

BALANCING THE RIGHTS OF THE INDIVIDUAL AND SOCIETY IN MATTERS OF TRUTH AND PROOF: PART II - EVIDENCE ABOUT INNOCENCE

David M. Paciocco*

Ottawa

This article comprises the second part of the author's analysis of the current law of evidence and the search for balance between individual and societal interests - the first part appears at (2001), 80 Can.Bar Rev. 433-480.

Cet article constitue la seconde partie de l'analyse que fait l'auteur du droit actuel de la preuve et de la recherche d'un équilibre entre intérêt individuel et intérêt de la société. La première partie a été publiée à (2001) 80 R. du B. can. 433-480.

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I. *Introduction*

In Part I of this article¹ I wrote about the close relationship that has to exist between truth and justice, and about how this relationship should inform the development and application of the rules of evidence. I dealt specifically in that Part with rules that tend to apply to proof of guilt. I argued in favour of the proposition that while society can choose to sacrifice the public interest in arriving at the truth about guilt by excluding relevant evidence, it should do so only as a matter of last resort, and only then to the extent absolutely required to achieve those collateral ends that require or support the exclusion of evidence. That proposition would have been self-evident had it not been for the practice in our accusatorial system of intoning that justice and truth are not necessarily synonymous. Notwithstanding that practice, the law of evidence is demonstrating the kind of increasing fidelity to the pursuit of the truth that I argue for.

This part of the article, Part II, deals with the relationship between truth and justice as it pertains to proof about innocence. In this context, things are not going so well. When it comes to proof of the truth about innocence, there are signs that we are increasingly losing our bearings. As a result, the following discussion takes on particular urgency.

In the pages that follow, I advocate the primacy of what I have styled the “principle of access to defence evidence,” that the accused should have uncompromised access to the admission of evidence that is capable, in the context of all of the evidence, of raising a reasonable doubt. This principle is based on the contention that a moral society has no right to choose to sacrifice the interest of the accused in pursuing the truth about innocence,² even where society perceives that its own utilitarian objectives would be better accomplished by excluding significant defence evidence.

¹ “Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof” (2001), 80 Can. Bar. Rev. 433.

² I use the term “find” when referring to the truth about guilt, and “pursue” when referring to the truth about innocence, advisedly. Consistent with the presumption of innocence and with the heavy burden that human decency places on society before it punishes and stigmatizes one of its own as criminal, where the truth about guilt cannot be known beyond a reasonable doubt, there is always the prospect that there is truth in assertions of innocence or in the denial of guilt. In this sense, the search for the truth takes on different meaning with defence evidence. The search in question is for information that may cast doubt on the Crown allegation. Where that doubt exists, the accused is innocent in the eyes of the law. It is in this sense that I speak of the truth about innocence; to require proof of the truth about innocence in the full sense of the term would undermine the balance that it has taken generations to strike and would imperil the innocent as readily as would modifying the standard of proof.

Notwithstanding its firm foundation in our traditions and in the underlying principles of justice, the “principle of access to defence evidence” is being challenged. It is imperilled by the risk of the improper use of the discretion to exclude defence evidence, by the faulty design of some rules, but most significantly, by the new politics of criminal law under which we are becoming increasingly intent on balancing competing interests. That balancing approach is described by Graeme G. Mitchell Q.C.:

“[T]his approach ‘shift[s] the balance away from the *primary* emphasis on the rights of the accused, [and] signals a more holistic and inclusive approach to the interpretation and application of the *Charter* in the criminal law context. The criminal justice process is more than a contest between an accused and the state; it engages the public interest and often implicates the rights of other citizens which should not always be subordinated to the interests of accused persons and their counsel.”³

I am concerned about an approach that denies primary emphasis on the rights of the accused in matters of criminal process. Many of those rights, especially those that are relevant to the law of evidence, were developed to guard against the conviction of the innocent. To be clear, Mitchell does point out that in this balancing process there is a caveat, that the “Accommodation of diverse interests” is to be done while “ensuring that an accused’s right to full answer and defence and the principle that no innocent individual should be convicted of a crime are vindicated.”⁴ There are passages in the leading decisions dealing with this balancing approach that support that claim. The problem, however, is that there is a fundamental incompatibility between the claim that the rights of the accused are not to given primary emphasis, and the contention that the principle that no innocent individual should nonetheless be convicted will be vindicated. In matters of proof and full answer and defence, giving primary emphasis to the right of the accused to access any and all “significant” evidence is a necessary condition for ensuring that no innocent individuals are convicted of a crime. I am convinced that unless the primacy of the “principle of access to defence evidence” is affirmed both in word and spirit, society will achieve its law enforcement objectives and its balance between competing rights on the backs of some who are innocent.

³ Graeme G. Mitchell, Q.C., “Developments in Constitutional Law: The 1999-2000 Term” (2000), 13 S.C.L.R.(2d) 77 at 93. I critique this approach in “Competing Constitutional Rights in an Age of Deference: A Bad Time to be Accused,” (2001), 14 S.C.L.R. (2d) 111.

⁴ Mitchell, *ibid.* at 93.

... II. *The Jurisprudential Foundation for, and Definition of, the Principle of Access to Defence Evidence*

A. *Utility and Evidence about Innocence*

The state is free to choose, as a matter of simple utility, to exclude evidence about guilt in the pursuit of other values. This is because it is through proving guilt that society is able to punish offenders, a practice that most believe will, in one way or another, make society safer. Proving guilt is therefore undertaken in society's own interest. If society chooses to forsake the benefits of proving guilt in a given case because of competing considerations, it is free to do so. When society makes the choice to exclude probative inculpatory evidence, it is effectively electing to forfeit one of its own interests in the pursuit of another.

Society is not free, however, to sacrifice proof about innocence in the same way, even where it might be in society's best interest to do so. Arguments about simple utility do not work the same way for proof of innocence as they do for proof of guilt. In a recent paper entitled *Competing Constitutional Rights in the Age of Deference: A Bad Time to be Accused*,⁵ I quoted John Rawls to make the point that the ability of the state to pursue the greatest good for the greatest number has long been subject to limits in the form of individual rights. At the risk of boring those who have stumbled upon both of these articles, I repeat the relevant passage here:

It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have an inviolability founded on justice, or some say, on natural right, which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by the greater good shared by others.... Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.⁶

One of the inviolable rights that prevents decisions from being made on the basis of social utility, of course, is "the fundamental tenet of our judicial system that an innocent person must not be convicted."⁷ Not surprisingly, the Supreme Court of Canada "has consistently affirmed that [this] is a fundamental principle of justice, protected by the *Charter*...."⁸

⁵ *Supra* note 3 at 113-14.

⁶ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 27-28.

⁷ *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 611.

⁸ *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 24.

The proposition that society can claim no right to punish the innocent, even if doing so would somehow be in society's best interests, should not be a controversial one, even in a constitutional democracy such as ours that guarantees rights only subject to reasonable limits. When could it possibly be demonstrably justifiable to make innocent people the scapegoats for society's benefit, whatever that benefit might happen to be, by stigmatizing them with criminal conviction, and by punishing them? When stated in the abstract, even as sweeping as this statement is, there is apt to be little disagreement with it. There was absolutely nothing startling in Justice Cory's words in *R. v. Scott* to the effect that, "[i]n our system the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount."⁹ The moral right of a society to punish an individual in a system committed to the rule of law is predicated entirely on the demonstrated violation of law by that individual. It would simply cost too much to the integrity of a society to claim the right to sacrifice the innocent in order to catch the guilty, or in order to make the criminal justice process more efficient or more effective in deterring crime and protecting society.

B. *The External Measure of Just Convictions*

Naturally, the conviction of the innocent cannot be avoided entirely. The innocent are sometimes convicted because the criminal process is an example of what John Rawls calls "imperfect procedural justice." "Even though the law is carefully followed, and the proceedings fairly and properly conducted, it may reach the wrong outcome."¹⁰ This can happen for a variety of reasons, including the practical unavailability of proof, or because of the design or application of procedural rules.

In my opinion, the main significance in recognizing that the criminal justice system is one of "imperfect procedural justice" lies in the simple fact that to come to the conclusion that the system of justice is imperfect, an external criterion for assessing perfect justice has to be utilized. The ultimate criterion for judging the correct result of a criminal trial is not to be found within the functional trial principles themselves or in the proper application of rules. Rather, the ultimate criterion is the consonance between the result and the actual or true facts. This proves my point about the integral relationship between truth and justice. Indeed, the tight relationship between truth and justice is illustrated with particular emphasis when we consider the term, "wrongful conviction." When we use that term

⁹ *R. v. Scott*, [1990] 3 S.C.R. 979 at 995-96.

