

ADMITTING PRIOR INCONSISTENT STATEMENTS FOR THEIR TRUTH

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Prior inconsistent statements made by a witness go to credibility only and are not admissible for their truth, unless adopted by the witness—that is the law in Canada. This article presents the case for reform. The rule excluding prior inconsistent statements for their truth is seen to be counter to prevailing principles and policies upon which the admission of evidence in criminal trials is based. Reform of the law has occurred in other countries and those reforms are examined for possible use in Canada. The article concludes by recommending a reform of the law that leaves a discretion with the trial judge to admit prior inconsistent statements for their truth, where the statements are seen to be both reliable and necessary.

Quand les déclarations faites antérieurement par un témoin sont incompatibles avec sa présente déposition, ces déclarations ne peuvent être utilisées que pour décider de la crédibilité du témoin et non pour décider de la vérité—à moins que le témoin ne les accepte lui-même: telle est la loi au Canada. Dans cet article l'auteur présente les arguments en faveur d'une réforme. La règle qui exclut ce genre de déclaration pour décider de la vérité va à l'encontre des principes sur lesquels se base l'admission de la preuve dans les procès criminels. Certains pays ont changé leur législation et l'auteur examine ces changements qui pourraient servir de modèles au Canada. En conclusion l'auteur recommande une réforme du droit de la preuve qui laisserait à la discrétion du juge de première instance le pouvoir d'admettre, pour les fins d'établir la vérité, des déclarations antérieures et incompatibles, quand elles semblent à la fois fiables et nécessaires.

The needless obstruction to investigation of truth caused by the hearsay rule is due mainly to the inflexibility of its exceptions, to the rigidly technical construction of those exceptions by the courts, and to the enforcement of the rule when its contravention would do no harm, but would assist in obtaining a complete understanding of the transaction.

—John Henry Wigmore.¹

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¹ John Wigmore, *A Treatise on the Anglo-American System of Evidence*, Vol.5 (Chadbourn Rev. 1974), para. 1427, p. 257.

Introduction

One of the "inflexible" hearsay rules of which John Wigmore advocated abolition concerned the limited admissibility of prior inconsistent statements made by a non-party witness. These out-of-court statements are not admissible for their truth, unless adopted by the witness. They are admissible only as to credibility, to show that on a prior occasion the witness said something inconsistent with what now is testified to in court.

For example, a witness to a robbery testifies that she observed the robbers leave the bank in a RED car. A few hours after the robbery in a statement to the police the witness describes the car as GREEN. The inconsistency is put to the witness at trial. The witness sticks to her in court testimony. At the end of the day the result is that the witness's description of the car is discredited and her testimony in that regard is neutralized if not negated entirely. But counsel for either side cannot argue that there is evidence before the court that the car was indeed GREEN—nor is the jury or judge to consider that as evidence.

The trial judge, in the above scenario, typically will charge the jury as follows:

Ladies and gentlemen of the jury, as to the evidence concerning what she said in the statement as to the colour of the car, I must ask you to bear in mind that the only evidence you can consider from her is the evidence she gave in this courtroom. I must direct you that what she said in that statement is not to be taken as evidence of the truth. The statement only serves to test her credibility as a witness.²

Such a limiting instruction has been described as "pious fraud".³ Moreover, the entire treatment of prior inconsistent statements as hearsay has been severely criticized both in terms of principle and policy.⁴ After all, the witness is present in court and can be cross-examined on the inconsistent statement. Criticism has led to reform and in many jurisdictions the blanket rule of exclusion has been abrogated in whole or in part.⁵

In Canada the rule stands:

prior inconsistent statements made by a non-party witness are not admissible for their truth unless adopted in court by the witness.

² See, for example, *McInroy and Rouse v. The Queen*, [1979] 1 S.C.R. 588, at pp. 602-603, (1978), 42 C.C.C. (2d) 481, at pp. 493-494.

³ E. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept* (1948-49), 62 *Harvard L. Rev.* 177, at p. 193.

⁴ See, for example: Wigmore, *op. cit.*, footnote 1, Vol. 3A, para. 1018; C. McCormick, *The Turncoat Witness: Previous Statements As Substantive Evidence* (1946-47), 25 *Texas L. Rev.* 573 (1947); Morgan, *ibid.*

⁵ For a summary of the status of reform in the United States, see: Note, *Substantive Admissibility of a Non-Party Witness' Prior Inconsistent Statements: Pennsylvania Adopts the Modern View* (1987), 32 *Villanova L. Rev.* 471; A. Nadel, *Prior Inconsistent Statements as Evidence*, ALR 4th 414 (1984). For a summary of reform in the Commonwealth, see: New South Wales, Law Reform Commission, L.R.C. 29, *Report on the Rule Against Hearsay* (1978).

The Supreme Court of Canada proclaimed this the law, virtually without question, in *Deacon v. The King*.⁶ Kerwin J. regarded the suggestion that such statements be accepted as evidence of the truth as "entirely foreign to our criminal law".⁷ *Deacon* was decided in 1947. Since that time the Supreme Court of Canada has not been called upon to consider the issue anew.⁸ The time has come for a reconsideration of the rule and this article presents the case for reform.

I. *The Case of R. v. B.(K.G.)*

The case of *R. v. B (K.G.)*⁹ squarely poses the issue of the use to be made of prior inconsistent statements. Simply put, in order to support conviction, the Crown needed the prior inconsistent statements made by witnesses to be accepted for their truth. The facts of that case bring home the absurdity of the rule and the need for a more flexible approach.

The accused, Keith "B", was tried as a young offender for the second degree murder of Joseph Wright. Joseph Wright and his brother, Steven, were walking home in the early morning hours of April 24, 1988. A fight occurred between the Wright brothers and four occupants of a car. The four young men in the car included the accused. In the course of the fight Joseph Wright suffered three knife wounds, two to his face and a fatal wound to the heart. The four young men fled the scene.

The Crown's position was that Keith "B" did the stabbing. Steven Wright was called as a witness and he testified that as he came to his brother's aid he was confronted by a knife wielding assailant. Steven Wright identified the accused as that person. MacDonnell J. thoroughly reviewed Steven Wright's identification evidence and found that it was fraught with frailties for the following reasons:¹⁰

- the fight occurred at approximately 2:30 a.m.,
- the knife wielder was facing away from the street lights,

⁶ [1947] S.C.R. 531, (1947), 89 C.C.C. 1.

⁷ *Ibid.*, at pp. 534 (S.C.R.), 4 (C.C.C.).

⁸ In *McInroy and Rouse*, *supra*, footnote 2, Estey J. in a concurring opinion canvassed the issue and urged that prior inconsistent statements be admitted for their truth. However, his opinion was not addressed by the majority and must be considered *obiter* to the matter before the court, which concerned the appropriateness of granting leave to the Crown to cross-examine a Crown witness on a prior inconsistent statement. In *R. v. Mannion*, [1986] 2 S.C.R. 272, (1986), 28 C.C.C. (3d) 544, the Crown sought a review of this issue; however, the court decided the case under s. 13 of the Charter of Rights and Freedoms, Constitution Act, 1982, Part I, and found it unnecessary to deal with the issue as to witness statements.

⁹ *R. v. B (K.G.)* (1991), 5 C.R. (4th) 370 (Ont. C.A.) (Dubin C.J.O., Brooke, Finlayson, Arbour and Doherty J.J.A.). The appeal was from a decision of MacDonnell J., Ontario Provincial Court, November 28, 1989 (unreported). Leave has been sought to appeal to the Supreme Court of Canada.

¹⁰ *Ibid.*, at pp. 20-24, reasons for judgment of MacDonnell J.

- the confrontation could not have lasted for more than a minute or two and probably less,
- the witness had been drinking,
- there were inconsistencies between the witness' identification given in court and descriptions given to the police and doctors immediately after the fight, and
- no pre-trial identification had ever taken place—no photo pack, no line-up.

MacDonnell J. was left with what he termed a “naked opinion given 19 months after the event”.¹¹ Accordingly he concluded:¹²

In view of the frailties to which I have drawn attention in these reasons, the evidence of Steven Wright identifying the accused as the person with the knife cannot, standing by itself, establish beyond a reasonable doubt that the accused was that person.

Other supporting evidence was needed. MacDonnell J. turned to the testimony of the three other occupants of the car. In separate statements given to the police approximately two weeks after the fight each had implicated the accused. Each had recalled a conversation with the accused that took place in the evening of April 24, 1988 during which the accused admitted using a knife in the fight.

