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Hearsay: A "Functional" Principled Approach

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HEARSAY: A "FUNCTIONAL" PRINCIPLED APPROACH

I. Introduction

The rule excluding hearsay evidence may be the most famous contribution of the common law to the world's methods of fact determination in legal processes. In very general terms, the rule requires the exclusion of out-of-court statements offered for the truth of their contents, unless the statements are admissible under a recognized exception or the principled approach. In this paper, we discuss the exclusionary rule itself, the development of a "principled approach" to the admission of hearsay, and the traditional exceptions (touching on their rationales). We give priority to discussing recent developments in this area of law, especially the "functional" analysis provided by the Supreme Court of Canada in *R.v. Khelawon*, [2006] 2 S.C.R. 787 (*Khelawon*).

However, before turning to these matters, by way of introduction, we recall the reasoning underlying the rule, and the importance of attention to the context of the legal dispute in issue.

A. Reasons for the Hearsay Rule

Any evidence may lack reliability. It may be useful to recall the potential weaknesses of testimony in general, whether oral or documentary, hearsay or non-hearsay. For instance, an eye-witness says "the

car was red." There may be problems of communication (or narration) failure (what does "red" mean); insincerity (is the eye-witness telling the truth); faulty memory (how well does she remember seeing the car); and misperception (how well did she actually see the car).[1] With non-hearsay evidence, we rely on various ways of testing/reassuring ourselves about the evidence: the taking of oaths, the opportunity to observe demeanor, the availability of information about context, and of course, cross-examination. With respect to hearsay evidence in particular, common sense and experience tell us that the danger of unreliability becomes more acute with each person who passes on a story. The concern underlying the hearsay exclusionary rule is the absence of such protections against the above weaknesses. In criminal trials especially there is also concern about the unfairness of convicting an accused person on the basis of untested evidence.[2] Again on a general level, it can be said that hearsay is admitted where necessary and where there is sufficient reassurance about the absence of the above weaknesses to justify the use of hearsay evidence.

The Supreme Court of Canada reconsidered the hearsay rule in *Khelawon*. Writing on behalf of a unanimous Court, Charron J. explained (at para 2):

> Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of facts, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. … Where it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. [emphasis in original]

Khelawon is now the leading case on the principled exception to hearsay, as well as providing a very useful review of the fundamental dynamics of the hearsay rules.

B. The Importance of Attention to Context

Questions relating to the rule against hearsay may arise in a wide variety of legal contexts. It is in the setting of a criminal jury trial where the issue of admissibility may be argued most vigorously, and where the movement away from the traditional exceptions might have dramatic structural outcomes, for example, tending to benefit the Crown. In contrast, judges presiding over bail and sentencing hearings are much more likely to admit hearsay, the primary question then becoming one of weight. Here are three examples from the criminal context.

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1 See Edmund Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948), 62 Harvard L.R. 177, and *Khelawon*, at para. 2. "Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity."

2 The constitutional dimension of this concern is discussed in *Khelawon*, at paras. 47-49, the court making clear that the constitutional right to a fair trial incorporates attention to society's interest in arriving at the truth.

Under s. 33(1) of the *Extradition Act*, S.C. 1999, a court considering whether to grant an extradition request must be given "a document summarizing the evidence available to the extradition partner for use in the prosecution." Section 32(2) of the *Extradition Act* provides that evidence gathered in Canada and relied upon for extradition must satisfy Canadian rules of evidence law. In *United States of America v. Anekwu*, 2009 SCC 41, Anekwu argued that evidence given in a hearsay form, including the summary required under s. 33(1), was inadmissible because it did not comply with Canadian rules of evidence. A unanimous Supreme Court of Canada rejected that argument. In a decision written by Charron J., the Court held that ss. 32(2) and 33(1), read together, modify the operation of the hearsay rule in this context. It is permissible for evidence to be conveyed to the extradition court in a summary form if the substance of that evidence conforms with the requirements of Canadian evidence law.