¹⁰ Rawls, *supra* note 6 at 86.

we do not refer to those who are factually guilty but who have been given imperfect trials. We refer to those who are factually innocent, including those to whom the procedures have been applied with perfection. When we recognize a wrongful conviction we, quite rightly, consider it to be an inexcusable tragedy. It is no answer to the factually innocent to say, "Well. Even though you are factually innocent it is fair to leave you convicted because the law was applied with perfection during your trial."

This is a point worth belabouring because we are quick these days to say that the accused is not entitled to a "perfect trial." If we are going to have a maxim about perfection of the trial and justice it should be that "the accused is entitled to more than a perfect trial." After all, the ultimate measure of justice is not perfect process but rather truth about guilt. Quite simply, the accused is entitled not to be convicted unless there is truth about guilt.

An indispensable corollary of the principle that the factually innocent should not be punished, is that, although we cannot prevent entirely the conviction of the innocent or always ensure the "perfect trial," that same human decency that causes us to grieve wrongful convictions requires that we can never, as a society, adopt processes knowing that they may result in the conviction of the innocent, even where there may be social utility in doing so. We must constantly work to develop processes that accomplish societal goals to the extent that they can do so, provided those processes remain intolerant to the risk of convicting the innocent. This is true whether that social utility lies in deterring crime, keeping the criminal process efficient or even protecting the privacy interests of complainants. None of these laudable societal objectives justify us in adopting rules built on the knowing acceptance that if we are going to accomplish these objectives, we will have to endure the conviction of some innocent persons.

C. The Legacy of Respect for the Protection of the Innocent

To be sure, deep respect for the value that the innocent should not be punished can be found in the law of criminal procedure generally. This is a testament to values we have harboured historically. The fundamental principle against the punishment of the innocent is reflected in the classic principles of criminal justice, most notably in the presumption of innocence itself, with its requirement that the guilt of the accused must be established beyond a reasonable doubt. The principle is evident, as well, in the asymmetrical law of disclosure. It can be seen, too, in the fact that we deny prosecutors a full adversarial role, expecting them to be ministers of justice who are not to measure their success by victory but rather by justice. Most relevant to the current discussion, in the interests of protecting the innocent, we have adopted the practice of more readily excluding prosecutorial evidence than defence evidence. In the language of Justice McLachlin in *R. v. Seaboyer*:

Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.¹¹

This passage demonstrate that there is a fast link between access to defence evidence and the protection of the innocent. It is self-evident that a necessary condition for reducing the risk that the innocent will be convicted is to keep our eyes open to all information that could, either alone or in concert with other information, raise a doubt about the case for the Crown. It is no answer to say, "Well, we can exclude defence evidence in order to pursue other goals and yet still protect the innocent, because other procedural devices, like the duty to disclose, the presumption of innocence, and the heavy onus the Crown has to prove guilt beyond a reasonable doubt, will protect against wrongful conviction." Making that claim is the equivalent of believing that you can withhold a few numbers from a mathematician yet still trust that the mathematician will come up with the correct answer by applying the proper techniques of multiplication or division. If the data for decision-making is incomplete, the correct answer can be arrived at only by happenstance, even if other principles of justice are applied properly. Those other safeguards against wrongful conviction, while themselves necessary conditions for protecting the innocent, are not sufficient. They can do nothing to ameliorate the loss, through exclusion, of probative defence evidence.

D. *Full Answer and Defence and the Protection of "Significant" Evidence*

The adjective, "probative," in the preceding sentence reflects the reality that the right to call defence evidence is not unlimited. The principle of "full answer and defence," the corollary of the principle against punishment of the innocent which, among other things,¹² is used to control access to evidence, has not been interpreted as a licence by the accused to call whatever evidence or ask whatever question he or she wishes.

Justice Sopinka appropriately observed that:

The right to full answer and defence does not imply that an accused can have, under the rubric of the *Charter*, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion would be admissible if it tended to prove his or her innocence.¹³

¹¹ *Seaboyer*, *supra* note 7 at 611.

¹² See *R. v. Rose*, [1998] 3 S.C.R. 262 at 316 - 320 for a detailed discussion of the nature of the principle.

¹³ *Dersch v. Canada (Attorney-General)* [1990] 2 S.C.R. 1505 at 1515.

Justice Sopinka's passage tells us there can, as a matter of principle, be limits on the right of the accused to tender evidence in an effort to prove his innocence. He stops short of telling us what those limits are.

A similar comment was made more recently in *R. v. Michaud* by the New Brunswick Court of Appeal. Michaud objected to the admission at his trial of the transcript of the testimony of a witness from his preliminary inquiry. He argued that to admit the evidence in the circumstances of his case would not respect principles of fundamental justice. Justice Drapeau responded:

Mr. Michaud's undoubted right not to be deprived of his liberty except in accordance with the principles of fundamental justice is not to be equated with an entitlement to the benefit of rules of evidence that will maximize his chances of acquittal. The pursuit of the truth with a view to properly determining the issues is what drives the rules of evidence.¹⁴

While *Michaud* dealt with an attempt to modify the rules of evidence to exclude prosecution evidence rather than to admit defence evidence, this general observation by Justice Drapeau is still apt. I could not agree more. The issue is not whether the evidence in question would assist in acquitting the accused. In the case of admissibility, it is whether the evidence in question is truly probative enough that it could support a legitimate acquittal. This is entirely in keeping with the fast connection required between truth and justice.

What, then, are the relevant principles that define the limits on the right of access to defence evidence referred to by Justice Sopinka? Based on the foregoing discussion, there is, in my view, one simple principle that can be used to test whether the accused can claim an absolute right of access to evidence, regardless of competing claims of social utility. As indicated, this principle is derived from the fact that what we are seeking to prevent, by giving full answer and defence, is the conviction of the innocent. It also derives more technically from the fact that the principle of full answer defence applies solely where there is prejudice to the accused.¹⁵ It follows necessarily that the accused can claim a right to uncompromised access to defence evidence only where that evidence [including a line of cross-examination or proof relevant to the credibility and reliability of the Crown case], "is [on its true and legitimate strength] not so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt."¹⁶ By contrast, denying the accused access to evidence that cannot

¹⁴ *R. v. Michaud* (2000), 144 C.C.C.(3d) 62 at 71 (N.B.C.A.).

¹⁵ See *R. v. Rose*, *supra* note 12 and *R. v. Dixon*, [1998] 1 S.C.R. 244 at 250, dealing with disclosure. In the disclosure context, prejudice is identified by asking whether there is a "reasonable possibility that the non-disclosure affected the outcome of the trial or the overall fairness of the process."

¹⁶ *R. v. Darrach* (2000), 148 C.C.C.(3d) 97 at para. 39 (S.C.C.).

contribute to a finding of reasonable doubt, even in the context of other proof in the case, causes no prejudice. In short, it is the "principle of access to defence evidence" that satisfies the material criteria.

There are two ways in which this principle of access to defence evidence is manifested in practice. The first is by applying rules of exclusion differently to the defence than they are applied to the prosecution. The second is by treating the discretion that judges have to exclude technically inadmissible evidence differently for defence evidence than it is treated for Crown evidence.

III. *The Differential Application of Exclusionary Rules and the Importance of Design*

As described in Part 1 of this article, for the most part the rules of exclusion have been modified of late. They are not as technically rigid as they once were, but call for a case-by-case assessment using a principled approach. An effort is made to determine the degree to which the particular evidence in question offends the relevant exclusionary principles. This approach, which invariably calls for a balancing of competing considerations or a judgment call, provides some flexibility to Courts. That flexibility can be used to provide a more benevolent assessment of defence evidence than prosecutorial evidence. This, in fact, has been the practice of Canadian courts. The reason why more benevolence is provided in the case of defence evidence is simple, and was expressed well by Justice Martin in *R. v. Williams* even prior to the development of our looser, principled rules:

It seems to me that a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist.¹⁷

The *Williams* passage was subsequently approved by Cory J. in *R. v. Finta*.¹⁸

A. *Defence Evidence and Exclusionary Rules of "Non-Evidence"*

In Part I of this paper, I developed categories of rules of exclusion, according to the purpose those rules fill. The first category I called rules of "non-evidence." That term comes from the essential character of evidence as helpful information. If information is not helpful, it is not evidence. In essence, rules of "non-evidence" seek to exclude information that is not

¹⁷ (1985), 18 C.C.C. (3d) 356 at 378 (Ont.C.A.).

