EVIDENCE—JUDICIAL DISCRETION AND RULES OF EVIDENCE—CANADA EVIDENCE ACT, S. 12: *Corbett* v. *The Queen*

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Introduction

In *Corbett* v. *The Queen*[1] Corbett was tried for murder. Before calling any evidence his counsel sought a ruling from the trial judge that, if the accused were called, section 12 of the Canada Evidence Act[2] would not apply to him because of his guarantee to a fair trial in section 11(d) of the Charter of Rights and Freedoms.[3] Therefore, it was argued, Corbett could not be cross-examined as to his prior criminal record. The trial judge refused the ruling, the accused was called as a witness, and, in order to "soften the blow" his counsel put to him his criminal record, which Corbett admitted. That record included a conviction for murder. Corbett's appeal to the British Columbia Court of Appeal was dismissed, Hutcheon J.A. dissenting, and the Supreme Court, La Forest J. dissenting, dismissed his further appeal.

While Corbett was unsuccessful the law has been changed by the decision and accused persons may have fairer trials in the future as a result. Until *Corbett* the law in Canada was usually taken to be as stated by Martin J.A. in *R.* v. *Stratton*.[4] Section 12 of the Canada Evidence Act states that "[a] witness may be questioned as to whether he has been convicted of any offence". Some had thought[5] that there was a discretion in the trial judge to exclude evidence of an accused's previous convictions if the weight of the evidence with respect to the issue of credibility was tenuous in comparison to the prejudicial effect on the accused. But in *Stratton* Martin J.A. denied the existence of any such

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[1] [1988] 1 S.C.R. 670.

[2] R.S.C. 1985, c. C-5.

[3] Constitution Act, 1982, Part I.

[4] (1978), 90 D.L.R. (3d) 420, 42 C.C.C. (2d) 449 (Ont. C.A.).

[5] See, *e.g.*, *R.* v. *Powell* (1977), 37 C.C.C. (2d) 117 (Ont. Co. Ct.).

discretion because "in the absence of acceptable guidelines, the recognition of such a discretion would result in a lack of uniformity in its application which would not be consistent with the proper administration of justice".[6] In *Corbett*, four of the six judges[7] recognized that there is a discretion in the trial judge to shield an accused-witness from the questioning permitted by section 12. The reform of the law of evidence in this area is long overdue and most welcome.

History

Until the early nineteenth century a person who had been convicted of an infamous crime was seen as so corrupt of character that he was incompetent to speak as a witness. By legislation in England, the Civil Rights of Convicts Act, 1828[8] and the Evidence Act, 1843,[9] people who had been convicted were made competent. Canada followed suit and our legislation also provided that a person would not be incompetent by reason of a previous crime.[10] The fact of a previous conviction would be left to affect only credibility. The English Common Law Commissioners recommended in 1853 that cross-examination regarding previous convictions should be restricted to "offences which imply turpitude and want of probity, and more especially absence of veracity—as for instance, perjury, forgery, obtaining money or goods under false pretences and the like".[11] The legislation which was introduced[12] did not however provide any limitation on the nature of the crimes to be inquired into. The statutory provision, later copied in Canada,[13] and eventually becoming our section 12, permitted questioning with regard to any previous convictions and provided for proof of the record of convictions should they be denied or should the witness refuse to answer the question.

It is most important to realize that this legislation, permitting the cross-examination of witnesses as to their criminal records, was enacted at a time when persons accused of crime were incompetent to testify at their own trial. Accused persons were not competent to testify in England

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[6] *Supra*, footnote 4, at pp. 439 (D.L.R.), 467 (C.C.C.).

[7] Dickson C.J.C., Lamer, Beetz and La Forest JJ. McIntyre and LeDain JJ. disagreed. In the result all six judges agreed that s. 12 did not violate the accused's right to a fair trial under s. 11(d) of the Charter.

[8] 9 Geo. 4, c.32.

[9] 6 & 7 Vict., c. 85.

[10] See, *e.g.*, s. 3 of the Canada Evidence Act, *supra*, footnote 2, and ss. 6 and 7 of the Ontario Evidence Act, R.S.O. 1980, c. 145.

