A COMMENTARY

ON

THE PROPOSED UNIFORM EVIDENCE ACT (The Act)

BY

JOHN SOPINKA

I N D E X

CHARACTER EVIDENCE

The Common Law

Unless the accused puts his character in issue the Crown cannot in the first instance prove the bad character of the accused either by evidence of general reputation or specific acts of past misconduct.[1]

This does not prevent the Crown from adducing acts of past misconduct which are relevant to an issue other than to prove disposition. For example, the Crown can adduce such evidence if:

(a) it constitutes a similar act;[2]

(b) to refute evidence given by the accused;[3]

When evidence is adduced under this exception to the general rule it must not be used directly for the wider purpose of proving guilt by reason of the accused's disposition as disclosed in the acts of misconduct. The trial Judge must charge the jury that it is to be used for the limited purpose for which it is admitted.[4]

The accused puts his character in issue by adducing evidence tending to show that he is not likely to have committed the offence by reason of his good character that goes beyond a denial of guilt and repudiation of allegations against him.[5]

Originally it was held in R. v. Rowton[6] that such evidence or or the rebuttal thereof was restricted to general reputation in the community of the accused. The Rowton case was decided, however, when an accused could not give evidence. It is now clear that an accused can adduce character evidence by testifying to specific acts of good conduct or opinion evidence as to his disposition.[7]

The evidence is relevant not only to establish the credibility of the accused,[8] but to rebut the Crown's case that the accused is guilty.[9]

Opinion evidence with respect to disposition is limited to certain traits. The limitation is expressed by Martin J.A. in the following passage in R. v. Robertson:

> "In my view, psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes a characteristic feature of an abnormal group falling within the range of study of the psychiatrist, and from whom the jury can, therefore, receive appreciable assistance with respect to a matter outside the knowledge of persons who have

> not made a special study of the subject. A *mere* disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused."[10]

The Crown is entitled to rebut evidence of good character. If the accused's evidence is adduced by proving reputation in the community then the Crown's evidence is similarly limited,[11] with one exception. The exception is that under Section 593 of the *Criminal Code* the Crown may adduce evidence of convictions. Once the accused puts in issue his reputation in the community for any trait of his character it is open to the Crown to adduce evidence as to any other trait.[12]

Furthermore, if the accused testifies as to specific conduct on his part as evidence of his good character, the Crown can rebut that evidence by cross-examining the accused and perhaps by leading evidence to show the contrary.[13]

The use of the Crown's rebutting evidence is limited to

(a) refuting the character evidence, or

(b) showing that the accused lied and thus impacting on his credibility.

The rebutting evidence may be used for both purposes in combination. The trial Judge must not use the evidence to establish the disposition of the accused to commit the offence and if he instructs the jury that it can be used as evidence of guilt it is a serious misdirection.[14]

If opinion evidence as to disposition is led by the accused the Crown can cross-examine and lead evidence to rebut such evidence. The evidence in rebuttal is probably limited to the relevant character trait.[15] Indeed, it may be open to the Crown to lead such evidence as part of its case if indentity is in issue.[16]

It has always been admissible to lead general evidence of bad character with respect to witnesses in a prosecution other than the accused. A witness called to so testify can express a personal opinion as to the veracity of the witness he is attacking.[17] Furthermore, psychiatric evidence may be called to attack the credibility of a witness on the ground that the witness is not to be believed due to a mental defect.[18]

In civil cases, although the character of ordinary witnesses can be attacked in the same manner as in criminal cases, evidence of the character of the parties, either good or bad, cannot be led except perhaps in cross-examination in which event the cross-examiner is bound by the answer unless he brings himself within one of the exceptions to the collateral fact rule.[19]

The Draft Act, Sections 23 - 34

The draft Act makes the following changes. Evidence of general character of an accused is excluded (S. 23). The accused can lead evidence with respect to a trait of his character by (i) expert opinion evidence as to his disposition; (ii) evidence as to his general reputation in the community (S. 24(1)). In the latter case notice must be given to the Crown.

The Crown is prohibited from adducing evidence of mere disposition in the first instance. Once the accused has laid down his protective shield by adducing evidence of good character the Crown can cross-examine or adduce rebuttal evidence as to any trait of the accused's character. This evidence may be adduced by way of:

(a) expert opinion as to the disposition of the accused;

(b) the general reputation of the accused in the community;

(c) any previous finding of guilt or conviction of the accused of an offence.

Section 26 preserves the right of the Crown to prove character traits that are otherwise relevant or constitute similar acts.

Character evidence adduced by the accused and by the prosecution can be used apparently not only with respect to innocence or guilt but in relation to credibility. No distinction is made between evidence led by the Crown and the accused (S. 27).

The accused can attack the character of a complainant by adducing evidence of a character trait of the complainant provided that:

(a) the trait was known to the accused at the time the offence is alleged to have been committed; or

(b) the evidence would be admissible, if the complainant were a party, under the rule known as the "similar acts" or "similar facts" rule.

