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THE PRINCIPLED USE OF HEARSAY IN CIVIL CASES: A TECHNICAL GUIDE TO AVOIDING TECHNICALITY

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There is misperception that the contextual evaluation permitted by the principled hearsay exception allows civil courts to freely accept hearsay evidence. In fact, there is no wholesale discount for hearsay in civil cases. The intensity with which the rule applies varies with the seriousness of the litigation, and the role played by the evidence. Indeed, regardless of context, to gain admission hearsay should be the best evidence of the declarant's observations that can reasonably be offered, and there must be a rational basis for accepting it to be true. This paper offers a technical guide to applying these standards.

Certains croient à tort que l'évaluation contextuelle, qui est permise dans le cadre de l'exception à la règle du ouï-dire, autorise les tribunaux civils à accepter librement la preuve par ouï-dire. Toutefois, dans les affaires civiles, l'admissibilité de la preuve par ouï-dire n'est pas automatique. La rigidité avec laquelle s'applique la règle varie selon la gravité de l'affaire en litige et le rôle de la preuve. En effet, quel que soit le contexte, la preuve par ouï-dire ne devrait être admissible que dans les cas où elle représente la meilleure preuve des observations du déclarant qui puisse raisonnablement être obtenue. De plus, il doit exister un motif raisonnable qui sous-tend l'acceptation de cette preuve comme étant véridique. Le présent article présente un guide technique de l'application de ces normes.

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1. Introduction

The principled approach to the hearsay rule has two key components. This first and far more important branch is the "principled exception" or "*Khan* exception" to the hearsay rule.[1] Simply put, this exception permits hearsay evidence to be admitted, regardless of whether any of the traditional fixed hearsay exceptions apply, where the twin principles of necessity and reliability are met and where judges choose not to exercise their residual exclusionary discretion. The second leg of the principled approach is the obligation of courts, identified in *R. v. Starr*,[2] to revise or refuse to apply traditional fixed hearsay exceptions where they fail to satisfy the principles of necessity and reliability. For ease of reference, I will refer to this second component as the "*Starr* review." This two-part principled approach, which was developed in criminal cases, applies in those civil hearings where the law of hearsay applies.[3]

Some would say that the principled approach developed because of an aversion to the "absurdly technical" state of the law of hearsay.[4] This is correct if the term "technical" is understood in the sense we intend when we speak of "technicalities" – rules that require unwelcome decisions in particular cases in the interests of broader considerations such as certainty, legal consistency and the rule of law. Indeed, the principled approach to the hearsay rule developed precisely because the traditional hearsay exceptions were too rigid or too rule-bound to achieve their underlying purpose.[5] They were causing the exclusion of evidence that should rightly be received[6] and in some cases they were permitting

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1 R. v. Khan, [1990] 2 S.C.R. 531 at 540, 59 C.C.C. (3d) 92 [Khan cited to S.C.R.]; as is well known, the rule, with its roots in the civil case of Ares v. Venner, [1970] S.C.R. 608, 14 D.L.R. (3d) 4 [Ares cited to S.C.R.], was adopted in Khan.

2 2000 SCC 40, [2000] 2 S.C.R. 144, 190 D.L.R. (4th) 591 [Starr cited to S.C.R.].

3 See especially Khan v. College of Physicians & Surgeons of Ontario (1992), 94 D.L.R. (4th) 193, [1992] O.J. No. 1725 (Ont. C.A.) [Khan v. C.P.S. Ont. cited to D.L.R.] (it was decided authoritatively that the principled exception applies in administrative hearings bound by the laws of evidence); see also Wepruk (Guardian ad litem of) v. McMillan Estates (1993), 77 B.C.L.R. (2d) 273, [1993] B.C.J. No. 818 (QL) (B.C.C.A.) (the principled exception also applies during civil trials); and Jung v. Lee Estate, 2006 BCCA 549, 279 D.L.R. (4th) 748, [2007] 5 W.W.R. 577 [Jung cited to W.W.R.] (a more recent example of the principled exception applying during civil trials).

4 Ronald Joseph Delisle, Evidence: Principles and Problems, 3d ed. (Toronto: Carswell, 1993) at 452; this description was removed from the 4th edition.

5 *Clark v. Horizon Holidays Ltd.*, [1993] 45 C.C.E.L. 244 at 251, 39 A.C.W.S. (3d) 108 (Ont. Ct. J. (Gen. Div.)) [*Clark* cited to C.C.E.L.].

6 The classic example is *Khan*, *supra* note 1, where the principled exception was developed. Had the principled exception not been accepted, the compelling if not definitive hearsay evidence of the complainant would have been excluded.

the admission of evidence that should have been excluded.[7] The principled approach developed to wash away this rigidity; it invited a functional analysis that would better accommodate the hearsay rules' underlying purposes. In this sense the principled approach did yeoman's work in reducing absurd technicality.

Yet it would be wrong and dangerous to think that the principled approach washed away technicality altogether. It did not redress the "technicality" that the Criminal Law Revision Committee of England bemoaned; the "numerous exceptions" that "add greatly to the technicality of the law of evidence"[8] continue to apply and in fact, their application can be a matter of increased complexity in those rare cases where a "*Starr* review" is involved. More importantly, what cannot be lost sight of is that the "principled approach" is itself technical. Its rules may be flexible but they are nonetheless rules and they demand proper technique within their legally recognized field of operation. They trade on "discretion," and while judges are given significant deference, that discretion is circumscribed by identifiable and obligatory legal standards. There is room to err.

This paper is intended to assist judges and lawyers in avoiding error in the application of the principled approach in civil cases. Since the principled approach has created technical rules for avoiding the rigid application of the law of hearsay, it is perhaps fair to describe this paper as a technical guide to avoiding technicality.

2. Criminal Influences in Civil Cases

One of the greatest challenges confronting lawyers and judges in civil cases is the fact that, when it comes to the rules of proof, they have to wear "hand-me-downs." For a variety of reasons the rules of evidence, including those that apply in civil litigation, have been forged in criminal cases where considerations differ from those that operate in the civil milieu.[9] As a result, those rules may not fit well or even at all in civil

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7 See *Starr*, *supra* note 2, where the Court used the principled approach to modify the "Statements of Present Mental State" exception because on its conventional criteria it purported to permit statements made by individuals disclosing their present intention to be admitted, even if made in circumstances of suspicion.

8 U.K., H.C., "Criminal Law Revision Committee Eleventh Report Evidence (General)," Cmnd 4991 in *Sessional Papers* (1972) at 133.

9 The law of evidence is largely common law based. Because of practices relating to access to Supreme Court of Canada appeals, the revolution in the law of evidence to accommodate sexual offence prosecutions, legal aid funding for appeals to provincial appellate courts, the appellate aversion to disturbing civil litigation outcomes on technical grounds, and the widespread reporting of criminal cases, the leading

litigation. Some believe this to be true with the law of hearsay generally; the context was different enough in their minds that the members of the 1982 Federal/Provincial Task Force on Uniform Rules of Evidence recommended unanimously that in civil litigation "first-hand hearsay should be receivable in evidence" in order to simplify the law and expedite the trial process, leaving judges to assess what weight it should be given. Meanwhile in criminal cases the Task Force wanted even more rigidity than the law of evidence currently imposes; the Task Force endorsed the continued application of the traditional pre-*Khan* law of hearsay, with only minor modification, and rejected the invitation to develop a generic exception.[10] In their view, there was a policy gulf between civil and criminal cases.

Of course, these Federal/Provincial Task Force recommendations were never adopted, and hearsay rules continue to apply in civil litigation in Canada. This is a good thing. There are sound reasons why they should.

First, the hearsay rule is one of those paradoxical rules that are meant to improve the ability of courts to come to accurate determinations by excluding evidence that can distort their ability to reach factually correct decisions. The rule is, in the words of the Supreme Court of Canada, "intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function."[11] The "central reason" for the *prima facie* exclusion of hearsay statements – the one that has to be kept in mind to apply the principled exception correctly – is "the general inability to test their reliability." As the Court explained in *R. v. Khelawon*:

> Without the maker of the statement in court, it may be impossible to inquire into the person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts.[12]

Simply put, unless trustworthiness is manifest, if there are inadequate criteria to measure the worth of an out-of-court statement, the claim that "judges are quite capable of taking into account the circumstances surrounding the making of the statement in assessing what weight it

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decisions are almost invariably criminal cases.

[10] Uniform Law Conference of Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982) at 150-51 [Uniform Law Conference Report].

[11] *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 at 793, 274 D.L.R. (4th) 385 [*Khelawon* cited to S.C.R.].

[12] *Ibid*.

should be given"[13] is undermined. As Justice Green of the Newfoundland Supreme Court Trial Division put it in *C.(C.) v. B.(L.)*:

> One of the purposes of the rules of evidence is to ensure that all information presented to the court meets a minimum degree of reliability and accuracy that would be safe for the trier of fact to rely on it. So long as the evidentiary rules tend to accomplish that result, they have a proper role to play.[14]

Of course, there are forums where hearsay evidence is admissible without fanfare and where adjudicators are expected during the reasoning process to disregard those statements that do prove to be unreliable or unassessable. While it is the continental European tradition, the approach in civil litigation in the United Kingdom, and a frequent practice in administrative hearings, admitting hearsay without quality control preconditions can impair the fact-finding process. It is a simple matter of focus. In tribunals that are unbridled by rules of admissibility, there is no forced attention given to reliability issues. Not surprisingly, there are examples in small claims court matters,[15] and in international tribunals that are not bound by rules of proof[16] where parties unburdened by the obligation of establishing preconditions to the admissibility of hearsay spend little time calling the evidence that can be used to assess the integrity of out-of-court claims. Where this occurs, the trier of fact is left with an impoverished record and an impaired ability to evaluate the proof. And if it chooses to rely on hearsay in these circumstances, it acts arbitrarily for it is accepting evidence without a rational basis for trusting it. In contrast, where a rule of admissibility operates the parties are obliged to turn their mind and their case to the material that the trier of fact will ultimately require to make optimal decisions about the value of the information it is being offered.

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13 Uniform Law Conference Report, *supra* note 10 at 150.

14 (1995), 136 Nfld. & P.E.I.R. 296 at 325-26, 60 A.C.W.S. (3d) 779 (Nfld. S.C. (T.D.)).

15 See e.g. *Morris v. Cameron*, 2006 NSSC 9, 240 N.S.R. (2d) 123, 144 A.C.W.S. (3d) 977 [*Morris*] (and the decisions cited therein).

16 See the appeal in *Prosecutor v. Rutaganda*, ICTR-96030A, Judgement (26 May 2003) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.ictr.org>. I appeared as an appellate counsel in this case. The Trial Chamber heard hearsay evidence that Mr. Rutaganda operated a prison in an abandoned chapel at the rear of his property. No information was given about the reliability of the source or the circumstances of the witness. Even though this hearsay evidence stood alone and the Tribunal had no rational basis for evaluating it, other than that it seemed believable given the other horrific allegations made against the man, it found there was a prison. Had a hearsay rule been in place, the integrity of the evidence would have been subject to dedicated litigation. Unfortunately, the Appeals Chamber was not troubled by the Trial Chamber's finding as the latter was entitled to act on hearsay.

