BASIC PROBLEMS IN EXAMINATION AND CROSS-EXAMINATION*

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Introduction

The basic rules of evidence have not changed a great deal in recent years. However, there has been a large number of reported decisions, particularly within the last few years, which apply and elaborate upon these rules. These decisions seem to reflect a recurrence of practical problems with which judges and counsel must deal on a day-to-day basis. It may be opportune, therefore, to attempt to re-state some of these basic rules and to draw together and comment upon the more recent cases which deal with them. Most of these cases were decided in the context of criminal trials but, essentially, the authorities are equally applicable to civil trials.

Generally speaking, in our adversary system, a witness is considered at any particular time to be a witness for one side or the other. The applicable rules vary, depending on whether you are examining your own witness or a witness called by your opponent.

This article is, therefore, divided broadly into two parts to correspond with the situations, firstly, where counsel is examining his own witness and, secondly, where he is cross-examining, that is examining an opponent's witness. The situation where a witness has been called as one's own but does not co-operate, is dealt with at the end of the first part.

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I. *Examination-in-Chief.*

1. *General Restrictions.*

Apart from problems related to the "hearsay" rule, which is not dealt with in this article, two of the most commonly encountered restrictions upon the manner of framing questions to one's own witnesses are the rules relating to "opinion evidence" and "leading questions".

The rule with respect to "opinion evidence" is basically that a witness must testify only as to *facts*. He is not to draw *inferences, opinions* or *beliefs* from those facts. That is the function of the trier of fact. To use a modern version of Phipson's example,[1] a witness who merely saw a car with a bashed fender surrounded by particles of paint of a different colour, would not be allowed to testify that he had seen a car that had been in a collision with another car. He must depose only as to what he actually saw, that is the state of the vehicle, leaving the jury or judge to draw the conclusion that it had been in a collision with another vehicle. As with hearsay, the rule with respect to "opinion evidence" is an exclusionary rule rendering the testimony inadmissible.

A common transgression of this rule occurs where counsel might say: "Now you have heard the evidence of X, what do you think of it?" or "Are you suggesting that the previous witness was lying?" In *R.* v. *Markadonis*[2] the Supreme Court of Canada specifically disapproved as being improper, questions to an accused about his opinion of the veracity of Crown witnesses. In that case, the questions occurred during cross-examination of an accused. However, it is submitted that the decision should be equally applicable to examination-in-chief and to witnesses other than an accused. In each case the questions would be improper as attempting to elicit an opinion.

The major exception to this rule relates to "expert witnesses". In other words, persons who are qualified by some special skill, training or experience can be asked their opinion upon a matter in issue. The law with respect to "expert evidence" is another subject in itself and I do not propose to deal with it.

There are a number of more specific exceptions to the rule which are clearly established by authority such as an opinion of the general reputation for morality of an accused[3] and opinions as to distance, speed, identification or age.[4] However, the general

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[1] On Evidence (11th ed., 1970), p. 630.

[2] [1935] S.C.R. 657, per Duff C.J., delivering the majority judgment and "entirely" agreeing with the comments of Mellish J.A., of the Nova Scotia Supreme Court, on this point.

[3] *R.* v. *Tilley*, [1953] O.R. 609 (C.A.).

[4] *Porter* v. *O'Connell* (1915), 43 N.B.R. 458 (C.A.); *R.* v. *German*, [1947] O.R. 395.

statements in the following passage may be of greater potential value to counsel:

> There are a number of matters in respect of which a person of ordinary intelligence may be permitted to give evidence of his opinion upon a matter of which he has personal knowledge. Such matters as the identity of individuals, the apparent age of a person, the speed of a vehicle, are among the matters which witnesses have been allowed to express an opinion, notwithstanding that they have no special qualifications, other than the fact that they have personal knowledge of the subject matter, to enable them to form an opinion. Doubtless there are many other matters of common experience in respect of which persons with no special qualifications are permitted to state what is really a matter of opinion.[5]

The last sentence, in particular, suggests considerable scope for the addition of new categories to those already recognized by the authorities. It is also obvious that the presentation of evidence would be tortuous if minor and obvious inferences were not occasionally allowed.

It has been suggested that the most frustrating restriction upon examination-in-chief for the novice is the rule against leading one's own witnesses. It is often suggested that a leading question is one to which the answer "yes" or "no" would be conclusive. A better starting point is probably the following passage from Best *on Evidence*:[6]

> It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract—for the identical form of question which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable but the very fittest mode of interrogation in another.

Generally speaking, a "leading question" can be defined as a question which suggests the answer desired (for instance, "Did the defendant punch you in the nose?") or which is "loaded" in the sense of requiring the concession of a fact if it is to be answered (for instance, "When did you stop beating your wife?").

The rationale for the rule is essentially that experience has shown that many witnesses will assent to questions which, upon subsequent reflection or cross-examination, they sharply qualify. For a variety of reasons, they may be led, unthinkingly, simply to assent to statements in the form of questions. There is also the danger of collusion between the examiner and the witness.[7]

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[5] *R.* v. *German, ibid.*, per Robertson C.J.O., at pp. 409-410. See also *R.* v. *Miller* (1959), 31 C.R. 101 (B.C.C.A.).

[6] (11th ed., 1911), quoted by Beck J. in *Maves* v. *G.T.P. Ry* (1913), 14 D.L.R. 70, at p. 74 (Alta C.A.). While the judgment is *obiter* on this point, it contains probably the singular most exhaustive Canadian judicial exposition on the subject and does not appear to have been rejected in any subsequent cases.

[7] *Smith* v. *Transcona*, [1923] 2 W.W.R. 995 (Man. K.B.); *Maves* v. *G.T.P. Ry, ibid.*

Whether or not a question is "leading" is a matter related to the weight of the evidence given rather than its admissibility. It is true that a judge may often say that he is disallowing a question because it is "leading" or suggest that a question be re-phrased. However, the answers to "leading questions" are not inadmissible in evidence.[8]

Nevertheless, the weight of such answers may be so diminished that they are of little or no evidentiary value. The trial judge's interjection is probably properly understood as a reflection of the view that the answers to certain questions are likely to be of such little evidentiary significance that there is little point in proceeding with them. Thus to be able to "get in" a highly leading question is likely to be a Pyrrhic victory for counsel.

However, there are a number of clearly established exceptions to the limitation against "leading questions". While Cross[9] suggests that it is impossible to draw up a comprehensive list, it may be useful to repeat some of the more commonly recognized situations where a leading question may be allowed. They are as follows:[10]

(1) With respect to introductory matters, which are undisputed, such as the introduction of a witness or the focusing of his or her attention upon a particular subject;

(2) Where the attention of the witness is directly pointed to persons or things for the purpose of identifying them;

(3) Where it is desired to have one witness contradict another as to remarks alleged to have been made, he may be directly asked whether or not the remarks were made;

(4) Where a witness is unable to answer questions put in the usual way because of the complicated nature of the matter upon which he is being questioned;

(5) Where a witness is a child or ill or has difficulty with the English language;

(6) Where a witness's memory is so defective that he is simply unable to answer.

The last category, in particular, reflects the nature of "leading questions" as going to weight rather than admissibility. The flexibility of the rule is illustrated by the broad discretion described in the following statement of Kellock J. in *Reference Re R. v. Coffin*:[11]

[8] *Moor* v. *Moor*, [1954] 2 All E.R. 458.
[9] On Evidence (3rd ed., 1967), p. 189.
[10] See, generally, *Maves* v. *G.T.P. Ry*, per Beck J., *supra*, footnote 6.
[11] [1956] S.C.R. 191, at p. 211.

> . . . while, as a general rule, a party may not either in direct or re-examination put leading questions, the Court has a discretion, not open to review, to relax it whenever it is considered necessary in the interests of justice . . ..

Thus if counsel exhausts every proper approach but still cannot obtain the desired answer, he may lead in the extreme, if necessary, to elicit the desired answer. But the trier of fact may simply disregard the answer elicited by deciding that no weight should attach to it.

There is authority which suggests that "leading" is relative to other criteria as well as to the particular factual situation. Thus it has been suggested that:[12]

> It is highly important under our system of criminal justice that a vital Crown witness should not be led in any way whatever.

It has also been suggested that a trial judge may ask leading questions of a witness to clear up doubtful points in his or her evidence.[13]

2. *Refreshing Memory: Use of Notes.*

A witness may not give evidence in court by reciting a prepared statement. However, it is clearly established that, provided certain conditions are met, a witness may properly refer to a document in order to "refresh memory".

In the recently reported decision in *R.* v. *Gwozdowski*,[14] the Ontario Court of Appeal quoted with *tacit* approval the following passages from Phipson:[15]

> A witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies; but such documents are no evidence *per se* of the matters contained.
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> . . . .
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> The writing may have been made either by the witness himself, or by others, provided in the latter case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct.
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> . . . .
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> The document must have been written either at the time of the transaction or so shortly afterwards that the facts were fresh in his memory. A delay of a fortnight may not be fatal; but an interval of several weeks, or six months, has been held to exclude.

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[12] *R.* v. *Chapman* (1958), 26 W.W.R. 385, per O'Halloran J., at pp. 391-392 (B.C.C.A.). Similarly, *R.* v. *Garand* (1959), 29 C.R. 324 (B.C. Co. Ct). But *Cf. Re R.* v. *Coffin, ibid.*

[13] *Connor* v. *Brant* (1914), 31 O.L.R. 274 (C.A.). Although in *Chapman, ibid.*, the leading question which was frowned upon by O'Halloran J.A., was asked by the court.

[14] (1973), 10 C.C.C. (2d) 434, at p. 437, per Gale C.J.O.

[15] *Op. cit.*, footnote 1, pp. 632-634, arts 1528-1529.

Phipson goes on to point out that it is not essential that a witness should have any independent recollection of the facts. It need not really be a "refreshing" of the memory at all. A witness could, therefore, refer to his cheque-book and, because of an entry he had made, testify that he had written a certain cheque on a certain date even though he still does not remember it.[16]

Thus, there are two categories. They have been described as "present memory refreshed" and "past memory recorded".