Evidence tending to establish self-defence is treated as evidence of the character of the complainant. (S. 29(2))

If the Court concludes that the accused has put his own character in issue by adducing evidence of a character trait of the complainant (including evidence tending to establish self-defence) the Crown can adduce evidence as to any trait of the accused's character. This evidence may be introduced by any of the three methods mentioned earlier. Except in special circumstances evidence of sexual conduct of the complainant with a person other than the accused is excluded. (S. 31, 32)

Analysis & Critique

General Character

Section 23 of the Act provides that:

> "Evidence as to the general character of an accused is not admissible in a criminal proceeding."

The sections that follow permit evidence of the general reputation in the community of the accused to be adduced with respect to a trait of the character of the accused. The term 'general character' is one that is associated with R. v. Rowton.[20] The accused there adduced evidence of good character by calling a witness who testified as to his reputation in the community for decency and morality. A prosecution witness called in reply was asked:

> "Q. What is the defendant's general character for decency and morality of conduct?"

The witness replied:

> "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

The Court ruled that the answer was inadmissible because in the absence of any knowledge on the part of the witness of the reputation of the accused in the community the witness was unable to give evidence as to the general character of the accused. Only evidence of general character was admissible. Cockburn C.J. said:

> "In the first instance, it becomes necessary to consider what is the meaning of evidence to character. It is laid down in the books that a prisoner is entitled to give evidence as to his general character. What does that mean? Does it mean evidence as to his reputation amongst those to whom his conduct and position is known, or does it mean evidence of disposition? I think it means evidence of reputation only. I quite agree that what you want to get at, as bearing materially on the probability or improbability of the prisoner's guilt, is the tendency or disposition of his mind to commit

> the particular offence with which he stands charged; but no one ever heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner's disposition of mind. The way, and the only way the law allows of your getting at the disposition and tendency of his mind is by evidence as to general character founded upon the knowledge of those who know anything about him and of his general conduct. Now that is the sense in which I find the word character used and applied by all the text writers of authority upon the subject of evidence. Mr. Russell in his book, which has now become a standard work of authority, puts the admissibility or the reception of evidence to character upon this ground, that the fact of a man having had an unblemished reputation up to the time of the particular transaction in question, leads strongly to the presumption that he was incapable of committing, and therefore did not commit the offence with which he stands charged." [21]

The drafters of the Act appear to use the term general character as applying to evidence that is not limited to a specific trait. The term however cannot have that meaning. Evidence of reputation, as demonstrated by Rowton, must relate to traits of character. It is unheard of to ask a witness about someone's reputation in the community without relating the evidence to reputation as to some character trait.

In view of the well-recognized meaning of general character its exclusion by section 23 will create confusion.

When Does the Accused Discard His Protective Shield?

In view of the serious consequences attendant on having adduced character evidence on his own behalf or having attacked the character of the complainant, it is desirable that this should not happen inadvertently. A casual reference by the accused to his past as a law-abiding citizen, or to the fact that he is married with a family and regularly employed may unleash a psychiatric opinion that he has a strong propensity for violence.[22]

There is often a thin line of demarcation between evidence of the accused that is simply a refutation of the Crown's case against him on the one hand and on the other evidence that could be interpreted to be a projection of an "image of a law-abiding citizen"[23] or evidence which constitutes an attack on the character of the complainant. A somewhat similar provision in s. I.(f)(ii) of The Criminal Evidence Act, has caused no end of controversy in England which has been characterized by Cross[24] as "an uneasy conflict of authority palliated by an extensive

exercise of the court's discretion". Section 30 of the Act may possibly provide for the application of judicial discretion in allowing an attack on the character of the accused when he has attacked the character of the complainant. If so, there is no similar discretion to palliate the effect of an inadvertent transgression into the character of the accused. It is submitted that if the Crown intends to allege that the evidence of the accused or his witnesses is not relevant to refute the Crown's case but is designed to put character in issue, Crown counsel should be obliged to object to the relevance of the evidence. The trial Judge should then rule whether the question objected to crosses the line. If it does and the examiner persists, he does so with the clear understanding that the accused is now being exposed to an attack on his character. This procedure would ensure that character is not put in issue unwittingly and would enable a character-vulnerable accused to put forward his full answer and defence without fear that by so doing he is projecting an image of a law-abiding citizen.

Indivisibility of Accused's Character (S. 26(2) & (3))

These sections adopt the proposition in R. v. Winfield,[25] that "there is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half".[26]

In Winfield, evidence as to Winfield's reputation for good behaviour with ladies was adduced on his behalf, on a charge of indecent assault. The Crown introduced evidence of a conviction for larceny. The Winfield principle has been justly criticized[27] because:

> "If a man is charged with forgery, cross-examination as to his conviction for cruelty to animals can have no purpose but prejudice".[28]

Sub-sections (2) and (3) would extend the principle to allow psychiatric evidence of disposition which may have no connection with the character trait introduced by the accused.

