Hearsay

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The hearsay rule has been described by Lord Reid:

> [...] *the law regarding hearsay evidence is technical, and I would say absurdly technical.*[1]

So, too, Professors Morgan and Maquire:

> [...] *a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.*[2]

A discretionary approach to the rule, based on principle, rather than pigeon-holing would be more sensible. We exclude hearsay evidence because we regard the adversary as disadvantaged by his inability to cross-examine the declarant with respect to the dangers resident in the out-of-court statement of perception, memory, communication and sincerity.[3] Also, we believe that the declarant's presence in the courtroom will enhance trustworthiness for a number of other reasons; the solemnity of the occasion, the presence of the opposite party, the possibility of a perjury prosecution. If we can find within the circumstances surrounding the making of the out-of-court statement sufficient guarantees of trustworthiness the statement may then deserve receipt even if we cannot fit it within one of the particular exceptions created by the courts in the eighteenth and nineteenth centuries. We need to recognize that the pigeon-hole exceptions were created by judges who believed that the out-of-court statement in their particular case warranted consideration. There was a time when all judges approached the problem on a principled way.

In *Myers* v. *D.P.P.*,[4] the majority of the House of Lords in England decided that it was too late to create a new exception since it had been so long since the last one had been created. If reform was to be accomplished it would have to be done by the legislature. The Supreme Court of Canada, in *Ares* v. *Venner*[5] considered *Myers* but decided that it:

> [...] *should adopt and follow the minority view rather than resort to saying in effect: "This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job".*[6]

The Court in *Ares* approved the reception of nurses' notes to establish the truth there expressed as to the plaintiff's condition. The Court found circumstantial guarantees of trustworthiness in the fact they were made by trained observers and relied on in affairs of life and death. The Court recognized that the adversary was not prejudiced by the reception of these notes. If the nurses were in fact called they would have been allowed to "refresh their memory" by having regard to their notes and little would be gained by their attendance as they would ordinarily add little to the information furnished by the record alone. The notes were made by trained observers and that should satisfy any concerns regarding the hearsay danger of perception. The notes were made contemporaneously with the observation and so concern for the memory danger should be stilled. Sincerity of the declarant should not be a concern as the nurse was under a duty to record her observations accurately and discipline could flow from any mistakes. The Court displayed a common sense, principled approach. The Court was aware of the reason for the rule and why that reason was not applicable to the factual situation before the trial judge. In his unanimous opinion for the Court, Justice Hall was clearly inviting the profession to join in the attempt at reform of this absurdly technical rule by approaching admission through discretion based on the rule's underlying rationale. That call went largely unheeded.

And then came *R.* v. *Khan*.[7] The accused was charged with sexual assault. The alleged victim was three-and-a-half years old at the time of the assault. The child had been ruled incompetent to give sworn or unsworn evidence. The issue was the admissibility of the victim's statement to her mother shortly after the incident. The Court decided to adopt the flexible and principled approach of *Ares* v. *Venner* in a criminal case. The Court decided that where there were grounds of necessity and sufficient circumstances promoting reliability surrounding the making of the statement then the hearsay could be received. With respect to necessity the Court wrote:

> *The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve.*[8]

In *Khan* v. *College of Physicians and Surgeons of 0ntario,*[9] the Ontario Divisional Court reviewed the decision of the College to revoke Dr. Khan's licence to practice. At the hearing of the Discipline Committee, the child testified and her mother was also permitted to testify as to her earlier statement. That hearing was conducted before the decision of the Supreme Court of Canada in the criminal case. Writing for the majority, O'Driscoll, J., noted:

> *[T]he precondition of "necessity" was absent and, therefore, the out-of-court statement by Tanya to her mother did not qualify as an exception to the rule against hearsay.* [...] *[C]ounsel for the respondent College submitted that because Tanya, in her evidence before the Discipline Committee, could not recall anything about "ejaculation", it was "necessary" to allow the mother to give the hearsay statement as truth of the facts contained therein.* [...] *Whatever may be the outside limit of the meaning of "necessity", in my view, it does not include shoring up and/or filling in aspects of the evidence of Tanya.*[10]