Section 723(5) of the *Criminal Code*, R.S.C. 1985, c.C-46 states that hearsay evidence is admissible at sentencing proceedings although the court may compel a person to testify in the interests of justice. Section 111(3) of the *Criminal Code* states that at the hearing of an application for a weapons prohibition "the provincial court judge shall hear all relevant evidence …" In *R. v. Zeolkowski* (1989), 69 C.R. (3d) 281 (S.C.C.), Sopinka J. stated for the Court (at para. 18):

> Accordingly, I am prepared to hold that hearsay evidence is admissible at a firearm prohibition hearing … unless such a result is precluded by the words "all relevant evidence" … In my opinion, this expression means all facts which are logically probative of the issue. The general rule of evidence is that all relevant evidence is admissible … This general rule is subject to certain exceptions, such as the rule against hearsay …" Admissibility signifies that the particular fact is relevant, and something more—that it has also satisfied all the auxiliary tests and extrinsic policies" (1 Wigmore, Evidence, para. 12 (Tillers rev.) 1983) 689 … By using the phrase "all *relevant* evidence" (emphasis added), Parliament did not address the question of exclusionary rules; it did not require "something more" at a firearm prohibition hearing. The effect of the exclusionary rules is left to the provincial court judge as part of the whole body of evidence on which the provincial court judge determines whether he or she is satisfied that the reasonable grounds exist. Frailties in the evidence are a matter of weight. In the case at bar, for example, the judge should properly consider what weight, if any, is to be given to the hearsay evidence. In doing so the judge should take into account the explanation, if any, for not making the best evidence available. The Crown bears the burden of proof … and … in considering its weight, the judge must scrutinize the evidence to ensure that it is credible and trustworthy …

An example from the civil context is provided by s. 68(2) of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. C-46:

> (2) In a proceeding under this Act, the court may admit as evidence
>
> (a) any hearsay evidence that the court considers reliable, or
>
> (b) any oral or written statement or report the court considers relevant, including a transcript, exhibit or finding in an earlier civil or criminal proceeding.

In *B.K. v. British Columbia (Director of Child, Family and Community Services)*, [1998] B.C.J. 1948, Levine J. upheld an appeal from a Provincial Court order granting permanent custody of a child to the Superintendent of Child and Family Services. This appeal was in part allowed on the basis that the trial judge gave too much weight to hearsay evidence standing alone. Levine J.'s reasoning reflects that

presumptive admissibility shifts the necessity/reliability analysis to weight, rather than excluding that analysis entirely.

Other commonly invoked statutory provisions that create exceptions to the common law rule include ss. 12, 29 and 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 715 of the *Criminal Code*, and ss. 15, 34, 41 and 42 of the BC *Evidence Act*, R.S.B.C. 1996, c. 124.

Where the common law rule does apply, the Supreme Court of Canada has also emphasized that attention to the twin requirements of reliability and necessity within the particular context should prevail over ossified rules or categories of exclusion and admission. In *Khelawon*, the Court refused to accept that its earlier decisions *B.(K.G.)*, [1993] 1 S.C.R. 740 (*B.(K.G.)*) and *U.(F.J.)*, [1995] 3. S.C.R. 764 (*U.(F.J.)*) had established a new categorical exception to the hearsay rule. Instead, Charron J. explained (at para. 45) that "these cases provide guidance—not fixed categories—on the application of the principled case-by-case approach." Practitioners faced with seeking or resisting admission of hearsay evidence should be prepared to adopt a contextual approach to the admissibility enquiry in every instance except where the hearsay statement was made by the accused or a party.[3]

The same approach should govern the question of weight accorded to hearsay evidence that is admissible by statute or pursuant to the common law rule.

II. The Hearsay Rule

A. Defining Hearsay

There are various ways of stating the rule and/or attempts to express ways of recognizing hearsay. On a relatively informal level, there is what has been called a "practitioners" test—is the right person in the witness box to be cross-examined?[4] Another informal approach is to imagine counsel asking a witness "How do you know *that*?" The witness could answer, for example, that she saw it or felt it or touched it. But if the witness replies that X (the declarant) told her, the testimony is hearsay *if offered for its truth*.[5]

The classic formal definition of hearsay is given by Sopinka J. in *R. v. Evans*, [1993] 3 S.C.R. 653, at para. 16: hearsay is "an out-of-court statement which is admitted for the truth of its contents." More recently, the Supreme Court of Canada has resisted the task of providing a comprehensive definition of hearsay. (See, for example, *R. v. Starr*, [2000] 2 S.C.R. 144 per Iacobucci J. (*Starr*). Instead, the Court has