Use of Character Evidence

For over 100 years the criminal law in Canada and in England has resiled from adopting the practice current in some European systems of allowing evidence as to the accused's antecedents to be used as direct evidence of guilt. Although character evidence is allowed in rebuttal it has a limited purpose. It cannot be used as direct evidence of guilt. The trier of fact cannot draw an inference of guilt from evidence showing a criminal disposition. The Act makes no distinction between the use of character evidence by the accused and by the Crown. Section 27 provides that it may be considered "not only in relation to the character traits but also in relation to the credibility of an accused ...". The early wording "in relation to the character traits" must mean on the issue of guilt or innocence. Otherwise, it would have

no meaning and would deprive the accused of its use for this purpose. Since no distinction is made between use by the Crown and by the accused, it follows that the evidence is available to both on the issue of guilt or innocence as well as credibility.

Expert Opinion Evidence as to Disposition

The comparatively recent trend (initiated by R. v. Lupien)[29] of allowing expert opinion evidence as to disposition, was circumscribed by a sensible limitation. The character trait was required to be a peculiar or distinctive feature possessed by a relatively small abnormal group. This characteristic or absence thereof, served as a badge of the criminal element as if it constituted a physical characteristic. Lord Sumner described it as "the hallmark of a specialized and extra-ordinary class as much as if they carried on their bodies some physical peculiarity".[30]

Opinion evidence as to the traits of the group was allowed if the field of study of the expert gave the latter an insight which would, when shared with the trier of fact, be of appreciable assistance. This requirement is commonly referred to as the rationale generally for admitting opinion evidence.[31]

Under this limitation, evidence of a disposition with respect to the more common anti-social conduct engaged in by mankind was excluded. Accordingly, for example, a disposition to violence or absence thereof was not admitted.[32]

This limitation has been left out in the new provision which allows "expert opinion as to the disposition of the accused". Unless the judiciary is prepared to read such a limitation into that broad language, one can expect most trials to become a battleground as to the propensities of the accused.

Attacking the Character of Other Witnesses

The Act provides specifically for an attack on the character of the complainant. In S. 122, however, it takes away the right to attack the character of a witness by evidence of reputation, either general or specific. Presumably, however, a witness can still express a personal opinion about the veracity of another witness.[33] This type of evidence is an anachronism and is seldom if ever used.

Furthermore, it is not clear why the limitations in subsections 28(a) and (b) were imposed. In cases such as Toohey v. Metropolitan Police Commissioners[34] and R. v. Hawke,[35] expert opinion evidence was allowed to show a propensity of a witness as to behaviour which tended to discredit the witness' testimony. The evidence in those cases was highly relevant irrespective of the fact that the accused did not know about such tendency. Indeed, the latter consideration was wholly

immaterial. Subsection 28(a) would exclude such evidence where the witness is the complainant. Nor is the matter ameliorated by subsection 28(b). The similar fact rule of admissibility is difficult enough to apply in the case of an accused without attempting to apply it in a wholly artificial scenario.

Similarly, equating any reliance on self-defence to an attack on the character of the complainant has dubious merit. Self-defence depends on a subjective assessment by the accused of the expected conduct of his alleged assailant. It may be quite unrelated to the alleged assailant's intent and the accused's evidence relating to this subjective assessment is not necessarily an attack on the character of the assailant.

Finally, sections 31 and 32 prevent the accused from adducing evidence as to the sexual conduct of the complainant with a person other than the accused, save and except in specified circumstances in section 32. It would appear that the law has finally come full circle as this was the original position adopted in R. v. Hodgson[36] and incorporates in substance the initial recommendations of the Heilbron Committee in England, (which were never enacted into legislation). The reason for this prohibition is that the evidence is irrelevant. A woman's sexual experience with partners of her own choice is not relevant to her lack of consent in another case nor does it exhibit a propensity not to tell the truth. In recognizing this, the Uniform Act does a great service in uprooting the law of evidence from the sexual mores of the Victorian age.

THE CO-CONSPIRATORS EXCEPTION TO THE HEARSAY RULE

Section 61(1) of the draft Uniform Evidence Act provides as follows:

> "61. (1) A statement made by a co-conspirator of a party in furtherance of a conspiracy is admissible against the party to prove the truth of the matter asserted if it is established by evidence from a source other than the declarant that the party was a party to the conspiracy."

This purports to be a codification of the existing law. It is submitted that the existing law was confusing and difficult to apply. The codification ought to have eliminated this exception to the hearsay rule or clarified the law. It did neither.

"If It Is Established by Evidence"

Does this mean established on a balance of probabilities beyond a reasonable doubt or *prima facie*? In Regina v. Baron and Wertman,[37] Martin J.A. stated as follows:

> "The requirement of additional admissible evidence against an accused to prove that he was a party to the conspiracy before the acts and declarations of an alleged co-conspirator become admissible against him has led to the comment that if there must be other evidence proving such accused's complicity in the conspiracy, the acts and declarations of a co-conspirator are unnecessary: see Williams, *Criminal Law: General Part*, 2nd ed. (1961), pp. 681-2; *Carbo et al. v. U.S.* (1963), 314 F. (2d) 718 at p. 736.
>
> The degree of proof of the conspiracy and of the accused's connection with it, which is required to make the acts and declarations of an alleged co-conspirator evidence against him, differs, however, from that required to establish his guilt on the charge. *Prima facie* proof of an accused's connection with the conspiracy, by evidence admissible against him, makes the acts and declarations of co-conspirators admissible against him: see *R. v. Container Materials Ltd. et al.* (1940), 74 C.C.C. 113 at p. 128, [1940] 4 D.L.R. 293 (affirmed on appeal to the Court of Appeal, 76 C.C.C. 18, [1941] 3 D.L.R. 145, and on appeal to the Supreme Court of Canada, 77 C.C.C. 129, [1942] 1 D.L.R. 529, [1942] S.C.R. 147.)"