Then there is the reality that even with the best of intentions a trier of fact is less apt to give evidence the kind of searching evaluation at the end of the case that it would be accorded during an admissibility *voir dire*. As a practical matter, there is often too much for the litigators to do in their closing submissions to enable them to offer the kind of critical evaluation of each item of evidence that may be warranted. Meanwhile, a trier of fact, particularly when encumbered with a complex court record, can be hard-pressed to perform a structured evaluation of discrete pieces of evidence at the end of the case. It may even be challenging in some cases to recall what information sailed into the record in a hearsay vessel, and what claims were delivered *viva voce*.

Simply put, the optimal time to strike is when the iron is hot. As the Newfoundland Court of Appeal observed in *Re B.(J.)*:

> To adopt the seductively simple approach of allowing all hearsay evidence to be received without any threshold test of admissibility, and relegating it merely to a consideration of the weight to be accorded to it, is in effect to abandon any pretext at deciding evidentiary issues according to appropriate principle and to expose those who may be adversely affected by the reception and use of the evidence … to considerable risk of having their interests determined or at least influenced by potentially untrustworthy evidence that they may find difficult to rebut.[17]

Finally, admitting hearsay evidence without limit impairs appellate review of the wisdom of the decisions that are reached by converting a reviewable question of law into a largely unreviewable finding of fact. As the Newfoundland Court of Appeal recognized in *Re B.(J.)*, admitting hearsay for later evaluation:

> […] would, in the vast majority of cases, insulate the decision to receive and act on the evidence from the possibility of appellate review. If hearsay statements are "received for what they are worth," without being screened for necessity and reliability, they will form part of the body of evidence that must be considered in the final weighing of the evidence at the end of the hearing. Given the deference shown by appellate courts to findings of fact by trial judges and the practical impossibility of determining in most cases the degree of weight placed by the judge on an apparently questionable piece of hearsay evidence, the reality will be that little or no control over the use of this type of evidence will exist.[18]

I am therefore firmly of the view that the continued practice of applying the law of hearsay in civil litigation is a wise one. There are two

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17 (1998), 166 Nfld. & P.E.I.R. 1, 163 D.L.R. (4th) 438 at 481 (Nfld. C.A.) [*Re B.(J.)*].

18 *Ibid*.

reasons why I have bothered, in a paper on the practical application of the principled approach, to engage this point in such detail. First, the principled approach can be applied properly only if the underlying purpose for the rule is kept in mind. The debate about why the hearsay rule applies in civil cases gets to the heart of that question – when civil courts apply the hearsay rule they have to do so with a firm appreciation that it is not a "technicality" that impedes substantive justice, or a ritual that adds pointlessly to the complexity of litigation. By insisting on a rational foundation for assessing the claims of non-witnesses[19] the hearsay rule enhances the accuracy of factual decisions. Meanwhile, the principled approach reduces the rigidity of the hearsay rule by confining its application to the mischief it is intended to address.

Second, reflecting on the value of the rule in this way is apt to discourage the kind of reflexive relaxation of the law of evidence that can occur in civil litigation, the regrettable "I will let it in and sort it out later" thinking that is sometimes adopted. The principled approach encourages judges to turn their minds directly to the material questions so that when things are sorted out, the requisite material is available.

3. The Impact of the "Civil Context" on the Principled Exception

It is beyond controversy that when applying the principled exception, courts are to consider the context in which the hearsay issues arise. After all, the whole point of the rule is to permit case-specific evaluations to be offered in place of generic rules. Indeed, it is no exaggeration to say that in *R. v. Khan* itself, the needs of the kind of case that was being litigated inspired the very creation of the principled exception. That case, of course, involved a contest over the admissibility of the hearsay statements of a young child about having been sexually assaulted. McLachlin J. observed that "[i]n Canada courts have been moving to

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[19] I am using the term "non-witness" to keep the explanation as simple as possible. In truth, the hearsay rule applies to the prior statements even of those witnesses who are testifying. The reasons are well-explained in *Khelawon*, *supra* note 11 at 809-11. Simply put, if the witness recounts the same facts in court, the in-court testimony becomes the evidence and the out-of-court statement becomes superfluous. We exclude the out-of-court statement due to fear that a trier of fact will assume that repetition enhances credibility, when it does not. It is where, during in-court testimony, the witness does not recount the out-of-court statement that things become problematic from a hearsay perspective. If the witness does not do so because he or she no longer accepts it as true, "the trier of fact is being asked to accept an out of court [sic] statement over the sworn testimony of the witness." Where the witness does not recall the earlier claim, the ability to plumb its accuracy through cross-examination is entirely frustrated. Unlike American practice, Canadian law therefore chooses to perform quality control on the out-of-court statements of a witness by using hearsay exceptions.

more flexibility in the reception of the hearsay evidence of children"[20] and she observed that "[t]hese developments underline the need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse."[21] Context was not only important to the application of the rule, it gave rise to it.

The need to make the law of hearsay sensitive to context, which was the catalyst for the principled exception, continues to inform its application. Context can influence the way the rule is applied in a variety of ways. It has long been accepted, for example, that the principled exception will apply differently in a criminal case, depending on whether it is the Crown or the accused seeking to call the evidence. Not surprisingly, the policy tilt in favour of avoiding wrongful convictions has resulted in a more generous approach to the admissibility of exculpatory hearsay. In *R. v. Finta*, the Ontario Court of Appeal observed that hearsay evidence found admissible at the instance of the defence would not have been accepted had the Crown sought to rely upon it.[22] And in *R. v. Folland*, Rosenberg J.A. observed with reference to Folland's anticipated application to have defence hearsay admitted at his retrial that "while the trial judge must be satisfied that the out-of-court utterances have some reliability, strict standards set in the context of the application by the Crown to make substantive use of prior inconsistent statements incriminating the accused do not apply."[23]

More recently in *R. v. Couture*,[24] Charron J. made it clear that both the nature of the charges faced by an accused and the potential impact that the hearsay evidence would have on the outcome, should influence the application of the rule. She remarked:

> The fact that the out-of-court statement is adduced for its truth should be considered so that the court may better assess the potential impact of introducing evidence in its hearsay form. In this case, the statements consist of alleged confessions by the accused to the commission of two murders. The accused could potentially be convicted on the basis of that evidence alone.[25]

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20 *Khan*, *supra* note 1 at 544.

21 *Ibid*. at 543.

22 *R. v. Finta* (1992), 92 D.L.R. (4th) 1, 14 C.R. (4th) 1 (Ont. C.A.), aff'd [1994] 1 S.C.R. 701 [*Finta* cited to C.R.].

23 (1999), 43 O.R. (3d) 290 at 305, 132 C.C.C. (3d) 14 (C.A.) [*Folland* cited to O.R.].

24 2007 SCC 28, [2007] 2 S.C.R. 517, (*sub nom. R. v. C. (D.R.)*) 280 D.L.R. (4th) 577 [*Couture* cited to D.L.R.].

25 *Ibid*. at 609.

It necessarily follows that the intensity with which the necessity and reliability inquiries are conducted should be influenced by the kind of litigation in question, including when hearsay is being offered in a civil as opposed to criminal context.[26] There is authority to support this. Clark v. Horizon Holidays Ltd.,[27] a wrongful dismissal case, is illustrative. A key issue was what was said between the plaintiff Clark and Slichter, an employee of Horizon Holidays Ltd., concerning Clark's "dismissal." By the time of trial Slichter had died, but he had "recorded" details of that conversation and of a conversation he had had with another employee. The documents were arguably admissible as business records but there was some contest about this. The Court nonetheless admitted the records, justifying the decision in the alternative by using the principled exception. Adams J. noted when rendering his decision that the case involved a wrongful dismissal claim: a context in which informal alternative dispute resolutions are common, and where hearsay is freely admitted in the name of informality, expediency and reduction of cost.[28] This observation, even though not central to the reasoning, is generally taken as authority for the proposition that the principled exception operates differently, and more freely, in civil cases.[29]

Courts involved in child welfare cases are most apt to claim this kind of liberal approach to the admission of hearsay. For example, in *E.S. v. D.M.*, Puddester J. observed:

> Clearly, in civil proceedings as here there is no accused, and it might be argued that the concern as to the absence of cross-examination is by that very reason of lesser import. Indeed, it might be said that in cases involving child protection issues, where

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26 See David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008) at 119-120.

27 *Supra* note 5.

28 *Ibid*. at para. 31.

29 See *Dodge v. Kaneff Homes Inc*. (2001), 104 A.C.W.S. (3d) 331, [2001] O.J. No. 1141 (Ont. Sup. Ct.) [*Dodge* cited to A.C.W.S.]; in truth, while the general proposition that the civil context can influence the intensity of the application of the principled exception is no doubt right in principle, outside of the child protection context the direct case-law support for the proposition is not strong. The comment in *Clark*, *supra* note 5, was made in passing and the case did not involve alternative dispute resolution; it was contested litigation. As for *Dodge*, it relied on John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada Ltd., 1999) at 195, which had simply quoted from *Clark* to query whether this was in fact the law, and it invoked the passing reference in *Khan*, *supra* note 1 at 545-46, to a comment in *F.(J.K.) v. F.(J.D.)*, [1988] B.C.J. No. 278 (B.C.C.A.) (QL), where the British Columbia Court of Appeal had observed with reference to *Ares*, *supra* note 1, that "the Supreme Court of Canada in that case indicates that the rules of evidence relating to hearsay evidence in civil case are not entirely inflexible."

> the focus is on the best interests of the child rather than the rights or liabilities of the parents, the absence of the ability to cross-examine is for that reason also of less weight in the equation, thus justifying a less "strict" requirement to prove "necessity" for the reception of hearsay evidence.[30]

Perhaps the most telling reason for lessening the intensity of the hearsay rule in child protection matters is that the proceedings are less adversarial and more inquisitorial.[31]

While both principle and authority support the view that the hearsay rule may be modulated or attenuated in the civil context, there are two things that should be borne in mind. First, it is never appropriate in a case governed by the law of evidence to jettison the principles of necessity and reliability entirely. It bears notice that after invoking the need for flexibility in sexual offence cases involving children, McLachlin J. ultimately applied the necessity and reliability criteria in *Khan*,[32] and that in *Folland*[33] Rosenberg J.A. noted the need for some level of reliability before hearsay can gain admission, even at the behest of the accused.

By and large civil courts appreciate this. Even where rules of practice permit the admission of hearsay,[34] and even in child welfare cases in jurisdictions where statutory provisions veritably invite courts to accept hearsay evidence, the prevailing practice is to consider the principles of necessity and reliability either before admitting the evidence,[35] or openly

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30 *E.S. v. D.M.* (1996), 143 Nfld. & P.E.I.R. 192 at 223, 448 A.P.R. 192, 65 A.C.W.S. (3d) 303 (Nfld. U. Fam. Ct.), adopted in *Children's Aid Society of the County of Simcoe v. C.L.(S.)* (2000), 38 C.R. (5th) 107 at 112, 99 A.C.W.S. (3d) 614 (Ont. Sup. Ct. (Fam. Div.)) [*Simcoe*]; and *Winnipeg Child and Family Services v. L.(L.)* (1994), 95 Man. R. (2d) 16, [1994] 6 W.W.R. 457 (C.A.) [*L.(L.)* cited to Man. R.].