At trial none of these witnesses saw a weapon any more lethal than a windshield scraper. Each denied the truth of their earlier statements. They were declared adverse. Confronted with their earlier statements each conceded that they had made the statement, but that they had each lied “to get himself out of trouble”.¹³

MacDonnell J., to his credit, was not prepared to leave the matter at that. He stated:¹⁴

Having regard to the consequences of their conduct, for the course of justice in this case, this is not the time to mince words. I have no doubt that each of them lied in court with respect to whether what they told the police earlier was true with respect to the accused's admission.

And he went on to find:¹⁵

I have no doubt that their recantations are false. That is, I have no doubt that on this point they were telling the police *the truth as they knew it about what the accused said*.

In coming to this finding, MacDonnell J. acted as any conscientious trier of fact. He assessed their demeanour and he found them wanting. He reviewed the circumstances of the taking of the statements and he found that each was “completely above-board, proper, non-oppressive, non-coercive”.¹⁶ The defence never suggested otherwise. Each of the statements was video-taped and these video-tapes showed that the youths, each of

¹¹ *Ibid.*, at p. 24.

¹² *Ibid.*

¹³ *Ibid.*, at p. 31.

¹⁴ *Ibid.*, at p. 32.

¹⁵ *Ibid.*, at p. 34. (Emphasis added).

¹⁶ *Ibid.*, at p. 27.

whom was accompanied by a mother or father, were not coerced by the police in any way. In fact, in one case the youth was interviewed by the police in the presence of his mother, his older brother and his lawyer! MacDonnell also found that it was “simply unbelievable that these three witnesses all independently manufactured that admission of the accused and independently relayed it to the police as described”.¹⁷

Having found that what the youths had said in the video-taped statements was the truth, MacDonnell J. went on to consider whether in law he could use these out-of-court statements, which never had been adopted in court by the witnesses, as evidence of their truth. He canvassed the law and reluctantly found that he was precluded from doing so.

The unsupported identification of the accused by Steven Wright was not enough to support conviction. The charge of second degree murder against the accused was dismissed.

II. *The Court of Appeal Decision*

The Ontario Court of Appeal placed precedent over principle and policy. The five member panel in a unanimous five-page judgment was not prepared to challenge the long standing rule of law as stated in *Deacon v. The Queen*,¹⁸ a rule that the Ontario Court of Appeal found had been “passed on”, “restated” and “reaffirmed” by more recent decisions of the Supreme Court of Canada.¹⁹ Yet, in none of these recent Supreme Court of Canada decisions was *Deacon* seriously considered or reconsidered. There was no need for the court to do so in these cases because the *Deacon* rule never was directly in issue, unlike in *R. v. B.(K.G.)*.

The Ontario Court of Appeal’s decision is disappointing. In constituting a five member panel the court recognized the importance of this issue, but chose to defer the matter, without serious re-examination, to the Supreme Court of Canada and that is where the matter now rests. What the Ontario court failed to do and what needs to be done is an assessment of the existing rule in light of the principles and policy concerns underlying the admissibility of evidence in a criminal trial.

III. *Assessing the Rule: The Test of Policy and Principle*

In 1974 the proposed Federal Rules of Evidence were before the United States Congress and Senate for hearing. Senator Sam Ervin was Chairman of the Senate Judiciary Committee. When confronted with the proposal

¹⁷ *Ibid.*, at p. 32.

¹⁸ *Supra*, footnote 6.

¹⁹ *Supra*, footnote 9, at p. 372. The Supreme Court cases referred to were: *R. v. Mannion*, *supra*, footnote 8; *R. v. Corbett*, [1988] 1 S.C.R. 670, (1988), 41 C.C.C. (3d) 385; *R. v. Kuldip*, [1990] 3 S.C.R. 618, (1990), 61 C.C.C. (3d) 385.

to allow out-of-court statements made by witnesses to be admitted in evidence for their truth, Senator Ervin had this to say:²⁰

Senator Ervin. I would throw this thing on the scrap heap of injustice myself. This would authorize a conviction of a man who has no accuser on the ground that a witness who say [sic] the defendant is not guilty of anything has a poor memory or is a liar . . .

I do not believe I can convince you and I know you cannot convince me. To me it is the heart of the rule to say a man has to be confronted by his accusers in all criminal cases, and he cannot be convicted when he has no accuser.

Senator Ervin never did change his mind. The Senator's opposition to the proposal was grounded in his own fundamental beliefs about what the American trial system represented. The hearsay rule, in general, and any relaxation of that rule brings into question basic beliefs about our system of justice and demands a critical re-examination of those beliefs. Many, like Senator Ervin, will never change their view. However, what is essential is that these beliefs be subjected to the scrutiny of reason.²¹ When that is done, it becomes apparent that the dictates of policy and principle point to a relaxation of the hearsay rule for prior inconsistent statements.

A number of common hearsay concerns have been advanced to support the "orthodox" rule of exclusion:

- (1) the statement, in many cases, was not made under oath;
- (2) the trier of fact did not observe the witness' demeanour at the time the statement was made;
- (3) admitting the statement as substantive evidence offends the "best evidence" principle;
- (4) the jury will give the statement inappropriate weight;
- (5) there is fear of fabrication of such statements; and
- (6) the witness was not subject to cross-examination at the time the statement was made.

Let us address these concerns.

1. *Absence of Oath:*

In the vast majority of cases, as in *R. v. B.(K.G.)*, the prior inconsistent statement is not made under oath and the witness is not subject to prosecution for perjury. The unfortunate reality in our modern society is that the power of an oath must be discounted as a means of ensuring reliability for a

²⁰ James Bailey and Oscar Trelles, *The Federal Rules of Evidence—Legislative Histories and Related Documents* (1980), Vol. 4, pp. 51-52.

²¹ It is interesting to note that Wigmore, *op. cit.*, footnote 1, Volume 3A, para. 1018, note 2, was a convert to the admissibility of prior inconsistent statements as truth. In the first edition of his treatise he approved the "orthodox" position. Upon "further reflection" he came to the contrary view.

statement.²² It is also true that for all the hearsay exceptions only one, that being for prior testimony, is the out-of-court evidence taken under oath.²³ Therefore, the absence or existence of an oath is not and should not be a determining factor in the decision to admit prior inconsistent statements for their truth.

2. *Assessing Demeanour*

The out-of-court statement being tendered for its truth was not made in the presence of the trier of fact. Contrast this to in court testimony where the judge and jury can watch the witness giving evidence. It must be conceded that in order fully to give meaning to what is said it is important to hear how it is said. Take the scene from Scott Turow's book, *Presumed Innocent*,²⁴ where Rusty Sabich, district attorney turned accused, is confronted by a despised colleague, Tommy Molto, and is first accused of murder:

Molto's eyes are burning.

"Don't pretend that you don't get it. I know. You killed her. You're the guy."

Rage; as if my blood has quickened; as if my veins were filled only with that black poison. How old and familiar, how close to my being it seems. I come near Tommy Molto. I whisper, "Yeah, you're right," before I walk away.

The stark words, "Yeah, you're right", are a damning admission of guilt, but not in the given context. Does the judge or jury need to be present to understand that? Or is subsequent evidence of the circumstances and subsequent observation of the witnesses when questioned on the making of the statement a sufficient substitute? For some, first hand observation is critical.²⁵ In answer, Learned Hand J.'s classic rejoinder is persuasive:²⁶

The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

The witness is present and when confronted with the earlier statement the witness' reaction can be observed and assessed in light of all the evidence. The circumstances of the making of the statement can be fully examined upon through questioning of the recorder of the statement, the maker of the statement or both.

²² For an excellent summary on this issue, as well as the entire question see, New South Wales Law Reform Commission, *op. cit.*, footnote 5, pp. 30-43.

²³ Michael Graham, *Employing Inconsistent Statements For Impeachment and Substantive Evidence* (1976-77), 75 Michigan L. Rev. 1565, at p. 1568.

²⁴ (1987), pp. 146-147.

²⁵ See Mark Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine* (1974-75), 26 Hastings Law J. 361, at pp. 372-373.

²⁶ *Di Carlo v. United States*, 6 F. 2d 364, at p. 368 (C.A., 2d cir., 1925).

