

Lost in Translation? The Difference Between the Hearsay Rule's Historical Rationale and Practical Application

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FROM THE PRACTITIONER'S DESK

ABSTRACT

The article examines the differences between the hearsay rule's historical rationale and current application. The analysis occurs on two levels. The hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the doctrine itself. Practical considerations in the modern practice of criminal law are considered to determine if they create any differences. Section II explains in brief the hearsay rule's historical rationale. Section III considers the difference between the hearsay rule's historical rationale and the practical application of the exclusionary hearsay rule. The differences between the hearsay rule's historical rationale and practical application are described, and it is for the reader to determine whether each difference is positive or negative development. Positions are taken on instances where practical considerations in the modern practice of criminal law create a difference between the historical rationale and practical application of the hearsay rule. In such instances, there is neither a principled nor policy reason for the difference between the hearsay rule's historical rationale and its practical application.

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I. INTRODUCTION

“Good my Lords, let my accuser come face to face, and be deposed,”¹ pleaded Sir Walter Raleigh. The year was 1603 and Raleigh was on trial for treason in England.² He was alleged to have conspired to kill King James I. The prosecution’s chief witness was Lord Cobham, an alleged co-conspirator. Interrogated in the Tower of London, Cobham provided a written confession that implicated Raleigh.³ Cobham recanted the confession before the trial. Cobham would recant again if he was brought to court and cross-examined.⁴ The prosecution refused to produce Cobham as a witness though. Treason trials were prosecuted largely through hearsay. The rationale was plain and prejudiced: treason trials were high stakes, and allowing a witness to be cross-examined would make it easier for the accused person to secure an acquittal.⁵ Raleigh was convicted on the strength of Cobham’s hearsay. He was sentenced to death and beheaded.

The spectre of Raleigh’s trial continues to haunt the hearsay rule’s historical rationale. This article examines the differences between the hearsay rule’s historical rationale and current application.⁶ It is a conceptual exercise which occurs in bite sized steps. There are three aspects to the hearsay rule’s historical rationale that were created by five factors. Section II discusses the hearsay rule’s historical rationale, identifying its three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. Section II discusses the five factors that gave rise to the hearsay rule’s tripartite rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process. The five factors are important beyond their historical significance. They are used to measure the extent to which there is a difference between the hearsay rule’s historical rationale and practical application.

¹ David Jardine, *Criminal Trials*, vol 1 (London: Charles Knight, 1832) at 427.

² *Ibid* at 425-426.

³ *Ibid* at 422-423.

⁴ Gordon Cudmore, *The Mystery of Hearsay* (Toronto: Carswell, 2009) at 18.

⁵ *Ibid* at 19-20.

⁶ Throughout the article the terms current and practical application are used interchangeably. The frame of discussion is how the hearsay rule is currently applied in practice.

Section III does the actual measuring. Section III considers the difference between the hearsay rule's historical rationale and the practical application of the exclusionary hearsay rule. There are two levels of examination in this section. First, the hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the modern hearsay doctrine. Second, practical considerations in the modern practice of criminal law are examined to identify differences.

The analysis in this article is mostly descriptive. The reader must determine whether differences between the historical rationale and practice application of the hearsay doctrine is positive or negative development. A rule of evidence can have multiple and different purposes over time. Mirjan Damaška reminds us that:

a factor that provides a good justification for an evidentiary rule can – as part of the motivational syndrome for its acceptance – easily find a place in the causal story describing the rule's origin. But this is not always the case: persuasive reasons can be advanced in favour of a particular evidentiary doctrine or practice although it is also clear that these reasons played no part in its genesis.⁷

A position is taken on instances where practical considerations in the practice of criminal law create a difference between the historical rationale and practical application. In such instances, there is neither a principled nor policy reason for the difference between the hearsay rule's historical rationale and its practical application.

The article aids in understanding what the hearsay rule is, where it comes from, and where there exists incongruence between the rule's theoretical purpose and practical application. These lessons can guide the doctrine's development to help ensure that the hearsay rule's application is consistent with its theoretical purpose.

II. THE HEARSAY RULE'S HISTORICAL RATIONALE

The hearsay rule has three aspects to its historical rationale: inherent reliability, procedural reliability, and fairness in the adversarial process. Five

⁷ *Ibid* at 3.

factors underlie this rationale. This section will canvass the literature's major theories about the hearsay rule's historical rationale. The section sets a base to appreciate how five factors influenced the hearsay rule's development, and how these five factors underlie the hearsay rule's historical rationale. Section III will use the five factors to measure the extent to which the hearsay rule's historical rationale differs from its practical application.

There are multiple rubrics at play. Here is how to keep track of them. There is one historical rationale to the hearsay rule. That rationale has three aspects. And those aspects were formed by five factors. This is all that matters for the purpose of tracking the differences between the hearsay rule's historical rationale and current application.

The paragraphs to follow will examine how the five factors influenced the hearsay rule's development. This is done by considering the major theories in the literature, of which there happen to be six.