31 See *Re B.(J.)*, *supra* note 17 at 479 (and cases cited therein).

32 *Supra* note 1.

33 *Supra* note 23 at 305.

34 See *Rees v. Canada (Royal Canadian Mounted Police)*, 2004 NLSCTD 192, 242 Nfld. & P.E.I.R. 13, 134 A.C.W.S. (3d) 370 [*Rees* cited to Nfld. & P.E.I.R.]; *Malik Estate v. State Petroleum Corp.*, 2007 BCSC 934, (2007), [2008] 1 W.W.R. 709 [*Malik Estate*]; *Sutherland Estate v. MacDonald*, [1999] O.J. No. 785 (Ont. Ct. J. (Gen. Div.)) (QL) [*Sutherland Estate*] (re. s. 27 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43); and *Morris*, *supra* note 15.

35 See e.g. *Alberta (Child, Youth and Family Enhancement Act, Director) v. S.(A.)*, 2006 ABQB 354, 28 R.F.L. (6th) 310 at 357-59, 150 A.C.W.S. (3d) 1071 [*S.(A.)*]; *Children's Aid Society of Ottawa-Carleton v. H.(S.)*, [2004] O.J. No. 2527 (Ont. Sup. Ct.) (QL); *Catholic Children's Aid Society of Hamilton v. L.(C.)* (2002), 118 A.C.W.S. (3d) 676, [2002] O.J. No. 4679 (Ont. Sup. Ct.) (QL); and *Re B.(J.)*, *supra* note 17. See especially *Children's Aid Society of Algoma v. H.(L.)* (2001), 120 A.C.W.S. (3d) 237; [2001] O.J. No. 5896 (Ont. Ct. J.), Kukurin J. (QL) [*H.(L.)* cited to O.J.]. But see *L.(L.)*, *supra* note 30 (relying on the *parens patriae* jurisdiction to admit hearsay absent a

and overtly when evaluating the evidence.[36] To paraphrase the Court in *Sutherland Estate v. McDonald*, to approach the matter otherwise would be to make the unlikely assumption that the law has "sanctioned the admissibility of hearsay evidence that is unnecessary and unreliable."[37] It has not. What it has sanctioned is a contextual evaluation of how necessary and reliable hearsay evidence needs to be to gain admission.

The second point is more subtle but no less important. It is that there should be no generic discount on the intensity with which the hearsay rule applies in civil cases. Put another way, a generalization that the law of evidence is always to be more generous in applying the principled approach in civil cases is a blunt overstatement that fails to provide any meaningful guidance. What is called for is a case-specific evaluation of how tolerant a court should be to the specific hearsay evidence being offered.

Given that the purpose of the hearsay rule is to increase the accuracy of the fact-finding process, the only way there could be a generic discount in civil cases would be to accept it to be universally true that the truth is less important in civil cases than it is in criminal prosecutions. Indeed, given the function of the hearsay rule that proposition would require accepting that civil litigation is universally so much less important than criminal litigation that it is appropriate to settle for less stringency and accept the risk of acting on inaccurate information. It was this kind of thinking that emboldened the 1982 Task Force to recommend the abolition of the hearsay rule in civil cases on the view that there is less at stake when liberty is not in issue, and that what matters most in civil cases is not so much truth as the effective settlement of claims.[38]

To be fair, it is indeed possible to use the relative burdens in criminal and civil cases to support this kind of thinking since civil cases, turning on mere probabilities, *ex hypothesi* accept a larger margin of error than proof beyond a reasonable doubt. There is, however, another side to the criminal coin. When it comes to verdicts of acquittal we accept a larger margin of error than civil cases do; the accused wins if there is a reasonable doubt, even if his or her guilt is probable. In civil cases a defendant loses where his or her responsibility is probable. Looked at in this light, it would be equally arguable that the standards for admission of hearsay defence evidence should be lower in criminal cases than

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necessity requirement); and *Children's Aid Society of London and Middlesex v. H.(R.)* (1999), 93 A.C.W.S. (3d) 852, [1999] O.J. No. 5037 (Ont. Sup. Ct. (Fam. Div.)) (QL).

36 See e.g. *S.(A.), ibid*.

37 *Sutherland Estate*, *supra* note 34 at paras. 11-12.

38 Uniform Law Conference Report, *supra* note 10 at 126.

standards of admissibility in civil cases. There is danger in simplistic assumptions and it is simplistic to think that the truth is uniformly of diminished importance in civil litigation. I suspect that most would rather stand convicted of a minor crime than lose their careers, or their children, or fall to financial ruin. The whole reason the principled exception got into context-based reasoning was to avoid the kind of unrefined thinking that would support a generalized discount.

A far better approach, one that is supported by the authorities and more in keeping with the principles underlying the rule, is to take a more nuanced view of context. In this view, the intensity in the application of the hearsay rule depends not on the general kind of litigation – civil or criminal – but on the specific circumstances of the case, including its seriousness, the centrality of the issue the evidence informs,[39] the consequences that the evidence could have for the parties,[40] and the instant policy interest being pursued by the law,[41] bearing in mind at all times that "the admissibility inquiry [must be] focused on the dangers of admitting the hearsay evidence,"[42] namely, that it can distort the truth.

There are three components in the proper application of the principled exception – the necessity requirement, the reliability inquiry, and judicial discretion. It is my view that the best way to take into account the particular context of the case when applying the principled exception is to permit the relevant characteristics of the case to influence the necessity determination, but to conduct the reliability assessment initially in disregard of the context. Where a basic threshold of reliability is met so that a responsible assessment of the evidence can be reasonably be made, the context should be examined as part of the discretionary assessment of the balance of probative value and prejudice to determine whether, given the dangers that remain in accepting hearsay in place of original evidence, it is appropriate to do so given the seriousness of the case, the centrality of the issue the evidence informs, the consequences that the evidence could have for the parties, and the policy interest being pursued by the law in the case at hand.

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39 See *Couture*, *supra* note 24 at para. 76; and *H.(L.)*, *supra* note 35 at para. 34.

40 See *Khan*, *supra* note 1 at 547 (even though the issue was whether the exception would facilitate a sexual assault allegation, McLachlin J. cautioned that "in determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused"); and *Catholic Children's Aid Society of Metropolitan Toronto v. P.* (1984), 42 R.F.L. (2d) 47 at 51, 27 A.C.W.S. (2d) 441 (Ont. Prov. Ct. (Fam. Div.)).

41 In my opinion this captures the tendency to apply the rule more generously to protect the innocent in criminal cases, and to determine child welfare interests in the civil context.

42 *Khelawon*, *supra* note 11.

4. Applying the Governing Principles

The starting point in any case, civil or criminal, is that hearsay evidence is presumptively inadmissible. The language of presumptive inadmissibility sends the important message that the reception of hearsay is to be the exception, and it imposes a clear burden on the party who is offering the hearsay evidence to satisfy the legal requirements of the hearsay exception that is being relied upon, on a balance of probabilities.[43]

Although there has been some controversy about it,[44] it is now settled that the place for the party calling the hearsay to begin is with the traditional or fixed exceptions.[45] It is only if the evidence does not fall within a fixed exception, or there is a real contest about it, that the principled exception should be engaged.

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[43] *Couture*, *supra* note 24 at 610.

[44] See *R. v. West* (2001), 45 C.R. (5th) 307, [2001] O.J. No. 3413 (Ont. Sup.Ct.); *R. v. Kimberley* (2001), 56 O.R. (3d) 18, 157 C.C.C.(3d) 129 (C.A.) (where the courts looked at the principled exception first); and *R. v. Wilcox*, 2001 NSCA 45, 192 N.S.R. (2d) 159, 152 C.C.C. (3d) 157 (expressing the view that those traditional exceptions that suggest themselves should be examined first).

[45] See *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358 at 366-67 [*Mapara*]; the following is the process of reasoning that was adopted, whose general framework for analysis is set out at para. 15:

> (a) hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions remain presumptively in place.
>
> (b) a hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) in "rare cases" evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case; and
>
> (d) if hearsay does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

There are three good reasons for dealing with the fixed exceptions initially. First, each of the traditional or fixed exceptions has set preconditions to admissibility and it is generally more certain, expeditious and simple to demonstrate compliance with those preconditions on the balance of probabilities than it is to enter upon a highly discretionary, unpredictable and complex *Khan*-style *voir dire*. Second, as indicated, if evidence does fall within a fixed exception, it is *prima facie* admissible. Practice has shown that principled challenges to the integrity of traditional exceptions are rare and unlikely to succeed. See David M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'" in Law Society of Upper Canada, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004) 17 at 24. In the majority of cases, evidence falling within a

As indicated, the principled exception has three components. The two most developed are the necessity and reliability requirements. The third component is the judicial discretion to admit or exclude evidence where it has satisfied the first two requirements. I will address each in turn.

5. Necessity: What "Necessity" Requires

There are four key requisites to understanding the "necessity" requirement. The first and most important is to appreciate that it is, in substance, a "best evidence" rule. The second is to understand that the "necessity" relates to whether hearsay is needed to get the hearsay declarant's own observations before the court; the issue is not whether the *witness* is available, nor is it whether there is other evidence that can accomplish the same thing that the hearsay evidence is offered to achieve. The third is that the "best evidence" may not always be the oral testimony of the witness; in other words, the hearsay can, in some cases, be necessary simply because of its quality. Fourth, necessity and reliability can work in a symbiotic way. I will address each of these in turn.

A) The "Best Evidence" Foundation for the Necessity Requirement

The necessity requirement exists out of recognition that hearsay will typically be more problematic than in-court testimony because it will be more difficult to assess. In an important sense, the necessity requirement reflects pragmatic resignation. In *R. v. Khelawon*, Charron J. remarked:

> The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form.[46]

This provides a worthy explanation of why we accept hearsay evidence when it satisfies the principled exception. When it comes to applying the necessity requirement, however, it is best to look at the other side of the coin and focus on why we exclude hearsay evidence. The reason, of course, is that the admission of hearsay is generally a compromise because it is typically an inferior kind of proof. In *Children's*

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traditional exception will be admitted without the need to go on to the principled exception. Third, as will be seen, even where their preconditions are not strictly met, evaluation of the traditional exceptions can inform the decision under the principled approach.

[46] *Khelawon*, *supra* note 11 at 815-16.

