was charged with murder. He claimed in his testimony that the victim had, in fact, assaulted him, then committed suicide. The Court heard evidence from the Crown that the accused was seen to enter the house, and a minute or two later the victim rushed out with her throat cut and said to her aunt, "See what Harry [the accused] has done". This exclamation was held to be inadmissible by Cockburn, C.J., because "it was something stated by her after it was all over, whatever it was, and after the act was completed".[103]

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100. *Ibid.*

101. 6 C. & P. 325.

102. 14 Cox. C.C. 341 [hereinafter *Bedingfield*].

103. *Ibid.* at 342-43.

This narrow test of strict contemporaneity remained the law in England and Canada until the Privy Council brought down its judgment in *Ratten* v. *R*,[104] discussed later in this section.

### 2. Scope and Preconditions

In the following oft-quoted *obiter dicta* from *Ratten*,[105] Lord Wilberforce sets out the present-day scope and rationale underlying this hearsay exception:[106]

> The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognized and applied directly as the relevant test: the test should not be the uncertain one whether the making of a statement was in some sense part of the event or transaction. This may often be difficult to establish... . As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it... . [I]f the drama leading up to the climax has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. [Emphasis added.]

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104. *Ratten*, *supra* note 65. Note in *Gilbert* v. *R.* (1907), 38 S.C.R. 207, while the Supreme Court of Canada cited *Foster* with approval, it appears to have considered itself bound by the *Bedingfield* decision. In that case, however, the Court distinguished the facts before it from those in *Bedingfield*. In *Gilbert*, the declarant was fleeing his attacker when the declarations were made. Thus, the transaction or event was still transpiring when the declaration was made. Chief Justice Fitzpatrick found additional support for the extension of the transaction to include fleeing the assailant in *Aveson*, *supra* note 49 at 188. In *Aveson*, Lord Ellenborough stated, in *obiter dicta*, that "if at the time she fled from the immediate personal violence of the husband I should admit what was said".

105. *Ratten*, *supra* note 65. Note Lord Wilberforce, as well the other members of the Board, held that the use being made of the evidence did not offend the hearsay exclusion doctrine. In the event they were wrong in this characterization, Lord Wilberforce took this opportunity to set out the modern-day principles and limitations on the scope of the "spontaneous exclamation" hearsay exception. These principles have been adopted into Canada in *R.* v. *Clark* (1983), 7 C.C.C. (3d) 46 (C.A.); *R.* v. *Khan* (1988), 27 O.A.C. 142, 654 C.R. (3d) 281, 42 C.C.C. (3d) 197 (C.A.).

106. *Ratten*, *supra* note 65 at 389.

In *R.* v. *Andrews*,[107] the House of Lords adopted Lord Wilberforce's *obiter* and overruled *R.* v. *Bedingfield*. Lord Acker set out five fundamental guidelines for the trial judge attempting to apply *Ratten* to admit hearsay evidence in a criminal trial:[108]

> 1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?
>
> 2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection... .
>
> 3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event... .
>
> 4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion... . The judge must be satisfied that the circumstances were such that, having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.
>
> 5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error... . In such circumstances the trial judge must consider whether he can exclude the possibility of error. [Emphasis added.]

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107. [1987] A.C. 281, [1987] 2 W.L.R. 413, 84 Cr. App. Rep. 382, [1987] 1 All E.R. 513 (H.L.) [hereinafter *Andrews* cited to A.C.].

108. *Ibid.* at 300-301.

Thus, it appears that the possibility of ordinary and inadvertent distortion through faulty memory goes to weight,[109] while circumstances implying the possibility of concoction goes to admissibility.[110]

In addition to these above-quoted guidelines, the following propositions complete the modern-day statement of this exception's rules and preconditions. The content of the out-of-court statement must relate to the startling event, and the startling event must be the subject of the trial or a fact in issue at the trial.[111] The declaration must be such that it would have been admissible at trial.[112] For example, the declarant must have had competent first-hand knowledge of the matter about which he speaks. However, in contrast to declarations accompanying or explaining acts, the words need not be those of the actor or victim: they may be those of a bystander.[113]

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109. Lord Acker is unclear as to whether the possibility of error can go to admissibility. It is evident that the existence of mere "ordinary fallibility of human recollection" goes to weight and not admissibility. However, do possibilities of error beyond the ordinary go to admissibility? In *R.* v. *Nye and Loan* (1978) 66 Cr. App. R. 252, the Court of Appeal added the possibility of error as a factor to consider in admitting evidence pursuant to the principles laid down in *Ratten*. Cross, *supra* note 3 at 663, suggests that the fifth guideline set out in *Andrews* adopts the 'gloss' *Nye and Loan* added to the *Ratten* framework. In *R.* v. *Slugoski* (1985), 17 C.C.C. (3d) 212 (B.C.C.A.), Justice Esson applied this added 'gloss'. The Court found that the declarant, Mrs. Slugoski, was not a person of ordinary mental and emotional make-up; therefore, her declaration was unreliable and thus inadmissible. Justice Esson also raised the question of whether the admission of a *res gestae* statement was dependent on the witness being unavailable. More interestingly, he queries whether a *res gestae* statement might be more readily admissible if exculpatory rather than inculpatory.

110. In *Andrews*, *supra* note 107, the deceased declarant had drank excessively and there was an allegation that he had a motive to falsely identify one of the co-accused as the assailant.

111. *Teper* v. *R.* [1952] A.C. 480 at 487, Lord Norman.

112. *R.* v. *Dingham* (1978), 4 C.R. (3d) 193 at 195 (B.C.S.C.). At the *voir dire*, Justice Murray adopts the following statement of Cheif Justice Duff from *Chapdelaine*, *supra* note 10 at 137, respecting dying declarations as applying to the *res gestae* exceptions:

> Then, [the trial judge] must consider whether or not the statement would be evidence if the person making it were a witness. If it would not be so, it cannot properly be admitted as a dying declaration. Therefore, a declaration which is a mere accusation against the accused, or a mere expression of opinion, not founded on personal knowledge, as distinguished from a statement of fact, cannot be received.

In *Dingham* the victim's statements were held to amount to assessment by the victim of the intention with which the accused shot her. The evidence, therefore, was excluded.

113. *Teper*, *supra* note 111. See also *R.* v. *Jobidon* (1987), 59 C.R. (N.S.) 203, 36 C.C.C. (3d) 340 (H.C.J.), rev'd on other grounds (1988), 45 C.C.C. (3d) 176, 67 C.R. (3d) 183, 30 O.A.C. 172 at 182

### 3. Rationales

Wigmore provides a succinct statement of the basic rationale underlying this exception to the hearsay exclusion rule:[114]

> This general principle is based on the experience that, under certain circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy... .

The reliability of the statement is further bolstered by the fact that there is little risk of faulty memory on the part of the declarant, as the event is still transpiring or just completed.[115] Some commentators also add that assurances of reliability reside in the fact that the perception of the declarant is heightened by the drama and excitement of the event.[116]

As noted previously, the "necessity" component of the rationale is not based on the unavailability or death of the declarant at the time of trial. Rather, "superior

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(C.A.), where the Court states:

> The absolutely spontaneous words "It's a fair fight," spoken during the affray with no possibility of contrivance are evidence of the character of the fight, or at least of its character as it appeared to the onlookers... . There is no reason in principle to treat the statements of the onlookers any differently from the statements of the participants.

114. *Wigmore on Evidence*, vol. 6, *supra* note 55 at 195. For further elucidation of the rationale see *Cross*, *supra* note 3 at 665-66, where the authors discuss the justification for this exception:

> [T]he probability of the truth of the statement is said to be guaranteed to some extent by the fact that the event to which it is related was an excited one. The theory may be said to be that there are certain occurrences which will shake the truth out of the most consummate liar.

See also Delisle, *supra* note 8 at 408 and Sopinka, *supra* note 55 at 257.

115. See Sopinka, *supra* note 55 at 257. Note that memory may be a factor if an element of the declaration is based on a past event. For example, the victim in *Andrews* was able to identify one of his attackers based on having met the accused at some time in the past. Thus, making this spontaneous exclamation required some element of recall.

116. *Ibid.*

trustworthiness of [the declarant's] extrajudicial statements"[117] satisfies the "necessity" principle: "The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand".[118]

### 4. Critique

The readiness of courts to admit spontaneous exclamations reflects what has been described as "the obsession which the English common law has had with the witness".[119] Unfortunately, this "obsession" overlooks many of the dangers and apprehensions which the hearsay exclusion doctrine was intended to address.[120] For example, while the rationale may give assurances of the veracity of the witness,[121] it does not alleviate concerns as to the possibility of misperception.[122] The witness may be sincere, but unwittingly mistaken. The stress from danger, drama or surprise may well decrease one's ability to accurately perceive what is transpiring, rather than heighten that ability.[123]

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117. *Wigmore on Evidence*, *supra* note 1 at 199.

118. *Ibid.*

119. McWilliams, *supra* note 12 at 8-63.

120. See discussion in *Ratten*, *supra* note 65 at 25-26, where Lord Wilberforce clearly is concerned only with the risks of insincerity and error caused through transmission. However, the testimonial dangers of misperception and faulty memory are not addressed by the Board.

121. I.D. Stewart in "Perception Memory and Hearsay: A Criticism of Present Law and Proposed Federal Rules of Evidence " [1970] Utah L.Rev. 1 at 28, challenges even the validity of the rationale that the nervous excitement caused by a startling or dramatic event negates a person's urge or ability to fabricate or concoct:

> The theory is faulty on every score. Excitement is not a guarantee against lying, especially since the courts often hold that excitement may endure many minutes and even hours beyond the event. [Footnotes omitted.]

122. Numerous authors have identified and discussed this concern. See *e.g.* McWilliams, *supra* note 12 at 8-63, and Delisle, *supra* note 8 at 408

123. See Sopinka, *supra* note 55 at 257. See also Delisle, *supra* note 8 at 249, where the author states, after setting out the rationale:

> A difficulty, of course, remains in the danger of misperception, and deserves stressing when evaluating the worth of the statement: how often have we exclaimed about a situation and found ourselves later saying, "on second thought...". The very fact that the event was startling and caused the viewer to be excited can impair his perceptual abilities.

See also R.M. Hutchins & D. Slesinger, "Some Observations on the Law of Evidence" (1928), 28 Col. L.Rev. 432 at 436-38, citing experimental data supporting the proposition that emotion lessens the impulse

After reviewing the current psychological research, James Marshall in *Law and Psychology in Conflict* summarizes his concern as follows:[124]

> The *res gestae* rule governing the admission of spontaneous explanations by a participant in an event is justified on the theory that the impact of intensity, the 'stress of nervous excitement' as Dean Wigmore calls it, will make for 'a spontaneous and sincere response...' That is, legal theory maintains that in the 'stress of nervous excitement' the witness does not consciously try to make self-serving declarations as to his perceptions, and therefore his statements are more reliable. It ignores, however, the distorting impact of trauma on the capacity to perceive. [Emphasis added.]

This risk of misperception has induced one commentator to characterize the spontaneous utterance as "[t]he most unreliable type of evidence admitted under hearsay exceptions".[125]

The courts have demonstrated a lack of confidence in this rationale by their imposition of limitations on the use of spontaneous exclamations. If a startling event stills the declarant's reflective faculties such that the utterance is inherently reliable, why must the event be the subject of the trial or a fact in issue?[126] Why is the subject matter of the declaration limited only to the startling event which operated to still the reflective faculties?[127] If such statements are truly reliable, there no reason for these limitations, so long as the statements satisfy the "necessity" principle.

If a spontaneous declarations is not of "superior trustworthiness" to *vive voce* testimony of the declarant, then the persuasiveness of the rationale underlying the "necessity" for the admission of the statement is drastically reduced. Even if we accept

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to lie but impairs perception. See also Stewart, *supra* note 121 at 28, where the author concludes that excitement is no guarantee of truthfulness and distorts perception and memory, especially when a witness observes "a nonroutine, episodic event" such as a collision or a crime.

124. J. Marshall, *Law and Psychology in Conflict*, 2d ed. (Indianapolis, Bobbs-Merrill, 1969) at 19-20.

125. Stewart, *supra* note 121 at 28.

126. Wigmore argued that the occurrence of the startling event is what bolsters reliability and it should not be important whether the event is fact in issue.

127. E.M. Morgan poses this question in "A Suggested Classification of Utterances Admissible as Res Gestae" (1922), 31 Yale L.J. 229 at 239.

that the declarant is utterly sincere when making a spontaneous exclamation, there will inevitably be circumstances in which misperception of the declarant is a real and apparent danger.[128] In those circumstances, unless the declarant is unavailable or dead at the time of the trial, the "necessity" principle remains unsatisfied.

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128. See *e.g. R.* v. *Leland* (1950), [1951] O.R. 12, 98 C.C.C. 337, 11 C.R. 152 (C.A.). In that case, the victim and the accused's husband were involved in a fight. During the course of the affray the lights went out. When the victim came downstairs into the lights he stated "Rose, she stabbed me through the heart". As there was not precise contemporaneity between the statement and the assault, applying *Bedingfield*, *supra* note 102, the Court excluded the evidence. However, had the utterance been made during the course of the fight, surely there may have been some risk that the victim misperceived the events. The victim may have seen the wife with the knife before the lights went out and merely assumed she had retained it and stabbed him. She may have, in fact, passed it to her husband. Unfortunately as the victim was deceased at the time of the trial, the accused could not cross-examine him to test his perception or on what he based his interpretation of the facts.

## IV. Declarations Against Interest

### A. Declarations Against Proprietary or Pecuniary Interests

#### 1. History[129]

Out-of-court declarations against interest, as with dying declarations, were received in court long before the hearsay exclusion rule crystalized in the eighteenth century. Originally, entries made by bailiffs, stewards or vicars in their books of account were admissible, there being no better evidence once the bailiff, steward or vicar was dead.[130] As shown in *Ivatt* v. *Finch*[131] and *Higham* v. *Ridgway*,[132] by 1808 the type of evidence which could be received under this exception had expanded and the rationale underlying the reception of such evidence somewhat changed. Such declarations, being admissions against interest, were thought to be inherently reliable and therefore admissible. This exception to the hearsay rule and its underlying rationale were so firmly established by 1829, that Parke, J., in *Middleton* v. *Melton*,[133] was able to say that it made no difference that the same facts could be proved by other available evidence. The final substantial refinement to this exception came in 1844 in the *Sussex Peerage*

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129. The following summary of the history of the declaration against interest hearsay exception borrows heavily from R.W. Baker, *The Hearsay Rule* (London: Sir Isaac Pitman & Sons, 1950) at 64 - 66.

130. *Manning* v. *Lechmere* (1737), 1 Atk. 453, 26 E.R. 288, *Walker* v. *Broadstock* (1795), 1 Esp. 458, 170 E.R. 419. Entries in rector's or vicar's tithe books had been admissible either for or against their successors for "as far back as our research can reach". (*Short* v. *Lee* (1821), 2 J. & W. 464 at 478, 37 E.R. 705 at 701.) It is arguable that the rationale underlying the reception of these statements had more to do with general trustworthiness of business records made in the ordinary course of business than it did the rationale of trustworthiness of declarations against interest as it later evolved.

131. (1808), 1 Taunt 141, 127 E.R. 785.

132. (1808), 10 East 109, 103 E.R. 717 (K.B.).

133. (1829), 10 B. & C. 317 at 327, 109 E.R. 467 at 471.

*Case*,[134] where the House of Lords refused to expand the application of this exception to include declarations against penal interests.

### 2. Scope and Preconditions

From a distillation of the relevant case law, the parameter of this classical hearsay exception can be stated as follows:[135]

> The written or oral declarations of a person, since deceased, which were against his pecuniary or proprietary interest at the time that he made them are admissible as evidence of the facts contained in the declarations, provided that he had competent knowledge of the facts he stated.[136]

Appended to the above statement of preconditions is the requirement that the declarant knew at the time of the declaration that it was against his interest[137] and that the declaration was to his or her immediate prejudice, rather than a contingent prejudice.[138] The declarant need not have been competent as a witness at the time the declaration was

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134. (1844), 11 Cl. & Fin. 85, [1843-60] All E.R. 55, 8 E.R. 1034 (H.L.) [hereinafter *Sussex Peerage* cited to E.R.]. This case involved a declaration by a deceased clergyman concerning an illegal marriage at which he officiated. Cross, *supra* note 3 at 867, notes, as do numerous other commentators, that even if a declaration exposing the declarant to criminal liability was admissible, this statement would still have been inadmissible in the circumstances as there was no evidence that the clergyman was aware that he was exposing himself to any criminal liability.

135. Taken from Sopinka, *supra* note 55 at 149. See also *St. Hilaire* v. *Krawicek* (1979), 26 O.R. (2d) 499 at 503-04, 14 C.P.C. 22, 5 E.T.R. 279, 102 D.L.R. (3d) 577 (C.A.) [hereinafter *St. Hilaire*].

136. It is recognized that the deceased must have personal knowledge of the fact asserted and not have relied upon what others have told him. See *Public Trustee for Alberta* v. *Walker* (1981), 26 A.R. 581, 122 D.L.R. (3d) 411, [1981] 3 W.W.R. 199 [hereinafter *Walker* cited to D.L.R.]; *Ward* v. *H.S. Pitt & Co.; Lloyd* v. *Powell Duffryn Steam Coal. Co.*, [1913] 2 K.B. 130 at 138; rev'd. on other grounds *(sub nom. Lloyd* v. *Powell Duffryn Steam Coal Co.)*, [1914] A.C. 733 (H.L.) [hereinafter *Ward* cited to K.B.].

137. See Hamilton, L.J. in *Ward*, *ibid.* at 138:
> It is essential that the deceased should have known the fact to be against his interest when he made it, because it is on the guarantee of truth based on a man's conscious statement of fact, 'even though it be to his own hindrance,' that the whole theory of admissibility depends.

138. *St. Hilaire*, *supra* note 135.

made,[139] nor must the declaration have been made *ante litem motam*[140] - these circumstances affect merely the weight accorded the evidence.

Not only is the portion of the declaration that is against interest admissible, but assertions collateral or annexed to the declaration are admissible as well. In *Higham* v. *Ridgway* (1808),[141] an entry made by a deceased male midwife stating that he had delivered a child on a certain day and referring to the payment of his fees was received as evidence of the date of the child's birth. In the words of Lord Ellenborough, C.J.:[142]

> If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him that his claim was satisfied... . It is idle to say that the word 'paid' only shall be admissible in evidence, without the context, which explains to what it refers.

Even if the tenor of entire declaration is in favor of the declarant, so long as a portion is against his interest, the entire declaration is admissible. The Alberta Court of Appeal in *Alberta (Public Trustee)* v. *Walker* (1981),[143] preferred to admit such a statement and address the fact that the whole tenor was in favor of the declarant by according the evidence its appropriate weight.

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139. *Gleadow* v. *Atkin*, 1 C. & M. 410.

140. *Whaley* v. *Masserene*, 8 Ir. Jur. (N.S.) 281. Note B.S. Jefferson in "Declarations Against Interest: An Exception to the Hearsay Rule" (1944) 58 Harv. L.R. 1 at 521, adds as a requirement that "the declarant must not have had a probable motive to falsify the fact declared". However, no authority is cited for this proposition and no Canadian authority could be located which squarely addressed this issue. R.W. Baker in *The Hearsay Rule* (London: Sir Isaac Pitman & Sons, 1950) at 75, states that "[a]lthough there are one or two statements in the reports that there must be no motive to misrepresent, this is not a requisite for admissibility". The view adopted by Greer, J., in *Republica de Guatemala* v. *Nunez* (1927), 42 T.L.R. 628, is that the presence of a motive to misrepresent is a matter of weight and not admissibility.

141. 10 East 109, 103 E.R. 717 (K.B.) [hereinafter *Higham* cited E.R.].

142. *Ibid.* at 717.

143. *Walker*, *supra* note 136.

### 3. Rationale

Wigmore provides numerous authorities which expound the rationale underlying this exception, two of which are adequate to set out the rationale:[144]

> *Gibblehous* v. *Stong* (1832), 3 Rawle 437 at 438 (per Rogers, J.): The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest.
>
> *Mercer's Administrator* v. *Mackin* (1879), 77 Ky. (14 Bush), 434 at 441 (per Cofer, J.): Experience has taught us that when one makes a declaration in disparagement of his own rights or interests it is generally true, and because it is so the law has deemed it safe to admit evidence of such declarations.

Simply stated, the declarant has no motive to misrepresent against his own interests; thus, declarations against interest are inherently reliable.[145]

As to the reliability of matters collateral or appended to the declaration against interest, it appears that the collateral matters draw their assurance of trustworthiness from the proximity to the statements against interest.[146] Justice Kerans commented on the reliability of such collateral matters in *Walker*:[147]

> For more than a century, the law has been that a declaration against pecuniary interest is a trust-inducing circumstance, on the theory that this is an indication that the declarant is of a mind to speak the truth. It follows that all declarations made in the same frame of mind might similarly be true.

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144. *Wigmore on Evidence*, *supra* note 1 at 329. See also *Re Perton* (1885), 53 L.T. 707 at 709-10, Chitty J.:

> The basis on which the declarations of deceased persons against their interest are admitted is the great probability of truthfulness. It is considered to be most improbable that a man would not tell the truth in a a matter of the kind.

145. For thorough analysis of this rationale, see the decision of Justice Clements in *Walker*, *supra* note 136.

146. See Delisle, *supra* note 8 at 384. Note Justice Kerans in *Walker*, *supra* note 136 at 239, requires more than mere proximity to the declaration. There must be contemporaneity and close connection of subject-matter. He cites *Smith* v. *Blakey* (1867), L.R. 2 Q.B. 326 at 331-2, in support of this proposition.

147. *Walker supra* note 136 at 439.

Thus, the truth-inducing rationale underlying the declaration against interest continues to operate with respect to collateral assertions in close proximity.[148]

The "necessity" principle is partially satisfied as the declarant must be dead, and thus, unavailable. If the out-of-court statement is not admitted, the result may be the loss of crucial evidence. However, the statement is admissible whether or not other evidence is available with respect to the relevant fact in issue.[149]

### 4. Critique

Lord Justice Hamilton made the following comments respecting the validity of the rationale underlying this hearsay exception in *Ward* v. *Pitt (H.S.) & Co.: Lloyd* v. *Powell Duffryn Steam Coal Co.*:[150]

> As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth century philosophy.

The "experience"[151] and "knowledge of human nature"[152] upon which this rationale is based is of tenuous psychological validity, inducing one commentator to describe this tenet as demonstrating the "legal system's primitive view of human nature".[153] Justice Kerans in *Walker* cites the above-quoted passage from *Ward* and acknowledges that the

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148. See also *Smith* v. *Blakey* (1876), 2 Q.B. 326 at 331-2, Blackburn J.:
> [W]hen entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of the truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matter involved in or knit up with the statement. [Emphasis added.]

149. Parke, J., in *Middleton* v. *Melton* (1829), 10 B. & C. 317 at 327, 109 E.R. 467 at 471, held that "it can make no difference that the same facts might have been proved by evidence of another kind; as, for instance, a living witness".

150. *Ward*, *supra* note 136 at 138.

151. See *Mercer's Administrator* v. *Mackin* (1879), 77 Ky. (14 Bush) 434, discussed under the previous heading.

152. See *Gibblehous* v. *Stong* (1832), 3 Rawle 437 at 438, discussed under previous heading.

153. B.P. Elman, Annotation, *Re Myers* (1979-80), 5 E.T.R. 279 at 280.

rule allowing admission of declarations against interest appears to be "arbitrary".[154] However, precedent and the need for certainty of the law appear to mandate the exception's continued use.

Even if one accepts the validity of this rationale, it only claims to negate the possibility of insincerity, while the dangers in misperception, faulty memory and ambiguity of language go unchecked.[155] With respect to its ability to promote veracity, the rationale's persuasive force must certainly diminish as the value of the interest diminishes and approaches a nominal value.[156] Even a declaration against interest valued as low as $4.00 triggers this exception, despite the fact that admission of the hearsay may affect the liberty of the accused in a criminal trial, or result in a damage award a thousand times that amount in a civil trial.[157]

The proposition that assertions collateral or annexed to the declaration against interest are inherently trustworthy because of their proximity to the declaration against interest has no logical foundation whatsoever.[158] The collateral matter need not even relate to the subject of the declaration, it need only be within close proximity to it. "Experience" and "knowledge of human nature" have convinced this author that liars will often place untruths in close proximity to truths, so as to give added credibility to their

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154. *Walker*, *supra* note 136 at 438.

155. Delisle makes this point, *supra* note 8 at 384.

156. See discussion in Sopinka, *supra* note 55 at 159. In *Palter Cap Co.* v. *Great West Life Assurance Co.*, [1936] O.R. 341, [1936] 2 D.L.R. 304, 3 I.L.R. 285, a $20.00 receipt triggered the application of the exception. Sopinka asks: "When the amount of pecuniary interest is that insignificant, can the declarant's motive for truth-telling be highly reliable?" In *Taylor* v. *Witham* (1876) 3 Ch. D. 605, a receipt for payment on account of twenty pounds against a debt for two thousand pounds mentioned in the same entry enabled the debt to be proved.

157. *Gormley* v. *Canada Permanent Trust Co.*, [1969] 2 O.R. 414, 5 D.L.R. (3d) 497 (H.C.J.).

158. The statement by Justice Kerans explaining this rationale in *Walker*, *supra* note 136 at 239, that "[i]t follows that all declarations made in the same frame of mind *might* similarly be true" does not display great confidence in the logic of this rationale. What kind of assurances of reliability does "might similarly be true" provide?

assertions. Liars may also concede to some lesser evil in an attempt to conceal some greater wrong doing.[159]

More absurd is the fact that a declaration, which in its entire tenor is favorable to the declarant, is still admissible under this exception so long as some portion of it is against interest. Especially considering that the declaration can be made *ante litem motam*, how can it be seriously argued that the declarant has no motive to misrepresent the portions of the statement favorable to his interest? Surely our everyday experience teaches us that the unscrupulous often concede to those matters against their interest which can easily be established and proved, yet vehemently deny those matters which are not easily proved. It is informative that the Supreme Court of Canada, in formulating the parameters of the declaration against penal interest hearsay exception, required the overall tenor of the declaration to be against the declarant's penal interest.

The compromise devised by the Alberta Court of Appeal's in *Walker*,[160] to admit declarations which in their entire tenor are favorable to the declarant and to address the motive to misrepresent in according the evidence proper weight, flies in the face of the rationale underlying the existence of the hearsay rule. As stated by Justice Kerans in that case, "[t]he law excludes hearsay because it deprives the jury, in the pursuit of truth, of the benefit of the oath, demeanor, and cross-examination".[161] Undoubtedly, these are the tools by which the jury assesses the veracity of the witness and accords the evidence the appropriate weight. Without these tools, any assessment of weight is merely arbitrary.

Finally, the "necessity" of admitting this evidence is entirely based upon the unavailability of the declarant. There is no requirement that there be no other adequate and admissible evidence available to establish the fact in issue to which this hearsay

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159. Admittedly, these intuitive beliefs are based upon this author's own anecdotal experiences, but certainly this is the same process applied by the judges in formulating this hearsay exception and its rationale.

160. *Walker*, *supra* note 136.

161. *Ward*, *supra* note 136 at 439.

evidence relates. As a result, there will undoubtedly be circumstances in which the "necessity" principle would be offended by the admission of this hearsay evidence.

### B. Declarations Against Penal Interests

In England, the House of Lords decision in the *Sussex Peerage Case* (1844)[162] limited the admissibility of statements against interest to pecuniary and proprietary interests and no other. While innumerable courts and academics questioned the logic of this distinction, so stood the law in Canada until *R.* v. *O'Brien*[163] and *R.* v. *Demeter.*[164] In those cases, the Supreme Court of Canada dramatically expanded the scope of the "declaration against interest" hearsay exception. The Court reconfirmed, with slight variation, the traditional preconditions which attach to the admission of declarations against proprietary or pecuniary interests. However, given that the Court perceived a greater risk of fabrication in circumstances relating to penal interest, the Court enumerated several additional safeguards. In the following section we concern ourselves only with those additional preconditions and the refinements.

#### 1. Preconditions

In addition to the requirements that the deceased declarant made the declaration with respect to some fact about which he had first-hand knowledge, which was to his immediate prejudice and which would have been known by him to be against his interest,

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162. *Sussex Peerage*, *supra* note 134.

163. [1978] 1 S.C.R. 591, 35 C.C.C. (2d) 209, 38 C.R.N.S. 325, [1977] 5 W.W.R. 400, 76 D.L.R. (3d) 513, 16 N.R. 271 [hereinafter: "*O'Brien*" cited to S.C.R.].

164. [1978] 1 S.C.R. 538, 38 C.R.N.S. 317, 34 C.C.C. 137, 75 D.L.R. 251, 16 N.R. 46.

The Supreme Court of Canada endorsed the principles laid down by the Ontario Court of Appeal in *R.* v. *Demeter* (1975).[165] Those principles are as follows:[166]

1. The declaration must have been in circumstances that the declarant would have apprehended a vulnerability to penal consequences;[167]

2. The vulnerability to penal consequences should not be too remote;

3. The declaration sought to be admitted must be weighed in its totality and admitted only if upon the whole tenor the weight is against his penal interests;[168]

4. In a doubtful case, a Court may consider other circumstances connecting the declarant with the crime or connecting the declarant with the accused; and,

5. The declarant would have to be unavailable due to death, insanity, grave illness or absence from the jurisdiction to which no process of the Court extends.[169]

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165. 10 O.R. (2d) 321, 25 C.C.C. (2d) 417.

166. Summary of safeguards taken from Sopinka, *supra* note 55 at 180.

167. However, see *R.* v. *Read* (1982), 18 Alta. L.R. (2d) 188 (Q.B.), where the deceased's diary contained passages describing her use and possession of marijuana. These were admitted, notwithstanding the fact that she could not possibly perceive herself vulnerability to penal consequences in the circumstances.

168. See *R.* v. *Pelletier* (1978), 38 C.C.C. (2d) 515 (Ont. C.A.). In that case, *Pelletier* was charged with manslaughter and attempted to introduce a statement he made to the police that he had assaulted the deceased, but that it was in self-defence. The Court determined that the declarant's statement, when considered in its totality, was against the declarant's interest. Sopinka and Lederman suggest this approach is more consistent with the rationale underlying the rule than the approach adopted by the Alberta Court of Appeal in *Walker*, *supra* note 136.

169. The fifth principle includes the statement that: "A declarant would not be unavailable in the circumstances that existed in *R.* v. *Agawa*". In *R.* v. *Agawa and Mallet* (1975), 28 C.C.C. (2d) 379 (Ont. C.A.), counsel for Agawa sought to elicit a statement by Mallet, jointly accused and tried, but who did not testify and was of course non-compellable. There was also a question whether Mallet's statement was self-serving.

A further 'gloss' was made in *R.* v. *Lucier*,[170] where Justice Ritchie laid down the principle that a declaration against penal interest can only be admitted if its purpose is to exculpate, rather than incriminate, the accused.

### 2. Implications for Declarations Against Pecuniary and Proprietary Interest.

As this hearsay exception can only be used to introduce exculpatory evidence, it is impossible for the admission of such evidence to operate unfairly against the accused; thus, it is unnecessary for the purposes of this chapter to explore the satisfaction of the "necessity" and "reliability" principles as they relate to this exception.[171] However, the preconditions developed with respect to the declarations against penal interest raise additional concerns with respect to the reliability of declarations against pecuniary and proprietary interests.

In *O'Brien*, the Court ruled that a declaration against penal interest is admissible for the reason that "a person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook".[172] This begs the question: Why are additional safeguards necessary with respect to declarations against penal interests, but not necessary with respect to declarations against pecuniary and proprietary interests?[173] Why can a statement against penal interest only be used to exculpate the accused, yet a statement against pecuniary interest used to inculpate the accused? While it appears that

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170. [1982] 1 S.C.R. 28 at 32-33, 65 C.C.C. (2d) 150, [1982] 2 W.W.R. 289, 14 Man. R. (2d) 380, 132 D.L.R. (3d) 244, 40 N.R. 153 [hereinafter *Lucier* cited to S.C.R.].

171. If it were found that the exception was be too restrictive and resulted in the exclusion of evidence which was necessary and reliable, *Khan* could be utilized to admit the evidence, assuming the twin criteria of "necessity" and "reliability" are satisfied.

172. *O'Brien*, *supra* note 163 at 599.

173. Recall that the elevated risk of fabrication discussed by the Supreme Court relates to the fact that the declarations are used in criminal proceedings to exculpate the accused. Surely there would be just as much a risk to fabricate declarations against pecuniary or proprietary interests which would exculpate the accused. There is nothing inherent in either category of declarations against interest which promotes a greater or lesser risk of fabrication. Rather, it is the use to which such declarations are put which promotes concoction.

the Court refuses to allow inculpatory statements based on notions of fairness to the accused,[174] would these arguments not just as aptly apply to declarations against pecuniary and proprietary interests?