¹⁸ (1994), 88 C.C.C. (3d) 417 at 527 (S.C.C.).

helpful in achieving the rectitude of decisions. For example, hearsay evidence that does not satisfy any exceptions to the hearsay rule is “non-evidence” because it is either redundant to available testimony or it is not reliable enough to act upon.

Under the “principle of access to defence evidence” an accused person can assert no claim of right to information that is not useful. As a general rule, then, the “principle of access to defence evidence” denies the accused access to “non-evidence.” It was entirely appropriate that Justice Sopinka used the example of “hearsay,” a species of non-evidence, when noting that the accused cannot rely on the fundamental rights contained in the *Charter* to rewrite the law of evidence.

The illegitimacy of the accused claiming access to “non-evidence” was a major theme of the Supreme Court of Canada in the production and disclosure decision of *R. v. Mills*.¹⁹ The Court declared that “full answer and defence does not include the right to evidence that would distort the search for truth inherent in the trial process,”²⁰ including irrelevant information. This is even more true of the admission of evidence than it is of disclosure of information. It is for this reason that no issue can be taken with the decision in *R. v. Seaboyer* to exclude absolutely all evidence, the relevance of which is premised entirely on “rape myths.”²¹ That ruling did not offend the “principle of access to evidence” because rape myth evidence of the kind described is simply not probative.

One of the challenges that is faced in crafting and applying rules of exclusion that are respectful of the “principle of access to defence evidence” is that it is often difficult to gauge, at the time evidence is tendered or a question asked, whether it will be capable of making a difference at the end of the day. Basic criminal law principles require that we err on the side of inclusion when deciding whether to exclude information based on non-evidence considerations.²² As a result, our tradition with respect to assessments of relevance and probative value, particularly during cross-examination by the accused, is to be guarded about prejudging the value of the potential answers that a line of questioning will provoke. This is why in *R. v. Osolin*,²³ a majority of the Supreme Court of Canada held that it was

¹⁹ *R. v. Mills*, [1999] 3 S.C.R. 668.

²⁰ *Ibid.* at 720.

²¹ *Seaboyer*, *supra* note 7. The “rape myths” are the general inferences that a complainant who is sexually experienced is, by virtue of her character, either less credible or more apt to have consented to have sexual relations with the accused.

²² This is true even with respect to issues of production or disclosure. In *R. v. Mills* the Supreme Court of Canada paid regard to this by requiring that, in border-line situations, the judge should err by ordering production of third party records to the court for inspection so that it can be determined whether the records are necessary for full answer and defence: *R. v. Mills*, *supra* note 19 at 748, 751.

²³ *R. v. Osolin*, [1993] 4 S.C.R. 595.

wrong for the trial judge to prohibit the accused from cross-examining a complainant on a statement found in her psychiatric records, even though that statement probably evidenced no more than the common and tragic process of self-blame that many victims endure. Without allowing the defence to explore that statement, there was no way of knowing what had caused the complainant to make it. In the interests of protecting the innocent, the questioning had to be permitted because there was a possibility that the line of inquiry could have cast doubt on the allegation.

This tendency to err on the side of inclusion in matters of non-evidence applies even to the application of exclusionary rules. In spite of the general observation by Justice Sopinka that full answer and defence does not prevent application of the hearsay rule to defence evidence, we do allow the accused to call hearsay evidence in some cases where it would be denied to the Crown. This occurs, for example, with the "statements against penal interest exception." This hearsay exception is available solely to the defence.²⁴

Similarly, in the context of the principled necessity/reliability hearsay exception, judges can be satisfied with a less exacting reliability inquiry for defence evidence than they must impose on Crown evidence.²⁵ In *R. v. Folland*, for example, the accused wished to use prior inconsistent statements that had been made by his friend Harris as proof of the truth of their contents. The trial judge refused Folland's request because those prior statements, being made out of court, were hearsay. Folland was convicted. A new trial was ordered on other grounds. Justice Rosenberg nonetheless felt it opportune to discuss in the appeal judgement how the out of court utterances by Harris should be analyzed by the trial judge during the retrial. He said:

In determining whether the defence should be permitted to make substantive use of this evidence, the trial judge will wish to bear in mind ... [that] while the trial judge must be satisfied that the prior out-of-court utterances have some reliability, the strict standards set, in the context of an application by the Crown to make substantive use of prior inconsistent statements incriminating the accused do not apply.²⁶

Similarly, courts are to be more generous in applying the *Mohan* test for the admission of opinion evidence when they are considering defence evidence than they are to be when assessing Crown evidence for its admissibility. With respect to the "relevance" analysis, the Ontario Court of Appeal noted in *R. v. M.(B.)* that "a trial judge should be particularly cautious in excluding defence evidence on the basis of a cost-benefit analysis."²⁷

²⁴ See *R. v. Lucier*, [1982] 1 S.C.R. 28.

²⁵ See *R. v. Finta* (1992), 14 C.R. (4th) 1 (Ont.C.A.), affirmed [1994] 1 S.C.R. 701.

²⁶ *R. v. Folland* (1999), 132 C.C.C. (3d) 14 at 31 (Ont.C.A.).

²⁷ *R. v. M.(B.)* (1998), 130 C.C.C. (3d) 353 at 385 (Ont.C.A.).

Dealing with the “necessity” requirement, the Northwest Territories Court of Appeal said in *R. v. Bell*:

Where, as here, expert evidence is offered by the defence, in its efforts to make full answer and defence, a trial judge should not impose, as noted in *Mohan*, too strict a standard for the necessity of such evidence...²⁸

B. Defence Evidence and Exclusionary Rules of “Subordinated Evidence” or “Practical Exclusion”

The other two categories of exclusionary rules discussed in Part 1, are rules of “subordinated evidence” and rules of “practical exclusion.” Rules of “subordinated evidence” are those that reject relevant evidence because of competing policy interests, or competing principles. An example would be the exclusion of unconstitutionally obtained evidence.

A rule of “practical exclusion” causes the rejection of relevant evidence not in pursuit of competing principles or competing policy interests, but because of practical interests related to the conduct of the trial. The best example is the “collateral facts rule.”

In keeping with the “principle of access to defence evidence,” society should never, as a matter of principle, claim the right to exclude *significant* evidence in order to serve competing societal interests. In *R. v. Seaboyer* when invited to exclude defence evidence in the societal interests of encouraging reporting and increasing the number of convictions, Justice McLachlin said this:

To accept that persuasive evidence for the defence can categorically be excluded on the ground that it may encourage reporting and convictions is, Elliot points out, to say either (a) that we assume the defendant’s guilt; or (b) that the defendant must be hampered in his defence so that genuine rapists can be put down. Neither alternative conforms to our notions of fundamental justice.²⁹

Even in the production and disclosure context of *R. v. Mills*, the Supreme Court of Canada, when taxed with compelling interests that favoured denying access to information, felt it necessary to say that “the accused’s right must prevail [over competing interests] where the lack of disclosure or production of the record would render him unable to make full answer and defence.”³⁰ The Court was driven to this conclusion by its acceptance

²⁸ (1997), 115 C.C.C. (3d) 107 at 118 (Ont.C.A.).

²⁹ *Seaboyer*, *supra* note 7 at 617, citing D.W. Elliot, “Rape Complainants’ Sexual Experience with Third Parties” [1984] Crim. L.Rev. 4 at 14.

³⁰ *Mills*, *supra* note 19 at 726. It is noteworthy that the claim by an accused person for access to information will generally be less compelling, for a variety of reasons, than a claim to admit evidence. First, in most production cases the most that can be established is that the target source is likely to have relevant evidence. In the admissibility context, relevant evidence is *ex hypothesi* already in the possession of the accused. It is one thing

that “he threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice.”³¹

When it comes to matters of “subordinated evidence” and “practical exclusion,” the common law rules of evidence that have developed largely respect the “principle of access to defence evidence.” There are few such rules that even apply to the kind of evidence likely to be called by the accused. The most commonly used rules of “subordinated evidence” are self-incrimination rules and rules respecting the exclusion of improperly obtained Crown evidence, neither of which apply to defence evidence.