The example of the cheque-book involves "past memory recorded". Here the evidence is really the cheque-book rather than the oral testimony and the note in question must be made an exhibit. Of course, it still must be introduced through a witness who must testify that the fact of the entry ensures its accuracy.[17]

The category of "present memory refreshed" is encountered far more frequently. One of the most common situations is where a police officer makes notes about an occurrence shortly afterwards and then wishes to make reference to them at the trial. While the following passage is lengthy, it provides a very good illustration of the rule and its *rationale*:

> It is evident that police officers, whose observations sometimes relate to several matters in the same period of time cannot remember different dates, exact times, descriptions of persons or places without making notes. It is customary for the notes to be made by one of the constables and, in the evening or on the day following their inquiry for the two constables to make a more regular report of their observations based on the notes taken at the very time of their investigations. What is important is that the police officer, heard as a witness, be able to affirm that what he says, based on his notes, is the truth, and no more than the truth; he must be in a position to declare that when he compiled or completed his notes in the evening or on the next day, what he wrote was true according to his own knowledge and his own recollection. If only one of the officers has taken summary notes while the other was watching, and the notes have later been put into regular form or completed, both the officers, when called as witnesses at the trial, must be able to swear that the summary notes taken and the subsequent report that they prepared constituted an exact account of what had happened, adding that each of them had compared them and that they are true, according to the officers' own knowledge and recollec-

[16] *Fleming* v. *Toronto Ry Co.* (1911), 25 O.L.R. 317, where the Ontario Court of Appeal adopted Phipson on this point as well. See also the Note by Alan Mewett in (1953), 5 Crim. L.Q. 282.

[17] Reference should be made to the recent decision of *Ares* v. *Venner*, [1970] S.C.R. 608 in which the Supreme Court of Canada held that: "Hospital records including nurses' notes made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein", per Hall J., at p. 626, delivering the judgment of the court. The decision is probably based upon the complexities related to hospital records, including problems of hearsay, and should not be interpreted as modifying the general rule with respect to "past memory recorded".

> tion. It is clear that if their report, based on the first summary notes, had been completed several weeks or months later, the evidence would be greatly weakened, and the judge, considering the circumstances, could refuse to permit the witness to refer to his report. [18]

It must be established, therefore, prior to allowing the notes or documents to be used,[19] that they were made or adopted by the witness and that either the making or adoption was "contemporaneous".

In *R.* v. *Davey*,[20] Mr. Justice Aikins of the British Columbia Supreme Court provided a useful test in determining whether an adoption is sufficient and whether it is "contemporaneous":

> The crucial point . . . is whether the witness verified the accuracy of the note while his memory was still fresh so that he would have caught any inaccuracy.

In that case, the witness had given a license number to a police officer who entered it in his notebook and then broadcast it over his radio while the witness was present. The witness recognized the number at the time although there was no specific evidence that the constable, when broadcasting, was reading from his notebook. Aikins J. held that the magistrate had erred in not permitting the witness to refresh her memory from the notebook.

A note used in this manner does not become evidence. Rather, it merely assists the witness in giving his or her oral testimony, which must be done in the usual way.

However, the witness will generally be required to produce such a note if requested by the cross-examiner for the purposes of cross-examination.[21] Since it is the testimony which is the evidence, the note does not become an exhibit even if opposing counsel inspects it. On the other hand, if he cross-examines on it, it goes in as an exhibit *not as evidence of the facts* contained in it, but in order that the trier of fact might assess the witness's testimony and, in particular, whether the witness's memory was, in fact, refreshed. If counsel cross-examines on portions of the writing not used to "refresh", those portions not only go in as evidence, but go in as part of the cross-examining counsel's case.

While the circumstances surrounding the request for production of a document used to "refresh memory" may fall within the

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[18] *Archibald* v. *R.* (1956), 24 C.R. 50, at pp. 56-57, per Lazure J. (Que. S.C.) (translation) quoted in Canadian Abridgment (2nd ed., 1969), Vol. 15, pp. 595-596.

[19] But where the proper foundation had not been laid prior to the giving of the evidence yet emerged on cross-examination, the evidence was accepted on appeal as being admissible. *R.* v. *Fleming* (1972), 7 C.C.C. (2d) 57 (N.S. Co. Ct).

[20] [1970] 2 C.C.C. 351, at pp. 357-358.

[21] *R.* v. *Vallillee* (1954), 18 C.R.1 (Ont. C.A.); *McLean* v. *Merchants Bank* (1916), 27 D.L.R. 156 (Alta C.A.).

ambit of section 10(1) of the Canada Evidence Act,[22] it is submitted that the better view is that the requirement of production of notes used to "refresh memory" operates independently of section 10(1).

The power to require production under section 10(1) is entirely discretionary in the trial judge.[23] On the other hand, the authorities suggest that the rule of production for notes used to "refresh memory" is established independently at common law and, for practical purposes, a matter of right. Furthermore, section 10(1) would not cover a situation where the note is not the statement of a witness but the statement of another person which was adopted by the witness. Yet the rule requiring production of notes used to refresh memory would be broad enough to cover such a situation.

What if the witness does not refresh his or her memory on the stand, but on cross-examination it is learned that prior to testifying, notes were consulted? In *R.* v. *Kerenko*[24] the Manitoba Court of Appeal held that the witness was not bound to produce such notes. He might only be required to produce them when he required them to refresh his memory *at trial.*

However, in *R.* v. *Musterer*[25] a police constable admitted that he had used his notes of an interview with the accused to refresh his memory some two and one half hours before coming into court. Levey P.M. distinguished the *Kerenko* case and ordered production on the basis that where the "refreshing" is done outside of the witness box, it is within the discretion of the trial judge to determine whether it had occurred close enough to the time of testifying to fall within the rule requiring production. In *R.* v. *Lewis*,[26] Mr. Justice Ruttan, of the British Columbia Supreme Court, agreed with the *Musterer* decision and held that a witness who paces up and down the corridor refreshing his memory from notes immediately prior to going into court is as much refreshing his memory at trial as if he reads them in court.

In *R.* v. *Husbands*[27] the issue was whether, as a matter of law, a witness may read his testimony from the preliminary inquiry outside the courtroom prior to giving evidence at a trial in order to refresh his memory. Graburn Co. Ct J. held that the practice

[22] R.S.C., 1970, c. E-10.

[23] See *R.* v. *Lalonde* (1972), 5 C.C.C. (2d) 168, at p. 1974, and the cases cited therein (Ont. H.C.). See also *R.* v. *Harbison, Harbison & Gerz* (1973), 9 C.C.C. (2d) 259 (B.C. Prov. Ct).

[24] (1965), 45 C.R. 291.

[25] (1967), 61 W.W.R. 63 (B.C.). See also *R.* v. *Monfils* (1971), 4 C.C.C. (2d) 163 (Ont. C.A.) where, however, the basis upon which production was ordered was not clearly stated.

[26] (1968), 67 W.W.R. 243.

[27] Toronto, Ontario, December 14th, 1973. Unreported at the time of writing.

was neither illegal nor improper. On the other hand, if the witness had read the testimony of other witnesses ". . . it would be grounds for judicial censure and seriously affect the weight of the evidence, but not its admissibility".

3. *Previous Consistent Statements.*

Counsel will often be in the position of wanting very badly to put in evidence an earlier statement made by his client or another of his witnesses.

For example, prior to a criminal trial, an accused may have told the police that he was in another city when the crime occurred. If the accused will make a bad witness, because of past convictions or for other reasons, defence counsel might find it essential to keep him off of the stand. Operating under such a restriction, it may be very important to be able to introduce the statement through another witness.

Another example might be where a witness had made a statement long before the trial which is almost identical to the evidence given by that witness at the trial. Counsel will often want to be able to introduce that earlier statement to "reinforce" the testimony of the witness. The consistency and earlier date at which the statement was made, suggest to most people that the witness is probably telling the truth on the stand.

Such statements are generally said to be "self-serving" and, therefore, inadmissible. However, that description is really a generalization which embraces two distinct situations. Furthermore, it can be misleading since if the Crown introduces a statement of an accused which contains a self-serving portion as well as an admission, the self-serving portion is admissible as evidence in favour of the accused.[28] It is, of course, for the jury to decide whether any part of a statement is "for or against" an accused as well as the weight to be given to it.

In the first example, the introduction of the statement is sought in order to prove the truth of the facts contained therein. Its admissibility must therefore be determined by the "hearsay" rule. Since it does not fall within any of the recognized exceptions, it would be inadmissible hearsay.[29]

[28] *R.* v. *Hughes*, [1942] S.C.R. 517; *R.* v. *Harris* (1946), 86 C.C.C. 1 (Ont. C.A.) specifically discrediting *R.* v. *Jackson* (1933), 60 C.C.C. 52 (Ont. C.A.); More recently, see *R.* v. *Caccamo and Caccamo* (1973), 11 C.C.C. (2d) 249, at p. 252 (Ont. C.A.).

[29] Phipson argues that statements made by an accused person to the police *do* form a recognized exception. See also Statements of An Accused: Some Loose Strands (1972), 14 Crim. L.Q. 425, at pp. 426-442 where a similar argument is made on the basis of the Canadian authorities. The argument is rather abstruse and the Canadian courts do not generally recognize such an exception. Nor does *R.* v. *Graham* (1972), 7 C.C.C. (2d) 93 (S.C.C.), at least on its face.

In the second example, the introduction of the statement is sought, not to prove the facts contained in it (that can be done best by the witness himself) but, rather, to enhance the *credibility* of the witness. Here there is no question of hearsay.[30] There is another basis for excluding it, which is sometimes referred to as the rule against "self-corroboration".

The evidentiary basis for exclusion is probably best described in the following passage from Cross:[31]

> . . . in an ordinary case, the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true, unless there is some particular reason for impeaching them as false. The necessity of saving time by avoiding superfluous testimony and sparing the court a protracted inquiry into a multitude of collateral issues which might be raised . . . is undoubtedly a sound basis for the general rule.

The rule is, therefore, that a witness may not be asked in chief whether he has formerly made a statement consistent with his present testimony.

However, there is a well-established exception to the rule which can be of great value to counsel. It is the rule that where opposing counsel raises the suggestion that the witness's testimony is a "recent concoction"[32] a previous consistent statement of the witness may be introduced. The exception was clearly established by the Supreme Court of Canada decision in *Welstead* v. *Brown*[33] and has been referred to in a number of recently reported criminal cases.

The decision of the British Columbia Court of Appeal in *R.* v. *Wannebo*[34] provides a useful illustration. The accused, Wannebo was charged jointly with another and convicted of robbery. They both had been arrested very promptly after the commission of the offence. Wannebo's defence was that although he had accompanied the co-accused to and from the bank, he had no idea a robbery had occurred. He testified that he was under the impression that the co-accused had merely been cashing a cheque.

During his cross-examination of the accused, Crown counsel

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[30] *Cf.* Jessup J.A. in *R.* v. *Pappin* (1970), 12 C.R.N.S. 287, at p. 288 (Ont.) and in *R.* v. *Rosik* (1970), 2 C.C.C. (2d) 351, at p. 390, (Gale C.J.O. agreeing on this point) as well as Haines J. in *R.* v. *Lalonde, supra,* footnote 23, at pp. 180-181. See also the criticism of this approach in Statements of An Accused: Some Loose Strands, *op. cit., ibid.,* at p. 444.