There does not seem to be any case which adequately explains what the burden of proof is. The term "*prima facie*" is generally taken

to mean sufficient to allow the case to be decided by the trier of fact and to resist a directed verdict or non-suit. In Rex v. Container Materials Ltd.,[38] Hope J. said:

> "A foundation should first be laid by proof sufficient in the opinion of the Judge to establish *prima facie* the fact of the conspiracy between the parties, or at least proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in furtherance of the original concerted plan, and with reference to the common object, is in contemplation of law the act and declaration of them all, and is therefore original evidence against each of them."

In R. v. Sunbeam,[39] the Supreme Court of Canada concluded that *prima facie* proof in a criminal case simply meant that the Crown had adduced sufficient evidence to permit a judge or jury to convict. Whether the judge or jury acted on this evidence was a question for the judge or jury. If this is the true meaning of *prima facie* proof then it is a question for the judge rather than the jury. Preliminary questions of fact which determine the admissibility of evidence are questions to be decided by the judge.[40]

In Regina v. Baron and Wertman,[41] Martin J.A. stated that it is implicit in the Canadian and English cases that the matter is to be decided by the jury. The Court in Carbo v. U.S.[42] was critical of this view. Merrill District Court Judge said:

> "Nor could this exception be rescued by giving the preliminary question to the jury to be decided by it upon the basis of a prima facie case rather than proof beyond a reasonable doubt. The jury is already concerned with the evidence-weighing standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence-weighing standards required of a prima facie case, is to expect the impossible. As stated in Dennis, supra, 183 F.2d at page 231:
>
> > 'Indeed, it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments that this requires.' "

This lack of clear judicial guidance accounts for the variation in the charge to the jury by the learned trial Judge in Regina v. McNamara et al.[43] Contrast the following:

> "If you find from such evidence that the accused was a party to the conspiracy then the acts and declarations of alleged co-conspirators in furtherance of the conspiracy whom you find were co-conspirators may be used as evidence for or against him. Each party in the plot is then an agent of all the others, and the acts and declarations of each in furtherance of the unlawful enterprise are evidence for or against the accused.
>
> . . .
>
> You may recall that I told you, assuming that there is evidence there was an agreement, as alleged in Count 7, and assuming that there is evidence to show that Marine Industries was a party to it, then the acts and declarations in furtherance of the agreement alleged by all other persons shown by the evidence to have been parties to the agreement are admissible to prove the charge."

Thus it is apparent that the standard of proof is material not only because it will govern the quality of the evidence that must be adduced before the rule is resorted to but furthermore may determine whether the Judge decides the issue or it is left to the jury. If the test is whether there is some evidence, it should not be a matter to be decided by the jury. On the other hand if some higher standard of proof is required it may be a question for the jury. It is submitted however that the reasoning in Carbo that it is a question for the judge is difficult to resist.

Finally if the rationale of the rule is that each conspirator is an agent of the other conspirators then it is not clear why in a criminal case an accused can be convicted by the acts and declarations of others who are not proved to be his agent by the standard required in criminal cases. This is so whether the matter is to be decided by a judge or jury.

"From a Source Other Than a Declarant"

Although this wording was apparently not intended to change the law it is not clear what is to be gained from departing from the time-honoured expression used[44] in the cases "from evidence admissible directly against an accused".

"Made By a Co-conspirator of the Party"

While much discussion appears in the cases concerning the standard of proof required to establish that the accused was party to the conspiracy, little has been said about the standard required

to show that the co-conspirators are parties to the conspiracy. In Regina v. Baron and Wertman,[45] Martin J.A. outlined the procedure to be followed by the trial Judge in the following four steps:

> "1. At the end of the whole case the trial Judge must decide as a matter of law, whether there is any admissible evidence against an accused from his own acts and declarations, that he is a participant in the conspiracy charged.
> 2. If there is no evidence directly admissible against an accused connecting him with the conspiracy the trial Judge must direct the jury to acquit that accused.
> 3. If the trial Judge concludes that there is some evidence admissible directly against an accused that he was a party to the conspiracy, he will instruct the jury that they must first find from evidence admissible directly against an accused (that is by evidence other than the acts and declarations of alleged co-conspirators) that he was a party to the conspiracy charged.. The trial Judge will then instruct the jury that if they find from such evidence that the accused was a party to the conspiracy the acts and declarations of alleged co-conspirators in furtherance of the conspiracy may be used as evidence against him: *R. v. Bird, supra,* at p. 183.
> 4. As a general rule, it would be desirable for the trial Judge to *then* refer the jury to the principal evidence admissible *directly* against each accused from which they may find that such accused was a party to the conspiracy but the jury should be instructed that it is for them to say if the evidence has this effect."