A. The Major Theories

First, professor John Wigmore believed that the historical rationale for the hearsay rule is to prevent lay jurors from overvaluing the reliability of hearsay evidence.⁸ The locus of Wigmore's theory was that lay jurors will miscalculate testimony. Wigmore's theory is the most commonly accepted account in Canadian jurisprudence.

Wigmore did not explicitly articulate his theory of the hearsay rule's historical rationale. His theory is understood from the discussion of hearsay in his famous text, the *Treatise on the Anglo-American System of Evidence in Trials at Common Law*. According to Wigmore, unsworn hearsay statements were excluded from evidence by common law judges beginning in the 1670s.⁹ By 1696 both sworn and unsworn hearsay statements were barred.¹⁰ The equitable courts later adopted the common law bar against hearsay evidence. Although the equitable and common law courts sometimes used different triers of fact – the common law courts allowed for lay jurors and

⁸ Frederick WJ Koch, *Wigmore and Historical Aspects of the Hearsay Rule* (PhD Thesis, Osgoode Hall, York University, 2004) [unpublished] at 89-90, citing John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada*, vol 2 (Boston: Little, Brown, 1904) at 1685-1686, §1364.

⁹ *Ibid* at 89.

¹⁰ Wigmore, *supra* note 8 at §1364, cited in Koch, *supra* note 8 at 90.

the equitable courts only allowed professional judges – the equitable courts adopted the hearsay rule under the legal maxim that “equity follows the law.”¹¹ The sole reason for the historical bar against hearsay evidence is the cross-examination of the declarant.¹²

What is further noticeable is that in these utterances of the early 1700s the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that “the other side hath no opportunity of a cross-examination.”¹³

The value of cross-examination is its ability to show lay jurors the potential sources of unreliability in testimony.¹⁴ Lay jurors will be less inclined to overvalue testimonial evidence if the frailties of the testimony are brought to light under cross-examination. Wigmore’s privileging of cross-examination in the rationale of the hearsay rule is unsurprising. He believed cross-examination to be “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”¹⁵

Alongside the belief that cross-examination is the greatest engine for the truth, Wigmore strongly distrusted lay jurors’ ability to properly evaluate testimonial assertions. Lay jurors were not believed to weigh hearsay evidence with the same competence as professional judges.¹⁶ Cross-examination existed as a corrective measure against lay jurors’ inability to properly assess testimony.

Under Wigmore’s theory, the hearsay rule was not necessary when cross-examination was not required to show lay jurors potential sources of unreliability in testimony. Wigmore believed that the hearsay rule is generally not applicable when the trier of fact is a judge alone.¹⁷ Unlike lay jurors, judges can properly assess testimonial evidence.

Second, the historical research of Professor John Langbein affected Wigmore’s theory. A legal historian, Langbein’s research agrees with

¹¹ Koch, *supra* note 8 at 242.

¹² Wigmore, *supra* note 8 at 1688, §1364, cited in Koch, *supra* note 8.

¹³ *Ibid* [emphasis added].

¹⁴ Koch, *supra* note 8 at 90

¹⁵ Wigmore, *supra* note 8 at 27, §1367.

¹⁶ *Ibid*.

¹⁷ Koch, *supra* note 8 at 90-94.

Wigmore that most exclusionary rules of evidence, including the hearsay rule, were developed by judges to guard against the perceived tendency of lay jurors to overvalue testimonial evidence.¹⁸ However, Langbein believed that the exclusionary rules relating to unsworn hearsay evidence developed later, in the 1700 and 1800s, as defence lawyers began to represent accused persons in felony trials.¹⁹ Langbein's research saw the hearsay rule emerging at the intersection of the rise of the professional advocate, the judge's loss of influence over the jury, and the advent of evidence law as a control on the rectitude of the jury's decision.²⁰

Langbein has been understood by some scholars to disagree with Wigmore on the historical purpose of the hearsay rule.²¹ This is a misreading of Langbein's research. Langbein and Wigmore agree that the historical purpose of the hearsay rule is to guard against the perceived tendency of lay jurors to overvalue testimonial evidence. Langbein and Wigmore disagree on the time period in which the rule emerged to achieve this purpose for unsworn hearsay evidence. Langbein, putting the emergence of the rule in the mid-1700s, sees the rule emerging at the intersection of the rise of the professional advocate, the judge's loss of influence over the jury, and the advent of evidence law as a control on the rectitude of the jury's decision.²² Wigmore, putting the emergence of the rule much earlier in the 1600s, sees the rule only emerging as a control on the rectitude of the jury's decision.

Third, professor Richard Friedman suggests that the core of the hearsay rule is the right to confront the witness during their testimony.²³ This right applies in judge alone and jury trials and is unconcerned with perceived judicial attitudes about lay jurors.

Friedman provides a variety of examples from sixteenth to eighteenth century British common law. For instance, the jurisprudence surrounding

¹⁸ John H Langbein, "The Criminal Trial Before the Lawyers" (1978) 45:2 U Chicago L Rev 263 at 306.

¹⁹ *Ibid* at 306-315. Langbein did not challenge Wigmore's description of sworn hearsay.

²⁰ *Ibid*.