Aid Society of Algoma v. H.(L.), Kukurin J. put it this way:

> The court should have the best opportunity to assess the content of evidence before it. Therefore, if one form is offered instead of another, the court should be able to ask the party tendering such information to justify the party's doing so in that form, particularly if a superior form may be available.[47]

Understood in this way, the "necessity" requirement is in substance no more than a best evidence requirement. As Charron J. explained in *Couture*, "The criterion of necessity is intended to ensure that the evidence presented to the court be in the best available form, usually by calling the maker of the statement..."[48]

Any references in the case law to "necessity" have to be read in light of the standard admonition that "necessity" means "reasonably necessary."[49] As intimated by Kukurin J. in the foregoing passage, the term "reasonably necessary" imposes a best efforts requirement. In *R. v. F.(W.J.)*, McLachlin J. remarked that "it is a matter of whether, on the facts before the trial judge, direct evidence is not forthcoming with reasonable effort."[50] As a result, a party cannot create their own "necessity" by failing to take reasonable steps to preserve evidence that was available. In *Khelawon*, Charron J. was troubled by the absence of any demonstration that the Crown had attempted to secure the evidence of an old and frail witness who died shortly before trial. The necessity component was accepted in that case because "necessity" had been conceded by opposing counsel, but she cautioned that "in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that preserves the rights of the other party."[51]

Taken together, the "best evidence" and "reasonable efforts" components of the necessity requirement mean that if the party calling the hearsay evidence can reasonably offer a better brand of proof in place of the hearsay that is presented, it should do so, failing which the necessity requirement will not be met.[52]

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47 *H.(L.)*, *supra* note 35 at para. 32; and see *Marszalek Estate v. Bishop*, 2007 BCSC 324, 156 A.C.W.S. (3d) 235, [2007] B.C.J. No. 472 (QL) at para. 18 [*Marszalek*].

48 *Couture*, *supra* note 24 at 610.

49 *Khan*, *supra* note 1 at 546.

50 *R. v. F.(W.J.)*, [1999] 3 S.C.R. 569 at 588, 178 D.L.R. (4th) 53 [*F.(W.J.)*].

51 *Khelawon*, *supra* note 11 at 841-42.

52 This includes the hearsay itself. If a party must resort to hearsay, it should

Of course, the most obvious forms of necessity arise from the unavailability of the witness. The paradigm case is the physically unavailable witness, whether that physical unavailability is caused by the death of the declarant,[53] by illness,[54] or through the absence of a witness who cannot reasonably be found.[55]

While it is the most obvious case of necessity, it is now trite that physical unavailability is not always required. Legal unavailability will do. In *Khan*, the witness was unavailable because she was incompetent to testify.[56] Indeed, a witness will be considered unavailable either if the court cannot compel the witness[57] or if a court exercises its discretion not to force the witness to testify because of the trauma (as opposed to the mere discomfort)[58] that would be caused to the witness by doing so. Accordingly, in *Children's Aid Society of the County of Simcoe v. S.(C.L.)*,[59] evidence that the children alleged to be in need of protection would be traumatized if forced to testify met the necessity requirement and, in *Rees v. Canada (Royal Canadian Mounted Police)*, the psychiatric illness of the plaintiff emboldened the judge to admit his evidence in affidavit form.[60]

Although it is customary to speak of reasonable *necessity*, the requirement can also be met in cases of impracticability falling short of full "necessity." In *R. v. Smith*, Lamer C.J.C. quoted with apparent approval the contention of American evidence scholar John Henry Wigmore that the principle can be satisfied by "expedience or

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present the best form of hearsay it can. See *H.(L.)*, *supra* note 35.

53 The necessity arose from the death of the declarant in *Bolton v. Vancouver (City)*, 2002 BCSC 1061, 115 A.C.W.S. (3d) 635; [2002] B.C.J. No. 1623 (QL) [*Bolton* cited to B.C.J.]; and *Dodge*, *supra* note 29. See also *Clark*, *supra* note 5.

54 See e.g. *R. v. Hawkins*, [1996] 3 S.C.R. 1043, 2 C.R. (5th) 245 at 272 [*Hawkins*].

55 See *Walkerton (Town) v. Erdman Estate* (1894), 23 S.C.R. 352. An analogy can be gained from fixed exceptions. Section 715(1)(d) of the *Criminal Code of Canada* permits transcripts of preliminary inquiries to be used where a witness is absent from Canada and it is arguable that the common law former testimony exception can be satisfied by any form of physical unavailability.

56 *Khan*, *supra* note 1.

57 *R. v. O'Connor* (2002), 62 O.R. (3d) 263 at 281, 170 C.C.C. (3d) 365 (C.A.) (provided other methods of securing the evidence have been tried, such as, for example, the use of teleconferencing or commission evidence for a witness who is out of the country). See also *R. v. M.(N.)*, [2002] O.J. No. 2221 (Ont. Ct. J. (Prov. Div. Youth Ct.)) (QL).

58 *R. v. Rockey*, [1996] 3 S.C.R. 829 at 846, 140 D.L.R. (4th) 503 [*Rockey*] ("Mere discomfort is insufficient to establish necessity.")

59 *Simcoe*, *supra* note 30.

60 *Rees*, *supra* note 34.

convenience."[61] This invitation to act on "expedience or convenience" has to be understood, however, in light of the mission of the necessity requirement, which is to oblige the party calling the proof to make reasonable efforts to secure the best evidence before resorting to hearsay. In effect, if it would not be unreasonable in the circumstances to expect a party to secure original evidence, even though it would be more expedient or convenient not to have to, the necessity requirement will not be met. If, on the other hand, it would impose an unfair or unrealistic burden or if it would be pointless to expect a party to secure a hypothetically available witness, the requirement will be satisfied.

"Expedience and convenience" are, in my opinion, criteria according to which the civil context of the case can and should impact on the ultimate decision. If requiring the "best evidence" would be prohibitively expensive or burdensome given the role the evidence would play in the case, it may not be reasonable to expect the party to produce it. Reasonableness should be measured contextually, including by considering the public interest in preserving the relevance, accessibility, and fairness of the civil litigation process. For this reason the decision in both *Professional Institute of the Public Service of Canada v. Canada (A.G.)*[62] and *Éthier v. Canada (R.C.M.P. Commissioner)*[63] to take a functional approach to necessity commends itself. Each case involved parties who were suing the government offering as evidence hearsay documents that had been produced by the government. While it may have been hypothetically possible for these parties to identify and call the individual authors, given the range of the documents and the lengthy period over which they were created it would have been impractical and unproductive to do so. If the documents required explanation, the government was in a position to provide it. As Panet J. said in the *Professional Institute* case, "There is therefore the advantage of efficiency and expediency with respect to the proposed evidence."[64] For this reason, statements such as that made by the trial judge in *Dhillon v. Dhillon* that "cost … is not to enter into the equation" have to be read with caution;[65] impracticability to the point where certain factors, including considerations of cost, would make it unreasonable to expect a

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61 [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257 at 271 [*Smith*].

62 (2005), 145 A.C.W.S. (3d) 396, [2005] O.J. No. 5775 (Ont. Sup. Ct.) (QL) [*Professional Institute* cited to O.J.].

63 [1993] 2 F.C. 659, 39 A.C.W.S. (3d) 313 (F.C.A.).

64 *Professional Institute*, *supra* note 62 at paras. 72-76.

65 2006 BCCA 524, 153 A.C.W.S. (3d) 97, [2006] B.C.J. No. 3008 (QL); the British Columbia Court of Appeal upheld the decision of the trial judge to reject admission of a copy of an affidavit, and was doubtlessly right to do so on reliability grounds. The case cannot be read as an endorsement of the correctness of the trial judge's "necessity" decision, as the judge equated necessity with the unavailability of the witness.

party to call original evidence can satisfy the reasonable necessity requirement.[66]

While physical, legal or practical unavailability of witnesses may meet the necessity requirement, it is important to appreciate that necessity does not require the unavailability of the witness *per se*. Indeed, the proper focus of the necessity inquiry is on the availability of the *testimony* of the witness. In *Chatham-Kent Integrated Children's Services v. L.(C.)*, for example, necessity was met where an available immature witness could only provide "yes or no" answers and was unable to give full and complete evidence, even after being furnished with testimonial aids, and despite being prompted to adopt recorded statements.[67] Moreover, it was held in *R. v. Rockey* that a child's recantation during cross-examination may make it necessary to receive an out-of-court allegation.[68] It was also a recantation by young persons that provided the impetus for, and gave rise to, the rule adopted in *R. v. B.(K.G.)* that applies to the hearsay admission of prior inconsistent statements.[69] These authorities illustrate a key point about the necessity-based "best evidence" concept powerfully; in the language of the Supreme Court of Canada "the issue … is the availability of the *testimony*, not the availability of the *complainant* [or witness.]"[70] At bottom, the question is whether it is necessary to call the

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See the discussion immediately below.

66 See *Morris*, *supra* note 15, where the costs of bringing an appraiser to a small claims court trial was a factor that the judge used to find necessity: "Affordability and efficiency support its admissibility."

67 2004 ONCJ 375, 136 A.C.W.S. (3d) 486, [2004] O. J. No. 5482 (QL) [*L.(C.)* cited to O.J.].

68 *Rockey*, *supra* note 58, where the Supreme Court of Canada stated that an "inability" to testify fully and frankly is required, and that "fear or disinclination without more, do not constitute necessity." Frankly, I find it difficult to reconcile this strict limit with the acceptance that recantation gives rise to necessity. After all, false recantations – the target of such cases – occur not because of an inability on the part of the witness to testify but because of the disinclination of the witness to be forthcoming. Moreover, I find the insistence on the "inability" of the witness to be inconsistent with the principle that reasonable necessity is met where the party calling the evidence does what they can to produce the best proof; it is not apt to be the fault of the party calling the witness that the witness is uncooperative and is refusing to furnish a full and frank version of events. Be that as it may, as a general proposition the law currently rejects a disinclination to testify, even from fear, as a foundation for necessity; what is needed in non-recantation cases is an inability to testify fully and frankly. See the critical discussion in Paciocco, *supra* note 45 at 24.

69 [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257 (the youthful witnesses recanted their police accounts during testimony, making it necessary to admit their out-of-court versions).

70 *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178, 150 C.C.C. (3d) 449 at 474

hearsay proof in order to get the relevant witness's version of events before the court.

B) Necessity Relates to the Witness's Version of Events

In *Khan v. College of Physicians and Surgeons (Ontario)*, the complainant, now older than she was when Dr. Khan was prosecuted, was mature enough to testify. When she took the stand, however, she was unable to provide some of the key details found in the statement that she had furnished to her mother when the initial sexual assault disclosure was made. The Ontario Court of Appeal held that, in those circumstances, it was necessary to admit the hearsay "in order to obtain a frank rendition *of the child's version of … events*."[71]

For this reason I question the decisions of those courts that have held that the necessity requirement has not been met because the party has evidence from other witnesses to prove the same essential point that the hearsay purports to prove.[72] The problem with this approach is not just that it is inconsistent with the "necessity" objective of getting a witness's version of events. It is also that relying on other proof to show that the hearsay is not needed begs the question of whether that other proof will be credited. What happens if it is not and the hearsay evidence had already been excluded? The hearsay would not have been superfluous, yet it is lost.

