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SENIORS ON THE STAND: ACCOMMODATING OLDER WITNESSES IN ADVERSARIAL TRIALS

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Adversarial trials are structured on the assumption that the most reliable evidence comes through the in-person cross examination of witnesses. However, for many older adults, aging introduces physical and cognitive changes that can interfere with the ability to meet this basic requirement. This paper considers whether the legal and procedural rules that have been developed to ensure that only the most reliable evidence is used as the basis of fact finding in a trial may disproportionately be excluding evidence from seniors. To explore this tension, I identify four physical and cognitive issues that increase in prevalence with old age that can interfere with a witness's ability to testify in person. I then review the promise and limitations of the current rules of evidence and procedure in meeting the potential challenges experienced by older witnesses. While current laws of evidence and procedure contain tools that can accommodate individuals who experience limitations, a case law review suggests that they are seldom used to facilitate the participation of older adults in trials. With the proportion of people aged over 65 expected to double in the next 20 years, it is critical for future research to explore this gap.

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Les procès contradictoires sont structurés autour du postulat selon lequel c'est au moyen du contre-interrogatoire des témoins effectué en personne qu'on obtient la preuve la plus fiable. Cependant, pour un grand nombre de personnes d'âge mûr, le vieillissement se traduit par des changements physiques et cognitifs qui peuvent nuire à la capacité de satisfaire à cette exigence fondamentale. Cet article examine la question de savoir si les règles juridiques et procédurales qui ont été conçues pour garantir que seule la preuve la plus fiable est utilisée pour justifier les conclusions de fait lors d'un procès peuvent exclure les témoignages des personnes âgées de manière disproportionnée. Pour explorer cette question, l'auteure identifie quatre problèmes physiques et cognitifs dont la prévalence augmente avec l'âge et qui peuvent nuire à la capacité de témoigner en personne. Elle examine ensuite les possibilités et limitations des règles de preuve et des règles procédurales actuelles quant à la possibilité de surmonter les difficultés qui pourraient être vécues par des témoins plus âgés. Alors que les règles de preuve et les règles procédurales en vigueur contiennent des outils qui permettraient d'accommoder les personnes ayant des difficultés, un examen de la jurisprudence semble indiquer qu'elles sont rarement utilisées pour faciliter la participation aux procès des adultes d'âge mûr . La proportion de la population dépassant 65 ans devant, selon toutes prévisions , doubler au cours des vingt prochaines années, il est essentiel que des recherches futures soient effectuées pour explorer cette lacune.

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1. Introduction

Within the next 20 years, the number of senior citizens who are aged over 65 in Canada is expected to double.[1] As the population ages, there will be more seniors involved with the justice system.[2] At the same time, studies in the social and cognitive sciences find a number of conditions that are prevalent with old age that can interfere with a person's ability to attend court and present accurate testimony.[3] In an adversarial system that puts a premium on having witnesses testify in person in a courtroom,[4] this paper considers whether the rules of evidence and procedure are prepared to meet this demographic shift.

To explore whether the current rules of evidence and procedure are capable of meeting the needs of older witnesses, this paper proceeds in four parts. In Part I, I identify some of the ways aging can jeopardize the ability to give in-person testimony: (1) the increased chance of dying (attrition);

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1 People aged over 65 will be referred to as "seniors", "senior citizens", or "elders" in the balance of this paper. Statistics Canada, "Population Projections for Canada, Provinces and Territories", (Ottawa: Statistics Canada, 27 November 2015), online: <www.150.statcan.gc.ca/n1/pub/91-520-x/2010001/aftertoc-aprestdm1-eng.htm>.

2 Howard Eglit, *Elders on Trial: Age and Ageism in the American Legal System* (Gainesville: University Press, 2004) at 62; Department of Justice, *An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Section of the Ottawa Police Service*, by Lisa Ha & Ruth Code (Ottawa: Department of Justice, 2013) at 1, online: Government of Canada <www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr13_1/> (projecting an increase in seniors accessing the justice system) [Ha & Code]. On the other hand, there are studies suggesting that as far as the criminal justice system is concerned, there may be a decrease in participation of seniors because seniors are much less likely to commit crimes or be the victims of crimes: Statistics Canada, Canadian Centre for Justice Statistics, *Seniors as Victims of Crime 2004–2005*, by Lucie Ogrodnik, (Ottawa: Statistics Canada, 2007) at 6, online: Statistics Canada <www.statcan.gc.ca/pub/85f0033m/85f0033m2007014-eng.htm> (seniors were three times less likely than younger adults to experience a victimization of crime). However, this rate may be higher for aboriginal Canadians aged over 55: Stephanie Hayman, "Older People in Canada: Their Victimization and Fear of Crime" (2011) 30:3 Can J Aging 423 at 431.

3 Michael P Toglia et al, eds, *The Elderly Eyewitness in Court* (New York: Psychology Press, 2014) contains chapters written by leading cognitive and social scientists that detail the myriad ways aging interferes with the ability to attend court and provide accurate testimony [Toglia et al].

4 *R v Khelawon*, 2006 SCC 57 at para 35, [2006] 2 SCR 787 [*Khelawon*].

(2) changes to the sensory organs and the brain; (3) mobility issues; and (4) strokes and dementia.[5] In Part II, I cast these physiological conditions within the context of adversarial trials by setting out two key legal barriers met by individuals who experience age-related limitations: the rule against hearsay and the assessment of witnesses in court through the testimonial factors. In Part III, I review legal and procedural solutions to these issues, including: the ability to expedite trial dates, preserve pre-trial testimony for use in a later trial, minimize in-court appearances, use of third-party evidence to assist with in-court assessments, and the principled approach to hearsay. A subsequent review of cases where these provisions have been used yields a striking absence of cases involving seniors. While the focus on this paper is on identifying potential issues and exploring the current accommodations, identifying the reasons why the legal tools that are available are infrequently used to accommodate older adults will be critical to ensuring that the laws of evidence respond appropriately to the projected increase of seniors using the courts in the future.

2. Part I: Risks Associated with Aging

Aging does not happen uniformly. The physical and cognitive issues mentioned in this part do not happen to all people once they turn 65, nor does any condition progress in the same way and to the same extent in all aging adults. There is a great deal of variation between adults and factors such as genetics, social integration, diet, exercise, and education all affect the rate of aging in the brain and the senses.[6] For some adults, old age impacts the ability to participate in a trial, for others, it does not. It is imperative that individual witnesses are assessed based on their unique abilities.[7] That said, there are a number of conditions that occur more frequently in adults that are aged over 65 that can introduce risks to a witness's ability to give accurate evidence at a trial. In this part, I discuss four of these physiological conditions in order to identify how aging could impact older witnesses differently than younger witnesses.

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5 Though there a number of other chronic conditions that are also prevalent with advanced age, the discussion in this paper is limited to those physical conditions that were the most frequently mentioned to cause a witness to be unable to testify in person in a case law review of 420 civil disputes where the age of the party was mentioned. Helene Love. *Age and Ageism in the Assessment of Witnesses* (SJD Dissertation, University of Toronto, 2011) [forthcoming in 2019].

6 Alaitz Aizpurua, Malen Migueles & Elvira Garcia-Bajos, "Accuracy of Eyewitness Memory for Events in Young and Older Adults" in Toglia et al, *supra* note 3 at 210.

7 *Ibid*.

A) Attrition

Perhaps the most obvious difference between older and younger people is the most important one: seniors are more likely to die before a matter makes its way to trial.[8] In Canada, the mortality rate is quite flat until age 65, at which point it increases markedly with age. For example, for males between the ages of 25 and 35, the mortality rate moves from 0.8/1,000 to 1/1,000. However, by age 65 the mortality rate is 15.7/1,000 and jumps to 41.6/1,000 by age 75. At age 80, the frequency of dying increases to 70/1,000.[9] Depending on the complexity of a case, it can take months or even years to have a trial date set. In light of the heightened risk that testimony from senior witnesses will be unavailable with advancing age, these wait times are especially problematic for witnesses as they get older.[10]

B) Changes to the Sensory Organs and the Brain With Age

A second aspect of aging that can interfere with the ability to participate in a trial is the biological changes to the sensory organs and the brain, which can result in a decrease in perceptual acuity and gaps in memory.[11] With natural aging, there is cell loss and a stiffening of the muscles around the lens of the eye that causes the visual field to shrink and visual acuity to decrease, especially in poor lighting conditions or environments with little

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8 Statistics Canada, *Mortality: An Overview 2008–2009*, by Nora Bohnert, Catalogue No 91-209X (Ottawa: Statistics Canada, 2013), online (pdf): Statistics Canada <www.statcan.gc.ca/pub/91-209-x/2013001/article/11785-eng.pdf> [Bohnert]; William E Adams & Rebecca C Morgan, "Representing the Client Who Is Older in the Law Office and in the Courtroom" (1994) 2 Eld LJ 1 at 25; Nesa Wasarhaley & Johnathan Goldring, "Perceptions of Institutional Elder Abuse in Civil Cases" (2013) 25:4 J Eld Abuse Negl 305 at 308.

9 Bohnert, *supra* note 8. Females have a similar pattern, where the mortality rate increases from 26.3/1,000 people for age 75 goes up to 47.4/1,000 people by age 80 (at 5).

10 Cases that illustrate this issue include *R v Burrows*, [2005] OJ No 2173, [2005] OTC 395 (Sup Ct J) [*Burrows*], where three of the witnesses had died and two were no longer competent in the two and a half years prior to trial; *Khelawon*, *supra* note 4, where four of the complainants had died and one complainant was no longer competent by the time of the trial two and a half years after the alleged assaults; *Schmor Estate v Weber*, 2010 ONSC 586, [2010] OJ No 837, where the plaintiff died after starting the action in 2006 when the trial did not occur until 2009. In recognition of this risk of attrition, the state of California provides for expedited trial dates where a party is aged over 70, see *Cal Civ Proc Code* §36.

11 Frank Scheiber, "Vision and Aging" in James Birren & K Warner Schaie, eds, *Handbook of Psychology and Aging*, 6th ed (New York: Academic Press, 2006) at 129.

contrast.[12] One in nine Canadians have irreversible vision loss by age 65; a number that increases to 1 in 4 by age 75.[13]

Hearing also becomes less precise with advancing age. Results from the Canadian Health Measures Survey suggest that adults aged 60 to 79 years were significantly more likely to have hearing loss (47%) compared to younger adults aged 40 to 59 years (16%) and 19 to 39 years (7%).[14] Auditory issues in seniors include trouble detecting low pitched sounds; or discriminating between changes in pitch, volume, and the location of a noise.[15]

Once information is perceived by the sensory organs, it is sent to the brain and encoded into memory. Neural aging decreases the efficiency of this information transfer, which can cause forgetfulness and gaps in memory.[16] These memory deficits are known as "age-associated memory impairments" and occur in almost 40 percent of people who are over the age of 65.[17] Studies on these cognitive changes on the ability to be a witness suggest that aging is related to more rapid forgetting,[18] and that

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[12] Bruce Schneider & Kathleen Pichora-Fuller, "Implications of Perceptual Deterioration for Cognitive Aging Research" in Fergus Craik & Timothy Salthouse, eds, *Handbook of Aging and Cognition*, 2nd ed (Mahwah: Lawrence Erlbaum Associates Publishers, 2000) at 155.

[13] National Coalition for Vision Health, "Vision Loss in Canada 2011", online: <cos-sco.ca/>.