This is precisely what MacDonnell J. did in *R. v. B.(K.G.)*. He found that the three youths had lied in court. He came to this conclusion in part by observing them testify. When confronted with their earlier statements he found the youths to be "anything but forthright".²⁷ MacDonnell J. then assessed the circumstances of the making of the prior statements and tested the youths' testimony against all the evidence in the case.

MacDonnell J. did what capable judges and juries do all the time. He applied what he heard and saw in court to determine the truth of past events. Surely these same triers of fact are as capable of determining the truth of prior statements. Professor McCormick made this common sense observation:²⁸

The argument seems pervasive that if the previous statement and the circumstances surrounding its making are sufficiently probative to empower the jury to disbelieve the story of the witness on the stand, they should be sufficient to warrant the jury in believing the statement itself.

3. *The Best Evidence Principle*

A substantial minority of the English Law Reform Commission were opposed to the admitting into evidence of out-of-court statements made by a person called as a witness, on the ground that such evidence offended the best evidence principle.²⁹ Their position was that the best evidence available was the direct in court testimony of the witness and that out-of-court statements ought not to be admitted in place of *viva voce* testimony.

Twaddle J.A. of the Manitoba Court of Appeal raised this same concern in the recent case, *R. v. Laramee*.³⁰ Twaddle J.A. "rediscovered" the "dormant" best evidence rule to strike down section 715.1 of the Criminal Code,³¹ which provides for admitting into evidence out-of-court video-tape statements taken from and adopted by child complainants in listed sexual offence trials. Twaddle J.A. fashioned the "best evidence principle" into a principle of fundamental justice that deserved Charter protection. And he went on to find that the impugned section breached this fundamental principle by substituting out-of-court for in court testimony.

Twaddle J.A. took the position that the witness' "own unvarnished tale" is the best evidence. However, the view that the in court testimony of the witness is the "best" available evidence is open to challenge. We know that this is not necessarily the case. For example, identification of

²⁷ *Supra*, footnote 9, at p. 32.

²⁸ McCormick, *loc. cit.*, footnote 4, at p. 582.

²⁹ Law Reform Committee, Thirteenth Report: Hearsay Evidence in Civil Proceedings, Cmnd. 2964 (1966), p. 17.

³⁰ (1991), 65 C.C.C. (3d) 465, 6 C.R. (4th) 277 (Man. C.A.) (Scott C.J.M., O'Sullivan, Twaddle, Lyon and Helper J.J.A.).

³¹ R.S.C. 1985, c. 46.

the accused at trial is extremely suspect and routinely is bolstered by evidence of out-of-court *prior* identifications made by the witness. Similarly, prior statements made closer in time to the events recalled are much fresher than the stale in court testimony made months later. Furthermore, as the Law Reform Commission of New South Wales points out, it is not just a matter of "staleness":³²

Even if the maker is available, his out-of-court statement made soon after an event may be much more valuable than his testimony in court years later; apart from its lack of staleness, it is much less likely to be affected by interest, by the heat of litigation, or by the fact that the legal advisers of the side calling him may have repeatedly interviewed him and consciously or unconsciously forced him into a particular story of which he has no actual memory.

The problem with the best evidence rule is that it is uncompromising. Only the "best" evidence is to be admitted and nothing else. Even reliable substitutes are excluded. Therefore, a demand for compliance with the best evidence rule resurrects technical obstruction to impede the admissibility of otherwise relevant and reliable evidence.

Strict adherence to the best evidence rule is no longer accepted. In today's courts the rule is typified by relaxation and flexibility.³³ The courts recognize that "[a]n over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth".³⁴ For this reason in the twentieth century the best evidence rule has been in "persistent rescission".³⁵ It would be better to treat the rule as one of weight.³⁶ Let the evidence go in for its truth and let the trier of fact assess its worth.

Indeed, Twaddle J.A. in resurrecting the best evidence principle never argued for strict application of the rule. Rather, he supported admitting "substitute" evidence when that evidence was necessary and reliable, which is consistent with a flexible and principled approach to the admissibility of hearsay evidence.³⁷

³² *Op. cit.*, footnote 5, pp. 34-35. See also McCormick, *loc. cit.*, footnote 4, at p. 577.

³³ See, for example, *R. v. Betterest Vinyl Manufacturing Ltd.*, [1990] 2 W.W.R. 751, (1989), 52 C.C.C. (3d) 441 (B.C.C.A.).

³⁴ *Ibid.*, at pp. 758 (W.W.R.), 448 (C.C.C.), quoting from *United States v. Manton*, 107 F. 2d 834, at p. 845 (C.A., 2nd cir., 1938).

³⁵ M.N. Howard, P. Crane and D.A. Hochberg, *Phipson On Evidence* (14th ed., 1990), p. 118.

³⁶ The Law Reform Commission of New South Wales, *op. cit.*, footnote 5, p. 34, addressed this point as follows: "The best should not be the enemy of the good; the unavoidable absence of the best conceivable evidence should not be a reason for excluding the best available evidence."

³⁷ *Supra*, footnote 30, at pp. 486 (C.C.C.), 311-312 (C.R.).

4. *Misuse of the Evidence by Juries*

One theory underlying the entire law of evidence is that it is the product of the jury system and the need for trained judges to exclude evidence that could mislead or confuse untrained jurors.³⁸ Simply put, the more you distrust juries the more evidence you exclude from them; the more you trust juries the more evidence you entrust with them. The key question is, can the juries of the 1990s be trusted to assess appropriately the weight to be attached to prior inconsistent statements made out-of-court by testifying witnesses?

The Supreme Court of Canada says that we can trust the common sense of Canadian jurors.³⁹ No matter how uneducated or unsophisticated juries may have been, this is certainly no longer the case. Dickson C.J.C., writing in *R. v. Corbett*,⁴⁰ had this to say:

In my view, it would be quite wrong to make too much of the risk that the jury *might* use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense.

The law, as it now stands, offends common sense. To say to a juror, who has found a witness to be totally discredited by a prior inconsistent statement, that the statement only goes to credibility and cannot be used for its truth brings our common sense notion of justice into disrepute.⁴¹ Therefore, concern for juries is a compelling argument in favour of simplifying what is now an unduly complicated and irrational state of affairs.

5. *Fear of Fabrication*

Fear of fabrication is an oft cited concern. This was the concern of Rand J. in *R. v. Deacon*,⁴² where he wrote that to admit prior inconsistent statements for their truth "would expose a person to a fabricated account of events, too dangerous to risk". Certainly there is something incongruous about accepting as truth a prior inconsistent statement made by a witness, whose sworn evidence at trial is found to be untruthful.⁴³ Furthermore,

³⁸ For a discussion of this theory, see A. Sheppard, *Evidence* (1988), pp. 143-144.

³⁹ See, for example, *R. v. Corbett*, *supra*, footnote 19; *R. v. Kuldip*, *supra*, footnote 19. For an article on the perception of juries by lawyers, see Lee Stuesser, *Lawyers Judge the Jury* (1990), 19 *Manitoba L.J.* 52.

⁴⁰ *Ibid.*, at pp. 692 (S.C.R.), 400 (C.C.C.).

⁴¹ See, *The Law Reform Commission of New South Wales, op. cit.*, footnote 5, p. 25.

⁴² *Supra*, footnote 6, at pp. 537-538 (S.C.R.), 7 (C.C.C.).

⁴³ R. Lempert and S. Saltzburg, *A Modern Approach to Evidence* (2d ed., 1982), p. 512.

in criminal cases, there is the additional concern about police induced fabrication.⁴⁴ After all it is the police who investigate crimes, it is the police who take witness statements, and it is the police and prosecution who would benefit most from a rule of law allowing such statements to be introduced as evidence of their truth at trial.

Where is the safeguard against fabrication? The safeguard is cross-examination. The maker of the statement is present and so too are the recorders of the statement. The circumstances of the making of the statement can be fully examined upon and the witness or authorities can be confronted with any allegations of fabrication. Cross-examination cannot prevent perjury but it remains our most effective trial means to detect deceit.⁴⁵

Even accepting that there exists a valid fear of fabrication, a more fundamental question is whether such a fear ought to dictate a rule of exclusion in all cases. Is not fear of fabrication better assessed, on a case by case basis, as a matter of reliability and weight for the trier of fact to decide? For example, in *R. v. B.(K.G.)*, where is the fear of fabrication? The statement is there for the jury to see. There is no suggestion of police intimidation or coercion. Defence counsel may argue that the three youths concocted the statements to implicate the accused, but surely that is a matter that the jury can assess using their own common sense and reviewing all of the evidence.