Some rules of evidence exclude information because of its prejudicial impact, or its tendency to attract irrelevant or inflammatory inferences disproportionate to its true weight. When these rules cause the exclusion of probative evidence because of fear that it will be misused, those rules operate as rules of subordinated evidence.³² Rules preventing proof of the general character of another person in order to demonstrate his or her propensity to act in a given way fit within this category. Relevant evidence is excluded because of fear that it will be used inappropriately. Rules governing the admission of evidence of general character operate more generously when it is the accused who is presenting the proof. These rules enable the accused to present character evidence for the purpose of showing the general propensity of the alleged victim or even of a co-accused, in

to refrain from assisting the accused in exploring whether there is probative information. It is quite another to deny the accused the use of probative information that is already before the court. Second, the claim by the accused in the production context that evidence may be probative and significant invariably involves a degree of speculation, although the prejudice caused by disclosure will not be speculative. In matters of admissibility, the probative value or significance of the evidence can be more accurately measured. Third, when a trial court is assisting in obtaining disclosure and production, it is not performing its central function. It is facilitating trial preparation. When a court is making determinations about admissibility, however, the trial court is engaging in what is, in effect, the essence of its responsibility, namely, judging the case on available evidence. Rulings relating to exclusion therefore implicate the overall fairness of the trial more directly, immediately and unequivocally than do rulings on production and disclosure. This is not in any way to denigrate the critically important process of production and disclosure. Its rules and their application, too, can lead to the loss of potentially exculpatory evidence. The point is that even in the context of production and disclosure, where its claim is not as deafening, the principle against the conviction of the innocent is treated as defining the limit to which competing policy considerations can be respected.

³¹ *Ibid.* at 726.

³² Evidence excluded by these rules may fit to some degree in both the “non-evidence” and “subordinated evidence” categories. Where the objection is that evidence does not have real probative value but because of its inflammatory character is likely to be treated as though it does, exclusion is a matter of non-evidence. The information is not truly helpful. Where, however, the evidence does have real probative value but is nonetheless excluded because of the concern that it will be given more weight than it deserves, the rule operates as one of subordinated evidence - the party wishing to call the evidence is deprived of it in spite of its probative value, in an effort to prevent the distorting effect of the evidence.

circumstances where the Crown would not be permitted to call the same kind of evidence, or even exactly the same evidence.

With respect to proof by the accused of the general character of the alleged victim when tendered to show what happened, Justice Martin said in *R. v. Scopelliti*:

... the admission of such evidence accords in principle with the view expressed by this Court that the disposition of a person to do a certain act is relevant to indicate the probability of his having done or not having done the act. The law prohibits the prosecution from introducing evidence for the purpose of showing that the *accused* is a person who by reason of his criminal character (disposition) is likely to have committed the crime charged, on policy grounds, not because of lack of relevance. There is, however, no rule of policy which excludes evidence of the disposition of a third person for violence where that disposition has probative value on some issue before the jury.³³

With respect to the general character of a co-accused, Justice Sharpe summarized the law in *R. v. Diu*:

It has been held that even where the Crown could not adduce evidence of an accused's bad character, a co-accused may do so where it would be relevant to the defence of that co-accused.³⁴

Rules that provide "privilege" to witnesses can also catch the accused and subordinate proof in the interests of competing policy concerns, but those rules invariably include "innocence exceptions." More than two-hundred years ago in 1794 in *R. v. Hardy*,³⁵ one can find recognition that the public policy privilege applicable to police informants was subject to an exception where production is required to establish innocence at a criminal trial. And it was in 1890 that Lord Esher, Master of the Rolls, said in *Marks v. Beyfus* with respect to police informant privilege:

I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.³⁶

The "innocence exception" for police-informant privilege was affirmed as recently as 1997 by the Supreme Court of Canada in *R. v. Leipert*.³⁷

³³ (1981), 63 C.C.C. (2d) 481 at 493 (Ont.C.A.).

³⁴ (2000), 144 C.C.C.(3d) 481 at 526 (Ont.C.A.).

³⁵ (1794), 24 State. Tr. 199, per Eyre C.J.

³⁶ (1890), 25 Q.B.D. 494 at 498 (C.A.).

³⁷ *Supra* note 8.

An “innocence exception” was also recognized with respect to solicitor-client privilege more than a quarter century ago. In *R. v. Barton* Justice Caulfield said:

If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.³⁸

In *R. v. McClure* the existence of an innocence exception to solicitor-client privilege was affirmed recently by the Supreme Court of Canada.³⁹

Insofar as rules of practical exclusion are concerned, the only fixed rule that could imperil the principle of access to evidence is the collateral facts rule. It is, by definition, meant to exclude only insignificant evidence. By design, it has the potential to exclude significant evidence.

C. *The Design of Rules Imperiling Access to Evidence*

The design of rules will obviously have a tremendous effect on the degree to which they ensure that the principle of access to defence evidence is respected. There can be no problem with respect to the broad, principled rules. They contain the flexibility to enable judges to give proper account to the need to present significant defence evidence. If the principle is not respected adequately, the problem will be one of application of the rule and not design.

This is not so with respect to fixed rules. Fixed rules can be applied correctly, and yet exclude probative defence evidence, if they are not designed carefully to ensure that this does not happen. The “collateral facts rule” provides an apt illustration.⁴⁰

³⁸ *R. v. Barton* [1972] 2 All E.R. 1192 at 1194. See also *R. v. Dunbar & Logan* (1982), 68 C.C.C. (2d) 13 (Ont.C.A.).

³⁹ (2001), 151 C.C.C. (3d) 321 (S.C.C.). Unfortunately, the *McClure* decision is an illustration, in my respectful opinion, of a case that has developed a rule that, by virtue of its design, impedes the very objective it was intended to achieve. The prerequisites to gaining access to apparently privileged solicitor-client evidence are so rigid as to be virtually impossible to meet, save in the rarest of case, and those hurdles have nothing to do with whether the person seeking the accused is likely to be innocent or guilty.

Technically *McClure* was a production case, involving a pretrial application by the accused to compel disclosure of the solicitor-client file. It will be interesting to see how its prerequisites operate where a party seeks to call a lawyer to the stand during the trial to ask relevant questions based on a claim to the innocence exception. I critique the *McClure* decision in “Competing Constitutional Rights in an Age of Deference: A Bad Time to be Accused”, *supra* note 3 at 126-27.

⁴⁰ So, too, does the treatment of the “innocence exception” respecting solicitor-client privilege, referred to the preceding footnote.

In its classic form, the “collateral facts rule” prevents a party from contradicting the answers provided on collateral matters by the opposing party’s witnesses. The assumption underlying the rule is that it would not be worth allowing witnesses to be contradicted on collateral matters because proof that a witness has lied or been mistaken about some unimportant matter can have no significance to the issue being tried. The intent of the rule is therefore respectful of the “principle of access to defence evidence.” Unfortunately, the design of the rule is not.

There is disagreement about what a “collateral matter” is. On the restrictive view, credibility [including reliability] is a collateral matter, although there are a set list of exceptional cases where collateral evidence can be lead about credibility. On the more generous view, credibility is not a collateral matter. The rule simply prevents contradicting a witness where the only relevance in doing so is to show that the witness lied in that answer, or was mistaken. Where the contradicting evidence has its own relevance apart from the contradiction, whether it be on the issue of credibility or on the direct factual questions the Court is enquiring into, the evidence can be admitted, both for its own value and for the value in contradicting the witness. In short, if a “yes” answer to the question would have had relevance, the parties are able to contradict a “no” answer.⁴¹

It can be seen immediately that on either conception, the rule is too wooden, too technical. It suffers from the same bloat as did the hearsay rule and the “similar fact evidence” rule before they were recast. The collateral facts rule is highly technical and does not always accurately confine its application to suit its purpose. It can, particularly in its narrower conception, exclude significant information. In *R. v. R.(D.)*, had this narrow view prevailed the accused would have been prevented from endeavouring to contradict a Crown expert’s denial of having conducted a suggestive interview of a child sexual offence complainant.⁴²

Unfortunately, this rule has been used of late in a technical way, to deny not only the admissibility of contradictory proof but even the ability to ask questions.⁴³ This is happening, most often, where the defence wishes to show evidence of prior false allegations by a complainant, typically of sexual assault. In most cases there will be little significance in this kind of inquiry. Where this is so, the general discretion to exclude defence evidence, described below, would suffice to prevent the questions from being asked.