[14] Statistics Canada, *Hearing Loss of Canadians*, Catalogue No 82-625-X (Ottawa: Statistics Canada, 2014), online: *Statistics Canada* <www.statcan.gc.ca/pub/82-625-x/2015001/article/14156-eng.htm>.

[15] Deborah Davis & Elizabeth Loftus, "Age and Functioning in the Legal System: Victims, Witnesses, and Jurors" in Ian Noy & Waldemar Karowski, eds, *Handbook of Human Factors in Litigation* (Boca Raton: CRC Press, 2006) at 11–12 [Davis & Loftus].

[16] See Anna M Hedman et al, "Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies" (2012) 33:8 Human Brain Mapping 1987 (studies link the decrease in efficiency to a shrinkage in the brain at a rate of over 0.5% per year in adults aged over 60; Davis & Loftus, *supra* note 15 at 11–12 (decrease in efficiency is also linked to deterioration in the frontal lobe—the area of the brain responsible for memory, emotional control, and judgment).

[17] Alzheimer Society of Canada, "Normal Aging vs Dementia", online: Alzheimer Society of Canada <www.alzheimer.ca/en/About-dementia/What-is-dementia/Normal-aging-vs-dementia>.

[18] Davis & Loftus, *supra* note 15 at 11–14; Tammy Marche et al, "Interviewing the Elderly Eyewitness" in Michael Toglia et al, eds, *The Elderly Eyewitness in Court* (New York: The Psychology Press, 2014) at 276 [Marche et al]; Amina Memon et al, "The Aging Eyewitness: Effects of Age on Face, Delay, and Source-Memory Ability" (2003) 58:6 J Gerontol Psychol Sci 338.

seniors generally provide less detailed accounts of an event.[19] As well, with aging, there is a greater susceptibility to incorporate false information into memories, a phenomenon known as the "misinformation effect".[20]

Together, these changes in sensory acuity and memory may introduce challenges to older witnesses. Decreases in the function of sensory organs can have a negative effect on the accuracy of testimony, both in terms of taking in information from the outside world at the time of a witnessed event and ability to recall and recount an event later on in a trial. There is also the question of whether the physical environment of the courtroom requires older witnesses to provide their testimony in less than ideal conditions. For witnesses who experience limitations in their vision or hearing, courtrooms with lower light conditions or muffled acoustics could make it more difficult to accurately hear questions or make identifications.

C) Mobility Issues

A third issue that is more commonly experienced by seniors is functional limitations to the ability to get around independently. While only around 10% of men and women aged between 55–64 living in the community report having a physical limitation, by age 75, 29% of men and 38% of women that are living in the community report at least one physical limitation.[21] Two common causes for this decrease in mobility are falls[22]

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19 Daniel Yarmey & Judy Kent, "Eyewitness Identification by Elderly and Young Adults" (1980) 4:4 L Hum Behav 359.

20 Elizabeth Loftus, "When A Lie Becomes Memory's Truth: Memory Distortion After Exposure to Misinformation" (1992) 1:4 Curr Dir Psyc Sci 121 [Loftus]; Lindsey Wylie et al, "Misinformation Effect in Older versus Younger Adults: A Meta-Analysis and Review" in Michael Toglia et al, eds, *The Elderly Eyewitness in Court* (New York: The Psychology Press, 2014).

21 Though most seniors eventually heal from their falls, many experience long term residual effects such as chronic pain, reduced functional abilities, and a curtailment of activity: Health Canada, Division of Aging and Seniors, *A Best Practices Guide for the Prevention of Falls Among Seniors Living in the Community* by Victoria Scott, Catalogue No H39-591/2001E (Ottawa: Health Canada, 2001) at 1; Michael Nevitt, Steven Cummings & Estie Hudes, "Risk Factors for Injurious Falls: A Prospective Study" (1999) 46:5 J of Geron M164.

22 Between 20% (at age 65) to 30% (at age 80) of seniors experience falls that require hospitalization every year, making falling the leading cause of injury-related hospitalizations among Canadian seniors: Kathryn Wilkins & Evelyn Park, "Chronic Conditions, Physical Limitations, and Dependency Among Seniors Living in the Community" (1996) 8:3 Health Reports 7 at 10 online (pdf): <www.statcan.gc.ca/pub/82-003-x/1996003/article/3014-eng.pdf> accessed October 11, 2016. The data reviewed in this survey was from seniors living in the community and does not take into account those seniors in institutional care where the number of individuals with physical limitations would likely be much higher (at 14).

and arthritis.[23] Arthritis is an inflammation of the joints that is experienced by approximately one in three (33.8%) senior males and one in two (50.6%) senior females in Canada.[24] There are over 100 different types of arthritis, and the experience of pain, inflammation, and mobility limitations that are associated with the condition vary from person to person. Mobility issues are important to consider when it comes to accessing the courts because they can make it more difficult to attend court in person.

D) Strokes and dementia

Other age-related issues that can interfere with the ability to participate in a trial are strokes and dementia.[25] A stroke is a sudden interruption of oxygen to the brain. Though a stroke can occur at any age, in Canada, individuals who are aged over 65 are ten times more likely to have a stroke than those who are aged between 18–44 years.[26] The effects of a stroke range in severity from relatively mild symptoms (e.g., slurred speech, short term confusion, loss of muscle tone) to more serious effects like long term mobility issues, loss of the ability to speak (known as "aphasia"), or loss of memory.

Individuals who have a stroke are more than twice as likely to develop dementia—a decline in cognitive function, judgment, language, complex motor skills, or other intellectual functions that lead to a loss of independence.[27] Within the next 15 years, the number of seniors in

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The higher overall prevalence of limitations among older women than older men partially reflects women have a longer life expectancy, and the resulting higher proportion of the very old among women aged 75 and over (at 10).

[23] Statistics Canada, *Arthritis Backgrounder*, Catalogue No 82-229-X (Ottawa: Statistics Canada, 2009), online: *Statistics Canada* <www.statcan.gc.ca/pub/82-229-x/2009001/status/art-eng.htm> accessed June 22, 2016. Though arthritis is associated with aging, from age 45 to 64 17.2% of males and 24.8% of females, representing more than 1.9 million Canadians were diagnosed with arthritis. This figure doubles after age 65.

[24] *Ibid.*

[25] Ronald Petersen et al, "Mild Cognitive Impairment: Ten Years Later" (2009) 66:12 Neurol Rev 1447. Anja Busse, Metthias Angermeyer & Steffi Reidel-Heller, "Progression of Mild Cognitive Impairment to Dementia: A Challenge to Current Thinking" (2006) 189: 5 Br J Psychiatry 399. This suggests that the development of mild cognitive impairment ("MCI") can begin at age 50 and after the age of age 70, 7.2% of men and 5.7% of women will develop MCI every year.

[26] Public Health Agency of Canada, *2009 Tracking Heart Disease and Stroke in Canada* (Ottawa: Public Health Agency of Canada, 2009) at 96, online: <www.phac-aspc.gc.ca/publicat/2009/cvd-avc/index-eng.php> accessed October 12, 2016.

[27] Ontario Heart and Stroke Foundation, "Understanding Stroke" online: <www.heartandstroke.com/>; Elissa Ash, "What is Dementia" in Charles Foster, Jonathan Herring & Israel Doron, eds, *The Law and Ethics of Dementia* (Oxford: Hart, 2014) at 3.

Canada who have dementia is expected to almost double.[28] Though most people associate dementia with memory loss, dementia can involve symptoms ranging from strictly physical manifestations of the condition (like limb stiffness or uncontrollable movements called "bradykinesia") to the serious cognitive decline associated with the most common type of dementia, Alzheimer's Disease.[29]

There is no way to uniformly characterize how having a stroke or dementia affects a person's ability to be a witness in a trial. Individuals with serious cognitive impairments would not be competent to testify in a trial.[30] For individuals with less serious cognitive impairments who are competent to testify in person, the diagnosis of dementia or a stroke complicates the assessment of in-court testimony and can negatively affect weight attributed to testimony. Finally, aphasia impairs the ability of those affected to communicate verbally. Part II explores the legal issues triggered by these limitations in greater depth.

3. Part II: Practical and Legal Issues Related to Aging Witnesses

In this Part, I provide a more detailed account of how the physiological conditions described in Part I can operate to exclude or discount testimony in a trial setting. I begin by reviewing the rationales for the adversarial system's preference for in-person testimony. I then discuss two key legal barriers: the presumptive inadmissibility of statements made from outside

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28 Between 90–98% of individuals with dementia are aged over 65, and the number of people with dementia is expected to increase from 747,000 to 1.4 Million: Alzheimer Society Canada, "Dementia Numbers in Canada" online: <www.alzheimer.ca/en/About-dementia/What-is-dementia/Dementia-numbers>. A US study found that the incidence of dementia increases with age where 2% of people aged between 65–69 have dementia, 5% of individuals in their 70s have dementia, and 25% of individuals in their 80s have dementia: Brenda Lee Plassman et al, "Prevalence of dementia in the United States: The Aging, Demographics, and Memory Study" (2007) 29 Neuroepidemiology 125 [Lee Plassman et al.].

29 Lee Plassman et al, *supra* note 28 at 128 suggests that, in the United States, Alzheimer's Dementia accounted for approximately 69.9% of all dementia, while Vascular Dementia accounted for 17.4%. Other types of dementia of an undetermined etiology, Parkinson's dementia, normal-pressure hydrocephalus, frontal lobe dementia, alcoholic dementia, traumatic brain injury, and Lewy body dementia accounted for 12.7% of cases. With increasing age, Alzheimer's Dementia accounted for a greater proportion of dementias with 79.5% of individuals aged over 90 in the group having dementia compared to 46.7% among those aged 71–79.

30 *Canada Evidence Act*, RSC, 1985, c C-5, s 16 [*CEA*]. Examples in the cases of dementia rendering a person incompetent to testify include: *Khelawon*, *supra* note 4; *R v Asling*, 2011 ONCJ 838, [2011] OJ No 6283 [*Asling*]; *Burrows*, *supra* note 10; *Mawani v Pitcairn*, 2012 BCSC 1288, [2013] BCWLD 266 [*Mawani*].

the courtroom for consideration in a trial (the rule against hearsay) and the in-court assessment of reliability. The rule against hearsay has direct implications for those witnesses who die, lose competency, or have mobility issues that prevent them from attending court in person. For witnesses who are able to attend court in person, aging may introduce physical or cognitive changes that detract from the in-court assessment of reliability. These material problems illustrate how the adversarial tradition's preference for in-person testimony can exclude seniors who experience limitations, or discount their version of events.

A) The Adversarial Method of Testing Evidence

The adversarial trial's preference that testimony be delivered in person is rooted in 16th and 17th Century trials by jury.[31] At that time, juries were comprised of members of the community who were encouraged to draw on their personal knowledge of events in adjudicating a dispute.[32] Nothing prevented the jury from relying on rumours, no matter how untrustworthy, as the basis of their findings of legal responsibility. In order to enhance the reliability of trials and control the quality of evidence upon which juries based their verdicts, judges created the requirement that witnesses give their evidence in person.[33]

Apart from the concern for the quality of evidence relied on by jurors, a justification for the requirement that witnesses attend court in person developed from a historical distrust of public officials and the need to safeguard against abuses of power.[34] Failures of the legal system that prompted the need to safeguard against state abuses of power include the 1603 trial and execution of Sir Walter Raleigh, who was convicted of treason based on an *ex parte* affidavit that was later retracted by the declarant.[35] The Salem Witch Trials of 1692 are another example of the types of abuses of power that prompted the preference for in-person cross examination as a basis for fact finding in a trial. In the Salem Witch Trials, 14 women and six men were executed on charges of witchcraft based entirely on "spectral evidence"—supernatural visions that indicated the presence of witchcraft, the reliability of which went unquestioned during

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31 Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121:3 U Penn LR 506 at 583 [Damaska].