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3 Where the hearsay statement was made by the accused or by the opposing party in civil litigation, it is presumptively admissible without the need to have regard to its necessity and reliability. (See *R. v. Starr*, [2000] 2 S.C.R. 144; *R. v. Foreman* (2002), 62 O.R. (3d) 204 (Ont. C.A.); and *R. v. Terrico*, [2005] B.C.C.A. 361 (leave to appeal to Supreme Court of Canada refused [2005] S.C.C.A. 413).) This proposition is considered at greater length in section III, below.

4 See Jenny McEwan, "Hearsay (Chapter 12)" (2005) 2(2) International Commentary on Evidence, Article 5, available at http://www.bepress.com/ice/vol2/iss2/art5, last accessed February 6, 2008.

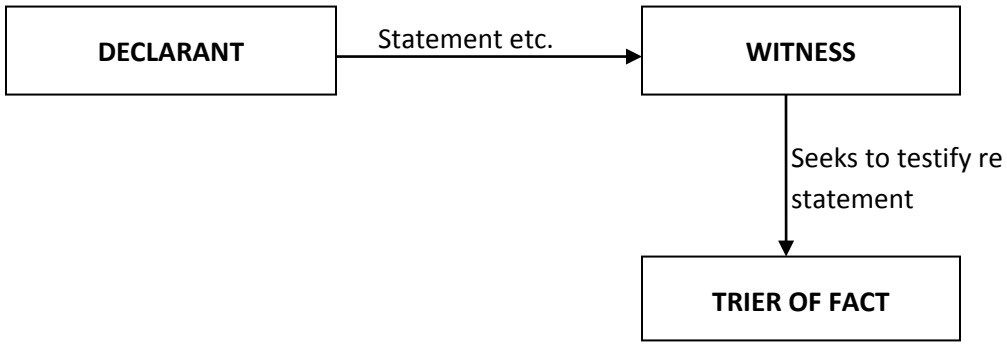
5 See Paul Roberts and Adrian Zuckerman, *Criminal Evidence*, Oxford University Press, 2004, at 587.

focused on what Charron J. described in *Khelawon* (at paras. 35-41) as the "essential defining features" of hearsay as part of its "functional approach": the fact that the statement is tendered to prove the truth of its contents; and the absence of an opportunity for contemporaneous cross-examination. Analytically, the fact that the statement is tendered for its truth enlivens the hearsay enquiry, while the absence of a contemporaneous opportunity to cross-examine the declarant gives rise to the hearsay dangers.

B. Hearsay Scenarios

The most straightforward hearsay scenario is that in which a witness testifies about what the declarant actually said. Figure one presents a graphical representation of this classic scenario.

Figure one



Hearsay can arise in multiple ways, however. Three scenarios that deserve mention are double hearsay, implied assertions, and the prior statements of a witness.

Double hearsay arises when a witness testifies that the declarant made a statement that was in itself hearsay. For example, in the Supreme Court of Canada case *R. v. Mapara,* [2005] 1 S.C.R. 358 (*Mapara*) the impugned statement was that "the little guy" had a job for the declarant and the witness, Binahmad. The Crown theory was that "the little guy" was the accused, Mapara. The statement was double hearsay because Binahmad testified that the declarant had told Binahmad what the little guy had said, and Binahmad repeated the little guy's alleged statements to the court. McLachlin C.J. held on behalf of the majority that double hearsay is subject to the same analytical approach for admissibility as any other form of hearsay (at para. 30). A practical approach, therefore, is to identify each layer of hearsay and submit each to an individual hearsay analysis.