The Ontario Court of Appeal reversed the Divisional Court's ruling. Doherty, J.A., writing for the Court, said:

> *A rule of automatic exclusion in cases where the child testifies would undermine the flexible case-by-case approach adopted in* Khan, *thereby detracting from the avowed goal of avoiding strict and prefabricated exclusionary rules in cases involving allegations of sexual abuse against young children.* [...] *In my view,* Khan *holds that where a party seeks to introduce an out-of-court statement made by a child and referrable to alleged abuse of that child, the party must establish that the reception of the statement is necessary and that the statement is reliable. The fact that the child testifies will be relevant to, but not determinative of, the admissibility of the out-of-court statement.* [...] *The fact that the child testifies will clearly impact on the necessity of receiving his or her out-of-court statement. Necessity cannot, however, be equated with unavailability.* [...] *In the context of cases involving an alleged sexual assault on a child, reasonable necessity refers to the need to have the child's version of events pertaining to the alleged assault before the tribunal charged with the responsibility of determining whether the assault occurred. In my view, if*

> *that tribunal is satisfied that despite the viva voce evidence of the child, it is still "reasonably necessary" to admit the out-of-court statement in order to obtain an accurate and frank rendition of the child's version of the relevant events, then the necessity criterion set down in* Khan *is satisfied.*[11]

In *R.* v. *Aguilar*,[12] the accused was charged with committing a sexual assault by touching a young girl's private parts. The complainant, who was just under eight at the time of the alleged sexual assault and just under ten at the date of trial, gave evidence first. Her evidence was that, on the night in question the accused kissed her in the mouth. The complainant's mother testified that her daughter told her "He tried to kiss me. And I told him I was too small. He tried to put his tongue on my private part". The trial judge ruled the statement was admissible as an exception to the hearsay rule, the accused was convicted and appealed. In allowing the appeal, Catzman, J.A., wrote:

> *In* Khan, *Doherty J.A. concluded that, in the circumstances of that case, the requirement of necessity had been established. I have concluded that, in the circumstances of the present case, that requirement has not been established.* [...] *[T]he Crown has not established that it was reasonably necessary to admit the complainant's out-of-court statements in the present case. I am influenced particularly by the facts that the complainant was almost eight years old at the time of the alleged event; that the trial took place within two years of that event; and that no evidence was adduced to explain the complainant's failure to testify beyond the evidence which she gave at trial. In these circumstances, I do not consider that the foundation for the admission of the complainant's out-of-court statements on the ground of necessity was made out in the record before us in the present case.*[13]

In *R.* v. *Khan*,[14] the retrial of the criminal case, following the Supreme Court's dismissal of the accused's appeal, the child, now aged 9, testified. She was cross-examined and discrepancies were pointed out between her evidence at the disciplinary hearing and her evidence at the trial. At the trial, for example, she testified to the accused putting his penis in her mouth and the accused then wiping her chest with a kleenex. At the discipline hearing she had not mentioned the kleenex incident. She had not mentioned the ejaculation at the discipline hearing. Pointing to this and other discrepancies, defence counsel submitted that it would be dangerous to convict

upon T.'s evidence, relying on the rule of practice in *R.* v. *Kendall,*[15] that it is dangerous to convict on the evidence of a child even when the child has been sworn. The mother, while testifying at the trial about matters that she herself had witnessed, did not relate what the child had told her soon after leaving the doctor's office. I understand that the trial judge ruled that either the child could testify or the mother could relate the statement; both could not occur. If the child testified there'd be no grounds of necessity. In this situation would it be possible, for the Crown, in reply, to lead evidence of the child's statement? In *Khan,* in the Supreme Court of Canada, the ruling that the statement could only be received if it was necessary, was a ruling dealing with the admissibility of a statement tendered for the purposes of proving the truth of that statement, that is when tendered as a hearsay statement. In the situation on the retrial, where the child's story was attacked on cross-examination, where it was noted that she is testifying about a matter, the kleenex, which she had not mentioned at the disciplinary hearing, where the suggestion was that the story has been since made up, should the Crown be able to rehabilitate the witness by calling the mother to show that on an even earlier occasion she made a statement consistent with her present testimony? The out-of-court statement would then be tendered not for the purpose of proving its truth but only for the purpose of showing that such a statement was made. Therefore, *Khan* wouldn't apply and the normal rules of evidence which allow evidence of a previous consistent statement to support credibility when allegations are made of recent fabrication,[16] should apply and permit receipt.[17]