This risk that necessary hearsay may be lost by premature determinations that it is superfluous reveals that to reason in this way is to approach the issue improperly. It is well-understood that, even in a judge-alone trial, a judge should not make credibility determinations until the end of the case, in light of all of the evidence. If at the admissibility stage while the trial is going on a judge finds the offered hearsay to be unnecessary because of other evidence proving the same point, the judge is effectively prejudging that other evidence contrary to proper adjudicative principle; if the judge were not prejudging the credibility of that other proof, it would be premature to say that the offered hearsay is superfluous.

[*Parrott*] [emphasis in original].

71 *Khan v. C.P.S. Ont.*, *supra* note 3 at 207 [emphasis added].

72 See e.g. *Canada (Minister of Citizenship and Immigration) v. Oberlander* (1998), [1999] 1 F.C. 88 at 111, [1998] A.C.F. no 1380 (T.D.); *Bolton*, *supra* note 53 at para. 13; *Clark*, *supra* note 5 at 258-59; and see the *obiter dictum* in *Jung*, *supra* note 3 at para. 33 ("No other evidence 'of the same quality' was available. Barbour's evidence as to what Richard told him stood alone."). For a preferable approach see *Marszalek*, *supra* note 47, where necessity was found in spite of submissions that other evidence addressed the same issue.

There is yet another problem with the practice of excluding hearsay because there is other evidence "proving" the same thing. As will be described below, judges are entitled to rely on corroborative evidence to find hearsay reliable.[73] It is to reason incorrectly to rely on the fact that other evidence corroborates the offered hearsay as a basis for excluding it. In *Smith*, Lamer C.J.C. made the point this way:

> The criterion of necessity … does not have the sense of "necessary to the prosecution's case." If this were the case, uncorroborated hearsay evidence which satisfied the criterion of reliability would be admissible if uncorroborated, but might no longer be "necessary" to the prosecution's case if corroborated by other independent evidence.[74]

C) Necessity Arising from Quality

Although many of the established hearsay exceptions have a "necessity" component that rests on the unavailability of in-court testimony, not all of them do. Indeed, the major exceptions tend not to. The admissions by opposing party litigant exception, the statutory business records exceptions, and the *res gestae* statements exceptions, including the one for spontaneous exclamations, do not have a discrete necessity requirement. The reason they do not is simple. Given their contemporaneity requirements and circumstances surrounding the proof, the hearsay statements that are admitted under these exceptions are often if not typically so functionally superior to what might be repeated during in-court testimony that reliability satisfies the necessity requirement; the hearsay evidence is generally necessary if the best version of events is to be received.

In *White v. Stonestreet*,[75] for example, the plaintiff was offering a hearsay statement that the Court took to be a "declaration of his contemporaneous bodily condition." Statements made by individuals about their physical sensations while they are experiencing those sensations and before litigation is contemplated can be admissible under one of the *res gestae* exceptions; it is assumed that such claims can be more reliable than in-court descriptions because they are made while the sensation is being experienced. This contemporaneity both removes the risk of memory problems and provides a context in which those hearing the declaration can observe whether the declarant is acting consistently with the physical condition he is claiming. In *White*, Ehrcke J. held that

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73 *Khelawon*, *supra* note 11.

74 *Smith*, *supra* note 61.

75 2005 BCSC 1751, 51 B.C.L.R. (4th) 386 (B.C.S.C.) [*White*].

the statement before him satisfied the exception.[76] The defendant attempted to use the "*Starr* review" to challenge the exception on the basis that it did not satisfy the necessity principle given that the plaintiff was available to testify. Ehrcke J. disagreed. He said:

> The salient point here is that in cases such as this … the requirement of necessity is satisfied … by the fact that his or her present memory is unlikely to be as precise as the contemporaneous declarations.[77]

Quoting John Henry Wigmore, he explained that the necessity requirement "is satisfied by the relative value of the [hearsay] evidence."[78]

This reasoning has to be right; where the reliability of the hearsay statement derives from the context in which it was expressed, it may well be more valuable than in-court testimony. It is arguable that the hearsay statement in *Khan*[79] was of this ilk. It was such a powerfully reliable account because of the context in which it occurred that it would doubtlessly surpass in importance any after-the-fact narration the child could have provided while testifying. Only a rule-bound system would refuse to listen to evidence that achieves that degree of reliability because the witness can intone the same thing in what is apt to be a far less compelling way during the trial process.[80]

Any doubt that the relative value of the evidence can satisfy the necessity requirement is removed, in my view, by the comment made in *Khelawon* by Charron J. when she said that admissibility could become "necessary" where a hearsay statement is so highly reliable that the fact-

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[76] The correctness of this particular holding is controversial since White did not make the statement while he was experiencing the symptoms, but rather when he was narrating his sensations to his health care providers a few days later. While the authorities do call for a little latitude on the contemporaneity requirement, the time lag in this case destroyed the ability of the hearsay witnesses to judge the truthfulness of the claim based on the apparent condition of the declarant while he was making the declaration. Moreover, to rely on historical narrations defeats the very *res gestae* nature of the exception by sacrificing the contemporeneity and spontaneity components.

[77] *White*, *supra* note 75 at para. 24.

[78] *Ibid*.

[79] *Khan*, *supra* note 1.

[80] This is a point that must take on increased importance, even in criminal cases, now that the standards of competence to testify have been lowered almost to the point of oblivion. See *Canada Evidence Act*, R.S.C., 1985 c.C-5 as amended by *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, S.C. 2005, c.C-32, s. 27 (adds s. 16.1 to the *Canada Evidence Act*).

finding process would be distorted without it.[81] In effect, where the hearsay statement is so reliable that using only the in-court testimony of the witness would diminish the prospect of arriving at the truth, then the necessity requirement is met. In such cases, necessity and reliability merge.

6. The Relationship between Necessity and Reliability

The conclusion that necessity and reliability can work together in this way is not so shocking when it is appreciated that it is widely accepted that the two prerequisites can enjoy a symbiotic relationship. While both the necessity and reliability requirements are necessary conditions, the more necessary the hearsay is, the more elastic the reliability inquiry can become and vice versa.[82] I will address the impact that reliability can have on necessity first.

As illustrated, an imposing degree of reliability can furnish necessity. A strong but less imposing level of reliability can equally reduce the rigidity of necessity standards, even where necessity remains an independent concern. In *Professional Institute*, for example, the decision to find that impracticability amounted to necessity was supported by the fact that "even if the author [of the report] was available, the attendance in court would be needless and a waste of the court's time where that person's attendance would be simply to give evidence on a matter that could reasonably be confirmed by hearsay evidence."[83]

In my opinion, *McLellan v. Dickinson*[84] is an example of the opposite form of symbiosis occurring, namely, heightened necessity encouraging a more benevolent approach to reliability. The hospital had destroyed its records relating to its treatment of the plaintiff, and the nurses either had or claimed to have no recollection of the events. In effect, the defendants and their agents were responsible for the necessity of the plaintiff relying on less conventional forms of hearsay proof, and the court ultimately accepted hearsay statements that met a very receptive standard of reliability.

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81 *Khelawon*, *supra* note 11 at 813-14.

82 See Paciocco and Stuesser, *supra* note 26, at 129-130, citing Irving Younger, "An Irreverent Introduction to Hearsay," in *The Section of Litigation Monograph Series* (American Bar Association Press, 1977) no. 3 at 20-21; Sopinka, Lederman and Bryant, *supra* note 29 at 195.

83 *Professional Institute*, *supra* note 62 at para. 73.

84 2002 BCSC 1639, 9 B.C.L.R. (4th) 193, 118 A.C.W.S. (3d) 231 [*McLellan* cited to B.C.L.R.].

In my opinion, particular care has to be exercised in fulfilling the need to reduce reliability. This is because reliability – or the desire to avoid reliance on inaccurate information – is the essence of the hearsay rule. Similar to taking uncalibrated risks respecting liability, no degree of necessity can justify receiving misleading information. If evidence bears such limited indicia of reliability that it cannot reasonably be assessed, or where the risk of unreliability is not materially reduced, then necessity, no matter how intense, should not drive admissibility.[85]

7. The Process of Establishing Necessity

Procedurally, there is an onus on the party seeking to tender evidence to demonstrate necessity. In keeping with the standard applied to the principled exception's preliminary requirements, this must be done on the balance of probabilities. Typically this will be achieved by the presentation of evidence during a *voir dire* by the party wishing to call the hearsay proof,[86] but "there is no absolute rule that evidence must be called" so long as the judge has a foundation arising from the facts or circumstances of the case for a ruling that necessity has been established.[87] The child witness in *F. (W.J.)* presented herself as unable to respond to questions, permitting the judge who was observing her performance to conclude that her evidence was effectively unavailable.[88] In this same way, no evidence (beyond simply familiarizing the judge with the prior statements) need be called *about* necessity in a case where a witness "forgets" key facts of an earlier version of events. The judge, having witnessed directly how impoverished the testimony is relative to the earlier statement, can make a finding of necessity. This is effectively what happened in *Khan v. C.P.S. Ont.*[89] Still, in such cases "some inquiry should be routinely undertaken on the issue of necessity,"[90] even if it is confined to submissions relating to whether what has transpired in court amounts to necessity. Moreover, the Supreme Court of Canada has held that where the basis for the necessity claim is that the witness will be unable to testify because of incompetence, unless there has been proof

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85 With respect, it may be that the reasoning in the decisions in *Dodge*, *supra* note 29 and *J.D.L. Realty and Development Ltd. v. Galfour Development Corp.*, 2004 ABQB 656, 368 A.R. 366, 23 R.P.R. (4th) 278 (A.B.Q.B.) [*J.D.L. Realty* cited to R.P.R.] went too far in permitting necessity to reduce the intensity of the reliability requirement.

86 See *H.(L.)*, *supra* note 35, where Judge Kukurin refused an application where there was no proof before him of the trauma that testifying would cause to the child said to be in need of protection.

87 *F.(W.J.)*, *supra* note 50.

88 *Ibid*.

89 *Supra* note 3.

90 *Children's Aid Society of Metropolitan Toronto v. M.(R.)*, [1992] O.J. No 1097, 1992 CarswellOnt 3830 (Ont. Ct. J. (Prov. Div.)) (QL).

that testifying would be traumatic, the witness must be called during the *voir dire*; it is therefore an error to rely exclusively on the opinions of others about the witness's ability to testify.[91]

8. Reliability

A) The Purpose of the Reliability Requirement

The "reliability requirement" is intended to enable the judge to act as a "gatekeeper,"[92] eliminating dangerous proof even in cases where the best evidence may be unavailable. While it is important for judges applying the principled exception to determine only "threshold reliability," leaving it to the deliberation stage to make the ultimate determination of its worth,[93] the rule is nonetheless "about ensuring the integrity of the trial process"[94] by eliminating evidence that could distort an accurate verdict. It is for this simple reason that I would recommend that judges satisfy themselves that the evidence is "reliable enough" to admit responsibly before permitting the particular context of the case to influence the admissibility decision. If the hearsay evidence proves to be so bereft of reliability that its admission may jeopardize the integrity of the trial process, it should not be admitted regardless of the context.