[31] *Op. cit.,* footnote 9, p. 194. *Cf.* Laskin J., as he then was, and Hall J. concurring, in *R.* v. *Graham* (1972), 7 C.C.C. (2d) 93 where he seems to suggest that such statements can be admissible without any reference to the exception discussed on the following pages.

[32] Other terms which have been used in the cases are "afterthought", "reconstruction", "recent contrivance", "recent invention" and "recent fabrication". The process of introducing the statement is sometimes referred to as the "rehabilitation" of the witness.

[33] [1952] S.C.R. 3.

[34] (1972), 7 C.C.C. (2d) 266.

tried to establish that the witness's story of having innocently accompanied the co-accused at the robberies had been recently fabricated and contrived. Defence counsel, in turn, sought to re-examine his client with a view to showing that very shortly after the robbery and before there would have been an opportunity to consult with the co-accused, Wannebo made statements to a detective to the same effect as his testimony.

The trial judge refused to allow that re-examination, presumably, on the basis that the statement was "self-serving". However, the British Columbia Court of Appeal held that because of the Crown's suggestion of recent fabrication and contrivance, defence counsel became entitled to re-examine with a view to countering that suggestion by introducing the statement.

Another useful example is found in the recent case of *R.* v. *Lalonde*.[35] In that case a Crown witness testified that she saw a man stabbed and that she watched as the victim ran in a route across the lawn. Counsel for the defence made a strong attack on her credibility with the object of showing that the evidence was concocted and that from her vantage point she could not see what she purported to have seen. Mr. Justice Haines thereupon permitted the Crown to call as a witness a detective, who had spoken to the girl within twelve minutes after his arrival on the scene, and he testified that, in effect, she told him she had seen a man stabbed. He also permitted the girl's mother to testify that her daughter telephoned her shortly after the event and told her that there had been a big fight outside and that she had seen a man stabbed. In the words of Haines J.:

> I ruled that where a witness is attacked in cross-examination on the basis that his evidence is fabricated, or it is otherwise suggested that the witness's testimony is of recent invention, under the doctrine of rehabilitation of a witness, the party calling the witness can also call other testimony as to statements made by that witness on an earlier occasion consistent with the present testimony.[36]

He cites the *St. Lawrence* decision which is discussed below.

What is the evidentiary value of such a statement when introduced? In *Welstead* v. *Brown*,[37] Cartwright J., delivering the majority judgment, adopted the following passage from Phipson:[38]

> Such statements are, however, receivable . . . not to prove the *truth* of the facts asserted, but merely to show that the witness is consistent with himself . . ..

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[35] *Supra,* footnote 23.
[36] *Ibid.,* at p. 181.
[37] (1951), 102 C.C.C. 46, at p. 60; See also *Fox* v. *General Medical Council,* [1960] 3 All E.R. 225, at p. 230 (P.C.).
[38] *Op. cit.,* footnote 1 (8th ed., 1942), p. 480.

In other words, the statement is only relevant to the issue of credibility.

This exception to the rule against "self-corroboration" based upon "recent concoction" is, therefore, easy enough to state. The *Wannebo* and *Lalonde* cases provide straightforward illustrations of its application.

But there is an aspect of the exception which can cause greater difficulty. That is the question of the point at which an imputation as to recent contrivance can be said to have been made.[39] The issue has arisen in a number of recent decisions of the Ontario Court of Appeal.

In *R.* v. *Pappin* the majority (Gale C.J.O., Schroeder J.A., concurring) suggested that the issue as to recent concoction had to be expressly raised.[40] On the other hand, Jessup J.A., dissenting in part, said that the issue as to recent concoction had been raised *by implication*:[41]

> . . . the evidence of the accused, that very shortly after his arrest he told the police that he did not know the package contained drugs, is admissible. The Crown's case was that the package contained drugs when he had the package in his possession and the Crown had evidence leading to an almost irresistible inference that he did have that knowledge. Therefore, it was implicit in the Crown's case that when the accused said at trial that he did not know what was in the package, he must have recently contrived that evidence. If the trial judge had any doubt as to such being part of the Crown's case, he could have asked the Crown to state its position for the record.

A similar suggestion was also raised by Jessup J.A. in *R.* v. *Rosik*,[42] this time with Gale C.J.O. agreeing on this point.[43]

On the other hand, in the *Rosik* case, McKay J.A. presented the opposite approach:[44]

> The only way in which this evidence could have been introduced at this trial would have been if the appellant had gone into the witness-box and given evidence as to the taking of drugs and liquor and the Crown in cross-examination had suggested to him that his evidence in this regard was recently fabricated.

This approach is thus similar to the view taken by the majority in the *Pappin* case that the issue had to be "expressly raised".

The difference in the two approaches is significant. If the exception can be invoked by implication, on the broad basis suggested by Jessup J.A., there would be an allegation of recent concoc-

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[39] See, generally, Statements of an Accused: Some Loose Strands, *op. cit.*, footnote 29, at pp. 445-452.
[40] *Supra*, footnote 30.
[41] *Ibid.*, at p. 288.
[42] *Supra*, footnote 30, at p. 390.
[43] *Ibid.*, at p. 358.
[44] *Ibid.*, at p. 361.

tion arising almost automatically in every case. In other words, the mere effect of being at odds on any issue in the case would be sufficient. On the other hand, if the narrower approach were adopted, it would be necessary for opposing counsel to make an express imputation before a witness would be entitled to introduce a previous consistent statement.

Neither *Pappin* nor *Rosik* offer precise guidelines as to when an imputation of recent concoction can be said to have occurred.

Perhaps the clearest exposition of the rule, in the Canadian cases, is to be found in the judgment of Chief Justice McRuer in *R.* v. *St. Lawrence*.[45] In that case, a Crown witness testified that he saw the accused near the scene of the murder. On cross-examination, it was pointed out to the witness that, when first questioned by the police, he had denied any knowledge of the murder. The cross-examination included the following questions: "Why did you change your tune?", "Then you thought you had better tell a different story?", "You became frightened they might pin it on you?", "It was then you decided (that the accused was the man you saw)?".

Thus, there was very close to an express suggestion on cross-examination that the testimony was recently concocted. McRuer C.J.H.C., therefore, admitted evidence of another witness to the effect that the first witness told him, shortly after the discovery of the crime, that he had seen the accused man near the scene. In addition to examining the specific questions which were asked, however, the learned Chief Justice also considered what would be open to the cross-examiner to argue before the jury. He stated that if the statement of the second witness had not been introduced, ". . . it would be clearly open to argue to the jury that . . . [the first witness's] . . . story, in so far as it implicated the accused, was an afterthought and concocted for the purpose of shielding himself".[46]

From the authorities[47] adopted by Chief Justice McRuer, it seems clear that the imputation must be raised by opposing counsel and not simply by the Crown or plaintiff proving his case and the accused or defendant giving contrary testimony (as suggested by Jessup J.A. in *Pappin*). However, it is not essential that the imputation be made "in so many words". What is important is not the specific wording of the questions used by counsel, but what it would be open to argue to a jury.

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[45] (1949), 93 C.C.C. 376. This decision does not seem to have been brought to the attention of the court in either *Pappin* or *Rosik*.

[46] *Ibid.*, at p. 381.

[47] Phipson, *op. cit.*, footnote 38, p. 480; Taylor on Evidence (12th ed., 1931), p. 940.

The following passage, which was quoted in the *St. Lawrence* case, illustrates the point:[48]

> I presume that if the cross-examining counsel had expressed this imputation in a direct question the witness would not merely have been at liberty to deny it, but also to have shown that it was not the true inference to be drawn . . . by proving that he had previously told how Coll was a party to the attack. *But skillful counsel do not always deal in direct imputation. The same effect can be produced in even a more striking way by delicate suggestion.*

Thus for the exception to the rule against self-corroboration to come into play there must be some actual imputation of "recent concoction" by opposing counsel but it need not be direct.

What if a witness is cross-examined as to a previous inconsistent statement? Does that necessarily impute recent fabrication? It is submitted that it does not. In considering this very question, Holmes J. stated:[49]

> . . . it does not follow that the way is (then) open for proof of other statements made by him for the purpose of sustaining credit. There must be something either in the nature of the inconsistent statement or the use made of it by the cross-examiner to enable such evidence to be given.

To hold otherwise could leave little meaning to the word "recent" and would really amount to allowing "self-corroboration" whenever a witness's credibility was attacked either directly or indirectly (as in *Pappin*).

Most references to the exception under consideration refer to "recent concoction" being imputed on cross-examination. But there seems to be no reason in law or in logic, why it could not be raised through an opposing witness or through other statements.[50]

How do these rules apply to alibi evidence? It is often said that there is a "rule" that an alibi may be given less weight if it is not put forward at the first reasonable opportunity.[51] While the "rule" seems to have originally applied to preliminary inquiries, it probably extends to the time of police investigation. It has a practical *rationale* in recognizing the difficulty of police officers "checking out" an alibi if it is raised for the first time at trial. The

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[48] *R.* v. *Coll* (1889), 24 L.R. Ir. 522, per Holmes J., at p. 542, emphasis added, quoted in *R.* v. *St. Lawrence, supra*, footnote 45, at p. 379.

[49] *Ibid.*, at p. 541.

[50] *R.* v. *Rosik, supra*, footnote 30. *Cf.* McKay J.A., at p. 361.

[51] *R.* v. *Howarth* (1970-71), 13 Crim. L.Q. 109, at p. 110 (Ont. C.A.). The "rule" seems to have developed in England. See: *R.* v. *Hoare* (1966), 5 Crim. App. Rep. 166 (Ct Cr. App.); *R.* v. *Littleboy* (1934), 24 Crim. App. Rep. 192 (Ct Cr. App.). The English position is now covered by statute: Criminal Justice Act 1967, c. 80, s. 11.

evidentiary effect of the "rule" was clearly stated by the Supreme Court of Canada in *R.* v. *Russell*:[52]

> This is not a statement of any rule of law but rather a statement of a rule of expediency in advancing the defence of an alibi and a test that may well be applied by a jury in weighing the evidence.

What then is the relationship of this situation to the rule against self-corroboration and the "recent concoction" exception?

If the accused were to take the stand and give evidence of the alibi and, on cross-examination, if Crown counsel were to impute that the alibi was recently fabricated, there would be no problem. The imputation would spring the exception so that defence counsel would be entitled to introduce on re-examination, an earlier statement of the accused in which the alibi was given.

The problem may be stated in the following manner. May the Crown avoid alleging recent fabrication, thus preventing the defence from introducing the earlier statement, and still argue, on the basis of the alibi "rule", that the alibi should be given little weight because the evidence only discloses that it was raised for the first time at the trial? Even if ethical considerations might restrict the Crown from arguing in this manner (because of knowledge of an earlier statement), the judge might still put the alibi "rule" to the jury, as occurred in *R.* v. *Russell*.