[11] Second Report of Her Majesty's Commissioners for Inquiry into the Process, Practice and Pleading in the Superior Courts of Law (1853), p. 21, as noted in Cross on Evidence (6th ed. by R. Cross and C. Tapper, 1985), p. 289.

[12] Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, s. 25 and Criminal Procedure Act, 1865, 28 & 29 Vict., c. 18, s. 6.

[13] S.C. 1869, c. 29, s. 65.

until 1898[14] and in Canada not until 1893.[15] When the accused was made competent in England the lawmakers recognized that the application of this legislation to an accused could severely prejudice him as the trier would be hard pressed to confine evidence of past misdeeds to credibility and not use the criminal record in deciding the substantive issue. In England, therefore, the drafters simultaneously modified the rule when the witness was also the accused. The modification did not completely ban such questioning of an accused but rather effected a compromise.[16] The legislation[17] provides the accused with a shield against such questioning but the shield will be abandoned if the accused leads evidence to establish his own good character or leads evidence involving imputations on the character of the prosecutor or the witnesses for the prosecution. Judicial interpretation of the legislation[18] has provided that a trial judge also has a discretion to exclude evidence of the accused's discreditable conduct, even though the statutory conditions have been fulfilled, if the accused would be unfairly prejudiced.

In Canada the lawmakers lacked the foresight of their English counterparts and they made no modifications to the existing rules. The earliest decision interpreting our section 12, *R.* v. *D'Aoust*,[19] recognized that the English legislation attempted to minimize the risk of prejudice to an accused, that the Canadian legislation did not, and decided:[20]

> When [the accused testifies] he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination.

Analysis

It is heartening, but also puzzling, that after ninety years of operation, the majority of the Supreme Court can now say that section 12 does not deny the accused his right to a fair trial under the Charter, because a trial judge in Canada can always exercise discretion under section 12 to exclude the evidence when "a mechanical application of s.12 would undermine the right to a fair trial".[21]

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[14] Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, s. 1.

[15] Canada Evidence Act, S.C. 1892, c. 31, s. 4.

[16] In *Maxwell* v. *D.P.P.*, [1935] A.C. 309, at p. 317 (H.L.), Lord Sankey wrote: "When Parliament by the Act of 1898 effected a change in the general law and made the prisoner in every case a competent witness, it was in an evident difficulty, and it pursued the familiar English system of a compromise."

[17] Criminal Evidence Act, *supra*, footnote 14, c. 36, s. 1(f).

[18] *Selvey* v. *D.P.P.*, [1970] A.C. 304 (H.L.).

[19] (1902), 3 O.L.R. 653, 5 C.C.C. 407 (Ont. C.A.).

[20] *Ibid.*, at pp. 656-657 (O.L.R.), 411 (C.C.C.).

[21] *Supra*, footnote 1, at p. 692, *per* Dickson C.J.C.

The majority of the judges who recognized discretion in *Corbett* voted to exercise that discretion against the accused because he had attacked the credibility of the prosecution witnesses, focusing heavily on their criminal records. For the majority, excluding evidence of the accused's prior criminal record would have created a serious imbalance; "the jury. . . would have been left with the entirely mistaken impression that while the Crown witnesses were hardened criminals, Corbett had an unblemished record".[22] The court has, in effect, judicially created an approach akin to the English legislation. An accused in Canada can throw away his shield against prejudicial questioning by the way he chooses to mount his defence. This should not, however, be seen simply as "a case of tit for tat",[23] "not in a vindictive or 'eye for an eye' sense",[24] but rather because in this case, which became simply one of credibility between accuser and accused, the jury might be better enabled to find truth if it was fully informed. *Corbett* should not then be read as deciding that whenever an accused attacks the credibility of his accuser, section 12 will automatically permit questioning regarding the accused's antecedents. It will still be a matter of discretion to be exercised on the basis of all the circumstances in the individual case.