32 Sidney Lederman, Alan Bryant & Michelle Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at 250 [Lederman et al].

33 *Ibid.*

34 Damaska, *supra* note 31 at 583.

35 Sir Walter Raleigh's trial continues to have a significant influence on hearsay jurisprudence, cited as recently as 2004 by the US Supreme Court in *Crawford v Washington*, 541 US 36, 124 S Ct 1354 (2004) [*Crawford*].

the trial.[36] Having witnesses attend court in person was developed as a means to prevent miscarriages of justice where parties, in particular the government, falsified evidence and trumped up charges against innocent citizens.[37]

A further benefit of having witnesses attend court in person is that witnesses in trials present evidence under oath. When common law trial procedures were developing, witnesses were highly religious, and the oath was seen to be a guarantee of truthfulness made under threat of divine vengeance.[38] Having witnesses face the adverse party in court and deliver their testimony under oath was thought to enhance the truthfulness of their testimony by imposing on them the solemnity of their role and making them accountable to those involved in the dispute as well as their peers.[39]

While the value of the oath is arguably diminished in contemporary society's more secular culture, requiring witnesses to provide their testimony in person is still thought to enhance the truth-seeking function of trials though courtroom cross-examination: "the greatest legal engine ever invented for the discovery of truth."[40] Cross-examination is necessary due to the partisan nature of the adversarial trial. During examination in chief, witnesses are guided through their evidence by an interested party so their testimony may omit facts that are significant to the opposing party's position. There may have been qualifications or explanations that the witness did not have the opportunity to add to his or her in-chief testimony, and which subsequently can be uncovered only by being cross-examined by the adverse party.[41] That witnesses give their testimony in person is important because the ability of a judge or jury to see a witness's demeanour as they are cross-examined is thought to be key to assessing their credibility.[42]

Though testing evidence in this way has served the common law well for hundreds of years, in recent decades, scholars and social scientists

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36 John Grimm, "A Wavering Bright Line: How *Crawford v. Washington* Denies Defendants a Consistent Confrontation Right" 48:1 Am Crim L Rev 185 at 202.

37 This historical basis underlying the preference for face-to-face confrontation is summarized in *Crawford*, *supra* note 35.

38 George Fisher, "The Jury as Lie Detector" (1997) 107:3 Yale LJ 575 at 580 [Fisher].

39 *Ibid.*

40 James H Chabourn, ed, *John Henry Wigmore*, *Evidence in Trials at Common Law*, 4th ed (London: Little Brown & Co, 1974) at § 1367.

41 Jenny McEwan, *Evidence and the Adversarial Process* (Oxford, UK: Blackwell, 1992) at 16 [McEwan].

42 *R v NS*, 2012 SCC 72 at paras 25–26, [2012] 3 SCR 726 [*NS*].

alike have questioned the efficacy of the oath, demeanour, and cross-examination at ensuring the reliability of witnesses. Some suggest that the oath has lost its "divine power" to ensure truthfulness in the more secular climate of current trials.[43] The value of seeing a witness as they provide testimony is undermined by studies that show that individuals are poor at determining the truthfulness of a witness based on demeanour.[44] Other social science studies weaken the truth-finding rationale of cross-examination by finding that it makes once accurate memories inaccurate.[45]

Despite these critiques, the traditional way of testing through courtroom cross-examination is so deeply rooted in the adversarial tradition that it continues to be thought of as the best tool for fact finding in a trial. In the civil context, a fundamental aspect of the adversarial system is that the decision rendered by a judge will be based only on the evidence and arguments presented in court.[46] In the criminal context, the ability to see and hear a witness as they provide testimony is even more important, and has been tied to the constitutional right to a fair trial and the ability to make a full answer and defence to a charge.[47] Accordingly, the common law has developed legal barriers to restrict the admission of witness statements made from outside of the courtroom. The paragraphs that follow describe these legal barriers, and how they can prevent the participation of individuals in the trial process who experience the conditions described in Part I.

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43 Fisher, *supra* note 38 at 580.

44 Paul Ekman, *Telling Lies: Truth and Deceit in the Marketplace, Politics, and Marriage*, 4th ed (New York: Norton and Company, 2009) at 72; Joseph Rand, "The Demeanor Gap: Race, Lie Detection, and the Jury" (2000) 33:1 Conn L Rev 1 at 3–4; Roderick Lindsay, Gary Wells & Fergus O'Connor, "Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension" (1989) 13:3 Law and Human Behaviour 333; Paul Ekman, Maureen O'Sullivan & Mark Frank "A Few Can Catch a Liar" (1999) 10:3 Psychological Science 263. Recent decisions from the Court of Appeal for Ontario *R v Hemsworth*, 2016 ONCA 85, 26 CR (7th) 79 [*Hemsworth*] and *R v Rhayel* 2015 ONCA 377, 22 CR (7th) 78 [*Rhayel*] have recognized demeanour is a poor indicator of reliability.

45 Tim Valentine & Katie Maras, "The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony" (2011) 25:4 App Cog Psyc 554 [Valentine & Maras]. See also Rachel Zajac & Fiona Jack, "The Effect of Age and Reminders on Witnesses' Responses to Cross-examination-style Questioning" (2014) 3:1 J App R Mem Cog 1. Both found that cross-examination led to decreased accuracy in witnesses. The latter study by Zajac and Jack tested the effects of age on cross-examination style coercion in mock witnesses in three groups: children, adolescents, and adults. The oldest witness in the "adult" group was aged 60, so while they found the negative effect of cross examination on witness accuracy was reduced with age, these results may not be applicable to older adults due to the changes of memory and cognition that increase in frequency after age 65.

46 *Re: International Commercial Arbitration Act*, 2005 ABQB 509 at para 18.

47 *NS*, *supra* note 42 at para 21.

B) Absence, Accessibility, and the Rule Against Hearsay Evidence

The archetype of the adversarial trial's preference for in-person testimony is the rule against hearsay. Hearsay is any out of court statement that is being tendered for its truth in a later trial. Some of the rationales for excluding hearsay are that it is thought to lend itself to the perpetration of fraud; it is weaker evidence compared to first hand knowledge; it deprives the trier of fact the opportunity to observe the demeanour of the declarant; and, relying upon it would weaken the fairness of the trial process.[48] In addition, hearsay evidence is not admissible because it is difficult for a trier of fact to know how much weight to attach to it; as Madam Justice Charron explained in *R v Khelawon*:

> The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.[49]

The material problem arising in the context of aging witnesses is that when witnesses die or are unable to access the courtroom due to mobility issues, in-court testimony is lost. Their only accounts—those that were made before trial—constitute hearsay that is presumptively inadmissible at common law.

C) Testing Reliability Through the Testimonial Factors

The adversarial trial's emphasis on orality has implications not only in terms of excluding hearsay, but also in terms of the heavy reliance that is placed on the in-court assessment of the reliability of witnesses.[50] The reliability of a witness depends on the judicial assessment of the "testimonial factors"—a witness's ability to observe, recall, and then recount an event in the courtroom.[51] There are a number of ways the age-related risks discussed in Part I could impact the in-court assessment of the testimonial factors.

For instance, perception would be negatively assessed if a decrease in functioning in the sensory organs prevents a witness from making an

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48 Lederman et al, *supra* note 32 at 240.

49 *Khelawon*, *supra* note 4 at para 35.

50 McEwan, *supra* note 41 at 68.

51 *R v HC*, 2009 ONCA 56 at para 41, 241 CCC (3d) 45. See also *R v Virk*, 2015 BCSC 981 at para 106, [2015] BCJ No 1197; David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 35–36 [Paciocco & Stuesser].

accurate courtroom identification. While it is well known that memory is negatively effected by the lapse of time between an event and a trial,[52] aging is associated with more rapid forgetting as well as an increased risk of a serious cognitive disruption.[53] Communication assessments could be affected by advancing age if a courtroom has poor acoustics, which make it more difficult for witnesses with hearing loss to understand direct and cross-examination, leading to confusion or uncertainty in responses.[54] Where any of these testimonial factors are deemed to be poor by a trier-of-fact, the entirety of a witness's account may be discounted—even parts that are accurate.

Studies in psychology suggest a number of best practices for interviewers trying to obtain reliable information from elder witnesses. First, the most reliable version of an event is the one that is told the soonest after the event.[55] Second, witnesses should be questioned in a manner that is consistent with their actual sensory abilities, and should not automatically be spoken to more slowly or loudly unless this is necessary, as this is linked to a decrease in seniors' memory performance.[56] Third, psychologists suggest that an effective way to improve the accuracy of elder witness accounts is to remind witnesses of an event through a process known as

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[52] McEwan, *supra* note 41 at 95 (memory lapses increase with time). Hermann Ebbinghaus first wrote about the effects of time on memory in his book *Memory: A Contribution to Experimental Psychology* (translated by HA Ruger & C E Bussenius) (New York: Dover, 1964). Known as the "forgetting curve" Ebbinghaus' theory posits that memories for new knowledge are halved within a matter of days or weeks unless there are conscious efforts to remember. Memories can be retained if there are efforts to remember, or where memories are particularly strong. The stronger the memory, the longer period of time that a person is able to recall it. The Supreme Court of Canada has echoed that time negatively affects the ability to remember in *R v Askov*, [1990] 2 SCR 1199, SCJ No 106.

[53] With advancing age, witness identifications become increasingly unreliable. See Amina Memon, Fiona Gabbert & Lorraine Hope, "The Aging Eyewitness" in Joanna R Adler, ed, *Forensic Psycholology Concepts Debates and Practice* (Cullompton: Willan, 2004). While most studies treat older adults as one group of adults over aged 60, Amima Memon and colleagues' study separated older adults into a younger group (aged 60–68, the "young-old" group) and an older group (aged 69–81, the "old-old" group) and found significant differences between these two groups of older witnesses. Seventy-five percent of the old-old group made false identifications from a target absent lineup compared to just 13 percent of the young-old witnesses. This would suggest that witnesses who are over age 69 may be particularly prone to making false identifications.

[54] Studies in psychology have linked confidence to perceptions of reliability. See especially Kenneth Diffenbacher & Elizabeth Loftus, "Do Jurors Share A Common Understanding Concerning Eyewitness Behaviour?" (1982) 6:1 L & Hum Behav 15.

[55] Marche et al, *supra* note 18 at 276.

[56] Meredith Allison & Elizabeth Brimbacombe, "A Credible Crime Report? Communication and Perceived Credibility of Elderly Eyewitnesses" in Michael Toglia et al, eds, *supra* note 3 at 288.

"context reinstatement". As its name suggests, context reinstatement calls on witnesses to imagine themselves back in the environment where the event occurred.[57] Finally, interviewers should ask open ended questions. Witnesses who are asked leading questions are prone to incorporate false information into their memories in a phenomenon known as the "misinformation effect".[58] Ideally, questioning practices during a trial would adopt these techniques in order to collect the most accurate testimony from a witness as possible.