⁴¹ For a discussion of the competing conceptions of the rule, see *R. v. B.(A.R.)* (1998), 128 C.C.C. (3d) 457 (Ont. C.A.), affirmed, [2000] 1 S.C.R. 781, Paciocco and Stuesser, *The Law of Evidence*, 2nd ed. (Toronto: Irwin Law, 1999) at 265-274.

⁴² *R. v. R.(D.)*, [1996] 2 S.C.R. 291.

⁴³ *R. v. W.(B.A.)* (1991), 59 O.A.C. 325 (Ont. C.A.), rev’d [1992], 3 S.C.R. 811; *R. v. Riley* (1992), 11 O.R. (3d) 151 (Ont. C.A.). Arguably *R. v. B.(A.R.)*, *supra* note 41, does not fall in this category because defence counsel indicated he did not want to ask the question if he could not contradict the answer.

In other cases, however, the existence of prior false allegations can have importance. In *R. v. R. (S.A.S.)*,⁴⁴ for example, the complainant's prior false allegation resulted in a conviction for public mischief, and was admitted as relevant to her credibility. In *R. v. Krause*⁴⁵ the evidence relating to a prior false allegation would likely have satisfied the similar fact rule had it been called by the Crown in a public mischief prosecution. Evidence about prior false allegations is not always lacking in probative value and should not always be excluded.

The "collateral facts rule" is ultimately about trial efficiency. Where the fact of, or the circumstances surrounding, prior false allegations or any other collateral matter are important, it is no suitable answer to say that it will take too much time to resolve whether the prior allegation was really false. That is an objection that is never raised when the Crown seeks to call other witnesses who will testify that the accused assaulted them as well, so that their testimony can be used to bolster the credibility of the complainant in the case.⁴⁶ More to the point, the convenience of the trial process can never be used to justify closing the eyes of the trier of fact to significant information. Society has no right to prosecute and purport to convict on the basis of findings of factual guilt, while at the same time disregarding significant defence evidence for the sake of its own practical convenience. To avoid this, the "collateral facts rule" should be accorded the same treatment as the other rules of evidence. It is unsafe to assume that the design of this rigid rule will catch only insignificant proof. Rather than extending it to prevent questions, the "collateral fact rule" should be shrinking. It should be restyled according to the discretionary, principled approach that we are using elsewhere. Only in this way can the risk be removed that it will deny access to significant defence evidence.

IV. The Judicial Discretion to Exclude Defence Evidence and the Protection of the Principle of Access to Defence Evidence

The second way in which the principle of access to defence evidence can be respected in the law of evidence is through the design and proper application of the exclusionary discretion to reject otherwise technically admissible evidence. If that application or design is not carefully tailored, the principle of access to defence evidence can be undermined.

⁴⁴ (1996), 111 C.C.C. (3d) 305 (Ont.C.A.).

⁴⁵ (1986), 54 C.R. (3d) 294 (S.C.C.).

⁴⁶ See, for example, the decision in *R. v. B. (L.)* (1997), 9 C.R. (5th) 38 (Ont.C.A.), for an illustration of the trend to use this kind of similar fact evidence for this purpose.

A. *The Common Law Discretion To Exclude*

1. *The Origin and Nature of the Discretion*

The current position, as expressed in *R. v. Seaboyer*, is that for prosecutorial evidence, "admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission."⁴⁷ With respect to defence evidence, however, the rule is more restricted. "[T]he prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law."⁴⁸

In a broad sense, these competing formulae reaffirm the primacy that is to be given to access to defence evidence. To this extent the relative rules honour the principle of access to defence evidence. Having said this, it is important to appreciate that *R. v. Seaboyer* marked a dramatic change in the law, one that increased the prospect of the exclusion of defence evidence. In recognizing a discretion to exclude defence evidence, the Supreme Court of Canada was departing from a long and established line of authority that denied the existence of any power on the part of trial judges to exclude technically admissible defence evidence.

In 1971, in *R. v. Wray*,⁴⁹ the Supreme Court of Canada set its face against a broad, general power among judges to exclude technically admissible evidence. It was not so much opposed to the discretionary exclusion of defence evidence as it was determined to restrict the application of exclusionary discretion generally. In *Wray* the Court adopted a narrow formula that would give judges the power to exclude evidence only where that evidence was of trifling probative value, gravely prejudicial and of tenuous admissibility. Of primary import to the present discussion, however, is that *Wray* affirmed that the discretion that did exist to exclude technically admissible evidence applied solely to Crown evidence, and not to defence evidence. As Justice Lacourciere said of *Wray* in *Reference re Legislative Privilege*:

In *R. v. Wray*, the Supreme Court of Canada made it clear that ...['the overriding discretion to exclude evidence even if such evidence was in law admissible'] does not extend to the exclusion of admissible evidence' for any reason other than 'to ensure that the accused has a fair trial.'⁵⁰

Wray was, and still remains, a controversial case, but not because the decision confined the power to exclude to prosecutorial evidence. *Wray*'s

⁴⁷ *Supra* note 7 at 610, adopting the formula expressed in *R. v. Sweitzer* [1982] 1 S.C.R. 949 at 953.

⁴⁸ *Ibid.* at 611.

⁴⁹ [1971] S.C.R. 272.

⁵⁰ *Reference re Legislative Privilege* (1978), 39 C.C.C. (2d) 226 at 236 (Ont.C.A.).

treatment of the exclusionary discretion was controversial because it denied the authority to trial judges to exclude Crown evidence on the basis that it was obtained improperly or unfairly. The main complaint about the case is that it did not permit the discretionary exclusion of enough Crown evidence.⁵¹

Doctrinally, the aspect of *Wray* that confined the exclusionary discretion to Crown evidence by linking that exclusionary power to the duty to provide a fair trial *to the accused* cannot be faulted. Virtually all of the examples of recognition at common law of the discretion to exclude technically admissible evidence prior to *Wray* related to prosecutorial evidence. These included the power to reject otherwise admissible similar fact evidence,⁵² to deny the statutory right to reveal during cross-examination the criminal record of the accused,⁵³ to exclude "adopted admissions" allegedly made by the accused,⁵⁴ to exclude voluntary confessions⁵⁵ and to jettison illegally or improperly obtained evidence.⁵⁶

⁵¹ For a trenchant criticism of the decision see A.F. Sheppard, "Restricting the Discretion to Exclude Admissible Evidence." (1971-72), 14 Crim.L.Q. 334. For a comment supporting *Wray's* efforts to narrow the discretion, see M.S. Weinberg, "The Judicial Discretion to Exclude Relevant Evidence" (1975), 21 McGill L. J. 1. See also, D.M. Paciocco, "The Proposed Canada Evidence Act and the 'Wray Formula': Perpetuating an Inadequate Discretion" (1983-84), 29 McGill L.J. 141.

⁵² The decision relied on by the Supreme Court of Canada in describing the exclusionary formula, *Noor Mohamed v. R.* [1949] A.C. 182, was a similar fact evidence case. So, too, were *Sweitzer*, *supra* note 47, and *Morris v. R.* [1983] 2 S.C.R. 190, two of the cases cited in *Seaboyer* as illustrations of the discretion to exclude defence evidence. See also *Harris v. D.P.P.* [1952] A.C. 694 and *Perkins v. Jeffery* [1915] 2 K.B. 702. In Canada, the exclusionary discretion has become part of the similar fact evidence rule itself. Evidence revealing the discreditable conduct of the accused will not be admissible unless its probative value substantially outweighs its prejudicial impact: *R. v. Arp* (1998), 129 C.C.C.(3d) 321 (S.C.C.).

⁵³ These cases relate to section 1(f) of the 1898 *Criminal Evidence Act*, 61-62 Vict. c.36 (England) which enables the Prosecution to cross-examine the accused about his or her prior criminal convictions under specified conditions, including when the accused conducts his case in a fashion that imputes poor character to prosecution witnesses. See *Selvey v. D.P.P.* [1968] 2 All E.R. 497; *Stirland v. D.P.P.* [1944] A.C. 315. There are many other such cases. The contemporary equivalent in Canada is the *Corbett* motion brought with respect to section 12 of the Canada Evidence Act. See *R. v. Corbett* [1988] 1 S.C.R. 670.