Who was "right" in *Corbett* ? Although Dickson C.J.C. and La Forest J. agreed on the principle that there was a discretion to be exercised under section 12, there was disagreement on how it should have been exercised on the facts of the particular case. La Forest J. believed that the trial judge should have foreclosed any questioning regarding the murder conviction, Dickson C.J.C. that he need not have done so. Dickson C.J.C. and La Forest J. have powerful arguments for their competing views on what will produce the fairest trial; fair for both the accused and the prosecutor. Both judgments are reasonable. Both are "right". Recognizing a discretion in the trial judge, recognizes room for choice, room for judgment. It is inherent in the nature of the exercise. We should not fear it nor should we insist on certainty in all our rules of evidence. The so-called "rules" of evidence were designed largely by trial judges seeking justice in their individual cases and were not meant to be a calculus rigidly applied. The best that we can do is to catalogue factors which are important to the sound exercise of discretion. Nor should discretion be feared as some form of palm-tree justice which is unreviewable. Protection against a trial judge's abuse of discretion should always be available

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[22] *Ibid.*, at p. 698.

[23] The description of the rationale for s. 1(f)(ii) of the Criminal Evidence Act, *supra*, footnote 14, in Cross, *op. cit.*, footnote 12, p. 372.

[24] See *Gordon* v. *U.S.*, 383 F. 2d 936, at p. 940 (1967), as quoted in La Forest J.'s judgment, *supra*, footnote 1, at pp. 740-741.

by appeal.[25] Appellate court judges at the same time should recognize, however:[26]

> . . . the vantage point of the trial judge, the superiority of his position. It's not that he knows more. It's that he sees more, and sometimes smells more.

Discretion and the Law of Evidence Generally

What do we mean by "discretion"? Consider these contrasting views:

> The discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different men; it is casual and depends on constitution, temper and passion. In the best it is often times caprice, in the worst it is every vice, folly and passion to which human nature is liable.[27]

> [D]iscretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague and fanciful; but legal and regular.[28]

No one would speak in favour of the former type of discretion; no one however can deny the necessity of the latter. Discretion is endemic to the law of evidence and essential to any model of adjudication. There is a need to recognize that fact and to get on with the task of articulating the guidelines necessary to the exercise of the judicial function.

It is somewhat odd to see resistance to discretion in the application of the rules of evidence when we remind ourselves that in bench trials we regularly equip the trial judge with the ultimate discretion of finding guilt or innocence. Judicial discretion in fact-finding takes a number of forms. When a judge seeks to reach a conclusion of fact from the evidence of witnesses he discriminates as to weight and cogency. Jerome Frank referred to this exercise as "fact discretion".[29] A witness describes a past event. On analysis, the witness is stating his present recall of what he believes he then saw. The trier of fact observes the demeanour of the witness, sees him tested on cross-examination, and expresses an opinion regarding the correctness of the witness's belief. We have "subjectivity piled on subjectivity"; guesses upon guesses.[30] In this exercise, which is the best we can do, we trust in the judge to exercise his discretion in a sound manner and to discriminate wisely.

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[25] See, *e.g.*, *R.* v. *Cook*, [1959] 2 Q.B. 340, at p. 348 (C.C.A.), holding that an appellate court can reverse an exercise of discretion regarding s. 1(f)(ii); seemingly approved in *Selvey, supra*, footnote 18. See also *R.* v. *Collins*, [1987] 1 S.C.R. 265, (1987), 56 C.R. (3d) 193, where the Supreme Court of Canada recognized that s. 24(2) of the Charter called for an exercise of discretion in deciding whether or not to exclude improperly obtained evidence but also noted that the decision "is a question of law from which an appeal will generally lie", at pp. 275 (S.C.R.), 204 (C.R.).

[26] M. Rosenberg, Judicial Discretion (1965), 38 The Ohio Bar 819.

[27] Lord Camden in *Doe d. Hindson* v. *Kersey* (1765).

[28] Lord Mansfield in *R.* v. *Wilkes* (1770), 4 Burr. 2527, at p. 2539, 98 E.R. 327, at p. 334 (K.B.).

[29] Courts on Trial (1949), p. 57.

[30] *Ibid.*, Ch. III, Facts are Guesses.

A judge's ruling on relevancy is also an exercise in discretion. To ensure that our process of fact-finding is rational, we insist that evidence be relevant to, logically probative of, the matters in issue. How does the judge determine relevancy? Professor Thayer advised:[31]

> Not by any rule of law. The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges and ministers. . .

He later explained[32] that by "logic" he was not referring to the deductive logic of the syllogism, but the inductive logic of knowledge or science. We need to recognize that in making this most fundamental determination, the judge, of necessity, relies on *his* logic based on *his* life experience. Unless we are willing to take the time and to incur the expense of leading evidence on the matter, to persuade him to another point of view, we must trust the judge to exercise his discretion soundly in making his ruling on relevancy.