In practice, context reinstatement regularly happens when witnesses are being prepared for court. Prior to a trial, when lawyers review earlier statements, documents, and photos with a witness before they take the stand, witnesses are reminded of the time and the environment in which an event took place. During a trial, a witness can refresh their memory from a document, electronic record, or transcript from an earlier proceeding.[59] Looking at these documents helps witnesses imagine themselves back in the time and place where the event occurred, and improve what they remember as they give their testimony.

With the exception of context reinstatement, the best practices recommended in the social science literature stand in stark contrast to what is seen to be an essential component of the adversarial system: the right to cross-examine a witness.[60] During cross-examination, counsel use leading questions in order to pull information from an opposing party.[61] Cross-examination also uses other techniques that are shown to reduce accuracy, such as asking the same question repeatedly in a different way, highlighting inconsistencies in a witness's story and exploiting memory gaps to discredit a witness.[62] Though studies in psychology suggest that these questioning strategies reduce the chance of getting the most accurate testimony from a witness, it is unlikely that the constitutional right to be

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57 Rachel Wilcock, Ray Bull & Aldert Vrij, "Are Old Witnesses Always Poorer Witnesses? Identification Accuracy, Context Reinstatement, Own-Age Bias" (2007) 13:3 Psyc Crim & L 305.

58 Loftus, *supra* note 20; *Firstline Trust Co v Mills*, 2000 BCSC 226 at para 12, [2000] BCJ No 256 [*Mills*] provides one example of how leading questions discredited a witness's testimony in practice. In that case, Ms. Mills' lawyer had tried to overcome some of her memory issues by asking leading questions in examination in chief. According to Madam Justice Baker, this strategy failed because it made it difficult to assess what Ms Mills actually remembered and what she reconstructed given her tendency to agree with her lawyer's suggestions.

59 Paciocco & Stuesser, *supra* note 51 at 455–66 describe the limits on a witness's ability to refresh their memory.

60 *R v Lyttle*, [2004] 1 SCR 193 at para 2, [2004] SCJ No 8 [*Lyttle*].

61 Paciocco & Stuesser, *supra* note 51 at 470.

62 Valentine & Maras, *supra* note 45.

able to cross-examine a witness "without significant and unwarranted constraint" will be unseated. [63]

Another way the common law legal tradition's emphasis on adversary processes conflict with recommended practices in the social sciences is in the rules relating to the presentation of evidence in a courtroom. Research on best practices for interviewing witnesses suggests that these courtroom conditions are not well suited for soliciting the most accurate testimony from witnesses of any age.[64] Ideally, witnesses would be interviewed in a comfortable setting by someone who makes them feel at ease.[65] In contrast, the courtroom is an unfamiliar and imposing place. Witnesses are alone, elevated above other individuals. While these conditions are meant to impress upon witnesses the solemnity of the occasion on the assumption that it will make them more truthful, they actually make witnesses feel uncomfortable and intimidated—which has been shown reduce accuracy.[66]

4. Part III: Accommodating Senior Witnesses

Contrasting the recommendations from the social sciences with the ways facts are established in a courtroom demonstrates how the current methods of testing evidence in a trial may actually make testimony less accurate. At the same time, as outlined in Part II, making it to the courtroom to give evidence in person can be problematic for older witnesses who experience age-related limitations. When these negative consequences of the adversarial process are brought to light in the context of conditions that become more prevalent with advancing age, the procedural accommodations that are discussed in this part can be seen as the compromise that Canadian legislatures and courts have negotiated with the common law's preference for in-person testimony.

The paragraphs that follow discuss how trials can be expedited, pre-trial testimony can be preserved, testimony can be provided from outside the courtroom, other evidence can assist with the assessment of in-court testimony, and the principled approach to hearsay can be used to meet

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63 *Lyttle*, *supra* note 60 at para 2.

64 Alison Cunningham & Pamela Hurley, *A Full and Candid Account* (London, ON: Centre for Children and Families in the Justice System, 2007), Book 7 at 12 [Cunningham & Hurley]. The authors provide a table that contrasts ideal interviewing techniques with the courtroom experience. While their analysis proceeds on the basis of child witnesses, the issues apply to witnesses of all ages, and mirror the concerns expressed by Tammy Marche and others on their research on best practices for interviewing senior witnesses in Marche *et al*, *supra* note 18 at 276.

65 Cunningham & Hurley, *supra* note 64 at 12.

66 *Ibid* at 3. See also McEwan, *supra* note 41 at 14.

the needs of witnesses who require accommodation. Though these rules may be less than perfect from a social science standpoint, they provide for a number of ways that evidence can be presented in both criminal and civil matters that respect the spirit of the procedural constraints of the adversarial tradition as well as an individual's interest in participating in the trial process.

A) Expedited Trial Scheduling

Where there is a significant risk that a witness may be unavailable to testify in person, there are a number of ways to speed up trial scheduling. For criminal trials, section 11(b) of the *Charter of Rights and Freedoms* ("*Charter*") enshrines a constitutional right to "be tried within a reasonable time" for all people accused of a crime.[67] The Supreme Court of Canada case *R v Jordan* addresses trial delays by setting presumptive ceilings 18 months in provincial court and 30 months in superior court to have a matter heard, beyond which delay is trial delay is presumed to be unreasonable, unless the Crown proves exceptional circumstances were involved.[68]

In addition to *R v Jordan*'s presumptive ceilings, Crown counsel seeking to expedite a trial could apply to proceed by direct indictment pursuant to section 577 of the *Criminal Code*.[69] In limited circumstances, a direct indictment expedites the overall trial process by eliminating the need to conduct a preliminary hearing.[70] In order to obtain permission from the Attorney General to proceed by direct indictment, Crown prosecutors must show that it is in the public interest to do so.[71] Public interest factors that could be relevant to senior witnesses include: (1) a significant danger of harm to witnesses and that it is reasonable to believe that they would be adversely affected if required to participate in multiple judicial proceedings; (2) a preliminary inquiry would cause undue delay; or (3) an expedited trial is necessary due to serious health problems of an accused or an essential witness.[72]

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67 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(b) [*Charter*].

68 2016 SCC 27, [2016] 1 SCR 631.

69 *Criminal Code*, RSC 1985, c C-46, s 577.

70 While summary conviction offences represent a large number of criminal prosecutions, they are not subject to a preliminary inquiry.

71 British Columbia Ministry of Justice, Criminal Justice Branch, DIR 1 "Direct Indictment", *Crown Counsel Policy Manual*, effective March 1, 2018, online: <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/dir-1.pdf>

72 The question of whether or not to proceed by direct indictment may very well be moot within the next couple of months, as Bill C-75, which at the time of writing just

However, dispensing with preliminary hearings may not always be a good idea for the Crown because they are a means to preserve testimony that may not be available at a later trial. Section 715(1) of the *Criminal Code* provides that testimony from a preliminary inquiry can be used at a later trial if the witness is unavailable.[73] In this way, Crown counsel could use the preliminary inquiry, together with section 715(1) of the *Criminal Code,* as a way of ensuring that a witness's testimony is available for a trial that occurs months or years in the future.

Apart from direct indictments and using testimony from a preliminary hearing, Crown counsel can guard against attrition through informal requests in pre-trial appearances to expedite a trial date on the grounds that the delays would prejudice their case. Any of these applications to abridge the trial wait times would trigger constitutional arguments that speeding up the trial process would interfere with an accused's right to the counsel of their choice and scheduling would need to be subject to that counsel's availability.[74]

In civil trials, there are no *Charter* guarantees for participants but there are a number of procedural options for parties looking to expedite trial dates. If there is a problem with the trial date set by the Registrar, a party can apply to the court for a different one.[75] Some provinces provide for expedited trials if a claim involves a pecuniary loss, real property, or a builder's lien with a value less than $100,000.[76] Counsel with elder clients involved in a civil dispute could avail themselves of these provisions to avoid trial delays.[77]

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passed its second reading in the House of Commons, proposes dispensing with a preliminary hearings except for cases involving life imprisonment: Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, cl 240 (as passed by the House of Commons 2 November 2018).

73 *Criminal Code*, *supra* note 69, s 715(1).

74 Brian Menarin, "Bedeviled by Delay: The Truth about Memory Loss, Procedural Manipulation and the Myth of Swift Justice" (2009) 27 Windsor Rev Legal Soc Issues 117 (discusses trial delay as a defence strategy).

75 AB, *Rules of Court*, AR 124/2010, R 8.4, 8.5; BC, *Supreme Court Rules*, BC Reg 221/90, R 12-1(7), (9) [*BC Supreme Court Rules*]; NS, *Civil Procedure Rules*, R 4.13 [*NS Civ Pro Rules*]; PE, *Rules of Court*, R 48.05; QC, *Code of Civil Procedure*, SQ c C-25.01, R 179 [*Quebec Code Civ Pro*]; SK, *Queen's Bench Rules*, R 9-2(2).

76 *BC Supreme Court Rules*, R 15-1 provides that these types of claims will be heard within four months of filing. Similar provisions exist in Saskatchewan (SK, *Queen's Bench Rules*, R 8-2) and Nova Scotia (*NS Civ Pro Rules*, R 57–58 (though, unlike BC's rules, in Nova Scotia builder's liens are excluded (they are governed by R 67) and trial dates not guaranteed in statute, only an "economical" process for resolving claims).

77 For example, in the Alberta case *3557537 Canada v Howard*, 2011 ABQB 212, 9 RPR (5th) 171 [*Howard*], counsel split up the trial so that they could get the plaintiff to

B) Preserving Pre-Trial Testimony for Later Use

To address the risk of the loss of testimony due to death or serious cognitive disruptions, there are a number of ways pre-trial evidence can be preserved for both criminal and civil matters. For civil matters, deposition, or commissioned evidence;[78] discovery evidence;[79] transcripts from other proceedings and other pre-trial examinations can be used to replace evidence in chief at a later trial.[80] While these types of examinations do not happen immediately, they do reduce the delay in providing testimony at a trial, which may improve the accuracy of a witness's account. These mechanisms also observe aspects of procedural fairness of the adversarial system, as witnesses that provide pre-trial evidence in these ways do so under oath and opposing counsel has the opportunity for cross-examination.

For criminal matters, where it is anticipated that a witness may be unavailable in the future, pre-trial testimony can also be preserved by having the evidence of a witness taken by a commissioner prior to trial pursuant to sections 709–11 of the *Criminal Code*.[81] In order to use these provisions, the party seeking to have evidence taken by commissioner must show that the witness would be unlikely to give live evidence at a trial due to physical disability arising out of illness or "any other good and sufficient cause."[82] These provisions have been used successfully to admit the commissioned evidence of seniors who, due to their age and poor health, were unavailable for a later trial.[83]

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testify sooner. The plaintiff had been diagnosed with dementia, and the parties wanted him to provide testimony sooner rather than later in order to guard against any further potential cognitive decline.

78 AB, *Rules of Court*, R 6.21; *BC Supreme Court Rules*, R 7-8, R12-5(40)–(44): MB, *Queen's Bench Rules*, R 36.01, R 36.05; NB, *Rules of Court*, NB Reg 82-73, R 53.01 [*NB Rules of Court*]; *Ontario Rules of Civil Procedure*, O Reg 575/07, s 6 (1), R 36.04 (*Ontario Rules of Civil Procedure*); PE, *Rules of Court*, R 36; *Quebec Code of Civ Pro*, R 227, 257; SK, *Queen's Bench Rules*, R 6-29. An early case that is often cited for the process of taking deposition evidence is *Walkerton v Erdman Estate* (1894), 23 SCR 352, 1984 CarswellOnt, however the age of the plaintiff in that case is not mentioned in the judgment.