In *R.* v. *Smith,*[18] the accused was charged with murder. The evidence at trial indicated that the accused and the deceased left Detroit together and drove to Canada where they spent the weekend together. The theory of the Crown was that the accused was a drug smuggler. He had asked the deceased to help him smuggle some cocaine back to the U.S. but she had refused. According to the Crown's theory, he abandoned her at the hotel, but later returned. He then drove her to a service station where he strangled her.

To support this theory, the Crown relied upon evidence of four telephone calls made by the deceased to her mother. The mother testified that in the first call, her daughter said that the

accused had abandoned her and she wanted a ride home. In the second call, an hour later, the deceased told her that the accused had still not returned. In the third call, a half hour later, her daughter told her that the accused had come back for her, and that she would not need a ride home. The fourth telephone call, about an hour later, was traced to a pay telephone at the service station near which the deceased's body was found. In that call her daughter told her that she was "on her way". The Crown also led evidence of a phone call, about twenty minutes later, traced to the pay telephone at the service station, which was made to the accused's residence in Detroit. A witness testified that he saw the accused near that pay telephone. The accused was convicted. The Court of Appeal ruled the third and fourth phone calls were inadmissible hearsay and ordered a new trial. The Crown appealed the rulings respecting the first three phone calls. The Supreme Court decided that the evidence did not fit within a recognized hearsay exception but that that was not necessarily fatal to the Crown's case. Writing for the Court C.J. Lamer decided:

> *This Court has not taken the position that the hearsay rule precludes the reception of hearsay evidence unless it falls within established categories of exceptions, such as "present intentions" or "state of mind". Indeed, in our recent decision in* R. v. Khan *we indicated that the categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence which the hearsay rule was originally fashioned to avoid.* [...] *The criterion of "reliability" - or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness - is a function of the circumstances under which the statement in question was made.* [...] *The companion criterion of "necessity" refers to the necessity of the hearsay evidence to prove a fact in issue. The criterion of necessity, however, does not have the sense of "necessary to the prosecution's case".* [...] *As indicated above, the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations. Wigmore, while not attempting an exhaustive enumeration, suggested at 1421 the following categories:*
>
> *"(1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason ....*
>
> *(2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources... The necessity is not so*

> *great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.*"[19]

There were obviously grounds of necessity in *Smith*, and the Court found the first two phone calls sufficiently reliable to be received. The Court decided however that the third phone call was not sufficiently reliable and therefore ought to be excluded.[20]

Chief Justice Lamer in *Smith* characterized *Khan* as a "triumph of a principled analysis over a set of ossified judicially created categories". While applauding this new approach, the next task, the articulation of what will qualify as the necessary grounds of necessity and reliability is perhaps more daunting. In *Smith* the Court was easily satisfied that there were grounds of necessity; the declarant there was dead. The Court went on, however, to assist us in determining the meaning of the word. The Court gives an expansive definition of the word which does not confine it to instances of unavailability. The Court adopted Wigmore's flexible approach and allowed that "expediency or convenience" will do. Counsel will establish necessity if it persuades the Court that the relevant evidence, or evidence of the same value, is not otherwise available. We will have to await future cases to flesh out this idea.