Fear of fabrication is also a two-edged sword. There is the countervailing concern about in court fabrication. The time between incident and trial presents an opportunity for untoward pressure to be exerted on witnesses. We would be naive to think otherwise. For courts to lift the veil of fabrication, as was done in *R. v. B.(K.G.)* by MacDonnell J., discover the truth and then be denied use of that truth in reaching a verdict seems equally unacceptable to our system of justice. There is a need to protect the integrity of our trial system from the "turncoat" witness.⁴⁶

⁴⁴ *Ibid.*, pp. 507-516.

⁴⁵ Dean Mason Ladd, *A Modern Code of Evidence*, as quoted in Bailey and Trelles, *op. cit.*, p. 338, footnote 19, in commenting on the proposed Model Code of Evidence, observed:

The formulation of the rules should be governed by the value and relationship of evidence to the problem of proof and not fear of perjury. No rule of exclusion can prevent the testimony of a witness willing to perjure his testimony. . . . A model code must pre-suppose a competent judge, intelligent triers-of-fact, and a society in which honest people outnumber the degraded, the deceitful, and the false-swearing. It must also assume ability on the part of lawyers through cross-examination and other legal methods of testing the credibility of witnesses to be able in the majority of situations to expose the false and discover the true.

⁴⁶ For a more thorough examination of the problem of the "turncoat" witness, see, McCormick, *loc. cit.*, footnote 4, and Michael Graham, *Witness Intimidation* (1985).

The Georgia Supreme Court, in overturning past precedent and accepting prior inconsistent statements for their truth, noted the following "salutary effects" that would flow from reform of the law:⁴⁷

- (a) Once a declaration is made, both the State and the defense are accorded some measure of protection from the erratic or unpredictable witness, in that his declaration can be considered substantively where the witness appears and is subject to cross-examination, notwithstanding variant testimony from the stand.
- (b) Similarly, both sides are assured a measure of protection against efforts to influence the testimony of a witness, as the prior declaration is no longer *effectively* revocable at the will of the witness.
- (c) For the same considerations, witnesses are protected from improper attempts to influence testimony—the potential gain from that impropriety being diminished substantially by the adoption of this rule.

6. *The Need for Contemporaneous Cross-Examination*

The principal reason for allowing prior inconsistent statements to go in for their truth is that the maker of the statement is present and can be examined in court. I have already referred to cross-examination as the "safeguard" against fabrication, but some observers maintain that subsequent in court cross-examination is an inadequate substitute for cross-examination that immediately follows upon the making of the statement.⁴⁸ It is argued that the statements remain dangerous hearsay because at the time made they were not subject to cross-examination before the same trier of fact, who now must determine whether the statement is truthful. The premise is that for cross-examination to be an effective safeguard it must "fall while the iron is hot".⁴⁹

The leading American case cited in support of this argument is *Ruhala v. Roby*.⁵⁰ The aim of cross-examination was defined as follows:⁵¹

Cross-examination is in essence an adversary proceeding. The extent to which the cross-examiner is able to shake the witness, or induce him to equivocate is the very measure of the cross-examiner's success.

The court concluded that successful cross-examination was not possible when the witness, in direct examination, recants an earlier statement:⁵²

The would-be cross-examiner is not only denied the right to be the declarant's adversary, he is left with no choice but to become the witness's friend, protector and savior. Though he may be permitted to ask questions in the form of cross-examination, the substance of his effort will be re-direct examination and rehabilitation.

⁴⁷ *Gibbons v. The State*, 286 S.E. 2d 717, at p. 722 (S.C. Ga., 1982).

⁴⁸ See, for example, Reutlinger, *loc. cit.*, footnote 25, and Lempert and Saltzburg, *op. cit.*, footnote 43.

⁴⁹ *State v. Saporen*, 285 N.W. 898, at p. 901 (S.C. Minn., 1939).

⁵⁰ 150 N.W. 2d 146 (S.C. Mich., 1967).

⁵¹ *Ibid.*, at p. 156.

⁵² *Ibid.*

The reason is simple. The witness cannot recant! Every cross-examiner tries to bring the witness to the point where he changes his story—literally eats his words—in the presence of the jury.

According to the court all effect is lost:⁵³

Instead of a plunge to the jugular, the examiner will have to be satisfied with applying a bandage.

To illustrate the point let us compare a contemporaneous cross-examination to a subsequent cross-examination by defence counsel in *R. v. B.(K.G.)*. In the contemporaneous cross-examination defence counsel is faced with the statements from the three youths implicating the accused. Defence counsel attacks. The youths are accused of fabricating everything to save themselves and in a miracle cross-examination each recants on the stand:

Yes, you're right. I admit that I lied in order to save myself.

The recantation is dramatic and utterly devastating to the Crown's case.

Now turn to the actual trial of *R. v. B.(K.G.)*. Defence counsel has no reason to attack the three youths. They have already recanted their statements in direct examination. The youths are not hostile witnesses to the defence. They are friendly to the defence. The cross-examination is made easy.⁵⁴ Defence counsel will be left with a "friendly" examination to elicit from the youths why they lied earlier.

True, the defence cross-examinations are different, but the distinction is too artificial. First, Perry Mason does not stalk the halls of real life court houses. To get a witness to recant testimony and admit lying on the stand is very rare indeed. A witness when confronted with a hostile cross-examination will become evasive, argumentative and, when cornered, forgetful but rarely will the witness admit to lying.

Second, cross-examination is not always adversarial. One of the fundamental purposes of cross-examination is to elicit favourable testimony. Cross-examiners often succeed in so doing through friendly questioning of honest, co-operative witnesses—even though called by the adversary.

Third, the mantle of a "hostile" cross-examiner in the case of a recanting witness is taken up by the caller of the witness. For example, in *R. v. B.(K.G.)* the Crown succeeded in having the youths declared adverse and cross-examined them on their prior inconsistent statements. Through this cross-examination the recanted testimony is put to the test. The counsel calling the witness becomes the adverse cross-examiner. An explanation for the recanted testimony is sought and challenged. A reasonable explanation that is presented in an honest manner confirms the in court testimony.

⁵³ *Ibid.*, at p. 157.

⁵⁴ One commentator complained that the cross-examination would be "too easy"; see Reutlinger, *loc. cit.*, footnote 25, at p. 370.

The lack of a credible explanation, given evasively, exposes the testimony as fabrication, which was the case in *R. v. B.(K.G.)*. In this sense there remains effective cross-examination, although now conducted by calling counsel.

The Supreme Court of the United States addressed this issue squarely in *California v. Green*⁵⁵ and the majority came to the following conclusion:

It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position", but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.

In *R. v. B.(K.G.)* effective in court cross-examination on the making of the statements was possible. Although the youths denied that the statements were true, they did admit to the making of the statements and could be examined upon what they said and why they said it. The situation is different where the witness denies the statement and denies making the statement or has no recollection of making the statement. Here cross-examination is thwarted by the stock response, "I don't remember."⁵⁶

This was the case in *R. v. Gillingham*.⁵⁷ The accused was charged with the rape of his thirteen year-old niece. The girl was observed by a neighbour hanging outside the second story bathroom of Gillingham's house in the early morning hours. She was helped down by the neighbour and Gillingham. She immediately fled to the home of another neighbour. There she told the neighbour that her uncle had raped her. She gave a detailed written and signed statement to the police. A medical examination also found semen in her vaginal pool. Some nine months later at trial the girl could recall nothing of the rape or of her statement to the police. MacDonald J. alluded to this difficulty and refused to admit the statement as evidence of truth precisely because "the truth of the statement could never be tested in the crucible of cross-examination".⁵⁸

The Law Reform Commission of Canada did not share MacDonald J.'s concerns and in a study paper on hearsay it concluded:⁵⁹

⁵⁵ 399 U.S. 149, at pp. 160-161, per White J. (1970).

⁵⁶ See *State v. Spadafore*, 220 S.E. 2d 655, at p. 662 (S.C. W. Va., 1975).

⁵⁷ (1981), 65 C.C.C. (2d) 42 (N.S.C.A.).

⁵⁸ *Ibid.*, at p. 50.

⁵⁹ Law Reform Commission of Canada, Evidence: Hearsay (A Study paper prepared by the Law of Evidence Project) (1974), p. 14.