79 AB, *Rules of Court*, R 8.14; *BC Supreme Court Rules*, R 12-5(46)–(50); MB, *Queen's Bench Rules*, M Reg 553/88, R 34.20 [*MB Queen's Bench Rules*]; *Ontario Rules of Civil Procedure* R 36.04, 31.11(6); *NS Civ Pro Rules*, R 18.20(5); PE, *Rules of Court*, R 31.11.

80 AB, *Rules of Court*, R 8.19; *BC Supreme Court Rules*, R 12-5(52); ON, *Rules of Civil Procedure*, R 20.05(2); SK, *Queen's Bench Rules*, R 9-22, R 9-32.

81 *Criminal Code*, *supra* note 69, ss 709–11.

82 *Ibid.*

83 *R v Stevenson*, 2012 BCSC 800, [2012] BCJ No 1568 [*Stevenson*], *Burrows*, *supra* note 10 at paras 22, 23.

The case *R v Khelawon* presents a cogent example of how the failure to use these sections to preserve the evidence of the senior complainants proved fatal for the prosecution of assaults that allegedly took place in a nursing home.[84] In *Khelawon*, criminal charges were laid against the manager of a retirement home for allegedly abusing and threatening five of the residents. By the time the matter reached trial two and a half years later, four of the complainants had died and the one remaining complainant was no longer competent to testify. While their earlier police interviews had been taped, these were not sufficiently reliable to qualify as an exception from the rule against hearsay. In acquitting the accused of all charges, the Supreme Court of Canada mentions that the evidence of the victims could have been preserved for later use at trial had these *Criminal Code* provisions for taking evidence by commissioner been used.[85]

In contrast, *R v Burrows* shows how sections 709–11 of the *Criminal Code* were successfully used to admit the statements of complainants in a case where the accused had broken into a nursing home and sexually assaulted a number of its residents, who ranged between 71 and 95 years of age.[86] The responding officers taped interviews with all of the complainants on the day of the event. By the time the preliminary inquiry was held a year later, one of the complainants had died. The other witnesses attended at the court and were ready to provide testimony, but other arguments took up all of the time and only one of them was able to testify.[87] For the others, the preliminary inquiry had to be rescheduled for a later date.[88] In order to preserve the evidence of the remaining complainants, the detectives took sworn videotaped statements that day. This proved to be a prudent decision, because two more complainants died and two others became incompetent to testify before the preliminary inquiry resumed six months later.[89] By the time of the trial, only one of the original seven complainants was available and competent to testify in person. For the others, Justice Wilson admitted the commissioned evidence, audiotaped interviews from the day of the assault, or videotaped statements that were taken earlier.[90] Though it was decided before *Khelawon*, *Burrows* is

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84 *Khelawon*, *supra* note 4. See also *R v Campoli*, 2011 ONSC 1226, [2011] OJ No 4903 [*Campoli*] where the failure to arrange for commissioned evidence was not seen as failing to meet the necessity requirement of the principled approach to hearsay given that the 97-year-old witness died only a couple of weeks after the information had been laid on the accused.

85 *Khelawon*, *supra* note 4 at para 7.

86 *Burrows*, *supra* note 10.

87 *Ibid* at para 40.

88 *Ibid* at paras 8–14.

89 *Ibid* at para 14.

90 *Ibid* at paras 265–69. Specifically, the complainants were G.M. (who died before the trial, audiotaped interview was her testimony at trial), E.T. (not competent to

nonetheless consistent with *Khelawon*'s later holding because, unlike the videotaped police interviews in *Khelawon*, there was no "pre interview" or discussion before the police took the statements from complainants that allowed the statements to meet the reliability branch of the principled approach to hearsay.[91]

C) Minimizing In-Court Appearances

For seniors who experience mobility issues, going to court may require arranging for rides for themselves and medical equipment or assistance navigating the courtroom. In *R v Burrows*, Justice Wilson described these logistical issues as "significant hurdles" that had to be overcome to get the elder complainants to appear at a preliminary hearing.[92] To ease this logistical burden, there are a number of provisions that can be used in both the criminal and civil contexts to minimize the in-person pre-trial appearances.

In criminal cases, a "Designation of Counsel" form can authorize counsel to attend some procedural appearances without an accused having to be present.[93] Section 650.01 of the *Criminal Code* provides that Counsel for the accused can attend most procedural applications in court except when oral evidence of a witness is taken, when jurors are being selected,

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provide evidence at trial, videotaped interview from a year after the event admitted for her testimony), B. (lost competency by the time of trial, but had provided commissioned evidence which was used as her testimony), A.S. (died before the trial, audiotaped interview was her testimony for the trial), F.R. (not competent by the time of the trial, audiotaped interview was her evidence for the trial), F. (only witness to give live testimony at trial), and L.V. (died before the trial, audiotaped interview from day of the assault was her evidence).

91 *Ibid* at para 240. In contrast, in *Khelawon*, *supra* note 4, a factor that detracted from where there was an extensive half hour interview conducted before the videotaped interview commenced. Further, *Burrows*, *supra* note 10 at paras 233–50 outlines factors that enhanced the reliability for individual statements, including that varying degrees of an oath were taken and there was evidence from other sources as to the demeanour of the complainants.

92 *Burrows*, *supra* note 10 at para 11 mentions these issues where each complainant had to take a separate taxi to accommodate the walkers and equipment. The complainants became agitated and upset that they were kept waiting for the day, and that they did not testify as planned. See also *Phillips v Canadian Pacific Railway Co*, [1938] OJ No 326 (HC) rvd [1939] OJ No 49 (SC), 1 DLR 776n where a trial was moved from Toronto to Ottawa to accommodate the 80-year-old plaintiff who had a broken foot.

93 *Criminal Code*, *supra* note 69, s 650.01. For example, Form 18, Criminal Proceedings Rules for the Superior Court of Justice (Ontario) (SI/2012-7). Those accused of crimes are required to attend a pre-trial conference pursuant to *Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, R 5.

or for an application for a writ of habeas corpus.[94] With the exception of these circumstances, or unless the court orders otherwise, an appearance by the designated counsel is equivalent to the accused being present.[95]

In addition, section 715.2 of the *Criminal Code* provides that witnesses may be able to adopt their videotaped testimony from a police interview or a prior hearing if they have difficulty testifying in a trial by reason of a mental or physical disability. [96] This provision could potentially help to preserve the evidence of witnesses who experience a decline in cognitive or physical function that renders them unable to communicate evidence in the courtroom. Witnesses must be present at the later trial in order to avail themselves of this section, so its benefit is limited to reducing the number of times a witness would have to attend court.[97]

Another rule that reduces the number of times a witness would have to attend court is section 540(7) of the *Criminal Code*, which provides that at a preliminary hearing, a justice can receive "any information that would otherwise not be admissible but that the justice considers credible or trustworthy … including a statement that is made by a witness in writing or otherwise recorded."[98] This provision may allow for seniors who find it difficult to present viva voce evidence to provide an affidavit or submit a recording or a prior interview instead of attending a preliminary hearing.[99] There is also the possibility for prosecution to proceed by direct indictment, without a preliminary hearing. However, as mentioned in the previous section, the preliminary hearing may be a useful way to preserve testimony.[100]

For witnesses who are unable to make it to the courtroom at all due to mobility issues, section 486.2 of the *Criminal Code* allows a witness to testify

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94 *Criminal Code*, *supra* note 69, s 650.01.

95 *Ibid*. More discussion on the use of the designation of counsel contained in this section is in Kenneth Grolish, "Accused Need Not Be in Court for Routine Adjournments" (2003) 23:4 The Lawyer's Weekly (QL).

96 *Criminal Code*, *supra* note 69, s 715.2.

97 *Ibid.*

98 *Ibid*, s 540(7).

99 Department of Justice, Research and Statistics Division, *The Perceptions and Experiences of Crown Prosecutors and Victim Services Providers in the use of Testimonial Support Provisions* by Pamela Hurley (Ottawa: Department of Justice, 2013) at 19 <www.publications.gc.ca/collections/collection_2013/jus/J4-18-2013-eng.pdf> accessed October 12, 2016 [Hurley].

100 *Criminal Code*, s 577.

from outside the courtroom by closed-circuit television ("CCTV").[101] In order to use CCTV, counsel need to establish that the accommodation is necessary to obtain a full and candid account from their witness.[102] In deciding whether to grant the application, the court considers: the nature of the offence; the relationship of the witness to the accused; the age of the witness; and any other circumstances the court might deem relevant.[103]

While some applications are consented to by counsel or made based on oral submissions alone, others have been supported by evidence from police officers, victim services providers, personal support aids, experts, existing documents, and letters from physicians.[104] Evidence of cognitive decline or increased likelihood of death might be advanced in support of an application for accommodation if these conditions make it difficult for a witness to be present in the courtroom. Though prosecutors could expect defence counsel to oppose an application for testimonial aids based on the argument that their use violates the accused's right to a fair trial and the right to be presumed innocent contained in sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*,[105] the Supreme Court of Canada has upheld the constitutionality of the adoption of videotaped statements in language that could extend to the other testimonial supports.[106] Specifically, testimonial accommodations may be used where they do not undermine the presumption of innocence, there is an opportunity to cross-examine a witness, and where the trial judge maintains a residual discretion to ensure the accused received a fair trial.[107]

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101 *Criminal Code*, s 486.2. Prior to the 2006 amendments, s 709 of the *Criminal Code* was also used as a means of allowing for videoconferencing of witnesses located outside the courtroom in *R v Dix* (1998), 1998 ABQB 370, AJ No 291.

102 Hurley, *supra* note 99 at 3. The testimonial support provisions are presumptively admissible for children or adults with a disability, but require a case by case determination for other vulnerable adults.

103 *Criminal Code*, s 486.2(3). In *R v AFJ*, [2014] OJ No 6148, 2014 CarswellOnt 1728 at para 12 (Ont Ct J), Beaman J suggests that advanced age might work against witnesses seeking testimonial accommodations: "M.J. is 55 years old. It is fair to say that she is a mature woman, with some life experience behind her. Unlike the young female complainants in *R v Salehi*, presumably she would have had "a significant degree of life experience which gives one the wisdom to separate potential fears from the reality".

104 Hurley, *supra* note 99 at 3.

105 Kristin Chong & Deborah Connolly, "An Examination of Current Psychological Issues on the Use of Testimonial Supports by Child, Adolescent, and Adult Witnesses in Canada" (2015) 56:1 Can Psych108 at 110.

106 *R v Levogiannis*, [1993] 4 SCR 475 at paras 19–21, [1993] SCJ No 70 [*Levogiannis*]. These rationales were cited with approval in upholding the constitutionality of the broader 2006 revisions to the testimonial accommodation provisions in the *Criminal Code* in *R v JZS*, 2008 BCCA 401 app dis'd 2010 SCC 1.