⁵⁴ The term "adopted admissions" refers to those cases where, based on conduct or silence when confronted with accusations, the accused is seen circumstantially to be accepting the truth of the allegation made in his or her hearing and presence: See *R. v. Christie* [1914] A.C. 545 at 559-560 per Moulton L.J., and *R. v. Doolan* [1962] Qd. R. 449. In Canada see *R. v. Pammer* (1979), 1 Man. R. (2d) 18 (C.A.).

⁵⁵ *Ibrahim v. R.* [1914] A.C. 599, *R. v. Voison* [1918] 1 K.B. 531 at 539, and see *R. v. Fitton* (1956), 116 C.C.C. 1 at 6-7 (S.C.C.), with respect to discretion and the English Judges Rules.

⁵⁶ The leading case is *Kuruma v. R.* [1955] A.C. 197 (P.C.). See also *R. v. Court* (1960), 44 Cr. App. R. 242.

In 1980 in *R. v. Sang*⁵⁷ the House of Lords arrived at the same conclusion. In the course of its decision⁵⁸ it too explained that the common law discretion of trial judges to exclude technically admissible evidence was confined to prosecutorial evidence. Every one of the five Law Lords agreed that the exclusionary discretion that did exist was grounded in the duty of the trial judge to give the accused a fair trial.⁵⁹ Lord Diplock, who gave the lead judgment, said:

"[T]he function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law....A fair trial involves... as a corollary... that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of the admissible evidence conveying that information."⁶⁰

Given the state of authority at the time, in *R. v. Hawke* Justice Dubin, on behalf of the Ontario Court of Appeal, denied that a trial judge had the discretion to release a psychiatrist from testifying for the defence because of confidentiality concerns:

"In this case, the evidence was being tendered by the defence. It was relevant to the issue of competency and credibility. It was not prejudicial to the accused. Under such circumstances I know of no judicial discretion to exclude it."⁶¹

⁵⁷ [1979] 2 All E.R. 1222 (H.L.).

⁵⁸ The narrow ruling in *Sang* was that an accused person could not indirectly create a defence of entrapment (which defence had been rejected in English law) by asking the trial judge to exclude all evidence of his crime on the basis that the evidence was unfairly or improperly obtained because of the entrapment by the police.

⁵⁹ Viscount Dilhorne described the discretion in specific terms, relating it solely to the accused:

"[The trial judge] can in my opinion disallow the use in any trial of admissible relevant evidence if in his opinion its use would be accompanied by effects prejudicial to the accused which would outweigh its probative value." *Supra* note 57 at 1231-32.

Lord Salmon noted:

"I consider that it is a clear principle of the law that a trial judge has the power and the duty to ensure that the accused has a fair trial. Accordingly, amongst other things, he has a discretion to exclude legally admissible evidence if justice so requires." (at 1237)

Lord Fraser, citing the illustrations in the authorities of the exclusion of evidence pursuant to a discretion, also said:

"These cases are in my opinion examples of the exercise of a single discretion founded on the duty of the judge to ensure that every accused person has a fair trial." (at 1239)

Lord Scarman referred to the merciful face of the law, being:

"the criminal judge's discretion to exclude admissible evidence if the strict application of the law would operate unfairly against the accused." (at 1243).

⁶⁰ *Supra* note 57 at 1230.

⁶¹ *R. v. Hawke* (1975) 22 C.C.C. (2d) 19 at 54-5 (Ont.C.A.).

Similarly, in *R. v. Valley*,⁶² no lesser judge than G. Arthur Martin expressed the view that there was no discretion on the part of a trial judge to exclude relevant defence evidence because it was "prejudicial" to the Crown case. Evidence that cast the deceased in a self-defence case in a prejudicial light was therefore held to be admissible, whatever impact it might have on the trier of fact. In sum, prior to *Seaboyer* it was simply considered wrong to deprive the accused of the rational probative value of otherwise admissible defence evidence, because of concern that the evidence might be used irrationally or compromise other policy concerns, including privacy interests.⁶³

I am not suggesting that the *Seaboyer* decision to recognize a power in trial judges to exclude defence evidence is in any way wrong. It was an inevitable development if a common law regime was going to be established to replace section 276 of the *Criminal Code of Canada*, after it was struck down. The Court was correct to recognize that defence evidence can produce negative effects, not only for prosecution witnesses, but for the efficiency of trials and even for the ability of the trial process to arrive at the truth. The concept of "prejudice" that animated Justice Martin in *Valley*, where "prejudice" was defined as the prejudgment of the accused by the trier of fact, was simply too narrow.

In truth, judges had been employing discretion to exclude defence evidence, no doubt since the beginning of the criminal trial process; although its jurisprudential character is a matter of some controversy, judges have always engaged in a kind of cost-benefit analysis in determining whether evidence is relevant enough to admit. Finally, and perhaps most importantly, by the time *Seaboyer* was decided, the entire law of evidence was changing. As that decision notes, the law of evidence was becoming more "principled" and less rigid. Judges were being called upon, within the exclusionary rules themselves, to weigh competing interests and to exercise choice or discretion. The general decision then, to articulate a discretion to exclude defence evidence, cannot be faulted. The question is whether the development of *this* particular discretion, the one captured in the *Seaboyer* formula which can be used to exclude defence evidence only where its probative value is *substantially* outweighed by the prejudice caused by its admission, can be faulted. Whether it can depends entirely on whether the power it confers conforms to the principle of access to defence evidence.

⁶² *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont.C.A.).

⁶³ The only apparent exception to this is the decision of the Quebec Court of Appeal in *R. v. St. Jean* (1976) 32 C.C.C. (2d) 438 at 445, where Justice Kaufman, in a case involving whether a discretion should have been used to prevent the accused from requiring a social worker to disclose the contents of a confidential therapy session, asserted without citing any authority in support, that notwithstanding *R. v. Wray*, a judge retains a discretion to exclude even defence evidence which would be so harmful to persons other than the accused that the benefit of it is far outweighed by the possible consequences.

In my opinion, properly applied, the exclusionary discretion defined in *Seaboyer* is not inconsistent with the principle of access to defence evidence. That principle protects only significant defence evidence. If evidence is not significant in the sense that either alone or together with other evidence it is capable of raising a reasonable doubt, its loss, whether through a rule of exclusion or the operation of discretion, is unobjectionable. While the *Seaboyer* formula does not state on its face that significant defence evidence is not to be excluded, that caveat is inherent within it. First, as a matter of simple impression, it is difficult to conceive of “prejudice” “substantially” outweighing in importance evidence that, by definition, has the potential, either alone or along with other evidence, of raising a legitimate reasonable doubt about guilt. This is particularly so when it is appreciated that the exclusion of probative evidence will itself prejudice the proper administration of justice. As the probative value goes up, the prejudice caused by exclusion increases to countermand any prejudice that admission might create. As a practical matter, it is therefore difficult to imagine that in the end the remaining balance of prejudice could substantially outweigh the probative value of the evidence. Second, as a more technical matter, it seems clear that the *Seaboyer* discretion would not be employed properly were it to be used to exclude “significant” defence evidence. As with any discretionary power, it must be exercised according to proper principles, and the overriding principle in a criminal trial has always been the need to protect the innocent. Indeed, in defining the discretion, the *Seaboyer* majority made it clear that the discretion to exclude defence evidence is to be used with “extreme caution” so as not to jeopardize the innocent.

It follows that, properly applied, that discretion should never be exercised where the evidence could, on its true weight and along with other proof, reasonably make a difference between conviction and acquittal.

2. *The Proper Operation of the Discretion*

How, then, does the discretion work?

(a) *Evidence of modest or “insignificant” probative value, and modest prejudice*

In *R. v. Clarke*⁶⁴ the Crown appealed the acquittal of the accused, in part because the accused had been permitted to present witnesses who testified to his reputation for trustworthiness and as to their opinion about his honesty, in order to bolster the credibility of his testimony. The rule

⁶⁴ *R. v. Clarke* (1998), 129 C.C.C. (3d)1 (Ont.C.A.).