The Court was persuaded in *Smith* that the first two telephone calls had the necessary indicia of reliability since the Court perceived there to be no known reason for the victim to lie. The Court was satisfied that the traditional dangers associated with hearsay evidence, perception, memory and sincerity, were minimal and the absence of cross-examination would affect only the weight to be given to the evidence and not admissibility. The Court theorized that a trier of fact could be properly instructed to take those possible dangers into account in assessing the worth of the statements. The Court took a different view with respect to the third telephone call. The Court hypothesized that the victim may have been mistaken or may have intended to deceive her mother, to assuage her. In the Court's judgment these dangers were too great to let the jury consider the contents of the third call. This decision, a judgment call, illustrates the potential difficulty with the principled discretionary approach. There is a serious risk that trial judges will differ greatly

in applying the elastic standard of equivalent trustworthiness and the lack of uniformity will make preparation for trial difficult.[21] Another judge could, it is submitted, conclude that, considering all the circumstances surrounding the third call, the evidence was sufficiently trustworthy to warrant putting it to the jury.[22]

The Federal Rules of Evidence in the United States,[23] adopted by many of the states, provides as an exception to the hearsay rule, with the availability of the declarant being immaterial:

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

We in Canada should pay particular attention to the closing sentence of that provision. Having embarked on a principled, discretionary approach to the law of hearsay it seems only fair that the adversary be given notice of a litigant's intention to so justify the reception of the evidence that he or she might be able to advance competing arguments on the criteria of necessity and reliability.

In *R.* v. *B.(K.G.)*,[24] the Court implemented the *Khan/Smith* development in the area of previous inconsistent statements. The accused and three other young men became involved in a street fight with two others. In the course of the fight one of the four young men pulled a knife and inflicted a fatal stab wound. The four young men then fled the scene. About two weeks later, the three young men involved with the accused were interviewed separately by the police. With the youths' consent the interviews were videotaped. In their statements, the three young men told the police that the accused had made statements to them in which he acknowledged that he caused

the death of the deceased by the use of a knife. The accused was charged with second degree murder. When called at trial by the Crown, the three young men refused to adopt their earlier statements respecting the admissions made by the accused. They admitted they had made the statements to the police but said that they had lied to the police and that the accused had not in fact made the incriminating statements. The trial judge held that the only use that could be made of the prior inconsistent statements was with respect to their credibility, and that the prior inconsistent statements could not be used as evidence of the truth of the matters stated therein; they could not be tendered as proof that the accused actually made the admissions. The only other evidence of the identity of the assailant was identification evidence provided by the victim's brother which was regarded as weak. The trial judge acquitted the accused. The Crown unsuccessfully appealed the acquittal to the Court of Appeal and then to the Supreme Court. The Supreme Court decided that the time had come for the orthodox rule with respect to previous inconsistent statements to be replaced by a new rule recognizing the changed means and methods of proof in modern society. The Court took a flexible approach to the necessity requirement and found the same resident in the fact that "it is patent that we cannot expect to get evidence of the same value from the recanting witness or other sources." Regarding the reliability requirement Lamer, C.J., wrote for the majority:

> *[I]t is clear that the orthodox rule, in so far as it is based on the hearsay rule, has been undermined by the decisions of this Court in* Khan *and* Smith. [...] *[T]he requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to the two hearsay dangers a reformed rule can realistically address: if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement. Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.* [...] *The trial judge must satisfy him or herself (again, in the majority of cases on the balance of probabilities) on the* voir dire *that the statement was not the product of coercion of any form, whether it involves threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.*[25]

Justice Cory, Justice L'Heureux-Dubé concurring, was moved to write a separate concurring opinion. He downgraded the importance of an oath and offered his own criteria:

(1) *That the evidence contained in the prior statement is such that it would be admissible if given in court.*

(2) *That the statement has been made voluntarily by the witness and is not the result of any undue pressure, threats or inducements.*

(3) *That the statement was made in circumstances, which viewed objectively would bring home to the witness the importance of telling the truth.*

(4) *That the statement is reliable in that it has been fully and accurately transcribed or recorded.*

(5) *That the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement.*[26]

If those conditions are met then the prior inconsistent statement should be admitted for all purposes.