If the witness denies any knowledge of the matter to which the statement speaks then the necessity for the evidence is just as great as if he were unavailable and yet the trier of fact will be in an improved position to evaluate the statement since it will have present before it not only the witness who reports the statement was made but also the person who is reported to have made it; the trier of fact can decide whom to believe.

The Law Reform Commission dismisses MacDonald J.'s concerns too easily. There is cause for caution when effective cross-examination of the maker of the statement is not possible. Professor Judson Falknor, writing nearly forty years ago, urged caution against blanket admissibility of prior witness statements:⁶⁰

What all this gets down to then, in my opinion, is this: Before the bar is removed in respect to a witness' prior extrajudicial utterances, there should be required some prior determination that the witness has (or at least at one time had) personal knowledge of the matter to which his prior statement relates, and, in addition, concession by the witness, or fair assurance otherwise, that he actually made the statement.

A further safeguard is needed. This can be achieved by requiring the proponent of the statement to prove the making of the statement. In this way a balance is achieved and abuses on both sides are avoided. On the one hand a threshold of proof will be required before the statement is admitted into evidence. On the other hand valuable evidence will not be lost simply at the whim of feigned memory loss by the witness.⁶¹ The reporter of the statement will have to be called and the circumstances of the making of the statement scrutinized with care. The procedure would be similar to a *voir dire* on the admissibility of a confession or an application to cross-examine a witness on a prior inconsistent statement made under section 9(2) of the Canada Evidence Act.⁶²

IV. *Reform of the Rule in Other Jurisdictions*

In other countries there has been a trend toward the reform of the hearsay exclusion for prior inconsistent statements. Change first occurred in England with the Evidence Act, 1938,⁶³ which made written statements admissible in civil proceedings provided that the maker of the statement had personal knowledge of the contents and is called as a witness or is unavailable to testify. The English statute opted for admissibility over exclusion, with

⁶⁰ Judson Falknor, *The Hearsay Rule and Its Exceptions* (1954-55), 2 U.C.L.A. Law Rev. 43, at pp. 53-54.

⁶¹ For an example of the court finding that the loss of memory was feigned see, *McInroy and Rouse v. The Queen*, *supra*, footnote 2.

⁶² R.S.C. 1985, c. C-5. The procedure is outlined in *R. v. Milgaard*, [1971] 2 W.W.R. 266, (1971), 2 C.C.C. (2d) 206 (Sask. C.A.).

⁶³ 1 & 2 Geo. 6, c. 28. A similar provision is contained in the Evidence Acts of Manitoba, Yukon and Northwest Territories. See Manitoba Evidence Act, R.S.M. 1987, c. E150, s. 58; Yukon Evidence Act, R.S.Y.T., c. 57, s. 53; Northwest Territories Evidence Act, R.O.N.T. 1974, c. E-4, s. 52.

appropriate weight to be assessed by the trier of fact. The Act, in fact, contained a specific reminder about weight:⁶⁴

2(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statements had any incentive to conceal or misrepresent facts.

Through the Evidence Act 1968⁶⁵ this exception in civil proceedings was expanded in England to include *oral* as well as written statements made by a witness. In the new Act the admissibility of prior inconsistent statements was addressed expressly:⁶⁶

3(1) Where in any civil proceedings

(a) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865; ...

that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

These reforms all apply to civil proceedings and in 1972 the English Criminal Law Revision Committee proposed that the civil law of evidence be applied, with suitable modifications, to criminal proceedings.⁶⁷ This has not taken place. The draft criminal evidence bill met strong opposition in the Parliamentary hearings and never was passed into law.⁶⁸ Therefore the situation in England today is that civil proceedings largely have been excised of hearsay but in criminal proceedings the stringent hearsay rules remain.

Other Commonwealth legislatures have been more bold. In Queensland and Tasmania prior inconsistent statements are admissible for their truth in both civil and criminal proceedings.⁶⁹

The New South Wales Law Reform Commission recommends the same for that state.⁷⁰ In a comprehensive review of the rule against hearsay, the Commission acknowledged the differences between civil and criminal

⁶⁴ *Ibid.*, s. 2(1).

⁶⁵ Civil Evidence Act 1968, c. 64.

⁶⁶ *Ibid.*, s. 3(1).

⁶⁷ English Criminal Law Revision Committee, 11th Report, Draft Criminal Evidence Bill, ss. 30-33 (1972).

⁶⁸ See, for example, Hansard, House of Lords Debates, Vol. 338, col. 1546 (1973).

⁶⁹ Queensland Evidence Act 1977, No. 47, s. 101; Tasmania Evidence Act 1910, as amended Evidence Act 1974, No. 91, s. 81L(2). The Queensland statute followed recommendations made by the Queensland Law Reform Commission, A Report on the Law Relating to Evidence (1975).

⁷⁰ *Op. cit.*, footnote 5, p. 238 (draft s. 77).

law, but found it “generally undesirable”⁷¹ to have substantially different rules of evidence. And the Law Reform Commission was not persuaded that with respect to prior inconsistent statements there was a need to distinguish between criminal and civil proceedings.

However it is in the United States where reform is most pronounced. At last count, only eight states cling to the “orthodox” rule excluding prior inconsistent statements for their truth.⁷² In the remainder of the state and federal jurisdictions the rule has been abolished or limited to varying degrees. Three general approaches to reform of the law emerge:

- A. **Broad Admissibility**—The hearsay exclusion is abolished for *all* prior inconsistent statements made by a testifying witness;
- B. **Narrow Admissibility**—Only those statements made by the witness in prior judicial proceedings are admissible for their truth; and
- C. **Middle Ground Admissibility**—Prior inconsistent statements are admitted for their truth where there is reliable evidence that the witness in fact made the statement.

It should also be noted that for the vast majority of states the rules of evidence are kept the same for both civil and criminal proceedings.⁷³

A. *Broad Admissibility*

The impetus for abolition began with the Model Code of Evidence, which was prepared by the American Law Institute in 1942.⁷⁴ Through Rule 503 traditional hearsay, including prior inconsistent statements, was washed away:

- Rule 503. ADMISSIBILITY OF EVIDENCE OF HEARSAY DECLARATION
 Evidence of a hearsay declaration is admissible if the judge finds that the declarant
- (a) is unavailable as a witness, or
 - (b) is present and subject to cross-examination.

The broad inclusionary view was reiterated in the Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws in 1953.⁷⁵ Rule 63 of those Rules repeated, albeit in more detail, Model Rule 503.

Flowing from the draft codes some ten states through statute abolished the hearsay exclusion for prior inconsistent statements.⁷⁶ Most notably the

⁷¹ *Ibid.*, p. 203.

⁷² See Note, *Substantive Admissibility of a Non-Party Witness' Prior Inconsistent Statements: Pennsylvania Adopts the Modern View* (1987), 32 Villanova Law Rev. 471, at pp. 489-491.

⁷³ *Ibid.*, at pp. 491-493.

⁷⁴ American Law Institute, Model Code of Evidence (1942).

⁷⁵ National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953).

⁷⁶ *Loc. cit.*, footnote 72, at p. 491.

state of California chose abolition. After nine years of study and drafting by the California Law Reform Commission, the California Evidence Code⁷⁷ emerged in 1965. Section 1235 of that Code reads:

1235. **Inconsistent statement.** Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

Section 770, referred to in section 1235, is procedural and requires that before an inconsistent statement can be admitted into evidence it must first be put to the witness to give him an opportunity to explain or deny the statement.

The only stumbling block for admissibility of the prior inconsistent statements is the residual discretion on the part of the trial judge to exclude evidence under Code section 352:

352. **Discretion of court to exclude evidence.** The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

This discretion, however, is narrowly prescribed with the result that virtually all relevant prior inconsistent statements will be admitted into evidence.

B. *Narrow Admissibility*

Other states, following the lead of the Federal Rules of Evidence, have opted for a more cautious and limited hearsay exception.⁷⁸ Rule 801(d)(A) of the Federal Rules⁷⁹ defines a prior inconsistent statement as *not* hearsay when made in certain circumstances:

(d) **Statements which are not hearsay.** A statement is not hearsay if

(1) **Prior Statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, . . .

As can be seen the exception applies only to statements made under oath in a deposition or at another proceeding. Statements taken by the police or oral statements to other witnesses would still be subject to hearsay exclusion. The videotaped statement in *R. v. B.(K.G.)* would remain hearsay.