There appears to be no authority directly on point. However, it is submitted that the ordinary rules with respect to self-corroboration and the exception based on "recent concoction" should be applicable to alibi evidence. Thus, unless there is an imputation of recent concoction by the Crown, Crown counsel should not be able to argue that the alibi should be given little weight because it was not raised earlier.[53] Nor should that point be considered by the trier of fact in the absence of such an imputation. Otherwise, the accused could be in the position of having adverse inferences drawn against him because of his failure to make an earlier statement when in fact he had made such a statement but was precluded by the self-corroboration rule from introducing it in evidence. (Another alternative might be simply to allow evidence of "early alibi" as a distinct exception to the "self-corroboration" rule quite apart from any imputation of "recent concoction").

4. *"Hostile" and "Adverse" Witnesses.*

In this area of the law of evidence it is easier to describe the

[52] (1936), 67 C.C.C. 28, at p. 32, per Hudson J., Duff C.J.C., Rinfret, Crockett and Davis JJ. concurring. See also Alibi Evidence (1967), 15 Chitty's L.J. 193 where it is suggested that a judge may instruct a jury as a matter of course along these lines.

[53] The general requirement to cross-examine, discussed under topic 2(a) *infra* might be sufficient to limit Crown comment.

procedures to be followed than to provide precise definitions of the terms or consistent interpretations of the authorities. The area is complicated by different legislative provisions at the federal and provincial levels in many provinces. At the same time, the procedures are essentially the same, with the differences being more of form than substance. Nevertheless, the following may provide a useful framework for dealing with practical problems in the area. Furthermore, it should serve to caution the unwary that since the essentially similar procedures followed federally and provincially are often based on different legislative provisions, there are some differences in terminology to be used in each situation.[54]

The starting point is the common law rule, codified in the Canada Evidence Act[55] and the Ontario Evidence Act[56] that a party producing a witness may not impeach that witness's credibility by general evidence of bad character. Nor may counsel cross-examine his own witness. Questioning is restricted by the rules governing examination-in-chief. Thus counsel might be in the position of having called a witness, with the expectation that he would give favourable testimony, when in fact the testimony turns out to be unfavourable. What can be done?

One thing that can always be done is to contradict the witness by calling other evidence. This option is also codified in both Acts. Rather curiously, however, section 9(1) of the Canada Evidence Act suggests that such evidence may only be led after the witness ". . . in the opinion of the court, proves adverse . . .". However, our courts have never recognized such a condition precedent. Perhaps Mr. Bull[57] best described the provision in question when he said:

> This is manifestly absurd as it would mean that a party would be bound by the first witness he called and could not call another witness who perhaps had a better opportunity to observe or better power of recollection and therefore might give contradictory evidence unless that witness was declared adverse. It has been universally held that this never was the law and such wording was a piece of bungling on the part of the legislative draftsmen.

It is clear, then, that there is no restriction under either Act with respect to the calling of other evidence to contradict a witness.

A second possibility is to have the witness declared "hostile" in order to be allowed to conduct a general cross-examination

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[54] The following discussion is based solely upon the provisions in the Canada and Ontario Evidence Acts.

[55] *Supra,* footnote 22.

[56] R.S.O., 1970, c. 151.

[57] The Hostile Witness (1962), 4 Crim. L.Q. 384, at p. 389. See also *Wawanesa Mutual Insurance Co.* v. *Hanes,* [1961] O.R. 495, at pp. 498-499, per Porter C.J.O., quoting from *Greenough* v. *Eccles* (1859), 5 C.B. (N.S.) 786.

(that is, in order to be allowed to ask leading questions, challenge the witness with regard to his means of knowledge on the matters about which he is testifying or test the accuracy of his memory or perception). *We are not here speaking of a situation covered by the Evidence Acts. There is no question of a prior inconsistent statement.* Counsel simply wishes to shed the restrictions which go with examination-in-chief and to be able, for example, to point out inconsistencies in the testimony being given and confront the witness with them.

The right to embark upon a general cross-examination of one's own witness is not expressly provided for in either the Canada Evidence Act or the Ontario Evidence Act. The existence of the right must flow, therefore, as a consequence at common law of a finding that a witness is "hostile" or "adverse". (The terms are used interchangeably here but attempts are made below to define them more precisely). That such a right does exist has been clearly recognized in the cases, as the following passage illustrates:[58]

> . . . defence counsel suggests that cross-examination of one's own witness, who is declared adverse under Ss. 9 and 10 of the Canada Evidence Act, is to be confined to the contradictory matters to which resort is made for impeaching the witness's credibility. The sections, however, are silent on that point. . . . A witness who is declared by the court to be adverse and, therefore, to be subject to cross-examination, is subject to such cross-examination as fully and freely as though he were the witness of the opposite party.

It is true that in *R.* v. *Milgaard*,[59] Chief Justice Culliton, in *obiter*, seems to suggest that cross-examination "at large", as a consequence of a finding of hostility, is embodied in section 9(1) of the Canada Evidence Act. But it is submitted that the better view is that the right to full cross-examination, quite apart from any previous statement, flows from a finding of hostility at common law.[60]

How then is the status of "hostile" to be defined? Generally speaking, "The weight of English and Canadian authority tends to support a construction which would render 'adverse' as the equivalent of 'hostile' in the sense of showing a hostile mind".[61] The following are some of the statements of the law in the earlier cases:

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[58] *R.* v. *Deacon (No. 3)* (1948), 5 C.R. 356, per Dysart J. (Man.). The decision of the Ontario Court of Appeal in *R.* v. *Cooper*, [1970] 3 C.C.C. 136 also illustrates the distinction between cross-examination on previous inconsistent statements and "at large".

[59] (1971), 2 C.C.C. (2d) 206, at p. 222 (Sask.).

[60] See also *Wawanesa Mutual Insurance Co.* v. *Hanes, supra,* footnote 57, at p. 528, per MacKay J.A. (Ont.) and *R.* v. *Marshall* (1972), 8 C.C.C. (2d) 329, at p. 340, per McKinnon C.J.N.S.

[61] *Wawanesa Mutual Insurance Co.* v. *Hanes, ibid.*, at p. 504, per Porter C.J.O.

> A hostile witness is a witness who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court.[62]
>
> . . . the weight of authority is overwhelmingly in favour of ("adverse") being construed as "showing a hostile mind".[63]
>
> A witness is "adverse" when he has exhibited such a hostile animus towards the party calling him as to reveal a desire not to tell the truth.[64]

These statements suggest that there must be some manifest hostility or animosity on the part of the witness towards the party calling him[65] so that the standard is not likely to be met easily.

The authority governing this general situation of allowing cross-examination "at large" is not precise. Many of the cases do not indicate whether they are speaking only of this situation. However, it is submitted that the courts are likely to continue to adopt a rather restrictive approach where counsel seeks to have his witness declared hostile in order to be allowed to embark upon cross-examination "at large". In any event, applications along these lines are relatively rare.

By far the most common situation occurs where the witness has not exhibited any "hostile animus" but has merely made a previous inconsistent statement. The importance of allowing counsel to impeach the credibility of his witness in such a situation was stated by MacKay J.A. in the *Wawanesa* case:[66]

> **The only purpose of a trial in so far as the facts of a case are concerned, is to ascertain the truth of the matters in issue and it seems to me that this purpose might well be defeated if a party were not permitted to show that a witness called by him in good faith, on reliance of the witness's previous statement, has told a story in the witness box inconsistent with his previous statements in respect of the same facts. In such cases it is of the utmost importance in the interests of justice that such a witness should be compelled to explain his change of story.**

The previous statement will often be a transcript of the preliminary inquiry or examination for discovery or simply an earlier statement made by the witness.[67]

What, then, can counsel do when his own witness begins to give testimony different from his earlier statements? Before rushing into an application under section 9 of the Canada Evidence Act or section 24 of the Ontario Evidence Act, there is a very practical approach which counsel might adopt. That is to suggest

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[62] *Coles* v. *Coles* (1866), L.R. 1 P. 70.

[63] *R.* v. *May* (1915), 23 C.C.C. 469 (B.C.C.A.).

[64] *R.* v. *Marceniuk*, [1923] 3 W.W.R. 758 (Alta C.A.).

[65] See also *R.* v. *McIntyre*, [1963] 2 C.C.C. 380 (N.S.C.A.); *R.* v. *Darlyn* (1947), 88 C.C.C. 269 (B.C.C.A.); *R.* v. *Coffin*, *supra*, footnote 11.

[66] *Supra*, footnote 57, at p. 534.

[67] Note that under s. 9(2) of the Canada Evidence Act, *supra*, footnote 22, it must be "in writing or reduced to writing".

to the witness that his memory might have been better at the time of making the earlier statement and asking whether he might not wish to "refresh his memory" by referring to the previous statement in the manner discussed earlier in this article. This approach was approved by the Supreme Court of Canada in *R.* v. *Coffin*.[68] Very often mere reference to the previous statement will sufficiently intimidate the witness to make unnecessary the more complicated procedure. However, "refreshing memory" does not permit cross-examination, and if the witness still does not co-operate, the procedure under the relevant Evidence Act will have to be followed.

The Canada Evidence Act will, of course, be applicable to trials under the Criminal Code and other federal statutes. The Ontario Evidence Act will apply to civil trials and trials of offences under provincial statutes in Ontario.

The relevant provision under the Canada Evidence Act is section 9(2) which provides as follows:

> 9(2) Where the party producing a witness alleges that the witness made at other times a statement in writing or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse.

The proper application of this provision has been explained in detail by the recent and very useful decision of the Saskatchewan Court of Appeal in *R.* v. *Milgaard*.[69] There, Chief Justice Culliton laid down the proper procedure to be followed under section 9(2) and I quote in full:[70]

(1) Counsel should advise the court that he desires to make an application under section 9(2) of the Canada Evidence Act;

(2) When the jury is so advised, the court should direct the jury to retire;

(3) Upon retirement of the jury, counsel should advise the learned trial judge of the particulars of the application and produce for him the alleged statement in writing, or the writing to which the statement has been reduced;

(4) The learned trial judge should read the statement, or writing, and determine whether, in fact, there is an inconsistency between such statement or writing and the evidence the witness had given in Court. If the learned trial judge decides there is no inconsistency,

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[68] *Supra*, footnote 11. See also the judgment of Schultz Co. Ct J. in *R.* v. *Garand*, *supra*, footnote 12.

[69] *Supra*, footnote 59. See also (1972), 4 C.C.C. (2d) 566 (S.C.C.) refusing leave to appeal without expressing an opinion as to the need to hold a *voir dire* prior to granting leave under section 9(2).