The issue of whether implied assertions are hearsay presents greater analytical difficulty and remains unsettled in Canada (David Paciocco and Lee Stuesser, *The Law of Evidence* 5th ed. at 109-12 (Paciocco & Stuesser)). An implied assertion is one that may be inferred from the evidence, rather than being directly stated. (Suppose, in a case where a material issue is whether it was raining and a witness is asked "How did you know it was raining?" the answer being "I saw X put his umbrella up." Is that

functionally equivalent to "X told me it was raining"?) An example comes from Hood J.'s decision in *Thompson Estate v. Lougheed*, 2004 B.C.S.C. 191. This case arose from an allegation that land in North Vancouver was transferred by Phillip Thompson to his nephew Ron Lougheed as a result of undue influence on the part of Ron Lougheed and his mother Rose Lougheed. Phillip Thompson's niece Elaine Thompson testified that Rose Lougheed had told Elaine Thompson not to visit Phillip Thompson. The Thompson estate suggested that Rose Lougheed implicitly "wanted to keep [Elaine] Thompson away from Mr. Thompson because they wanted to obtain his property" (at para 38). Hood J. held that Elaine Thompson's evidence about Rose Lougheed's statement was not hearsay because it was not introduced to prove the truth of its contents. However, the implied assertion that Rose Lougheed was seeking to isolate Phillip Thompson in order to exercise undue influence was hearsay, and Hood J. proceeded to analyze its admissibility accordingly.

A third analytical challenge arises when the impugned statement is an out-of-court statement by a declarant who becomes a witness in the eventual case. Where the declarant/witness remembers and adopts the prior statement, no hearsay danger arises because the evidence can be treated as direct testimony.[6] Where the declarant/witness either denies having made the earlier statement or cannot recall the earlier statement, the hearsay dangers are increased and again it will become necessary to identify an appropriate exception in order to admit the statement for the purpose of proving the truth of its contents. *Khelawon* (at para. 41) confirms the possibly counter-intuitive rule that "hearsay extends to out-of-court statements tendered for their truth even when the declarant is before the court."

C. Analytical Approach

The Supreme Court of Canada has established and refined an appropriate analytical approach to the hearsay admissibility enquiry over a series of cases, from *Starr* through *Mapara* to *Khelawon*. Subsequent decisions (e.g., *R. v. Griffin,* 2009 SCC 28; *R. v. Devine*, [2008] S.C.R. 283) have confirmed the applicability of this approach in particular situations. Appendix "A" sets out the analytical approach in some detail. Briefly, where an out-of-court statement is introduced for a hearsay purpose, it is presumptively inadmissible unless it fits within an established exception to the hearsay rule or it meets the requirements of necessity and reliability. If the party seeking to introduce the evidence can establish that the statement fits within an established exception other than admissions by a party, it is open to the party seeking exclusion to argue that the exception does not conform to the requirements of necessity and reliability, or that the particular evidence is not necessary and/or reliable. The latter argument (regarding particular evidence) will only rarely apply (*Mapara*). *R. v. Simpson* (2007), 230 C.C.C. (3d) 542 (Ont. C.A.) (*Simpson*) provides an example of such an argument succeeding. Appendix "B" contains a flowchart that illustrates both the admissibility inquiry and the shifting burden of proof within this inquiry.

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6 Even so, the evidence given by a witness who heard the declarant's statement will still be treated as hearsay if the out-of-court statement is introduced to establish the truth of its contents. See, for example, *R. v. R.(D.)*, [1996] 2 S.C.R. 291.

Given the centrality of the principles of necessity and reliability, the following discussion addresses the use of these concepts in the "principled approach" before turning to the established exceptions to the exclusionary rule.

III. Exceptions to the Rule

The principled approach to admitting hearsay evidence can be traced back to *R. v. Khan*, [1990] 2 S.C.R. 531 (*Khan*) and its general applicability was confirmed in *R. v. Smith*, [1992] 2 S.C.R. 915 (*Smith*). At its most straightforward level, the principled approach establishes a new exception to the hearsay rule, predicated on the requirements of necessity and reliability. This "residual exception" permits hearsay evidence to be admitted where that evidence is both necessary to allow the court to find the truth of the matter in issue (*Smith*) and sufficiently reliable to overcome the traditional hearsay dangers (*Khelawon*).