Even though a good deal of the hearsay evidence gains admission under the principled exception because it is inherently trustworthy, it is unfortunate that we have taken to referring to this second precondition to admissibility as the "reliability" inquiry. While the search for indicia of reliability and unreliability does play a large role, this inquiry is not exclusively about finding a basis for concluding that the evidence is "reliable." In fact, it is often engaged in ensuring that hearsay will be admitted where there is a rational basis for its ultimate acceptance. At times its central concern has more to do with "assessability" than reliability *per se*. Any doubt about this is evaporated by the decision in *R. v. Hawkins*.[95] That is the case in which the Supreme Court of Canada found that the recanted, inherently contradictory testimony of a witness who had plenty of motives to mislead the police nonetheless had the necessary "indicia of reliability" for admission. What the Court was really reacting to was that the hearsay statement the Crown was seeking to use was almost of the same character as live in-court testimony because it was taken under oath, transcribed faithfully, and fully cross-

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91 *Parrott*, *supra* note 70.

92 *Khelawon*, *supra* note 11 at 793.

93 *Ibid*. at 794, 816.

94 *Ibid*. at 815.

95 *Supra* note 54.

examined upon by the very party it was being tendered against. In effect, the evidence was not demonstrated to be reliable so much as it was shown to be assessable. In admitting it, the Court remained faithful to the underlying purpose of the hearsay rule. As the Supreme Court of Canada put it in *Khelawon*:

> Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule.[96]

Although the evidence in *Hawkins* provided a treasure-trove of indicia by which hearsay evidence could be tested, it would be fanciful to suggest that it was demonstrated to be reliable.

With the "criterion for evaluation" rationale having percolated to the top in recent cases as a central basis for the hearsay rule, there have been two important developments in the authority that should impact on the way the reliability inquiry is undertaken in civil cases, namely (1) a clarification of the "ultimate/threshold" reliability requirements, and (2) the establishment of a rational analytical framework for examining reliability inquiries.

B) The Ultimate/Threshold Reliability Requirements

The most significant recent development in the principled exception was the abandonment of the rule that purported to confine the reliability assessment to "threshold reliability" factors and to delay consideration of "ultimate reliability" factors until the deliberation stage. In effect, "threshold reliability" factors were considered to be the circumstances surrounding the making of the statement, while "ultimate reliability" factors were "external" considerations, such as the general character or reputation for truthfulness of the declarant, other statements by the declarant whether consistent with the hearsay declaration or not, and confirmation or contradiction by other independent evidence. The role that a motive to mislead arising out of historical events would play was always controversial – some considered motive to be a threshold reliability factor while others considered it to be an ultimate reliability factor.

This now discredited practice was borne of two primary concerns. It was in part an attempt to prevent judges from effectively resolving issues of reliability at the admission stage, thereby usurping the role of the trier

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96 *Khelawon*, *supra* note 11 at 820-21.

of fact. It was also an effort to prevent "bootstrapping" – the use of corroborating evidence to lend credibility to evidence which on its own is not reliable. The dichotomy proved difficult if not impossible in practice. There was tremendous confusion over what features were "threshold reliability" factors appropriate for consideration when applying the principled exception, and what features were "ultimate reliability" factors to be examined solely at the decision stage. Indeed, there were doubts about whether the dichotomy was even sound theoretically. It seemed inconsistent with the overall mission of the principled exception of pursuing the truth to disregard available information about the reliability of the evidence that was being tendered. Moreover, the "bootstrapping" theory was suspect. To make matters worse, the Supreme Court of Canada had not been consistent. In *Hawkins*[97] and *Starr*,[98] the Court was effectively telling lower courts not to do what it had done in *Khan*[99] when it relied on the "ultimate reliability" factors vis-à-vis the semen/saliva stain to bolster the reliability and hence admissibility of the child's account, and in *R. v. U.(F.J.)*[100] when it admitted the hearsay evidence of the sexual assault complainant because it had been corroborated by her father's confession.[101]

Fortunately, the Supreme Court of Canada rectified things in *Khelawon*. Charron J., speaking for the Court, rejected the "bootstrapping" theory and cited the difficulties that the practice created, concluding:

> [S]ome of the comments … in Starr should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach … and focus on the particular dangers raised by the hearsay evidence sought to be introduced … [always] mindful of the limited role [the trial judge] plays in determining admissibility – it is crucial

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97 *Hawkins*, *supra* note 54.

98 *Starr*, *supra* note 2.

99 *Khan*, *supra* note 1.

100 [1995] 3 S.C.R. 764, 42 C.R. (4th) 133 [*U.(F.J.)* cited to C.R.].

101 Many academic commentators provided trenchant criticism of the practice in various writings. See e.g. Lee Stuesser, "*R. v. Starr* and the Reform of the Hearsay Exception" (2001) 7 Can. Crim. L. Rev. 55; Don Stuart, "*Starr* and *Parrott*: Favouring Exclusion of Hearsay to Protect Rights of Accused" (2001) 39 C.R. (5th) 284; Bruce P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (1999) 25 Queen's L.J. 1; Laurie Lacelle, "The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes" (2000) 19 C.R. (5th) 389; and David M. Tanovich, "*Starr* Gazing: Looking into the Future of Hearsay in Canada" (2003) 28 Queens L.J. 371. I discussed the issue in Paciocco, *supra* note 45 at 32-38.

> to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility voir dire.[102]

As a result, when conducting the reliability inquiry, both criminal and civil courts are permitted to take into account such diverse factors as the reputation of the hearsay declarant for reliability, other statements made by the declarant, the presence or absence of motives to mislead and, most importantly, the presence of corroborating or confirming evidence.[103]

8. A Rational Analytical Framework

Relying on the underlying purpose of the hearsay rule, recent Supreme Court of Canada case law has clarified that there are two, non-mutually exclusive, kinds of reliability inquiry. As summarized by Charron J. in *R. v. Couture*:

> Since the central underlying concern about hearsay is the inability to test the truth and accuracy of the statement, the reliability requirement is aimed at identifying those cases where this concern is sufficiently overcome to justify receiving the evidence regardless of this difficulty. As explained in Khelawon, the criterion of reliability is usually met either because of the way in which the statement came about, its contents are trustworthy, or where circumstances permit the ultimate trier of fact to sufficiently assess its worth.[104]

A) The Contents are Trustworthy

The most familiar way to satisfy the reliability requirement is "to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about."[105] In effect, the statement is shown to be trustworthy enough for the trier of fact to act upon it. By demonstrating that the contents of the statement are worthy of trust, the inability to fully assess the statement by exploring all of the things normally inquired into during cross-examination becomes academic; if the statement is shown to be worthy of trust there is no need to insist on its exposure to the panoply of evaluative circumstances. Not

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102 *Khelawon*, *supra* note 11 at 837.

103 See *Jung*, *supra* note 3; this change in the law required the British Columbia Court of Appeal to reconsider its decision where it had initially ruled that the trial judge had erred, in part by considering corroborative evidence in supporting the admission of hearsay evidence. After *Khelawon* the Court revisited its decision, but held that even considering the change in the law, the hearsay statement at issue still should not have been admitted.

104 *Couture*, *supra* note 24 at 610.

105 *Khelawon*, *supra* note 11 at 821.

only is *Khan*[106] the case that introduced the principled exception, it also remains the classic example of a case where the context, content, and manner of delivery of the statement, coupled with corroborative evidence, stamped hearsay as reliable.[107]

In *Couture*,[108] the majority of the Court signalled a high standard for the admission of hearsay where the basis for doing so is that its contents are shown to be trustworthy. The Court in *Khelawon*, explaining why indicia of reliability can support admission, quoted Wigmore's contention that, "if a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy…, in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured."[109] The reference to "sceptical caution" may prove to be more than a didactic device; it may be the standard that is to be met. In *Couture*, the majority overturned the trial judge's decision to admit Couture's pre-marital murder confession to his future wife, in part because there was "nothing in [the] circumstances that [would cause] even a sceptical caution [to] look upon it as trustworthy."[110] Moreover, in a passage that arguably gives inadequate focus to the fact that the judge's assessment is a threshold one, the majority announced that "what must be shown is certain cogency about the statements that *removes* any real concern about their truth and accuracy."[111] While the context in *Couture* did invite extreme caution, involving statements that, if accepted, would be determinative of two murder convictions, the broader message is clear. When hearsay is admitted on the basis that it is trustworthy, it is because circumstances lead the trier of fact to find that it is probably so. It is wrong to seize upon a smattering of scattered factors that point in that direction unless this standard is met.

In *Re B.(J.)*, the Newfoundland Court of Appeal described how "the sorts of factors which are to be examined in determining reliability for the purposes of reception of hearsay evidence are circumstantial, corroborative and contextual factors...."[112] In identifying the circumstantial, corroborative and contextual factors that serve as "indicia" that a statement could be accepted by a reasonable trier of fact as trustworthy, it is often helpful to look at the kinds of things that feature

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106 *Khan*, *supra* note 1.

107 See the compelling summary of why the statement was so trustworthy in *Khelawon*, *supra* note 11 at 823-24.

108 *Couture*, *supra* note 24.

109 *Khelawon*, *supra* note 11 at 821.

110 *Couture*, *supra* note 24 at 616 [emphasis omitted].

111 *Ibid*. [emphasis added].

112 *Re B.(J.)*, *supra* note 17 at 483.

in the fixed or established exceptions.[113] Indeed, in many of the civil cases where hearsay has been admitted on this principled basis, there was either controversy over whether a traditional exception was in fact met,[114] or the evidence came close to meeting an established exception.[115]

Although there is no closed list of features that indicate trustworthiness, more familiar factors relied upon include identifying whether the statement was made:[116]

- spontaneously;[117]
- naturally;[118]
- without suggestion;[119]
- reasonably contemporaneously with the event;[120]
- by a person who had no motive to fabricate;[121]
- and who was capable of making the observation;[122]
- was against the person's interest in whole or in part;[123] or
- was by a young person who would be unlikely to have the knowledge of the acts alleged.[124]

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113 See *Wilcox*, *supra* note 44; *S.(A.)*, *supra* note 35 (a civil case).

114 See *White*, *supra* note 75, where the "declarations of contemporaneous bodily condition" exception was either satisfied or was close to being satisfied.

115 See *RDA Film Distribution Inc. v. British Columbia Trade Development Corp.*, 2000 BCCA 674, 83 B.C.L.R. (3d) 302, [2000] B.C.J. No. 2550 (QL), where statements almost qualified as business records were accepted using the principled exception.

116 Paciocco and Stuesser, *supra* note 26 at 125-126 (this list is taken in part from Professor Stuesser's work in *Law of Evidence*).

117 See e.g. *Khan v. C.P.S. Ont.*, *supra* note 3; *S.(C.L.)*, *supra* note 59; and *L.(C)*, *supra* note 67 at para. 30.