[70] *Ibid.*, at pp. 221-222. The decision has been adopted by the Nova Scotia Court of Appeal in *R.* v. *Polley* (1972), 5 C.C.C. (2d) 95.

then that ends the matter. If he finds there is an inconsistency, he should call upon counsel to prove the statement or writing;

(5) Counsel should then prove the statement, or writing. This may be done by producing the statement or writing to the witness. If the witness admits the statement, or the statement reduced to writing, such proof would be sufficient. If the witness does not so admit, counsel then could provide the necessary proof by other evidence;

(6) If the witness admits making the statement, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted;

(7) The learned trial judge should then decide whether or not he will permit the cross-examination. If so the jury should be recalled.

Chief Justice Culliton had earlier made it clear that the granting of permission to cross-examine is not an absolute right, but in the discretion of the judge.

The purpose of the cross-examination on the inconsistent statement is to attack the credibility of the witness with respect to the evidence already given.[71] But proof of a prior inconsistent statement does not mean that such evidence is to be wholly disregarded. The weight of the evidence is entirely for the trial tribunal.[72] The introduction of the prior inconsistent statement is not evidence of the facts therein unless (and then only to the extent that) the witness adopts that statement as part of his testimony at the trial.[73]

It is important to keep in mind that in this whole process the issue of "adverse" or "hostile" has not yet arisen. The procedure under section 9(2) merely provides for cross-examination with respect to a prior inconsistent statement. The judge may decide that the previous statement is sufficiently inconsistent and made in such circumstances that cross-examination should be allowed. If so, it must be restricted to cross-examination *on the inconsistent statement.*

Nevertheless, that cross-examination could lead to a further

[71] *Ibid.*, at p. 222.
[72] *R.* v. *Disano* (1944), 81 C.C.C. 272 (Ont. C.A.).
[73] *Deacon* v. *The King*, [1947] S.C.R. 531. See also the very recent decisions in *R.* v. *Hamelin* (1973), 10 C.C.C. (2d) 114 (B.C.C.A.); *R.* v. *Laing* (1973), 10 C.C.C. (2d) 161 (Ont. C.A.) and *R.* v. *Gwozdowski, supra,* footnote 14.

step. It might lead the judge to conclude that the witness is not only inconsistent, but "adverse" or "hostile" as well. That would allow counsel to go beyond the statement and enter upon general cross-examination.[74]

Presumably, if a second inconsistent statement were raised after a declaration of "adverse", the procedure in section 9(1) would apply without the necessity of going through the same procedure once more. Similarly, if a general declaration of "adverse" or "hostile", as discussed earlier, were made on the basis of the witness's hostility and antagonism on the stand, without any reference to a prior inconsistent statement, such a statement could then be introduced under section 9(1) without recourse to the procedure under section 9(2) which was explained by *Milgaard*.

In moving to the Ontario Evidence Act,[75] the first noticeable feature is the similarity between its section 24 and section 9(1) of the federal statute. The provisions are as follows:

> S. 24. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement.
>
> S. 9(1). A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

The second feature is that the Ontario Act does not contain a provision similar to section 9(2) of the federal Act. Therefore, apart from a general declaration of hostility on the common law basis, the entire procedure under the Ontario Act must be found in section 24. In the Ontario Evidence Act there is no explicit provision for cross-examination on a statement which is merely inconsistent. There must first be a finding of "adverse".

The effect of the *Wawanesa* decision[76] can be said to have been to interpret section 24 of the Ontario Act as providing for cross-

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[74] See the "second possibility" discussed *supra*.
[75] *Supra*, footnote 56.
[76] *Supra*, footnote 57.

examination of one's own witness on a previous inconsistent statement alone. However, since the wording of section 24 does not expressly provide for cross-examination on an inconsistent statement, it was necessary to extend the definition of "adverse" to include a situation where the witness ". . . is unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him".[77] In addition, it was held that the statement itself could be considered in determining whether the witness is "adverse". There are two majority judgments (Porter C.J.O. and McKay J.A.) and one dissenter but it is submitted that this is the thrust of the decision.

The *Wawanesa* decision preceded and probably was the reason for the addition[78] of section 9(2) to the Canada Evidence Act. Section 9(2) was added to the federal statute to provide specifically for cross-examination on the basis of "inconsistency". The former section 9 was simply designated as section 9(1) without any further modification.

It might be useful, in dealing with the *Wawanesa* judgment, to distinguish between the terms "hostile" and "adverse". McKay J. A. does so in the following passage:[79]

> . . . unquestionably if the witness is "hostile" the common law rule applies and he is subject to a general cross-examination as to all matters in issue; whereas, under the statute, if he is adverse, the only right given is to produce the prior inconsistent statement and cross-examination should be limited to the prior inconsistent statement only.

Porter C.J.O. puts the matter another way:[80]

> Section 24 . . . embraces inconsistent prior statements made by a hostile witness, and by one who though not hostile is unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him.

As awkward as it may seem, there is a difference in terminology which is required under the two Acts. In effect, the language of section 24 requires that the word "adverse" be used when "inconsistent" is often all that is involved.

The procedure laid down in *Wawanesa*[81] will not be analyzed in detail. One is probably safe in following essentially the same procedure as that described in *Milgaard*. The evidentiary effect of statements introduced under the Ontario legislation is the same as that discussed earlier with respect to the federal Act.

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[77] *Ibid.*, at p. 507, per Porter C.J.O.
[78] See S.C., 1968-9, c. 14, s. 2.
[79] *Supra*, footnote 57, at p. 532.
[80] *Ibid.*, at p. 507.
[81] See generally the discussions of this decision in H. H. Bull, *op. cit.*, footnote 57, and the comment by J. W. Morden, now Morden, J. in (1962), 40 Can. Bar Rev. 96.

To summarize:

(1) Counsel may not impeach the credit of his witness by general evidence of character;

(2) Counsel may introduce other evidence to contradict evidence given by his own witness;

(3) If his witness is declared "hostile", counsel can enter into a general cross-examination of him. (This is quite apart from the provisions in the Evidence Acts, provided that even if a witness has been declared hostile, section 9(1) or 24 must be complied with if a prior inconsistent statement is introduced);

(4) If his witness gives testimony inconsistent with a previous statement, counsel may use the statement in an attempt to refresh the memory of the witness;

(5) If his witness gives testimony inconsistent with a previous statement and item (4) does not assist, counsel may make an application to cross-examine on the statement:
   (a) on the basis that it is "inconsistent" if section 9(2) is applicable;
   (b) on the basis that the witness is "adverse" (unfavourable) under section 24;

(6) If cross-examination is allowed under item (5) the result of it might lead the trial judge to conclude that the witness is adverse in the sense of being "hostile" thereby permitting general cross-examination as under item (3).

A recent example of the confusion that still surrounds the application of these rules is found in the report of the recent decision of the Ontario Court of Appeal in *R.* v. *Gwozdowski*.[82] During the course of examination of a Crown witness in a non-capital murder trial, the Crown must have concluded that the witness was not being entirely candid. Counsel produced a previous statement on the basis that it was to be used to refresh her memory. When asked whether the statement assisted her recollection about a certain matter:

> . . . she plainly indicated that she did not know what [counsel] meant by the question, and Crown counsel, without leave, thereupon, and at

[82] *Supra*, footnote 14. See also *R.* v. *Marshall* (1972), 8 C.C.C. (2d) 329, where the correct procedure had not been followed by the trial judge but the Nova Scotia Court of Appeal held that the cross-examination happened substantially to accord with the provisions of section 9(2) and that even if there was error in applying the section there was "no substantial wrong . . .".

considerable length, cross-examined her as to her credibility on matters quite unassociated with the statement.[83]

Needless to say, the Court of Appeal regarded the procedure as highly improper.

II. *Cross-Examination.*

1. *General.*

The purpose of cross-examination is often stated to be twofold:

> . . . to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses.[84]

Indeed, a defendant is entitled to cross-examine a plaintiff's witness on every issue and, thereby, to establish, if he can, the entire defence.[85]

The scope of cross-examination is extremely broad. It is not confined to matters upon which the witness has already been examined-in-chief. Thus if a party calls a witness for even a trifling thing, the other side may cross-examine him upon the whole of the matters in issue. However, in eliciting new evidence, the opposing party runs the risk of being bound by unfavourable testimony.[86]

In addition to questioning on matters in issue, cross-examination opens up a broad range of questioning related to credibility. Thus questions may be asked of a witness tending:

(1) to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment; or

(2) to expose the errors, omissions, contradictions and improbabilities in his testimony; or

(3) to impeach his credit by attacking his character, antecedents, associations and mode of life; and in particular by eliciting (a) that he has made previous statements inconsistent with his present testimony; or (b) that he is biased or partial in relation to the parties to the cause; or (c) that he has been convicted of any criminal offence.[87]

However, the issue of credibility is one of fact and cannot be

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[83] *Ibid.*, at p. 435. The trial judge had also failed properly to warn the jury that they might not rely upon certain parts of statements unless they had been adopted as the truth by the witness. See footnote 73, *supra.*

[84] *Op. cit.*, footnote 1, pp. 648-649, specifically quoted in *Jones* v. *Burgess* (1914), 43 N.B.R. 126. See also Cross on Evidence, *op. cit.*, footnote 9, p. 211.

[85] *Lamb* v. *Ward* (1860), 20 U.C.Q.B. 304 (C.A.); *Dickson* v. *Pinch* (1861), 11 U.C.C.P. 146 (C.A.).

[86] *R.* v. *Schraba*, [1921] 3 W.W.R. 107 (Man. C.A.).

[87] *R.* v. *Mulvihill* (1914), 18 D.L.R. 189, quoting from Phipson, *op. cit.*, footnote 1, (5th ed., 1911), p. 195; *Wallace* v. *Davis* (1926), 31 O.W.N. 202.

determined by a set of rules. Human characteristics such as the integrity and intelligence of the witness, whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive all become important. These and other questions may be largely answered from the observation of the witness's general conduct and demeanour on the stand.[88]

Leading questions may be asked on cross-examination, although the extent to which answers are elicited through leading the witness, may still affect the weight to be given to those answers.[89]

Nevertheless, there are restrictions upon the scope of cross-examination, the first of which is relevance. The questioning must be relevant either to a fact in issue or to credibility. While considerable latitude should be given on cross-examination, there clearly are limits:

> No doubt the limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issue of the witness's credibility necessarily enlarges the field. But that does not mean that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or to the issue raised in the pleadings is no more admissible in cross-examination than in examination-in-chief.[90]

The trial judge may also control counsel with respect to the repetition of questions, particularly where they are of marginal relevance.[91]

Nor may cross-examination be used merely to harass the witness. Obviously, the discretion of the trial judge will be very important in determining whether a particular question or line of questioning is vexatious or abusive:

> It is the duty of the Court to protect witnesses from harsh and oppressive treatment by counsel. The duty is not easy to discharge, for some witnesses are so penurious of truth that they will only part with it when torn from them by violence . . . . Rule 255 [Now Rule 254 in Ontario] gives to the judge power to disallow any question put to a witness which may appear to the judge to be vexatious and not relevant to any matter proper to be inquired into at trial.[92]

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[88] *White* v. *R.*, [1947] S.C.R. 268.