In *Khelawon*, the Court explained that there are two paths to necessity: the unavailability of a witness to provide direct testimony (see, for example, *Khan* and *Smith*); and the unavailability of testimony at the court proceeding (for example, *B.(K.G.)* and *U.(F.J.)*). Unavailability of a witness includes the circumstances in which a potential witness dies or becomes incapable of testifying, but it also extends to the circumstance in which a potential witness will suffer significant trauma if forced to testify (see, for example, *R. v. Nicholas* (2004), 182 C.C.C. (3d) 152). One classic scenario in which testimony becomes unavailable is that in which the witness recants a prior statement. *U(F.J.)* stands for the proposition that necessity will always be demonstrated when a witness recants a relevant statement about a material issue. Necessity is judged at the time that evidence is being adduced, and the negligence of a party in failing to make reasonable efforts to adduce evidence in a different form (or via a statutory exception) will not prevent a finding of necessity (*R. v. Port Chevrolet Oldsmobile* (2009), 246 C.C.C. (3d) 355 (B.C.C.A.)).

As always, however, the necessity inquiry will be driven by context, and most especially by attention to the relationship between the hearsay evidence and the material issues within the particular case. In *R. v. Oliynyk* (2008), 232 C.C.C. (3d) 411 (*Oliynyk*), the BC Court of Appeal held that necessity was demonstrated in a case in which the Crown introduced wiretap evidence to establish the existence of a conspiracy, despite the fact that some of the participants in the tapped conversations were neither indicted nor called as witnesses. Essentially, the Court held that the wiretaps constituted the best evidence of the conversations between the conspirators, and that in these circumstances necessity was established. While this reasoning arguably conflates reliability with necessity, it seems correct in principle because the traditional hearsay dangers do not arise. Necessity may be satisfied analogously with *Ares v. Venner*, [1970] S.C.R. 608 (*Ares v. Venner*) on the basis that it would be cumbersome to call 12 individual witnesses to confirm their part in the telephone conversations. However, in other cases, the risk of misconstruing co-conspirators' statements or the existence of other reliability concerns may well lead to a different result. The Ontario Court of Appeal held in *Simpson* that an undercover police officer's written, non-contemporaneous note of a co-conspirator's statement was not admissible as the Crown had not demonstrated why it was unable to call the co-conspirator to give evidence against Simpson. The unlikelihood that witnesses would co-operate is probably not adequate to establish

necessity unless the Crown has demonstrably made efforts to secure co-operation (*Simpson*). The Supreme Court of Canada denied leave to appeal in both *Oliynyk* and *Simpson*. In *Simpson*, the Crown's appeal was predicated on the assertion that provincial Courts of Appeal are applying different standards of necessity to similar evidence. We have found no convincing evidence to support this argument—rather, appellate courts and trial judges alike seem to be engaged in the type of case-by-case, contextual analysis contemplated in *Khelawon*.

Reliability has presented conceptual difficulty for courts and practitioners alike. An important aspect of the Court's decision in *Khelawon* is its rejection of a passage in *Starr*, which distinguished between factors relevant to threshold reliability (going to admissibility) and ultimate reliability (going to weight), and stated that factors extrinsic to the making of the statement were not to be considered at the threshold stage. *Khelawon* reversed this, much criticized, *obiter* in *Starr.* After *Khelawon*, there are two complementary ways to demonstrate reliability. First, in some instances, the circumstances in which a hearsay statement was made will warrant its truthfulness. For example, in *Khan,* a three year old child told her mother that their family doctor had sexually assaulted her. Both the declarant's demeanor and the nature of the statement itself provided the Court with significant comfort in its inherent truthfulness. Accordingly, the statement was sufficiently reliable to be admitted into evidence. The second method of demonstrating reliability is to find alternative means by which the truthfulness of the hearsay statement can be tested—that is, by alleviating the hearsay dangers. For example, in *B.(K.G.),* three declarants testified at trial, but each recanted a statement previously made to police. Embarking on a search for alternative indicia of reliability to contemporaneous cross-examination, the Court held that the prior inconsistent statements could be introduced for their truth. Reliability was established in this case by the existence of an accurate (videotaped) record of the declarants' statements, by the fact that the declarants knew they were obliged to tell the truth to police or face possible sanction, and because, as they were witnesses at trial, the accused's counsel could cross-examine the declarants on their out-of-court statements.