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174. See *Lucier*, *supra* note 170 at 33. Justice Ritchie stated as follows:
> The difference [between allowing admission of inculpatory versus an exculpatory statement] is a very real one because a statement implicating the accused in the crime with which he is charged emanating from the lips of one who is no longer available to give evidence robs the accused of the invaluable weapon of cross-examination which has always been one of the mainstays of fairness in our courts.

## V. CONCLUSION

This chapter has demonstrated that a number of hearsay exceptions firmly rooted at common law have a grave potential to admit both unnecessary and, more importantly, unreliable hearsay evidence. It is clear that a number of the rationales providing circumstantial guarantees of trustworthiness for these categorical exceptions are ancient and archaic. They are of questionable validity in today's secular society.

The "dying declaration" category probably represents the most serious threat to the accused's right to a fair trial. It allows for the admission of hearsay evidence which is gravely prejudicial to the accused, while denying the accused any reasonable opportunity to test or challenge the trustworthiness of the evidence, short of the accused taking the stand. The eighteenth century rationale upon which it is based, that no man would want to meet his Maker with a lie on his lips, is infused with religious indoctrination no longer applicable to a large segment of our modern society. Providing the accused with an opportunity to demonstrate that the rationale does not obtain in the particular circumstances is an inadequate safeguard. In the event, even, that the rationale continues to obtain in the twentieth century, it claims only to substitute for the absence of the oath and to negate the danger of declarant insincerity. Thus, the circumstances do not necessarily provide a substitution for cross-examination and the testimonial dangers of misperception and faulty memory go unchecked.

It appears that the "public necessity of preserving lives of the community, by bringing manslayers to justice"[175] has overriden the court's apprehensions as to the inherent trustworthiness of dying declarations. However, this mirrors a s.1 analysis under the *Charter*, which therefore presupposes that an infringement of a *Charter*-protected right has been found. Arguably, the possibility that unreliable evidence is admitted without the accused having any opportunity to cross-examine the declarant to assess his or her credibility infringes the accused's rights as protected under ss.7, 11(c) and 11(d) of the *Charter*. Analysis under s.1 would then provide the proper framework

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175. Greenleaf, *supra* note 34 at 187.

from which the court can assess whether the perceived societal interest warrants the accused's deprivation of these rights.

As a final note under our consideration of the "dying declaration" hearsay exception, as was also found to be the case with every exception discussed in this chapter, this hearsay evidence is admissible despite there being other relevant and admissible evidence available. Clearly, the "necessity" principle, as set out by Wigmore and adopted by the Supreme Court of Canada in ***Khan***, ***Smith*** and ***R.*** v. ***K.G.B.***, would be offended in these circumstances.

Analysis of the four hearsay exception categories subsumed under the *res gestae* classification produced similar criticisms and concerns respecting the validity and sufficiency of the circumstancial probability of trustworthiness inherent in such declarations. All the *res gestae* exceptions, with the exception of "declarations accompanying and explaining act", require that there to be no apparent motive for the declarant to fabricate or concoct. This displays a lack of confidence in the capacity of the rationales underlying these exceptions to promote and ensure declarant veracity.

With respect to both "declarations of contemporaneous bodily or mental sensations or conditions" and "declarations indicating contemporary state of mind or present intention", the contention that contemporaneity of the utterance with the sensation, condition, state of mind or intention eliminates any opportunity to fabricate or concoct was seriously challenged. This rationale is entirely dependent upon the declarant, in fact, experiencing a sensation, condition, state of mind or intention at the moment the declarant claims to experience it. Thus, the guarantee of veracity is absurdly dependent upon the declarant being sincere in the first instance. The validity of this rationale becomes particularly suspect where a declaration as to a contemporaneous bodily sensation is made at a point distant in time from the event or transaction which caused the sensation. With respect to declarations of intention, the applicability of this 'contemporaneity bolstering veracity' rationale is highly doubtful. Intention rarely forms spontaneously such that concoction or fabrication can be ruled out.

A concern raised in our discussion, which is common to several of the subcategories under the *res gestae*, is the inability of the court to prevent the trier of fact from making use of hearsay evidence for prohibited purposes. While declarations of contemporaneous bodily or mental sensations or conditions cannot be tendered to establish the cause of the injury, should the contents of the hearsay disclose it, it is permissible for the trier of fact to draw an inference from the timing of the declaration as to the cause of the sensation. It is doubtful that a court can restrict the trier of fact from, either consciously or subconsciously, drawing conclusions as to the cause of the sensation based upon the contents of the out-of-court statement. Similarly, though hearsay under the "state of mind" exception cannot be admitted to establish some past act referred to in the hearsay statement, courts sometimes fail to appreciate that the relevance of a particular state of mind has its genesis in the declarant's belief as to a past act.[176]

The use of hearsay evidence most difficult to reconcile with the principles underlying this exclusion rule is the admission of declarations indicating intention for the purpose of establishing that the declarant, in fact, acted on that stated intention. The rationalization that a declaration as to intent makes it more probable than not that the declarant acted in accordance with that stated intention applies just as forcefully to any out-of-court assertion as to past acts, yet the latter is excluded. In fact, there appears to be no greater circumstantial probability of trustworthiness that a declarant acted upon a stated intention than there is circumstantial probability of trustworthiness for a reference to a past act contained in inadmissible hearsay.

In our analysis of the "spontaneous exclamation" subcategory of the *res gestae* we noted that its underlying rationale did not adequately address the danger of the declarant not accurately perceiving the startling or excitement-producing event. Numerous academics and commentators have cited modern psychological experimentation which suggests that nervous excitement may well diminish, rather than heighten, one's

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176. See discussion of *Wysochan*, *supra* note 78, under heading entitled "Declarations Indicating Contemporary State of Mind or Present Intention".

perceptive abilities. The many limitations placed on the use of this hearsay exception demonstrate, once again, the courts' lack confidence in the rationale underlying the "spontaneous exclamation" exception.

As was the case with the "dying declaration" exception category, hearsay evidence can be admitted pursuant to all four of the subcategories under the *res gestae* despite there being other adequate and admissible evidence available. Unlike the "dying declaration" or "declarations against pecuniary or proprietal interest", there is no need for the declarant be dead or unavailable at the time of the trial. As was discussed in this section, the defensiblility of Wigmore's "fair necessity" for the admission of such hearsay crumbles once the superior reliability of this evidence, as compared to *viva voce* evidence by the declarant, becomes suspect.

It is evident that the inherent trustworthiness of declarations against proprietary or pecuniary interest has concerned members of the judiciary for years.[177] That "[w]e can safely trust a man when he speaks against his own interest"[178] has been described as a "sordid and unconvincing"[179] reason to admit these out-of-court assertions. However, even accepting the validity this rationale, it only claims to negate concerns as to declarant insincerity and no other testimonial danger. We found that the persuasiveness of this rationale surely must lose its force as the value of the interest against which the declaration is made decreases, especially as it approaches a nominal value. More importantly, that the rationale can bolster the reliability of matters collateral or annexed to the actual declaration against interest was vehemently disputed. Further, the fact that the tenor of the declaration as a whole can be in the declarant's interest yet still be admitted providing that a portion of it is against interest is illogical and absurd. Assigning diminished weight to such evidence in no way remedies the fact that potentially unreliable hearsay evidence may be tendered against the accused in a criminal trial. It

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177. See comments of Lord Justice Hamilton in *Ward*, *supra* note 136 at 138, and Justice Kerans in *Walker*, *supra* note 136 at 438.

178. *Gibblehous* v. *Strong* (1832), 3 Rawle 437 at 438, Rogers J.

179. *Ward*, *supra* note 136 at 438.

is telling that the Supreme Court of Canada adopted additional safeguards to address many of these concerns in their propoundment of "declarations against penal interest" exception to the hearsay rule. The fact that the Court in *Lucier* added a further gloss, that the "declarations against penal interest" exception could only be used to introduce exculpatory hearsay evidence, further demonstrates a lack of confidence in the inherent reliability of declarations against interest.

# CHAPTER FOUR

# RELIABILITY AND NECESSITY: THE APPLICATION OF *KHAN/SMITH* FRAMEWORK AND A CRITIQUE OF THIS NEW APPROACH TO THE ADMISSION OF HEARSAY

> "Now if, even without increasing the present number of hearsay exceptions, all were replanned for operation in accordance with the broad requirements of (a) necessity (including the concept of reasonably essential convenience and (b) an accompaniment of circumstantial or other matters (including but not confined to guarantees of reliability or trustworthiness) furnishing a basis for intelligent appraisal, we should be rid of the kinks, quirks, inconsistencies, and outright errors of the present set up". J.M. Maguire, *Evidence: Common Sense and Common Law* (Chicago: Foundation Press, 1947) at 147.

## I. INTRODUCTION

In 1990, the Supreme Court of Canada delivered its judgment in *R.* v. *Khan.*[1] Not since that same Court's decision in *Ares* v. *Venner*[2] has there been such a radical reform to the law relating to the admission of hearsay evidence. Reminiscent of the judiciary's response to *Ares*, the lower courts initially questioned whether *Khan* was to be interpreted broadly, representing a bold new approach to the admission of hearsay evidence generally, or whether it was to be construed narrowly, confined only to sexual assault cases involving young children. In 1992, the decision of *R* v. *Smith*[3] clearly and unequivocally put this issue to rest. After reviewing Madame Justice McLachlin's judgment in *Khan*, Chief Justice Lamer stated:[4]

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1. [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 113 N.R. 53, 41 O.A.C. 353, aff'g (1988), 27 O.A.C. 143, 64 C.R. (3d) 281, 42 C.C.C. (3d) 197 [hereinafter *Khan* cited to C.C.C.].

2. [1970] S.C.R. 608, 73 W.W.R. 347, 14 D.L.R. (3d) 4 [hereinafter *Ares* cited to D.L.R.].

3. [1992] 2 S.C.R. 915, aff'g (1990), 75 O.R. (2d) 753, 61 C.C.C. (3d) 232, 2 C.R. (4th) 253, 42 O.A.C. 395 [hereinafter *Smith* cited S.C.R.].

4. *Ibid.* at 933.

> This Court's decision in *Khan*, therefore, signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.

*Smith* provided further clarification as to the nature and application of these principles governing the admissibility of hearsay. This chapter provides an analysis and critique of the *Khan/Smith* framework in the context of the criminal trial, as well as suggesting possible implications this new approach might have on firmly-rooted hearsay exceptions.

The analysis starts with an overview of the two Supreme Court decisions and an extraction of the "necessity" and "reliability" principles, the twin criteria which determine admissibility. While *Khan*, and more so *Smith*, provide some guidance as to the application of these principles, much was left to the discretion of the trial judge and many questions left unanswered. An examination of the application of the *Khan/Smith* principles by subsequent courts follows.

Under the heading "Application of Principles in Subsequent Case Law", the lower courts' interpretations of, and refinements to, the "necessity" and "reliability" principles are examined. In addition, a third principle - "fairness to the accused" - is discussed, along with some of the procedural issues which the *Khan/Smith* framework raises. This analysis demonstrates that, despite the lower courts' valiant attempts to give firm and functional definition to these principles, the new approach does not provide a solid, coherent framework within which to determine the admissibility of hearsay evidence. In an effort to equip the trial judge with some flexibility in the admission of hearsay evidence, the Supreme Court has created a framework of analysis which is too loose, providing inadequate safeguards and insufficient guidelines to the lower courts. This new approach leaves far too much to the discretion of the trial judge, promoting inconsistent application of the principles and leaving open the possibility of the admission hearsay evidence which is inherently unreliable.

Many concerns and criticisms of the framework are raised and dealt with in the analysis both of the new approach to the admission of hearsay, as set out in *Khan* and

*Smith*, and the cases which subsequently attempt to apply it. The fourth section of this chapter, entitled "Critique of Framework", summarizes and expands upon many of the criticisms raised during the prior analysis, as well as identifies further concerns as to the framework's inherent inability to adequately safeguard the rights of the accused in the criminal trial process.

In the final section of the chapter, an analysis of the implications of *Khan* and *Smith* on firmly-rooted hearsay exceptions is provided. Does the framework superimpose itself onto hearsay exceptions already existing at common law, such that it cuts back the common law exception to only allow for the admission of hearsay evidence which satisfies both the twin criteria? Several lower courts have picked up on the broad language used in *Khan* and *Smith* to suggest that it does. Do the principles of "necessity" and "reliability" represent a minimum constitutional threshold for the admission of hearsay, which the failure to satisfy offends ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*?[5] One court of appellate jurisdiction has accepted this argument to strike down a statutorily-created exception to the hearsay rule. While the Supreme Court of Canada has subsequently overturned that decision, the proposition that "necessity" and "reliability" principles represent the minimum constitutional standard for the admission of hearsay likely[6] remains intact.

By the conclusion of this chapter it will be apparent that further consideration by the Supreme Court of Canada as to the admission of hearsay evidence under this new approach is warranted. To provide a truly coherent principled approach, the Court must answer the following questions: What is the fundamental question respecting the "reliability" of hearsay evidence - the assessment of its inherent trustworthiness or the determination of its truth? Which, if not all, of the testimonial dangers must be

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5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

6. As of the date of writing this chapter, the reasons in *R.* v. *Laramee* have not yet been released. This author has assumed that the Supreme Court of Canada merely disagreed with the Manitoba Court of Appeal's application of the principles espoused by the Court of Appeal to the facts in the case.

addressed in the "reliability" assessment? In addition to answering these questions, some limitations as to which matters are relevant to the assessment of "reliability" must be set out, especially with respect to the relevance of corroborative and "recent complaint" evidence. Only after these issues are addressed can one truly claim that *Khan* represents a "triumph of a principled analysis over a set of ossified judicially created categories".[7]

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7. *Smith*, *supra* note 3 at 930.

## II. *KHAN & SMITH*: A NEW APPROACH TO THE ADMISSION OF HEARSAY

### A. Overview of Judgments

#### 1. *R.* v. *Khan*

At the trial of the accused for sexual assault on a three and a half year old child, the trial judge ruled that the child-complainant, then four and a half years old, was incompetent to give unsworn testimony. The Crown then sought to admit out-of-court statements made by the child to her mother some 30 minutes after the alleged assault.[8] The Court rejected the Crown's argument that these statements were close enough in temporal proximity as to come under the "spontaneous declarations" exception to the hearsay rule. As a result, without the benefit of either the child's testimony or her out-of-court statements, the Court was forced, reluctantly, to acquit the accused.

The Ontario Court of Appeal allowed the Crown's appeal and sent the matter back for a new trial. Justice Robins, writing for the Court, held that the trial judge erred both in refusing to permit the child to give unsworn testimony and in refusing to admit the evidence of the out-of-court declarations made by the child to her mother. With respect to the hearsay evidence, the Court found that the usual requirements for "spontaneous declarations" of contemporaneity and intensity or pressure should be relaxed in cases involving sexual assaults on children of tender years. The importance of receiving such

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8. The accused was a physician who had been alone with the child for a few minutes before he conducted an examination of the child's mother. When the mother returned to the child, she noticed a wet spot on the child's clothing. Subsequent analysis proved the spot to be a mixture of semen and saliva. On the way home in the car, some 15 minutes after leaving the office, the mother testified as to the following interchange between her daughter and herself:

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|---|---|
| Mother: | So you were talking to Dr. Khan, were you? What did he say? |
| Child: | He asked me if I wanted a candy. I said yes. And do you know what? |
| Mother: | What? |
| Child: | He said "open your mouth". And do you know what? He put his birdie in my mouth, shook it and peed in my mouth. |
| Mother: | Are you sure? |
| Child: | Yes. |
| Mother: | You're not lying to me, are you? |
| Child: | No. He put his birdie in my mouth. And he never did give me a candy. |

evidence demanded greater latitude be given in applying the temporal constraints of the "spontaneous declaration" exception.

At the Supreme Court of Canada, Justice McLachlin, writing for the Court, concurred with the results, but disagreed as to the grounds upon which the Ontario Court of Appeal admitted the hearsay evidence. With respect to the admission of the victim's out-of-court statements, she agreed as to "the need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse".[9] However, as to the method employed to achieve this objective, Justice McLachlin held that extending the "spontaneous declaration" exception to include such statements "is to deform it beyond recognition and is conceptually undesirable".[10] Any modification or relaxation of the preconditions attached to existing hearsay exceptions, without regard to the principles underlying the rule and its exceptions, could result in the admission of evidence which is either unnecessary or unreliable.[11] As a result, Justice McLachlin rejected the Ontario Court of Appeal's proposed temporal relaxation of the "spontaneous declaration" hearsay exception as it did not adequately safeguard the rights of the accused.

Instead, Justice McLachlin adopted a "more flexible approach, rooted in the principles and the policy underlying the hearsay rule".[12] After reviewing the decision of Justice Hall from *Ares* v. *Venner*[13] and the dissent of Lord Pearce from *Myers* v.

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9 *Khan*, *supra* note 1 at 102.

10. *Ibid.*

11. See also *R.* v. *Hanna*, [1993] B.C.J. No. 961 (C.A.) (QL) [hereinafter *Hanna*]. Justice Wood, in considering the admissibility of hearsay of a document pursuant to the past recollection recorded doctrine states:

> As noted by Kerans, J.A. in *Regina* v. *Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.), past recollection recorded is really nothing more than an unremarkable exception to the hearsay rule. In the move toward greater flexibility in the interpretation and application of that rule, it is conceptually undesirable to focus on relaxing the criteria for its recognized exceptions, since such an approach is likely to lead one to overlook the concerns which originally gave rise to the rule in the first place.

12. *Khan*, *supra* note 1 at 100.

13. *Ares*, *supra* note 2.

*D.P.P.*,[14] she found that two principles underlie the existence of all common law exceptions to the hearsay rule: "necessity" and "reliability". These principles adequately protect the rights of the accused while providing flexibility to the courts to address new and novel circumstances. Justice McLachlin concludes:[15]

> [H]earsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.

On the facts before the Court, Justice McLachlin found that hearsay evidence satisfied both these requirements, therefore, the out-of-court statement should have been admitted.

### 2. *R.* v. *Smith*

For a period of time after the release of the decision in *Khan*, there was some question as to whether or not the principles espoused therein were confined to cases involving evidence of sexual assault on children.[16] Despite *obiter* by the Supreme Court to the contrary, many courts continued to interpret *Khan* in this narrow manner.[17]

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14. (1964), [1965] A.C. 1001, [1965] 2 All E.R. 881 [hereinafter *Myers* cited to A.C.].

15. *Khan*, *supra* note 1 at 105.

16. See *R.* v. *Kharsekin*, [1992] N.J. No. 161, 1991 (Nfld. S.C.T.D.) (QL), where Justice Roberts ruled the dying declaration of a stabbed sailor inadmissible. After finding that neither the "dying declaration" or the *res gestae* hearsay exception applied to the circumstances, the Court held that *Khan* does not extend beyond child sexual assault case:

> I am not convinced, however, that the relaxation of the hearsay rule in child sexual assault cases as sanctioned by *Khan* can or should be extended across the board.

See also *R.* v. *Weinberg*, [1992] O.J. No. 1049 (Ont. Ct. Just. Prov. Div.) (QL) [hereinafter *Weinberg*].

17. See *R.* v. *Seaboyer* (1991), 66 C.C.C. (3d) 321 at 399, McLachlin J.:

> Consider the hearsay rule. At one time it was seen as an absolute prohibition subject to a number of limited, rigidly defined exceptions. In this respect, it resembled s.276 of the *Criminal Code*. But in more recent times, this inflexible approach has been replaced by an approach which allows more discretion to the trial judge. Thus, this court in *Ares v. Venner* (1970), [citation omitted], held that old categories are no longer exclusive and that hearsay evidence which does not fall within one of the traditional exceptions may be received if it is (a) necessary, and (b) reliable. This approach was recently affirmed by

However, Chief Justice Lamer, writing for the Court in the 1992 decision of *R.* v. *Smith*, put this particular issue to rest.

In *Smith*, the accused was charged with murdering a women with whom he had been vacationing in Canada. Both the accused and the deceased were American citizens ordinarily resident in Detroit. The evidence at trial disclosed that the accused had picked up the deceased at her mother's house and drove with her to Ontario, where they had spent the weekend together at a hotel. The Crown's theory was that the accused was a drug smuggler who had tried to persuade the deceased to carry drugs, concealed on her body, across the border into the United States. When the deceased refused, the accused abandoned her but later returned to pick her up, and drove her to a place where he strangled her.

In support of this theory, the Crown relied upon the evidence of four telephone calls made by the deceased to her mother the day she died. The first three calls were traced to the hotel in which the accused and deceased were staying. In the first call, the deceased claimed that the accused had abandoned her and that she needed a ride home. In the second call the deceased stated that the accused had still not returned. In the third call, the deceased told her mother that the accused had returned and that she no longer needed a ride home. In the fourth and final call, traced to a pay phone at the gas station near where the deceased's body was found, the deceased told her mother that she and accused were on their way home.

After a thorough analysis of the purpose for which these statements were tendered, the Chief Justice rejected admitting the third and fourth phone calls under the "present intentions" or "state of mind" hearsay exception. Having said this, however, the Chief Justice then stated that this finding was not fatal to the admissibility of the out-of-court declarations. Hearsay may still be admissible despite its failing to come under any firmly-rooted common law exceptions. Chief Justice Lamer then went on to consider

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this court in *R. v. Khan*, [1990] [citation omitted]. [Emphasis added.]

whether or not the circumstances in this case satisfied the twin tests of "necessity" and "reliability" as set out in *Khan*.

It is immediately evident from the judgment that these principles are of broad application in determining whether or not to admit hearsay evidence. The Chief Justice stated:[18]

> *Khan* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and the exceptions to it. What is important, in my view, is the departure signalled by *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. The preliminary determination of reliability is to be made exclusively by the trial judge before the evidence is admitted.
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> This Court's decision in *Khan*, therefore, signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity.

An indepth analysis and clarification of the twin criteria of "necessity" and "reliability" then follows.

While *Khan* signalled the end of the "old categorical approach" to the admission of hearsay, the statement of principles contained in this landmark decision, upon which the trial judge must determine admissibility of hearsay, is somewhat vague and simplistic. *Smith* provided a much-needed elucidation of these principles. The following section provides an extraction and analysis of the Supreme Court's proposed framework gleaned from both *Khan* and *Smith*.

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18. *Smith*, *supra* note 3 at 932 - 33.

### B. *Khan/Smith* Framework: Extraction of Principles

#### 1. "Necessity" Principle

##### a) *Khan*

In determining whether to admit a particular hearsay statement, Madam Justice McLachlin states that "[t]he first question should be whether reception of the hearsay statement is necessary".[19] Immediately following this passage is the only explanation of the functioning of the "necessity" principle provided in the entire judgment:[20]

> Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.

Unfortunately, this statement of principle left many questions unanswered. If the child testifies, does this preclude admission of the child's out-of-court statement made at the time of the offence? What if other alternatives are available to establish the fact in issue to which the hearsay evidence relates? Must the party tendering the hearsay demonstrate that all other means of obtaining admissible evidence have been explored and exhausted? Can there be "necessity" for hearsay which is merely circumstantial evidence? Further elucidation of this principle and many answers to the above questions were to be found in *Smith*.

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19. *Khan, supra* note 1 at 104. While the choice of language used by Justice McLachlin suggests a sequential test, subsequent decisions have not picked this up. See *Rocchio* v. *Willets*, [1993] A.J. No. 360 (Q.B.) (QL), where Justice Veit queries whether the tests must be applied in sequence, but notes that "[i]t is too early to determine if the tests set in Kahn [sic] are sequential".

20. *Khan, supra* note 1 at 104.

**b) *Smith***

While Justice McLachlin appears to have borrowed heavily from Wigmore's formulation of the twin criteria of "necessity" and "reliability", no mention is made in her judgment to his treatise on evidence. Thus, little or no guidance can be derived from his comprehensive work in this area. A trial judge attempting to apply these somewhat ethereal twin principles had, at best, a very loosely sketched-out framework within which to make the determination of admissibility. Thankfully, however, further clarification of the principles of "necessity" and "reliability" was forthcoming in *Smith*. In addition, Chief Justice Lamer stated, without reservation, that the principles identified by Justice McLachlin were the same as those explained by Wigmore.[21] Substantial excerpts from *Wigmore on Evidence* were adopted by the Chief Justice in his analysis.

With respect to the "necessity" principle, the Chief Justice held that "necessity" does not mean "necessary to the prosecution's case";[22] rather, it "refers to the necessity of the hearsay evidence to prove a fact in issue".[23] The principle "must be given a flexible definition, capable of encompassing diverse situations".[24] The Chief Justice states further:

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21. See *Smith*, *supra* note 3 at 932:

> It is no accident that the criteria identified by McLachlin J. in *Khan* bear close resemblance to the principle of necessity, and the circumstantial guarantee of reliability, referred to by Wigmore.

22. *Ibid.* at 933.

23. *Ibid*:

> The companion criterion of "necessity" refers to the necessity of the hearsay evidence to prove a fact in issue...
>
> The criterion of necessity, however, does not have the sense of "necessary to the prosecution's case". If this were the case, uncorroborated hearsay evidence which satisfied the criterion of reliability would be admissible if uncorroborated, but might no longer be "necessary" to the prosecution's case if corroborated by other independent evidence. Such an interpretation of the criterion of "necessity" would thus produce the illogical result that uncorroborated hearsay evidence would be admissible, but could become inadmissible if corroborated. This is not what was intended by this Court's decision in *Khan*.

24. *Ibid.* at 934.

> What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations. Wigmore, while not attempting an exhaustive enumeration, suggests at s.1421 the following categories:
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> > (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason....
> >
> > (2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources.... The necessity is not so great, perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.
>
> Clearly the categories of necessity are not closed....

In adopting the above statement of the "necessity" principle, Chief Justice Lamer decisively put to rest one of the contentious issues left unresolved in *Khan*. Clearly, death or unavailability of the declarant were not the only circumstances in which the "necessity" principle could be satisfied.[25] If the declarant was available to testify, and did in fact testify, there might still be a need to admit his or her out-of-court declaration, as this might be the best evidence available.

However, numerous questions remained unanswered in *Khan* and *Smith* respecting the "necessity" principle. Cases subsequently applying the *Khan Smith* framework have continued to further define its limits. Some have raised new questions and concerns as to the use and applicability of this framework. These decisions are discussed and analyzed in Section III, "Application of Principles in Subsequent Case Law".

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25. This issue was unquestionably put to rest in *R.* v. *B.(K.G.)* (25 February 1993), File No. 22351 at 60-61 (S.C.C.). This same passage quoted above from J.H. Chadbourn, ed. *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown & Co., 1974) [hereinafter *Wigmore on Evidence*], was again cited by the Chief Justice to explain how there could still be "necessity" for hearsay when the declarant did, in fact, give evidence.

### 2. "Reliability" Principle

#### a) *Khan*

In the course of explaining the principles upon which hearsay has historically been admitted in evidence, Justice McLachlin takes note of four tests set out by Jessel M.R. in *Sugden* v. *Lord St. Leonards* (1876),[26] which attempt to explain the existence of all common law hearsay exceptions.[27] This is a good place to commence our analysis of the nature of the "reliability" principle as set out in *Khan*.

The first of these four *Sugden* tests merely encapsulates the "necessity" principle. As to the latter three tests, Justice McLachlin notes that the "reliability" principle is a consolidation of these. The latter three tests are:[28]

> ... the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, they must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.

The first and second of these tests, that the declarant be disinterested and the declaration be made *ante litem motam*, both ensure that the declarant had no apparent motive to fabricate or misrepresent at the time the declaration was made. The testimonial dangers of misperception and faulty memory are not addressed.[29] As to what is meant by "peculiar means of knowledge not possessed in ordinary cases", Justice McLachlin tells

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26. 1 P.D. 154 at 241, [1875-80] All E.R. Rep. 21 (C.A.) [hereinafter Sugden cited to P.D.].

27. In fact, Madam Justice McLachlin, at 101, quotes Lord Donovan's dissent in Myers, *supra* note 14 at 1047, adopting Jessel M.R.'s test. Justice McLachlin notes that the same passage from Lord Donovan's dissent was quoted by Justice Martland [sic - should read "Hall"] in *Ares*, *supra* note 2 at 15.

28. *Sugden*, *supra* note 26 at 241.

29. The fourth testimonial danger, ambiguity of language, is of lesser importance. See discussion in Chapter Two. The degree of ambiguity of language in a declaration is apparent on its face; thus, the court is able to determine whether the testimonial danger is present without the aid of cross-examination. Cross-examination is likely to resolve the ambiguity, but does not play an important role in revealing the presence of this testimonial danger as it does with the others.

us little, except that the child in the *Khan* "beyond a doubt" possessed it.[30] Arguably, "peculiar means of knowledge not possessed in ordinary cases" refers to knowledge obtained in circumstances which would preclude the possibility of misperception or faulty memory on the part of the declarant.[31] As a result, the "reliability" principle embodied

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30 *Khan, supra* note 1 at 101. No further clarification of this test is given in the dictum of Jessel M.R. either. It is interesting that few courts or academics have really considered what is a "peculiar means of knowledge not possessed in ordinary cases", especially since Jessel M.R. described this as "one of the strongest reasons for admitting" hearsay.

31. J.H. Wigmore does not agree. In *Wigmore on Evidence*, *supra* note 25 at 252, in discussing this last factor, the Learned Professor makes the following comments in the text of a footnote:

> The learned judge, in this fourth element, is referring merely to the requirement that the hearsay witness must possess the ordinary knowledge qualifications of every witness. This is therefore not peculiar to the hearsay exceptions. It merely presupposes that asserter of the statement possessed the qualifications of a witness.

Only one Canadian decision could be located which touches on the nature of the last factor mentioned by Jessel M.R., and the decision appears to support this author's interpretation, as opposed to Wigmore's. In *R.* v. *Finta* (1992), 73 C.C.C. (3d) 65 at 193ff [hereinafter *Finta*], on an appeal of the acquittal of the accused for war crimes, the Ontario Court of Appeal considered the admissibility of two depositions made by a witness, now deceased, before a Hungarian judicial tribunal. The witness, himself a Jew, had been put in charge of a brick yard. As a result of his position, he received commands from German Officers directly. In his depositions he identified a person other than Finta who may have been responsible for the brick yard confinement and the atrocities committed there. This hearsay evidence did not fit within any of the existing common law hearsay exception categories.

The Ontario Court of Appeal considered the admissibility of this evidence under the *Khan* twin criteria. With respect to the "reliability" of the hearsay, the Court noted: [at 200 (C.C.C.)]

> The statements were made on a solemn occasion, somewhat akin to a court proceeding, by a person adverse to the party seeking to tender the statement. They appear to have been made by a person having peculiar means of knowledge of the events described in the statement, and the statements themselves distinguish between events within Dallos' personal knowledge and events about which he had merely received information from others. [Emphasis added.]

It is apparent in this quote that, to this Court, "peculiar means of knowledge" means something more than the declarant merely being a competent witness. The fact that the witness had first-hand knowledge is distinguished from his having "peculiar means of knowledge". As the witness was in charge, he would be the conduit of orders from the authorities to the persons within his charge. From his unique vantage point, he was better able to perceive and determine who had *de facto*, as opposed to ostensive, control of the brick yard confinement. Thus, the use of the phrase "peculiar means of knowledge" reflects the fact that the situation enhanced above the ordinary the witness' ability to accurately perceive the events or facts he was describing.

in the three *Sugden* tests addresses, to some extent, all of the testimonial dangers normally checked by cross-examination.[32]

Justice McLachlin builds upon this framework and goes on to consider additional *indicia* of "reliability". She states as follows:[33]

> Many considerations such as timing, demeanor, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.

However, providing the trial judge with such a broad discretion to determine which matters are relevant to "reliability" could result in wide-ranging and inconsistent application of the "reliability" principle, as well as "matters" being considered which are inconsistent with the principles underlying the hearsay exclusion rule and its exceptions. Constructing a more structured framework around this discretion would address many of these concerns without unduly restricting the flexibility of the new approach. For example, if a court lists a number of factors considered in making its determination as to "reliability", yet all relate only to one testimonial danger, is this an error in law since not all the credibility factors are addressed?

Interestingly, an analysis of the list of "matters" relevant to Justice McLachlin's conclusion respecting the "reliability" of the hearsay does not resolve this issue. It is unclear whether "timing, demeanor, the personality of the child, the intelligence and understanding of the child" relate exclusively to apprehensions as to declarant insincerity

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32. The British Columbia Court of Appeal in *R. v. Chahley* (1992), 72 C.C.C. (3d) 193 at 212 [hereinafter *Chahley*], makes an additional observation respecting these principles:

> [The latter three] principles combine to form a trustworthiness test which has the great advantage of being immune to the court's subjective evaluation of reliability, and which, therefore, honours the line that separates admissibility from weight.