[89] *R.* v. *Deacon* (1947), 3 C.R. 129 (Man. C.A.). There is authority to the effect that if a witness appears too willing to aid the case of the party cross-examining him, the trial judge may forbid further leading questions: *Stewart* v. *Walker* (1903), 6 O.R. 495.

[90] *Brownell* v. *Brownell* (1909), 42 S.C.R. 368, per Anglin J.; See also *N.B. Elec. Power Commission* v. *Barberie* (1968), 70 D.L.R. (2d) 492 (N.B.C.A.).

[91] *Dickinson* v. *Harvey* (1913), 72 D.L.R. 129 (B.C.C.A.).

[92] *Murray* v. *Haylow* (1927), 60 O.L.R. 629 (C.A.). See also *R.* v. *Prince*, [1946] 1 D.L.R. 659 (B.C.C.A.) with respect to the impropriety of "double barrelled" questions.

However, it should not be forgotten that there are also limits to the scope of permissible judicial interference.[93]

A number of recent decisions illustrate the importance of allowing a full cross-examination. In *R.* v. *Roulette*[94] the accused's counsel entered upon a lengthy cross-examination of the physician who had treated the murder victim prior to his death. After three hours of cross-examination, the preliminary hearing was adjourned until the next morning, whereupon the magistrate informed counsel he would permit only thirty minutes more of cross-examination. Defence counsel was required to discontinue after the thirty-minute period expired.

Mr. Justice Matas, then of the Manitoba Queen's Bench, granted *mandamus* directing the magistrate to resume the preliminary inquiry and allow continued cross-examination even though Matas J. was of the opinion that defence counsel ". . . could well have shortened his cross-examination without prejudice to his client's position".

In *R.* v. *Makow*[95] Chief Justice Farris, delivering the majority judgment of the British Columbia Court of Appeal, said:[96]

> Once a relevant line of questioning is precluded the Court cannot speculate as to what answers might have been obtained and what the effect of them would have been had the questioning been pursued. The denial of the right to cross-examine on a relevant matter, particularly as to conversations taking place during the actual act of the alleged rape, is, in my view, a denial to the accused of the opportunity to make full answer and defence.

The majority refused to apply section 613(1)(b)(iii) of the Criminal Code and ordered a new trial.

The issue of judicial restriction of cross-examination was considered even more recently in the case of *R.* v. *Bradbury*.[97] After the protracted cross-examination of a police officer by defence counsel, the trial judge stated that he would be allowed only a specified number of minutes to complete his cross-examination. This ground of appeal was dismissed on the basis that, despite the threats to terminate it, the cross-examination, (which Mr. Justice Kelly described as "both exhaustive and exhausting") extended well past the announced limits and no pertinent area was left unexplored by reason of any improper ruling.

In delivering the judgment of the Ontario Court of Appeal, Mr. Justice Kelly made some very useful general comments about

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[93] *R.* v. *Viger* (1958), 29 C.R. 302 (Ont. C.A.); *R.* v. *Miller*, *supra*, footnote 5; *R.* v. *Rewniak* (1949), 7 C.R. 127.
[94] (1972), 7 C.C.C. (2d) 244.
[95] (1973), 13 C.C.C. (2d) 167.
[96] *Ibid.*, at p. 169.
[97] (1974), 14 C.C.C. (2d) 139.

the role of the trial judge in relation to the conduct of cross-examination before him:

> The right and indeed the responsibility of the trial Judge to control the proceedings before him to prevent conduct which may well be or become an abuse of the process of the Court is unquestioned. It must, however, be exercised with caution so as to leave unfettered the right of the defendant, through his counsel, to subject any witness's testimony to the test of cross-examination. The disallowance of questions ruled improper, as inviting the introduction of hearsay evidence, or as being irrelevant or for the protection of a witness from unwarranted harassment falls within the scope of the trial Judge's authority. We do not consider that it is allowable, in advance to place any restriction on the length of time to be consumed by cross-examination. The rulings of the trial Judge should be made when questions are put or about to be put and should be confined to the propriety of the question or questions in issue.

The word "unfettered" must, of course, be read in the context of the entire passage.

In *Pilon* v. *the Queen*[97a] the Quebec Court of Appeal held that the accused was not afforded the opportunity to make full answer and defence, because the trial judge precluded his counsel from cross-examining fully the Crown's principal witness. The trial judge had refused to permit questions on the basis that they were not relevant but Chief Justice Tremblay, delivering the judgment of the court, stressed the importance of cross-examination with respect to credibility.[97b]

Another restriction is based upon the impropriety of misleading a witness by the mis-statement of facts or by the statement of facts which are unproved. Cross points out that questions which suggest the existence of unproved facts might well be disallowed, even in cross-examination. He cites authority[98] to the effect that questions put to a witness in cross-examination ought to be put in interrogative form; they should commence "did you?" and not "you did".[99] However, counsel may put questions in cross-examination based on material which he is not in a position to prove directly.[100]

Finally, it should be pointed out that the rules of admissibility are in no way relaxed in cross-examination. The broader latitude

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[97a] (1973), 23 C.R.N.S. 392.

[97b] He also adopted a number of useful passages from the judgment of Dennistown J.A. of the Manitoba Court of Appeal in *R.* v. *Anderson* (1938), 70 C.C.C. 275 which describe the proper scope of cross-examination.

[98] *R.* v. *MacDonnell* (1909), 2 Cr. App. Rep. 322.

[99] Cross, *op. cit.*, footnote 9, p. 189. See also *Brunet* v. *R.*, [1928] S.C.R. 375, at p. 383, per Smith J., delivering the majority judgment.

[100] *Fox* v. *General Medical Council*, [1960] 1 W.L.R. 1017, applied by the Ontario Court of Appeal in *R.* v. *Bencardino and De Carlo* (Unreported. Released on December 1st, 1973).

in questioning does not extend to the introduction of otherwise inadmissible evidence.[101]

Is it necessary to cross-examine? Generally speaking, a party should put to each of his opponent's witness, in turn, so much of his own case as concerns that particular witness. Where it is intended to suggest that the witness is not being truthful on any matter, it should normally be put to him so that he may have an opportunity of explaining the contradiction.[102]

In *R.* v. *Vanmeer*[103] it was held that if counsel considered a word used by a witness to be capable of having an ambiguous meaning, there was a duty on counsel to cross-examine on it. In *R.* v. *Dyck*,[104] counsel for the accused led evidence in a rape case that the complainant had "necked" and went out into a car with the accused. At no time throughout the whole of the cross-examination of the complainant was there any suggestion of these facts. The British Columbia Court of Appeal adopted Phipson's statement of the law and pointed out that the failure to cross-examine was tantamount to an acceptance of the complainant's version. Furthermore, the omission was wrong if the defence intended to call evidence to contradict the complainant.

The credibility of witnesses will obviously be crucial to the determination of many, if not the vast majority, of disputed issues. In the remainder of this article, three specific areas of cross-examination as to credibility are briefly considered: cross-examination as to collateral matters, cross-examination as to previous convictions and cross-examination as to previous inconsistent statements. Cross-examination as to "bias" is mentioned in passing.

2. *Collateral Issues Generally.*

The general rule has been stated in the following manner:

> A witness may upon cross-examination be asked any question concerning his antecedents, associations or mode of life which although irrelevant to the issue would be likely to discredit his testimony or degrade his character but he cannot always be compelled to answer and his answers cannot, unless otherwise relevant to the issue, be contradicted.[105]

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[101] *Allen* v. *R.* (1911), 44 S.C.R. 331, adopted in *Brunet* v. *R.*, *supra*, footnote 99, at p. 383, per Smith J., delivering the majority judgment.

[102] Cross, *op. cit.*, footnote 9, pp. 211-212; Phipson, *op. cit.*, footnote 1, p. 649. *Browne* v. *Dunn* (1893), 6 R. 67, per Lord Herschell, adopted by Duff J. in *Peters* v. *Perras* (1909), 42 S.C.R. 244.

[103] (1950), 10 C.R. 149 (Ont. Co. Ct).

[104] (1969), 70 W.W.R. (2d) 449.

[105] Phipson, *op. cit.*, footnote 1 (5th ed., 1911), p. 462. Cited in *Geddie* v. *Rink*, [1935] 1 W.W.R. 87, at pp. 101-102 (Sask. C.A.) and also (4th ed., 1907), in *R.* v. *Bell* (1930), 53 C.C.C. 80 (Alta C.A.). Applied in *R.* v. *Miller* (1940), 74 C.C.C. 270 (B.C.C.A.).

It is to be noted that on this basis for questioning as to credibility any aspersion must be found in the answer of the witness alone since the answer cannot be contradicted.[106]

The basis for the rule is that while a witness' answers to questions such as these may be relevant to his credibility, the court will not allow itself to be sidetracked by hearing contradictory evidence on this collateral issue. Therefore, the answer must be taken for better or for worse and it cannot be contradicted by other evidence.

The finality of the answer has been described in terms of "binding" the questioner:

> It has long been settled that when an irrelevant question of this nature is put to a witness of the opposite party, and is answered, the party putting the question is bound by the answer and cannot be allowed to produce witnesses to prove that the answer is false.[107]

The word "irrelevant" must not be taken as implying that any irrelevant question may be asked. The rule does allow questions of this nature which are irrelevant to any fact in issue. But they must still be relevant to credibility and the judge may in all cases disallow any questions which may appear to him to be vexatious or not relevant. Along these lines, Phipson suggests the examples of alleged improprieties of remote date or questions of such a nature as not seriously to affect present credibility.[108]

A trial judge is not likely to permit questioning on collateral issues when the object is really to harass the witness. The Bar Council in England has laid down ethical guidelines for counsel in cross-examination.[109] The relevant rule in the present context is Rule Four:

> Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual inquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well founded or true.

Subsequent rules provide that a barrister may act upon the opinion of a solicitor that an imputation is well founded or true. However, where the information comes from any other person, the barrister should not accept the imputation as being well founded or true ". . . without ascertaining as far as is practicable in the circumstances whether the person has substantial reasons for his state-

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[106] *R.* v. *Steinberg*, [1931] O.R. 222, aff'd. [1931] S.C.R. 421. See esp. Grant J.A. (dissenting on other grounds), at p. 255. See also *The King* v. *Muma* (1910), 17 C.C.C. 285 (Ont. C.A.).

