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Party Admissions: A Different Kind of Exception to the Hearsay Rule

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Introduction

In the Supreme Court of Canada's recent decision *R v. Schneider*[1] ("Schneider"), the Court determined that testimony given at trial by the accused's brother was admissible under the party admissions exception to the hearsay rule. At issue was whether the brother's hearsay evidence, in which he testified that he overheard the accused admit to killing the victim during a phone call, met the criteria for admissibility.

This paper will examine the law of hearsay evidence in two parts. The first part of this paper will provide an overview of the law of hearsay evidence in Canada with examples from leading and recent criminal cases. The second part of this paper will examine the Court's analysis in *Schneider* and its application of the party admissions exception to the hearsay rule.

Hearsay evidence: an example

Hearsay evidence consists of any out of court statement, usually in oral or written form, that is tendered for the truth of its contents.[2] In *Schneider*, the out of court statement consisted of the accused's phone conversation with his wife, during which the accused's brother overheard the accused say something along the lines of "I did it" or "I killed her". The Crown sought to tender these statements at trial to prove that the accused admitted to killing, and did kill, the victim.

The hearsay rule and the associated dangers of hearsay evidence

As a general rule, hearsay evidence is presumptively inadmissible. Courts have warned of the dangers associated with hearsay evidence, including the potential for its admission to impinge on trial fairness.[3] One concern lies in the inability to test its reliability.[4] Because hearsay evidence cannot be challenged or objected to through contemporaneous cross-examination of the witness from whom the evidence derives, there is a risk that fabricated or inaccurate evidence can go undetected and unchecked. Another concern arises from the circumstances in which hearsay evidence is given. Hearsay evidence is provided in the absence of an oath and

*Former associate: Derstine Penman, Criminal Lawyers (Toronto).
[1] *R v Schneider*, 2022 SCC 34 [*Schneider*].
[2] *R v Bradshaw*, 2017 SCC 35 at para 1.
[3] *Ibid*.
[4] S. Casey Hill, David M. Tanovich and Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Thompson Reuters, 2017) at 7:20.

the solemnity associated with that environment,[5] leading some to question whether such evidence can even be relied upon for its truthfulness.

As a result of these dangers, the admissibility of hearsay evidence must remain exceptional.

Exceptions to the hearsay rule: the traditional exception and the principled approach

There are two ways in which hearsay evidence can be admitted. The party tendering the evidence can either fit it into a categorical or "traditional" exception, or otherwise seek to admit it under the principled approach.

I. The traditional exception to the hearsay rule

The traditional exception to the hearsay rule permits hearsay evidence to be admitted if it fits under a defined, judicially created category. These categories include, to name only a few:

- Dying declarations by the declarator made immediately prior to their death;[6]
- Spontaneous utterances by the declarator;[7] and
- Statements that convey the declarator's state of mind or present intentions.[8]

The rationale for admitting hearsay evidence under a traditional exception is that statements made under this exception "traditionally incorporate an inherent reliability component".[9] This is because the circumstances in which a traditional exception apply are those where there is only a remote possibility of fabrication or concoction.[10]

In *R v. Nurse*, the Court of Appeal for Ontario upheld the trial judge's decision in finding that the gestures made by the victim just prior to his death met the dying declaration and spontaneous utterance exceptions to the hearsay rule. In *Nurse*, the victim was stabbed 29 times and left at the side of the road. Upon arriving at the scene, the police officer asked the victim, who was still alive at the time, to name his attacker. However, the victim could not speak because his vocal cords had been severed in the attack. The victim responded by pointing to his abdominal injury and then pointing to one of his attackers who had appeared at the scene. Shortly afterwards, the victim died in the ambulance while being transported to the hospital.

The Court found that the victim's gesture in pointing to his attacker met the requirements of a dying declaration, one of which is that the victim's gestures speak to the circumstances of

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[5] *Ibid*.
[6] *R v Nurse*, 2019 ONCA 260 [*Nurse*].
[7] *R v Camara*, 2021 ONCA 79.
[8] *R v Candir*, 2009 ONCA 915.
[9] *R v Starr*, 2000 SCC 40 at para 212 [*Starr*].
[10] *Nurse*, *supra* note 6 at para 80.

his death. In this case, the victim intended to implicate his attacker by pointing to his abdominal injury and then pointing to his attacker.

The Court also found that the victim's gestures were equally admissible under the spontaneous utterance exception to the hearsay rule. The rationale for this exception is that it is essentially inconceivable that a declarant would fabricate or concoct a statement that he or she makes spontaneously, if not contemporaneously, under the stress or pressure of a startling event.