Step 3, which is the crucial one, requires evidence directly admissible against an accused that he was a party to the conspiracy charged. Thereafter the acts and declarations of the "alleged co-conspirators" may be used as evidence against him. This would mean that the acts and declarations of persons not shown to be agents of the accused are admissible against him. It may be suggested that if step 3 is carried out the accused will have been shown to be a party to the conspiracy of which the other conspirators are members. This step does not restrict the acts and declarations which become admissible to those of co-conspirators shown to be party to the conspiracy. Accordingly, an accused could be shown to be a member of the I.R.A. (which would satisfy step 3) and then all other alleged members of the I.R.A. could implicate the accused by their acts and declarations.

Section 61 does nothing to clear up this problem. It does not require that it be established by appropriate proof that the declarant be a co-conspirator.

Procedural Problems

The exception is subject to a serious procedural problem. The rule can only be resorted to if there is a conspiracy. Accordingly, separate acts of alleged conspirators may initially and provisionally be admitted in order to establish the conspiracy.

Regina v. Baron and Wertman,[46]
Rex v. Container Materials Ltd.,[47]

While the jury must be instructed by the trial Judge with respect to what evidence is directly admissible against the accused to show his participation in the conspiracy, they do not have to be referred to other acts and declarations of co-conspirators which have been admitted but are not directly admissible. These acts and declarations may directly implicate the accused. In R. v. McNamara,[48] the following acts and declarations were admitted which implicated the accused Marine Industries Limited but the Court of Appeal found no error in the Judge's failure to warn the jury that these acts and declarations were not evidence:

(1) Mr. Quinlan told Mr. Rindress that he expected arrangements would be made with regard to the Pointe aux Trembles and Three Rivers jobs.

(2) After the tender on the Pointe aux Trembles job, Mr. Quinlan told Mr. Rindress that McNamara Corporation would look after the Pitts Company and the Appellant would give C.D. & D. work at Three Rivers.

(3) Mr. Quinlan told Mr. Rindress that the Appellant and McNamara Corporation had arranged between themselves that McNamara Corporation would get the Pointe aux Trembles job and that the Appellant would get the Three Rivers job.

(4) Mr. Schneider told Mr. Rindress that C.D. & D. was getting a sub-contract at Three Rivers from the Appellant in return for submitting a high bid.

(5) Mr. Quinlan told Mr. Rindress that the Appellant would receive a credit from the Stelco job with respect to the Beauport sub-contract as well as the reduction of its debt to C.D. & D.

(6) Mr. Quinlan told Mr. Rindress that the joint venture of C.D. & D. and McNamara were prepared to pay the Appellant money to bid high at the Nanticoke job.

(7) Mr. Rindress told Mr. Schneider about Mr. DeRome's price for cooperating at Stelco.

(8) Mr. Rindress told Mr. Quinlan that the Appellant agreed to bid high or not bid at Stelco in return for a 10¢ per cubic yard payment as well as the assumption of 1¢ of the 2¢ debt of the Appellant to C.D. & D.

(9) Mr. Quinlan told Mr. Goldfarb that Mr. DeRome had told Mr. Quinlan that he did not wish to bid in joint venture with McNamara and Jason, but wished to bid on their own and wanted McNamara Corporation to put in a complimentary bid in return for a sub-contract on the Beauport job. 49

It is unrealistic to assume that a jury would be capable of compartmentalizing this evidence so as to distinguish between various declarations which implicate the accused. A particularly damaging piece of evidence which would ordinarily be withheld from the jury until its admissibility had been established is permitted to go to the jury. At some stage after the evidence has had its affect on the jury's mind they are told that before considering it they must decide on the basis of other evidence whether the accused was party to the conspiracy. As pointed out by the Court of Appeal, if the trial Judge reviews with the jury not only the pieces of evidence directly admissible but also evidence which is not unless the accused is found to be a party to the conspiracy, it may be more prejudicial to the accused.[49a]

RESTRICTIONS ON CROSS-EXAMINATION

(a) Questions in Cross-Examination Which Impute Misconduct

Section 103(2) provides:

> "(2) A party shall not allege or assume facts on cross-examination unless he is in a position to substantiate them."

In some jurisdictions it has been the practice to exclude questions put to a witness which are demeaning or impute misconduct on the part of the witness or on the part of others in the case unless the cross-examiner undertakes to call evidence to support the allegation. Haines J. expressed what was generally the rule of practice in Ontario in the following passage from R. v. Hawke:[50]

> "... I would think that in appropriate situations, any trial Judge would at least protect the witness who was asked a demeaning question where the Judge has reason to believe it is without foundation or for some ulterior motive. All the Judge need say to counsel is: 'Are you prepared to call evidence in support of your question?' and if the answer is 'No', to direct the witness not to reply. In my opinion, fairness demands nothing less."

This practice was disavowed by the Ontario Court of Appeal in R. v. Bencardino & de Carlo.[51] The Court adopted the following statement of Lord Radcliffe from Fox v. General Medical Council:[52]

> "An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth."