In *Starr*, Iacobucci J. confirmed that the principled approach has not subsumed the traditional exceptions to the hearsay rule. These exceptions will, however, progressively become subject to re-assessment in order to ensure that they comply with the twin requirements of necessity and reliability. For example, in *Starr* itself*,* the majority refined the exception that applies to statements of present mental intention, concluding that in order to fit within this exception, a statement must be made naturally and without any circumstances of suspicion. The following exceptions have been confirmed as meeting the requirements of the principled approach:

(1) prior identifications;

(2) co-conspirators' statements;

(3) declarations in the course of duty; and

(4) statements of present intention.[7]

The continued relevance of the traditional exceptions reflects the fact that these exceptions draw on the principles of necessity and reliability. Counsel leading (or objecting to) evidence that may be subject to the hearsay rule should understand and ground their argument on these principles. Again, it must be noted that application of these principles varies according to context. Where a traditional exception applies, it is usually advantageous to rely on that exception rather than the principled approach when seeking admission. This is because evidence that fits foursquare within a traditional exception is presumptively admissible, and the burden shifts to the party resisting admission to demonstrate that either the exception or the evidence does not meet the requirements of the principled approach. By contrast, when a traditional exception does not apply, the party seeking admission bears the burden of demonstrating necessity and reliability.

In the traditional exceptions, both statutory and common law, as under the principled approach, there are varying degrees of necessity, ranging from the unavailability of the declarant to the inconvenience of calling witnesses.[8] Declarations against interest and dying declarations are examples of hearsay exceptions based on the unavailability of the declarant. There are instances, however, when it may be necessary to admit hearsay evidence despite the availability of a witness. For example, the admission of spontaneous *res gestae* statements is necessary even if the witness is available because there is a risk that he or she would have time to fabricate in-court testimony.[9] In other words, admitting the hearsay evidence is reasonably necessary here because the spontaneous statement would be "better" than evidence given under oath. A declaration in the course of a business duty is another example of hearsay evidence that may be admitted despite the availability of the witness. In *Ares v. Venner*, the nurses who made the hospital records were available to testify, but the Court held that there were too many staff members involved in making those records and it would be disruptive to require all of them to attend court. In essence, it was reasonably necessary to admit the records because it would have been inconvenient to call all the witnesses.

Similarly, within the traditional exceptions there are varying warrants for reliability, ranging from statements which are bolstered by procedural safeguards to those which are unlikely to be fabricated based on "common sense." Reliability with respect to business records is premised on routine and the potential for discipline. Testimony from a prior proceeding may be reliable if the witness was under oath at the time the statements were made and an opposing party had adequate opportunity for cross-examination. *Res gestae* statements may be reliable as impulsive utterances. The declaration against interest exception appeals to common sense in that "people do not readily make statements that admit

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7 Cases are cited in Appendix "A."

8 The general discussion of necessity and reliability draws heavily on Chapter 1, "Basic Concepts of the Law of Evidence," in CLEBC, *Introducing Evidence at Trial: A BC Handbook* (Vancouver: CLEBC, 2007), at 6.

9 David Paciocco and Lee Stuesser, *The Law of Evidence*, 4th ed., Toronto: Irwin Law, 2005, at 143.

facts contrary to their interests unless those statements are true."[10] Counsel must remember, however, that the ultimate reliability of hearsay statements must be decided by the trier-of-fact. More detailed discussion of the "traditional" hearsay exceptions can be found in Chapter 10 of *Introducing Evidence at Trial: A BC Handbook*.

Some categorical exceptions are now rarely used in preference for the principled approach. Two examples are the exception for statements against penal interest and the dying declarations exception. Each of these common law exceptions is extremely limited in its application, and subject to criteria that are arguably unnecessarily stringent (see the discussion, including cases cited, in Paciocco & Stuesser, chapter 5, sections 7 & 8). Counsel seem to have concluded that it is easier simply to rely on the principled approach when seeking to admit a statement that may fit within one of these common law exceptions.