ANNEX 1

PROBLEMS

1. The accused is charged with importing heroin. A government analyst has been qualified and described the sample given to him for analysis as heroin. He is being cross-examined.

Q: Sir, you have advised that this white powder analyzed as heroin.

A: Yes.

Q: And I understand that you used spectrographic analysis to come to that conclusion.

A: Yes. I compared the spectrum of the suspect sample with a spectrum for heroin in an authoritative text.

Q: I understand you also compared the spectrum produced by the suspect sample with that produced by a known sample.

A: Yes.

Q: Where did you get your known samples?

A: They're sent by mail to us here in Vancouver by the Dominion Analyst in Ottawa.

Q: How do you know the "known" sample is what it's said to be?

A: I take the word of the Dominion Analyst represented by his certificate.

Q: Well, that may be good enough for you but it's not good enough for the courtroom. You are basing your opinion on hearsay and as Chief Justice Dickson said in the Abbey decision the opinion is therefore entitled to "no weight".

CROWN COUNSEL: Surely my friend is not insisting that I call the Dominion Analyst?!

DEFENCE COUNSEL: I don't make the law.

Compare *R.* v. *Abbey* (1982), 29 C.R. (3d) 193 (S.C.C.), *R.* v. *Jordan* (1984), 39 C.R. (3d) 50 (B.C.C.A.), *Lavallee* v. *The Queen* (1990), 76 C.R. (3d) 329 (S.C.C.) and *R.* v. *Giesbrecht* (1993), 20 C.R. (4th) 73 (Man. C.A.)

2. The accused is charged with possession of stolen goods. A number of leather coats were found in his garage. Underneath the lining of each, serial numbers had been imprinted into the leather. The prosecutor calls two employees of Simpsons to identify the seized coats as property removed from their store during a break-in two weeks prior to accused's arrest. The first employee has been sworn.

EMPLOYEE 1:

Q: The night before the break-in, could you advise the court what you did?

A: I took inventory of all our coats.

Q: How did you do that?

A: Well, Madge, who works with me went into the racks and examined each coat. Then she yelled out its serial number, style and colour. I wrote these things down on these forms.

Q: I see you're looking at some documents. These are the forms showing the serial numbers of the coats?

A: Yes.

Q: Would you proceed to read these numbers to the Court?

OBJECTION: Your honour, I object to this evidence as hearsay.

CROWN: I'm leading this evidence to prove the fact of the statement made - the fact that these entries were made - not for their truth.

DEFENCE: Oh, okay then.

Witness proceeds to give serial numbers.

The second employee has been called, sworn and is being examined by the counsel.

Q: We've heard evidence of an inventory being conducted on May 7, the day before the break-in. What part did you play in that?

A: I examined the coats, observed their style, colour and serial number and yelled out the same to Martha. Martha wrote down whatever I yelled out.

OBJECTION: Your honour, this witness can't testify that Martha wrote down the details accurately as she yelled them out to her. In fact this witness is testifying to her own hearsay. To statements she earlier made to Martha. About which she now obviously has no memory.

CROWN: This witness's evidence is not being led for its truth but only to prove that statements were in fact made to Martha. Martha can speak to the accuracy of the recording. This witness's evidence is not hearsay.

DEFENCE: Your honour, I'm puzzled. My friend says that neither of these witnesses is giving hearsay evidence and yet, on the basis of their evidence about statements earlier made he would have us believe these coats are properly identified. Some of the evidence must have been led for the purpose of proving truth. Can you help?

See *R.* v. *Penno* (1977), 37 C.R.N.S. 391 (B.C.C.A.).

3. A husband and wife died as the result of injuries suffered in an automobile accident. In subsequent litigation over the devolution of their respective estates the plaintiff is seeking to establish that the wife died first. Plaintiff calls a witness who was at the scene of the accident.

Q: So you were at the scene of the accident?

A: Yes, I arrived shortly after the car slammed into the guardrail. In fact it was I that called for the ambulance. Then I tried to assist the man and woman out of their car. They were both bleeding very badly.