When a judge makes his ruling in favour of relevancy he still might exclude the evidence if, in the exercise of his discretion, he decides that the probative worth is outweighed by other considerations. In *Morris* v. *R.*[33] the Supreme Court of Canada was concerned with a charge of conspiracy to import and traffic in heroin and needed to consider the admissibility of a newspaper clipping found in the accused's apartments. The article was headed "The Heroin Trade moves to Pakistan". The majority of the court believed the article was admissible in evidence as relevant to the accused's involvement in the charged conspiracy. The dissenting opinion regarded the article relevant solely to the accused's disposition and would have excluded. The majority, however, expressly agreed with the minority opinion's observations on the subject of relevancy. In that opinion Lamer J. adopted as the law in Canada Professor Thayer's basic principle that everything of probative value should be received in evidence unless there is a clear ground of policy justifying exclusion. But, he wrote:[34]

> To this general statement should be added the discretionary power judges exercise to exclude logically relevant evidence
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> > . . . as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury, and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public grounds; others on the bare ground of precedent. It is this sort of thing, as I said before, the rejection on one or another

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[31] J.B. Thayer, Preliminary Treatise on Evidence at the Common Law (1898), p. 265.

[32] Law and Logic (1900), 14 Harv. L. Rev. 139.

[33] [1983] 2 S.C.R. 190, (1983), 7 C.C.C. (3d) 97. For a recent application of the discretionary exercise recognized in *Morris*, see *R.* v. *Clermont,* [1986] 2 S.C.R. 131, (1986), 53 C.R. (3d) 97.

[34] *Ibid.*, at pp. 201 (S.C.R.), 106 (C.C.C.).

> practical ground, of what is really probative, which is the characteristic thing in the law of evidence; stamping it as the child of the jury system. [Thayer, at p. 266.]
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> It was through the exercise of this discretionary power that judges developed rules of exclusion.

In *Corbett*, La Forest J. has given us the best reminder to date of the origin of our rules and the need to understand their bases:[35]

> As is true with respect to the resolution of most, if not all, issues relating to the law of evidence, resort must be had, first and foremost, to its animating or first principles, for it is only with reference to these that the more specific rules of evidence can be understood and evaluated. Failure to so reference discussion often results in the unhappy divorce of legal reasoning from common sense, with the consequence that rules of evidence are apt to be viewed as both self-sustaining and self-justifying. The present case further illustrates that statutory rules of evidence must also be interpreted in light of these guiding principles.
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> The organizing principles of the law of evidence may be simply stated. All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy. Questions of relevancy and exclusion are, of course, matters for the trial judge, but over the years many specific exclusionary rules have been developed for the guidance of the trial judge, so much so that the law of evidence may superficially appear to consist simply of a series of exceptions to the rules of admissibility, with exceptions to the exceptions, and their subexceptions. . ..
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> . . . A cardinal principle of our law of evidence, then, is that any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, subject, of course, to the overriding judicial discretion to exclude such matter for the practical and policy reasons already identified. Also important, especially in the context of the present case, is the Court's recognition that the present rules of exclusion are but specific accretions or manifestations of a subsisting general judicial discretion to exclude, on practical or policy grounds, that which is admittedly relevant.

The Supreme Court of Canada and Discretion

Corbett is but the latest in a series of cases in the Supreme Court recognizing the necessity of discretion in the application of the rules of evidence. A brief review of a few cases might convince the doubter of the centrality of discretion.

The Opinion Rule

There was a time when Canadian lawyers and judges spoke of an opinion rule together with a list of exceptions. For example, in *R. v. German*,[36] Robertson C.J.O., in the Ontario Court of Appeal, wrote:[37]

> No doubt, the general rule is that it is only persons who are qualified by some special skill, training or experience who can be asked their opinion upon a matter

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[35] *Supra*, footnote 1, at pp. 713-715.

[36] [1947] O.R. 395 (Ont. C.A.).

[37] *Ibid.*, at pp. 409-410.

> in issue. The rule is not, however, an absolute one. 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 [such] matters. . . .