An important exception to the general relevance of the principled approach applies in relation to admissions by a party. In *R. v. Foreman* (2002), 62 O.R. (3d) 204 (C.A.) and *R. v. Terrico*, [2005] B.C.C.A. 361 (leave to appeal to Supreme Court of Canada refused [2005] S.C.C.A. 413), appellate courts held that admissions by a party are not subject to the necessity/reliability analysis, but are directly admissible at the opposing party's instance.[11] This exception to the reliability and necessity analysis includes statements by an accused person, although the usual rules regarding voluntariness and right to silence naturally continue to apply. This direct path to admissibility reflects the philosophy that a party to litigation has no cause for complaint if her own statements are used against her (see *Evans* per Sopinka J.). Given that some concerns have arisen about convictions secured on the basis of "Mr Big" sting operations, the presumed reliability of accused people's statements against interest arguably should receive greater judicial scrutiny in future cases.[12] Whenever a party wishes to tender an out-of-court statement by the opposing party, it is of course necessary to satisfy the trier of fact that the statement was actually made. Note that the co-conspirators exception, which was traditionally grouped with admissions by a party, is still subject to a necessity and reliability analysis—in *Mapara*, the Supreme Court of Canada confirmed that the co-conspirators exception is subject to the principled approach, but also confirmed that the traditional exception met those requirements.

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10 Paciocco and Stuesser, *ibid*., at 149-50.

11 In *Khelawon*, at para. 65, the Court stated that "some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In these cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators."

12 For example, the acquittal of Kyle Unger after spending 14 years in prison. Unger's "confession" was allegedly rife with basic errors about the crime he had supposedly committed and an external reliability analysis would have cast doubt on the confession. Compare *R. v. Osmar* (2007), 84 O.R. (3d) 271 (Ont. C.A.) in which the Ontario Court of Appeal reiterated that no reliability and necessity analysis need be conducted in the context of a Mr Big confession.

There is some disagreement about whether the admissions by a party exception extends to statements made by an employee or agent who is not expressly authorized to bind the employer/principal. The better view is probably that, where these statements are made in the course of duties, they will bind the employer/principal (see, for example, *Morrison Knudsen Co. v. British Columbia Hydro & Power Authority* (1973), 36 D.L.R. (3d) 95 (B.C.S.C.); *Ault v. Canada (Attorney General)*, [2007] O.J. No. 4924 (S.C.J.) but compare *R. v. Strand Electric Ltd*., [1969] 1 O.R. 190 (C.A.)).

Two further exceptions to the hearsay rule warrant particular attention. First, in cases including *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, and *R. v. Marshall,* [2005] 2 S.C.R. 220 (*Marshall*), the Supreme Court of Canada has held that oral history evidence is admissible to assist Aboriginal claimants to prove Aboriginal rights and Aboriginal title claims. In *Marshall*, McLachlin C.J.C. held that oral history evidence should be admitted "where it meets the requisite standards of usefulness and reliability," judged "with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved" (at para. 70). McLachlin C.J.C. emphasized the *sui generis* nature of Aboriginal title and rights, and warned judges that in assessing oral history evidence they should resist making "facile assumptions based on Eurocentric traditions of gathering and passing on historical facts" (at para. 69). In *Williams v. B.C.*, 2006 BCSC 1427, Vickers J. criticized an expert witness who seemed to suggest that Aboriginal oral history evidence should be given no weight unless it was corroborated by other evidence. Vickers J. held that "A failure to give such evidence independent weight would contradict the directions provided by the Court in *Delgamuukw*." At the same time (as Vickers J. also noted), Aboriginal oral history evidence should not be given more weight than it deserves and will be assessed in the light of other evidence (see *Benoit v. Canada*, 2003 FCA 236).

Second, in *R. v. Abbey*, [1982] 2 S.C.R. 24 and *R. v. Lavallee*, [1990] 1 S.C.R. 852 (*Lavallee*), the Supreme Court of Canada held that where an expert opinion is based on hearsay statements, that hearsay may be introduced at trial for the purposes of explaining how the expert has reached his or her conclusions. Before the trier of fact attaches weight to the expert opinion, it must decide whether at least some of the facts that form the basis of the expert opinion have been proved via evidence properly admitted at trial (see particularly *Lavallee* at para. 66).