33. *Khan, supra* note 1 at 165.

or also to other credibility factors. For example, is "timing" relevant in the sense that if the child makes the declaration soon after the alleged offence, he or she will have had little opportunity to fabricate, or is it relevant in the sense that the risk of faulty memory is nonexistent when there is a relatively short period of time between the alleged event and the disclosure? Does the "personality of the child [and] the intelligence and understanding of the child" go to the unlikelihood of fabrication or susceptibility to coaching,[34] or is it a consideration because it reduces the risk of misperception on the part of the child? *Khan* provides the trial judge attempting to identify "matters relevant to reliability" with little guidance as to which, if any, of the testimonial dangers must be addressed.[35]

A further analysis of other "matters" found relevant to "reliability" in *Khan* demonstrates that Justice McLachlin took into account factors which were neither logically connected to the promotion of "circumstantial guarantees of trustworthiness" nor addressed or discounted the existence of any testimonial danger. In addition to

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34. The answer to this question might be inferred from an earlier passage earlier in McLachlin's judgment. She states: [*Khan, supra* note 1 at 101]

> Moreover, the evidence of a child of tender years on such matters may bear its own special stamp of reliability. As Robins J.A. stated in the Court of Appeal (at p. 210):
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> > Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.

Thus, arguably, Justice McLachlin's later reference to demeanor, personality, intelligence and understanding of the child refers back to this "special stamp of reliability" present in the disclosure of a child of tender years as to sexual abuse.

35. There is some support for the argument that "veracity" is the primary testimonial danger tested by cross-examination; therefore, "veracity" should the be primary testimonial danger addressed and bolstered by the circumstances surrounding any hearsay exception. See comments of Justice Dickson, as he then was, in *R.* v. *Abbey*, [1982] 2 S.C.R. 24 at 41, 68 C.C.C. (2d) 394, 29 C.R. (3d) 193, 39 B.C.L.R. 201, 138 D.L.R. (3d) 202 at 216 [hereinafter *Abbey* cited to S.C.R.]:

> The main concern of the hearsay rule is the veracity of the statements made. The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented.

emphasizing the existence of no apparent motive for the child to falsify her story, Justice McLachlin stressed the importance of two facts which compelled her to find that the "reliability" principle had been satisfied in this case:[36]

> The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. [Emphasis added.]

The emphasis on the latter two factors raises two questions of fundamental importance respecting the nature of the "reliability" test as set out in *Khan*.

First, is the relevant question whether the declaration is inherently trustworthy or whether the contents of the declaration are true? Trustworthiness and truthfulness are similar, yet distinct, concepts.[37] If we know that a hearsay assertion is true, this does not preclude it from being incredible and unreliable. Rather, it simply means that the issue as to the inherent trustworthiness of the hearsay declaration is no longer relevant. A number of factors which have logical relevance to establishing truth have no logical relevance to establishing trustworthiness. If unrelated evidence substantiates all the factual elements contained in an unreliable hearsay declaration, it does not convert it into a reliable hearsay declaration.

The importance of this distinction is made evident in the following scenario. Suppose that the weight of the evidence against the accused is close, but not quite sufficient, to satisfy the criminal standard of proof. In these circumstances, the Crown might attempt to admit an inculpatory hearsay statement to bolster its case and get over the "beyond a reasonable doubt" hurdle. If the evidence establishing the commission of the offence is considered in the "reliability" assessment, this results in an interesting

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36. *Khan*, *supra* note 1 at 106.

37. For example, the declarant may have misperceived the event because of his poor eyesight and then made an insincere declaration out of hatred for the accused. The contents of this declaration happen to conform to the truth, but the declaration is unreliable.

anomaly. The very evidence used to corroborate the unrelated evidence suggesting the commission of the offence derives its "reliability", and thus its admissibility, from the same evidence it is supposedly corroborating. The unrelated evidence has, in essence, corroborated itself. Thus, the relevant question in the "reliability" assessment should be: Are the circumstances surrounding the making of the hearsay declaration such that the declaration can be considered to be inherently trustworthy? As a result, the courts should not take into consideration the existence of corroborative evidence going to the truth of the contents of the hearsay, as this has no logical relevance to this question. However, it is apparent that the Supreme Court did take such evidence into consideration in its "reliability" assessment.[38]

The second question raised by the above-quoted passage from *Khan* is: Should the court restrict itself in its assessment of "reliability" to considering only those facts or circumstances which tend to negate the possibility that testimonial dangers are present and operative in the hearsay declaration? Is this not the key to almost every existing common law hearsay exception: that the circumstances obviate concerns with respect to the presence of the testimonial dangers normally tested by cross-examination, such that cross-examination would be superfluous? As noted previously, both factors emphasized by

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38. The distinction between whether the declaration is true or inherently reliable is particularly important when a psychological expert is called to give evidence as to the "reliability" of a declaration. *R.* v. *Moore* (1990), 63 C.C.C. (3d) 85 (Ont. Ct. (Gen. Div.)), provides an excellent example of where expert evidence begins to encroach into the exclusive domain of the trier of fact. Mrs. Moore, the accused, allegedly had a repressed memory and could not recall events surrounding the death of the child she was baby-sitting. Justice Moldaver found as follows: [*ibid.* at 88]

> Dr. Hucker was asked whether or not he had an opinion as to the reliability of the version of the events as described by Mrs. Moore while under the influence of sodium amytol. He testified that, in his opinion, her version was reliable. His reasons were as follows:
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> (1) His overall impression of the interview was such that Mrs. Moore's recitation of the events had a ring of truth... .
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> . . .
>
> (4) The description she gave of the incident was, in Dr. Hucker's mind, more consistent with what the pathologist had said was the likely cause of the injuries.

Both these opinions held by the expert relate primarily to whether the contents of the declaration were true, rather than whether the circumstances were such as to enhance the reliability of Mrs. Moore's out-of-court statement.

Justice McLachlin are relevant only to whether or not the alleged assault, in fact, occurred. These factors have no logical relevance to whether the declaration was made in circumstances which bolstered or addressed any of the four credibility factors. The existence of corroborative evidence neither compels the declarant to speak sincerely nor provides circumstantial guarantees as to the accuracy of the declarant's perception and memory. The fact that the child had knowledge of such sexual acts well beyond her years in no way promoted her veracity, perception or memory; rather, it implied that the child had been, at some time in the past, a victim of sexual assault. Thus, the declarations made by the child-complainant in *Khan* might have been admissible for the non-hearsay purpose of establishing the peculiar sexual knowledge possessed by the child. From this, the trial judge could infer that child had been sexually assaulted at some time prior to making the declaration, which then could be used to corroborate other evidence indicating that the alleged assault had occurred.[39]

While the object of flexibility may demand that the court refrain from drawing up "a strict list of considerations for reliability", *Khan* provides far too "loose" a framework in which to make this assessment. Our analysis of *Khan* demonstrates that even Justice McLachlin may have taken certain factual circumstances into consideration which have no logical relevance to demonstrating circumstantial guarantees of trustworthiness or to obviating the need for cross-examination to test for the presence of testimonial factors. Fortunately, the paucity of guidance as to the mechanics of this principle was to be remedied, somewhat, when Chief Justice Lamer redirected the Supreme Court's attention to the "reliability" principle in *Smith*.

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39. The chain of reasoning would be as follows: The mere fact that the child makes the statement demonstrates that she has knowledge of sexual acts not to be expected in a child of her age. This leads to an inference that she has the victim of a sexual assault at some time in the past. In effect, there is very little difference in this line of reasoning to that which allows the admission of medical evidence as to injuries of the child-complainant which are consistent with the allegation of sexual abuse.

b) *Smith*

In *Smith*, Chief Justice Lamer did much to provide the trial judge with a more structured and coherent framework in which to assess the "necessity" and "reliability" of hearsay. In keeping with the Court's expressly-stated "principled approach to the admission of hearsay evidence", the Chief Justice starts his discussion of the twin criteria by first revisiting the hearsay rule's underlying rationale:[40]

> It has long been established that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it.

Borrowing heavily from *Wigmore on Evidence*, he notes that the main purpose for the hearsay rule is to ensure that the litigants have an opportunity to test, through cross-examination, the trustworthiness of testimonial evidence tendered by the opposing party-litigant.[41] However, there may be circumstances in which the test of cross-examination would serve no useful purpose and where the admission of hearsay evidence is crucial to one of the litigants being able to prove some element of their case.[42] In those circumstances where the presence of all testimonial dangers is substantially negated, the societal interest in providing every opportunity to the litigants to prove their case with all available and relevant evidence counterbalances any protections lost to the accused as a result of his inability to cross-examine the declarant. As a result, the balance tips in favour of admitting the hearsay evidence.

Having set out these general principles, the Chief Justice explains what constitutes "reliability" or, in Wigmore's words, "circumstantial guarantee of trustworthiness":[43]

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40 *Smith*, *supra* note 3 at 929.

41. *Ibid.* at 929.

42. Chief Justice Lamer adopted Wigmore's statement of the rationale underlying all hearsay exceptions: [*Smith*, *supra* note 3 at 930]

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.

43. *Ibid.*

> Well before the decision of this Court in *Khan*, therefore, it was understood that the circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. "Guarantee", as the word is used, does not require that reliability be established with absolute certainty. Rather it suggests that where the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence such evidence should be admissible even if cross-examination is impossible. [Emphasis added.]

Plainly the "apprehensions traditionally associated with hearsay evidence" are the same "credibility factors" or "testimonial dangers" - insincerity, misperception, faulty memory and ambiguity of language - which are discussed in Chapter Two of this thesis.[44]

The Chief Justice then reproduces from Wigmore a list setting out three categories of circumstances which "provide a functional substitute for testing by cross-examination". All existing hearsay exceptions supposedly rely on one or more of these reasons for their circumstantial probability of trustworthiness. They are as follows:[45]

a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

Interestingly, the first two of these identified categories of circumstances promote no credibility other factor than veracity. Only the third category addresses the danger that the declarant did not accurately perceive or recall the events described in the hearsay evidence, and such "conditions of publicity" rarely present themselves in a criminal

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44. See *Smith*, *supra* note 3 at 935.

45. *Ibid.* at 930.

context.[46] However, later in the judgment, in his summary of "reliability" principle, the Chief Justice emphasizes that the circumstances must do more than negate fears of declarant insincerity:[47]

> The criterion of "reliability" ... is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. [Emphasis added.]

Clearly, the choice of the word "mistaken" means that the circumstances must negate the possibility that the declarant misperceived the events or was unable to accurately recall the events. Thus, the Chief Justice's interpretation of the "reliability" principle is that the circumstances must "substantially negate the possibility" of any of the testimonial dangers of insincerity, faulty memory, or misperception being operative.[48]

With respect to the evidential burden placed on the party-litigant attempting to establish the "reliability" of the hearsay, the Chief Justice is inconsistent throughout the judgment as to nature of this burden. Early in the judgment, he suggests that the phrase "circumstantial guarantee of trustworthiness" means no more than that the circumstances are "not such as to give rise to the apprehensions traditionally associated with hearsay evidence".[49] However, later he states that this same guarantee of trustworthiness is

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46. This category relates primarily to the "declarations as to reputation", "declarations as to pedigree" and "declarations as to public documents", rarely-used hearsay exceptions, especially in the criminal proceedings. See discussion in Chapter Two.

47. *Ibid.* at 933.

48. In applying this principle to the facts of the case, the Chief Justice makes this point abundantly clear: [*Smith*, *supra* note 3 at 935]

> Moreover, in respect of the first two telephone conversations, there is no reason to doubt Ms. King's veracity. She had no reason to lie. In my view, the hearsay evidence relating to the first two telephone conversations between Ms. King and her mother could reasonably be relied upon by the jury, as the traditional dangers associated with hearsay evidence - perception, memory and credibility - were not present to any significant degree.

49. *Smith*, *supra* note 3 at 930.

established where the circumstances "substantially negate the possibility that the declarant was untruthful or mistaken".[50] Requiring that the circumstances "substantially negate the possibility" places a more onerous and affirmative duty on the party tendering the hearsay to put evidence before the court negating the existence of each and every testimonial danger. This distinction is of some importance in circumstances where there is very little or no evidence going to one particular credibility factor. In that case, the party with the evidential burden might fail to satisfy the more stringent affirmative evidential burden, while satisfying the less stringent one.[51] The Chief Justice resolves this ambiguity somewhat in his application of the "reliability" principle to the facts before the Court.

In assessing the "reliability" of the hearsay tendered in *Smith*, Chief Justice Lamer speculates as to alternative explanations for the declarant's out-of-court statements which would be inconsistent with the truth of their contents. As the evidence before the court failed to discount these possibilities, the hearsay was held to be unreliable. The Chief Justice adds:[52]

> I wish to emphasize that I do not advance these alternative hypothesis as accurate reconstructions of what occurred on the night of Ms. King's murder. I engage in such speculation only for the purpose of showing that the circumstances under which Ms. King made the third telephone call to her mother were not such as to provide that circumstantial guarantee of trustworthiness that would justify the admission of its contents by way of hearsay evidence, without the possibility of cross-examination. Indeed, at the highest, it can only be said that hearsay evidence of the third telephone call is equally consistent with the accuracy of Ms. King's statements, and also with a number of other hypothesis.

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50. *Ibid.* at 933.

51. If there is no evidence as to the declarant's perceptive or mnemonic abilities, a court still might be able to say that the circumstances were "not such as to give rise to the apprehensions traditionally associated with hearsay evidence".

52. *Smith*, *supra* note 3 at 936-37.

Thus, it appears that the Chief Justice is employing the more onerous standard, requiring that the evidence "substantially negate the possibility" that any of the testimonial dangers are operative.[53]

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53. For an example of where a court has appeared to adopted the lower threshold test, see *R.* v. *Accoose*, *infra* note 155, and discussion there.

## III. Application of Principles in Subsequent Case Law

Whether the principles of "necessity" and "reliability" are satisfied in the circumstances of each case "is a question of law for determination by the trial judge".[54] Undoubtedly, in applying the *Khan/Smith* framework for the admission of hearsay evidence to the facts in each case, trial judges have, necessarily, further refined these principles and set out their limitations. How have the lower courts interpreted the "necessity" and "reliability" principles? Has the subsequent application and refinement of these principles been consistent with the analysis and reasoning of Justice McLachlin in *Khan* and Chief Justice Lamer in *Smith*? The following section examines the lower courts' application of the *Khan/Smith* twin criteria. Concerns and criticisms with respect to the application of the *Khan/Smith* framework are raised throughout the analysis. Attention will also be paid to a third principle mentioned in *Khan*, "fairness to the accused", which has been further developed and articulated by these later courts. In the final part of this section, some procedural issues specific to the *Khan/Smith* framework are brought to light.

### A. Applying the "Necessity" Principle

One of the first questions which confronts the trial judge attempting to apply the "necessity" principle is: What is this supposed "flexible definition, capable of encompassing diverse situations"[55] of which Chief Justice Lamer speaks? Since the release of the decision in *Khan*, and continuing after *Smith*, there has been an ongoing refinement of the "necessity" principle by the lower courts, setting out its parameters, trying to resolve the numerous questions left answered in both Supreme Court decisions. The following sections analyzes how the principle has been applied in the many "diverse situations" contemplated by Chief Justice Lamer. By the end of this analysis, a coherent and functional explanation of the "necessity" principle will, hopefully, be made apparent.

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54. *Smith*, *supra* note 3 at 934.

55. *Ibid.* at 934.

### 1. "Reasonably Necessary": Is Obtaining Other Admissible Evidence Impossible, Difficult or a Mere Inconvenience?

Several months prior to the Supreme Court's decision in *Smith*, the Ontario Court of Appeal released its decision in *R.* v. *Finta* (1992).[56] One of the issues on appeal in that case was the admissibility of a report prepared after World War II by the International Red Cross. The report was written by unknown authors and it contained statistics as to the number of Jewish persons who died in the Holocaust. The report failed to satisfy the pre-conditions needed to trigger the application of any existing common law hearsay exception.[57] In discussing the admissibility of the evidence pursuant to *Khan*, the Court made the following comments with respect to the nature of the "necessity" principle:[58]

> Properly understood, the principle of necessity means not that the hearsay evidence is necessary for a party to prove his case, but that hearsay is the only available means of putting that evidence before the court. To be admissible, the evidence must be relevant to, but not necessarily dispositive of, an issue, and for hearsay to be admissible, it must be the only way of tendering that relevant evidence. [Emphasis added.]

Thus, in this Court's eyes, the impossibility of obtaining other admissible evidence on a material particular must be the basis for the "necessity" of admitting the hearsay evidence.[59]

However, this "impossibility" standard set down in *Finta* represents the furthermost extreme on a continuum of how difficult the obtainment of other admissible evidence

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56. *Finta, supra* note 31.

57. Since the report was prepared as a result of an investigation, it did not qualify under the business records exception.

58. *Finta, supra* note 31 at 199.

59. The meaning of the word "evidence" by the Court in this quote must be synonomous with the word "information". See also *R.* v. *S.(K.O.)* (1991), 63 C.C.C. (3d) 91, 4 C.R. (4th) 37 (B.C.S.C.), where the admissibility of a statement made by a 3-yr-old to her grandparents was at issue. Both Crown and defence had agreed that no meaningful testimony would be forthcoming from child. In considering the necessity for the admission of this evidence, Justice Wetmore held: [at 93 (C.C.C.)]

> It seems to me "necessity" has a twofold meaning. It must be necessary in the sense of the evidence being crucial to the case. That is evident here.
>
> The other aspect is that it is *reasonably necessary* in the sense of the direct evidence not being available. [Emphasis added.]

must be to satisfy the "necessity" principle. Criminal cases subsequent to *Khan*, *Smith* and *Finta* have given varying interpretations to the phrase "reasonably necessary", ranging from where the obtainment of alternative evidence is virtually impossible, to where it merely presents an inconvenience.[60]

In the 1993 decision of the Supreme Court of Canada in *R.* v. *B.(K.G.)*,[61] Chief Justice Lamer revisited the "necessity" principle and made some important *obiter* comments with respect to the difficulty of obtaining other admissible evidence. In that case, the admissibility of videotaped statements of juvenile witnesses was at issue. During examination-in-chief, the juvenile witnesses completely recanted their original version of the events. The Crown then sought to admit the videotaped statements, not merely for the purpose of attacking the witnesses' credibility, but to establish the truth of the contents in the prior inconsistent statements. After quoting the same passage from Wigmore he cited in *Smith*,[62] - setting out the two categories of situations where there is a "necessity" for hearsay - the Chief Justice commented on the quality of the "necessity" present in the second category:[63]

> As an example of the second type of necessity, many established hearsay exceptions do not rely on the unavailability of the witness. Some examples include admissions, present sense impressions and business records. This is because there are very high circumstantial guarantees of reliability attached to such statements, offsetting that fact that only expediency and convenience militate in favour of admitting the evidence. [Emphasis added.]

Thus, "necessity" and "reliability" interact such that superior "reliability" inherent in the hearsay declaration reduces the stricture of the "necessity" principle. The standard of availability of other evidence shifts along a continuum: moving from requiring that the

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60. In civil cases, mere economic expediency undoubtedly can satisfy the "necessity" principle where the hearsay evidence is "presumptively reliable". See *Rocchio* v. *Willets*, [1993] A.J. No. 360 (Q.B.) (QL), Veit J., and *Birch* v. *Southam*, [1993] A.J. No.274 (Q.B.) (QL), Shannon J.

61. (25 February 1993), File No. 22351 (S.C.C.) [hereinafter *K.G.B.*].

62. *Smith*, *supra* note 3 at 934.

63. *K.G.B.*, *supra* note 61 at 61.

obtainment of other evidence be impossible, to it being difficult, and, finally, to it being a mere inconvenience. Although these comments of the Chief Justice were not essential or fundamental to the judgment ultimately reached in *B.(K.G.)*,[64] subsequent case law has picked up on this *obiter* to support the admission of hearsay when the obtainment of alternate admissible evidence would only have presented a mere inconvenience.

For example, in *R.* v. *Caplette* (1993),[65] the issue before the Court was the admissibility of certified copy of an Order of Prohibition. This document would have been admissible pursuant to s.23 of the *Canada Evidence Act*[66] had it been either an "exemplification" or a copy certified by a judge.[67] It failed to meet either of these requirements. Nevertheless, the Court was willing to admit the court document if both the "necessity" and "reliability" principles as set out in *Khan* were satisfied.[68] After commenting on the superior circumstantial guarantees of reliability inherent in the document, the Court reviewed the very different approaches taken by appellate courts in defining "reasonably necessary". Having considered the judgments in *Finta*, *Chahley*, *Smith* and *B.(K.G.)*, the Court concluded:[69]

> In the case at bar it is clear that for a variety of reasons, the direct evidence of the prohibition order is not available. It is true that there are alternative ways of entering the documents which the Crown wishes to enter. The methods are however sometimes difficult to implement.

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64. Undoubtedly, more than mere expedience or convenience militated for the admission of the hearsay evidence in *K.G.B.* It was impossible to obtain other evidence.

65. [1993] B.C.J. No. 727 (B.C. Prov. Ct.) (QL) [hereinafter *Caplette*].

66. R.S.C. 1985, c. C-5 [Hereinafter *C.E.A.*].

67. A justice of the peace had signed it.

68. See further discussion of this case under heading "The Use of *Khan* to Circumvent Statutory Intent".

69. *R.* v. *Caplette*, *supra* note 65.

> It is difficult in many instances to get a Judge to certify these documents which the Crown wishes to introduce in this matter. It is also practically impossible to have the original Orders made in these types of cases extracted from the file in order that they could be introduced into evidence at a subsequent trial.
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> . . .
>
> At any rate, I am satisfied that under the "flexible" definition of necessity as postulated by Lamer, C.J.C. in *R.* v. *Smith* (*supra*), the requirement of "necessity" has been met in this instance. There is "a very high circumstantial guarantee of reliability" attached to these documents". [Emphasis added.]

It is noteworthy that in describing the difficulty of obtaining alternative evidence, the Court used the expressions "sometimes difficult to implement" and "difficult in many instances". This court did not even go so far as to find that in this given instance the obtainment would, in fact, be difficult. Rather, the fact that "sometimes" or "in many instances" the obtainment of such evidence would be difficult was enough. In practise, however, locating a judge to certify a copy of the prohibition order, thus making the evidence admissible pursuant to s.23(2) of the *C.E.A.* would, at most, qualify as merely inconvenient rather than difficult.

On the furthest extreme of the continuum, opposite *Finta*, is the 1993 decision of the Nova Scotia Court of Appeal in *R.* v. *Johnson.*[70] Mere convenience of the hearsay evidence is the only possible explanation for the "necessity" in this case. The appellant appealed his conviction of touching, for a sexual purpose, a female person under the age of 14 years of age. During the course of the trial the complainant had given evidence as to the date of her birth. No other evidence was called on the issue, despite the fact that her father was evidently present in the courtroom. Chief Justice Clarke, for the Court, found that *viva voce* evidence from a person as to his or her own age, though by its very

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70. [1993] N.S.J. No. 116 (C.A.) (QL) [hereinafter *Johnson*].

nature hearsay, was inherently reliable and "generally the best possible evidence of that fact".[71]

As to the satisfaction of the "necessity" principle, the Court made no specific references. While recognizing that age was a significant ingredient in the charge, the Chief Justice held that the evidence was so reliable as to not warrant the inconvenience of calling other witnesses. In fact, the Chief Justice appears to suggest that in the face of such inherently reliable hearsay evidence, the onus shifts to the defence to call as a witness someone who could give evidence as to the complainant's age, if the accused wished to dispute this fact. In his conclusion, the Chief Justice states:[72]

> Although the evidence of T.D. as to her date of birth is, strictly speaking, hearsay, it was necessary to prove a fact in issue. Her evidence on such a subject, by taking a common sense approach, deserves to be considered as having an element of reliability and trustworthiness.

The Court here seems to have confused the "necessity" for the admission of the evidence with the relevance of the evidence. The fact that the hearsay is the only evidence before the court relevant to a fact in issue does not satisfy the "necessity" principle as set out in *Khan*.

This author would suggest that the Court in *R. v. Johnson* lost sight of the fact that the twin criteria are just that - two independent principles which must both be satisfied. While there may be some interplay between the thresholds and required standards of proof of the principles, satisfaction of one principle to a superior degree does not extinguish the need to satisfy the other. Arguably, this case has relaxed the "necessity" principle to the point of non-existence. In any event, the rectitude of relaxing either of the *Khan* twin criteria in a criminal proceeding where the accused's liberty is at state is also debatable. In effect, the Court in *Johnson* shifted the evidential burden from the Crown to the Accused, to disprove the existence of a material particular. This Court failed to recognize

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71. The Court cites with favor the judgment of Justice Kaufman in *R. v. LeChapelle* (1977), 38 C.C.C. (2d) 369 at 372.

72. *Johnson, supra* note 70.

the importance of the accused's right to test under cross-examination the credibility of the Crown's witnesses.

Superior trustworthiness of the hearsay is not the only circumstance which will compel a court to relax its application of the "necessity" principle. In some cases, the misconduct of one of the party-litigants in obstructing the opposing party-litigant's access to evidence may also be a factor. In *Ethier v. Canada (Royal Canadian Mounted Police (RCMP) Commissioner)*,[73] a wrongful dismissal action against the Crown, the Federal Court of Appeal appears to have relaxed the requisite "necessity" standard for this very reason. Justice Hugesson, for the Court, considers the "necessity" of the hearsay evidence in the following extract:[74]

> There can equally be no serious question as to the criterion of necessity in the circumstances. Respondent, by their counsel, had blocked any normal means of access to the material. Even once it was obtained through *Access to Information Act* proceedings it was hardly realistic to expect appellant's solicitor to approach the various declarants and seek affidavits from them, assuming that he could have done so without committing a serious breach of professional ethics. Their production, by means of the Supplementary Affidavit, was clearly the most practical and convenient way to bring them forward without putting in jeopardy any of the respondent's rights to reply or explain if they wished to do so.

Although *Ethier* involves a civil action, it seems probable that the accused could make a similar argument to admit exculpatory hearsay evidence using the same relaxed "necessity" standard, if the Crown has in some way blocked the accused's access to other admissible evidence.[75]

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73. [1993] F.C.J. No. 183 (F.C.A.) (QL), Hugessen J..

74. *Ibid.*

75. As to whether the "necessity" standard may be relaxed when the Crown seeks to enter inculpatory hearsay evidence, see *Johnson*, *supra* note 70. In that case, Justice Chipman, dissenting on other grounds, finds that failure of the accused to make timely objection caused the "necessity" for the hearsay evidence. Had the accused objected, it would have been easy for the Crown during the trial to call the father, who was sitting in the court room, to give evidence as to the complainant's age. On appeal, as result of the Defence's omission, the Crown found it "necessary" to rely on this hearsay to prove the age component of the charge. There appears to be some fault aspect to Justice Chipman's arguments. Also, this case demonstrates that despite Chief Justice Lamer's prohibition

The above analysis as to the meaning of "reasonably necessary" supports the conclusion that the requisite difficulty or inability to obtain other admissible evidence to satisfy the "necessity" principle fluctuates depending upon the inherent reliability of the hearsay. In cases where the inherent reliability of the hearsay is of a superior quality, difficulty or mere inconvenience in obtaining other evidence may suffice. Where the inherent reliability of the hearsay is not of a remarkable or extraordinary quality, "reasonably necessary" will require that obtainment of other evidence be somewhere on a continuum between difficult and impossible. However, in the exceptional case, where the Crown or authorities have unreasonably obstructed the accused's access to evidence or information, the court may also relax the "necessity" standard despite the fact that the hearsay does not qualify as being exceptionally trustworthy.

### 2. Availability of Other Admissible Evidence: Repercussions to "Necessity" Principle

In some circumstances, the degree of difficulty in obtaining other evidence is irrelevant, as there is already evidence before the court on the fact in issue to which the hearsay relates. Alternatively, evidence might presently exist, or have existed in the past, which is relevant to that fact in issue and which would have been available had the Crown or accused bothered to make the appropriate inquiries. In both these cases, the court must resolve whether or not the admission of the hearsay is still "reasonably necessary" in light of the present evidence before the court or in light of the evidence which should have been before the court. Chief Justice Lamer, in *Smith* emphasizes that "necessity" does not have the sense of being "necessary to the prosecution's case".[76] Just because there is a reasonable doubt as to the existence of a material particular in the face of the evidence already admitted does not mean there is a "necessity" to admit hearsay evidence relating to that fact in issue. On the other hand, neither does the existence of

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otherwise, the admission of hearsay evidence is sometimes based solely on the fact that it is "necessary to the prosecution's case".

76. *Smith*, *supra* note 3 at 933.

corroborative evidence on a fact in issue preclude the "necessity" for hearsay evidence.[77]

But at what point does evidence go farther than merely corroborate, so far that it precludes "necessity" for hearsay, and yet still falls short of discharging the criminal standard of proof with respect to the existence of that material particular? Does this theoretical margin exist in reality, or does the "necessity" principle simply translate in practice to mean "necessary to the prosecution's case"? Can the Crown bolster the credibility of a incredible witness with hearsay evidence? Following is an analysis of the evolution in the case law respecting the effect of the declarant giving testimony on the "necessity" for the hearsay. As a result of this analysis, some answers to the above questions and further clarification as to the meaning of "reasonably necessary" is forthcoming.

### a) Effect of Declarant Testifying: Evolution Away From Automatic Exclusion

Prior to the decision in *Smith*, many appellate courts assumed that once the child-complainant had given *vive voce* evidence at the trial, this automatically precluded the "necessity" for the child's hearsay statements.[78] An example of this is found in *R.* v. *Collins* (1991),[79] a sexual assault case involving a 5-year-old complainant. With respect to the "necessity" of the hearsay evidence, the Ontario Court of Appeal, in a very brief judgment, simply stated:[80]

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77. See note 23 and passage reproduced there from *Smith*, *supra* note 3 at 933.

78. See *e.g. R.* v. *Laramee* (1991), 65 C.C.C. (3d) 465, 6 C.R. (4th) 277 (Man. C.A.), Twaddle J.A. [hereinafter *Laramee*]. But see *R.* v. *F. (G.)* (1991), 10 C.R. (4th) 93 (Ont. Gen. Div.), where the trial judge held that, while the child testified she was unable to narrate fully her version of the relevant evidence because of her emotional condition. Thus, the hearsay evidence was necessary. See also *R.* v. *Moore* (1990), 63 C.C.C. (3d) 85 (Ont. Gen. Div.) where the hearsay statements were admitted based on expert evidence that the accused, an adult, was mentally incapable of recounting the relevant events in the witness stand.

79. 9 C.R. (4th) 377 (Ont. C.A.).

80. *Ibid.* at 378.

> We do not think that this evidence can be used for anything but the limited purpose of refuting the concoction suggested in cross-examination. It cannot be used in any way for proof of its contents or to confirm the testimony of the child. It does not meet the test laid down in *Khan*, particularly, that of necessity. The child gave the evidence independently

Unfortunately, it is unclear from the judgment how credible or complete was the child's testimony.

One of the first of many assaults on the automatic exclusion of hearsay where the declarant gives *viva voce* evidence was in response to a problem commonly arising in child sexual assault cases, where the child-complainant recants or rescinds their story by the time the matter comes to trial. In *R.* v. *F.(J.)* (1991),[81] Justice Hogg considered the admissibility of a statement made by the complainant alleging sexual abuse by her father. In out-of-court statements subsequent to the initial disclosure the complainant changed her story, denying that any assault had ever taken place. At trial, the complainant, then 8 years old and obviously intimidated and nervous, continued to deny that she had been assaulted. With respect to the "necessity" of the out-of-court statements made by the complainant, the Court found as follows:[82]

> Although the child in the witness box before me after minutes of silence managed finally to whisper "no", I do not regard this as the giving of "evidence" as we understand it.
>
> There is evidence before me on which I can - and at this point I choose that word carefully - come to a conclusion that the child was terrorized or traumatized and that she was in fear of her father and that she may well have felt that she was responsible for the problems that were visited upon the family when the father went to jail and the family income was more than halved.

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81. 10 C.R. (4th) 93 (Ont. Ct. (Gen. Div.)).

82. *Ibid.* at 97.

> The father had an opportunity both before he went to jail and after he was released from jail to bring pressure upon this child not to implicate him in an offence. There is evidence of that. It is for me later to determine whether or not, in fact, that occurred.
>
> There was also evidence of pressure of the type I have referred to that could cause a child to recant or to deny as she did on occasions.
>
> The child was able to communicate what had occurred with her mother and with the skilled child workers in the manner that I have described I have no hesitation in holding that for the ends of justice to be met, it is necessary to admit this evidence.

Clearly, there could be no doubt as to the "necessity" of admitting the hearsay in these circumstances . The purpose for admitting this hearsay evidence was not to confirm or bolster the credibility of other existing evidence or testimony. Except for the accused, the child was the only witness who could shed any light on the events surrounding the alleged assault. Other evidence before the Court suggested that the child had been pressured by the accused or compelled by the circumstances befalling the family to recant her story. Arguably, the accused was predominantly responsible for creating the "necessity" for this hearsay.[83] It would be perversion of justice to preclude the admission of the out-of-court disclosure on the basis that this obviously intimidated and fearful child-complainant took the witness stand.