Rule 801(d)(A) was the subject of heated debate in the Committee hearings of the United States Congress.⁸⁰ The original proposal, presented to the Congress and recommended by the Supreme Court, provided for

⁷⁷ California Evidence Code (passed in 1965, and enacted in 1967).

⁷⁸ To date, some 15 states apply the Federal Rules verbatim or with slight variation. See *loc. cit.*, footnote 72, at p. 492.

⁷⁹ Federal Rules of Evidence (1974).

⁸⁰ See, for example, Bailey and Trelles, *op. cit.*, footnote 20, Volume 4.

complete abolition of the hearsay exclusion for prior inconsistent statements made by a witness.⁸¹ This proposal followed the draft codes and the California Evidence Code. In committee the proposal met strong and ultimately successful opposition.

Friendly J. of the United States Court of Appeals for the 2nd Circuit was one who spoke against the proposed law:⁸²

Any prior inconsistent statement of a witness, even an oral one, is made admissible as affirmative evidence. This includes a case where, for example, a witness for a criminal defendant denies that he has any knowledge of an event or ever made a statement about it, but a government agent swears that he has made an oral statement inculcating the defendant. This makes cross-examination a farce. The rule goes far beyond any decided case dealing with federal crimes or any consideration of sound policy.

The opposition of Friendly J. was significant because it was in the 2nd Circuit and through his judgments that the orthodox rule initially had been relaxed. The 2nd Circuit Court of Appeal already had approved the admissibility into evidence of prior inconsistent statements taken at prior proceedings while the witness was under oath.⁸³ In those circumstances there were sufficient indicia of trustworthiness to satisfy the court. Obviously, Friendly J. was not prepared to relax the law any further, nor was Congress. The final form of Rule 801(d)(A) reflects the 2nd Circuit law.

The Federal Rule can be criticized for being overly strict.⁸⁴ Ensuring reliability is the valid aim of the Rule 801(d)(A) limitations, but the rule is too narrow and excludes otherwise reliable and relevant evidence—such as the videotape statements in *R. v. B.(K.G.)*.

3. *Middle Ground Admissibility*

Friendly J.'s stated concern was with denied oral statements where the trier of fact is left with a situation akin to a school yard squabble:

You said that.
Did not.
Did too.

The case of *Weston v. County of Middlesex*⁸⁵ provides a concrete example of the problem. Weston brought an action against the County for personal injuries sustained when his sleigh overturned on a county road. Riding with the plaintiff at the time of the accident was his son. The plaintiff blamed the accident on the County for its negligence in the

⁸¹ *Ibid.*, Vol. 2, p. 159.

⁸² *Ibid.*, Vol. 3, p. 264.

⁸³ See *United States v. De Sisto*, 329 F. 2d 929 (C.A., 2nd Circ., 1964).

⁸⁴ See, for example, *Graham*, *loc. cit.*, footnote 23, at p. 1583.

⁸⁵ (1913), 16 D.L.R. 325, 30 O.L.R. 21 (Ont. H.C.), *aff'd* (1914), 19 D.L.R. 646, 31 O.L.R. 148 (Ont. App. Div.).

design and maintenance of the road. The County denied the claim and called a witness who testified that "the plaintiff's son, on the evening after the accident, told him that one of the horses had bit at the other, and just then the accident happened".⁸⁶ The son denied the statement and denied any conversation with the witness on the day stated.

Meredith C.J.C.P. was left with, "You said that. Did not. Did too." How to rule? He carefully sifted through the testimony of each of the witnesses. At the end of the day, without expressly ruling on whether he found that the statement was actually made or not, the Chief Justice attached very little weight to the evidence. His decision is interesting because it shows the type of common sense reasoning that can be brought to bear in resolving whether or not a denied oral statement was said, but the real question is whether the evidence was worth the expended court time.

Professor McCormick first voiced concern about such denied oral statements.⁸⁷ He noted that the Model Code ignored "the hazard of error or falsity in the reporting of oral words".⁸⁸ To deal with this problem he suggested the following statute:⁸⁹

A statement made on a former occasion by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts, notwithstanding the rule against hearsay if

- (1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, and
- (2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant.

This suggested statute specifically addresses the concern about denied oral statements, and it goes far beyond Federal Rule 801(d)(A) to include other instances where there is reliable indication that the statement was made. Professor McCormick observed that such a statute would encourage the practice of taking written statements from witnesses—already the practice of diligent investigators.⁹⁰

Certain states, equally uncomfortable with broad abolition or the narrow confines of Rule 801(d)(A), have embraced McCormick's model. The Hawaii statute is one example:⁹¹

⁸⁶ *Ibid.*, at pp. 341 (D.L.R.), 41-42 (O.L.R.) (Ont. H.C.).

⁸⁷ *Loc. cit.*, footnote 4, at p. 588.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* Professor Falknor proposed a similar statute, *loc. cit.*, footnote 60, at p. 54.

⁹⁰ *Loc. cit.*, footnote 4, at p. 587.

⁹¹ Hawaii Rules of Evidence, 802.1(1), quoted *loc. cit.*, footnote 72, at p. 494, which also contains other similar state laws.

The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

- (1) Inconsistent Statement. The declarant is subject to cross-examination concerning the subject matter of his statement, the statement is inconsistent with his testimony . . . and the statement was:
 - (A) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or
 - (B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or
 - (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement.

Even with the more generous Hawaii Rule, the bottom line remains that there is drawn a *fixed line*, which acts as a boundary between admitted and excluded evidence. Where the law draws a line there will always be reliable evidence lost because it falls outside the boundary.

For example, this was the flaw in section 276 of the Criminal Code,⁹² the so-called “rape shield” provision, which prohibited an accused, charged with certain sexual offences, from adducing evidence concerning the past sexual activity of the complainant with other persons—with three stated exceptions. The Supreme Court of Canada in *R. v. Seaboyer*⁹³ struck down the law. The listed exceptions were too narrow and that precluded the accused from presenting otherwise relevant evidence. The court’s solution was not to create or broaden the listed exceptions; rather the court eschewed the use of categories entirely in favour of leaving the issue of relevancy for the trial judge to rule upon using his or her discretion.

Returning to our situation, take this hypothetical loosely based on the *R. v. B.(K.G.)* scenario. B is on trial. He denies the stabbing. There is further eye-witness evidence against him. The mother of another of the youths goes to defence counsel and says that her son, X, admitted to her that he had done the stabbing. X is called to the stand by the Crown and testifies that B did the stabbing. In cross-examination he is confronted by the accusation and by the oral statement allegedly made to his mother. X denies both doing the stabbing and saying so to his mother. Mrs. X is called by the defence and testifies as to what her son told her. Assume further that the evidence shows a loving, caring mother with no motive to implicate her son—other than to see the truth come out. This is an oral statement, not adopted or admitted being made by the witness X, and it remains excluded hearsay under the Hawaii Rule.

This is the problem with defining classes of admissible evidence. One solution, as illustrated in *R. v. Seaboyer*, is to replace the listed class of admissible or excluded evidence with a regime based on judicial discretion.

⁹² *Supra*, footnote 31.

⁹³ [1991] S.C.J. 62 (August 22, 1991).

The advantage of this approach is that it allows for flexibility to accommodate reliable evidence. The disadvantage is loss of certainty.

The Federal Rules of Evidence provide for such a residual hearsay exception in Rule 803(24):⁹⁴

803(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

This discretionary rule embodies John Wigmore's two principled thresholds for the creation of hearsay exceptions—necessity and circumstantial probabilities of trustworthiness.⁹⁵

Weinstein, long a proponent for broader judicial discretion, led the way in applying the residual rule to deal with prior inconsistent statements⁹⁶ and his lead was followed in *United States v. Leslie*,⁹⁷ a case similar to *R. v. B.(K.G.)*. In *Leslie* the United States Court of Appeals for the 5th Circuit was satisfied that there were sufficient indicia of trustworthiness to admit prior inconsistent statements made to the police by accomplices.

Thus far we have examined legislated reform in the United States; the courts have been equally pro-active. The New York Court of Appeals recommended adherence to the following principle:⁹⁸

The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. Exceptions to the hearsay rules are being broadened and created where necessary . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts in civil cases.

Following upon this advice, the court overturned the orthodox rule for civil cases in the state.

⁹⁴ *Supra*, footnote 79, Rule 803(24).