That rule-exception approach is to be contrasted with the sound, principled, discretionary approach adopted by the Supreme Court of Canada in *Graat* v. *R.*[38]

In *Graat* the court noted how the law of evidence had been burdened over the years with a large number of exclusions and exceptions to the exclusions. The court insisted on a return to broad principles and discretion. In ruling that the police officers were entitled to express their opinions regarding the accused's ability to operate a motor-vehicle, the court reasoned:[39]

> The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time.

What a refreshing attitude!

Similar Fact Evidence

We were all taught to approach the reception of similar fact evidence in a particular way. First, one should parrot the words of Lord Herschell in *Makin* v. *Attorney-General for New South Wales*[40] that as a general rule the prosecution cannot lead evidence of the accused's misbehaviour on previous occasions. We should then go on to consider whether the evidence nevertheless fitted within one of a list of exceptions, which list grew over the years; to prove intent, to prove system, to prove a plan, to show malice, to rebut the defence of accident, to prove identity, to rebut the defence of innocent association. But in *Sweitzer* v. *R.*[41] the Supreme Court of Canada approved the *Boardman*[42] approach and explained the remarks of Lord Herschell in *Makin*.

The court noted that the creation of a list of exceptions to the general principle, while useful, tended to obscure the true basis upon which similar fact evidence was admissible. The court explained:[43]

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[38] [1982] 2 S.C.R. 819, (1982), 31 C.R. (3d) 289.

[39] *Ibid.*, at pp. 836 (S.C.R.), 305 (C:R.).

[40] [1894] A.C. 57, at p. 65 (P.C.).

[41] [1982] 1 S.C.R. 949, (1982), 68 C.C.C. (2d) 193. It is curious in *Corbett* that the Chief Justice retreats to the *Makin* rule and exception language.

[42] *R.* v. *Boardman*, [1975] A.C. 421 (H.L.).

[43] *Supra*, footnote 41, at pp. 953-954 (S.C.R.), 196 (C.C.C.). In *R.* v. *Davis*, [1980] 1 N.Z.L.R. 257, at p. 263 (C.A.) this discretionary approach to similar fact was

> [A]dmissiblity will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission . . . The general principle enunciated in the *Makin* case by Lord Herschell, should be borne in mind in approaching this problem. The categories, while sometimes useful, remain only as illustrations of the application of that general rule.

Corroboration

Aside from statutory requirements of corroboration the common law has also long required corroboration in certain instances. Some wise trial judge recognized that an accomplice might be purchasing immunity with his evidence and therefore warned his jury to proceed with caution. Other trial judges recognized the wisdom of the practice and followed suit. However, a rule of law came into existence in Canada[44] at the beginning of this century that the jury had to be warned of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice. Failure to warn would result in the conviction being overturned. Some appellate courts then began to require the trial judge also to indicate to the jury what evidence in the case was capable of constituting corroboration and to confine the jury to a consideration of these matters when determining whether corroboration existed.[45] The law assumed a complexity which belied its humble beginnings as an application of common sense. Little wonder that the Law Reform Commission of Canada recommended the outright abolition of all corroboration requirements.[46] A halt was recently called by the Supreme Court of Canada; replace a hard and fast rule with discretion. In *Vetrovec* v. *R.*,[47] Dickson J. bemoaned the numerous technical appeals involving corroboration, the complexity of the law and the massive periodical literature that had been generated. He stressed that this was an area that cried out for discretion:[48]

> [W]hat was originally a simple common sense proposition—an accomplice's testimony should be viewed with caution—became transformed into a difficult and highly technical area of law. . . All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense. . .

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justified: "The price of this approach is some uncertainty in borderline cases, but some uncertainty is inevitable with questions of relevance or degrees of relevance. In criminal law it is more important to have a just and fair trial than a certain rule." And see *R.* v. *McNamara* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), where the court notes that the problem is not a matter of pigeonholing but rather of balancing.

[44] See *Gouin* v. *R.*, [1926] S.C.R. 539.

[45] See *R.* v. *Racine* (1977), 32 C.C.C. (2d) 468 (Ont. C.A.). Compare *Kirsch and Rosenthal* v. *R.*, [1981] 1 S.C.R. 440, (1981), 62 C.C.C. (2d) 86.

[46] Report on Evidence (1975), s. 88(b), p. 107.