Q: Then what happened?

A: Well the ambulance came and the attendant looked at both of them. He was probably trying to figure out who could be saved. I was consoling the man who was

deeply concerned about his wife. He was telling me what a wonderful person she was and how badly he felt about losing control of the car. As he was talking I looked over to where his wife was lying and I saw the ambulance attendant draping a sheet over her body. As he did this he covered her face with a sheet. I knew then that she was dead. I couldn't bring myself to tell the man. He was still describing his wife.

COUNSEL FOR DEFENDANT: Your honour, I must object. This witness is relating hearsay. If my friend wants to lead evidence of what the ambulance attendant observed he should call him.

COUNSEL FOR PLAINTIFF: Hearsay, your honour? This witness hasn't related anything said by the attendant.

Compare *R.* v. *Kearley*, [1992] 2 All E.R. 345 (H.L.).

4. The accused is charged with the murder of his wife. His defence was that the killing occurred while he was in the throes of an epileptic seizure and that total amnesia followed the seizure. He is now being cross-examined.

Q: So you say that the killing was involuntary. You never intended to hurt her.

A: Yes, that's true.

Q: Did you know that five days before the killing your wife swore an information before a justice of the peace that she feared you would cause her bodily harm and that you had threatened her a number of times that month.

A: I heard, the day before the killing, that the police were looking for me to serve me with some documents to have me bound over to keep the peace. I was just devastated to learn that. There was no reason.

CROWN COUNSEL: Your honour, I should alert my friend that I intend to apply, at the end of the defence's case, to reopen my case to prove the sworn evidence of the victim. The document just came into my possession today and I was frankly surprised by it.

DEFENCE COUNSEL: Your honour, my friend is seeking to introduce a hearsay statement made by the victim five days before the unfortunate incident. It's clearly not a dying declaration and it's certainly not res gesta. What exception is it?

CROWN COUNSEL: I'm tendering it your honour, not for the purpose of proving its truth, but only for the purpose of showing the statement was made. From that fact you can infer that the victim was in fear of the accused. You can also infer a motive in the accused.

DEFENCE COUNSEL: Your honour - !

CROWN COUNSEL: And if that doesn't satisfy my friend, I submit the statement is receivable as a declaration as to state of mind and therefore receivable as an exception to the hearsay rule. The statement demonstrates her fear of the accused, resulting from his animosity toward her, and the swearing of the information allows the jury to measure the extent of the animosity of the accused toward the victim.

Compare *Collin* v. *R.* (1987), 55 C.R. (3d) 152 (Que. C.A.).

See also, *R.* v. *McKinnon* (1989), 70 C.R. (3d) 10 (Ont. C.A.) and *R.* v. *Delafosse* (1989), 47 C.C.C. (3d) 165 (Que. C.A.). For an excellent exposition of the law in this area see *R.* v. *P.(R.)* (1990), 58 C.C.C. (3d) 334 (Ont.).

5. The accused, Harry Smith is charged with murder. A Crown witness is testifying regarding his observations of the victim.

Witness: She came running out of the accused's apartment covered with blood. Her throat had been slit. It was horrible. She screamed "See what Harry has done", and fell to the ground.

Defence: Objection my Lord. I'm surprised my friend would knowingly lead such hearsay evidence.

Crown: The poor woman is not here to speak for herself. Surely the evidence is of great probative value and ought therefore to be received.

Compare *R.* v. *Bedingfield* (1879), 14 Cox C.C. 341, *R.* v. *Clark* (1983), 35 C.R. (3d) 357 (Ont. C.A.), *R.* v. *Slugoski* (1985), 43 C.R. (3d) 369 (B.C.C.A.) and *R.* v. *Khan* (1988), 64 C.R. (3d) 281 (Ont. C.A.) and *R.* v. *Khan* (1990), 79 C.R. (3d) 1 (S.C.C.).

ENDNOTES

1. *Myers* v. *D.P.P.,* [1965] A.C. 1001 at 1019 (H.L.).