The English view which was adopted by the Ontario Court of Appeal is that there is no rule of evidence that restricts the cross-examiner and prevents him from asking such questions. On the other hand it is unethical to put such questions if counsel has no basis for them.[53]

Jessup J.A., in R. v. Bencardino & de Carlo,[54] said:

> "... whatever may be said about the forensic impropriety of the three incidents in cross-examination, I am unable to say any illegality was involved in them."

Section 103 obviously intends to revert to the practice of prohibiting not merely questions imputing misconduct but any questions which cannot be substantiated. This is far too wide and beyond anything that has been suggested in the cases. Furthermore, what is meant by the words "unless he is in a position to substantiate them"? If it means that the cross-examiner must be able to prove the imputation the cross-examination is restricted to matters which can be proved independently of the cross-examination. A good cross-examiner will not usually cross-examine on matters that he can prove unless required to do so by reason of the rule in Browne v. Dunne.[55] This Section would therefore virtually rule out cross-examination except as a matter of notice to the witness of facts which are intended to be adduced to discredit the witness. On the other hand, if substantiate means something less than proof, how is it to be enforced? If it means that counsel must have some foundation in his brief to support the question, the trial Judge would be required to rummage around in counsel's brief before deciding on the admissibility of the question. Having regard for the expedition that is required in making rulings during cross-examination it would be undesirable to predicate such a ruling on the results of an investigation into counsel's brief. Such an investigation is more appropriate in disciplinary type proceedings. This restriction on cross-examination should be removed as a rule of evidence.

(b) The Rule in Browne v. Dunne

Section 103(3) provides:

> "(3) Where a party cross-examining a witness intends to contradict the witness on a fact in issue, the party shall direct the attention of the witness to that fact."

This is apparently intended to be a codification of the rule in Browne v. Dunne.[56] The gist of this rule is that if a cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence he must give that witness notice of his intent. Lord Herschell explained the reason for the rule as follows:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been

> able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling." [57]

Phipson states the rule as follows:

> Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation [57]; and this probably applies to all cases in which it is proposed to impeach the witness's credit.[58] Such questions are rendered by statute a condition precedent to proof of a previous contradictory statement by the witness.[59] Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, *e.g.* if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character,[60] or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, *e.g.* to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all. [58]

The rule is not an inflexible one and may be relaxed by a trial Judge where it is clear to the witness or counsel producing him from other circumstances of the case that his evidence will be attacked.[59]

The rule applies not only to prevent contradictory evidence to be led but also to preclude the cross-examiner from attacking the credibility of the witness in argument.[60] A corollary to the rule which is often treated as part of the rule in Browne v. Dunne, but is more properly treated as a separate rule, holds that failure to cross-examine implies acceptance of the evidence.[61] There has been some criticism of this rule on the ground that it would prevent a judge or jury from rejecting evidence that is not credible.[62]

The criticism of section 103(3) is that it is too cryptic and too absolute. It extends to all contradictory evidence whether or not the credibility of a witness is being impeached. Moreover it is stated as an inflexible rule. It applies whether or not it is clear from other circumstances that the witness' evidence will be impeached. The revision suggested by the Uniform Law Conference is as follows:

> To retain S. 103(3) but to allow comment to be made and rebuttal evidence to be called where it is not followed.

If this is allowed in all cases the rule loses its raison d'être. Apart from being a rule of fairness it is designed to shorten trials by requiring that a witness be confronted with adverse imputations on credibility before the witness leaves the witness box. The revision appears to allow the rule to be ignored. Comment and rebuttal evidence is allowed "where the rule is not followed". Does counsel or the Judge decide whether the rule is followed?

(c) Cross-examination on a Previous Inconsistent Statement

Section 115 provides as follows:

> "115 (1) A party intending to cross-examine any witness on a previous inconsistent statement shall, prior to such cross-examination,
>
> (a) furnish the witness with sufficient information to enable him reasonably to recall the form of the statement and the occasion on which it was made and ask him whether he made the statement; and
>
> (b) where the witness was called by that party and is not an adverse witness, attempt to refresh his memory if the court so requires.
>
> (2) If it is intended to contradict a witness by reason of a previous inconsistent statement, his attention shall be drawn to those parts of the statement that are to be used for that purpose."

This is a revision of the rule which is currently contained in most Provincial Evidence Acts and the Canada Evidence Act. The Canada Evidence Act, which is typical, provides:

> 10 (1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but, if it is intended to contradict the witness by the

> writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

The change is a partial re-introduction of the rule in Queen Caroline's case.[63] The Judges of the House of Lords ruled that before a witness could be asked about a previous statement in writing the witness must first be shown the writing.

The rule was severely criticized because of its restrictions on the cross-examiner. Wigmore characterized it as a rule which "for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings on the subject".[64]

Among the disadvantages of the rule enunciated by Cross[65] the first and foremost was the tactical advantage removed from the cross-examiner. Cross states:

> "First, it was unfair to the cross-examiner because it deprived him of the invaluable weapon of surprise. In certain situations, the most effective procedure is to ask the witness whether he has ever said the contrary of what he now says on oath and only to show him the previous statement if he answers the question in the negative."