Soon thereafter, other courts began revisiting the issue of the "necessity" of hearsay in the face of child-complainant giving testimony. Could there still be a need for such hearsay where the child-complainant was neither reticent nor recanting on the stand? What if a child of tender years provided less than adequate testimony merely as a result of memory loss or because of their inability to adequately communicate. In that instance, the accused is not so clearly the cause of the "necessity". In *Khan* v. *College of*

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**83. It appears to have been crucial to Justice Hogg's determination as to the "necessity" of the hearsay that the Crown provided evidence which explained the child's reticence or recantation. See discussion under section entitled: "When is Material Particular Sufficiently Established as to Preclude "Necessity" for Hearsay?". It is also uncertain whether the fact that the accused appears to have terrorized or influenced the witness, and thus himself caused the necessity for the evidence, that "for the ends of justice to be met" it was necessary to admit the hearsay evidence.**

*Physicians & Surgeons of Ontario* (1992),[84] the Ontario Court of Appeal squarely addressed this issue in Dr. Khan's appeal of the finding against him of professional misconduct by the Disciplinary Committee of the College of Physicians & Surgeons of Ontario.[85] In those hearings, unlike the original criminal trial, the child-complainant did give *viva voce* evidence. Unfortunately, the child could not remember much of the detail surrounding the alleged assault.[86] The Disciplinary Committee allowed the mother to give evidence as to what the child said after leaving Dr. Khan's office. The primary ground of the appeal was the contention that the child-complainant having given *viva voce* evidence should have precluded the admission of this hearsay evidence.

Justice Doherty, for the Court, began by reviewing and discounting previous decisions by the Court which appeared to support such a rule of automatic exclusion in such cases.[87] Support for the nonexistence of this rule was derived from the judgment in *Khan*. Justice Doherty suggested that it was apparent that Madam Justice McLachlin contemplated circumstances in which the child would testify and yet there would still be a need for the admission of hearsay.[88] In addition, Justice Doherty held that such a rule

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84. 9 O.R. (3d) 641 (Ont. C.A.) [hereinafter *Khan* v. *C.P.S.O.*].

85. Note that while this was not a criminal trial, Justice Doherty recognized that the principles laid down in *Khan* applied equally to the admissibility of out-of-court statements at disciplinary hearings [*ibid.* at 653.].

86. See *Khan* v. *C.P.S.O.*, *supra* note 84 at 647-49, for the transcript of Tanya's evidence at the disciplinary proceedings. It is evidence she cannot really remember very much. As "the nature of her evidence is central to one of the grounds of the appeal", a lengthy extract from her examination-in-chief is set out.

87. With respect to *R.* v. *Collins* (1991), 9 C.R. (4th) 377 (Ont. C.A.), the Court states: [*Khan* v. *C.P.S.O.*, *supra* note 84 at 654]

> In my opinion, *Collins* does not preclude the admissibility of a child's out-of-court statements in all cases where the child testifies. It does no more than hold that in the particular case the nature of the child's evidence rendered it unnecessary to admit her out-of-court statement to her mother.

88. The three passages relied upon by Justice Doherty are not very persuasive. Justice Doherty notes that "[a] rule which would automatically exclude the out-of-court statement where the child testifies is inconsistent with *Ares* v. *Venner*, *supra*, the authority relied on in Khan". He notes that there was no suggestion in *Ares* that had the nurses been called the hearsay statements would have been rendered inadmissible, nor was the availability of the nurses seen as enhancing the reliability of the statements. However, Madam Justice McLachlin stated that there was no possible way to

of automatic exclusion would undermine the flexible case by case approach adopted in *Khan*, "thereby detracting from the avowed goal of avoiding strict and prefabricated exclusionary rules in cases involving allegations of sexual abuse against young children".[89] The Court then concluded that "reasonably necessary" in circumstances where the child has given evidence "*refers* to the need to have the child's version of events pertaining to the alleged assault".[90] Despite the existence of *viva voce* evidence of the child, the tribunal may find that:[91]

> ... it is still "reasonably necessary" to admit the out-of-court statement in order to obtain an accurate and frank rendition of the child's version of the relevant events, then the necessity criterion set down in *Khan* is satisfied. [Emphasis added.]

The Court found that the complainant's testimony at the disciplinary hearing supported the conclusion that the child-complainant was "unable to give anything approaching a full description of the events surrounding the alleged assault".[92] While she recalled the central fact, that is, that Dr. Khan inserted his penis in her mouth, "she could not recall the details of that event or the surrounding events".[93] It is evident from the

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identify which of the nurses had made the notes, therefore, none could be called to establish the reliability of the notes. Thus, it is difficult to see how *Ares*, as interpreted by Justice McLachlin, has any bearing on this issue.

89. *Khan* v. *C.P.S.O.*, *supra* note 84 at 656.

90. *Ibid.* at 657.

91. *Ibid.*

92. *Ibid.* at 660.

93. *Ibid.* See also *R.* v. *D.H.*, [1992] O.J. No. 1753 (Ont. Ct. (Gen. Div.)) (QL), Howden J.:

> In this case, the child was on the borderline of whether she could give unsworn evidence, looking at the full body of her testimony. She was only a little more than two and a half years when the alleged event occurred and about five when she appeared in court. Her evidence showed her to have, no doubt due to her young age, a strange adult environment in court and the type of questions and subjects asked about, very limited articulation skills, prone to sporadic memory lapses which could also be simply cases of not understanding, poor communication ability, and limited ability to draw conclusions common for adults or older children from what she saw. Yet this small child had a peculiar knowledge, being the only other witness to the alleged event which she did describe briefly. She was disinterested, and even with her evidence admitted, there remained difficulty in

language used by Justice Doherty that the absence of reference to factual elements triggers the "necessity", not that factual references contained in the complainant's testimony lacked credibility.

However, it is interesting to note that admission of the conversation between the mother and the child-complainant, in fact, adds nothing to provide a more "full description of the events". The child, in her testimony, referred to almost all the same relevant material particulars[94] contained in the hearsay statements, though mainly in answer to leading questions. She recalled being alone with Dr. Khan, him telling her to close her eyes and open her mouth, and him "dropping" his pants and putting his penis in her mouth. She was sure it was his penis because she saw his bare legs. This is not a case where there are gaps in the testimony, missing material particulars or an absence of context[95] which is established by the hearsay evidence. Rather, this is a case where all the necessary facts in issue were present in the child's *viva voce* evidence, but where that evidence attracted diminished weight.[96] The purpose for admitting this hearsay evidence was primarily to bolster the credibility of the child's testimony which, if believed, contains sufficient material particulars with which to convict the accused. *Khan* v *CPSO* is of particular importance as it provides a list of factors to consider in assessing whether

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**getting evidence of the alleged event other than what she had later told her mother.**

**In these circumstances, the Court finds necessity to be present in the sense meant by the Kahn [sic.] decision, being "reasonably necessary" to the ascertaining of the truth of the matter, and of course subject to weight by the trial judge after *hearing cross-examination of both declarant and recipient and submissions* by counsel for the parties.**

**94. The complainant could not remember Dr. Khan "peeing" in her mouth. Whether Dr. Khan ejaculated in the child's mouth is certainly not a required element of the offence.**

**95. The mother could easily have provided evidence to put the child's testimony in context. She would be well aware of the precise place and time of the complainant's last encounter with Dr. Khan.**

**96. The trier of fact would accord less weight to this evidence mainly as a result of the following: evidence as to the material particulars was elicited mainly through leading questions; in the course of giving her evidence, the child initially denied that she saw Dr. Khan's penis; and the loss of memory or uncertainty of the child as to many incidental factual elements.**

the hearsay is "reasonably necessary" in the face the declarant's testimony. The factors, summarized or paraphrased, are as follows:[97]

1 age of child at time of incident and time he or she testifies;

2 manner in which child gives evidence - extent necessary to resort to leading questions to elicit answers;

3 the demeanor of the child while testifying;

4 substance of testimony (coherence and completeness of child's description of events);

5 professed inability of child to recall all or part of relevant events;

6 evidence of matters which occurred between the event and the time of the child's testimony which may reflect on the child's ability to provide an independent and accurate account of the events; and,

7 any expert evidence, relevant to the child's ability at the time he or she is required to give evidence, to comprehend, recall or narrate the events in issue.

These factors do not address merely the existence of memory lapses or absence of material particulars. However, neither do they give free rein to the Crown to admit hearsay evidence to bolster the credibility of the child-complainant in any circumstances.[98] What they do is ensure that the "necessity" for the admission of the hearsay is, in fact, reasonable in the circumstances. Thus, the Crown must provide a reasonable explanation for the omission of detail or lack of credibility of the child-witness.[99] As a result, these factors set the parameters for the "necessity" principle within which the need to admit hearsay evidence does not offend Chief Justice Lamer's prohibition against the need for the evidence being merely "necessary to the prosecution's case".

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**97. Taken from *Khan* v. *C.P.S.O.*, *supra* note 84 at 658**

**98. Thus, offending Chief Justice Lamer's edict that "necessity" does not mean "necessary to the prosecution's case.**

**99. See also *R.* v. *Aguilar* (1992), 10 O.R. (3d) 266 (C.A.) [hereinafter *Aguilar*], discussed later in this section.**

**b) When is a Material Particular Sufficiently Established as to Preclude "Necessity" for Hearsay?**

The use of a child-complainant's own out-of-court disclosure to bolster the credibility of, or to fill in details missing from, his or her *viva voce* evidence does not greatly undermine the protections afforded the accused which the hearsay rule seeks to preserve. The declarant is available in court to be cross-examined. The trier of fact can assess the demeanor and personality of the child at the time of the trial, and from that infer, at least, the child's perceptual abilities and communication skills at the time of the alleged offence and the out-of-court disclosure. If the child is fabricating the allegations, then the child will either stick with the made-up story in his or her *viva voce* evidence, or claim to be unable to recall much of the events surrounding the alleged assault. In either event, the child would be lying in front of the trier of fact; thus, the trier-of-fact would have an opportunity to assess the veracity of the declarant through observation of witness demeanor.

However, in circumstances where the declarant is dead or unavailable to give evidence, there is a greater concern as to accused's inability to test for the presence of testimonial dangers through cross-examination. As a result, there may be different considerations in assessing whether there is a "need" to admit the hearsay evidence relevant to a particular fact in issue when there is independent evidence on this point already before the court. The question then becomes, at what point does corroborative evidence not emanating from the declarant preclude the "necessity" for the admission of hearsay, yet still fall short of discharging the criminal standard of proof with respect to the relevant material particular?[100] Is the answer simply that until a fact in issue has been

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100. *R.* v. *C.(B.)* (1993), 12 O.R. (3d) 608 at 623ff, goes further and suggests that hearsay evidence may be necessary merely to corroborate other evidence. In *C.(B.)* the Crown sought to use the out-of-court admission of one accused against the other merely to corroborate testimony of complainant. However, the Court found that:

> [a]ssuming such evidence could be shown to be necessary, which is doubtful in the present case since the Crown could have severed the charges against the two young offenders and made Kevin a compellable witness against Brian, it is obvious that the out-of-court statement of one accused implicating another is not reliable.

proven beyond a reasonable doubt there is a need for the admission of hearsay evidence relating to that issue? If the answer is yes, then despite Chief Justice Lamer's exhortations otherwise, "necessity" does connote "necessary to the prosecution's case". In the 1993 decision of *R.* v. *G.N.D.*,[101] the Ontario Court of Appeal made some attempt to wrestle with this issue.

In that case the child complainant had made numerous out-of-court statements to various adults with respect to the alleged sexual assault. Each statement was repetitious of certain elements contained in previous or subsequent statements. The appellant argued that, since the first two statements contained all the essential elements of the alleged offence, it was unnecessary to admit any of the subsequent out-of-court declarations.

Justice Weiler, for the Court, after reviewing the judicial pronouncements as to the meaning of "reasonably necessary", concluded as follows:[102]

> The task of the trial judge in determining whether there is need to have recourse to further statements made by the child, is thus to explore whether an accurate, frank, and, by implication, full account, will be had if the proposed further statement is not admitted.
>
> . . .
>
> In order to obtain a full and complete account of what is alleged to have happened to a very young child, the reception into evidence of several conversations the child had with adults may be reasonably necessary. Where a statement by the child to an adult contains material particulars, or provides important context in which the alleged acts took place, some repetition may be essential. Where a hearsay statement adds nothing which is relevant for consideration by a trier of fact, it will not satisfy the criterion of reasonable necessity and will not be admissible. [Emphasis added.]

Applying these principles to the facts, the Court found that the hearsay statements made after the first two statements provided no additional context and were merely repetitive

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101. [1993] O.J. No. 722 (C.A.) (QL) [hereinafter *G.N.D.*].

102. *Ibid.*

of allegations contained in the first two statements. They were unnecessary to obtain a "full and complete account", and therefore inadmissible for the truth of their contents.[103]

*G.N.D.*, however, does not entirely explain what is a "full and complete account of what is alleged to have happened". What if there is evidence from a less than credible witness as to each material particular of the offence? Is this a "full and complete account"? It is unclear whether the lack of "necessity" in *G.N.D.* resulted from there being evidence on each material particular and as to the surrounding circumstances, or whether its absence merely reflects the principle underlying the rule against the admission of prior consistent statements?[104] Clearly, repetitious out-of-court of the same facts adds no credibility to a declarant's earlier declarations. As a result, the question is still open: can there still be a "necessity" for hearsay which merely bolsters or corroborates existing evidence?

In a judgment released several weeks previous to *G.N.D.*, the Ontario Court of Appeal was presented with a set of facts which raised this question, but where the Court either failed to appreciate or recognize this issue, or found it unnecessary to address. In

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**103. One of the statements was admissible to rebut the inference raised by the defence that the complainant's version of events had been tainted by the biased interviews conducted by the authorities.**

**104. It is interesting to note that Justice Weiler does allow admission of one of the hearsay statements for the same purpose for which prior consistent statements may be admissible: that is, to rebut the inference of recent fabrication. The Court found as follows: [*G.N.D.*, *supra* note 101.]**

> In view of the ruling I propose to make with respect to the conversation with P.C. Morrison, there was, however, no necessity to admit any of this conversation. The situation might be different, if, for example, the defence position was that the questions posed by the social worker were of such a suggestive nature that they had 'tainted' the reliability of the child's subsequent statement to the police officer which followed shortly afterwards.
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> ...
>
> It must not be overlooked that the appellant also argued that all of L.'s earlier statements were prompted or elicited by questioning and could not be said to have emerged naturally. Coupled with this, the defence took the position that L.'s tender age and her initial allegation that the bruise was the fault of a playmate, made her statements unreliable.
>
> In my opinion, the admission of this statement was, in the circumstances, reasonably necessary to assist the trier of fact in assessing the issue of the ultimate reliability of the earlier statements.

In effect, the defence strategy in this case created the "necessity" for admitting the hearsay statement

*R.* v. *C.(R.)* (1993),[105] an out-of-court statement made by a co-accused was admitted against another merely to bolster and corroborate the complainant's version of events. In applying the "necessity" and "reliability" criteria, the Court doubted the "necessity" of the evidence only on the basis that the Crown could have severed the charges against the two accused so that one co-accused could have been compelled to give evidence against the other.[106] The admissibility of the hearsay was ultimately rejected on the basis that an out-of-court statement of one co-accused implicating another is inherently unreliable. No reference was made whatsoever to the fact that the complainant had given what appears to have been a "full and complete account of what is alleged to have happened", and that the purpose for admitting the hearsay would be merely to corroborate and bolster the credibility of complainant's testimony.

Only one Canadian court appears to have specifically addressed this issue as to whether there can be "necessity" for hearsay merely to give added weight to existing testimony. Unfortunately, it is within the context of a criminal trial where the declarant was called as a witness. However, the case does provide a coherent framework within which to assess the "necessity" of corroborative hearsay. In *R.* v. *W.B.* (1992),[107] a seventeen-yr-old was accused of sexual interference with his five-year-old cousin. On the day following the alleged assault, the complainant told his mother that the accused had "stuck his pee-pee in his bum", and that it hurt. At the time of the trial, the complainant, then six years old, repeated the allegation that the accused "put his pee-pee in my bum". However, instead of stating that it hurt, he stated that it "tickled a little". The accused argued that this contradiction raised a question as to the credibility of the complainant's evidence. The Crown sought to confirm the evidence of the complainant by admitting the hearsay disclosure made to the mother for the truth of its contents.

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105. 12 O.R. (3d) 608.

106. *Ibid.* at 623.

107. [1992] A.J. No. 1168 (Alta. Prov. Ct. Youth Div.) (QL).

Provincial Court Judge Russell, since elevated to the Court of Queen's Bench, quickly dismissed the argument that the child's evidence was unreliable merely because of a contradiction in describing the sensation he experienced: "The contradiction here is neither significant nor confusing, and I attach little weight to it".[108] Judge Russell then reviewed *Khan*, *Smith*, *Khan* v. *C.P.S.O.*, and *R. v. Aguilar*,[109] and concluded that the principle of "necessity" does not preclude the admission of both the hearsay of the child-complainant and the child-complainant's testimony. However, Judge Russell then set out the limitations of the "necessity" for the child-complainant's out-of-court statements in the face of the child-complainant's *viva voce* evidence:[110]

> In the recent past, hearsay statements have generally not been admitted for their truth to bolster the credibility of a witness on the grounds that previous consistent statements are self-serving in the case of a party, or superfluous in the case of a witness. The rejection of superfluous evidence would seem to conform to the test of "necessity" established in *Kahn* [sic] #1. Unless some purpose can be established for the admission of hearsay statements of a child where the child has testified, it must be rejected.

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108. *Ibid.*

109. *Aguilar, supra* note 99.

110. *Ibid.*

> In adopting the principle of "necessity" in Kahn [sic] #1, McLachlin, J. stressed that necessity must be interpreted as "reasonably necessary". In R. v. R.W. (1992) 137 N.R. 214, S.C.C., she said that courts may continue to treat children's evidence with caution where the circumstances require caution, but should not assume that a child's evidence is less reliable than an adult's. In my view, the principles established in these two cases can be linked. That is, if the circumstances of the child's testimony requires that it be treated with caution because of the child's reticence or confusion, the principle of reasonable necessity has been met. If the test of reliability can also be met, out-of-court statements of children should be admissible even though the child has also testified, not for the purpose of bolstering the child's credibility, but rather to provide testimony the child has been unable to provide. If no caution is required, the court must rely exclusively on the child's own statement. [Emphasis added.]

Thus, "reticence or confusion" on the part of the child witness, such as to warrant the trier of fact treating the evidence with caution, triggers the "necessity" for the hearsay evidence "to provide testimony the child has been unable to provide".

Applying this principle to the facts, Judge Russell found that the complainant's *vive voce* evidence was "quite straightforward" and "he had no difficulty describing the alleged events leading to the charge". She notes that, in giving his evidence, the child-complainant was:[111]

> ... neither reticent, nor confused. I see no need to treat his evidence with caution... . Therefore, there is no necessity for the hearsay statement of the child to be admitted, and accordingly it will be disregarded.

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111. *Ibid.*

As Judge Russell found that there was also evidence corroborating the child's allegations,[112] she was satisfied beyond a reasonable doubt that the accused did touch the complainant as alleged.

While Judge Russell makes a point of emphasizing that the admission of hearsay in these circumstances was "not for the purpose of bolstering the child's credibility", but rather to "provide testimony the child has been unable to provide", it is difficult to see how this is a useful distinction. Where a reticent child-witness provides evidence as to all the necessary elements of the alleged offence, however timidly or meekly, it is ludicrous to argue that the admission of hearsay in these circumstances is doing anything other than "bolstering the child's credibility". This is especially so when the hearsay statement itself contains no additional factual elements. But, having said this, is it so offensive to find the admission of hearsay evidence to bolster credibility is "reasonably necessary" in such circumstances? Her Honour Judge Russell provides a framework which imposes, in this author's opinion, reasonable limitations on the Crown as to the use of hearsay evidence to bolster credibility. Thus, where the complainant recants his or her allegations on the witness stand without reticence or confusion, the Crown is precluded from introducing the hearsay evidence for the purpose of establishing the truth of the allegations contained therein.[113] It is irrelevant whether we conceptualize the admission of hearsay in these circumstances as "providing testimony that the child has been unable to provide" or as merely "bolstering the child's credibility".

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112. After reviewing the law on corroboration, Judge Russell notes:

> Similarly, in this case, the evidence of the complainant, the mother and the accused clearly places the accused in the bedroom alone with the complainant on the day in question. The complainant's description of the room and the events surrounding the incident were consistent with a photograph of the room which was entered as an exhibit. The description of the sexual act, had its own peculiar stamp of reliability, in the absence of any explanation as to how a child of this age would acquire such knowledge. No motive has been established for the complainant to fabricate such an allegation. In my view, this all confirms the evidence of the complainant.

113. This test would allow the court to come to the same conclusion that it did in *R.* v. *F.(G.)*, *supra* note 81. There, the recantation could undoubtedly be characterized as reticent, thus allowing the court to admit the hearsay.

Add Judge Russell's gloss (that hearsay is "necessary" in circumstances where "the child's testimony requires that it be treated with caution because of the child's reticence or confusion") to the requirements established in *Khan* v. *C.P.S.O* and *R. v. Aguilar*[114] (that the Crown must demonstrate that the child's confusion, loss of memory or reticence is reasonable in the circumstances), and we have a coherent and workable framework within which to assess the "necessity" of the hearsay evidence. The limitations imposed on the Crown by this framework ensures that "necessity" does not equate to "necessary for the prosecution's case".

### 3. Who Carries the Burden and How is it Discharged?

On whom is the burden to produce enough evidence in court to satisfy the "necessity" criteria? A perusal of the case law suggests immediately that the onus is completely upon the party tendering the hearsay evidence to put enough evidence before the court to establish, on a balance of probabilities,[115] that there is "necessity" for the admission of the hearsay. However, numerous questions relating to the nature of this burden have not-so-readily-apparent answers. What is the nature of the obligation as it relates to the impossibility, difficulty or inconvenience of obtaining other admissible evidence? Must the party tendering the hearsay demonstrate that all means have been thoroughly investigated and explored in a timely manner,[116] but to no avail? When the declarant is available to give evidence, but is not called, what evidence must the party

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114. *Aguilar, supra* note 99.

115. See *R.* v. *Rowley*, [1992] O.J. No. 2347 (Ont. Ct. of Just. (Gen. Div.)) (QL) [hereinafter *Rowley*]:

> In the case at bar, I am satisfied on a balance of probabilities, of the necessity to admit the relevant portion of the deceased officer's notes into evidence. [Emphasis added.]

116. If the Crown fails to investigate a lead in a timely manner, such that potential admissible evidence is lost, then the Crown may not be able to rely upon hearsay evidence. It may not be enough merely for the Crown to establish that it would have been unlikely to bring forth admissible evidence. One cannot create the "necessity" upon which one then seeks to admit hearsay evidence. The goes more to fairness, as the lost evidence may have, in fact, supported the accused's innocence. See discussion under heading "Fairness to the Accused: Khan's Third Principle"

tendering the hearsay evidence put before the court? How does one demonstrate that the declarant might be psychologically harmed if compelled to give evidence? When a party wishes to admit hearsay evidence despite having heard *viva voce* evidence from the declarant, is there any additional burden than merely establishing that there are gaps in the child-complaint's testimony?

While some Courts have found "necessity" present in circumstances where it is conspicuous that other admissible evidence was likely available,[117] the majority of cases have declined to admit hearsay evidence where it is apparent that other potential sources of evidence have not been thoroughly explored.[118] The reasoning of the courts in the

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117. See *R.* v. *Johnson*, *supra* note 70, *Caplette*, *supra* note 65, *Rowley*, *supra* note 115. In all these cases, it makes more sense to interpret these decisions as reflecting a diminished standard of "necessity" in the face of hearsay evidence of inherently superior and reliable quality, rather than exceptions to the rule that the party tendering the hearsay has an obligation to establish that other sources of evidence have been explored to no avail. *Rowley*, is particularly interesting because the court clearly confuses who has the burden.

In that case, notes of a deceased police officer were required to prove continuity of a drug sample. The officer had given evidence at the preliminary inquiry. After finding that these notes failed to meet the preconditions for the statutory business records hearsay exception [*C.E.A.*, R.S.C. 1985, c. C-5, s. 30.], the Court considered whether the *Khan* principles would allow admissibility. With respect to the "necessity" of the hearsay, the trial judge noted that an adjournment might have enabled the Crown to get a copy of the transcript of the preliminary inquiry and read it in pursuant to s. 715 of the *Criminal Code*. However, the Court stated as follows:

> Thus, an alternative approach to the problem might well be, in certain circumstances, to allow the Crown an adjournment so that the transcript of the preliminary hearing might be ordered with a view to entering into evidence, the testimony of the deceased officer. Neither party expressed any certainty, however, about the contents or availability of the transcript in this case.

As the accused had strongly opposed the Crown's request for an adjournment, and the Court had agreed with the accused and denied the request, this "ironically, provides emphasis to the Crown's submission based on necessity".

However, this conclusion as to the "necessity" of this evidence seems questionable. Surely the accused has no obligation to demonstrate that the transcripts of the preliminary inquiry were available and that they contained evidence which would establish continuity of the drug sample. Also, that the accused was successful in arguing that further delay of his trial would be unfair should not in any way diminish the Crown's obligation to produce the best evidence available to substantiate the allegations against the accused.

118. See *Re. B.* (1991),31 R.F.L. (3d) 219 at 224 (Ont. Prov. Div.), where the Court found that the party tendering the evidence had failed to demonstrate that all other possible sources of obtaining the relevant information had been explored. As a result, it was improper for the court to consider admitting the hearsay under the *Khan* principles:

latter category is arguably more in line with the principles espoused in *Khan* and *Smith*.[119] In any event, how does the party tendering hearsay evidence establish that no other admissible evidence is available? Proving such a negative could certainly be time-consuming and an inefficient use of the court's time. Is it sufficient that the factual circumstances surrounding the offence, as established by the evidence, suggest no other sources of proof exist? The British Columbia Court of Appeal, in *R.* v. *Chahley* (1992),[120] suggests that evidence as to the circumstances surrounding the offence may be enough in certain cases.

In *Chahley*, the defence sought to introduce into evidence a statement made by the murder victim to his common-law spouse in which he disclosed that a person, other than the accused, had recently threatened him with a knife. In considering the applicability of the "necessity" principle, the Court promptly rejected the Crown's submission that the onus falls on the person who tenders inadmissible hearsay evidence to establish the necessity of the evidence "by demonstrating affirmatively that no alternative source of proof is available".[121] Rather, Justice Wood, for the Court, found that there was "no

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> I would add, further, that even if these preconditions were, on balance, met, that, because the child did give evidence in the other Court, I would prefer not to exercise my discretion to admit it at this time since there may be other means available which should have been considered and explored before the Court is asked to come to this conclusion. [Emphasis added.]

119. *Smith*, *supra* note 3 at 934:

> As indicated above, the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. [Emphasis added.]

Arguably, with respect to the first category of cases where it is apparent other evidence might be available, it is better to characterize these cases as representing fact scenarios where the inherent superior reliability of the hearsay evidence shifted the "necessity" standard along its continuum to requiring that the obtainment of other evidence be a mere inconvenience. Thus, with the inconvenience evident on the facts already before the court or evident as a result of judicial notice, the "necessity" principle is satisfied in a manner consistent with *Khan* and *Smith*.

120. *Chahley*, *supra* note 32.

121. *Ibid.* at 211.

evidence suggesting any other source of admissible proof", and that this was sufficient to satisfy the "necessity" test.[122] However, Justice Wood did add the following caveat:[123]

> The proper procedure to follow when evidence of this sort is tendered is for the trial judge to conduct a *voir dire* in which these issues can be tested under the microscope of cross-examination. For obvious reasons that did not occur in this case. But in most cases it would, I think, be impossible for the court to be satisfied that the threshold tests established in *Khan* have been met without the advantage of exploring fully, with the witness through whose mouth the declarations are offered, the circumstances under which they were made. [Emphasis added.]

Thus, it appears that the party against whom the hearsay evidence is tendered bears the onus to explore and probe for other probable[124] sources of admissible evidence in cross-examination of the witness bringing the hearsay statements to court. The party tendering the hearsay evidence then has the onus to discount any reasonable leads disclosed by the witness or which are made apparent from the other evidence.[125] To discount these opportunities, someone involved in the investigation would necessarily be called to provide evidence that reasonable and adequate inquiries were made with respect to these leads, but no admissible evidence was obtained as a result.[126]

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122. *Ibid.*

123. *Ibid.*

124. There must be something greater than a remote possibility that the lead will produce admissible evidence to require that the party tendering the hearsay to address and discount the lead. In *Chahley*, the fact that the deceased victim's partner was with him a great deal of the time was not sufficient to raise the possibility that the partner witnessed the threat to a realm beyond a remote possibility. Obviously, the Court of Appeal found this possibility too remote to require that this witness be called to exclude the possibility of his being able to give admissible evidence on this point.

125. It may be apparent merely from the facts before the court that other sources of evidence are or were available. For example, in cases of fraud or thefts involving banks, it may be necessary to tender certain computerized banking records. Some officer of the bank will be required to give evidence to explain why this hearsay evidence is the best or only possible source for the required information, as opposed to a witness. See e.g. *R.* v. *Pilkington*, [1993] M.J. No. 93 (Man. Prov. Ct. Crim. Div.) (QL) [hereinafter *Pilkington*].

126. The burden is similar for the accused if he or she is attempting to tender hearsay evidence. If it is apparent that other sources of information were or are available, the accused must demonstrate at least that he or she reported these leads to the police or made some effort to locate these potential witnesses or to obtain this other evidence. See *e.g. R.* v. *Douglas*, [1992] B.C.J. 908 (B.C.S.C.) (QL), where the accused's defence to an impaired driving charge was that someone had,

However, this allocation of burdens does not appear to recognize the huge disadvantage the accused has with respect to knowledge about the police investigation, sources or informational leads. It is possible that none of the witnesses called by the Crown are able to give any meaningful evidence as to whether all informational leads uncovered in the investigation were thoroughly explored. The accused is, effectively, much at the mercy of the police and the Crown in these circumstances.

When the complainant is not called to give *viva voce* evidence on the basis that it would cause him or her psychological harm, the party tendering the hearsay has a more onerous burden to discharge. Courts have shown a reluctance to make a determination as to the "necessity" of hearsay in such circumstances, equipped only with evidence as to the factual circumstances surrounding the offence and the disclosure. The party tendering the evidence must call an expert witness who has had an opportunity to interview, first-hand, the complainant, and who can give testimony about the likelihood of psychological damage occurring in this specific individual.[127]

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**unbeknownst to the accused, slipped some drug into her drink. A defence witness, the accused's niece, testified that, after the accused had left the bar in which they were sitting together, two men present at their table commented and laughed at having slipped something into the accused's drink. On appeal to the British Columbia Supreme Court, Justice Perry found that the lower court had erred in admitting this hearsay evidence. The Court strongly emphasized that there was "no evidence" that the accused made any effort to identify and locate the men who supposedly slipped the drugs into her drink. Nor was any mention made to the police as to these potential witnesses so that the police could assist in locating them and bringing them to court to give evidence.**

**127. Justice McLachlin in *Khan*, *supra* note 1 at 104-05, stated:**

> **The inadmissibility of the child's evidence might be one basis for a finding of necessity, but sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. [Emphasis added.]**

**Tendering psychological reports and assessments will not suffice. You must call the expert who actually assessed the child. See *Child and Family Services of Winnipeg West* v. *N.J.G.* (1998), 69 Man. R. (2d) 43 at 45-46, where the Court refused to admit the hearsay on the basis that the "necessity" principle had not been satisfied. No expert was called who had personally interviewed the children to determine whether they could give evidence. The Court found:**

> **In this case, the criterion of necessity has not been satisfied. There has been no demonstration that the children would have been disqualified from testifying had they been called as witnesses. They are all of an age where, *prima facie*, their evidence might be received... . Counsel for the agency pointed to certain passages in the medical and psychological reports which, he said, showed that the children were under stress and that testifying would have been too traumatic for them. In**

For example, in *R. v. W.* (1990),[128] the Crown called a psychologist to give evidence on a *voir dire* as to the likelihood of psychological damage to the complainant if compelled to testify. The psychologist testified that she had not interviewed the complainant because of her concern for trauma that might be generated in continuing interviews. However, in her opinion, she had acquired sufficient information as to "psycho-social history" of the complainant from what she had observed and heard at the preliminary inquiry to make this assessment. The psychologist described the courtroom as intimidating for the child and concluded that the complainant might see the experience of testifying in court as a criticism of herself, thereby sadly perpetuating the abuse itself. In the face of this evidence, the Court, however so reluctantly, found as follows:[129]

> ... in the absence of an actual assessment of [the complainant], by her for the purpose of determining the trauma or harm, I am unable to see that the "sound evidence" threshold of the necessity test has been met

The Court held that evidence from an expert as to how a child-complaint in a sexual assault case might generally react to giving *viva voce* evidence was insufficient to discharge the burden on the Crown. Evidence was required which related to the likelihood of psychological damage being caused to this specific individual as a result of being compelled to give testimony.