[47] [1982] 1 S.C.R. 811, (1982), 67 C.C.C. (2d) 1.

[48] *Ibid.*, at pp. 826, 832 (S.C.R.), 13, 18 (C.C.C.).

Hearsay

The hearsay rule has been described by Lord Reid: "[T]he law regarding hearsay evidence is technical, and I would say absurdly technical."[49] So, too, Professors Morgan and Maguire:[50]

> [A] picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.

A discretionary approach to the rule, based on principle, would be no more understandable. We exclude hearsay evidence because we regard the adversary as disadvantaged by his inability to cross-examine the declarant with respect to the dangers resident in the out-of-court statement of perception, memory, communication and sincerity.[51] Also the declarant's presence in the courtroom will enhance trustworthiness for a number of other reasons; the solemnity of the occasion, the presence of the opposite party, the possibility of a perjury prosecution. If we can find within the circumstances surrounding the making of the out-of-court statement sufficient guarantees of trustworthiness the statement deserves receipt even if we cannot fit it within one of the particular exceptions created by the courts in the eighteenth and nineteenth centuries. In *Myers* v. *D.P.P.*[52] the majority of the House of Lords decided it was too late to create a new exception since it had been so long since the last one had been created. If reform was to be accomplished it would have to be done by legislation. The Supreme Court of Canada, in *Ares* v. *Venner*,[53] considered *Myers* but decided that it:

> . . . should adopt and follow the minority view rather than resort to saying in effect: "This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job."

The court approved the reception of nurses' notes to establish the truth there expressed as it found circumstantial guarantees of trustworthiness in the fact the notes were made by trained observers and relied on in affairs of life and death. In his unanimous opinion for the court, Hall J. was clearly inviting the profession to join in the attempt at reform of this absurdly technical rule by approaching admission through discretion based on the rule's underlying rationale.

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[49] *Myers* v. *D.P.P.*, [1965] A.C. 1001, at p. 1019 (H.L.).

[50] E.M. Morgan and J.M. Maguire, Looking Backward and Forward at Evidence (1937), 50 Harv. L. Rev. 909, at p. 921.

[51] See, generally, E.M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept (1948), 62 Harv. L. Rev. 177.

[52] *Supra*, footnote 49.

[53] [1970] S.C.R. 608, at pp. 625-626, (1970), 14 D.L.R. (3d) 4, at p. 16. For a recent application of *Ares* v. *Venner* in a criminal context see *R.* v. *Monkhouse* (1988), 61 C.R. (3d) 343 (Alta. C.A.).

Conclusion

A sound exercise of discretion is absolutely essential to the proper application of the rules of evidence and recognition of that fact will likely produce greater real certainty at the sacrifice only of apparent certainty. Interestingly the Charter of Rights and Freedoms may also have a role in promoting greater recognition of the necessity of discretion to accomplish justice in the individual case. In two recent appellate decisions there is acceptance that the requirement in section 7 that no one be deprived of the right to life, liberty and security except in accordance with principles of fundamental justice may require the trial judge to "recognize exceptions when rigid adherence will prevent or hinder a fair trial".[54]

In answer to those who fear discretion, listen to Professor Rosenberg:[55]

> Discretion need not be, as Lord Camden said, a synonym for lawlessness or tyranny, if those who created it wield it and review its use are sensitive to the risks and responsibilities it raises, and if they play fair with the system; for the difference between government of law and government of man is not that the lawyers decide cases in one and fools in the other. Men, that is the judges, always decide. The difference is in whether judges are aware of their power, sensitive to their responsibilities and true to the tradition of the common law.

We, properly, trust our judges to make all manner of preliminary and final decisions affecting the outcome of a case. It would be incongruous then to deny them the right to exercise discretion in judging how, and what evidence will be heard by the trier of fact.

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[54] *R.* v. *Rowbotham* (1988), 63 C.R. (3d) 113, at p. 164 (Ont. C.A.); *R.* v. *Williams* (1985), 44 C.R. (3d) 351 (Ont. C.A.). Recall also *Lucier* v. *R.*, [1982] 1 S.C.R. 28, (1982), 65 C.C.C. (2d) 150, where the court holds that the hearsay rule should be approached differently when the accused's interests are at stake.

[55] *Supra*, footnote 26, at p. 826.