IV. Conclusion

The Supreme Court of Canada's decision in *Khelawon* represented a welcome return to the unanimity and clarity that was the hallmark of the Court's early approach to hearsay reform, and this unanimity has largely persisted through subsequent decisions. The Court's decision to abolish the unworkable *Starr* distinction between factors going to threshold and ultimate reliability was well received by judges, practitioners, and evidence law scholars. As with any major review of a field of law, however, there remain some areas of contention and uncertainty. Applying the principles of necessity and reliability in a disciplined manner overcomes much of this residual disorder. For practitioners, understanding the rationale underpinning the hearsay rule, acquiring a firm grasp of the principled approach, and appreciating the principled approach's relation to the traditional exceptions is tremendously beneficial to effective advocacy. Possessing this knowledge is the best way of ensuring that, when faced with the

task of identifying hearsay and then applying the appropriate analytical framework, one can readily frame objections and argument to meet the demands of the contemporary Canadian law of hearsay.

V. Recommended Reading

CLEBC, *Introducing Evidence at Trial: A BC Handbook* ,Vancouver: CLEBC, 2007).

David Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed., Toronto: Irwin Law, 2008.

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VI. Appendix "A"—Hearsay: Analytical Approach

1. Is the statement hearsay?

A. Is it an out of court statement (express or implied)?

B. Is it being introduced to prove the truth of its contents?

Non-truth purposes may include:

(1) to establish the declarant's belief at the time of making the statement;

(2) to establish the recipient's belief at the time of hearing the statement;

(3) to establish that the hearer or the declarant had a particular state of awareness or knowledge.

*If yes to 1.A **and** 1.B, the statement is hearsay and you should proceed to consider the exceptions. If no, the statement is not hearsay.*

2. Does the hearsay statement fit within an established exception to the hearsay rule?

(1) Admissions by a party

(2) Prior identifications

(3) Prior testimony

(4) Prior convictions

(5) Declarations against interest by non-party

(6) Dying declarations

(7) Declarations in the course of duty

(8) *Res gestae*

(9) Declarations as to reputation, pedigree and family history

(10) Statements in ancient or public documents

A. If the evidence fits within *any* established exception, it is presumptively admissible (*per* Iacobucci J. in *Starr* and McLachlin C.J. in *Mapara*.

B. If the evidence is an admission by a party, including a statement by the accused in a criminal case, it is admissible. There is no need to consider the necessity and reliability of that evidence before concluding admissibility, but the general judicial discretion to exclude evidence still applies. See *Starr*; *Foreman*; and *Terrico*.

C. If the evidence is admissible under an exception other than admissions by a party, it may be possible to resist admission using the principled approach. If a party wishes to resist the admission of hearsay evidence that fits within an established exception, they may request a *voir dire*. The party resisting admission has the burden of establishing one of the following propositions on the balance of probabilities:

1. The exception does not conform to the requirements of reliability and necessity, and should be modified to bring it into compliance (may be difficult to establish—in *Starr*, the SCC changed the present intention exception but in *Mapara*, the majority refused to alter the co-conspirators' exception);

The following exceptions have been confirmed as meeting the twin requirements of necessity and reliability:

i. prior identifications (*Starr*; *R. v. Tat* (1997), 117 C.C.C. (3d) 481);

ii. co-conspirators (*Mapara*);

iii. declarations in the course of duty (*R v. Larsen* 2003 B.C.C.A. 18); and

iv. spontaneous statements (*res gestae*) (*Starr*).

2. Although the exception is generally sound, in this particular context the hearsay statement does not meet the requirements of necessity and reliability. This will only arise in "rare cases" (*Mapara*).

3. The judge should exercise his or her residual discretion to exclude the evidence on the basis that its prejudicial effect outweighs its probative value (defence evidence will only be excluded where prejudicial effect substantially outweighs probative value—*R. v. Seaboyer,* [1991] 2 S.C.R. 577).

3. If the hearsay statement does not fit within an established exception, should it be admitted under the principled approach? (*Khan*)

A. The party seeking admission has the burden of establishing in a *voir dire* that the tests of reasonable necessity and reliability are satisfied on the balance of probabilities. (*Khan* and *Khelawon* explain how to approach these tests.)

B. If the trial judge is satisfied that the information satisfies the principled approach, he or she may still exercise the general discretion to exclude evidence if satisfied that its prejudicial effect (substantially) outweighs its probative value.

VII. Appendix "B"—Hearsay Flowchart