When the declarant has been called as a witness, must the party tendering the hearsay establish anything other than the mere existence of gaps in the testimony or missing details resulting from reticence or memory loss? As is evident from *Khan* v

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**my opinion, the reports fall short of establishing this. The children were able to tell their story to the social workers on more than one occasion, and on one occasion, in front of their mother. They were able to do that much without any apparent undue trauma, and I have no evidence upon which to conclude that they could not do the same in court, even conceding that the stresses in that environment would probably be greater than in the privacy of their home or professional offices. I hold therefore that the hearsay statements are not admissible to prove the allegations of possible sexual abuse.**

128. **2 C.R. (4th) 204 (Ont. Ct. of Just. (Prov. Div.)).**

129. ***Ibid.* at 211.**

*C.P.S.O.* (1992)[130] and again emphasized by the Ontario Court of Appeal in *R.* v. *Aguilar* (1992),[131] any attempt to tender hearsay evidence to fill in gaps or details missing in testimony will necessitate the party tendering the hearsay evidence provide the court with a reasonable explanation for lack of detail or memory loss. In *Aguilar*, the Crown failed to provide such a reasonable explanation. Justice Catzman, for the Court, illustrates this by comparing the facts as disclosed on the evidence with those in *Khan* v. *C.P.S.O.*, where the Crown satisfied this additional burden. In *Khan* v. *C.P.S.O.* the complainant was 3 1/2 years old at the time of the alleged assault and almost 8 at the time of the disciplinary hearing. The period of time between alleged assault and trial was over 4 years. In *Aguilar*, the complainant was almost 8 at the time the alleged assault, and almost 10 when she gave her evidence. The period between the incident and the trial was 2 years. In *Khan* v. *C.P.S.O.*, the complainant was interviewed following the alleged assault; in *Aguilar*, there was no such questioning.[132]

As to why the complainant in *Aguilar* could not recall certain events, Justice Catzman found as follows:[133]

> In the present case, while there were a number of matters which the complainant was, at least initially, unable to remember in giving her evidence, there is nothing in the record, except for references to her being "a little nervous, a little scared" and "somewhat diffident", to indicate the basis of her inability to testify at trial to the further matters mentioned in her statements to Ms. MacFarlane and her mother.

Justice Catzman emphasized that in *Khan* v. *C.P.S.O.*, two witnesses, who were accepted as experts in the field of investigation, verification and treatment of the sexual abuse of children, testified that the complainant's inability to recall details beyond the central event

130. *Khan* v. *C.P.S.O.*, *supra*, note 84.

131. *Aguilar*, *supra* note 99.

132. Justice Catzman agrees with Justice Doherty's opinion in *Khan* v. *C.P.S.O.* as to the possible effect of interviewing the child: [*Aguilar*, *supra* note 99 at 274]

> ... a child's ability to recall and recount past events may suffer where the child has been questioned by various persons about those events in the intervening years.

133. *Ibid.* at 275.

some four and a half years later was consistent with the expected limitation of a young child's ability to remember and articulate prior traumatic events. No such similar evidence was adduced in *Aguilar*. Justice Catzman concluded[134]

> In my assessment, on consideration of the circumstances I have reviewed, the Crown has not established that it was reasonably necessary to admit the complainant's out-of-court statements in the present case. I am influenced particularly by the facts that the complainant was almost eight years old at the time of the alleged event, that the trial took place within two years of that event, and that no evidence was adduced to explain the complainant's failure to testify beyond the evidence which she gave at trial. [Emphasis added.]

Thus, where the Crown seeks to admit hearsay evidence in addition to the declarant's *viva voce* evidence, it had best provide a reasonable explanation for the declarant's memory loss or lack of detail, substantiated by expert testimony.

### B. Applying the "Reliability" Principle

The trial judge has a broad discretion as to what "matters" are to be taken into account in assessing the "reliability" of the hearsay. While *Khan*, and to a greater extent *Smith*, provide some guidance as to what circumstances promote the "reliability" of hearsay evidence, many questions were left to be resolved by the lower courts. While it might have appeared settled in *Khan* and *Smith* that the focus of the inquiry in the "reliability" assessment is upon the declarant, numerous lower courts have, rightly or wrongly, directed a great deal of attention at the credibility of the recipient-witness[135] in determining the "reliability" of the hearsay evidence. Is the relationship of the recipient-witness to the declarant of any relevance to "reliability"? What is the nature of the burden satisfying the "reliability" principle and upon whom does that burden rest? What are some of the factors trial judges, using "common sense and experience", have found

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134. *Ibid.* at 275.

135. The term "recipient-witness" refers to the witness to whom the hearsay declaration was made and who testifies in court as to contents of the declaration and the circumstances surrounding the making of the declaration.

relevant to this assessment? Are these factors logically connected to promoting "circumstantial guarantees of trustworthiness", as described by Chief Justice Lamer in *Smith*? Is the presence of most or all the testimonial dangers "substantially negated" in these cases, such that the cross-examination of the declarant would have been a supererogation?[136] Is there any danger that this "reliability" framework allows the trial judge to inject, unchecked, his or her own personal biases into the determination of "reliability"? Does the "reliability" standard vary with any circumstances? These questions are addressed in the following section.

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**136. This analysis of the "reliability" principle does not address those cases where the accused has had a full opportunity to cross-examine the declarant in a prior proceeding. See *Hanna*, *supra* note 11, where the Crown attempted to tender the testimony of a child-witness from an earlier trial relating to the same matter under the "past recollection recorded" doctrine. The earlier verdict was overturned on appeal and sent back for a new trial. The child had been the only other person home the night the accused allegedly beat the child's mother to death. The child testified at the second trial that the testimony read in from the first trial was the truth. The Court considered the admissibility of the evidence under the *Khan* principles. With respect to its reliability, the Court stated:**

> **His evidence at that trial was, of course, subject to cross-examination. In those circumstances, I conclude that it meets the standard of reliability established in the ancient authorities, as well as that prescribed by the recent cases which have signalled the new approach to hearsay evidence.**

**It makes little sense to conceptualize this as a case where the circumstances provide sufficient circumstantial guarantees of trustworthiness to obviate the need for cross-examination. Rather, it is simply that the accused had a full opportunity to cross-examine the witness at the earlier trial. In these circumstances, it would be impossible to argue that the admission of this prior testimony raised any new issue which the cross-examination at the earlier trial could have addressed. See also Madame Justice Wilson's decision in *R.* v. *Potvin*, [1989] 1 S.C.R. 525 at 632, where she finds that admissibility of testimony given at the preliminary inquiry, pursuant to provisions of the *Criminal Code*, does not offend any of the accused's rights under the *Charter*. So long as the accused had a full opportunity to cross-examination the witness, the testimony is admissible. In Madame Justice Wilson's opinion, the fact that the accused did not make use of the opportunity to cross-examine at the preliminary is irrelevant.**

### 1. Upon Whom is the Focus of Inquiry?

#### a. The Declarant

Prior to the trial judge reviewing the evidence to determine if there are circumstantial factors promoting "reliability" of the hearsay statement, the court should remind itself as to who and what is the focus of this inquiry. As stated by Justice Thomas in *R.* v. *Maltman*:[137]

> There is some authority for the proposition that the trial judge is not dealing with the credibility of the recipient and that the focus of the court dealing with the admissibility of the evidence should be on the declarant. In my respectful view, its is abundantly clear from the judgement of the Supreme Court of Canada in *R. v. Smith* that the focus of the trial judge must be on the declarant, the declarations or communicative conduct, and the circumstances under which the declarations or communicative conduct occurred. [Emphasis added.]

The declarant is the party unavailable for cross-examination, whose demeanor the court does not have the opportunity to assess. Thus, the circumstantial guarantees of trustworthiness must relate to the declarant and obviate concerns as to the existence of testimonial dangers at the time the declaration was made. The inquiry is not directed at the recipient-witness who heard the statement and repeated it in court.[138] The recipient-witness gives his or her evidence in the presence of the trier-of-fact, and is available for cross-examination to test for the presence of any testimonial dangers. Thus, the trier-of-

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137. [1992] O.J. No. 3017 (Ont. Ct. Just. Gen. Div.) (QL) [hereinafter *Maltman*].

138. *See Chahley*, *supra* note 32 at 212:
**The principal concern which underlies the rule against the admission of hearsay evidence is the trustworthiness of the out-of-court statements. But, as noted by both Jessel M.R. in *Sugden* v. *Lord St. Leonards* and Lord Norman in *Teper* v. *The Queen*, the focus of that concern has always been the declarant, and *not* the person through whose mouth the declarations are tendered. The reliability of the witness who offers the hearsay testimony, and who is under oath and available for cross-examination, has much to do with the weight to be ascribed to the evidence, but in my view it ought not to be a condition of its admissibility. The weight to be ascribed to evidence given under oath in a trial is a question of fact for the jury. It is not a question of law. The trustworthiness tests upon which the admissibility of hearsay evidence depends, on the other hand, ought to be legal tests which do not purport to invade the function of the jury. [Emphasis added.]**

fact has all the necessary means to ascribe the proper weight to this testimony. Factors promoting the trustworthiness of the recipient-witness' testimony may be relevant in weighing the evidence; however, these factors should not be confused with matters relevant to the "reliability" of the hearsay declaration.

**b. Recipient-Witness' Credibility: An Erroneous "Reliability" Factor**

Unfortunately, it appears at times that courts have amalgamated the assessment the recipient-witness' credibility with the consideration as to the hearsay declaration's "reliability". For example, in *T.Y. v. C.L.M.* (1990),[139] a child custody case involving allegations of sexual abuse by the father, Justice Mercier of the Manitoba Court of Queen's Bench clearly takes into account the credibility of recipient-witnesses in assessing whether the "reliability" principle has been satisfied:[140]

> In considering whether the child's evidence is reliable, I must consider the credibility of the witnesses who gave evidence with respect to the statements and all of the circumstances surrounding the making of the statements. I find that the homemaker, whom I have already said was an impressive witness, and the mother, who has devoted herself to the child, were both credible witnesses. There is no evidence which could reasonably lead me to believe that either the mother or the homemaker fabricated evidence. [Emphasis added.]

Nothing in this analysis so far addresses whether or not any testimonial dangers were present in the child's out-of-court disclosures. That the recipient-witness may be fabricating evidence should be irrelevant at this step in determining whether or not to admit the out-of-court statements.

Continuing in its analysis, the Court then finds support for the hearsay's "reliability" in the evidence of an expert on child abuse:[141]

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139. 69 Man R. (2d) 21 (Q.B.).

140. *Ibid.* at 27.

141. *Ibid.*

> ... Dr. Jordan, whom I accept as an expert witness in this matter, submitted a report which I accept ... and gave evidence that she did not believe the child was manipulated by her mother because there was no "incongruity" between the child's emotional state and the disclosures she made, that an accidental "hurt" was unlikely, that the child clearly identified her father as the abuser, that the evidence of the relationship with the father is not inconsistent with having been sexually abused. In addition, her report of September 20, 1990, and her evidence pertaining to this report, outline the circumstances under which the child's disclosures to her were made. The interviews were conducted in a professional manner to obtain an accurate and correct statement when the child was ready to make such a statement on her own. The clinical manner in which such disclosures were made to Dr. Jordan confirm the reliability of the previous disclosures to the mother and homemaker. [Emphasis added.]

While this analysis presents problems with respect to the logical relevance of several of the factors considered,[142] an additional concern is that the attention of the trial judge, again, seems to be focused on the credibility of the recipient-witness.[143] It is unclear whether the fact that the statement obtained was "accurate and correct" relates to the

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142. The fact that "the child clearly identified her father as the abuser," adds nothing to the circumstantial probability of trustworthiness of the disclosure. That "an accidental 'hurt' was unlikely" and that "the evidence of the relationship with the father is not inconsistent with having been sexually abused" are relevant to whether or not the alleged sexual assault took place. As noted previously, such evidence corroborates the allegations of abuse, but does nothing to bolster or address any of the credibility factors relating to the declarant and the circumstances surrounding the making of the declaration. Even if the hearsay statement made to the psychiatrist was obtained in circumstances which promoted its inherent reliability, this does not provide any circumstantial guarantees of trustworthiness with respect to the prior consistent statement. In addition to these apprehensions as to the logical relevance of these factors, that the "evidence of the relationship with the father is not inconsistent" with the allegation of abuse does not appear to reflect the correct evidential burden. The party tendering the hearsay has the onus to tender evidence which "substantially negates the possibility" that the declaration is suffering from any of the testimonial dangers. The mere absence of evidence which is inconsistent with the allegation does not meet this affirmative obligation.

Note, however, the fact that the expert was of the opinion that the child was not manipulated by her mother, is logically relevant to whether or not the child's disclosure was reliable.

143. The fact that the statement was elicited when the "child was ready to make such a statement on her own" would reduce the fear that the child was pressured or in some way influenced by the interviewer to make the disclosures. Thus, this consideration is relevant to the inherent "reliability" of the child's declaration.

reliability of the expert's testimony as to retelling the contents of the declaration, or to the reliability of the factual assertions contained in the declaration.

While the relationship of the recipient-witness to the declarant may, in some circumstances, be relevant to the declarant's veracity, it can sometimes attract too much of the court's attention, as evidenced above.[144] No doubt children are especially vulnerable to pressure, coaching or manipulation which would make their statements unreliable. However, the court must distinguish its assessment of the weight accorded the recipient-witness' testimony that no coaching or pressure was exerted on the child, from the assessment of the "reliability" of the declaration.[145] The absence of manipulation is merely one factor to be taken into consideration in determining ultimately whether or not to admit the hearsay evidence. That the mother was an extremely credible witness when she testified as to her not having coached or exerted pressure on the child may justify the court in giving full weight to the "absense-of-coaching" factor, but this factor is still only one of many factors which must be considered in assessing "reliability.

The decision of Justice Larlee of the New Brunswick Court of Queen's Bench, in *M.A.C. v. E.J.L. & V.L.* (1993),[146] provides a further example of how the relationship between the recipient-witness and the declarant can become overly emphasized. In that

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144. For a further example, see *R.* v. *R.*, [1991] B.C.J. No. 791 (B.C.S.C.) (QL). With respect to the reliability of the child's disclosure as to the sexual abuse, Justice Spence focuses primarily on the credibility of the recipient-witness:

> The next question is whether that evidence should be received for its truth. McLachlin J. did not close the list of tests on that issue but left it open to be dealt with on a case by case basis. In my view the credibility of the child is closely tied to the credibility of the grandmother and mother who report what the child is alleged to have said. [Emphasis added.]

The Court then vigorously scrutinizes the credibility of grandmother to assess whether the "reliability" principle has been satisfied.

145. M. Misener in her article entitled "Children's Hearsay Evidence in Child Sexual Abuse Prosecutions: A Proposal for Reform" (1990-91) 33 C.L.Q. 364 at 373-74, emphasizes that the testimony of the recipient-witness has an "enhancing-trustworthiness" effect on the hearsay of children of tender age:

> Moreover, to admit an incompetent child's out-of-court allegations through the testimony of an adult lends to the statements a semblance of reliability that would be lacking if the child repeated those same statements on the witness stand.

146. [1993] N.B.J. 113 (QL).

case, the disclosure was made to the child's foster parents immediately after being apprehended from her birth mother. Justice Larlee found as follows:[147]

> Similarly in this case, I have taken into consideration to whom the statements were made - independent or neutral people; the spontaneity of the statements; the number of statements; the language the four year-old used; the probability of coaching or prompting; and the relationship between the child and the uncle. Based on these factors there is sufficient indication of reliability to allow the hearsay statements to be admitted. [Emphasis added.]

As previously recognized, the probability of coaching or prompting the declarant is relevant to the "reliability" assessment, but the fact that the recipient-witness was independent and neutral in these circumstances is not. The neutrality of the foster parents either goes to the unlikelihood of coaching or promoting, which has already been factored into the court's assessment of "reliability", or it goes to the "reliability" of the foster parents' testimony that the disclosure, in fact, was made. If it is for the latter purpose, it is an error, as this should go to the weight given the recipient-witness' testimony, and not to the admissibility of the testimony itself.[148]

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147. *Ibid.*

148. See also *Children's Aid Society of Metropolitan Toronto* v. *L.M.*, [1992] O.J. No. 1097 (Ont. Ct. Justice, Prov. Div.) (Jones Prov. Div. J.):

> Under this exception, clearly only first-hand hearsay should be accepted and then only after the court is satisfied of the following two factors as they relate to the issue of reliability. The court must be satisfied that the statements have been accurately and objectively reported, and secondly, there is an absence of those factors which would undermine the reliability of the child's statement. The court should inquire into the circumstances surrounding the making of the statement to satisfy itself that the child had not been manipulated, coerced or pressured into making such a statement.
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> . . .
>
> On the voir dire of the admissibility of the out-of-court statement, the court should consider the factors outlined in the *Khan* case as well as the identity of the informant, the relationship, if any, of the informant to any of the litigants, the qualifications and training of the informant, the method and timing of the recording of such statements, and the existence of any independent verification of such statement, such as the existence of an audio or video tape, and such other factors as may be relevant to the particular case, which could not be exhaustively enumerated in advance.

The following section examines under what circumstances the recipient-witness/declarant relationship may have some relevance to the "reliability" determination.

### *c. Relevance of Relationship of Recipient-Witness or Bystander to Declarant*

While the focus of the "reliability" inquiry must be on the declarant and the circumstances surrounding the declaration, the relationship between the recipient-witness and the declarant may be a factor relevant to the declarant's veracity. As is demonstrated by two of the tests[149] set out by Jessel M.R. in *Sugden v. Lord St. Leonards*,[150] absence of motive to fabricate diminishes the probability of fabrication or misrepresentation, while presence of a motive to fabricate has the reverse effect. The relationship may be such that the declarant has a motive to fabricate and that leads the court to the conclusion that there is insufficient circumstantial guarantees of trustworthiness to satisfy the reliability principle. The fact that the victim in *Smith* made the statements to her mother caused Chief Justice Lamer some apprehension as to whether the declarant might have been lying simply to keep her mother from worrying or from becoming aware of her illicit activities.[151] Such a concern may not have arisen if the statements were made to a casual acquaintance or to a person already involved in and aware of the illicit activities.

*R.* v. *Weinberg* (1992)[152] presents an example where the relationship between the declarant and a bystander within hearing distance of the out-of-court declaration may also be relevant to the court's assessment of "reliability". Edward Weinberg was allegedly assaulted with a knife by his brother, Eric Weinberg, at their mother's home. At the trial, Edward could not recall anything that happened the night of the alleged assault.

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Clearly in the first paragraph above, this court makes it evident that the credibility of the recipient-witness is an important factor for determining admissibility.

149. That the declaration be made *ante litem motam* and that the declarant be an uninterested party.

150. *Sugden, supra* note 26.

151. *Smith, supra* note 3 at 936.

152. *Weinberg, supra* note 16.

However, apparently after the ambulance and police had arrived, Edward identified his brother as his assailant in the presence of his mother and a police officer named Kerr. In an application to have the statement of Edward admitted under the *Khan* criteria, Judge Lampkin found as follows:[153]

> On the question of reliability, Edward was not prompted by Kerr to name his brother on May 6. Kerr simply asked him who stabbed him and he said "Eric". Their mother, Joan Potter, was present at the time and presumedly heard the comment. There would be a natural disinclination to accuse falsely one's own brother of such a serious offence - moreso in the presence of one's own mother. [Emphasis added.]

If one accepts the assertion that there is a "natural disinclination" of a sibling to accuse another sibling of a serious offence in the presence of their mother, then the relationship is a logical consideration in assessing the circumstantial guarantees of trustworthiness surrounding the making of the declaration. This case epitomizes the kind of "arm-chair psychology", discussed later in this chapter, which judges sometimes inject into the "reliability" assessment.

### 2. Who bears the onus?

Clearly, the party tendering the hearsay evidence has the onus to put before the court enough evidence so as to "substantially negate the possibility that the declarant was untruthful or mistaken".[154] However, courts sometimes lose sight of this simple proposition as to who has the burden of proof. In *R.* v. *Acoose* (1993),[155] at the preliminary inquiry of an accused for an assault and battery charge, the wife of the accused, the alleged victim of the assault, could not recall the assault or having previously given a written statement to the police. Judge Rathgeber found that the document failed to satisfy the requirements for admission under the past recollection recorded doctrine, as the witness could not, or would not, attest to the truth or accuracy of the document

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153. *Ibid.*

154. *Smith*, *supra* note 3 at 924.

155. [1993] S.J. No. 93 (Sask. Prov. Ct.) (QL) [hereinafter *Acoose*].

However, this was not determinative of admissibility of this prior written statement. After reviewing the most recent cases pertaining to the admission of children's evidence, including *R.* v. *Meddoui* (1991)[156] and *Khan*, the Court concluded as follows:[157]

> A review of these cases indicates that in the case of a helpless victim, a more relaxed view of admissibility should be observed. Evidence is admissible on the basis of necessity and reliability.
>
> . . .
>
> There is nothing to indicate that at the time of the taking of the statement the witness was not telling the truth to the officer and the fact that she is unable or unwilling to recall the statement does not mean that it is not true. [Emphasis added.]

Having said this, the court found that the hearsay evidence was admissible.

The first paragraph cited above raises concern with respect to the correctness of this Court's interpretation of *Khan* and *Smith*. Neither Chief Justice Lamer nor Justice McLachlin would likely endorse the proposition that "in the case of helpless victim, a more relaxed view of admissibility should be observed". To the contrary, both Supreme Court Justices have clearly stated that the new approach, while providing much-needed flexibility in the admission of hearsay, still guarantees that only hearsay evidence both necessary and inherently reliable is admitted.[158] With respect to the second paragraph quoted above, presumably this represents the entirety of the Court's consideration of the "reliability" of the hearsay evidence, as there is no other discussion of the issue. That "[t]here is nothing to indicate that at the time of the taking of the statement the witness was not telling the truth" demonstrates either that the court misunderstands the nature of the burden of proof respecting "reliability",[159] or that it has misconstrued who has the evidential burden. While there was "nothing to indicate" that the witness was not telling

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156. 2 W.W.R. 289 (Alta. C.A.): "[I]n relation to child victims, the distinction between past *memory recorded and memory refreshed should be relaxed*".

157. *Acoose*, *supra* note 155.

158. *Khan*, *supra* note 1 at 102ff, *Smith*, *supra* note 3 at 929ff.

159. See discussion as to nature of the burden of proof as set out by Chief Justice Lamer in *Smith*, *supra* note 3.

the truth, neither was there anything to indicate the witness was telling the truth. The fact that the witness is unable or unwilling to recall the statement leads to no inference either way as to the truth of the out-of-court statement. There is a distinct lack of evidence on this issue. By admitting the hearsay evidence, thus inferentially finding that the "reliability" principle has been satisfied in these circumstances, the Court placed the burden on the party opposing the admission of the hearsay to put evidence before the court to rebut the presumptive "reliability" of this hearsay evidence

### 3. Analysis of "Common Sense" Factors

As to what "matters" will be relevant to "reliability", Justice McLachlin in *Khan* leaves this to the discretion of the trial judge. Some guidance as to how the courts are to exercise this discretion is provided by the Ontario Court of Appeal in *R. v. Finta*[160] Justice Doherty, for the Court, tells us that the trial judge is to apply his or her "common sense and experience" to the evidence to determine which facts, or absence thereof, "provide a practicable substitute for cross-examination".[161] This broad discretion, relying primarily upon judicial notice based on the trial judge's anecdotal experience, raises

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160. *Finta*, *supra* note 31.

161. In fact, the court adopts a passage from Wigmore which sets out how the trial judge determines "reliability": [*Finta*, *supra* note 31 at 199]

> Wigmore expresses this second branch of the foundation of a hearsay exception in the following terms at Vol V, 253:
>
> > #1422. Second principle; *Circumstantial probability of trustworthiness.* The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of the salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of necessity of the situation. [Emphasis added.]

concerns as to the adequacy of this framework to exclude unreliable evidence. Often the trial judge reaches conclusions respecting human nature without the assistance of any expert in this field of study or the support of any empirical data from psychological or sociological research. In the eighteenth and nineteenth century, this same kind of "arm-chair psychology" by the judiciary, as to when people tend to tell the truth or lie, resulted in the adoption of numerous hearsay exceptions whose underlying rationales are of questionable validity today.[162] In the following sections we examine and critique some of the factors commonly considered by courts in assessing the "reliability" of the hearsay evidence.

### a. Absence of Motive to Fabricate

As previously noted, both the second and third tests laid down by Jessel M.R. in *Sugden*[163] - that the declarant be disinterested and that the declaration be made *ante litem motam* - relate to absence of motive to fabricate or misrepresent. That the evidence discloses no such motive on its face has consistently been cited as an important factor in determining the "reliability" of a statement. Undoubtedly, where such a motive is present it logically precludes a finding that the declaration is inherently reliable.[164] However, any

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**162. See discussion respecting "Dying Declarations" in Chapter Three at 71 - 85.**

**163. *Sugden, supra*, note 26.**

**164. See *R.* v. *C.(B.)* (1993), 12 O.R. (3d) 608 at 617, where the Ontario Court of Appeal considers the admissibility of a co-accused statement implicating another co-accused:**

> **Assuming such evidence could be shown to be necessary, which is doubtful in the present case since the Crown could have severed the charges against the two young offenders and made Kevin a compellable witness against Brian, it is obvious that the out-of-court statement of one accused implicating another is not reliable. An accused could have many personal reasons for wanting to implicate another, particularly when he is first arrested. Therefore, such a statement must be tested through cross-examination and should not be admitted as a hearsay exception unless in compliance with the principles set forth in *R. v. B. (K.G.)*.**

**See also *Luscar Ltd.* v. *Pembina Resources Ltd.* (1991), 85 Alta. L.R. (2d) 46 at 63, where the fact that the declarant was found not to be completely disinterested automatically precluded finding that the hearsay evidence could satisfy the "reliability" criteria. However, see *G.N.D., supra* note 101, where Justice Weiler found that the test that the declaration be made *ante litem motam* should be relaxed in cases involving children:**

motive to fabricate or misrepresent not so readily apparent is just as likely to taint the "reliability" of the hearsay evidence. Moreover, if a witness is compelled to be deceitful in making the declaration, would he or she not just as likely be motivated to conceal that underlying motivation? Unfortunately, cross-examination is probably the most effective tool in revealing such concealed motives. As a result, courts must be cautious in relying upon any evidence emanating from the mouth of the declarant or inferred from his or her conduct in determining whether or not the declarant had a motive to fabricate [165]

### b. The Declarant's Age, Personality, Cognitive Abilities and Communication Skills

In some circumstances, the mere fact that the declarant is a child of tender age diminishes the probability that the declarant is insincere.[166] Two lines of reasoning appear to underlie this assertion. First, there appears to be a presumption that a child of tender years is incapable of making up a falsehood and repeating it with any consistency such

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**The appellant contends, however, that this statement was made after there existed a dispute or litigation in the sense that all of the comments were made in response to inquiries made with a view to dispute or litigation... .**

**The requirement of this authority that the statement be made prior to litigation of a dispute is not a strict requirement and may have only limited relevance to the declarations of children. While this criterion may be a factor to consider with respect to the reliability of the evidence given by an adult, it is more significant to reliability to consider that the child's original report arose in the context of explaining an injury, that the child was able to articulate to P.C. Morrison the circumstances of how she said it occurred, and that there was no perceived dislike of her father at the time. [Emphasis added.]**

**165.** ***R.* v. *S.(K.O.)* (1991), 63 C.C.C. (3d) 91 at 95, 4 C.R. (4th) 37 (B.C.S.C.), provides an example of where it is probably reasonable to draw an inference as to motive to fabricate from the conduct of the declarant. In that case the victim of the sexual assault was a three-year-old child. The Court found that the child did not appear to have any dislike for her father, the alleged perpetrator of the assault. Thus, there appeared to be no motive to fabricate the allegations of abuse. The Court made this determination as to her feelings toward her father based upon what the child said in her out-of-court statements. The Court considered this child too young to be capable of being deceitful as to any like or dislike towards her father.**

**166. See D.A. Rollie Thompson, "Taking Children and Facts Seriously" (1988) 7 Can. Jour. of Fam. Law 59, cited with approval in *New Brunswick (Minister of Health and Community Services)* v. *R.R.* (1991), 113 N.B.R. (2d) 271 at 281.**

that it would withstand the scrutiny of a criminal investigation.[167] Second, a child of tender years, whose personality and cognitive abilities appear normal, is presumed not to have detailed knowledge of the mechanics of certain sexual acts.[168] As previously discussed under our review of *Khan*, this second line of reasoning causes some concerns with respect to its use as a "reliability" factor. The fact that a child has this detailed knowledge of deviant sexual behavior leads to an inference that the child has been the victim of sexual abuse at some time in the past.[169] It does not address or diminish any of the testimonial dangers operating within the out-of-court statements. Thus, hearsay evidence disclosing such knowledge should be admitted for the non-hearsay purpose of corroborating that the alleged assault took place. (See the discussion in this chapter under section "Real or Testimonial Corroborative Evidence".)

While the "reliability" of disclosures of very young children is somewhat enhanced by the presumed inability of young children to create and sustain elaborate lies, correspondingly, the younger the declarant, the more likely that he or she has not yet

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**167. See judgment of Justice Robins in *R.* v. *Khan* (1990), 42 C.C.C. (3d) 197 at 210, 64 C.R. (3d) 281 and passage below which is cited with approval by Justice McLachlin at the Supreme Court, *Khan*, *supra* note 1 at 101:**

> **Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.**

**168. Such was the case in *Khan*, where the child-declarant, who for all intents and purposes appeared to have been a normal, well-adjusted three and a half year old, nonchalantly described the act of fellatio she had performed on Dr. Khan. See also *R.* v. *D. (G.N.)*, [1991] O.J. No. 239 (Ont. Ct. (Gen. Div.) (QL), aff'd [1993] O.J. No. 722 (C.A.) (QL).**

> **It is not uncommon for the accused to make an attempt to rebut this inference by claiming that the child has accidently walked in on the accused having sex. See *G.N.D.*, *supra* note 101, where accused claimed that the child-victim had seen farm animals copulating a number of times and that she had walked in on the accused and his girlfriend while they were making love.**

**169. *R.* v. *R.*, [1991] B.C.J. No. 791 (B.C.S.C.) (QL):**

> **Set against that are some of the details which the child is said to have given. I am quite satisfied that a child of this age could not know them save from actual observation.**

developed the cognitive abilities or communication skills necessary to accurately interpret and communicate what has happened to them.[170] The courts also recognize that a very young child is far more susceptible to the power of suggestion by well-meaning adults.[171] Thus, the courts carefully scrutinize the circumstances surrounding the out-of-court disclosure to ensure that no pressure or suggestion was brought to bear on the child.[172] While courts recognize that there is a risk that a child can misconstrue events, they have demonstrated a reluctance to accept any explanation of innocent association which requires great leaps of misperception on the part of the child.[173]

170. *G.N.D.*, *supra* note 101. See also *R.* v. *S.(K.O.)*, *supra* note 165 at 95, where the court noted as one of the factors relevant to its determination that the hearsay evidence was reliable: "The child is adequately articulate and bright to appreciate what she believed occurred...".

171. See Misener, *supra* note 145 at 374:

> [T]he vulnerability of children to demand cues in questions is so great that the presence or absence of adult suggestion must be a factor for the trial judge to consider in every case.

See generally: J. Doris, ed., *The Suggestibility of Children's Recollections* (Washington, D.C.: American Psychological Association., 1991).

172. *G.N.D.*, *supra* note 101:

> The age of the child, and, as a result, the child's ability to understand and interpret events accurately, the lapse of time between the alleged incident and the making of the statement, whether the statement was spontaneous or emerged naturally, elicited by leading questions from well-meaning professionals or the result of prompting by parents, are all factors to be considered in assessing reliability. [Emphasis added.]

See also *R.* v. *F.(G)*, *supra* note 81, *R.* v. *S.(K.O.)*, *supra* note 165 at 95.

173. It is a common occurrence for the perpetrator of a sexual assault on a child to provide some innocent explanation which explains elements of the child's allegation, thus implying that the child simply misperceived some benign conduct. See *R.* v. *R.*, [1991] B.C.J. No. 791 (B.C.S.C.) (QL), a child custody case where the father claimed that the child might have been sleep walking and entered his bedroom while he was masturbating to explain how semen might have been found on her pajamas.

**c. Spontaneity of Declaration and Close Proximity of Complaint to Alleged Assault.**

Numerous courts have considered as a factor in assessing "reliability" the fact that a disclosure was made spontaneously, without prompting[174] soon after the alleged assault.[175] As discussed in the previous section, the fact that the statement arose spontaneously, without prompting, is relevant to whether or not any pressure or suggestive influence was brought to bear on the child which might distort the child's version of events. Undoubtedly this is a valid consideration with respect to whether the circumstances obviated concerns as to the presence of testimonial dangers. However, a number of courts have associated with this factor the fact that the disclosure was made soon after the alleged assault and emphasized this as additional indicia of "reliability". For example, in *G.N.D.*,[176] Justice Weiler stated as follows:[177]

> The age of the child, and, as a result, the child's ability to understand and interpret events accurately, the lapse of time between the alleged incident and the making of the statement, whether the statement was spontaneous or emerged naturally, elicited by leading questions from well-meaning professionals or the result of prompting by parents, are all factors to be considered in assessing reliability. [Emphasis added.]

Unfortunately, the Court does not articulate its reasoning as to how this factor is relevant to the inherent reliability of the disclosure. Is this fact relevant because the shorter the duration between the alleged assault and the disclosure, the less concern there is that the declarant suffered from a faulty memory at the time of making the declaration? Is the

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174. See *Khan*, *supra* note 1 at 106.