118 See e.g. *L.(C)*, *ibid.* at para. 29.

119 See e.g. *Khan v. C.P.S. Ont.* cinted to D.L.R., *supra* note 3; *S.(C.L.)*, *supra* note 59; and *L.(C)*, *ibid.* at para. 31.

120 See e.g. *Khan v. C.P.S. Ont.*, *ibid.*; and *Bolton*, *supra* note 53.

121 *Ibid.*

122 See *Bolton*, *ibid.* (the mental competence of an injured declarant was a factor favouring admission).

123 *J.D.L. Realty*, *supra* note 85 (the Alberta Court of Queen's Bench admitted statements made by the owner of the defendant corporation ostensibly agreeing to pay additional commissions. Although the court did not cite the fact that these statements were against his interest in admitting the evidence, this appears to be the sole appropriate basis for doing so. The court's reasoning focused almost exclusively on "necessity" and the false comfort the judge took in his confidence that he was only letting the statements in for threshold purposes to be later assessed).

124 See e.g. *Khan v. C.P.S. Ont.* cited to D.L.R., *supra* note 3.

Other safeguards often invoked include:

- that the person was under a duty;[125]
- that the statement was made to public officials;[126] and
- that the person knew the statement was being publicized.[127]

With the recent rationalization of the law in *Khelawon*, corroborative evidence can now also be a crucial feature, such as the semen/saliva stain on the child's sleeve in *Khan v. C.P.S. Ont.*,[128] or independent witnesses providing testimony about abuse consistent with the claims of the children in *Simcoe*.[129] In *Clark*, the decision to admit the hearsay statements attributed to the deceased agent of the defence was bolstered by the mutual corroboration provided by different witnesses claiming that the agent had said the things being attributed to him.[130]

At the same time, it is important to counter-balance indicia of reliability with any indications of unreliability. The practice began in *Smith* where Lamer C.J.C. excluded the contents of a telephone call because the caller had a known motive for potentially misleading her mother about the fact asserted.[131] In *Khelawon*, the key hearsay statement was excluded because of concerns about the declarant's mental competence, whether in his frail and elderly state the declarant was unduly influenced by a disgruntled employee, and whether he was motivated to make false accusations given his known dissatisfaction with the care facility where he lived.[132] In *N.(J.C.) v. H.(R.J.)*, hearsay allegations of sexual assault were excluded because they were made not

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125 See e.g. *McLellan*, *supra* note 84 (the fact that the statements were attributed to nurses who were under a duty to report may have provided a foundation for the largely unexplained decision to admit them); *Clark*, *supra* note 5 (the statements admitted were arguably business records); and *Morris v. Cameron*, 2006 NSSC 9, 240 N.S.R. (2d) 123 at 133, 144 A.C.W.S. (3d) 977 (although since the statements involved matters of opinion, the existence of a duty was not, in my opinion, a strong indicium of reliability).

126 See *Bolton*, *supra* note 53, where the young accident victim understood the seriousness of the police interview. Care must be taken, in my opinion, with this factor. It can become a ready basis for admitting statements made to the police, even though both true and false statements are made to officers during investigations.

127 See *Professional Institute*, *supra* note 62; this indicium derives from the public records exception to the hearsay rule.

128 *Supra* note 3.

129 *Supra* note 59.

130 *Supra* note 5.

131 *Supra* note 61 at 273.

132 *Supra* note 11 at 795-96.

to an adult but to a child, and because they were brought forward after a long delay in the context of a divorce and custody battle.[133]

Courts should be cautious about converting the absence of indicia of unreliability into a conclusion that the hearsay statements are reliable. While a number of commonly-used factors operate by dismissing reliability risks, to rely solely on the absence of demonstrated cause for concern is to reverse the onus of proof. It is not enough to demonstrate that there is no reason to consider hearsay statements to be unreliable; the obligation is on the party presenting the evidence to show that the statements are reliable enough to be considered trustworthy even with "sceptical caution." In *Couture*, the majority of the Supreme Court of Canada held that the trial judge had fallen into this error:

> The circumstances identified by the trial judge, while relevant, in essence simply point to an absence of factors that, if present, would detract from an otherwise trustworthy statement… [yet] there is nothing about the statements themselves that compels one to trust their truth and accuracy....[134]

In keeping with the high bar it had set, the majority, over the dissent of four judges, treated "no coercion," "no preponderance of leading questions" and "no motive to lie" as being simply the negation of reasons for disbelief rather than adequate evidence of reliability.

Finally, it bears emphasis that the hearsay exception is concerned with indicia that the hearsay statement is reliable and not with indicia that the hearsay statement was in fact made. While courts will, of course, be interested in whether a hearsay statement they are being asked to rely on was actually made, this is not an issue for the principled exception. The making of the hearsay statement is typically proved not by hearsay but rather by original evidence; the witness claiming to have heard the relevant hearsay statement will be testifying to having witnessed the hearsay words being spoken, and will be in court where he or she can be fully cross-examined about what he or she claims to have heard.[135] Simply put, the principled approach is not concerned with demonstrating the reliability of in-court testimony.

What the principled approach is concerned about, of course, is the trustworthiness of what the hearsay statement claims. As a result, indicia that the witness reporting to have heard the hearsay is a reliable witness

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133 2007 BCSC 820, 159 A.C.W.S. (3d) 530, [2007] B.C.J. No. 1249 (QL) (B.C.S.C.).

134 *Supra* note 24 at 612, 616-17.

135 Similarly, where the hearsay is contained in a document, a live witness will

are not indicia of reliability under the exception because they do not signify that the thing asserted in the hearsay statement is true. To take a concrete example, if a reliable witness reports hearing a declarant claim that "the car was white," this may give the court confidence that the reliable witness really heard what he or she claims, but it does nothing to help confirm that the car really was white, which is the preoccupation of the principled approach. In spite of this, it is not uncommon for courts considering the principled exception to adjudge factors such as the independence or professional stature of a witness who reports that the hearsay statement was made as an indication of reliability supporting admissibility.[136] This is not only a conceptual error, but it is also dangerous because it can create the false impression that there is more rational support for the truth of the hearsay claim than there actually is; in effect, the credibility of the report that the hearsay statement was made is co-opted as a basis for believing what the hearsay statement claims. In *Jung v. Lee Estate*,[137] the British Columbia Court of Appeal overturned a trial judge because this kind of mistake occurred; fully six of eight "indicia" relied upon by the trial judge to admit the hearsay statement actually went to show that the hearsay statement was made, yet said nothing about whether the contents of the hearsay statement were true. Lawyers and judges should remember that the "indicia of reliability" must relate to the trustworthiness of what is claimed by the hearsay, and not the trustworthiness of the claim that the hearsay statement was made.

B) The "Circumstances Permit Assessment" Branch

The second method of satisfying the reliability requirement is far more generous. It is met where there are suitable substitutes for in-court processes to enable a fair assessment of the evidence by the trier of fact. "[T]he presence of adequate substitutes for the process [of in-court testimony] establishes a threshold of reliability and makes it safe to admit the evidence."[138] Factors courts ordinarily seize upon to evaluate whether there are adequate substitutes include:[139]

- whether the person was under oath or otherwise cautioned to tell the truth when making the statement;

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typically be testifying from personal knowledge and can be fully cross-examined about the document's authenticity.

136 See e.g. *Bolton*, *supra* note 53 (where the independence of the reporter was relied upon); *S.(C.L.)*, *supra* note 59 (where the expertise and neutrality of the reporting therapist was stressed); *L.(C)*, *supra* note 67 at para. 15; and *Peepeetch v. Saskatchewan Government Insurance*, 2006 SKQB 423, 286 Sask. R. 41, 153 A.C.W.S. (3d) 1225.

137 *Supra* note 3.

138 *Khelawon*, *supra* note 11 at 830.

139 Paciocco and Stuesser, *supra* note 26 at 127 (again, this list is adapted from

- whether the statement was audio-taped, or videotaped, or transcribed;
- whether the person making the statement was cross-examined at the time; or
- whether the person is now available to be cross-examined in court in respect of making the out-of-court statement.

The classic example is *Hawkins*, where the hearsay being offered was the preliminary inquiry testimony of the complainant. Since it had been taken under oath, transcribed, and was subject to contemporaneous cross-examination by the very party the evidence was being tendered against, threshold reliability was established.[140] The only ordinary trial advantage that was missing was the ability to observe the witness's demeanour since, naturally, the prior testimony had not been videotaped. There was therefore an adequate record upon which the trier of fact could assess the evidence.

B.(K.G.) furnishes another illustration.[141] The Supreme Court of Canada described how, if the police administered oaths and cautioned witnesses to tell the truth before videotaping their "voluntary"[142] statements, those statements could be admitted and relied upon, even in preference to inconsistent in-court testimony should the trier of fact ultimately so decide. Since the witness would be available for cross-examination on the making of the statement in such cases, these factors together, or reasonable substitutes for them,[143] could constitute adequate replacements for the in-court procedures meant to ensure reliability.

Appropriately, similar reasoning can be found in civil cases. In *Marszalek Estate v. Bishop*, in the absence of a rule as generous as Ontario's, the British Columbia Supreme Court admitted the examination of discovery evidence of an unavailable witness because the transcript and circumstances permitted a fair evaluation of the testimony furnished.[144]

Importantly, where there is an adequate process-based foundation for assessment, the need to maintain the division between admissibility and ultimate use of the evidence requires that the trial judge avoid further

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Professor Stuesser's work).

140 *Supra* note 54.

141 *Supra* note 69.

142 *Ibid*.; if there is evidence of pressure or threats, statements should not be admitted.

143 *Ibid*. (the Court contemplated audiotapes and witnesses testifying to the demeanour of the declarant).

144 *Supra* note 47.

inquiry into the likely truth of the statement at the admissibility stage.[145] If there is an adequate foundation for assessing the evidence, it should be left to the deliberation stage to do so. Where a process-based foundation standing alone cannot sustain the reliability inquiry, however, since the two streams of analysis are not mutually exclusive, they can be combined. An example is provided by *Malik Estate v. State Petroleum Corp.*[146] The evidence at issue was transcripts from an examination for discovery provided by a since-deceased witness. The Court admitted the evidence because the discovery testimony was largely corroborated and the examination had been conducted in the nature of a cross-examination by a lawyer who was aware at the time that the witness was critically ill, an appreciation that motivated him to produce a record that addressed the witness's credibility. Together, process-based indicia providing a foundation for evaluation coupled with the presence of reliability indicia sustained the decision to admit the evidence.

Before leaving this topic it is worth giving more searching consideration to two of the common indicia of reliability, namely the existence of transcripts and the opportunity to cross-examine the hearsay declarant at trial.

When it comes to reliance on transcripts it is again worth reminding oneself that the relevant hearsay inquiry under the principled exception is not about what was said. It is about whether what was said is reliable. Transcripts are useful indicia for assessing the reliability of what was said because they enable the trier of fact to examine the precise responses given or claims made by the declarant. This can furnish data about the candour, completeness and co-operation of the declarant, all of which are relevant to the declarant's reliability. While it is of course true that the transcript may also assist in proving what the hearsay statement comprised, the accuracy of the report about what was said is not, *per se*, a guage of whether the facts claimed in the transcript are true, which is the concern of the principled exception.