As a result of the criticism of the rule, statutory provisions were introduced both in England (Section 5 of the Criminal Procedure Act, 1865) and in Canada, overruling Queen Caroline's case. This is embodied in our present Evidence Act. Lord Esher explained the operation of the present practice in North Australian Territory Co. Ltd. v. Goldsborough, Mort & Co. Ltd.[66] Speaking of a witness under cross-examination he said:

> "When a witness is asked as to what he said on a previous occasion, he is bound to answer the question; he cannot insist on seeing what he previously said before he answers it; he must answer. If his answer does not contradict what he said before, it is no use pursuing the topic further; he adopts his previous answer and it becomes part of his evidence; if he does contradict it, he can be contradicted in turn by showing him what he said before. That goes to his credit only; it proves nothing, it is only a contradiction."

The tactical advantage is illustrated in the excerpt from a trial demonstration which is appended hereto.

The revision reintroduces Queen Caroline's case to some extent. It may very well require sufficient information to be given to the witness to alert him as to the fact that the cross-examiner has a statement and the nature of it. The tactical advantage of requiring an answer in the absence of that knowledge is lost. As a result the opportunity to test the witness' memory and veracity is removed.

APPENDIX I

CROSS-EXAMINATION ON A PREVIOUS INCONSISTENT STATEMENT

Excerpt from a Trial Demonstration

Facts: The plaintiff and the defendant, Don Houston, were both senior employees of a Crown corporation. It's alleged by the plaintiff that a dispute arose between the plaintiff and the defendant arising out of their participation in a transaction called the "Crestview deal". The plaintiff claims that he was assaulted during a violent argument in connection with that transaction. During the progress of the Crestview deal both plaintiff and defendant kept the President informed of developments. Counsel for the plaintiff, who subpoenaed the President to testify at trial, discovered a memorandum from the defendant to the President which was in the possession of the President. This memorandum contains a statement acknowledging that the defendant "took a swing" at the plaintiff. The defendant has testified in chief that there was never any disagreement between him and the plaintiff.

CROSS-EXAMINING ON AN EXAMINATION FOR DISCOVERY
BY MR. SOPINKA:

Q. Mr. Houston you have testified that you never had a disagreement with the plaintiff?

A. Yes, that's what I said.

Q. Did you have a violent argument during the negotiations of the Crestview deal with the plaintiff?

A. No. As I said, I don't believe we ever had a disagreement.

Q. Do you recall being examined for discovery on the 9th of January, 1979?

A. Yes, I do.

Q. My Lord, may I explain the examination for discovery to the jury.

MR. JUSTICE GRIFFITHS: Yes, please do.

MR. SOPINKA . . . [explains discovery to jury.]

"Q. 4. Did you have a violent argument during the negotiations of the Crestview deal?

A. Yes, I believe we had words."

Q. Were you asked that question and did you make that answer?

A. Well, I am not sure. Is that what it says?

Q. Would you like to see the transcript? (witness examines)

A. Well, that's what it says.

Q. Are you prepared to admit that you said that or do you want me to call the Court Reporter?

A. No, you don't have to do that. I said it.

Q. And since you were under oath I assume you were telling the truth.

A. Yes, I was under oath and I was telling the truth.

CROSS-EXAMINATION ON PREVIOUS INCONSISTENT STATEMENTS

Q. Did you ever send a memo in which you admitted that you had taken a swing at the plaintiff?

MR. CHERNIAK: In fairness, my Lord, surely the witness ought to be shown that memo.

MR. JUSTICE GRIFFITHS. Yes do you have the memo?

MR. SOPINKA: My Lord, I haven't indicated that I have a memo at the moment and I wonder if I could make some submissions in the absence of the jury.

MR. JUSTICE GRIFFITHS: Yes, the jury will be excused.

MR. SOPINKA: And I would ask that the witness be excused.

MR. JUSTICE GRIFFITHS: Yes.

MR. SOPINKA: . . . [Submissions]

MR. JUSTICE GRIFFITHS: Well, in my view we haven't gotten to that point yet. You may proceed Mr. Sopinka.

MR. SOPINKA: Thank you, my Lord.

Q. I will repeat the question Mr. Houston, Did you ever, in a memo, say that you took a swing at the plaintiff?

A. No, I didn't. At least I don't remember.

Q. Well, which is it? Do you say you didn't write such a memo or that you don't remember?

A. I say I didn't, but I could be wrong.

Q. I show you a memorandum dated the 5th day of June, 1975, from you to the President. Was that memorandum dictated by you and sent to the President?

A. Yes, it was.

Q. Would you please read to the court the second paragraph?

A. "During the course of these discussions the disagreement became so intense that I took a swing at the plaintiff."

Q. Was that a correct statement as to what occurred?

A. Yes, but I didn't say I hit him.

FOOTNOTES

1 *R. v. Doyle* (1916), 26 C.C.C. 197, 199 (N.S.C.A.)