175. See *G.N.D.*, *supra* note 101, *R.* v. *Ovular*, [1992] N.W.T.R. 267 (S.C.), Ferrets J. [hereinafter *Ovular*].

176. *G.N.D.*, *supra* note 101.

177. *Ibid.* See also *Ovular*, *supra* note 175 at 266-67:

> I should note here that the statements purportedly made by D., as testified to by K., while technically hearsay, were admitted by me, after a voir dire, on the basis of the principles enunciated by the Supreme Court of Canada [in *Khan*]. I was also satisfied that the requirement of "reliability" was met because the statements were made spontaneously and without prompting, they were timely in that they were relatively contemporaneous to the act alleged, and there was no evidence of either the time or the inclination on the part of D. to fabricate. [Emphasis added.]

shortness of duration between the assault and the disclosure also relevant in that it minimizes the opportunity for suggestion and other influences to be brought to bear on the child" These inferences and their relationship to "circumstantial guarantees of trustworthiness" raise no concerns However, there may be another inference made here, which is not articulated by the courts, and causes this author some discomfort

The doctrine of recent complaint as applied to sexual offences has been abolished in Canada as a result of s 275 of the *Criminal Code*.[178] It is no longer permissible to suggest that any inference of concoction or fabrication can be drawn from the fact that the sexual assault victim took some time after the alleged assault to disclose it and report the assault to the authorities However, it is unclear in some instances whether the courts are, in fact, making this inference This is especially so when the court merely states the factor in such terms as "[the disclosures were] timely in that they were relatively contemporaneous to the act alleged".[179]

That courts still draw this impermissible inference is evidenced in *R. v T.S.* (1993).[180] In that case, a 12 year old complainant testified as to the alleged sexual assault which took place 9 years earlier, when she was a three-year-old The mother gave evidence as to an out-of-court statement made by the child some four months after the alleged assault which incriminated the accused Though no comment was made as to the hearsay nature of this evidence, Judge Nasmith concluded that this corroborating disclosure was unreliable because:[181]

> [i]f this extraordinary behavior was actually going on over a period of months, it seems surprising to me that no earlier mention was made of it within the family by this bright little girl and no resistance to the baby sitter was observed at any time before he moved away. There is no hint of any fear or shame or other inducement for this silence. [Emphasis added.]

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178. R.S.C. 1985, c. C-46.

179. *Ovular, supra* note 175 at 267.

180. [1993] O.J. No. 153 (Ont. Ct. Just. Prov. Div.).

181. *Ibid.*

Clearly, in this judge's "common sense and experience", bright children are likely to make disclosures soon after they have been sexually abused. Unfortunately, psychological and sociological findings do not support this belief.[182] For example, in *R. v. D.H.* (1992),[183] Justice Howden, relying instead on the evidence of an expert in child-abuse rather than his "common sense and experience", accepted the statistical evidence which indicated that 80 percent of males and 70 percent of females who were sexually abused as children told no one as children.

### d. Corroborative Evidence

The presence of unrelated evidence, whether real or testimonial, which corroborates the contents of the hearsay declaration has repeatedly been cited as an important factor in establishing the "reliability" of hearsay evidence. The presence of semen stains on the child's jumper in *Khan* was emphasized by Justice McLachlin as an vital consideration. However, as discussed previously under our review of Justice McLachlin's analysis of the "reliability" principle, the existence of corroborative evidence does not preclude any of the testimonial dangers from being present and operative. Establishing the truth of the contents of an inherently unreliable declaration does not transform it into reliable evidence.

Fortunately, the existence of unrelated evidence supporting the truth of hearsay's contents will often make the "reliability" assessment unnecessary and irrelevant.[184] However, in circumstances where the unrelated evidence is insufficient to meet the criminal standard of proof, the court may find that there is a "necessity" to admit the hearsay evidence to meet this burden. As discussed previously, this may result in the

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182. See *K.O.* v. *H.H.*, [1992] 3 S.C.R. 6, and list of authorities cited there which contradict this belief.

183. [1992] O.J. No. 1753 (Ont. Ct. Just. (Gen. Div.)) (QL).

184. If there is unrelated evidence which establishes the truth of the relevant contents of the hearsay declaration, the court applying the *Khan* twin criteria would not get past the "necessity" principle assessment.

anomaly that the hearsay evidence derives its "reliability", and thus admissibility, from the very evidence it is intending to corroborate.

It is worthwhile to note that the United States Supreme Court has considered the relevance of corroborative evidence with respect to determining the "reliability" of hearsay evidence. Justice O'Connor of the United States Supreme Court, for the majority in *Idaho* v. *Wright*,[185] rejected its use as a factor in the assessment of the hearsay's "reliability". However, prior to reviewing the judgments in that case, some comments are in order with respect to the admission of hearsay under the American legal system.

The United States Supreme Court has, for some time, interpreted the accused's right to confront his accusers, constitutionally entrenched under the Sixth Amendment, as in essence the right of the accused to cross-examine witnesses and to have the trier-of-fact observe the demeanor of witnesses.[186] The admission of hearsay evidence in the trial process does not violate that constitutionally-protected right if the circumstances are such that both Wigmore's "necessary" and "reliability" principles are satisfied, as cross-examination would be of marginal utility.[187] Hearsay admitted pursuant to long-standing common law exceptions presumptively satisfies both the twin criteria.[188] Hearsay which does not fall under one of these long-standing exceptions may still be admitted if the party tendering the evidence demonstrates that the twin criteria are satisfied.[189]

The issue on appeal in *Wright* was whether the out-of-court disclosure made by one of the child-complainants was admissible. Medical evidence substantiated the allegations contained in the hearsay evidence. Madame Justice O'Connor rejected the use of the unrelated medical evidence as a factor in assessing whether the "reliability"

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185. 110 S. Ct. 3139 (1990) [hereinafter *Wright*].

186. *California* v. *Green*, 399 U.S. 149 (1970).

187. *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

188. *Bourjaily* v. *United States*, 475 U.S. 387 (1986).

. Each state has its own statute addressing the residual hearsay exception; however, they are inevitably fashioned upon the wording of Fed. R. Evid. 803(24).

principle had been satisfied in the circumstances. A summary of her argument against the use of such evidence is as follows:

> In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

Justice Kennedy, representing the dissenting four judges, vehemently disagreed with this conclusion:[191]

> ... I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.

However, it is this author's opinion that Justice O'Connor's interpretation of the "reliability" principle is preferable. Justice Kennedy, arguably, confuses the issue as to whether a statement is "inherently trustworthiness" with the issue of whether the statement is, in fact, true. It is the former that is relevant to the court's determination of the admissibility of hearsay, not the latter. Otherwise, it would logically follow that the existence of evidence contradicting the contents of the hearsay declaration would be relevant to determination of "reliability". As a result, the accused's denial of the allegations contained in the hearsay declaration, or the testimony of a defence witness contradicting the contents of the hearsay, or the existence of other real evidence corroborating the accused's version of events or contradicting the hearsay could be used to establish the falsity of the hearsay evidence. Under Justice Kennedy's analysis, this

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190. *Wright, supra* note 185 at 3151.

191. *Ibid.* at 3153.

evidence would undermine the hearsay's "reliability", thus preclude its admission.[192] The balancing of evidence supporting the accused's version and the complainant's version involves the assignment of weight to the evidence, and is best left to the trier of fact in their ultimate determination of guilt beyond a reasonable doubt. The decision as to what evidence is admissible, and thus available to the trier-of-fact, must be kept separate. The existence of corroborative evidence will be given its full due weight in the ultimate determination of guilt or innocence by the trier of fact.

Another concern respecting corroborative evidence relates to the relevance of evidence which substantiates elements of the hearsay declaration which are not material particulars. For example, in *R.* v. *Miller* (1991),[193] the Ontario Court of Appeal found that the fact that unrelated evidence corroborated certain incidental elements contained in the tendered hearsay evidence helped to satisfy the "reliability" principle as set out in *Khan*. The Court stated as follows:[194]

> Many other statements made by her in her telephone conversation with Stehr were supported by other evidence, indicating that at least a major portion of what she said to Stehr was reliable.... The impugned evidence should have been admitted for the purpose of supporting the position of the defence that the accused had left the apartment just prior to Ms. Howard's telephone conversation with Stehr.

However, the Court fails to recognize that a deceptive assertion is often immersed in a sea of incidental but true assertions, so as to provide a "ring of truth" to the falsehood. Undoubtedly, the "common sense and experience" of anyone who has raised a child will tell them that a child's lie will often be surrounded by a mass of non-contentious truths in an attempt to bury the deception. There is no logical relevance between the truth of

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192. See *Maltman*, *supra* note 137. This was precisely what Justice Thomas' main concern was with respect to the inherent reliability of this evidence. There existed unrelated evidence which was contradictory to the truth of its contents.

193. 68 C.C.C. (3d) 517.

194. *Ibid.* at 535.

one unrelated asse...on to the truth of another assertion merely because they are in close proximity in the same declaration [195]

### e. Miscellaneous "Common Sense" Factors

Having reviewed the case law applying the *Khan* principles of "necessity" and "reliability", it becomes evident how wide the range is of "common sense and experience" each judge brings to the determination of what matters are relevant to the hearsay's "reliability". Following is a review of some rather unique factors found relevant to the assessment of "reliability".

In *R. v. Weinberg*,[196] as previously discussed, the fact that the mother of the accused and the declarant is present makes it less likely that one of the siblings would falsely accuse another of his or her siblings. No further comment is warranted with respect to the logical validity of this factor.

In *R. v. F.(G.)*,[197] the admissibility of a hearsay disclosure, identifying the child-complainant's father as the perpetrator the sexual abuse, was at issue. Justice Hogg held that the fact that the child-complainant initially denied the abuse "strengthens the reliability because of the circumstances and because of the nature of the statements sought to be admitted".[198] The Court's reasoned as follows:

> The child was severely injured by penetration in her vaginal area. She initially told her mother that this injury was caused by a fall from a tree. This is patently and obviously untrue. There is, in my opinion, not

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195. Mr. Justice Shannon of the Alberta Court of Queen's Bench recognized this argument in *Birch* v. *Southam*, [1993] A.J. No. 274 (QL). In a wrongful dismissal action, the admissibility of certain hearsay evidence was at issue. No objection was raised to this evidence's admissibility, but in closing, the Defendant attempted to argue that it satisfied the two-fold test set out in *Khan* and *Smith*. With respect to the "reliability" of the evidence, Mr. Justice Shannon found that "[o]n the issue of reliability, I do not accept the argument that the truth of part of his statements lends credibility to those in contention".

196. *Weinberg*, *supra* note 16.

197. *R. v. F.(G.)*, *supra* note 81.

198. *Ibid.* at 98.

> the slightest possibility that the injuries described by the doctors could have occurred in this fashion
>
> Therefore the question arises, why did the child tell this story and was she attempting to protect somebody and if so, who?
>
> There is evidence to corroborate in a material particular the statements of the child concerning her father At a later state it will be my duty as the trial judge to decide what weight and what inferences to draw. There are his unusual actions, behavior and demeanor after the event occurred There is the very nature of the injury. There is evidence of opportunity Of course, that is not corroboration.

It is difficult to comprehend logically how an initial denial of sexual abuse can subsequently bolster the circumstantial probability of trustworthiness of a hearsay disclosure. In this case, it appears that the initial denial would be better characterized as circumstantial evidence corroborating the identity of the child abuser as that of the father.[199]

In *R. v. Lemky* (1992),[200] Justice Hinds of the British Columbia Court of Appeal found that the inclusion of the murder victim's hearsay statements in the Agreed Statement of Facts enhanced the "reliability" of the hearsay evidence. It is evident, however, that in referring to the hearsay declaration in the Agreed Statement of Facts, the Defence Counsel was merely conceding that the statements were, in fact, made and not conceding as to their truth or reliability.

### 4. Does the "Reliability" Standard Vary?

As discussed in our analysis of the "necessity" principle, it appears that the "necessity" standard will be reduced or qualified where the inherent reliability of the hearsay evidence is of a superior quality. However, does the requisite "reliability"

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199. It must be kept in mind that it was abundantly clear from the medical evidence that this child had been sexually abused by someone. In this case, it was more an issue of establishing who was the abuser.

200. [1992] B.C.J. No. 1784 (B.C.C.A.).

measure fluctuate at all in response to who is tendering the hearsay, whether it is inculpatory or exculpatory evidence, or any other circumstances"[201] There appears to be no support in the case law for a different "reliability" standard for inculpatory hearsay evidence tendered by the Crown versus exculpatory hearsay evidence tendered by the accused.[201] However, one appellate court has appeared to have applied a relaxed "reliability" standard with respect to exculpatory hearsay evidence in a particular set of circumstances, solely on the basis of fairness to the accused. Another appellate court has suggested that the availability of the declarant to be cross-examined might also be a circumstance which affects the "reliability" measure.

**a. Where Fairness Dictates, Diminished Reliability Standard Required.**

In *R.* v. *Miller* (1991),[202] at the trial of the accused for murder, the Crown was permitted to adduce statements made by the deceased in a telephone conversation indicating her state of mind to negative the defence's suggestion of suicide. The recipient-witness who received the telephone call testified that the deceased spoke of intending to go to a nightclub that night with a friend, and later in the conversation told the recipient-witness that a friend had just left the apartment. The trial judge admitted the entire conversation, but instructed the jury that it was not admissible for the truth of its contents, rather, it was evidence from which the jury could infer the deceased's state of mind. The defence wished to admit the statement for the truth of its contents, as it corroborated the accused's statement to the police that he had left the apartment prior to the deceased's death.

The Ontario Court of Appeal began with a brief summary of the "flexible approach" to the admission of hearsay set out by the Supreme Court in *Khan*. After reviewing the principles found there, the Court held that the admission of this hearsay satisfied the "reasonably necessary" test. Turning its attention to the "reliability" issue,

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201. See *Finta*, *supra* note 31 at 203.

202. 68 C.C.C. (3d) 517 (Ont. C.A.) [hereinafter *Miller*].

the Court noted that circumstances in this case were different from those present in *Khan*:[203]

> Here, it is the accused, rather than the Crown, who wishes the hearsay evidence in question to be admitted. Its not only in his interest to allow admission of this evidence, but its admission also balances the admission of hearsay evidence at the behest of the Crown to show the frame of mind of the deceased. . . . In balancing the interests of a fair trial for both the Crown and the accused, it seems inappropriate to admit evidence of hearsay utterances by the deceased which were of assistance to the Crown in showing the deceased's frame of mind but to reject evidence of utterances made in the same telephone conversation which could be of assistance to the accused. [Emphasis added.]

Specifically addressing the "reliability" of this evidence, the Court then found as follows:[204]

> The Crown argues that hearsay evidence which does not fall within an established exception to the hearsay rule is presumptively unreliable and inadmissible, and that only in cases where the courts have recognized a "peculiar stamp of reliability" should hearsay evidence be admitted for its truth. At minimum, it is argued, there must be an evidentiary foundation which establishes that the declarant is particularly worthy of belief. That may be so, but in this case, where other evidence was admitted against the interest of the accused, it becomes important, for the fairness of the trial and to allow the accused to make full answer and defence, for the trial judge to consider the necessity and reliability of the statement of the deceased. Many other statements made by her in her telephone conversation with Stehr were supported by other evidence, indicating that at least a major portion of what she said to Stehr was reliable. We are of the view that, given the importance of this evidence to the accused, and given the relaxation of the hearsay rule by the Supreme Court of Canada where the evidence favours the position of the Crown, it is at least as important to look at the questions of necessity and reliability of the hearsay evidence when it is favourable to the accused. [Emphasis added.]

We have already commented as to the circumstantial guarantee of trustworthiness which results from the fact that incidental portions of the declarant's declaration proved

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203. *Ibid.* at 534.

204. *Ibid.* at 535.

to be true. In light of the Court's prior analysis, it is probable that the Court of Appeal was not overly persuaded by the persuasive merit of this factor as it relates to "reliability". Clearly, the Court allowed the admission of this hearsay evidence primarily to compensate for the fact that the Crown has tendered inculpatory hearsay evidence from the same conversation. Recognizing that the accused has lost the opportunity to cross examine the deceased declarant, it was only fair[205] that he should be able to make use of the contents of the same conversation.

**b. Deceased vs. Available Declarant**

The question as to whether or not the fact that the declarant is dead affects the "reliability" standard has been raised by one Canadian court. However, the question is not answered there. In *R. v. Chahley*,[206] Justice Wood, writing for the British Columbia Court of Appeal, makes the following comments at the conclusion of the section of the judgment dealing with the "reliability" of the hearsay:[207]

> In both *Chamber* and *Williams* the declarant was still alive at the time of trial, and the declarations in question had not been made under circumstances which met all three of the trustworthiness tests enunciated by Jessel M.R. in *Sugden v. Lord St. Leonards*. From what McLachlin J. said in the *Khan* case, it seems that different considerations may affect the trustworthiness of hearsay declarations when they are tendered in evidence while the declarant is alive and potentially available to be called as a witness. Just what those considerations will be, and in particular, how they can be addressed without invading the function of the jury with respect to matters of "weight", are problems that must be addressed in light of the circumstances existing in each case.

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**205. The "fairness" discussed here is distinct from the third principle, "fairness to the accused", set out in *Khan* and discussed in the following section. The third principle allows the court, after finding that the twin criteria have been satisfied, to attach conditions to admission of the hearsay or to exclude its admission. Thus, the third principle cuts back on the admission of hearsay pursuant to *Khan*. The fairness discussed here permits the court to admit hearsay which may not fully satisfy both the twin criteria.**

**206. *Chahley, supra* note 32.**

**207. *Ibid.* at 213.**

> But those problems do not exist in this case. Here the declarant is dead, and I am satisfied that the disputed declarations were made under circumstances which meet the trustworthiness tests enunciated by Jessel M.R. in *Sugden v. Lord St. Leonards*. That being so, I conclude they were admissible as an exception to the hearsay rule.

The statements in *Khan* respecting the "different considerations" affecting the trustworthiness, to which Justice Wood refers, relate to the trial judges' discretion to impose conditions on the admissibility of hearsay. Justice McLachlin notes that, in the interest of safeguarding the rights of the accused, the trial judge may permit cross-examination of the child-declarant as a condition of admissibility of the hearsay. Arguably, however, Justice McLachlin may not have been suggesting that a different "reliability" standard exists where the child-declarant is available for cross-examination. If the declarant is available for cross-examination, then obviously the "necessity" for the admission of the child's hearsay is not based on the potential of psychological harm resulting to the child by being required to give *viva voce* evidence. If the trial judge does permit the accused to cross-examine the child, it is more likely that the original "necessity" for the hearsay evidence is caused by the child's inability to remember the events clearly or that he or she is too young to be a competent witness. As no harm would result by allowing cross-examination in these circumstances, then why would the court not allow the accused to exploit this highly valued fact-finding tool? While the *Khan* principles go a long way to compensating the accused for the lost opportunity to contemporaneously cross-examine the declarant, they make no claim to be a perfect replacement for cross-examination. Cross-examination can sometimes disclose unusual facts or circumstances which no one could anticipate the witness would know or disclose. Permitting cross-examination of the child-declarant is no reflection on the "reliability" of the hearsay evidence; rather, it reflects the court's intent to give the accused every possible opportunity to mount a full and complete defence.

It is also worthy of note that Justice McLachlin collapses the three tests of trustworthiness set out by Jessel M.R. in *Sugden v. Lord St. Leonards*[208] to form her "reliability" principle. She makes no distinction between the application of the principle to the facts in *Sugden*, where the declarant was dead, and to the facts in *Khan*, where the declarant was alive but deemed incompetent to give evidence. It appears to be the same principle applied in either case.

### C. Fairness to the Accused and Procedural Issues

#### 1. Fairness to the Accused: *Khan's* Third Principle

An analysis of Justice McLachlin's decision in *Khan* suggests the existence of a third principle overlaying the twin criteria of "necessity" and "reliability": fairness to the accused.[209] After concluding that the evidence tendered in *Khan* satisfied both twin criteria, she states that "[i]n determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused".[210] Justice McLachlin then suggests that there may be circumstances where it is "possible and fair" for the trial judge to permit cross-examination of the child-declarant as a condition of admissibility of the hearsay.[211] She emphasizes this "fairness to the accused" principle again in the her conclusion:[212]

> I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards

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208. See *Khan*, *supra* note 1 at 101.

209. This is distinct from the right to a fair trial, as protected under s. 11(d) of the *Charter*. The admission of hearsay evidence which satisfies both the twin criteria of "necessity" and "reliability" does not violate this right. See *Laramee*, *supra* note 78 at (4th) 277 at 311:

> For the purpose of this case, the limits of the principle need not be defined. Well within its scope is the requirement that in a case of crime for which the accused may go to prison, an out-of-court statement by a witness can only be admitted to prove the truth of what the witness said if the twin guarantees of necessity and reliability are met.

210. *Khan*, *supra* note 1 at 105.

211. *Ibid.*

212. *Ibid.* at 121.

> as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.

Numerous courts have since further explained and elucidated this principle, primarily through their application of the principle to the facts in the case before them.[213]

One of the earliest cases to consider the "fairness to the accused" of admitting the hearsay evidence is *Miller*.[214] This decision of the Ontario Court of Appeal has already been discussed at length in the previous section entitled "Where Fairness Dictates, Diminished Reliability Standard Required". In that case, notions of fairness to the accused dictated that the Court permit the accused to make use of the same hearsay statement for the truth of its contents which was being relied upon by the Crown to establish the deceased declarant's state of mind. However, this case is an anomaly in that it is the only decision which appears to rely upon the principle of "fairness to the accused" to permit admission of hearsay which might not otherwise satisfy the *Khan* criteria.[215] All other courts have discussed "fairness to the accused" as a principle which

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**213. Note Chief Justice Lamer's decision in *Smith*, *supra* note 3 provides no further clarification as to the nature of the principle. The only reference to anything resembling "fairness to the accused" occurs in his conclusion in the part of the judgement dealing with the admissibility of the hearsay: [*Smith*, *supra* note 3 at 937]**

> **To conclude, as this Court has made clear in its decisions in *Ares* v. *Venner*, *supra*, and *R.* v. *Khan*, *supra*, the approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in Khan, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. [Emphasis added.]**

**214. *Miller*, *supra* note 202.**

**215. P.K. McWilliams in *Canadian Criminal Evidence*, 3rd ed. (Aurora, Ont.: Canada Law Book, 1992) at 8-12, characterizes *Miller* as merely an example of the courts' general readiness to relax evidential rules in the interest of maintaining fairness in the adversarial trial process:**

> **In *Miller*, the prosecution tendered a statement of the deceased to show her state of mind. The appellate court overruled the ruling at trial that a further portion of the same statement that someone had just left was inadmissible as proof of the truth. If one portion of a statement is accepted as sufficiently relevant and reliable it is unfair to reject another portion.**

bars the admission of hearsay or that permits the trial judge to attach conditions to the admissibility of hearsay evidence which might otherwise satisfy the twin criteria.

The Ontario Court of Appeal, in *Finta*,[216] is one of the first courts to espouse and explain the nature of the "fairness to the accused" principle. After reviewing Mr. Justice Ritchie's decision in *R. v. Lucier*,[217] which found that it would be unfair to admit inculpatory hearsay evidence pursuant to the declarations against penal interest hearsay exception, Justice Doherty states:[218]

> In our view, the same unfairness would exist in this case if the Dallos evidence could be called by the prosecution. The evidence of Dallos is sufficiently reliable to justify its admission as an exception to the hearsay rule on behalf of the accused. It dealt relatively comtemporaneously with an event which took place 46 years ago and which the declarant, since deceased, had a unique opportunity to observe. The statements were given on a solemn judicial or *quasi*-judicial occasion by a person who appeared to be opposed to the interest of the party now desirous of having the evidence tendered. Yet it would be unfair and oppressive for the state to prosecute an accused today with the assistance of evidence, however reliable, which has been in existence for some 46 years and which the accused was not given the opportunity to challenge.

Thus, the Crown would be precluded from tendering this evidence or making use of any inculpatory elements contained in it, despite its having satisfied the "necessity" and "reliability" principles.

It does not appear that unfairness in admitting this evidence was solely a result of the lengthy passage of time from the alleged incident and making of the hearsay statement to the trial of the accused. Rather, the Court appeared to be somewhat critical of the Crown's failure to lay charges and bring the matter to trial sooner. After all, this evidence had been in existence and available for 46 years before the Crown attempted to admit the

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**Thus, arguably, the reference to "fairness" in this case does not relate the "fairness to the accused" principle from *Khan*.**

**216. *Finta, supra* note 31.**

**217. [1982] 1 S.C.R. 28, 65 C.C.C. (2d) 150, 132 D.L.R. (3d) 244.**

**218. *Finta, supra* note 31 at 203.**

hearsay evidence in any proceeding. This raises the possibility that the Court may have been willing to admit the inculpatory hearsay evidence had the accused been somehow responsible for the gross delay in bringing this matter to trial.

Not only does the Crown's failure to bring a matter to trial in a timely manner cause unfairness to the accused, but if the police or investigating officials simply cease to inquire beyond the hearsay declaration and fail to explore further for the existence of corroborating evidence which might support or discredit the truth of its contents, this may also result in unfairness to the accused. This is especially so when, on the face of the hearsay declaration, it suggests the possible existence of other corroborative evidence. For example, in *R.* v. *Maltman*,[219] the victim was found dead in her garage of carbon monoxide poisoning. The accused was charged with her murder. The son of the victim had later demonstrated to his father how he had seen the accused syphon off gasoline from one vehicle into another in the garage. At the trial, the child could not recall having demonstrated this or having originally observed it. The Crown sought to tender the father's evidence of the demonstration. Justice Thomas, for the Ontario Court of Justice (General Division), rejected the admission of this evidence on the following basis:[220]

> There is no doubt, in my respectful view, from the judgement of the Supreme Court of Canada in *R. v. Khan* that fairness to the accused is of vital consideration. The accused is charged with homicide. It is alleged that he murdered this woman. Obviously the liberty of the subject is at stake. There must be an underlying need for a perception of fairness. Hearsay evidence, after all, is secondary evidence and, in certain circumstances, may be inherently weak. The evidence tendered is hearsay by conduct.

As there was evidence contradicting the truth of the hearsay's contents, Justice Thomas found that the evidence was not inherently unreliable.[221]

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219. *Maltman*, *supra* note 137.

220. *Ibid.*

221. See critique of the use of unrelated evidence contradicting the truth of the contents of the hearsay statement above in discussion of Mr. Justice Kennedy's dissent in *Wright*, *supra* note 185.

However, even if the hearsay declaration had been made in more reliable circumstances, the Court appears to have been very reluctant to admit this evidence Justice Thomas was very concerned that the police might have found corroborating evidence either supporting or undermining the truth of the contents of the hearsay had they bothered to take this evidence seriously earlier in the investigation Thus, in addition to the evidence having failed to satisfy the "reliability" principle as set out in *Khan*, the court makes the following argument for its refusal to admit this evidence

> In addition, as argued by counsel for the defence, the police seemed to have not treated this evidence with any degree of significance It was essentially ignored.
>
> Accordingly - while it is not mandatory - in the exercise of my discretion, examining the concept of fairness to the accused, I conclude that it would be wrong and improper to admit this evidence when there could be confirmatory evidence if certain steps had been taken to support the testimony.

As a result, it appears clear from this decision that inaction by the police or authorities may result in causing unfairness to the accused if the hearsay is admitted

**2. Procedural Issues**

Certain procedural issues are raised as a result of this new approach to the admission of hearsay evidence as set out in *Khan* and *Smith*. For example, how does the party-litigant tendering the hearsay evidence establish on the *voir dire* that the "necessity" and "reliability" principles have been satisfied? Must they call the recipient-witness and other witnesses with knowledge about the circumstances surrounding the making of the declaration to give evidence in-chief at the *voir dire*, or can counsel merely provide the trial judge with an overview of the witnesses' prospective evidence, thus saving the witnesses from having to give evidence twice - once at the *voir dire* and once again before the jury? What is the effect of agreements between counsel as to the admissibility of the hearsay or conceding as to the presence and satisfaction of one of the twin criteria?

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222. ***Malmen, supra* note 137.**

Does a party's failure to object to the admission of hearsay evidence preclude the party from later raising the issue on appeal? Is there an obligation on the party tendering the hearsay evidence to give opposing counsel advanced notice of its intent to admit this evidence pursuant to the *Khan/Smith* framework? These questions are discussed in the following section

### a) The *Voir Dire*: Necessity for *Viva Voce* Evidence?

To determine whether the twin criteria are satisfied in the circumstances, must the recipient-witness and other witnesses be called to give *viva voce* evidence on the *voir dire* as to the contents of the declaration and the surrounding circumstances? Must they submit to cross-examination? Is it sufficient for counsel to have the statement or outline of the prospective witnesses' evidence read in, and then make the witness available for cross-examination if the opposing party so desires? The Supreme Court of Canada in *Khan* does not specify the manner in which the questions of "necessity" or "reliability" should be assessed in any given case. However, Justice McLachlin found that the "matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge".[223] As a result, some courts have inferred from this that it is for the trial judge to determine what should be the proper procedure in any given case, depending on the particular circumstances. So argued Justice Fedak of the Ontario Court of Justice (General Division), in *R.* v. *D. (G.N.)* (1991).[224] The Learned Justice then exercised this discretion to permit counsel to outline the prospective evidence so that the Court could determine whether the "necessity" and "reliability" principles had been satisfied.[225] In the circumstances of the case, the Court found that it was an inefficient

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223. *Khan*, *supra* note 1 at 105.

224. [1991] O.J. No. 239.

225. The Court quotes lengthy passage from *R.* v. *Dietrich* (1970), 1 C.C.C. (2d) 49 at 62, where Chief Justice Gale shuns unnecessary *voir dires* in which the evidence is presented in the absence of the jury, thus prolonging the trial and breaking continuity of the trial. Gale, C.J.O., favours a *voir dire* in which an outline of the prospective evidence is given to the judge from which he or she then rules as to its admissibility.

use of its time to have the witnesses give evidence both in-chief at the *voir dire* and then again before the jury.[226] The Ontario Court of Appeal, however, while agreeing with the lack of guidance on the issue from the Supreme Court of Canada, did not agree that the trial judge had this broad a discretion.[227] While concurring with Justice Fedak's ultimate assessment of "necessity" and "reliability", the Court held that procedure adopted by the trial judge in this case "ought to be discouraged". Justice Weiler, for the Court, set out the proper procedure as follows:[228]

> In the ordinary course, in a *voir dire* before a judge conducting a trial without a jury, the evidence of the witness is given in-chief and the witness is then cross-examined. If the evidence is ruled admissible, an application is made by the proponent of the evidence to have the evidence given on the *voir dire* read in at trial, and, if consent is given, this is done. The effect of the procedure adopted in this case was to lengthen the trial and to subject the witnesses to a second cross-examination. It also carried with it the risk that any significant difference from the summary in the testimony of the witnesses in their evidence in-chief would result in the judge having to reconsider his ruling as to the admissibility of the statements.

Additional support for this conclusion is found in the British Columbia Court of Appeal decision in *Chahley*, involving a jury trial.[229] In that case, Justice Wood was of the opinion that:[230]

> The proper procedure to follow when evidence of this sort is tendered is for the trial judge to conduct a *voir dire* in which these issues can be tested under the microscope of cross-examination. ... [i]n most cases it would, I think, be impossible for the court to be satisfied that the threshold tests established in *Khan* have been met without the advantage of exploring fully, with the witness through whose mouth the declarations are offered, the circumstances under which they were made.

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226. The accused was found guilty, by judge alone, on count 2, and guilty on count 1, by jury.

227. *G.N.D.*, *supra* note 101.

. *Ibid.*

229. *Chahley*, *supra* note 32.

230. *Ibid.* at 211.

Thus, it appears settled that the recipient-witness and any witnesses with evidence of the circumstances surrounding the making of the declaration must give *viva voce* evidence and submit to cross-examination at the *voir dire*. Cross-examination ensures that the party opposing the admission of the evidence has a full opportunity to explore and reveal to the court factors which may be relevant in its determination of whether the twin criteria are satisfied.

However, Justice Fedak's efficiency arguments certainly have persuasive force in cases involving a judge and jury, which appears to have been the case in *R* v. *D.(G.N.)*. The testimony of the witnesses on the *voir dire* could not be read in as this would prevent the trier of fact from observing the demeanor of the witnesses to assess their credibility. Thus, Justice Weiler is wrong in having suggested that this procedure unnecessarily lengthened the trial in that case. In addition, Justice Fedak's procedure diminishes the risk that the trial judge will take the credibility of the recipient-witness into consideration when making the assessment as to "necessity" and "reliability" of the hearsay evidence. As discussed earlier, the credibility of the recipient-witness is not relevant to this inquiry.[231]

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**231. See section entitled "Recipient-Witness' Credibility: An Erroneous "Reliability" Factor" for discussion as to impropriety of considering witness credibility in determining "reliability" factor.**

### b) Agreements, Admissions of Fact and Failure to Make Timely Objection

Can the parties agree to admit hearsay evidence and thus circumvent the trial judge's assessment of the satisfaction of the *Khan* principles? Though courts periodically continue to raise this question,[232] it appears to be a long-settled principle that the parties cannot waive exclusionary rules by agreement.[233] Neither does a party-litigant's failure to object to the admission of hearsay evidence turn inadmissible hearsay evidence into admissible evidence.[234] It is the duty of the presiding judge to permit only admissible

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232. *Hanna*, *supra* note 11:

> On behalf of the appellant it was argued that the agreement of counsel at trial ought not to prevent this court setting aside the verdict and ordering a new trial if the evidence was inadmissible. I do not find it necessary to decide that difficult question, because in my view the evidence was, in any event, admissible.