107 *Levogiannis*, *supra* note 106. Some may argue based on *NS*, *supra* note 42 that a limit to accommodations is that those that interfere with an accused's view of a witness's

A further accommodation available for witnesses who have mobility issues in criminal cases is found in section 714.3 of the *Criminal Code*, which allows for witnesses to give evidence and be cross-examined by telephone or other technology.[108] Courts considering an application under this section will look at (a) the location and personal circumstances of the witness; (b) the costs that would be incurred if the witness had to be physically present; (c) the nature of the witness's anticipated evidence; and (d) any potential prejudice to either of the parties caused by the fact that the witness would not be seen in person.[109] Seniors who have mobility issues or for whom it would be cost prohibitive to attend a trial in person could make applications to have their evidence admitted pursuant to this section.[110]

In civil cases, there are a number of ways that counsel could minimize the number of in-court appearances required of their clients. While each province has different rules, in British Columbia, counsel can apply for a Case Planning Conference where a judge could make orders that examinations for discovery of a witness be conducted in a certain manner or at a certain place, which allows for the possibility that elders are examined in their homes.[111] Mandatory pre-trial or trial appearances can be made by telephone or videoconference.[112] Some provinces also provide

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demeanour as they respond to cross-examination violate an accused's right to make full answer and defence. However, this argument could be countered with: (1) the testimonial accommodations in the *Criminal Code* do not interfere with the accused's ability to see the witness as they provide testimony (as set out in *Levogiannis*, *supra* note 106 screens only block the witness's view of the accused, not that of the accused, their lawyer or the judgeof the witness); and (2) the Supreme Court in *NS* did not have any social science or legal scholarship on the fallibility of demeanour evidence on the record to consider. Recent decisions from the Court of Appeal for Ontario in *Hemsworth*, *supra* note 44 and *Rhayel*, *supra* note 44 have recognized demeanour as a poor indicator of reliability, which could change the position that the Supreme Court could take on the connection between being able to see a witness during cross examination and an accused's right to a fair trial in the future.

108 *R v NS*, *supra* note 42 at para 104; *Criminal Code*, s 714.3.

109 *Criminal Code*, s 714.3.

110 See e.g. *R v Jeanes*, 2014 BCSC 994, [2014] BCJ No 1165 [*Jeanes*].

111 *BC Supreme Court Rules*, R5-1(1)(f)(ii), (o), (q),(r). Similar provisions include: MB, *Queen's Bench Rules* R 48.01(3), R 50.01; NB, *Rules of Court*, R 50.01; NL, *Rules of Court*, R 11.02(3); NS, *Civ Pro Rules*, R 26.04; ON, *Rules of Civil Procedure*, R 20.05(2); PEI, *Prince Edward Island Rules of Court*, R 50 [*PEI Rules of Court*]; *Quebec Code of Civ Pro* R 153, R 158; SK, *Saskatchewan Queen's Bench Rules,* R 4-5.

112 *BC Supreme Court Rules*, R 12-2(1), (5), (6). Other provinces have made similar use of technology to allow for witnesses to attend a trial or pre-trial examinations remotely, see AB, *Rules of Court*, R 6.10; MB, *Queen's Bench Rules*, R 34.19 (examinations), R 20A(20) (case conferences); *NS Civ Pro Rules*, R 51.08; ON, *Rules of Civil Procedure*, R 20.05(2); *Quebec Code Civ Pro*, R 295, 296; *Saskatchewan Queen's Bench Rules*, R 9-20. In Saskatchewan and in Prince Edward Island, parties can apply for pre-trial appearances

for the option to pursue a claim by summary trial, which can rely almost exclusively on documentary evidence from witnesses, such as affidavits.[113]

Finally, where a group of seniors have common claims against a defendant (for instance, claims of abuse against an institutional defendant) their claims could be brought by way of class action procedure.[114] The class procedure minimizes in court appearances because only one member of the group, the representative plaintiff, needs to attend a trial in person. The other members of the group, known as "the class", are kept up to date on the proceedings by class counsel. Courts have held that a class proceeding may be a preferable procedure in circumstances where "[m]any of the class members are elderly and unlikely to survive protracted litigation and inevitable appeals on an individual basis."[115]

D) Assessing Testimony from Individuals with Cognitive Issues

For those individuals with cognitive issues who are competent to testify in person, it may be necessary to adduce evidence to help the finder of fact move beyond a medical diagnosis to determine the effect of a

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to be conducted by counsel alone (see SK, *Queen's Bench Rules*, R 4-15) and *PEI Rules of Court*, R 1.07, R 50.08).

113 AB, *Rules of Court*, R 7.5; *BC Supreme Court Rules*, R 9-7; MB, *Queen's Bench Rules*, R 20.01; NB, *Rules of Court*, R 22 (summary judgment); NS, *Civ Pro Rules*, R 13; ON, *Rules of Civil Procedure*, R 20.01; SK, *Queen's Bench Rules*, R 6-18 (summary trial) and 7-2 (summary judgment).

114 A statement of claim was recently filed in the Ontario Superior Court against the Revera chain of nursing homes for neglect, but has yet to be certified: Moira Welsh, "Family Seeks Class Action Suit Against Ontario Nursing Home After Father's Death", *Toronto Star* (October 20, 2016), online: <www.thestar.com/news/queenspark/2016/10/20/family-seeks-class-action-suit-against-ontario-nursing-home-after-fathers-death.html>.

115 *Anderson v Canada (AG)*, 2010 NLTD(G) 106, 2010 NCLA 106 at para 121, affd 2011 NLCA 82. The class action procedure has been used a number of other times to address institutional abuse (e.g. *Rumley v British Columbia*, [2001] 3 SCR 184, [2001] SCJ No 39 (which dealt with abuse in a school); *Murray v Capital District Health Authority*, 2016 NSSC 141, [2016] NSJ No 213 (strip searches in a mental hospital); *Cavanaugh v Grenville Christian College*, 2014 ONSC 290, [2014] OJ No 849 (abuse in a school). In the United States there have been a number of class actions certified against nursing homes for neglecting their residents (e.g. *Passucci v Absolut Ctr for Nursing & Rehabilitation at Allegany*, LLC, 2014 NY Misc LEXIS 5834; 2014 NY Slip Op 33459(U)); *Salas v Grancare*, 22 P.3d 568; *Flemming v Barnwell Nursing Home and Health Facilities*, 56 AD3d 162, 865 NYS 2d 706 [3d Dept 2008], affd 15 NY3d 375, 938 NE 2d 937, 912 NYS 2d 504 [2010]). Another advantage of the use of the class proceedings for seniors is the ability to make a ruling on probabilistic proof, which reduces the evidential burden on individual complainants, see Helene Wheeler, "United We Stand: Using Class Actions to Redress Harm in Nursing Homes" (2008) 1 Can J Elder L 131.

medical condition on that witness's testimonial abilities. For instance, as discussed in Part I(d), dementia manifests itself in a number of ways, ranging from strictly physical manifestations (that would not have any effect on the ability to recall events) to very severe memory loss as in those with Alzheimer's Disease. Given that Alzheimer's Disease is the most commonly experienced form of dementia, there is the risk that a judge or jury may assume dementia results in severe memory loss when this is not necessarily the case.

To displace any potential preconceptions that may be triggered by a diagnosis of dementia, counsel may need to advance third-party evidence to assist the finder of fact with the determination of the extent of the effect of a cognitive condition on a witness's ability to observe, remember, and recall an event. Case law provides examples of different sources that have assisted with the assessment of testimony from senior witnesses with cognitive issues including: (1) treating doctors;[116] (2) expert evidence from geriatric nurses,[117] nurse psychologists,[118] or geriatric psychiatrists;[119] or (3) family members.[120] While this third party information can only be used for the limited purpose of delineating the extent of a medical condition and not the reliability of a witness's testimony, it has allowed judges to look past diagnoses and assess witnesses on their actual abilities.[121]

In some cases, a stroke or dementia can affect an individual's ability to communicate by causing aphasia. In these circumstances, the *CEA* provides if a witness has difficulty communicating by reason of physical disability, the court may order that the witness be permitted to give evidence "by any means that enables the evidence to be intelligible."[122] To date, this provision has been used to enable the use of interpreters to provide evidence for individuals who are deaf.[123] Though there is an absence of reported decisions of individuals with aphasia who have used the *CEA* to provide their evidence by typing their responses on a laptop during a trial, or writing their responses on a white board, there is nothing in the *CEA* to suggest that such accommodations should not be available for seniors who may need to access these alternative means of communication when a stroke or dementia limits verbal language abilities.

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116 *Ast v Mikolas*, 2010 BCSC 127, [2010] BCJ No 160; *Khelawon*, *supra* note 4; *Howard*, *supra* note 77; *Asling*, *supra* note 30.

117 *Burrows*, *supra* note 10.

118 *Ibid.*

119 *Khelawon*, *supra* note 4.

120 *Ibid*; *Asling*, *supra* note 30.

121 Other cases where doctors provided evidence relating to witnesses testifying in court include *Howard*, *supra* note 77 and *Mills*, *supra* note 58.

122 *CEA*, *supra* note 30, s 6(1).

123 For example, *R v Titchener*, 2013 BCCA 64, [2013] BCJ No 225.

E) The Principled Approach to Hearsay

For individuals who are unable to provide testimony in person due to a loss of competence or death, it may be necessary to introduce their earlier statements that were made out of court. As discussed in Part II(b), these statements, known as hearsay, are presumptively inadmissible at common law because they have not been made under oath, tested by cross-examination, and the trial judge has not had the opportunity to see and hear a witness as they provide evidence in order to assess their demeanor.[124] Despite its presumptive inadmissibility, hearsay statements can be admitted at a trial for their truth if they are sufficiently necessary and reliable. [125] *R v Khelawon* is the leading case that sets out this approach to the admissibility of hearsay statements in its "principled approach" to hearsay.[126] Since *Khelawon,* the principled approach to hearsay has been used to successfully admit out of court statements made by seniors who have died or lost competence prior to a trial.[127]

For example, in *R v Asling*, neighbours called the police after Mary Asling had run to their house, telling them that she needed to escape from the accused, her grandson.[128] Mary told her neighbours that the accused had been responsible for injuries on her arms and head. At that time, the accused lived with Mary because she had already been diagnosed with dementia and was unable to live independently. By the time of the trial two years later, Mary's cognitive abilities deteriorated and she was unable to testify in court due to a lack of competence.

In these circumstances, Justice MacLean of the Ontario Court of Justice held a *voir dire* to determine the admissibility of her prior statements to her neighbours, her doctor, and the police who responded to the 911 call.

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124 *Khelawon*, *supra* note 4.

125 *Ibid.*

126 *Ibid.*

127 Cases where a senior citizen's videotaped statements, affidavits, or signed statements were admitted through the application of the principled approach to hearsay include: *Campoli*, *supra* note 84; *Chandra v Canadian Broadcasting Corp*, 2015 ONSC 4063, [2015] OJ No 3329 [*Chandra*]; *MacNeil v MacNeil*, 2014 NSSC 171, [2014] NSJ No 269 [*MacNeil*]; *R v Nadeau*, 2014 QCCS 838, [2014] JQ No 1727 [*Nadeau*]; *R v Taylor*, 2012 ONCA 809, 294 CCC (3d) 483 [*Taylor*]. In *R v MacHannah*, 2012 QCCQ 1496 [*MacHannah*], the statements by the deceased were not sufficiently reliable. Other cases that involved hearsay cases that involved statements to other people include: *Asling*, *supra* note 30 (statements made to neighbours admitted, statements made to doctor and detective were not); *Gutierrez Estate v Gutierrez*, 2015 BCSC 185, [2015] BCJ No 217 [*Gutierrez*] (not admissible), *Maddess v Racz*, 2008 BCSC 1550, [2008] BCJ No 2202 [*Racz*] (admitted), *Verwood v Goss*, 2014 BCSC 2122, 2 ETR (4th) [*Verwood*] (not admissible).