2 *R. v. McNamara #1* (1981), 56 C.C.C. 193, 349

3 *R. v. Davison, DeRosie and MacArthur* (1974), 20 C.C.C. (2d) 424
Morris v. The Queen (1978), 43 C.C.C. (2d) 129;
[1979] 1 S.C.R. 405, 432-3

4 *R. v. McNamara*, supra, at p. 352-3
Lucas v. The Queen, [1963] 1 C.C.C. 1

5 *Morris v. The Queen*, supra
R. v. McNamara, supra, p. 346 et seq.

6 (1865), 169 E.R. 1497

7 *R. v. McNamara*, supra, at p. 348
R. v. Robertson (1975), 21 C.C.C. (2d) 385, 424
R. v. Lupien, [1970] 2 C.C.C. 193, 203

8 *R. v. Billis*, [1966] 1 All E.R. 552

9 *R. v. Boles* (1978), 43 C.C.C. (2d) 414, 416
Cross, 5th ed., 408

10 supra, at p. 429

11 *R. v. Rowton*, supra

12 *R. v. Winfield*, [1939] 4 All E.R. 164; 27 Cr. App. Rep. 139
(C.C.C.A.)

13 *R. v. Morris*, supra, p. 152
R. v. McNamara, supra, p. 349
But see *Lowery v. The Queen*, [1973] 3 W.L.R. 235, 246

14 *R. v. McNamara*, supra, p. 352 et seq.

15 *R. v. McNamara*, supra, at p. 349

16 See *R. v. Glynn* (1971), 5 C.C.C. (2d), p. 354

17 *Mawson v. Hartsink* (1803), 4 Esp. 102;
R. v. Gunewardene, [1951] 2 All E.R. 290

18 *Toohey v. Metropolitan Police Commissioner*, [1965] A.C. 595; *R. v. Hawke* (1975), 7 O.R. (2d) 145 (C.A.)

19 See Sopinka and Lederman, *The Law of Evidence in Civil Cases*, 288-289

20 (1865), 10 C.C. 25

21 supra, at p. 29

22 *R. v. Morris*, supra, at p. 156;
R. v. McNamara, supra, at p. 342 et seq.;
Cross, supra, at p. 425

23 See *R. v. McNamara*, supra, at p. 342 et seq.

24 supra, at p. 430

25 (1939), 27 Cr. App. Rep. 139

26 supra, at p. 141

27 *Cross*, supra, at pp. 407-8

28 Nokes, *Introduction to Evidence*, (4th edition) p. 140

29 supra

30 *Thompson v. The King*, [1918] A.C. 221

31 *R. v. Fisher*, [1961] O.W.N. 43; aff'd [1961] S.C.R. 535

32 *R. v. Robertson*, supra

33 supra, at p. 2 herein, (fn. 17)

34 supra

35 supra

36 (1821), R & R 211

37 (1977), 31 C.C.C. (2d) 525 at pp. 544-45

38 (1940), 74 C.C.C. 113 at 128; aff'd on appeal to the Court of Appeal, 76 C.C.C. 18, and on appeal to the Supreme Court of Canada, [1942] S.C.R. 147

39 [1969] 2 C.C.C. 189

40 *United States v. Dennis*, 183 F.2d 201 at 231
Maguire and Epstein, *Preliminary Questions of Fact Determining the Admissibility of Evidence*, 1927, 40 Harv. L. Rev. 415
Carbo v. U.S. (1963), 314 F.2d 718 at 735 et seq.
R. v. Murabito, [1949] S.C.R. 172
Girvin v. The King (1911), 45 S.C.R. 167
May v. O'Sullivan (1955), 92 C.L.R. 654 (Aust. H.C.)

41 supra

42 supra

43 supra, at p. 487

44 See *Regina v. Baron and Wertman*, supra, at p. 545

45 supra

46 supra, at p. 544

47 supra, at p. 128

48 supra

49 supra, at pp. 489-91
49a (1981), 56 C.C.C. (2d) 193 at 491
50 (1974), 3 O.R. (2d) 210

51 (1974), 2 O.R. (2d) 351 (C.A.)

52 [1960] 1 W.L.R. 1017 (P.C.)

53 See *Rondel v. Worsley*, [1967] 3 All E.R. 993 at 998-99 (H.L.)
Phipson, 12th ed., 1976, para. 1593

54 supra, at p. 347

55 (1893), 6 R. 67

56 supra

57 supra, at pp. 70-71

58 para. 1593

59 *Cross*, 5th ed., 1979, p. 257
Rex v. Foxton (1920), 48 O.L.R. 207, 209
Peters v. Perras et al. (1909), 42 S.C.R. 244

60 *R. v. K & B Ambulance Ltd.*, [1979] 2 W.W.R. 71 at 74-81
R. v. Bircham, [1972] Crim. L.R. 430

61 See *Phipson*, para. 1593

62 *R. v. Mite*, [1973] 3 W.W.R. 709

63 (1820), 2 Brod & Bing 286

64 IV *Wigmore*, p. 497

65 5th ed., p. 259

66 [1893] 2 Ch. 381, 386