In *Nurse,* the victim's gestures were made within minutes of the attack, just after his attackers had fled. The gestures were made as a direct result of the event, being the attack, that he continued to experience as he lay dying. Completely overcome by the events, there was no opportunity for concoction or speculation.[11]

While statements or utterances usually consist of verbally spoken words, the Court found the victim's gestures in this case to nevertheless fall within the definition of a hearsay statement or utterance. The gestures constituted a form of "assertive conduct" that was just as capable of conveying meaning as any verbal statement or utterance.

II. The principled approach to the hearsay rule

A party that fails to categorize hearsay evidence under any one of the traditional exceptions may seek its admission under the principled approach. Under this approach, hearsay evidence is admissible if it meets the twin criteria of necessity and reliability.

The rationale for admitting hearsay evidence under the principled approach is founded on the concept of trial fairness and society's interest in getting at the truth. Courts have recognized that it is sometimes necessary, in the interests of justice, to admit evidence in hearsay form rather than to lose the value of it simply because there is no opportunity to contemporaneously cross-examine the witness from whom the evidence derives. In some cases, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little, if anything, to the process. And even in cases where the evidence may not be so cogent, there may be alternative means other than contemporaneous cross-examination to sufficiently test the evidence.[12]

Necessity

The concept of necessity refers to the necessity of the hearsay evidence to prove a fact in issue where the relevant direct evidence is not, for a variety of reasons, available.[13] This could be because the declarant has died, or that a child witness lacks competence to testify.

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[11] *Ibid* at para 83.
[12] *R v Khelawon*, 2006 SCC at para 49 [*Khelawon*].
[13] *R v Smith*, [1992] 2 SCR 915.

Reliability

In determining whether a statement is sufficiently reliable, courts are concerned with whether the statement meets the requirement of threshold reliability, rather than ultimate reliability. Whereas ultimate reliability is concerned with whether the statement is true or not, threshold reliability is concerned with whether the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.[14] Circumstantial guarantees of trustworthiness may exist because the declarant had no motive to lie, or because there were safeguards in place such that a lie could be discovered.[15]

In *R v Hawkins*,[16] the Supreme Court of Canada held that the prior testimony of an accused's spouse given at a preliminary inquiry was admissible under the principled approach at the accused's trial. The spouse, who was the accused's girlfriend at the time of the preliminary hearing, could not be called as a witness at the trial because by then, she was married to the accused and therefore incompetent to testify under the spousal incompetency rule pursuant to the *Canada Evidence Act*.[17] In addressing threshold reliability, the Court was satisfied that the spouse's prior testimony at the preliminary hearing was admissible at trial. Her evidence provided sufficient guarantees of trustworthiness because it was given under oath, subject to contemporaneous cross-examination, and recorded in written form.

There may be "rare cases" in which evidence falling within a traditional exception is nevertheless excluded

The Court in *Starr* ruled that there may be "rare cases" where evidence falling within a traditional exception should nevertheless be excluded if the required indicia of necessity and reliability are lacking in particular circumstances.[18]

The trial judge retains residual discretion to exclude hearsay evidence

Even when hearsay evidence is technically admissible under a traditional exception or under the principled approach, a judge retains discretion to exclude it in circumstances where the prejudicial effect of the evidence outweighs its probative value. In *R v Ferris*,[19] the Court held that a police officer's evidence at trial, in which he testified that he overheard the accused say to someone on the phone at the police station, "I killed David", was inadmissible. Justice Sopinka remarked that even if the evidence had relevance, it's meaning was "so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value".[20] While the words could have been an

[14] *Khelawon*, *supra* note 12 at para 51.
[15] *Ibid*.
[16] *R v Hawkins*, [1996] 3 SCR 1043.
[17] RSC, 1985, c C-5.
[18] *Starr*, *supra* note 9 at para 214.
[19] *R v Ferris*, [1994] 3 SCR 756.
[20] *Ibid*.

admission, it could also have been part of a reply to a question as to what the police believed the accused did.

The Court's ruling in *Schneider*

Facts

At issue in *Schneider* was whether the brother's hearsay evidence, in which he testified that he overheard the accused admit to killing the victim during a phone call, was admissible at trial. The accused was charged with second degree murder after the victim's body was recovered by police following a tip from the accused's brother. At trial, the Crown sought to adduce hearsay evidence from the brother, who overheard the accused speaking on the phone with his wife. At the *voir dire* to determine the admissibility of the brother's testimony, the brother testified that he could not remember word-for-word what the accused said to his wife but that the statements made were along the lines of "I did it" or "I killed her".[21]

The Court held that the trial judge did not err in admitting the brother's hearsay evidence. In its ruling, the Court reaffirmed the application of the three-part test to determine whether this evidence should be admitted. The Court asked:

1) Is the evidence relevant?