2. E.M. Morgan & J. Maguire, "Looking Backward and Forward at Evidence" (1937) 50 Harv. L. Rev. 909 at 921.

3. See generally E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv. L. Rev. 177.

4. *Supra* note 1.

5. *Ares* v. *Venner* (1971), 14 D.L.R. (3d) 4 (S.C.C.). For differing views as to whether *Ares* v. *Venner* represents the law in Ontario, compare *Tecoglas Inc.* v. *Domglas Inc.* (1985), 51 O.R. (2d) 196 (H.C.) and *Exhibitors Inc.* v. *Allen* (1990), 70 O.R. (2d) 103 (H.C.).

6. *Ares* v. *Venner, ibid* at 16.

7. *R.* v. *Khan* (1990), 79 C.R. (3d) 1 (S.C.C.). The Court recognized that the *Ares* v. *Venner* approach was applicable to criminal cases as well as civil. For commentary on this and for description and citations of a number of earlier appellate opinions recognizing the applicability, see R.J. Delisle & M. Rosenberg, *Ares v. Venner and the Criminal Law* (1990), 78 C.R. (3d) 158. And see *R.* v. *Miller* (1992), 9 C.R. (4th) 347 at 363 (Ont. C.A.) an appeal from a murder conviction, applying *Khan*:

> *"Although the reasons in the Khan case referred to this flexible approach in the context of the evidence of children of tender years in cases involving sexual offences, both the comments* [appearing in Khan] *and the court's reference to its decision in* Ares v. Venner, *and to the dissenting reasons of Lord Pearce in* Myers v. D.P.P., *indicate approval of a more flexible approach where warranted by the circumstances".*

8. *R.* v. *Khan, ibid.* at 13. See *R.* v. *A.(S.)* (1993), 11 O.R. (3d) 16 (C.A.), regarding the instructions that should be given to the jury where a child's out-of-court statement is admitted.

9. *Khan* v. *College of Physicians and Surgeons of Ontario* (1991), 43 O.A.C. 130.

10. *Ibid.* at 137.

11. *Khan* v. *College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 at 656-657 (C.A.).

12. *R.* v. *Aguilar* (1992), 15 C.R. (4th) 157 (Ont. C.A.).

13. *Ibid.* at 165-167.

14. *R.* v. *Khan, supra* note 7.

15. *R.* v. *Kendall* (1962), 132 C.C.C. 216 (S.C.C.).

16. See for example, *R.* v. *Owens* (1987), 55 C.R. 386 at 393 (Ont.C.A.).

17. But see *R.* v. *Collins* (1992), 9 C.R. 377 (Ont. C.A.). The child gave evidence of the sexual assault. She was cross-examined. The mother testified that the daughter told her that the accused had touched her vagina. The Court noted that: "It was conceded that that evidence was admissible because of the cross-examination directed earlier at the trial". In a short endorsement the Court directed a new trial saying that the trial judge had made serious errors in the application of the mother's evidence: "We do not think that this evidence can be used for anything but the limited purpose of refuting the concoction suggested in cross-examination. It cannot be used in any way for proof of its contents or to confirm the testimony". While it may be correct to say that the statement cannot be used "for proof of its contents", if the mother's evidence rebuts the concoction suggested to the child in cross-examination, isn't the child's testimony confirmed?

18. *R.* v. *Smith* (1993), 15 C.R. (4th) 133 (S.C.C.).

19. *Ibid.* at 145-149.

20. On the retrial the third statement was excluded and the accused was acquitted. After two days the jury came back with a question for the trial judge as to why they were able to hear the contents of the first two statements but not the third!

21. See Weinstein's *Evidence*, 803-385.

622. See for example R.J. Delisle, "R. v. Smith: The Relevance of Hearsay" (1991), 2 C.R. (4th) 260.

23. 28 U.S.C.A. 803 (West Supp. 1984).

24. *R.* v. *B.(K.G.)*, [1993] 1 S.C.R. 740.

25. *Ibid* at 774, 795 and 802.

26. *Ibid.* at 827.