The other indicium of reliability commonly used in the "circumstances permit assessment" context that warrants further comment is the heavy reliance the law places on the fact that the hearsay declarant will be a witness in the case, and will therefore be available for cross-examination. This factor is given great importance, since where the hearsay declarant is appearing as a witness in the proceedings, the only deficiencies the hearsay suffers from relative to ordinary testimony are the inability to engage in "contemporaneous cross-examination" at the

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145 *Khelawon*, *supra* note 11 at 836; and *Couture*, *supra* note 24 at 612-13.

146 *Supra* note 34.

time the statement was originally made, and the inability to observe the witness's demeanour at the time the hearsay statement was offered. In *Couture*, the majority of the Court emphasized the importance of this factor by noting that "in the usual case, the availability of the declarant for cross-examination [at trial] goes a long way to satisfying the requirement of adequate substitutes."[147] This is not to say that the opportunity to cross-examine at trial is enough on its own to justify the principled admission for hearsay purposes of the prior out-of-court statements made by a witness. After all, if it was sufficient there would have been no need for the Supreme Court of Canada to craft as many *prima facie* admissibility requirements in *B.(K.G.)*[148] as it did. Depending on the circumstances, the opportunity to cross-examine at trial may nonetheless operate as the most important factor in determining whether the reliability inquiry can be satisfied based on "adequate criteria for assessment" reasoning.

On the other hand, Lamer C.J.C. recognized the reality that there will be times when such cross-examination can be relatively useless in actually disclosing criteria for assessment.[149] If the witness denies having made the hearsay statement, or claims not to recall the subject-matter of the statement, cross-examination can produce little helpful data. In *Jung*, the British Columbia Court of Appeal observed that where a witness testifies to having no recollection of an earlier statement, "there is simply no basis on which to evaluate the truth of the prior statement, or to weigh its relative reliability against the witness's in-court testimony."[150] The ability to cross-examine was therefore inadequate to warrant the substantive admission of the prior inconsistent statement.

There is some controversy about whether the quality of the cross-examination is, in fact, a factor that can properly be considered at the admissibility stage. The Supreme Court of Canada held in *R. v. Biscette* that "this alone" is not a reason to bar admission, and can be taken into account at the deliberation stage.[151] Having said this, it is my opinion that where the ability to cross-examine the witness during trial on a prior inconsistent statement is one of the only real substitutes for the ordinary safeguards of in-court testimony, and where that cross-examination is apt to prove fruitless, excluding the evidence on that basis is not "this alone"

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147 *Supra* note 24 at 614.

148 *Supra* note 69 at 36, 38.

149 *U.(F.J.)*, *supra* note 100 at 155. See also Ronald J. Delisle, Annotation (1996) 42 C.R. (4th) 135; and The Hon. M. Rosenberg, "*B.(K.G.)* – Necessity and Reliability: The New Pigeon-Holes" (1993) 19 C.R. (4th) 68 at 77.

150 *Supra* note 3 at 591.

151 [1996] 3 S.C.R. 599, (1995), 110 C.C.C. (3d) 285 at 287.

reasoning. The dearth of other real substitutes, combined with the opportunity to conduct a largely pointless cross-examination, ought to support an exclusionary decision as was done in *Jung*. At the very least, it may support a decision to exercise the exclusionary discretion in appropriate cases.

C) The Third Element of the Principled Exception: *The Exclusionary Discretion*

In *Khelawon*, Charron J. affirmed for the Court that "the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value."[152] This is a third, adjunct component of the principled exception whose function is to capture considerations not adequately addressed in the necessity and reliability requirements. As Charron J. commented in *Khelawon*, this discretion works along with the principled exception to ensure that a trial remains fair, "because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect."[153]

There are examples in the criminal context wherein factors falling outside the necessity and reliability inquiries have impacted on the principled exception's admissibility considerations. In *Finta*,[154] the Ontario Court of Appeal indicated that it would have relied upon this discretion to exclude the fifty-year-old Hungarian testimony of a since-deceased witness had the Crown sought to rely upon it, since the Crown had delayed the prosecution of the charges for so long that original evidence might have naturally disappeared, making it unfair for the accused to have to deal with inferior inculpatory proof. In *R v. Ahgabali*,[155] it would have been unfair to permit the Crown to rely on the testimony of a witness who was out of the jurisdiction because the Crown had failed to make proper disclosure before the defence had cross-examined the witness at earlier proceedings, making the cross-examination less effective than it might have been. Similarly, in *R. v. Toribio*,[156] the Crown knew that there was a real risk that the witness would be unable to testify at trial, but failed to disclose this to the defence in advance of the preliminary inquiry. This made it unfair for the Crown

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152 *Khelawon*, *supra* note 11 at 794.

153 *Ibid*. at 815-16.

154 *Supra* note 22 at 92.

155 Unreported (27 January 1993) (Ont. Prov. Div.).

156 *R. v. Toribio*, 2002 MBQB 327, 171 Man. R. (2d) 86.

to try to rely on the hearsay evidence as the cross-examination would have been different had the defence been privy to this information. In *Hawkins*,[157] the dissenting judges would have relied upon the discretion to exclude the hearsay statements of the wife of the accused because doing so would compromise the spousal non-compellability rule.[158]

Although this exclusionary discretion is bolstered by a constitutional dimension in criminal cases where the fair trial rights of the accused are engaged, there is no reason to think it does not apply in civil cases. It is clear that civil judges have an exclusionary discretion to reject technically admissible evidence.[159] This discretion supports a judge's authority to protect witnesses by disallowing unfair questions, to protect parties from unfair surprise, to direct counsel to move away from unproductive lines of inquiry even where technically relevant, to avoid side-issues from taking on undue prominence, and to prevent inflammatory or prejudicial evidence from being presented.[160] Fittingly, the relevance and application of the discretion in the context of the principled exception in civil cases was recognized in *Malik Estate*.[161]

It is this exclusionary discretion that should be used, in my opinion, to reconcile reliability and context. By approaching the matter in this way, it can be ensured that, regardless of how hearsay evidence is put to

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157 *Supra* note 54.

158 See *Hawkins*, *ibid*.; and *Couture*, *supra* note 24. In *Hawkins*, the hearsay was admitted because, in the view of the majority, admission did not compromise the policy concerns supporting spousal privilege. The issue arose again in a slightly different context in *Couture*. A bare minority of the Court wanted the impact of admission to be assessed on a case-specific basis using the exclusionary discretion, and would have let Mrs. Couture's statements in. A bare majority of the Court held at 604-05, however, that an independent rule should be used to preserve the underlying policy, holding that hearsay evidence may be admitted under the principled approach if it meets the twin criteria of necessity and reliability *and* if its admission would not undermine the spousal incompetency rules or its rationales. The decision of the majority is not a rejection of the exclusionary discretion; it merely reflects a disagreement about how the principled exception should operate when conflicting with a rule of evidence, e.g., spousal non-compellability, which pursues general policies. The majority did not want to leave this to case-by-case assessment.

159 See e.g. *Draper v. Jacklyn*, [1970] S.C.R. 92; and *Hutton v. Way* (1997), 105 O.A.C. 361, 75 A.C.W.S. (3d) 857, [1997] O.J. No. 4755 (QL) (C.A.).

160 For this reason, the suggestion in *McLellan*, *supra* note 84, that there is no need for an exclusionary discretion in civil trials conducted by judge alone is regrettable. Prejudice is not confined to the kind of prejudgment that comes with misunderstanding the relevance of evidence; it extends to any adverse or negative implications that evidence can have for witnesses, the reasoning of the court, or the proper administration of justice. See Paciocco and Stuesser, *supra* note 26 at 40-41 where this is discussed.

161 *Supra* note 34.

use, it satisfies the minimum level of reliability required. It would be inconsistent with the overall objective of the hearsay rule of protecting the integrity of the trial process to jeopardize it by permitting context to lower standards of admissibility. By evaluating reliability without regard to context, a minimum level of reliability can be assured as an absolute precondition to admissibility.

The exclusionary discretion, then, can be used to determine whether it is fitting to admit hearsay evidence possessing the degree of reliability or assessability of the proof in question, given the risk of inaccuracy it continues to carry. In essence, the question is whether the evidence, although satisfying the minimum level of reliability required for admission, is reliable enough given the seriousness of the case, the centrality of the issue the evidence informs, the consequences that the evidence could have for the parties, and the policy interest being pursued by the law in the case at hand. For example, in *Rees*,[162] the Newfoundland and Labrador Supreme Court observed that less may be expected of hearsay where it will not alone be determinative of the relevant issue. That is surely right and it is a factor than can be taken into account in evaluating the potential prejudicial effect that proof can have.

9. Conclusion

Even though it was adopted to remove technicalities that obstructed access to useful evidence, the principled approach is itself technical and there is room to err. If used properly, however, it provides an excellent vehicle for ensuring that the law of evidence achieves the primary underlying purpose of the hearsay rule of protecting the fact-finding process from error. Because the principled approach invites case-specific determinations, such protection can be accomplished with some precision without wasting useful information through rigid exclusionary practices.

While the principled approach was born of criminal cases, it applies in the civil context where the law of evidence operates. Its rules, the principled exception and the *Starr* review, are apposite primarily because the need to pursue the truth remains central to the proper administration of civil justice. Still, the principled approach can and should be calibrated to fit the civil context. This is not done by granting hearsay a generic dispensation from the hearsay rule. It is done by considering the impact of admission or exclusion in the specific context of the civil litigation at hand.

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[162] *Supra* note 34.

In particular, the necessity principle – the search for whether hearsay is the best way to get the declarant's version of events before the court – can be adjusted to take account of the needs of the case, including that what is at stake is a civil dispute. More specifically, contextual considerations can be used to determine what efforts to secure the original evidence can reasonably be expected of a litigant given the nature of the case and the costs of doing so, if civil litigation is to be kept relevant, accessible and fair.

As for the reliability requirement, in order to ensure a minimum level of trustworthiness or reasonable assessability it should be conducted initially without regard to the civil litigation context. Only after a minimum level of trustworthiness or assessability – that which would permit a rational and reasonable choice by a trier of fact to credit the hearsay evidence – is identified, should the contextual circumstances of the specific case be considered. In this way context-specific considerations will not be permitted to inspire the reception of unreliable proof. Context-specific considerations can therefore best be balanced when considering whether to employ the exclusionary discretion. More specifically, the probative value of the hearsay, as revealed by its indicia of reliability, should be balanced against the dangers that remain in accepting hearsay in place of original evidence given that it will be an imperfect substitute. The risk that this prejudice presents can be measured by considering the seriousness of the case, the centrality of the issue the evidence informs, the consequences that the evidence could have for the parties, and the policy interest being pursued by the law in the case at hand.

This, in my view, is the best technical guide to avoiding the technicality of the hearsay rule in civil cases.