⁹⁵ Wigmore, *op. cit.*, footnote 1, Vol. 5, para. 1420.

⁹⁶ See, *United States v. Iaconetti*, 406 F. Supp. 554 (U.S. D.C., N.Y., 1976); *aff'd* 540 F. 2d 574 (2nd Cir., 1976); Jack Weinstein, *Probative Force of Evidence* (1960-61), 46 Iowa L. Rev. 331.

⁹⁷ 542 F. 2d 285 (C.A., 5th Cir., 1976).

⁹⁸ *Letendre v. Hartford Accident and Indemnity*, 236 N.E. 2d 467, at p. 471 (C.A. N.Y., 1968), citing Fuld C.J. in *Fleury v. Edwards*, 200 N.E. 2d 550, at p. 554 (C.A. N.Y., 1964).

The case law across the United States mirrors the diversity of the statutory reforms. In certain states the courts have seized the initiative to abolish the orthodox rule outright.⁹⁹ Other courts have been more cautious. The Supreme Court of Connecticut's decision in *State v. Whelan*¹⁰⁰ is a case in point. The court was called upon to rule on the admissibility of a prior written statement given by the witness to the police. The court concluded that an exception to the hearsay rule was necessary, but with restraints:¹⁰¹

We believe an exception to the hearsay rule is necessary to allow the trial court to admit for substantive purposes prior inconsistent statements given under prescribed circumstances reasonably assuring reliability . . . Although we are impressed by the logic of the modern view favouring substantive admissibility for all prior inconsistent statements where the defendant [declarant?] is in court and subject to cross-examination, we are unwilling to abrogate, without adequate precautions, the traditional view prohibiting their substantive use . . .

We, therefore, adopt today a rule allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination.

V. Reform of the Law in Canada

The subject of prior inconsistent statements going in for their truth has received much less scrutiny in Canada than in the United States and, while reform was ongoing elsewhere, the law in Canada remained dormant.¹⁰² Reform of the law was raised in three reports: (1) The Law Reform Commission of Canada Report on Evidence; (2) Report of the Federal Provincial Task Force on Uniform Rules of Evidence; and (3) The Ontario Law Reform Commission Report on the Law of Evidence. These reports presented mixed recommendations for change.

The Law Reform Commission of Canada Report¹⁰³ proposed the abolition of the hearsay rule for all prior statements made by the testifying witness. The Uniform Task Force "out of caution" opted for the approach of the United States Federal Rules and would admit only prior inconsistent statements made under oath and where the witness was subject to cross-examination.¹⁰⁴ The Ontario Law Reform Commission,¹⁰⁵ in a new twist,

⁹⁹ See, for example, *Commonwealth v. Brady*, 507 A. 2d 66 (S.C. Pa., 1986). Of interest is that the statements in *Brady* were tape-recorded.

¹⁰⁰ 513 A. 2d 86 (S.C. Conn., 1986).

¹⁰¹ *Ibid.*, at pp. 91-92.

¹⁰² See, for example, Nadel, *loc. cit.*, footnote 5.

¹⁰³ Law Reform Commission of Canada, Report on Evidence (1976), s. 28 of Draft Evidence Code.

¹⁰⁴ Uniform Law Conference of Canada, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982), p. 315, and s. 121 of draft Uniform Evidence Act.

¹⁰⁵ Ontario Law Reform Commission, Report on the Law of Evidence (1976).

recommended that the caller of the witness be precluded from introducing into evidence a prior inconsistent statement made by the witness. In other words the caller of the witness would not be allowed to bolster his case. But, in "pure" cross-examination by opposing counsel the prior inconsistent statement would be allowed in as evidence of its truth.¹⁰⁶ This proposal is novel. It is also inherently flawed. If the prior statement is reliable and relevant, why should it matter who calls the witness? Is it not also the case that once a witness is declared adverse the calling counsel really becomes the adversary?

Needless to say, in response to the various commission reports, the Canadian legislatures have stood mute. Nor have the lower Canadian courts seized the initiative. For the most part they have bowed with little dissent to the precedent of *R. v. Deacon*.¹⁰⁷ The Ontario Court of Appeal's curt judgment in *R. v. B.(K.G.)* is typical.¹⁰⁸

Rather than addressing the issue in a forthright and principled fashion certain courts have taken to fanciful devices to circumvent *R. v. Deacon*. For example, the Manitoba Court of Appeal in *R. v. Grant*¹⁰⁹ chose to characterize the complainant in a sexual assault case as a "party", thereby turning her prior statements into admissible admissions. One would have hoped that such baseless manoeuvring would have been quietly ignored by other courts; unfortunately it has been accepted by an Ontario court.¹¹⁰ If one accepts a sexual assault complainant as a "party", then what about the victim of any assault, or the victim of a robbery, or the victim of an attempted murder? Such a characterization effectively does away with the hearsay rule for key "witnesses". In criminal cases, the only parties are Her Majesty the Queen and the accused. Complainants are "witnesses", they are not "parties".

As I noted earlier, the time is ripe for the Supreme Court of Canada to address the issue. Fortunately, it has not been afraid to take the initiative and has been in the forefront of reform in the law of evidence and specifically the reform of the hearsay rules.

In *Ares v. Venner*¹¹¹ the Supreme Court created a hearsay exception for hospital records and did so in the face of argument that such change was properly for the legislatures and Parliament to enact. Hall J., in writing the judgment of the court, placed principle over formalism; the principles

¹⁰⁶ *Ibid.*, Draft Evidence Act, ss. 24, 34.

¹⁰⁷ *Supra*, footnote 6.

¹⁰⁸ See, also, *R. v. Hawkins* (1985), 17 C.C.C. (3d) 518 (B.C.C.A.); *R. v. Gilligham*, *supra*, footnote 57.

¹⁰⁹ (1989), 49 C.C.C. (3d) 410, 71 C.R. (2d) 231 (Man. C.A.).

¹¹⁰ *R. v. Greene* (1990), 76 C.R. (3d) 119 (Ont. Dist. Ct.).

¹¹¹ [1970] S.C.R. 608, (1970), 14 D.L.R. (3d) 4.

being, necessity and reliability. He quoted¹¹² with approval from Lord Pearce's minority opinion in *Myers v. D.P.P.*,¹¹³ who said: "I find it impossible to accept that there is any 'dangerous uncertainty' caused by obvious and sensible improvements in the means by which the court arrives at the truth."

In *The Queen v. O'Brien*¹¹⁴ the Supreme Court recognized a penal interest exception to the hearsay rules. The court swept aside the "arbitrary and tenuous" distinction between penal and pecuniary interest.

Most recently, the Supreme Court, in *R. v. Khan*,¹¹⁵ approved a hearsay exception for prior statements made by a child witness. The accused, a family doctor, was charged with sexually assaulting a three and a half year old patient in his office. After leaving the office the child told her mother about a sexual act committed by the accused. At trial the judge refused to receive the child's unsworn evidence. The Crown then sought to introduce the child's prior statement to her mother as substantive evidence. The trial judge excluded the evidence as hearsay. On appeal the Supreme Court found that the trial judge erred both in not receiving the child's evidence and in not admitting the child's prior statement for its truth. In dealing with the hearsay issue, McLachlin J. urged an approach to the law rooted in principle:¹¹⁶

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in principle and the policy underlying the hearsay rule rather than the strictures of traditional justice.

McLachlin J. went on to fashion a hearsay exception around the two key principles—necessity and reliability. Necessity was interpreted as "reasonably necessary", which would cover instances where forcing the child to testify would be traumatic or cause harm to the child.¹¹⁷ Reliability was to be determined by the trial judge and McLachlin J. refused to "draw up a strict list of considerations for reliability or to suggest that certain categories of evidence . . . should be always regarded as reliable".¹¹⁸

The result from *Khan* is an exception with no set parameters. Flexibility was chosen over certainty. McLachlin J. concluded her judgment as follows:¹¹⁹

¹¹² *Ibid.*, at pp. 624 (S.C.R.), 15 (D.L.R.).

¹¹³ [1965] A.C. 1001, at p. 1040, [1964] 2 All E.R. 881, at p. 898 (H.L.).

¹¹⁴ [1978] 1 S.C.R. 591, (1977), 35 C.C.C. (2d) 209.

¹¹⁵ [1990] 2 S.C.R. 531, (1990), 79 C.R. (3d) 1.