233. See *R* v. *Bezanson* (1983), 8 C.C.C. (3d) 493 (N.S.S.C. App. Div.), which illustrates the point that the parties cannot by agreement waive the exclusionary rules. In that case, Justice Jones found as follows:

> The defence relied on the statement given by John Mappleback to the police as evidence of the facts stated therein. This was admittedly hearsay and should have been excluded by the trial judge notwithstanding an agreement by counsel that the statement be admitted. With respect, counsel cannot agree to the admission of such evidence. The jury was asked to act on a statement which had not been tested in any way as to reliability.

234. Otherwise parties could simply come to an agreement that the party against whom the hearsay is tendered will not object. See *R.* v. *Douglas*, [1992] B.C.J. No. 908 (B.C.S.C.) (QL), Perry J., where counsel had reached an agreement to admit hearsay. The Crown informed the Court it would not be objecting to the admission of this evidence. The Court found:

> Before me, counsel for the appellant argued that in a situation such as occurred here, a hearsay statement, which would otherwise be inadmissible, becomes testimony of evidential force where its admissibility has not been objected to.
>
> ...
>
> No authority in support of their respective positions was cited to me by either counsel.
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> In my view, in agreement with counsel for the respondent, testimony which is inadmissible by virtue of a long-established common law rule of evidence does not become transformed into admissible evidence merely because its reception into evidence is not objected to.
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> ...
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> Contravention of the hearsay rule makes evidence inadmissible. In *Regina* v. *Tunke* (1976) 25 C.C.C. (3d) 518 (Alta. S.C.) McDonald, J. said at p. 526:
>
> It is the duty of the presiding Judge to allow only admissible evidence to be heard, and the mere fact that counsel for the accused has failed to object to the evidence, whether the failure is due to mistake or otherwise cannot relieve the

evidence to go before the trier of fact, and the failure of one party to object does not relieve the judge of this duty.[235]

However, while the parties may not take the ultimate decision as to admissibility away from the trial judge, they can greatly enhance the probability that the court will admit the tendered hearsay evidence. It appears that the party against whom the hearsay evidence is tendered may concede that one or both of the twin criteria is made out on the facts. Trial judges have then been willing to accept that the principle is satisfied in the circumstances of the case without any further inquiry.[236] One court has even found that the mere incorporation of the hearsay evidence into the Admission of Facts, in and of itself, was sufficient to satisfy the "reliability" test.[237]

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**Judge from his duty or deprive the accused of his right to object to the evidence on appeal.**

**I see no distinction in principle where the position is that the Crown has failed to object.**

**Note, however, that the failure to object has in some circumstances then formed the basis for the "necessity" of admitting the hearsay. See *Johnson*, *sup.*, note 70, Chipman J.A., dissenting:**

> **The evidence of the victim's date of birth was not objected to. The most convenient way to establish a person's birth date is by evidence from that person, a standard of proof which is constantly accepted in our daily lives. In the absence of an objection before the trial judge as to the admissibility of the evidence, the point is now raised before this court. Had an objection been made at the time, the Crown could probably have either supplied firsthand evidence of the birth date or have addressed the criterion of necessity by establishing that such evidence was not readily available. Dealing with the point at this stage, it is now a matter of necessity for the Crown to rely on the victim's hearsay evidence of her birth date to establish one of the essential elements supporting the conviction. If necessary I would, to use the words of Chief Lamer, give the criterion of necessity a flexible definition here. [Emphasis added.]**

**Thus, by failing to object, the Crown does not have the evidence on the record that it could have easily obtained if there had been a timely objection.**

**235. *R.* v. *Tunke* (1976) 25 C.C.C. (3d) 518 at 526 (Alta. S.C.).**

**236. See *Children's Aid Society of Metropolitan Toronto* v. *L.M.*, [1992] O.J. No. 1097 (Ont. Ct. Justice, Prov. Div.) (QL), where the "necessity" branch of *Khan* was conceded by all parties.**

**237. *R.* v. *Lemky*, [1992] B.C.J. No. 1784) (B.C.C.A.), Hinds J.A.:**

> **[Para. 25] In this case there was a domestic homicide. Declarations of Michelle Cummins made shortly before her death concerning her relationship with the appellant revealed her state of mind and they were relevant to the motive for the killing as alleged by the Crown. In my view they were a necessary element in the Crown's case and, due to the declarations being incorporated in the Admission of Facts, they met the test of reliability. [Emphasis added.]**

**c) Notice Requirements**

*R. v. Caplette* (1993)[238] raises an interesting question respecting notice of a party's intention to admit hearsay evidence pursuant to the *Khan/Smith* framework. As of yet, no cases applying this new approach have required that any advanced notice be given to the opposing party of an intention to introduce hearsay evidence at the trial. The Judge in *Caplette* admitted the evidence as it satisfied both the "necessity" and "reliability" principles. However, the court document sought to be entered clearly fell within the ambit of ss. 23 and 28 of the *C.E.A.*[239] The evidence had failed to meet the requirements of these statutory provisions.

One of the statutory requirements had been that advance notice of the party's intention to tender the evidence must be given to opposing counsel. The Crown had failed to do this. The Court acknowledged this, but found that no such advanced notice was required under the *Khan Smith* framework. However, as discussed later in this chapter, by admitting this evidence the court completely circumvented the statutory intent of the provision in the *C.E.A.*. Parliament must have considered it necessary to adequately safeguard the rights of both party-litigants to require that advanced notice be given before any use be made of such evidence. The Court ignored this

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**However, the relevance to "reliability" of these statements being in an Admission as to Facts is dubious at best. The Defence was likely merely admitting that the statements were made, as alleged, not admitting to the truth of their contents.**

**238. *Caplette*, *supra* note 65.**

**239. *C.E.A.*, R.S.C. 1985, c. C-5.**

## IV. CRITIQUE OF FRAMEWORK

Throughout the above analysis of *Khan* and *Smith*, and of the lower courts' application of the principles set out by the Supreme Court of Canada in those cases, a myriad of concerns and criticisms have been raised and directed at this new framework. With respect to the "necessity" principle, the validity of Chief Justice Lamer's pronouncement that "necessity" does not mean "necessary to the prosecution's case" has been greatly undermined by the judiciary's application of the "necessity" principle. It is apparent, in several instances, that the admission of the hearsay evidence added nothing new to the Crown's case except to bolster the credibility of the complainant's testimony. A further objection related to the placement of the burden on the accused to explore in cross-examination whether other possible sources of admissible evidence exist. This placement of burden does not acknowledge the imbalance between the state and the accused respecting information as to the conduct of the investigation and to details regarding possible sources of evidence. Finally, the relaxation of the "necessity" principle in some circumstances, such that mere inconvenience in the obtainment of other admissible evidence satisfies the principle, strips the *Khan* framework of its dual-principled approach. This emasculation of the "necessity" component completely ignores the importance and utility of cross-examination by the accused in testing the Crown's case.

With respect to the "reliability" principle, the trial judge's discretion, just short of unlimited, to determine which matters are relevant to "reliability" raises numerous concerns. These concerns do not only relate to the rights of the accused. This broad discretion may permit the banished "recent complaint" doctrine to make its way back into criminal trial process in assessing the "reliability" of the child-complainant's hearsay disclosure. Additionally, "common sense and experience" varies widely from courtroom to courtroom, promoting inconsistency in the application of the "reliability" principle. It also appears that a number of courts, including the Supreme Court in *Khan*, have lost sight of what is the chief purpose underlying the existence of the "reliability" principle.

As Chief Justice Lamer states, the principle exists to "substantially negate" apprehensions as to the existence of any of the testimonial dangers which would normally be checked by cross-examination. However, many factors considered to be relevant in this assessment are not logically connected to this stated purpose. Corroborative evidence, for example, is relevant to whether or not the offence took place as alleged, and is taken into consideration and given its appropriate weight by the trier-of-fact in the ultimate determination as to guilt or innocence. The existence of corroborative evidence does not negate the possibility of any of the testimonial dangers operating at the time the declaration was made. As a result, it should not be relevant to the determination of admissibility of hearsay. Also, it appears that the credibility of the recipient-witness may sometimes work its way into the court's consideration of whether or not the "reliability" principle is satisfied on the facts. The focus of the inquiry is not on the recipient-witness, as this person is available in court to give *viva voce* evidence and to be cross-examined. Finally, in some cases the courts have failed to place the appropriate burden of proof on the party tendering the hearsay evidence. Instead of reviewing the circumstances to determine whether the presence of any testimonial dangers is "substantially negated", the courts have been satisfied when there is merely "nothing to indicate" that the declarant was being untruthful.

In the following section, we expand on several of these concerns and criticisms directed at the *Khan/Smith* framework, and address others which have not yet been discussed.

### A. "Common Sense and Experience": The Problem of the Arm-Chair Psychologist

One of the concerns respecting several of the ancient hearsay exceptions discussed in Chapter Three, is the validity of some of the assumptions, based on 18th and 19th century "common sense and experience", as to when people are more or less likely to tell

the truth. As *Weinberg* demonstrates,[240] judges in the twentieth century are no less immune than their predecessors to applying their anecdotal experience to formulate presumptions and inferences which may be of dubious validity. However, today we take some solace in the fact that courts of appellate jurisdiction will scrutinize the logic and reasoning employed by the trial judge, identify any unacceptable inferences or assumptions, and send the matter back to be reconsidered using the appropriate analysis. Unfortunately, the "new approach" to the admission of hearsay does little to promote an organized and structured analysis of the assessment of "reliability" such that inferences or assumptions made by the trial judge are express and apparent.

A trial judge constantly utilizes logic and reason in making factual inferences and in coming to conclusions of both law and fact. Undoubtedly, the court relies upon its "common sense and experience" in doing so. However, unless a court articulates its analysis in reaching these conclusions, stating the assumptions relied upon and inferences drawn, appellate review is greatly inhibited.[241] With respect to satisfying the "reliability" test set out in *Khan*, trial judges often do little more than review the factual circumstances of the case and state that the hearsay's "reliability" is made out on the facts. Often it is ambiguous what logical relevance the courts are drawing from these factors.[242]

As we have seen, the "common sense and experience" which each judge brings to the "reliability" assessment varies greatly from courtroom to courtroom. Not only does this cause misgivings as to the consistency in application of the "reliability" principle, but it also raises a concerns that the trial judge might bring unacceptable biases and prejudices

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240. See *Weinberg*, *supra* note 16, where court considered as a factor in determining reliability of a hearsay statement that a sibling is unlikely to accuse another sibling of a serious offence in front of their mother.

241. This is not the case unless the verdict is patently unsupportable on the facts.

242. See *e.g. Khan*, *supra* note 1, where Justice McLachlin does not explain the logical relevance of many of the factors she considers there. See discussion above consideration of *Khan* under heading "'Reliability' Principle". See also *G.N.D.*, *supra* note 101, discussed under the heading "Spontaneity of Declaration and Close Proximity of Complaint to Alleged Assault". It is unclear in that judgment the relevance of the fact that it was a short period of time between the alleged assault and the disclosure.

to the "reliability" assessment. It is apparent that some assumptions made by courts, based primarily on the trial judges' anecdotal experience, are not borne out by psychological or sociological research.[243] However, when these assumptions and bias are operative in the mind of the judge, hidden from appellant review, they are particularly dangerous. If this "new approach" was to provide a clearer and more structured framework, it would more likely expose any improper inferences or assumptions made by the trial judge.[244]

### B. "Necessity" of Hearsay and Balancing Societal Interests: Why the *Charter* Analysis?.

In *R.* v. *W.* (1990),[245] ruling on a *voir dire* as to the admissibility of a hearsay disclosure made by a three and a half year old complainant to her twelve-year-old sister, the Court made some peculiar comments respecting the "necessity" principle. After emphasizing that Justice McLachlin was "alert to the issue of protecting the interests of the accused",[246] the Court stated:[247]

> I believe that an application of the test in *Khan* involves a court in a delicate balancing act, balancing the societal interest in having proceed prosecutions of alleged sexual assaults involving child victims, against the individual's right to a fair trial.

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243. See *R. v T.S.*, [1993] O.J. No. 153 (Ont. Ct. Just. (Prov. Div.)) (QL), where the court assumed that every "bright little" three-year-old normally makes some disclosure as to sexual abuse to a family member relatively soon after it has occurred.

244. For example, requiring that the trial judge put his or her mind to the presence of circumstances which negate the possibility of each and every testimonial danger, then relating the relevance of each factor considered to the specific testimonial danger it addresses would do much to expose improper inferences. See discussion under heading "Spontaneity of Declaration and Close Proximity of Complaint to Alleged Assault". It would be improper to consider the close proximity of the disclosure to the alleged assault with respect to witness veracity, but it may be a proper consideration in relation to a witness' ability to accurately recall the events.

245. 2 C.R. (4th) 204 (Ont. Ct. Just. (Prov. Div.)).

246. *Ibid.* at 209.

247. *Ibid.* at 210.

> In my view, a court must be very vigilant where the Crown seeks to have a ruling of this nature made at the beginning of the case, in circumstances where the child has not (yet) been called to give *viva voce* evidence. Notwithstanding great sympathy for children who are required to testify on intimate matters, the Court must not lose sight of the wider picture, i.e., the balancing act involved in the *Khan* application.

It is evident from this passage that, in this court's opinion, admitting hearsay evidence pursuant to the *Khan* twin criteria may result in the "individual's right to a fair trial" being somewhat abrogated, and that this must be balanced against the societal need to admit the evidence. Interestingly, the phrase "balancing the societal interests" sounds very reminiscent of a s.1 analysis, usually performed after an infringement of a right protected under the *Charter*[248] has been found.

This case, along with numerous others,[249] raises concerns that, in circumstances where there is perceived extreme "necessity" for the admission of hearsay evidence, the courts may reduce the requisite "reliability" threshold. As a result, hearsay evidence of possibly dubious "reliability" might be admitted, particularly in circumstances where the accused is the only other party possessed with the knowledge of the surrounding circumstances or the truth of the contents. If the courts are, in fact, admitting hearsay evidence in which the surrounding circumstances do not "substantially negate" the existence of each and every testimonial danger, then the accused's right to a fair trial, as protected under ss. 7 and 11(d) of the *Charter*, may be abrogated.

The courts appear to take some solace in the fact that if any of the testimonial dangers are present and operating with respect to the hearsay declaration, all that is needed is for the accused to take the stand to remedy the untruth or mistake.[250] However,

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248. *Charter*, *supra* note 5 s.1:
**The Canadian Charter of Rights and Freedoms guarantees the right and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

249. See *R.* v. *F.(G.)*, *supra* note 81.

250. This was precisely what was proposed in *R.* v. *Ferry*, [1992] O.J. No. 2619 (Ont. Ct. Just. (Gen. Div.)) (QL), by Justice Clarke:

as discussed previously in this chapter, this relieves the Crown of the burden of proof and places the evidential burden on the accused. Compelling the accused to take the stand to rebut this evidence offends his right to a fair trial, right to silence, the presumption of innocence and protection against self-incrimination. Thus, both the admission of hearsay evidence not satisfying the full-blown "reliability" test[251] and the curative scheme redressing possible inaccuracies offend one or all of the following sections of the *Charter* ss. 7, 11(c), 11(d) and 13.[252]

The situation is in no way ameliorated by the fact that the courts, indirectly, attempt to balance the societal interests of admitting the hearsay evidence against the

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> So far as the criteria of "reliability" is concerned, it has been met in that the circumstances here negate the possibility that the declarant was untruthful, mistaken, or had formed a plan to falsify the testimony. Although it can be said that cross-examination of the witness, (now deceased wife of the accused) is not available for cross-examination, the deponent or author of the statement, the accused Ferry, can give evidence on his own behalf that the words attributed to him were not spoken, if that is his position.

This case is particularly interesting as it involved double-hearsay. The witness-recipient testified in court as to what the deceased wife had told her that her husband had said on the telephone. The witness-recipient had little or no knowledge as to surrounding circumstances of the telephone call, except what little the deceased declarant had told her. Surely if there is ever a case of inherently unreliable evidence being admitted against the accused, this is it.

251. See *Laramee*, *supra* note 78.

252. Following is the text of the relevant *Charter* provisions:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right
>
> . . .
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for giving contradictory evidence.

rights of the accused. The proper place for such an analysis is within the framework of s. 1 of the *Charter*. Once a *Charter* breach has been found, the Crown must adduce evidence to show that the objective of the legislation or societal interest underlying it is "pressing and substantial in a free and democratic society".[253] The Crown must also demonstrate that the legislation is rationally connected to meeting this important objective, that it impairs the accused's rights as little as possible in achieving this objective, and that there is a proportionality between the effect of the limiting measure and the objective. Clearly, if the courts are admitting evidence which is not inherently reliable, to address even an overwhelming societal concern, they are trespassing recklessly into the exclusive jurisdiction of Parliament.

### C. The Use of *Khan* to Circumvent Statutory Intent

Numerous examples exist where, despite having failed to satisfy the admissibility requirements set out under a statute clearly intended to address such evidence, the courts have gone ahead and admitted the hearsay evidence pursuant to the *Khan Smith* framework. Arguably, it may be an improper use of this framework if it enables court to circumvent the statutory intent of the relevant legislation in these circumstances.

For example, in *Caplette* (1993),[254] at issue was admissibility of a certified copy of an Order of Prohibition. The document was not admissible under s. 23 of *C.E.A.* because it was neither an "exemplification" or a copy certified by a judge.[255] Clearly, this section was specifically designed with this type of evidence in mind. However, despite having failed to meet these requirements, the Court went on to consider admitting the document pursuant to the twin criteria set out in *Khan*. The Court was satisfied that the "necessity" principle was met in the circumstances, as a result of taking judicial notice of the fact that "it is difficult in many instances" to locate a judge to certify a copy of the

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253. See generally *R. v. Oakes* (1986), 50 C.R. (3d) 97, 14 C.C.C. (3d) 97 (S.C.C.).

254. *Caplette, supra* note 65.

255. It was, in fact, signed by a Justice of the Peace.

Order of Prohibition.[256] As the document was obviously a court document, there was, *prima facie*, "a very high circumstantial guarantee of reliability" attached to the evidence. Ultimately, the court admitted the document.

The difficulty with this decision arises out of the court's failure to consider the reasons behind the conditions of admissibility imposed by the statute. Surely Parliament had some reason for imposing these particular limitations on the admission of such evidence. One such safeguard, which the Court declined to attach to the admission of the evidence pursuant to the *Khan* principles, was the notice requirements provided under s. 28 of the *C.E.A.* This section provides that before any copy of a document can be admitted in evidence under the authority of the listed sections, including s. 23, the party intending to produce the copy shall give advance notice of that intention to other party of not less than 7 days. The Court in *Caplette* completely circumvented the statute and the safeguards imposed by Parliament which are intended to protect the rights of the party against whom this evidence is tendered.

The question then becomes whether or not Parliament intended these provisions in the *C.E.A.* to codify the law relating to the admissibility of court documents? Or were these sections merely intended to supplement the common law, to further facilitate the admission of such evidence? If it was the former, and Parliament intended this section to comprehensively address the admission of any such court document, then the Court in *Caplette* was perilously close to encroaching on the jurisdiction of Parliament. While a review of the relevant sections of the *C.E.A.* gives no clear answer to the question of legislative intent, it nonetheless warrants some consideration by the Court. Thus, the Court's use of *Khan* may not, in these circumstances, be an improper circumvention of statutory intent.

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256. *Caplette, supra* note 65.

In two other cases the Courts appeared to employ *Khan* to effectively get around legislative schemes,[257] though in both cases, the hearsay evidence was ultimately rejected on the basis that one of the twin criteria was not satisfied in the circumstances. However, in one of these cases the relevant sections of the *C.E.A.*, relating to business records, makes it clear that Parliament intended these provisions to supplement the common law rule.[258] Thus, the Court's use of Khan may not, in these circumstances, be an improper circumvention of the statutory intent.

### D. "Reliability": An Imperfect Substitute For Cross-Examination

In cases involving hearsay evidence the trustworthiness of which is of a superior quality, Courts have been willing to relax the strictness of the "necessity" principle such that mere inconvenience of calling a witness with first-hand information satisfies the "necessity" principle. However, failing to call such a witness for reasons of mere

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**257. In *Pilkington*, *supra* note 125, the issue on the *voir dire* was the admissibility of computer records. The Crown asserted that the records were kept by a financial institution, therefore, they were admissible pursuant to s.29 of the *C.E.A.* One of the documents failed to meet the requirements of this section, as it was not a "true" copy. However, that was not the end of the inquiry:**

> **The initial question is, therefore, whether or not the records are admissible pursuant to the aforementioned provision of section 29. But I think it important to note that the issue of a ' missibility does not necessarily stop there as the recent Supreme Court decision in *R.* v. *Larry Arther Smith* [footnote omitted] has made it clear that the categorical approach to the reception of hearsay evidence has now ended.**
>
> . . .
>
> **It is therefore logical that the court must now consider the *voir dire* evidence in the light of the Smith test if it concludes, the bank records to be inadmissible pursuant to section 29.**

**The circumstances surrounding the creation of this hearsay evidence did not satisfy the "reliability" principle, thus the evidence was excluded.**

In the second case, *R.* v. *Hawkins*, [1993] O.J. No. 1219 (Ont. Ct. Just. (Gen. Div.)) (QL), Philp J., the accused married a witness crucial to the Crown's case. The witness had already given evidence at the preliminary inquiry. The court found that the principle of necessity was satisfied as "the Crown has provided sufficient proof of the need for Ms. Graham's testimony at trial in view of her testimonial incapacity". The evidence failed on the "reliability" test as Ms. Graham gave conflicting testimony at the preliminary inquiry. However, the court fails to give any consideration as to whether the admission of this hearsay evidence pursuant to *Khan* will undermine the statutory intent of s. 4 of the *C.E.A.*, dealing with the non-compellability of the accused's spouse.

**258. s.30(1) of the *C.E.A.***

inconvenience demonstrates an over-confidence in the "reliability" principle's ability to substitute for cross-examination. Neither Justice McLachlin nor Chief Justice Lamer make any claims that the "reliability" principle is a perfect replacement for cross-examination. On a not-so-rare occasion, cross-examination will reveal evidence or disclose factual circumstances which were unbeknownst to all parties, including the party tendering the witness. Cross-examination might also lead to a course of inquiry which neither counsel had previously explored. While the courts have found it unnecessary for the party tendering the hearsay to refute every possible imagined scenario which might undermine the "reliability" of the hearsay, they should not be so cavalier as to completely discard this possibility. This is especially so in the context of a criminal trial where the accused's liberty is at stake, and in light of the fact that it causes merely some inconvenience to a witness to get first-hand information.

**E. Presence of Opinion or Subjective Elements in Hearsay Declaration.**

Although, there have been no criminal cases to date in which the Crown or the accused have sought to admit hearsay evidence containing opinion or subjective elements, it is only matter of time before this issue is raised. How can any assessment of weight or credibility be given to opinion evidence if the court is unable to establish the basis for that opinion and whether the hearsay declarant was qualified to give such an opinion? Unfortunately, if the civil decisions which deal with this issue are any indication of how the criminal courts will respond, the ability of the accused to meet the Crown's case will be severely hindered when hearsay evidence containing opinion is tendered.

In the *Mastrangelo (Litigation Guardian of) v. Kitney* (1992),[259] Justice Kovaks of the Ontario Court of Justice (General Division) considered the admissibility of a document indicating a chiropractor's diagnosis as to a complaint he was treating the Plaintiff for at the time of the motor vehicle accident. The Defendant, the driver at fault,

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259. [1992] O.J. No. 2932 (QL).

resisted payment of personal injury damages on the basis that the Plaintiff's injuries were pre-existing. In this regard, the Defendant submitted an O.H.I.P. claims card from the chiropractor. The chiropractor had since retired, moved to British Columbia and was unavailable to give evidence at the trial. The claims card had a numbered code which represented the doctor's diagnosis and the treatment for which he sought payment. With respect to the admission of this hearsay evidence pursuant to the *Khan* principles, the court stated as follows:[260]

> It is not disputed that the recorded diagnosis made by the chiropractor by the means of the diagnostic code is hearsay and is an opinion.
>
> In my view, in *Ares v. Venner* [citation omitted], the Supreme Court of Canada made an exception to the hearsay rule at common law (as does section 35 of the *Evidence Act*). The Court accepted the dissenting opinions in *Myers v. Director of Public Prosecutions* [citation omitted] and the test there applied to admit hearsay.
>
> [The Court paraphrases four tests set out by Jessel M.R. and reduced by Madame Justice McLachlin into two tests.]
>
> I am satisfied in this case that those tests have been met on the facts outlined. A chiropractor's records are destroyed. He is a disinterested person and made the record about a month before the cause of action arose ... and he had a peculiar means of knowledge. I am also satisfied that the tests of necessity and reliability have been met.

With respect to the fact that the diagnosis contained in the hearsay evidence is primarily the opinion of expert who is not before the Court, Justice Kovaks draws attention to the fact that the evidence tendered in *Ares* v. *Venner* contained subjective elements:[261]

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260. *Ibid.*

261. *Ibid.*

> Historically the courts rejected hearsay evidence because it was evidence not subject to cross-examination. That is particularly true of opinion evidence and subjective impressions of a witness. However, in *Ares v. Venner* and in *R. v. Khan* the admissibility was not based on the failure of the defendant to be able to cross-examine. (See particularly *R v. Khan* at page 14.)

However, this court completely loses sight of the fact that the nurses were available to be cross-examined in *Ares*, had the Defendant wished to do so [262]. Also, the subjective element contained in the hearsay evidence in *Ares v. Venner* related to description of the Plaintiff's toes as "blue" or "bluish", hardly in the same category of a diagnosis regarding a neck injury. The nurses qualifications to identify toes as "blue" or "bluish" would certainly not be a live issue. In addition, the fact that in *Khan* the hearsay's "admissibility was not based on the failure of the defendant to be able to cross-examine" was irrelevant to this case. There was no opinion or subjective element contained in the child's out-of-court statement in *Khan*.

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**262. Madame Justice McLachlin was wrong in this regard. The decision of the courts below in this case make it clear that the parties were aware of who were the authors of the notes. It is evident from the trial judge's decision that these nurses were present in the courtroom.**

## V. *KHAN*: IMPLICATIONS TO EXISTING HEARSAY EXCEPTIONS

### A. *Khan*: Overlaying and Retrenching Firmly-Rooted Common Law Hearsay Exceptions.

Some authority already exists to support the argument that existing common law hearsay exceptions have been cut back such that they must operate within the confines of the *Khan Smith* framework.[263] In espousing this "new approach" to the admission of hearsay, the Supreme Court used very broad language in stating its principles.[264] A number of courts have taken the generality of these statements as an indication that the twin criteria set the minimum standards which overlay and override every common law exception to the hearsay rule.

In *R. v. Lemky* (1992),[265] Justice Hinds of the British Columbia Court of Appeal considered the admissibility of numerous declarations made by a murder victim shortly before her death. The necessity for the admission of the hearsay statements related to establishing the nature of the victim's relationship with the appellant and her state of mind

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263. Some courts had begun limiting or circumscribing application of certain exceptions prior to *Khan* for the reason that the statement lacked circumstantial guarantees of trustworthiness. See *R. v. P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.J.), where Doherty J. looked for circumstantial guarantees of trustworthiness with regards to a state of mind assertion. After an extensive review of Canadian and American case law, he superimposed an overriding discretion to exclude evidence otherwise admissible to show the state of mind of the deceased declarant (or statement of intention) if there was no such guarantee of reliability.

264. See *Smith*, *supra* 3 at 933:

> This Court's decision in *Khan*, therefore, signalled an end to the old categorical approach to the admission of hearsay. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity. [Emphasis added.]

And again, *ibid.* at 937:

> To conclude, as this Court has made clear in its decisions in *Ares v. Venner*, *supra* and *R. v. Khan*, *supra*, the approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in *Khan*, and subject to the residual discretion of the trial judge to exclude the evidence when the probative value is slight, and undue prejudice might result to the accused. [Emphasis added.]

265. [1992] B.C.J. No. 1784 (B.C.C.A.) (QL) [hereinafter *Lemky*].

at a time just prior to her death.[266] Instead of simply determining whether or not these assertions satisfied the pre-conditions of the "state of mind" exception, the court assessed whether or not the twin criteria of "necessity" and "reliability" were satisfied in the circumstances:[267]

> [Para. 24] Upon consideration of the foregoing authorities I conclude that the state of mind of the victim as regards the relationship with a domestic partner can be relevant to the presence and absence of motive and a declaration made by the deceased shortly before death may be admissible if it meets the test of necessity and reliability. [Emphasis added.]

It is evident in the case that all the requisite conditions for admissibility pursuant to the existing common law "state of mind" exception were satisfied. Why would the Court go any further unless it felt that it was compelled to ensure that the circumstances also satisfied the *Khan Smith* twin criteria before admitting the hearsay evidence?

On an appeal of a murder conviction, the Manitoba Court of Appeal in *R. v. Jack* (1992)[268] considered the admissibility of certain written statements made by the victim just prior to her disappearance, indicating her state of mind and future intentions. As there was no body found, the Defence had attempted to raise a doubt as to whether the wife had died or, in fact, run away, abandoning her children and family. The hearsay evidence consisted of letters and cards the victim had written just previous to her disappearance. The contents of many of these letters and cards undermined the Defence's hypothesis that the woman had run away.

The declarations contained in these letters and cards clearly fit within the "state of mind" hearsay exception as it existed at common law. However, once again, another court of appellate jurisdiction felt compelled to test the "necessity" and "reliability" of the hearsay evidence before allowing its admission. Chief Justice Scott stated:[269]

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266. Both were relevant to the motive for the killing, as alleged by the Crown.

267. *Lemky, supra* note 178.

268. 70 C.C.C. (3d) 67 (Man. C.A.).

269. *Ibid.* at 83.

> In my opinion, the broad, general rulings made by the trial judge permitting the introduction of state-of-mind/future-intentions evidence based on a witness-by-witness assessment of the circumstantial trustworthiness of the evidence, and the circumstances under which the statement was made, were correct... .
>
> . . .
>
> An argument can be made, in my opinion, that the letter is admissible not merely as original evidence to prove state of mind, but as an exception to the hearsay rule itself pursuant to the Supreme Court of Canada decision in *R. v. Khan* [citation omitted]. The letter and card might well satisfy the dual tests of necessity and reliability mandated in that case for the admission of hearsay evidence not otherwise obtainable... .

In *R. v. Rowley* (1992),[270] the Ontario Court of Justice (General Division) had to decide whether or not to admit the notes of a deceased police officer to prove continuity of drug sample. After finding that these notes fell within the existing common law "business record" hearsay exception, the Court then went on to consider whether the principles in *Khan* had been satisfied:[271]

> In making a determination as to the admissibility thereof, I am cognizant of the relatively new approach to hearsay evidence as enunciated by the Supreme Court of Canada in *R. v. Khan* [citation omitted], in which the court rejected a rigidly categorized approach to the hearsay rule in favour of a fairer, more flexible approach. That approach was recently scrutinized and expanded in *R. v. Smith* [citation omitted]. As a result, the current governing and fundamental principles which underlie the hearsay rule and exceptions to it, appear to be based upon the reliability of the evidence and its necessity. In general, hearsay statements should be admitted into evidence where they are necessary and reliable.

The Court then went on to consider, at length, the "necessity" and "reliability" of this evidence.

While none of the above authorities clearly and unequivocally supported the proposition that *Khan* cuts back all exceptions to the hearsay rule existing at common

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270. [1992] O.J. No. 2347 (Ont. Ct. of Just. (Gen Div.)) (QL).

271. *Ibid.*

law, it was just a matter of time before the issue was put squarely before a judge in a criminal trial. In *R. v. Smith*,[272] Justice Corbett of the Ontario Court of Justice (General Division) considered the effect of the *Khan* twin criteria on the "spontaneous declaration" hearsay exception:[273]

> A traditional articulation of the *res gestae* exception indicates that the maker of the statement need not be unavailable. However, in my view, a recent line of case law has established that necessity and reliability are the two key components which must be demonstrated to create an exception to the hearsay rule, *R. v. Khan* [1990] S.C.R. 531, *R. v. Smith* [1992] 2 S.C.R. 915; and *R. v. K.G.B.* (unreported, 1993, S.C.C.). Accordingly, in order for this statement to be admitted, I would have to be satisfied that both the elements of necessity and reliability are fulfilled. As previously stated, in the circumstances of this case, I do not find that the element of necessity has been satisfied.

It must be recalled that the availability of the declarant is not a pre-condition of the "spontaneous declaration" as it existed at common law.[274] Here is a clear case where the court has overlaid the *Khan/Smith* framework on to a long-established hearsay exception.