128 *Asling*, *supra* note 30.

For each of Mary's hearsay statements, Justice MacLean looked at (1) the timing of the statement in relation to the event reported; (2) the nature of the event reported; (3) the context and tone of the statement; (4) the absence or presence of a motive to lie on the part of the third party relating what Mary had told them;[129] (5) the presence of leading questions; (6) the confirmation of the event reported by physical evidence; and (7) evidence of Mary's cognitive abilities at the time of making the statement.[130] This application of the principled approach to hearsay is the type of contextual analysis that can facilitate hearsay from seniors who have cognitive issues because it considers the individual nature and variability of the condition.

F) Older Witnesses' Use of the Available Tools

The preceding sections find there is some procedural flexibility within the current rules that could help seniors who require accommodation. Unfortunately, a review of the cases citing these provisions suggests that, with the exception of the principled approach to hearsay, these legal tools are rarely used to facilitate the participation of senior citizens in the trial process.[131] Admittedly, a case law review provides a limited picture of

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[129] *R v Blackman*, 2008 SCC 37 at paras 43–46, [2008] 2 SCR 298 holds that motive is a relevant consideration in assessing whether the circumstances in which a hearsay statement came about are sufficient to justify its admission, but that motive is one factor to consider in determining admissibility.

[130] *Asling*, *supra* note 30 at para 127. Scrutinizing each of Mary's statements to other people at the time of the event according to the test above, Justice MacLean found that Mary's statements to her neighbours about how she was injured were admissible, but her later statements to doctors and police were not admissible for their truth because they were not sufficiently reliable.

[131] In a case law review that noted up *Khelawon*, *supra* note 4 (current to February 23, 2017) where the age of a declarant was mentioned, the principled approach to hearsay was used regularly to admit statements from seniors, including: *Anderson v Anderson*, 2010 BCSC 911, 5 ETR (3d) 291 (some statements admitted, others not admissible); *Asling*, *supra* note 30 (statements made to neighbours admitted, statements made to doctor and detective were not); *Bunn v Bunn Estate*, 2016 BCSC 2146 at para 76, 22 ETR (4th) 200 ; *Campoli*, *supra* note 84; *Chandra*, *supra* note 127; *David v Beals Estate*, 2015 NSSC 288, 13 ETR (4th) 252; *Mac v Mak*, 2016 BCSC 1140, 69 RPR (5th) 211; *MacNeil*, *supra* note 127; *Modonese v Delac Estate*, 2011 BCSC 82, 65 ETR (3d) 254; *Morgan v Pengelly Estate*, 2011 BCSC 1114, 340 DLR (4th) 53; *Nadeau*, *supra* note 127, *Philips v Keefe*, 2010 BCSC 2005 at para 29, [2010] BCJ No 2939; *Racz*, *supra* note 127; *Travica v Malloux*, [2008] OJ No 3880 (SC), 43 ETR (3d) 210; *Williams Estate v Vogel of Canada Ltd*, 2016 ONSC 342 at para 20, [2016] OJ No 414. However, in *Cowper-Smith v Morgan*, 2015 BCSC 1170, 10 ETR (4th) 218; *Taylor*, *supra* note 127 and *MacHannah*, *supra* note 127 statements were sufficiently reliable to be admitted. Other cases that involved hearsay statements to third parties included *Gutierrez*, *supra* note 127 (not admissible), *Verwood*, *supra* note 127 (not admissible). Given that the search was conducted in English, decisions from Quebec and New Brunswick are under-represented.

the overall phenomenon. A case law review will only consider written decisions, which means routine dispositions and oral decisions are not included. This case law review is further limited to judgments where the age of a person is mentioned, which narrows the population of trials that are considered even further.[132] So while a definite conclusion on the use of these laws is difficult to draw, a case law review does demonstrate a striking difference in the number of cases that cite the accommodations as being used for seniors compared to other age groups: in over 1,500 cases that applied the civil and criminal accommodations described in this part, 53 were used in favour of seniors.[133]

In the civil context, over 700 reported decisions considered the use of depositions, affidavits, discovery evidence, or out of court examinations to admit testimony from unavailable witnesses, but only 39 of these cases involved seniors.[134] There was one example where trial dates were

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[132] In a random sample of 50 real property disputes, 17 mentioned the age of the witness which places the overall proportion of cases where age is mentioned at around 30%. This number would likely be larger in the criminal context because some crimes have an age-based element (for example, sexual interference, invitation to sexual touching, and sexual exploitation involve touching for a sexual purpose in relation to a person under the age of 16 in *Criminal Code* ss 151–53) further the age of a victim is an aggravating factor for the purposes of sentencing (*Criminal Code* s 718.2).

[133] There is variability in the ways QuickLaw reports citations of provisions from jurisdiction to jurisdiction. In British Columbia, the *BC Rules of Court* can be noted up by Rule, however in other jurisdictions a Boolean search was conducted to look for citing cases. For example, "Rules of Court"/s "R. 31.11" with a jurisdictional limit of Ontario, which was a lot less precise, and may have the effect of understating case law from other jurisdictions.

[134] The relevant provincial rules of court were noted up current to September 25, 2016, as well, a search of the term "de bene esse" was conducted in QuickLaw. De bene esse examinations, like the commissioned evidence provisions in the current rules, are "an examination out of court and before trial, of witnesses who are old, dangerously ill, or about to leave the country, on the terms that, if the witnesses continue ill or absent, their evidence be read at the trial, but if they recover or return, the evidence may be taken in the usual manner" per Bouck J in *A-Dec v Dentech Products*, [1988] BCJ No 1875 (SC), 31 BCLR (2d) 320 citing Jowitt's Dictionary of English Law, 2nd ed page 551. This case law review includes cases where applications were unsuccessful, as well as successful applications–focusing only on the age of the witness who was bringing the application and not on its success to show who is using the provisions.

Cases where applications to admit deposition or commissioned evidence from seniors include: *Boshard v Combined Painting (WP Boshard) Ltd*, [1974] BCJ No 326 (SC); *De Araujo v Neto*, 2001 BCSC 935, 40 ETR (2d) 169; *Eastern Trust v Hume*, [1964] BCJ No 12 (SC), 48 WWR 575; *Martin v Gilson*, [1956] BCJ No 156 (SC), 7 DLR (2d) 62; *Mawani*, *supra* note 30; *Pierre v Lil'Wat Nation*, [1999] BCJ No 17, [1999] 10 WWR 174 (though the party died before his videotaped statement could be taken); *Williston Lake Navigation v Pacific Terex Ltd*, [1985] BCJ No 855 (SC) (no age mentioned, party who was examined described as "senior"). In Alberta, there were no cases that cited AB, *Rules*

expedited or a case planning conference was used to minimize pre-trial appearances for a senior citizen.[135] In five cases, a summary trial or fast track litigation process was used to expedite the trial process for a senior

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of Court R 6.21 (depositions prior to a trial to preserve the evidence of a witness), R 6.10 (electronic hearing); or R 8.14 (pre-trial examinations to preserve evidence) that involved a person aged over 60. Of the 50 cases mentioning "de bene esse" in Alberta, only five involved individuals aged over 60 (*Alberta (Public Trustee) v TF*, 1998 ABQB 864, [1998] AJ No 1159; *Bakker v Van Santen*, 2003 ABQB 706, [2003] AJ No 1044; *JMJ v GP*, 1998 ABQB 933, [1998] AJ No 1235; *Lindahl Estate v Olsen*, 2004 ABQB 639, [2004] AJ No 967; *Schwartz Estate v Kwinter*, 2008 ABQB 288, [2008] AJ No 548). R 8.14 was used two times to admit pre-trial examinations when a witness had died, though the age and cause of death of those absent witnesses was not mentioned so it is unclear whether they were seniors or not (*Empson v Wenzel Downhole Tools*, 2013 ABCA 418, [2013] AJ No 1321; *Willard v Compton Petroleum*, 2015 ABQB 766, [2015] AJ No 1321). In Saskatchewan, there were no cases that cited the SK, *Queen's Bench Rules* R 6-17 (electronic hearing) or R 6-29 (depositions); *Toto v Canada (AG)*, 2005 SKQB 358, [2005] SJ No 593 used a de bene esse examination. In Manitoba, of the 23 cases mentioning commissioned evidence, only one involved a senior (*Tomkewich v Ellis*, 2011 MBQB 166, [2011] MJ No 237). In Nova Scotia, one case involved a person who was described as "old and sick", though an exact age was not mentioned: *McKinnon v MacPherson*, [1909] NSJ No 7 (SC), 7 ELR 448. In Ontario, *Ontario Rules of Civil Procedure*, R 36.01 or de bene esse examinations were used for senior witnesses in: *Avery v Fortune*, [1906] OJ No 809 (HC), 8 OWR 952 (described as an "aged" witness); *Bruzzese v Peterkin*, [1994] OJ No 658 (CJ), 25 CPC (3d) 246 (failure to use the provision resulted in loss of evidence); *Deevy v Deevy*, [1912] OJ No 341 (HC), 4 OWN 555; *Don Valley Volkswagen v Haberbusch*, [2001] OJ No 3 (SC); *Frank v Harwich (Township)*, [1889] OJ No 109 (HC), 18 OR 344; *Hunt v Prentiss*, [1854] OJ No 209 (HC) (refers to "aged" witness); *Geisel v Geisel*, [1985] OJ No 576 (HC); *JM v Clouthier*, 2013 ONSC 221, 113 OR (3d) 624; *Johnstone v Johnstone*, [1913] OJ No 58 (CA), 12 DLR 637; *Keenan v Cambellford (Township)*, [1940] OJ No 138 (HC) (for "a woman between sixty-nine and seventy-six years of age, her age not being definitely established"); *Martin v Ross* [1875] OJ No 275 (Practice Ct) (mentions de bene esse examinations could be used if plaintiff could not travel to new venue for trial); *Moberley v Stewart Estate*, [1941] OJ No 14 (SC); *Patterson v Christie* (1983), 41 OR 2d 145 (HC); *Slate Falls Nation v Canada (AG)*, [2007] OJ No 348 (SCJ), 2007 CanLII 1928; *Vasil v Lukatch*, [1954] OJ No 50 (HC); *WA v St Andrew's College*, [2008] OJ No 1678 (SC), 292 DLR (4th) 427*; Ward v Ward Estate*, [1976] OJ No 857 (HC); *Warrin v London and Canadian Loan and Agency Co*, [1885] OJ No 144 (HC) (age not mentioned, but the witness, Archibald Taylor, was providing historical information from 33 years prior and had died before the trial); *White v Weston*, [1986] OJ No 2611 (HC), 14 CPC (2d) 121; *Wright v Whiteside*, 40 OR (2d) 732 (HC), [1983] OJ No 2504. In Newfoundland and Labrador cases that used affidavits and discovery evidence include *Re Dyer Estate*, 2010 NLTD(G) 201 at para 5, 65 ETR (3d); *Gough v Newfoundland and Labrador*, 2005 NLTD 70 at para 35, [2005] NJ No 129; *Hawco Estate v Kennedy*, 2013 NLTD(G) 11 at paras 12–14, 29 RPR (5th) 139. There were no cases from New Brunswick, PEI or Quebec, however, a search in French could affect this result.