[107] *The King* v. *Muma*, *ibid.*, at pp. 289-290, per Maclaren J.A.

[108] Phipson, *op. cit.*, footnote 1 (9th ed., 1952), p. 655, quoted in *R.* v. *Mahonin* (1957), 119 C.C.C. 319, per McInnes J. (B.C.). See also *Brownell* v. *Brownell*, *supra*, footnote 90.

[109] Quoted in Phipson, *op. cit.*, *ibid.*, pp. 651-652.

ment". The further limitation is also expressed that such questions should not be put if they are of such a character or where they relate to matters so remote in time, that they might only marginally affect credibility.

Does a trial judge still, in view of *R.* v. *Wray*,[110] have a discretion to rule evidence on collateral matters, of the kind under discussion, to be inadmissible on the basis that it is too prejudicial? It is submitted that the *Wray* decision did not eliminate the discretion described in *Noor Mohamed* v. *The King*.[111] Rather, it interpreted the scope of that discretion as not extending to considerations as to the manner in which evidence is obtained. Indeed, one might well envision circumstances where the evidence of collateral matters as to antecedents, associations or mode of life is "gravely prejudicial" to the accused with reference to his position at the trial and only of "trifling weight".[112]

It must be remembered that contradictory evidence may always be offered with respect to a fact in issue. Thus, where a question might seem, on its face, to be related to a collateral matter, it might also be relevant to a fact in issue. If so, the witness's answer could be contradicted by other evidence. Thus a complainant in a rape case may be cross-examined with respect to her chastity and whether she had intercourse with other men, including the accused. But her answers are final and cannot be contradicted by other evidence. However, if consent is in issue, then previous acts of intercourse with the accused are relevant to that "fact in issue" and she may be contradicted by other evidence if she denies previous voluntary intercourse with him.

The application of the rule with respect to collateral issues is clearly illustrated in the recent decision of the Ontario Court of Appeal in *R.* v. *Rafael*.[113] The accused was charged with fraud in connection with the operation of a travel agency run by him. The allegations related to obtaining money from various persons by holding out to them that he would obtain for them landed immigrant status in Canada.

The accused gave evidence and was asked in cross-examination whether he had filed income tax returns over a period of years. He answered by stating that he had done so except for two or three years when his books were under seizure by Crown authorities. The Crown then called evidence in reply to prove that

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[110] [1970] 4 C.C.C. 1.

[111] [1949] A.C. 182, at p. 192. See, generally, Unravelling Confessions (1971), 13 Crim. L.Q. 488. Also *R.* v. *Darwin* (1973), 13 C.C.C. (2d) 432 (B.C.C.A.).

[112] See *Colpitts* v. *The Queen*, [1965] S.C.R. 739, at p. 749, per Spence J.

[113] (1972), 7 C.C.C. (2d) 325.

in fact the accused had not filed any income tax returns for a period of some ten years.

All the members of the court were of the opinion:[114]

> . . . that the accused had been cross-examined upon a collateral matter relating only to his credibility and that the Crown was bound by the answer received and was not entitled to call evidence to contradict it.

They were also of the opinion that this error was sufficient to require a new trial.

A perimeter of the rule was illustrated in the even more recent decision of the Ontario Court of Appeal in *R.* v. *Gross*.[115] The accused was charged with making counterfeit money. On examination-in-chief he testified as to his supposedly reputable business dealings for the purpose of attempting to establish that he was a substantial businessman not likely to have engaged in the offence charged. He specifically testified about his "serious" involvement in a television production company and his property company.

On cross-examination he was asked about the location and telephone number of the property company. Reply evidence was called to show that the company did not have an office at the location where he said it had and that the telephone number which he had given was not listed as being a telephone number of the company. A witness was also called in reply, who said that he had had business dealings with the accused related to television production but his evidence was that the dealings were not of a substantial nature and that the accused had difficulty in financing even that small project in which they were engaged.

Counsel for the appellant (accused) argued that the evidence in reply was not admissible by virtue of the application of the rule under discussion. However, the Court of Appeal disagreed:[116]

> The present case does not fall within the ambit of the rule. The evidence called in reply was in respect of matters introduced in examination-in-chief. Evidence-in-chief, to be admissible, must be relevant to the issues being tried and reply evidence may be called in respect of any matters that counsel in examination-in-chief elect to introduce.

No authority is cited.

The decision appears to be in conflict with the earlier decision of the Manitoba Court of Appeal in *R.* v. *Hrechuk*.[117] On a trial for using a syringe to procure an abortion, the accused was asked on examination-in-chief whether she had ever used the syringe (which she had admitted to possessing) for the purpose of giving

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[114] *Ibid.*, at p. 330, per Arnup J.A., delivering the judgment of the court.
[115] (1973), 9 C.C.C. (2d) 122.
[116] *Ibid.*, at p. 124, per MacKay J.A., delivering the judgment of the court (Evans and Jessup JJ. A.).
[117] (1950), 98 C.C.C. 44.

a douche to any other woman and she answered in the negative. On cross-examination, Crown counsel suggested that three other women had received douches from the accused, which she denied. The three women were called in rebuttal and each swore that the accused had given her a douche.

The court held that the evidence was inadmissible and since the trial judge had relied upon it, the conviction would have to be set aside. Mr. Justice Dysart stated his view of the law succintly:[118]

> The subject matter of rebuttal evidence which is not relevant to the issue is not made relevant for the Crown by the fact that it was introduced by the defence.

The cases might be distinguished on the basis that, in the *Gross* case, the evidence was held to be relevant to a fact in issue, whereas in *Hrechuk* it was not. However, in *Gross*, the Ontario Court of Appeal equated admissibility in-chief with relevance to a fact in issue. Therefore, counsel (in Ontario at least) can assume that if evidence is introduced in-chief, they may not only cross-examine on it, but may also introduce evidence to contradict it without any restriction based on the collateral evidence rule.

Finally, there is the recent decision of the British Columbia Court of Appeal in *R.* v. *Shewfelt*.[119] There, the defence consisted entirely of evidence to show that the key Crown witness was a liar and a trafficker of drugs. The defence was that she could not, therefore, have been merely a courier for the accused, as the Crown alleged. The Crown was allowed to call rebuttal evidence to show that some of the evidence of the defence witnesses was, itself, untrue.

The court held that the rebuttal evidence was admissible since:[120]

> . . . the evidence was relevant to the issue of guilt or innocence of the appellant which depended on whether or not [the Crown witness] was merely a hired courier or a trafficker procuring and transporting her stock-in-trade. It is clear that was the issue being litigated and the credibility of [the Crown witness] was far from being only collateral.

The basis of the decision, therefore, seems to be that the rebuttal evidence was in relation to a fact in issue and not merely credibility although the judgment does not precisely distinguish between the two situations.

3. *Cross-Examination as to Bias.*

A witness may be asked on cross-examination about facts which suggest that the witness is biased or partial:

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[118] *Ibid.*, at p. 46, citing *R.* v. *Cargill*, [1913] 2 K.B. 271.
[119] (1972), 6 C.C.C. (2d) 304.
[120] *Ibid.*, at pp. 306-307, per Bull J.A., delivering the judgment of the court.

> Questions relating to collateral facts may be put to a witness for the purpose of discrediting his testimony, and showing his interest, motives and prejudices.[121]

If the witness denies facts which tend to show want of partiality between the parties, other witnesses may be called to contradict him.[122] This line of cross-examination thus forms an exception to the rule with respect to cross-examination on collateral matters.

4. *Cross-Examination on Previous Convictions.*

Cross-examination as to previous convictions forms a second exception to the rule that evidence may not be introduced to contradict a witness on a collateral matter. It is specifically provided by statute[123] that a witness may be asked whether he has been previously convicted and, if he denies the fact or refuses to answer, the opposing party may prove the conviction. (An accused who is examined on his own behalf is in the same position as any other witness for the purpose of cross-examination.)[124]

It has been clearly established that evidence of previous convictions goes *only* to credibility. Moreover, the trial judge must direct the jury to this effect where the witness in question is the accused. In *R.* v. *Skippen*[125] the Ontario Court of Appeal held that:[126]

> The failure of the learned trial judge to direct the jury as to the limited use which might be made of the appellant's admission that he had been convicted of a criminal offence on a prior occasion constitutes serious non-direction amounting to misdirection. The judge not only failed to instruct the jury that they were entitled to take the record into account only to determine the credibility of his evidence, but he also omitted to instruct them that they must not use that evidence for any other purpose as e.g. to establish a propensity on the part of the accused to commit crime.

However, the trial judge need not expressly say that evidence of convictions cannot be used as evidence of guilt or propensity to commit the offence charged. It is sufficient if the trial judge leaves

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[121] *R.* v. *Chasson* (1876), 16 N.B.R. 546.

[122] See, generally, MacRae on Evidence (2nd ed., 1952), p. 369.

[123] Canada Evidence Act, *supra,* footnote 22, s. 12; Ontario Evidence Act, *supra,* footnote 56, s. 23. See *Street* v. *City of Guelph,* [1965] 2 C.C.C. 215 (Ont. H.C.) on the interpretation of the words "offence" and "crime" in the respective sections.

[124] *R.* v. *D'Aoust* [1902], 3 O.L.R. 653 (C.A.).

[125] [1970] 1 C.C.C. 230. See also *R.* v. *Gajic* (1956), 116 C.C.C. 34, at p. 39.

[126] *Ibid.,* at p. 233, per Schroeder J.A., delivering the judgment of the court. See also *R.* v. *Fushtor* (1946), 85 C.C.C. 283; *R.* v. *Bodnarchuk* (1949), 94 C.C.C. 279; *R.* v. *Gajic, ibid.; R.* v. *Williams & Irvine,* [1969] 1 O.R. 139.

no doubt in the minds of the jury through constant repetition that such evidence is to be used solely with respect to credibility.[127]

How does proof of a past conviction affect credibility?[128] In *R.* v. *Leforte*[129] the trial judge referred to admissions made by the accused, as to previous convictions, in the following way:

> It is for you to say, on the evidence, as to whether or not these people being, having suffered these convictions are the kind of people that you would choose to believe.

In a dissenting judgment, Sheppard J.A. of the British Columbia Court of Appeal approved of this direction. However, Norris J.A. held that it was erroneous. In his view the questioning allowed by section 12 was:[130]

> . . . merely for the purpose of *testing* his credibility . . . for, if he admitted the convictions that would end the matter. The jury might consider it in favour of the accused that his answers were truthful as to credibility. If he denied the convictions and they were thereafter proved, then the jury might well find that the witness was not a credible witness.