### B. Section 7 and 11(d): the Principles of Fundamental Justice and the Accused's Right to a Fair Trial

#### 1. Groundwork for *Charter* Challenge

In Canada, the accused's right not to be deprived of liberty except in accordance with the principles of fundamental justice is protected under s. 7 of the *Charter*, while the accused's right to a fair and public hearing is protected under s. 11(d). While the Ontario Court of Appeal has held generally that an accused is not precluded from making a full

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272. [1993] O.J. No. 1204 (Ont. Ct. Just. (Gen. Div.)) (QL).

273. *Ibid.*

274. The court also found that the hearsay declaration failed the "reliability" test, but it was unclear from the judgment whether the unreliability of the declaration relates to the *Khan* "reliability" test or to the test set out *R. v. Andrews*, [1987] 1 All E.R. 520, requiring that the declarant still be affected by the dramatic or startling events such that "the pressure of the event would exclude the possibility of concoction or distortion".

answer and defence merely because he is prevented by the laws of evidence from introducing hearsay,[275] several Canadian courts have raised the question as to whether or not admission of out-of-court statements might, in some circumstances, abrogate the rights of the accused.

In *Lucier v. The Queen* (1982),[276] the Supreme Court overruled a decision of the Manitoba Court of Appeal which had extended the hearsay exception known as "declarations against penal interest" to statements which were used to inculpate the accused. At the Court of Appeal, Justice O'Sullivan, dissenting, held that to admit the evidence would deny the accused the basic right to confront his accuser. At the Supreme Court, Justice Ritchie focused not on the accused's right to confront his accuser, but rather on his right to cross-examine Crown witnesses:[277]

> The difference [between allowing admission of inculpatory versus an exculpatory statement] is a very real one because a statement implicating the accused in the crime with which he is charged emanating from the lips of one who is no longer available to give evidence robs the accused of the invaluable weapon of cross-examination which has always been one of the mainstays of fairness in our courts. [Emphasis added.]

While this decision pre-dates the application of the *Charter*, the segment highlighted above sounds very much like a "principle of fundamental justice" protected under s.7.

In *R. v. Albright* (1987),[278] Justice Lamer stated as follows:[279]

> The conduct of a trial in general, including the application of the rules of evidence in a given case, must not result in the trial being unfair because the accused has been denied a full opportunity to prepare his case, challenge and answer the Crown's case. If a rule of law, statutory or common law, were framed in such a way that it would be per se a

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275. *R. v. Williams* (1985), 50 O.R. (2d) 321, 44 C.R. (3d) 351, 18 C.C.C. (3d) 356, 7 O.A.C. 201, 14 C.R.R. 251; leave to appeal to S.C.C. refused [1985] 1 S.C.R. xiv.

276. 65 C.C.C. (2d) 150 (S.C.C.).

277. *Ibid.* at 154.

278. [1987] 2 S.C.R. 383, 60 C.R. (3d) 97, 4 M.V.R. (2d) 311, [1987] 6 W.W.R. 577, 18 B.C.L.R. (2d) 145, 79 N.R. 129, 45 D.L.R. (4th) 11, 33 C.C.C. (3d) 105.

279. *Ibid.* at 395-396 [S.C.R.].

> violation of the right to a fair trial, then the statute would be declared inoperative or the common law declared to be otherwise

Arguably, unless there is a "necessity" to admit this hearsay evidence and some circumstantial guarantees of trustworthiness which makes cross-examination superfluous, unfairness and a denial of a principle of fundamental justice would result

### 2. *R. v. Laramee*: The Admission of Hearsay and ss.7 and 11(d) of the *Charter*

The decision of the Manitoba Court of Appeal in *R. v. Laramee* (1991)[280] presents the strongest and most persuasive argument for the restriction in operation of long-standing common law hearsay exceptions so that they fit within the *Khan Smith* framework. While this decision has subsequently been overturned by the Supreme Court of Canada,[281] it is presumed that the principles espoused by the Manitoba Court of Appeal were left intact and that the Supreme Court simply disagreed as to the application of principles to the facts in the case. In any event, the thrust of Manitoba Court of Appeal's decision is that the operation of a statutorily-created hearsay exception admitting inculpatory evidence which does not satisfy the twin criteria of "necessity" and "reliability" offends ss. 7 and 11(d) of the *Charter*.

The *Laramee* decision involved the admissibility of videotaped testimony of a child-complainant and raised an issue as to the constitutional validity of s.715.1 of the *Criminal Code*. The Court unanimously held, in four separate judgments, that this section contravened ss. 7 and 11(d) of the *Charter* and could not be sustained under s. 1. Of particular interest for the purposes of our discussion are the judgments of Justices Helper and Twaddle.

Justice Helper discussed the safeguards which must be imposed on statutory exceptions to the "norm" of presenting evidence in court under oath:[282]

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280. 6 C.R. (4th) 277.

281. The Court's reasons are unavailable at the time of writing this thesis.

282. *Laramee*, *supra* note 78 at 289.

> In Canada, statutory exceptions to the general rule that all evidence must be presented through testimony in the courtroom exist as well [*C.E.A.*, R.S.C. 1985, c. C-5; *Criminal Code*]. As in England, there is a commonality to these statutory exceptions. The rights of the accused are safeguarded, he is not unduly prejudiced by the formulation of the exception to the rule, the evidence is necessary to the truth-seeking process and the reliability of the evidence has been tested.

Insomuch as s.715.1 authorizes the use of out-of-court statements as evidence without meeting *Khan's* twin tests of "necessity" and "reliability", s.7 of the *Charter* is violated. As stated by Justice Helper:[283]

> The minimum criteria set out in s. 715.1 do not address the requirements for the departure from the normal rules for the taking of evidence in the truth-seeking process - necessity and reliability: *R. v. Khan, supra*; *R. v. Potvin, supra*... . As compared to other sections of the Code - ss. 715 and 486(2.1) and (2.2), s. 715.1 does not address necessity or reliability as criteria for the departure from the established rules of evidence and process in a criminal trial.

Justice Twaddle concurs in the holding that the twin tests of "reliability" and "necessity" are the minimum standards for the admission of out-of-court statements:[284]

> For the purpose of this case, the limits of the principle need not be defined. Well within its scope is the requirement that in a case of crime for which the accused may go to prison, an out-of-court statement by a witness can only be admitted to prove the truth of what the witness said if the twin guarantees of necessity and reliability are met.

Justice Twaddle found that both ss.7 and 11(d) were affected by the admission of either unnecessary or unreliable hearsay evidence. As the offending section of the *Criminal Code* did not, in the eyes of the Court, adequately address the requirements of "necessity" and "reliability", it was struck down.

On the basis of this decision, it is a minute leap in logic to propose that the *Khan Smith* principles of "necessity" and "reliability" are the minimum constitutional

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283. *Ibid.* at 295.

284. *Ibid.* at 311.

threshold by which to measure all common law hearsay exceptions used to admit inculpatory out-of-court statements in a criminal trial.

## VI. CONCLUSION

We started this chapter by reviewing the decisions of the Supreme Court of Canada in *Khan* and *Smith* and attempting to extract the principles upon which hearsay is now to be admitted under this new approach. If *Khan* was intended to have broad application, we demonstrated how Justice McLachlin's statement of twin criteria of "necessity" and "reliability" is somewhat vague and inadequate, particularly with respect to setting out a meaningful definition of the "necessity" principle. Chief Justice Lamer's judgment in *Smith* did much to elucidate and further explain these twin criteria, including identifying their genesis in and adoption from the work of J.H. Wigmore. That the hearsay evidence must be "reasonably necessary" does not mean that the evidence is merely "necessary to the prosecution's case";[285] rather, it "refers to the necessity of the evidence to prove a fact in issue".[286] Death and unavailability of the declarant are not the only circumstances which can satisfy this principle. There may be a need to admit hearsay as "we cannot expect, again of at this time, to get evidence of the same value from the same or other sources".[287] However, as to just what is this "flexible definition, capable of encompassing diverse situations",[288] that was left to subsequent courts to construct.

With respect to the "reliability" principle, both *Khan* and, to a greater extent, *Smith* provide more guidance. Justice McLachlin derived the "reliability" principle by collapsing and merging three of the four tests set out by Jessel M.R. in *Sugden*. She built upon this framework and identified additional indicia of circumstantial probability of trustworthiness from the facts before the Court in *Khan*. However, Justice McLachlin was unclear as to which, if not all, testimonial dangers must be addressed in the court's assessment of the "reliability" of the hearsay. She also emphasized two factors (the semen stain found on

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285. *Smith*, *supra* note 3 at 933.

286. *Ibid.*

287. *Ibid.*

288. *Ibid.*

the child's jumper and the fact that the out-of-court declaration demonstrated a knowledge of sexual acts well beyond the child's years) which in no way address or obviate concerns as to the presence of any testimonial dangers. These factors corroborate that the alleged assault took place, but they do not necessarily enhance the reliability or trustworthiness of the declaration. Whether the focus of the "reliability" assessment is on the truth of the contents of the declaration or the inherent trustworthiness of the declaration, is a question which must be addressed by the Supreme Court of Canada. Based upon the rationale underlying the existence of the hearsay exclusion rule, and the fact that the "reliability" assessment goes merely to the admissibility of the hearsay evidence, we concluded that focus of the "reliability" analysis should be on whether the hearsay declaration is inherently reliable.

We then discussed how failing to appreciate the distinction between the truth of a declaration and its inherent trustworthiness can lead to a queer anomaly. If hearsay evidence is used to corroborate other real or testimonial evidence, and if the existence of this real of testimonial evidence is a factor considered in the assessment of the "reliability" of the hearsay, then the real or testimonial evidence being corroborated is, in effect, corroborating itself. As a result, we concluded that, despite Justice McLachlin's having decided otherwise, corroborative real or testimonial evidence should not be considered in assessing the "reliability" of hearsay evidence.

*Smith* provided further guidance respecting the application of the "reliability" principle. Borrowing heavily from *Wigmore on Evidence* to explain both principles, Chief Justice Lamer explained that the hearsay rule exists primarily to preserve the litigant's opportunity to test, through cross-examination, for the presence of testimonial dangers in *viva voce* evidence. However, there may be circumstances where cross-examination serves not useful purpose as the "apprehensions traditionally associated with hearsay evidence are substantially negated".[289] In these circumstances, the hearsay evidence is sufficiently reliable to justify its reception into evidence if the "necessity" principle is satisfied. Thus,

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289. *Ibid.* at 930.

the party tendering the hearsay evidence has a positive obligation to put enough evidence before the court to "substantially negate" any concerns that testimonial dangers are present and operative.

Under the heading "Application of Principles in Subsequent Case Law", we discussed how subsequent courts have applied and further refined both the "necessity" and "reliability" principles. Our analysis demonstrated that satisfying the "necessity" principle does not always mean that the obtainment of other evidence must be impossible. It appears the requisite standard of how difficult the obtainment of other evidence must be fluctuates with the quality of the hearsay evidence. Where the inherent trustworthiness of the hearsay is remarkably superior, difficulty or mere inconvenience of obtaining other admissible evidence may suffice. Also, Crown misconduct or interference in defence counsel's attempts to obtain other admissible evidence may result in the courts easing this standard. We noted, however, that some courts have so relaxed the "necessity" principle as to completely emasculate it, losing sight of the duality of the twin criteria framework set out by Wigmore and adopted by the Supreme Court.[290] Even superior satisfaction of the "reliability" principle is not a perfect substitute for cross-examination; thus, the court should always satisfy itself that there is a real and substantial need for the admission of the hearsay evidence.

As to when the availability or admission of other evidence precludes the "necessity" for hearsay, we saw that the child-declarant giving *viva voce* evidence no longer automatically results in the exclusion of the child's out-of-court disclosure. As demonstrated in *Khan* v. *C.P.S.O.*, "reasonably necessary" means that the hearsay may be required "in order to obtain an accurate and frank rendition of the child's version of the relevant events".[291] However, while in *Khan* v. *C.P.S.O.* the child was "unable to give anything approaching a full description of the events",[292] it was evident that the admission

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290. See discussion of *Johnson*, *supra* note 70, in section entitled "'Reasonably Necessary': Is Obtaining Other Admissible Evidence Impossible, Difficult or a Mere Inconvenience."

291. *Khan* v. *C.P.S.O.*, *supra* note 84 at 657.

292. *Ibid.* at 650.

of the child's hearsay did virtually nothing to fill in any missing details. It was apparent that the hearsay evidence was admitted primarily to bolster the credibility of the child's testimony.

*Khan* v. *C.P.S.O.* was of particular importance as it provided a list of factors to consider in determining whether the admission of the hearsay is "reasonably necessary". These factors imposed what this author considered to be reasonable limitations on the Crown's ability to tender hearsay evidence to fill in the gaps and missing detail in the evidence of a child-witness. Thus, the inability of the child to recall or effectively communicate the details of what had transpired must be reasonable in the circumstances.

The Ontario Court of Appeal decision in *G.N.D.* was reviewed and discussed. In that case we saw that the "necessity" for the admission of hearsay depended upon "whether an accurate, frank, and, by implication, full account"[293] had been given by the child in his or her testimony. Unfortunately, the Court in *G.N.D.* failed to identify what exactly was a "full and complete account". Does this mean that there can be no details or factual references missing in the child's testimony? What if the child's testimony refers to all the essential factual elements, but is primarily in response to leading questions, thus attracting diminished weight by the trier of fact? Is this still "an accurate, frank, and full account"? There still remains no authoritative answer to the question of whether the "necessity" for the admission of hearsay evidence can be based on the need to bolster or corroborate other existing evidence.

We then examined one provincial court's attempt to reconcile the need to receive a child's out-of-court disclosure into evidence in the face of their own testimony by linking the "necessity" principle to the principles which compel a judge to give a caution to the jury respecting children's testimony. In *R.* v. *W.B.*, Her Honour Judge Russell, since elevated to the Court of Queen's Bench, found that such a jury caution is warranted when a child shows "reticence or confusion" in testifying. Thus, where a similar "reticence or confusion" would have demanded such a caution, then the "necessity"

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293. *G.N.D., supra* note 101.

principle demands that the out-of-court disclosures by the child be admitted in evidence.

In our discussion of *W.B.*, we noted that the Court emphasized that the hearsay was not being admitted "for the purpose of bolstering the child's credibility". However, we concluded that this was, in fact, precisely the purpose for which the Crown tendered the hearsay. It would be a strained legal fiction to insist otherwise, and one which would serve no useful purpose. We then questioned whether it would be so offensive to admit hearsay to bolster the credibility of children, especially in light of the limitations imposed by Judge Russell. We concluded that adding Judge Russell's gloss to the factors set out by the Ontario Court of Appeal in *Khan* v. *C.P.S.O.*, provides a coherent and workable framework within which to determine whether there was a "necessity" to admit the out-of-court disclosure of the child despite the child having testified. This framework ensures that the lack of credibility necessitating the admission of the corroborative hearsay evidence is a function of the child's age and his or her being in the early stages of developing cognitive or communicative skills. The admission of corroborative hearsay evidence pursuant to this analysis does not offend Chief Justice Lamer's prohibition in *Smith* that the "necessity" for the admission of hearsay must not mean that it is merely "necessary for the prosecution's case".

With respect to who has the burden of proof, we found that the party tendering the hearsay must establish, on a balance of probabilities, the "necessity" for the admission of the hearsay. However, upon further examination we discovered that this burden is not as straightforward and clear as our initial perusal of the case law suggested. To establish the unavailability of other admissible evidence, evidence as to the factual circumstances surrounding the offence and the making of the disclosure may be sufficient to satisfy to the court that no other admissible evidence is realistically available. Clearly, the party tendering the hearsay evidence does not have an affirmative obligation to adduce evidence discounting or excluding every possible source of admissible evidence, no matter how remote. Rather, the party opposing the admission of the hearsay appears to have the tactical burden of eliciting enough evidence in cross-examination of the recipient-witness to make the existence of other sources of admissible evidence a "live issue". The party

tendering the hearsay must then address and discount any reasonable possibility by calling someone involved in the investigation to give evidence that this potential source of evidence was thoroughly explored and investigated in a timely manner, but to no avail. We noted how such a tactical burden on the accused to make the existence of other evidence a "live issue" does not adequately reflect the power imbalance between the Crown and the accused with respect to information regarding the conduct of the investigation.

If the Crown or Defendant, because of a perceived risk of psychological harm to the child-complainant, intends to admit hearsay evidence in place of calling the child-complainant to give *viva voce* evidence, the party tendering the hearsay had best call an expert to provide opinion evidence as to the risk of psychological harm to this specific child-complainant. It may also be vital that the expert have personally interviewed and assessed the child-complainant in reaching his or her conclusion regarding the risk of psychological harm. As a final note, if a party wishes to admit hearsay in addition to the declarant's *viva voce* evidence, to fill in the gaps or missing details, courts have demanded that a reasonable explanation for the memory lapse or lack of detail be provided from an expert witness qualified to give such opinion evidence.

We then examined how subsequent courts have applied and refined the "reliability" principle. While is it clear that the "reliability" inquiry is focused on the declarant, we found that the credibility of the recipient-witness often gets inextricably bound-up in the determination of the trustworthiness of the hearsay statement. While the relationship of the recipient-witness to the declarant may, in rare circumstances, have some relevance to the assessment of the declaration's "reliability", it is often given undue weight.

It is clear from *Smith* that the party tendering the hearsay has the onus to tender such evidence as to the circumstances surrounding the making of the declaration so as to "substantially negate" the possibility that any of the testimonial dangers are present and operative. However, courts have, in some instances, misunderstood the nature of this

burden. That there is "nothing to indicate [the declarant] was not telling the truth"[294] certainly does not discharge this evidential burden. Where the court is faced with no evidence either way as to the presence or absence of testimonial dangers in the out-of-court disclosure, the party tendering the hearsay evidence has failed to discharge its burden and the evidence should be excluded.

An analysis of the factors considered by different courts to be relevant to the "reliability" assessment demonstrated how diverse and varying judges' "common sense and experience" can be in exercizing this discretion. This discretion is extremely broad, with few limitations imposed on it. Not only does this promote inconsistencies and uncertainty in the law, but it allows for the judiciary to inject, unchecked, certain biases, assumptions or prejudices into the assessment of "reliability". For example, while close proximity of the complaint to the alleged assault may negate the possibility of adult suggestion or coercion being brought to bear to distort the child's disclosure, it is apparent that an additional and improper inference is sometimes drawn from this fact. The inference is that the shorter the duration between the alleged sexual assault and the first disclosure, the less likely it is that the declarant is fabricating or concocting the allegations of sexual assault. Unfortunately, the *Khan/Smith* framework does not promote an organized and structured analysis such that biases, assumptions and prejudices are made apparent so that the trial judge's discretion can be effectively reviewed by courts of appellate jurisdiction.

As was the case in *Khan*, it is apparent that the courts also take into consideration certain factors which have no logical relevance whatsoever to the inherent trustworthiness of a hearsay declaration. Factors such as the existence of corroborative real evidence, or that the hearsay declaration demonstrated a knowledge of sexual acts well beyond the years of that declarant, go to whether the allegations of sexual assault are true and not whether they are trustworthy.

The relevance of corroborative evidence as a factor in the "reliability" assessment was discussed at length, and its use as a factor in this assessment criticized. We reviewed

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294. *Acoose*, *supra* note 155.

the decision in *Wright*, where the United States Supreme Court rejected the use of corroborative real evidence as a factor in determining the "reliability" of hearsay, as this "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial".[295] That evidence confirming incidental factual assertions contained in the hearsay declaration should somehow bolster the trustworthiness of the entire declaration was also criticized. The truth of incidental factual assertions has no logical relevance to the "reliability" of other assertions contained in the hearsay statement.[296]

It appears that the degree of circumstantial probability of trustworthiness necessary to satisfy the "reliability" principle may vary in certain circumstances. While the availability versus unavailability of the declarant does not appear to affect this standard, principles of fairness reduce the requisite "reliability" threshold in certain circumstances. However, it is noteworthy that such a relaxed standard has only been applied in circumstances where the accused seeks to admit exculpatory hearsay evidence. It is unlikely that this fairness principle would operate in the reverse, to permit the Crown to admit inculpatory hearsay which does not satisfy the benchmark of the ordinary "reliability".

With respect to the third principle extracted from *Khan*, "fairness to the accused", this allows the court to exclude hearsay evidence which otherwise satisfies the twin criteria of "necessity" and "reliability" on the basis that its admission would be unfair to the accused. Such unfairness, for example, may result from the passage of a great deal of time from the making of the out-of-court declaration to when the declaration is tendered.[297] Such unfairness to the accused will be especially manifest when the Crown has been slow to bring the matter to trial, or the police are tardy in pursuing informational leads which would have been likely to produce other admissible evidence.[298]

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295. *Wright*, *supra* note 185 at 3151.

296. See discussion of *Miller*, *supra* note 202.

297. See *Finta*, *supra* note 31, where the hearsay evidence was over forty years old.

298. See *Mailman*, *supra* note 137.

This new approach to the admission of hearsay evidence raises few procedural issues. It now appears settled that the recipient-witness, as well as any other witness who can give evidence as to the circumstances surrounding the making of the out-of-court declaration, must be produced to give testimony in-chief at the *voir dire* and be available for cross-examination. While the parties cannot by agreement compel the court to admit otherwise inadmissible hearsay, they can greatly increase the likelihood that a court will find that the *Khan Smith* twin criteria are satisfied in the circumstances. Where the party against whom the hearsay is tendered concedes that of either the "necessity" or "reliability" principles are satisfied on the facts, the courts have been willing to accept this without further inquiry, so long as there is some reasonable basis for such a finding. Additionally, it appears that there are no notice requirements imposed on the party seeking to admit hearsay evidence pursuant to the *Khan Smith* framework. This is so even if the hearsay evidence fails to satisfy the criteria for some statutorily-created hearsay exception which was obviously intented to address this type of evidence and which imposes a notice requirement on the party tendering the hearsay.

In the section entitled "Critique of Framework" we reviewed many of the criticisms raised previously in our analysis and addressed some new ones. We concluded that the judiciary using only its "common sense and experience" in determining which factors bolster the "reliability" results in the same type of "arm-chair psychology" which produced many of the firmly entrenched hearsay exceptions in the 18th and 19th centuries, and which today are of questionable validity. Rarely do courts seek any guidance or assistance from modern psychological or sociological research as to human nature, particularly as to when people are more or less likely to lie, misperceive or suffer from faulty memory.

It was also made evident that in determining whether to admit hearsay in cases involving sexual assaults on children, some courts partake in a balancing exercise which appears remarkably similar to a s.1 analysis under the *Charter*. These courts reason that the extreme need to admit hearsay evidence in such cases counterbalances the societal interest in permitting only inherently reliable hearsay evidence to be admitted into the

criminal trial. However, while there may indeed be a very powerful societal interest which demands that hearsay evidence of slightly diminished or ambiguous inherent trustworthiness be admitted, we concluded that this balancing exercise is best done within the framework of a s.1 analysis under the *Charter*. That courts even go through this exercise supports the contention that the admission of hearsay evidence pursuant to the *Khan Smith* framework may sometimes result in the violation of the accused's rights as protected under ss. 7 and 11(d).

As was demonstrated in our analysis of *Caplette* and *Pilkington*, it is also evident that courts sometimes use the *Khan Smith* framework to circumvent the legislative intent of certain statutes dealing with the admissibility of evidence. In both *Caplette* and *Pilkington* there existed statutes which specifically addressed the type of hearsay evidence which was before the courts in those cases. Having failed to qualify for admissibility under those statutes, the courts, nonetheless, went on to consider the admissibility of the hearsay pursuant to the *Khan Smith* framework. The Court in *Caplette* even went so far as to admit the hearsay evidence without applying the notice requirements imposed by the statute as a condition of admissibility. Clearly, the court in *Caplette* was circumventing the legislative intent of the statute and encroaching on the jurisdiction of Parliament. In the final section of this chapter we examined the implications of the *Khan Smith* framework on the firmly-rooted hearsay exceptions existing at common law. We found that some courts have interpreted the broad language used by Chief Justice Lamer in *Smith* as a signal that the framework overlays itself onto all existing hearsay exceptions. Once the trial court has satisfied itself that the traditional preconditions attached to the exception are met in the circumstances, the court must then determine whether the twin criteria of "necessity" and "reliability" are also satisfied before admitting the hearsay. Thus, *Khan* and *Smith* cut back on the scope of the firmly entrenched hearsay exceptions.

As our analysis of *Laramee* demonstrated, an alternative method of overlaying the *Khan/Smith* framework onto the firmly-rooted common law hearsay exceptions is through the application of the *Charter*. The Manitoba Court of Appeal found that, as a minimum

constitutional standard, the principles of "necessity" and "reliability" must be satisfied before a hearsay evidence can be admitted against an accused in a criminal trial. Anything less infringes the accused's rights as protected under ss. 7 and 11(d) of the *Charter*. Although *Laramee* dealt with a statutorily-created hearsay exception, there is no reason that these arguments do not apply with equal force to common law hearsay exceptions.

# CHAPTER FIVE

## CONCLUSIONS AND RECOMMENDATIONS

> "In my view, it would be neither sensible nor just to deprive the jury of this highly relevant evidence on the basis of an arcane rule against hearsay, founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement, made under circumstances which do not give rise to apprehensions about its reliability, simply because the declarant is unavailable for cross-examination. Where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on that basis". Chief Justice Lamer in *R.* v. *Smith*[1]

In Chapter Two, we sought to identify the purpose and reason for the continued existence of the hearsay exclusion rule, as we suggested this to be the key to understanding the exceptions to the it. Through an analysis of both the rule's historical origins and development, as well as 20th century judicial pronouncements on the rationale underlying it, we concluded that the primary purpose of the hearsay exclusion rule is to preserve the party-litigants' right to cross-examine witnesses. The function of cross-examination is to probe and test for the presence of any of the four testimonial dangers - insincerity, misperception, faulty memory and ambiguity of language. If any of these testimonial dangers is operative, the evidence is to some degree unreliable. As the trier of fact has no basis upon which to logically assess or estimate the degree of trustworthiness of an out-of-court assertion, so as to accord the evidence its appropriate weight, it is excluded. Where the circumstances surrounding the making of an out-of-court declaration are such that concerns as to the presence of any of the testimonial dangers are obviated, then the hearsay declaration has a "circumstantial probability of trustworthiness". In such a case "the test of cross-examination would be work of supererogation".[2] If the hearsay evidence is the only way in which a party can establish

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1. [1992] 2 S.C.R. 915 at 935 [hereinafter *Smith*].

2 J.H. Chadbourn, ed., *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown & Co., 1974) at 251 [hereinafter *Wigmore on Evidence*].

a particular fact in issue, then a court should admit it into evidence. Thus, we concluded that two principles - "circumstantial probabilities of trustworthiness" and "necessity" - underlie most, if not all, categorical exceptions to the hearsay rule.

In Chapter Three we demonstrated how a number of firmly-rooted hearsay exceptions do not provide a practicable substitute for cross-examination, as some testimonial dangers may be present and operative and yet the hearsay declaration still can be received into evidence. Also, the admission of hearsay pursuant to these categorical exceptions undoubtedly offends the "necessity" principle in certain instances, as the hearsay is admitted despite there being already ample admissible evidence on the fact in issue. As a result, not only does the old categorical approach restrict the flexibility of the judiciary to admit hearsay which may be both necessary and reliable, but it also fails to ensure that only necessary and reliable hearsay is admitted into evidence. Thus, the old categorical approach does not adequately safeguard the rights of the accused in the criminal trial.

Clearly, the *Khan Smith* framework provides greater flexibility for the trial judge to permit the admission of hearsay where its reception into evidence admission would not offend the purpose and reason for the existence of the exclusion rule. However, as our discussion in Chapter Four demonstrated, this framework requires further fine-tuning and the imposition of some limitations on the trial judge, particularly with respect to the "reliability" assessment. The Supreme Court of Canada must revisit this "new approach" to admission of hearsay set out in *Khan* and *Smith*. In that regard, this author proposes that the recommendations contained in the following paragraphs be adopted or implemented by the Court.

With respect to the "reliability" criterion, I recommend that the Court expressly state that this assessment relates exclusively to the trustworthiness of the out-of-court declaration, not to the likelihood of the contents of the declaration being true. Determining whether the declaration is true or false is ultimately the responsibility of the trier of fact, after having reviewed and weighed all the evidence. As a result of this clarification, a number of factors considered by courts in the past to be relevant to the

"reliability" assessment will no longer be appropriate considerations. For example, the existence of real or other testimonial evidence corroborating the truth of the contents of the hearsay declaration would have no logical bearing on the inherent trustworthiness of the hearsay declaration.

I recommend that the Court should impose some framework of analysis requiring the trial judge to put his or her mind to the possible existence of each of the testimonial dangers and then specifically relate each factor considered in the "reliability" assessment to the testimonial danger it negates. Thus, any improper inferences drawn from the existence of a particular fact or circumstance would be more likely apparent. As a result, the trial judge's discretion in deciding what factors are relevant to the hearsay's "reliability" would be more open to appellate review.

The Court should stress that the focus of inquiry in the "reliability" assessment is on the declarant and the circumstances surrounding the making of the declaration. The credibility of the recipient-witness should not be a factor considered by the trial judge in determining the admissibility of the hearsay. The credibility of the recipient-witness will be given its due consideration when the trier of fact ascribes the appropriate weight to the hearsay evidence.

The Court should also re-emphasize that the evidential burden on the party tendering the hearsay evidence is a positive one to substantially negate the apprehensions associated with hearsay evidence. Thus, the party tendering the hearsay must establish that it is unlikely that any of the testimonial dangers are operative. If there is no evidence as to presence or absence of these testimonial dangers, then the evidence should be excluded.

I recommend that the Court expressly state that both the principles of "necessity" and "reliability" must always be satisfied before hearsay evidence is admitted into the criminal trial. The fact that the hearsay evidence is exceptionally reliable should not preclude the need to satisfy the "necessity" principle, as we concluded in Chapter Four that superior "reliability" of the hearsay is still not a perfect substitute for cross-examination.

I recommend that the need to bolster the credibility of a child-complainant's testimony be recognized as a valid ground upon which to base the "necessity" of the admission of out-of-court disclosures. This would alleviate courts from having to keep up the pretense of the legal fictions we identified in Chapter Four so as to admit hearsay evidence to bolster a child's credibility. Of course, some constraints would have to be imposed on this type of "necessity" so that it does not offend Chief Justice Lamer's prohibition that "necessity" must not mean "necessary to the prosecution's case". In that regard, I recommend that the Court adopt the framework set out by the Ontario Court of Appeal in *Khan* v. *C.P.S.O.*[3] and *R. v. Aquilar*,[4] along with the gloss propounded by Her Honour Judge Russell in *R. v. W.B.*

I also recommend that the Court expressly state that satisfaction of the twin criteria of "necessity" and "reliability" be the minimum threshold test for the admission of all hearsay evidence into the criminal trial. Thus, instead of simply having to demonstrate that the preconditions necessary to trigger application of a firmly-rooted hearsay exception are met, the party tendering the hearsay will have to establish that the twin criteria of "necessity" and "reliability" are satisfied in the circumstances.

Finally, I recommend that the Court should expressly prohibit the relaxation of the requisite standard of "reliability" to address situations where there is an pressing or substantial societal objective underlying the "necessity" for the admission of the inculpatory hearsay evidence in the criminal trial. Any such relaxation would, arguably, result in an infringement of the accused's right to a fair trial and not to be deprived of his or her liberty except in accordance with the principles of fundamental justice. Even in the face of an important societal interest or objective, the "reliability" standard should not be reduced without statutory authority. To do otherwise usurps legislative authority and

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3. (1992), 9 O.R. (3d) 641 (C.A.) [hereinafter *Khan* v. *C.P.S.O.*].

4. (1992), 10 O.R. (3d) 266 (C.A.) [hereinafter *Aquilar*].

denies the accused of the right to have the legislation reviewed within the framework of a s.1 analysis pursuant to the *Canadian Charter of Rights and Freedoms*.

With respect to the firmly-rooted hearsay exceptions recognized at common law, it appears that the *Khan Smith* framework overlays and cuts back on the scope of these existing exceptions. Even if a court refuses to recognize this broad application of *Khan* and *Smith*, where inculpatory hearsay evidence is admitted in a criminal trial, the *Charter* likely prevents the admission of hearsay evidence which fails to meet either of the twin criteria of "necessity" or "reliability". From our analysis in Chapter Three, it appears clear that many of the exceptions discussed there fail to satisfy one or the other of these principles in certain instances. The inherent "reliability" of the hearsay admitted pursuant to some of these exceptions is especially suspect as some of the 18th and 19th century rationales underlying these exceptions are today of questionable validity. In addition, even accepting the validity of the underlying rationales, many of these rationales address and obviate concerns respecting only one testimonial danger - insincerity. Thus, the circumstances cannot claim to provide a practicable substitute for cross-examination. As a result, it appears just a matter of time before we see such ancient and archaic categorical hearsay exceptions as the "dying declarations" or "spontaneous exclamations" become a point of interest only to legal historians.

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5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

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