2) Is the evidence subject to an exclusionary rule?

3) Should the evidence be nevertheless excluded on the basis that its prejudicial effect outweighs its probative value?

1. Is the brother's testimony relevant?

The Court ruled that the brother's testimony in what he overheard was relevant, even though he could not remember the exact words the accused said. The question in determining relevance was whether the evidence would tend to increase or decrease the probability of a fact at issue.[22]

In this case, the Court relied on context to find that the brother's evidence, if believed by a jury, would tend to increase the probability that the accused was responsible for the victim's death. In the days leading up to the phone call, the accused and the brother had spoken about the victim, in which the accused admitted he had done "something bad". On the day of the phone call, the accused told the brother where the victim's body was and referred to the victim at the opening of the call.[23]

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[21] *Schneider*, *supra* note 1 at para 17.
[22] *Ibid* at para 76.
[23] *Ibid* at para 64.

The Court found this case distinguishable from *Ferris*. In *Ferris*, the accused and the officer who overheard the phone call were strangers. Unlike in *Schneider*, "there was nothing at all like the circumstances, sequence of events and conversations that led up to what in this case the brother overheard in the accused's conversation with his wife".[24]

2. Is the brother's evidence subject to an exclusionary rule?

The Court found the brother's testimony to be hearsay evidence and thus, presumptively inadmissible. However, the Court ruled that the evidence was a party admission that fell within a recognized exception and was thus admissible.

Party admissions: an exception to the hearsay rule

A party admission is described as any "acts or words of a party offered as evidence against that party".[25] In criminal trials, a party admission is evidence that the Crown adduces against an accused.[26] Here, the brother's evidence constituted a party admission because it was adduced by the Crown to prove the accused's criminal culpability.

The rationale for admitting party admissions flows from the adversarial nature of our trial system and the belief that "what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements".[27] Such admissions are presumed truthful because they have been made by one party and are tendered by the other to advance its case.[28]

Party admissions fall within a traditional exception to the hearsay rule and are admissible without reference to necessity and reliability, save the "rare case" where judges retain discretion to exclude any hearsay evidence on the basis that it is unreliable or unnecessary.[29]

3. Should the trial judge have retained discretion to exclude the brother's evidence on the basis that the prejudicial effect of the evidence outweighed its probative value?

The Court found that the trial judge, upon a careful balancing of the probative weight against its prejudicial effect, properly exercised her discretion to admit the brother's evidence. The trial judge gave clear and effective instructions on the proper use of the brother's testimony to the jury and addressed the weaknesses of the testimony in the jury instructions.

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[24] *Ibid* at para 70.
[25] *Ibid* at para 52.
[26] *Ibid* at paras 52-53.
[27] *R v Evans*, [1993] 3 SCR 653 at p 664.
[28] *R v Violette*, 2008 BCSC 422 at para 64.
[29] *Schneider*, *supra* note 1 at para 55.

Concluding remarks

The party admissions exception rule "stands on a different footing"[30] than the other traditional exceptions to the hearsay rule. Unlike the other traditional exceptions, the rationale for allowing party admissions is founded on the nature of the adversarial system. Permitting a party to tender evidence to advance its case is a key component of the adversarial system's fact-finding function.

Because of the different foundation on which party admissions are admitted, it is difficult to imagine a situation in which a party admission would ever fall in the ambit of those "rare cases" that *Starr* speaks of, whereby hearsay evidence falling under a valid traditional exception could nevertheless be excluded for failing to meet the twin principles of necessity and reliability. In the twenty years since the *Starr* decision was released, courts have never excluded party admissions on the basis of the "rare case" exception. However, the availability of this exception presents an opportunity to reshape the law of hearsay evidence with respect to the other traditional categories. As Justice L'Heureux Dube predicted in her dissent in *Starr*, the result of *Starr* is such that "lawyers being lawyers will be quick to claim that their case is the 'rare' one".[31] As such, lawyers who make such claims are fundamentally challenging the accepted reliance on the traditional categories and asking courts to re-examine them in a manner that is consistent with the principles of necessity and reliability.

[30] *Khelawon, supra* note 12 at para 65.
[31] *Starr*, *supra* note 9 at para 48.