However, the Supreme Court of Canada[131] stated its "complete agreement with the reasons of Sheppard J.A." so that it is the fact of the conviction in itself that is relevant with respect to credibility.

In *R.* v. *Goldhar*,[132] the Ontario Court of Appeal approved of the following direction:[133]

> We do not try people in this country on their records. But Goldhar's record is disclosed to you because he goes into the witness box, swears on oath to tell the truth and gives evidence on his own behalf; and you have to determine whether he is the sort of person whom you can believe under these circumstances, and whether the sanctity of an oath is likely to weigh with him or not.

However, the trial judge may not instruct the jury that the credibility of a witness must be diminished because of a past conviction. It is an error to direct a jury that ". . . the evidence of a person with a criminal record *cannot* be given the same credence as a witness with such a record".[134] It is for the jury to decide what weight is to be given to the testimony of such a witness.

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[127] *R.* v. *Leforte* (1961), 130 C.C.C. 318 (B.C.C.A.), at p. 329, per Sheppard J.A., with whose judgment, the Supreme Court of Canada was in "complete agreement": (1962), 31 D.L.R. (2d) 1, at p. 2.

[128] See, generally, the Hon. Mr. Justice Hartt, Character Evidence in Studies in Canadian Criminal Evidence, ed. by Salhany and Carter (1972), p. 259.

[129] *Supra*, footnote 127.

[130] *Ibid.*, at pp. 337-338.

[131] *Ibid.*

[132] (1957), 117 C.C.C. 404.

[133] *Ibid.*, at p. 406.

[134] *R.* v. *Titchner*, [1961] O.R. 606, at p. 613, per Morden J.A., delivering the judgment of the court.

Both the federal and provincial Evidence Acts provide only that a witness "may" be questioned as to past convictions. There have been numerous suggestions that the trial judge may have a discretion to disallow cross-examination as to previous convictions where the prejudicial effect is particularly severe or where the relevance to credibility is remote. However, the authority in favour of such a discretion is rather tenuous[135] and there is clear authority to the contrary.[136] It has been suggested that the word "may" is properly interpreted as describing a discretion in the cross-examiner rather than in the trial judge.

If a witness, who is being questioned as to a previous conviction, admits to having committed the offence, the answer is final. If he denies having committed the offence, then the conviction may be proved in accordance with the statutory provision. The witness may not be examined as to the details of the offence.[137] On the other hand, the cross-examiner should be permitted to refer to the specific offence since the nature of the offence will have a bearing upon how seriously credibility is affected.[138]

What if the witness has committed an offence but has not been charged or, if charged, has been acquitted? Cross-examination about the act in question does not fall within section 12 of the Canada Evidence Act or section 23 of the Ontario Evidence Act since there is no conviction. Questioning about such conduct would seem to be permissible under the rule with respect to collateral issues going to credibility. Of course, a denial could not be contradicted.

However, it has been clearly established in Canada that where the witness is an accused, he may not be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.[139] Both judgments in the *Koufis* case seem

[135] *R.* v. *Titchner, ibid.*, at p. 612, per Morden J.A.; *R.* v. *Leforte, supra,* footnote 127, at p. 336, per Norris J.A.; *Colpitts* v. *The Queen, supra,* footnote 112, at p. 749, per Spence J.; See also Milton Cadsby, Cross-Examination of Accused Persons as to Previous Convictions (1912), 4 Crim. L.Q. 265 and the notes in (1940), 18 Can. Bar Rev. 808 and (1969), 47 Can. Bar Rev. 656. Such a discretion was applied but in a different (and highly unusual) factual situation in *R.* v. *Hartridge* (1966), 57 D.L.R. (2d) 344 (Sask. C.A.). These authorities are reviewed (perhaps more optimistically) by Haines J. in *R.* v. *St. Pierre* (1973), 10 C.C.C. (2d) 164 (Ont. H.C.). It may be significant that in the *Colpitts* case, Spence J. was really dealing with the collateral matter of general misconduct, discussed earlier, rather than with past convictions.

[136] *Clark* v. *Holdsworth* (1968), 62 W.W.R. 1 (B.C.S.C.).

[137] *R.* v. *Tanchuk* (1935), 63 C.C.C. 193, at p. 200, per Robson J.A. (Man. C.A.).

[138] In this respect, see the useful direction of Disbery J. in *R.* v. *Bird* (1973), 13 C.C.C. (2d) 73, at p. 76 (Sask.).

[139] *Koufis* v. *The King* (1941), 76 C.C.C. 161 (S.C.C.); *R.* v. *Duscharm* (1955), 113 C.C.C. 1 (Ont. C.A.); *R.* v. *Tilley, supra,* footnote 3, esp. at p. 620.

to be based upon the prejudicial effect of such questioning and seem to be broad enough to preclude any questions under the rule permitting cross-examination with respect to collateral matters going to credibility.[140]

In the recent Saskatchewan case of *R.* v. *Bird*[141] the accused was cross-examined about his past conduct including his activities as a bootlegger and drug trafficker. Chief Justice Culliton, delivering the judgment of the Court of Appeal, held that the questioning was not improper. He pointed out that the sole ground of defence at the trial was an incapacity to form the requisite intent because of the consumption of alcohol and "speed" pills. Thus the questioning was relevant to a fact in issue and, indeed could have only had an effect with the jury which was beneficial to the accused.

In *R.* v. *St. Pierre*,[142] counsel for the accused asked for a ruling as to the right of the accused to bring out his criminal record in examination-in-chief. In this way, he sought to lessen the impact of the record, with which he anticipated the Crown would deal. Crown counsel argued that section 12 of the Canada Evidence Act made the introduction of the record the exclusive perquisite of the Crown.

Mr. Justice Haines ruled that the accused could introduce his record during examination-in-chief but that, if he did so, "then the record became evidence for all purposes", and not merely with respect to credibility. The jury would not, therefore, be warned about considering the convictions only with respect to credibility and, presumably, they would be entitled to consider them as having probative value in relation to the likelihood of the accused having committed the act in question. The decision contains a review of the authorities with respect to some of the issues considered under this heading as well as some references to strategic considerations.

5. *Cross-Examination on Previous Inconsistent Statements.*

Cross-examination with respect to previous statements is covered by sections 11 and 12 of the Canada Evidence Act[143] and sections 21 and 22 of the Ontario Evidence Act.[144] They are basically the same, and essentially provide that:

(1) A witness may be cross-examined as to previous statements

[140] *Ibid.*, per Kerwin J., Duff C.J.C. concurring, at p. 167, and per Taschereau J., Rinfret and Crocket JJ. concurring, at p. 170. *Cf. Colpitts* v. *The Queen*, *supra*, footnote 112, at p. 749, per Spence J. and, more generally, *R.* v. *D'Aoust*, *supra*, footnote 124.

[141] *Supra*, footnote 138.

[142] *Supra*, footnote 135.

[143] *Supra*, footnote 22.

[144] *Supra*, footnote 56.

made by him in writing or reduced to writing: (a) and they need not be shown to him; (b) but they must be relevant to the subject matter of the case;

(2) If it is intended to contradict the witness by the writing, the parts of the writing which are inconsistent must be brought to his attention before they can be proven;

(3) The judge may require production of the writing for his inspection at any time during the trial and may make such use of it for the purposes of the trial as he thinks fit;

(4) A witness may also be cross-examined as to a previous statement made orally but it must also be relevant to the subject matter of the case;

(5) If it is intended to contradict the witness by proof of the statement, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he did make such a statement.

A number of issues arising out of these provisions have already been touched upon in earlier parts of this article. In the part dealing with "refreshing memory", it was pointed out that the power to require production of a statement under section 10(1) is entirely discretionary in the trial judge.[145] Most of the discussion of "adverse" and "hostile" was related to prior inconsistent statements and it was there mentioned that a prior inconsistent statement cannot be evidence of the facts therein unless (and only to the extent that) the witness adopts that statement as part of his testimony at trial.[146] There is also a useful general discussion of the subject in an earlier Law Society of Upper Canada "Special Lecture".[147]

Special considerations arise where the witness, whom it is sought to contradict by the previous inconsistent statement, is the accused in a criminal trial. Where the Crown seeks to introduce a previous statement of an accused which contains admissions, it is doing so for the purpose of establishing the truth of that statement (or some part of it). Where the statement was made to a person in authority, the voluntariness requirements must be satisfied.

Must the statement be shown to be voluntary where its introduction is sought solely to show inconsistency and thereby to attack credibility? It is submitted that compliance with the voluntari-

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[145] *Supra*, footnote 23.
[146] *Supra*, footnote 68.
[147] Isadore Levinter, Q.C., Cross-Examination on Previous Contradictory Statements in Evidence (1955). However, it should be noted that the Highway Traffic Act provision referred to therein has since been amended.

ness rule must be established before any use can be made of the statement.[148]

Conclusion

It is obvious that many of these basic rules of evidence, which must be applied in our court rooms everyday, contain rather technical aspects and subtle distinctions. Perhaps that is inevitable in an adversary system based upon a foundation of the rule of law. The latter concept insists upon a degree of precision in the laws (including those laws which could be characterized as "procedural"). Laws which avoid precise rules and, instead, delegate broad discretionary powers to judges are the very antithesis of such a concept.

On the other hand, it is difficult to argue against the view that many of these rules are *unnecessarily* complex and even counterproductive at times. This is particularly significant when one considers the context in which evidentiary decisions must often be made by judges and counsel, that is quickly and under the pressures of a trial.

In the Preface to its study papers, the Evidence Project of the Law Reform Commission of Canada has stated:

> It has long been recognized, however, by those who are engaged in day-to-day practice before the courts that our present laws of evidence are in need of reform. They are unduly complex, difficult to determine, and often thwart the truth-finding function of the court for reasons unrelated to the protection of any significant interest. Changing conditions have rendered many of the rules historical oddities.

The Commission is working towards a Code of Evidence with the objects not only of assuming a sound result in individual cases but also of achieving clarity, precision and comprehension.

The first few working papers have been the subject of some debate and strong views have been expressed. This is as it should be. To adopt a quotation familiar to readers of this *Review*:

> Where there is much desire to learn, there of necessity will be much arguing, many opinions, for opinion in good men is but knowledge in the making.

The Commission is actively seeking comments and criticisms of its working papers prior to the actual drafting of the proposed Code. It is important that the judges and lawyers who must apply these rules on a day-to-day basis respond to the challenge.

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[148] *Monette* v. *The Queen*, [1956] S.C.R. 400. *Cf. Harris* v. *New York* (1971), 91 S. Ct 643. See Unravelling Confessions, *op. cit.*, footnote 111, at p. 484.