⁶⁵ *Ibid.* at 13 (Ont.C.A.).

permitting the admission of this kind of evidence is of ancient lineage. The Crown asked the Court to reject or modify that rule and to order a retrial. The Court agreed that the rule should be modified in light of recent Canadian authority so that the personal opinion of a reputation witness should not normally be given. It declined to hold, however, that reputation evidence should not be permitted. In the end, even though the trial judge had permitted the opinion of the reputation witness to be expressed, the Ontario Court of Appeal refrained from ordering a retrial because that evidence could not reasonably have affected the jury.

This ultimate conclusion, as well as Justice Rosenberg's recognition that reputation evidence "may not be as probative as other forms of proof" and can have "some" value⁶⁵ illustrates that reputation evidence is not generally "significant" evidence. Still, Justice Rosenberg suggested that it would be extremely rare for a judge to be able to exercise the discretion to exclude such evidence when called by the defence. While the probative value of this kind of evidence is limited, the sole prejudice caused by its presentation would be the consumption of time: the attraction of trial efficiency would not substantially outweigh the probative value of the proof. Justice Rosenberg noted that even where the number of such witnesses called begins to make this kind of proof redundant:

"The judge will [still] wish to keep in mind that the Supreme Court in *Seaboyer* has held that the discretion to exclude relevant evidence must be exercised with extreme caution and that in most cases the better course would be to permit the defence to call all of those witnesses."⁶⁶

The *Clarke* case demonstrates that even technically admissible, insignificant evidence cannot be excluded without serious prejudice. Mere inconvenience, a non-evidence consideration, cannot substantially outweigh even modest probative value.

(b) *Evidence of modest or "insignificant probative value" causing substantial prejudice*

This does not mean that the discretion is without teeth. In *R. v. Tahai*⁶⁷ the defence wished to cross-examine a police officer during a jury trial on four unrelated drug purchases where it was alleged that the officer had planted evidence and framed the accused. In three of those cases acquittals were ordered and in the fourth, the charge was withdrawn. The trial judge refused to permit this line of questioning. The trial judge expressed concern about the undue consumption of time that would be caused, noting that the questioning would "open the door to 'a minute examination of each arrest

⁶⁶ *Ibid.* at 21 (Ont.C.A.).

⁶⁷ (1999), 137 C.C.C. (3d) 206 (Ont.C.A.).

[the officer] had been involved in over his entire career'.⁶⁸ This would prolong and complicate the case and deflect the jury from the main issue. To what end? The probative value of the evidence was extremely low. There was no indication that the three acquittals had been based on findings that the drugs had been planted, or that the withdrawal had anything to do with the actual innocence of the accused. The Ontario Court of Appeal, in rejecting the appeal, noted:

"Any possible doubts we may have had were put to rest in oral argument when, as a result of questions from the bench, counsel for the appellant made inquiries and discovered, for the first time, that the three jury acquittals and the withdrawal ... occurred after, not before, [this] investigation. This only reinforces the trial judge's conclusion that the proposed evidence had little, if any, probative value."⁶⁹

(c) *Evidence of significant probative value and high prejudice*

What would have happened, however, if the evidence in *Tahal* was significant? What if there was a foundation for concluding that the acquittals and withdrawals were in fact related to a serious reason to believe that the evidence had been planted, and that these incidents were related in time to the event being tried? Surely the fact that the line of questioning may have raised distracting issues and taken considerable time to develop could not have justified depriving the accused of the information.

An illustration is *R. v. Osolin*⁷⁰ a case already referred to above in a related context. The trial judge prevented defence counsel from cross-examining the complainant about an entry contained in her psychiatric records. The record disclosed that she was having second thoughts about proceeding against the men because something she did may have caused them to act as they did. The prejudice of allowing defence counsel to cross-examine a complainant on a confidential record, even though it had already been produced during a competency hearing, can only be considered high given the degree to which privacy in therapeutic relationships is prized in this country. The line of questioning would be profoundly embarrassing, would raise the prospect of the psychiatrist having to be called, and, to the extent that any particular evidentiary rulings do so, permitting the questioning raised the spectre of discouraging future complainants from coming forward and interfering with the therapeutic relationship. Yet it was held that the trial judge had erred by denying the cross-examination. The line of questioning was significant because it had the potential to raise a reasonable doubt, either about consent or belief in consent; therefore, the discretion could not properly be applied.

⁶⁸ *Ibid.* at 210.

⁶⁹ *Ibid.* at 210-11.

⁷⁰ *Supra* note 23.

(d) *The Relationship Between Significance and Prejudice*

Both these cases, and those principles that characterize our criminal process, including the need to protect the innocent and the corollary principle of access to defence evidence, demonstrate that the key variable in deciding whether to exercise the exclusionary discretion is the probative value of the evidence. That the defence evidence is not "significant" in the sense that it may not either alone or in connection with other evidence raise a reasonable doubt, is a necessary condition to the operation of the discretion. It is only where the evidence is not significant but still has a sufficient degree of relevance to pass the low threshold for admissibility, that exclusion is possible. Even then, exclusion is appropriate solely where the prejudice is high.

It is important to assert this and to think about it. The exclusionary discretion has been given special emphasis where evidence about the general character of sexual offence complainants is called by the defence in an effort to attack credibility.⁷¹ It applies, as well, in cases where the accused seeks to prove the general character of other suspects in order to suggest that they are the kind who could have committed the offence for which he or she is being blamed.⁷² These cases present a particular danger that the discretion to exclude defence evidence will be applied improperly. In these kinds of cases, the immediate thing that comes to mind is that this kind of evidence can discourage complaints, invade privacy, or inflame the trier of fact by prejudicing the complainant or deceased whose character is being maligned. These factors are unquestionably relevant to the exercise of the discretion, but what cannot be lost sight of is that ultimately they play what can only be described as a secondary role to the consideration of probative value. If the evidence is significant, it cannot be excluded because of such concerns.

What complicates matters somewhat is that often the prejudice defined will be closely related to the actual probative value of the evidence. If the objection is that the character evidence rests for its relevance on discreditable or "mythical" assumptions about human or female behaviour, the evidence has little or no probative value and the prejudice is clear. Such evidence is ripe for exclusion, and this is no doubt what the *Osolin* Court was referring to when it elaborated on the proper operation of the discretion.

If, however, the objection is that character evidence of modest relevance is so inflammatory in nature that it is apt to be misused by the trier of fact, the application of the exclusionary discretion is possible, depending on the degree of prejudice, but not at all assured. In a judge alone trial, the judge will be both the trier of fact and the person responsible for assessing

⁷¹ *Ibid.*

⁷² *R. v. Yaeck* (1991), 6 O.R. (3d) 293 (Ont.C.A.).

competing probative value and prejudice with a view to possible exclusion. If the trial judge can correctly evaluate the probative value and the risk of prejudice when deciding whether to admit the evidence, there is no risk that when that judge makes the factual assessment at the end of the case the judge will misuse the evidence. There is therefore no need to exclude the evidence in order to prevent this kind of apprehended prejudice. Even in a jury trial, the judge will want to consider whether a pointed jury direction (of the kind we rely on to protect the accused when similar fact evidence is admitted) may sufficiently ameliorate that prejudice. Still, exclusion is possible, depending on the degree to which the inflammatory nature of the evidence outweighs probative value.

According to the principles already discussed, if the objection is that character evidence of significance is so inflammatory that it has the potential to be misused, it should never be excluded. On what basis can it be determined that the accused should lose the use of evidence that may raise, or assist in raising, a reasonable doubt, as the result of fear that the trier of fact will not give the evidence its legitimate force?

Other forms of prejudice are not “non-evidence” considerations, but they too involve the spectre of subordinating evidence because of competing concerns. If the objection is that evidence of significance will, by its nature, embarrass the alleged victim, or discourage future complaints if allowed to be called, or invade the privacy of the complainant, it should never be excluded, no matter how grave that prejudice might seem. If we were to exclude significant evidence to prevent these forms of prejudice, we, as a society, would be accepting overtly and unambiguously that innocent accused persons may have to pay the price of a wrongful conviction, so that witnesses are not embarrassed, so that society may become more effective at encouraging complaints, or so that private thoughts or statements can remain buried. This is an affront to the most basic principles of our criminal justice system.

B. *The Statutory Discretion to Exclude in Subsection 276(2)(c)*

Unfortunately, it may not be possible to make the same case credibly with respect to section 276 of the *Criminal Code*, the so-called “rape shield” provision. That section, which applies to relevant evidence disclosing the sexual experiences of complainants, provides expressly in subsection 276(2)(c) for the exclusion of such evidence even where it has “significant probative value.” It says, in particular:

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than activity that forms the subject matter of the charge, whether with the accused or with any other person, unless the judge ... determines ... that the evidence

(c) has significant probative value that is not substantially outweighed by the danger or prejudice to the proper administration of justice.