[135] *Howard*, *supra* note 77, where the parties scheduled Mr. Seaman's evidence to be given first, before the rest of the trial due to his diagnosis of dementia and the possibility of cognitive deterioration.

citizen.[136] While a case law review provides a limited picture of the total number of applications made in court, it does suggest that civil provisions are infrequently used to facilitate the participation of seniors who require accommodation.

In criminal cases, the accommodations seem to be used with even less frequency. There were no reported decisions where the testimonial supports provided for in section 6 of the *CEA* or 715.2 of the *Criminal Code* were used by senior witnesses.[137] Of the over 200 reported decisions relating to applications to give testimony via telephone or CCTV, two involved senior citizens.[138] Only three of the 345 reported decisions that considered using a transcript or videotape from a preliminary inquiry were used with respect to a senior witness in a trial pursuant to section 715 of the *Criminal Code,*[139] and three of the 57 reported decisions citing

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[136] *Carter v Canada*, 2012 BCSC 886, [2012] BCJ No 1196; *Collette v AMV Enterprises*, 2014 BCSC 816, [2014] BCJ No 912; *Lacey v Weyerhauser*, 2012 BCSC 353, [2012] BCJ No 481, *Maxwell v British Columbia*, 2013 BCSC 1386, [2013] BCJ No 1686; *Tomas v Mackie*, 2015 BCSC 364, [2015] BCJ No 431. There were no cases where the advanced age of a party was mentioned in the context of the summary trial provided in AB, *Rules of Court* R 7.5, the SK, *Queen's Bench Rules* R 6-18 (summary trial) and 7-2 (summary judgment), or *NS Civ Pro Rules*, R 57–58.

[137] Department of Justice Canada, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2) Case Law Review and Perceptions of the Judiciary* by Nicholas Bala et al, Catalogue No J2-367/2011F (Ottawa: Canadian Research Institute for Law and the Family, 2011), online: <www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10_vic3/rr10_vic3.pdf> accessed October 12, 2016 [Bala], noted up all of the testimonial accommodations in the *Criminal Code* from 2006–2009. Subsequently, Department of Justice Canada, Research and Statistics Division, *Testimonial Support for Vulnerable Adults (Bill C-2): Case Law Review 2009–2012* by Mary Ainslie (Ottawa: Research and Statistics Division, Department of Justice Canada, 2013) <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_15b/index.html> accessed October 12, 2016, built on Professor Bala's study and noted up the provisions from when Professor Bala left off in 2009, until 2012 without one case involving an individual aged over 60. I built on Ms. Ainslie and Professor Bala's work by noting up sections 486.1, 486.2, and 715.2 of the *Criminal Code* from when Ms. Ainslie's study finished in January 1, 2013 until June 24, 2016. For perspective on how frequently these provisions were cited generally, as of September 26, 2016, there were 24 cases that referred to s 715.2; and five cases that referred to s 6 of the *CEA*.

[138] *Jeanes*, *supra* note 110; *Hasnain v Waddington's Auctioneers and Appraisers*, 2010 ONSC 3493, [2010] OJ No 2597. For an idea of how frequently these provisions are used in general, as of September 26, 2016 there were 189 cases citing s 486.2 of the *Criminal Code* (CCTV) and 17 cases that referred to s 714.3 (testimony via telephone or other technology).

[139] A transcript from a preliminary inquiry was used instead of in-person testimony in *R v Dorfer*, 2009 BCSC 202, [2009] BCJ No 291 (74-year-old complainant was too ill to testify); *R v Kralik*, 2006 BCSC 306 at para 13, [2005] BCJ No 1827 (87-year-old complainant's videotaped preliminary inquiry was admitted because cognitive decline

sections 709–11 of the *Criminal Code* involved an application to have a senior witness's pre-trial testimony taken by a commissioner.[140] These findings are consistent with surveys of judges and Crown Prosecutors, which found that applications for testimonial aids are made infrequently for adults (as opposed to children).[141]

The question then becomes not if the laws of evidence are ready to meet the needs of seniors, but why are there so few cases where they are being used to help older adults? One possible reason is that applications for accommodations are not being opposed. If applications are being granted without being opposed, there would be no need for the judge to issue a written decision. The lack of case law would just be a methodological issue.

Alternatively, perhaps seniors do not need accommodations. Some of the provisions discussed in this part can be used with very little effort by counsel. The absence of any cases that involve seniors using the accommodations could be a signal that there is an insufficient need for them as opposed to insufficient use.[142]

However, given the prevalence of the age-related issues described in the first part of this paper in the population more broadly, it may be more likely that seniors who go to trial could be those who do not require accommodation; and those who do may not be engaging in the trial process to begin with. In the criminal context, charges are infrequently laid for elder abuse due to elder victims' reluctance to press charges where the perpetrator of abuse is a child or caregiver, fear of institutionalization and loss of independence, and/or mental or physical disabilities.[143] For civil cases, seniors who require accommodation may be deterred from initiating a civil dispute due to the time and emotional and financial costs of litigation. Lawyers may be more likely to advise elder clients to settle a civil case or plead out a criminal case if they anticipate their client's health

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made it impossible to testify in person); *R v Wilder*, 2002 BCSC 1333 at para 15, [2002] BCJ No 2110 (74-year-old third party witness was too ill to travel). Not counted was the case *R v Utinen*, 2015 BCSC 1796, [2015] BCJ No 2998 where the complainant was described as "elderly" and "frail" but she was in her 50s.

140 *Burrows*, *supra* note 10; *R v Morin*, 2009 ABQB 486, [2009] AJ No 889 [*Morin*]; *Stevenson*, *supra* note 83. There were two cases where counsel attempted to argue that failure to take an elder's evidence by commissioner prior to the death of the witness should mean that the necessity requirement for the principled approach to hearsay was not met, but in both cases that argument was rejected: *Campoli*, *supra* note 84; *Nadeau*, *supra* note 127.

141 Bala, *supra* note 137 at 53; Hurley, *supra* note 99 at 12.

142 For example, s 715 of the *Criminal Code*.

143 Ha & Code, *supra* note 2 at 15 found that only 17% of police investigations of elder abuse resulted in laying charges. See also, *Morin*, *supra* note 140 at paras 56–58.

may deteriorate before a trial can happen, or that the litigation process itself could exacerbate an existing medical condition.

Where cases do make it to trial, research on the use of the testimonial aids in the *Criminal Code* provides some clues as to why seniors are not using the *Criminal Code* aids to provide their testimony. A survey of judges found that there were technical and logistical issues using CCTV; for example, courthouses are not equipped with the necessary technology or staff lack training on how to use it, which could explain why there is a lack of case law showing that it has been used for seniors.[144] Testimonial aids are still a relatively new development in the law of evidence, and it may take some time for courtroom infrastructure and legal precedent setting out how and when these aids are available to catch up to the legislation.

Resource concerns might also act as a barrier to accessing the testimonial supports for seniors. A survey of Crown counsel and victim support workers revealed that the Crown counsel found CCTV is "hard to impossible" to obtain for an adult witness.[145] Given this limited prospect of success, Crown counsel may feel that it would not be worth the time and costs preparing an application for a testimonial aid.[146] In the civil context, lawyers may be reticent to use the existing rules due to similar resource issues relating to the costs of bringing applications; they are not familiar with their availability; or do not have the time to prepare the necessary motions. If the costs of bringing motions for accommodations are prohibitive, then an adjustment to the rules that would allow for mandatory pre-trial conferences to be conducted remotely without a motion being brought to request it in advance may go some way to addressing this issue.

5. Conclusion: Meeting the Needs of Aging Witnesses

Whether the laws of evidence are ready to respond to the needs of an aging population is ultimately a case study on how the adversarial emphasis of our legal system can be at odds with the social and practical objectives of the trial. Socially, an objective of the trial is to enable individuals to access justice through the courts.[147] Practically, a trial objective is to discover the

144 Bala, *supra* note 137 at ix.

145 Hurley, *supra* note 99 at 22.

146 *Ibid* at 3.

147 As Madam Justice L'Hereux Dube sets out in *Levogiannis*, *supra* note 106 at 483 "[t]he goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth".

truth.[148] By reviewing studies on how aging affects the ability to provide accurate testimony in a courtroom and highlighting key legal barriers that prevent the best practices suggested in the social sciences from being adopted in practice, this paper shows how these goals can be defeated by the philosophical and logistical constraints of common law trials.

Looking at the legal and procedural accommodations currently available shows that Canadian courts and legislatures have resolved this tension by developing rules that respect the rationales underlying the adversarial tradition's preference for in court testimony, and at the same time working in some flexibility for individuals who require accommodation. Whether it is a stroke, dementia, mobility issues, or biological changes that affect the senses and memory, the laws of evidence seem to be prepared to respond to the types of issues that present more frequently with advanced age.

Specifically, in both the civil and criminal contexts, there are ways to minimize pre-trial appearances, preserve pre-trial testimony for use in court, and facilitate the assessment of in-court testimony. For unavailable testimony, there is the principled approach to hearsay, which is flexible in its application. In addition, there are a number of ways that trials can be expedited to reduce delay. Though these accommodations are not perfect from a social science standpoint, they can be used to incorporate the best practices recommended in the social science literature within the practical and logistical constraints of the trial.

Taken together, Canada's laws of evidence are capable of being responsive to the coming demographic shift. This is not to say that there is not room for improvement. In the criminal context, having specific rules

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148 Of course, whether there is a conflict naturally depends on how you define the social and practical objectives of the trial. I adopt a rationalist purpose of the trial—the discovery of the truth (to the extent possible) (William Twining, *Theories of Evidence: Bentham and Wigmore* (London, UK: Weidenfeld and Nicolson, 1985) at 16). Arguably a more realistic objective is that put forth by Sir Richard Egglestone—where a trial's objective is to reach a decision that is justifiable based on the material presented in court (*Evidence, Proof, and Probability*, 2nd ed (UK: Weidenfeld & Nicolson, 1983) at p 32), or even more cynically put by Kenneth W Graham, Jr., as "a kind of political theatre" in "There'll Always Be an England': The Instrumental Ideology of Evidence" (1987) 85:5 Mich L Rev 1204 at 1232. Julia Simon Kerr convincingly argues that the adversarial trial has a "complicated" relationship with the truth, that it "frequently privileges policy goals over information-gathering, and it tolerates obvious falsehoods in certain circumstances. Truth in legal proceedings not only competes with other priorities, such as fairness and efficiency, but under the American legal system, it may be sought through deception, half-truths, misleading statements, and, at times, outright falsehoods" (Julia Simon Kerr, "Credibility by Proxy" (2017) 85:1 Geo Wash L Rev 152 at 153).

for expedited trial dates could increase seniors' ability to attend trial and have the clearest memory of an event. In the civil context, allowing for mandatory pre-trial, or even trial, appearances to be conducted remotely without having to bring a motion to request permission to do so would go some way towards easing the financial disincentives for requesting accommodation.

That the laws on the books seldom show up in the cases involving seniors may signal access to justice issues for seniors who require accommodation. Current research suggests that the underuse of the testimonial aids for adults may arise from different charging patterns by police; time and financial resource issues for lawyers; and/or logistic and technical issues in the court houses. While the focus of this paper was to identify potential issues, and not propose solutions, to ensure that the laws of evidence can truly respond to the needs of seniors in the future, these issues should be explored further and addressed now.