¹¹⁶ *Ibid.*, at pp. 540 (S.C.R.), 9 (C.R.).

¹¹⁷ *Ibid.*, at pp. 546 (S.C.R.), 13 (C.R.).

¹¹⁸ *Ibid.*, at pp. 547 (S.C.R.), 14 (C.R.).

¹¹⁹ *Ibid.*, at pp. 548 (S.C.R.), 14 (C.R.).

I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.

This reflects an approach by the Supreme Court that favours admissibility over automatic exclusion and that bestows on the trial judge discretion to exclude the evidence, or to admit it with limiting instructions, where needed to safeguard the interests of the accused.¹²⁰

Khan provides a suitable blueprint for the admissibility of prior inconsistent statements. It is analogous to Federal Rule 803(24),¹²¹ which also is premised on flexibility and discretion. The party who wishes to introduce the statement into evidence has to satisfy the trial judge of its necessity and reliability. These conditions ensure sufficient safeguards for the party against whom the statement is being tendered.

In the *voir dire* on admissibility opposing counsel is given an opportunity to challenge the reliability of the statement. Federal Rule 803(24) contains a notice requirement that is designed to give opposing counsel notice of an intention to introduce the statement into evidence. Advance notice is not possible with a "turncoat" witness, who turns at trial. What should be sufficient, and is expected of the Crown, is full disclosure prior to trial of all relevant witness statements.¹²² Defence then is on notice as to the Crown's expected evidence. Being given this advance notice, it is difficult to see any prejudice to the defence when at trial it becomes necessary for the Crown to move the statements into evidence, provided, of course, the defence is given full opportunity to question the witness as to the making of the statement. Should defence counsel need time to prepare to meet the admissibility of the statement an adjournment can be granted. This was the procedure following in *United States v. Leslie*,¹²³ where the Court of Appeals Fifth Circuit saw no need for strict compliance with the notice requirement under Federal Rule 803(24). Instead the court looked to see that the defence had a "fair opportunity to meet the statements".¹²⁴

The *Khan* model of reform is to be preferred over the three general approaches to reform of the law undertaken in the United States, namely: (1) abolition of the hearsay exclusion; (2) the limited Federal Rules exception; and (3) the broader McCormick exception.

¹²⁰ Concerning judicial discretion, see *R. v. Corbett*, *supra*, footnote 19; *R. v. Potvin*, [1989] 1 S.C.R. 525, (1989), 47 C.C.C. (3d) 285.

¹²¹ See *supra*, footnote 94.

¹²² See, for example, Ontario Ministry of the Attorney General, Criminal Law Division Directive No. D2, October 1, 1989—Disclosure, *The Lawyers Weekly*, December 15, 1989, p. 14.

¹²³ *Supra*, footnote 97.

¹²⁴ *Ibid.*, at p. 291.

At first glance total abolition of the hearsay exclusion for prior inconsistent statements seems attractive. It is a simple and clean change in the law. The problem with such reform is that it replaces an absolute law of exclusion with essentially an absolute rule of admissibility. The major criticism of the existing law is that it is too inflexible, too absolute with the result that too much relevant and reliable evidence is lost. Abolition would lead to excess in reverse—the introduction of too much unreliable evidence. With abolition of the exclusion, reliability no longer would be a bar to admissibility, but would become simply a matter of weight.

Reliability was one of Wigmore's pillars for the creation of hearsay exceptions and it ought not to be discarded lightly as a pre-condition for admissibility.¹²⁵ The fact that the witness is present in court and available for cross-examination is not, in all cases, a sufficient safeguard. This is particularly the case for oral statements denied by the witness. The traditional caution of the courts about the admissibility of such statements is the fear of fabrication. Oral statements are easily "created" and difficult to challenge. This concern is heightened in criminal investigations given the coercive power of the police and the willingness on the part of many witnesses to extricate themselves by implicating others. Such concerns ought not to be taken lightly.

The requirement of necessity is Wigmore's second pillar for the creation of a hearsay exception.¹²⁶ It too is worth preserving. There is the spectre of out-of-court evidence becoming a substitute for in court testimony. McLachlin J. addressed this concern and observed that the exception created in *Khan* did "not make out-of-court statements by children generally admissible; in particular, the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence".¹²⁷

To illustrate the necessity requirement for prior inconsistent statements reconsider the situation in *R. v. Gillingham*,¹²⁸ the case of the thirteen year-old niece who alleged that she was raped by her uncle. Assume that the girl does testify as to a rape. The police also have a statement from a neighbour who said that the accused admitted the rape to her. The neighbour is called as a witness. The neighbour denies the statement on the stand. In this situation there is no "necessity" that this prior inconsistent statement be accepted for its truth. The court already has the girl's testimony and other circumstantial evidence supporting her account.

Caution is in order. The hearsay rule of exclusion is based upon valid concerns and thoughtful reform of the law needs to take these concerns into account. McLachlin J. addressed this same issue when confronted

¹²⁵ Wigmore, *op. cit.*, footnote 1, Vol. 5, para. 1420.

¹²⁶ *Ibid.*

¹²⁷ *Supra*, footnote 115, at pp. 548 (S.C.R.), 15 (C.R.).

¹²⁸ *Supra*, footnote 57.

with reforming the law on similar fact evidence in the case of *R. v. B.* (C.R.).¹²⁹ In endorsing a "modern" approach to the law on similar fact evidence, McLachlin J. sounded a note of caution:¹³⁰

Despite the apparent simplicity of the modern rule for the admission of similar fact evidence, the rule remains one of considerable difficulty in application. The problems stem in part from a tendency to view the modern formulation of the rule in isolation from the historical context from whence it springs. While the contemporary formulation may permit a more flexible, less restricted analysis, the dangers which it addresses and the principles upon which it rests remain unchanged.

Flowing from the above, McLachlin J. reaffirmed the basic common law position that the starting point for similar fact evidence was that it was *inadmissible* and only became admissible when the probative value of the evidence exceeded its potential prejudice.

For these same reasons a hearsay *exception* is to be preferred over outright abolition of the hearsay exclusion for prior inconsistent statements. In turn, the *Khan* exception is to be preferred over the prescribed exceptions as described in Federal Rule 801(d)(A) and by the McCormick model. Both of these models create categorical exceptions with set parameters. Federal Rule 801(d)(A) casts a small net—too small. The McCormick model casts a larger net, nevertheless the result will always be that certain statements caught in the net ought to be thrown out, while other statements not caught in the net ought to be and are lost. The *Khan* model, in comparison, provides the necessary flexibility.

Conclusion

What is troubling is that *R. v. Khan* provided a blueprint for reform of the hearsay rules and that blueprint was completely ignored in *R. v. B.* (K.G.). The Ontario Court of Appeal never even referred to *Khan* in its judgment.

Under the *Khan* model of necessity and reliability the three statements made and videotaped by the youths would be admissible for their truth.¹³¹ Such a result is consistent with principle, policy and, most importantly, the pursuit of the truth, which is, after all, the ultimate aim of our justice system.

The Law Reform Commission of New South Wales provided this "ideal" statement for the law of evidence:¹³²

The ideal of the law of evidence. The law of evidence is in constant use. It is basic to the proper administration of justice. Yet in our view much of it is complicated, obscure, irrational, and sometimes unjust in operation. Parts of it are only made

¹²⁹ [1990] 1 S.C.R. 717, (1990), 76 C.R. (3d) 1.

¹³⁰ *Ibid.*, at pp. 723 (S.C.R.), 16 (C.R.).

¹³¹ Note that the statements would also be admissible under the McCormick model in that they were recorded and the youths admitted making the statements.

¹³² *Op. cit.*, footnote 5, p. 25.

tolerable by being ignored, deliberately or inadvertently, by the parties and the courts, particularly in civil cases. Those concerned with the administration of justice—whether practitioners, witnesses, parties, observers, or the wider public—will not have respect for our system of trial unless the rules of evidence are rational and just. We think that the ideal to which the law of evidence should move in all areas, unless good cause to the contrary is clearly shown, is to admit such material as an intelligent layman carefully making important decisions in his own affairs would regard as worth taking into account, subject to restrictions demanded by the need to preserve a substantially oral adversary system of trial (where such a system is used) and to dispose of litigation expeditiously. The law falls well short of this ideal.

Reform of the law with respect to the admissibility of prior inconsistent statements would help move the law of evidence one step further towards achieving the above stated ideal.