A constitutional challenge to the requirement that the defence evidence has to be significant in order to be admissible was rejected by the Supreme Court of Canada in *R. v. Darrach*.⁷³ I agree that this challenge was appropriately rejected. Again, the principle of access to defence evidence is offended only by the rejection of "significant" evidence, and not otherwise. It therefore does not violate the principle of access to defence evidence to predicate admissibility on the existence of significance.

The more important question, however, one that was not directly posed to the Court, is whether it is constitutionally valid to exclude defence evidence that is "significant," in the pursuit of competing considerations. It is not entirely clear what to make of the *Darrach* decision as it relates to this question.

Aspects of the decision appear to unambiguously endorse the constitutional propriety of excluding "significant" defence evidence. After defining "significant" evidence as I have in this article as evidence that is not "so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt," the Court expressly recognized that "significant" evidence can be excluded as a matter of discretion:

"The adverb "substantially" serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value."⁷⁴

If subsection 276(1)(b) is given the effect described in that passage, it would permit the exclusion in some cases of evidence that could, on its own or in the context of all other evidence, be capable of raising a reasonable doubt.

As soon as the *Darrach* Court made this comment, however, it immediately appeared to contradict itself by suggesting that only trifling evidence would be excluded by the operation of section 276:

In light of the purposes of s.276, the use of the word "significant" is consistent with both the majority and minority reasons in *Seaboyer*. Section 276 is designed to prevent the use of evidence of prior sexual activity for improper purposes. The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice." The Court has recognized that there are inherent "damages and disadvantages presented by the admission of such evidence." As Morden A.C.J.O. puts it, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect.⁷⁵

⁷³ *Darrach*, *supra* note 16.

⁷⁴ *Ibid.* at para. 40.

⁷⁵ *Supra* at para. 41.

In contrast to the previous passage, this one appears to set what I have described above as the appropriate standard. Depending on the degree of prejudice, section 276 could be used to exclude evidence that is not significant, since significantly probative evidence will overcome any prejudicial effect it may have.

The problem with this construction of subsection 276(2)(c) is that it contradicts the plain language of the provision. As indicated, that subsection contemplates expressly the exclusion of significant defence evidence.

There may be a way to reconcile these apparently contradictory passages in the *Darrach* decision, although not in a fashion that satisfies the principles I have described in this paper. Perhaps, in the latter passage, Justice Gonthier was simply noting the obviously correct point that all evidence that is not significant must always be excluded by virtue of subsection 276(2)(c). Since this interpretation eradicates the contradiction in the judgment, and permits the language of section 276(2)(c) to mean what it says, I have to concede grudgingly that technically, this is the most attractive way to read the case.

Having said that, there are features in the latter passage that suggest that Justice Gonthier was not simply describing the fact that all evidence that is not significant must be excluded. First, he said that the use of the word “significant” in the legislation was consistent with *Seaboyer*, which it would not be if the discretion permitted the exclusion of “significant” evidence. Second, he also spoke in that passage of the need to exclude “evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the ‘proper administration of justice.’” His reference to the danger to the administration of justice suggests that Justice Gonthier was still considering the balance of competing interests in that passage, and was not simply describing the automatic exclusion of insignificant evidence. Third, he referred in this second passage to the purpose of section 276. He described that purpose as preventing the use of evidence of prior sexual activity for improper purposes. Evidence that may not be significant does not have to be automatically excluded to fulfil that purpose, since evidence that is not significant might nonetheless be lead for a proper purpose. Fourth, Justice Gonthier expressed agreement with the Court of Appeal that the word “significant” “on a textual level, is reasonably capable of being read in accordance with ss.7 and 11(d) [of the *Charter*] and the fair trial they protect.” Although I am reluctant to become too doctrinaire about what the *Charter* requires for a trial to be fair, in light of the recent approach to constitutional adjudication,⁷⁶ there is strong reason to believe that to accomplish all of this, section 276 (2)(c) would have to be read so that significant evidence will never be substantially outweighed by competing

⁷⁶ See Paciocco, *supra* note 3, where the main theme discussed is the erosion of principles of fundamental justice relied on by the accused.

considerations. The most compelling point in favour of reading the second passage as an assertion that only insignificant evidence can be excluded under the section 276(2)(c) discretion, however, is that Justice Gonthier claimed that the standard required by section 276 "is not a departure from the conventional rules of evidence." If section 276 permits the exclusion of significant defence evidence, it is a monumental departure from the conventional rules of evidence.

The best I can do for the principle of access to defence evidence in the context of section 276(2)(c), then, is to concede that *Darrach* may well support the view that a judge can exclude significant defence evidence because of competing considerations, while arguing that the decision is contradictory and that the Court may not have meant what it said. I can also point out that the matter was not argued directly. I nonetheless despair that the *Darrach* decision, which otherwise strikes a sagacious balance, appears to comprehend the prospect that the innocent may be convicted in the interests of competing principles and policies. This is contrary to the spirit of *Seaboyer*, the very decision the Court relied on to assist it in both understanding and saving the constitutional validity of the legislation.

C. *The Discretion Being Revised?*

I was invited to write this paper on the proper balance between the competing interests of the state and the accused, by members of the Supreme Court of Canada. That great privilege was extended to me as a participant in the symposium held in honour of the Court's 125th Anniversary. The irony is that another engagement with the Court now prevents me from expressing my views fully on what is doubtless the most significant contemporary challenge to the principle of access to defence evidence. In *R. v. Shearing* a panel of the the B.C.C.A. expressed the view⁷⁷ that the discretionary formula in *Seaboyer* has been modified by *R. v. Mills*, such that judges will henceforth be able to exclude defence evidence, whether significant or not and whether prejudice substantially outweighs probative value or not, by simply balancing competing interests. *R. v. Shearing* is now before the Supreme Court of Canada and I will be appearing as a co-counsel. It would be unfitting, therefore, for me to write at large on the decision, although my views will not be a matter of mystery. Suffice it to say, the question for the Court in *Shearing* will be two-fold. First, does the approach in *Mills* govern questions of admissibility? Second, and if so, does the approach in *Mills* in fact mean that no priority is to be given, when it comes to the admission of defence evidence, to the principle of access to defence evidence?

⁷⁷ (2000) 143 C.C.C. (3d) 233 at 252. In a subsequent judgement of another panel of the same court, *R. v. Yu* (2000), 150 C.C.C. (3d) 217 (B.C.C.A.), the Court applied the *Seaboyer* standard for the discretion to exclude defence evidence.

IV. *Conclusion*

If the competing interests of the accused and the state are to be properly balanced, the accused must be absolutely entitled to present any and all evidence that may, either alone or in conjunction with other evidence, raise a legitimate, reasonable doubt. The “principle of access to defence evidence” must be given primacy because it is an indispensable corollary of the more basic foundational and inviolable principle that the innocent must not be punished.

In our modern law of evidence, the “principle of access to defence evidence” has received appropriate respect, both in the fixed rules and in the application of the more open-textured rules that now predominate. Even the judicial discretion to exclude defence evidence is consistent with it, so long as that discretion is not used to exclude significant defence evidence.

Despite its pedigree and intuitive appeal, however, the principle of access to defence evidence is not assured. As has always been and will always be true, this principle, like any other principle, is vulnerable to the ineffective design of rules. Even when it is intended to respect the principle, an overly aggressive exclusionary rule can defeat it. The innocence at stake exception to solicitor-client privilege, the collateral fact rule, and section 276(1)(c) are, in my opinion, examples of this. The principle of access to defence evidence is also vulnerable to the improper application of carefully styled rules, particularly the exclusionary discretion, but there is nothing startling in this. All rules are capable of improper application. By far the most dramatic challenge to the principle of access to defence evidence, however, is the contention that things have changed and that evidentiary decisions are to be made through a simple, even balancing of competing interests. With the decision in *R. v. Shearing*, there may well be a sea-change in the principles and standards that I have been discussing. In a few short months, this article could become nothing more than a dissertation on legal history. Should that come to pass I will not be lamenting the loss of the paper. I will be lamenting the loss of principle.