²¹ See e.g. criticism of some scholars in the literature levied in Lisa Dufraimont, "Evidence Law and the Jury" (2008) 53:2 McGill LJ 199 at 222.

²² Langbein, *supra* note 18 at 306-315.

²³ Richard D Friedman, "No Link: The Jury and The Origins of the Confrontation Right and the Hearsay Rule" in John W Carins & Grant McLeod, eds. *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Oxford: Hard Publishing, 2002) 93 at 93.

depositions crystalized during this time. Depositions were not allowed to be used at trial unless the adverse party had an opportunity to cross-examine the declarant.²⁴ Similarly, Magistrates under the reign of Queen Mary could take statements sworn from witnesses in felony cases for the express purpose of preserving their evidence before a trial. If the declarant was alive and able to travel to court, the statement could not be used at trial. The rationale was that the accused person could not be denied their right to confront the witness.²⁵ These sworn statements were eventually prohibited by the Courts of King's Bench and Common Pleas for misdemeanor cases as well. The Court specifically reasoned that "the defendant not being present when [the statements] were taken before the [examining authority, in this case the mayor], and so had lost the benefit of a cross-examination."²⁶

Freidman readily admits that the right to confrontation was not cleanly applied in the time leading up to the eighteenth century. Some courts enforced the right sporadically. Still, the affirmation or denial of the right never depended on the jury's perceived ability to evaluate the hearsay evidence. The concern was always the procedural issue of whether the witness should give their testimony in open court, face to face with the adverse party.²⁷

Fourth, professor Edmund Morgan posits that the hearsay rule is a product of a judicial desire to ensure that only reliable evidence is put to the trier of fact.²⁸ Morgan directly challenges Wigmore's suggestion that the hearsay rule's historical rationale is concerned with the evaluative competency of lay jurors.

Morgan's research reveals three rationales for the hearsay rule until the 1700s.²⁹ Hearsay is rejected because it is not information based on a witness' observations: it is information based on "what [the witness] is credulous

²⁴ *Ibid* at 95.

²⁵ *Ibid* at 96.

²⁶ *R v Paine*, 5 Mod. 163, 87 ER 584 at 585, cited in *ibid* at 96.

²⁷ Freidman, *supra* note 23 at 98.

²⁸ Edmund M Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62:2 Harv L Rev 177 at 182-183 [Morgan, "Hearsay Dangers"].

²⁹ *Ibid*.

enough to believe.”³⁰ A hearsay statement is not made under oath.³¹ And the opposing party in litigation is unable to receive the benefit of cross-examining the hearsay declarant.³²

Cross-examination is necessary for its ability to shed light on the potential sources of unreliability in testimonial evidence. Morgan identified four ‘hearsay dangers’ that exist whenever a witness testifies about an out of court statement. A court is unable to test the declarant’s sincerity, use of language, memory, and perception of the statement in question.³³ Cross-examination allows the opposing party to test these potential sources of unreliability and make them plain to the trier of fact. This allows the trier to better weigh the testimonial evidence. Such insight into the reliability of testimony is lost when hearsay evidence is admitted.

Note that cross-examination is not necessary for its perceived ability to remedy an evaluative issue with lay jurors. Under Morgan’s theory, the historical role of cross-examination in the hearsay rule is a product of the adversary system. Cross-examination is required to allow the opposing party an opportunity to expose sources of unreliability in testimony. This applies regardless of whether the trier of fact is a judge or jury.³⁴

Morgan acknowledged a caveat to his research. His theory begins to show cracks in its application to the case law after the early 1700s. After the hearsay rule was formed in the 1600s, some decisions creating exceptions to the rule referenced perceived issues with the jury’s competence. Morgan conceded that these hearsay exceptions were influenced by the jury’s role as trier of fact.³⁵ He reconciles the discrepancy by recognizing that the hearsay doctrine is the product of conflicting considerations. Much of the doctrine, including the creation of the hearsay rule, is influenced by the reliability of hearsay evidence. Some of the exceptions to the rule, however, are influenced by concerns about the jury.³⁶

Despite these caveats, Morgan’s theory marked a paradigm shift in the literature. His suggestion that the hearsay rule stems from a concern for the reliability of testimonial evidence brought a new dimension to the debate

³⁰ *Ibid* at 183.

³¹ Edmund M Morgan, “The Jury and the Exclusionary Rules of Evidence” (1936) 4 U Chicago L Rev 247 at 253 [Morgan, “Jury and Exclusionary Rules”]

³² *Ibid*.

³³ Morgan, “Hearsay Dangers”, *supra* note 28.

³⁴ Morgan, “Jury and Exclusionary Rules”, *supra* note 31 at 255.

³⁵ *Ibid*. at 255.

³⁶ *Ibid* at 255-256.

about the historical rationale of the hearsay rule. Equally, his research is one of the most significant challenges to the jury control theory on which Wigmore premises his analysis.

Fifth, Professor H.L. Ho, taking a philosophical approach, considers fairness to be the lynchpin of the hearsay rule's historical rationale. For Ho, hearsay is based on two conceptions of fairness. First, the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified.³⁷ Under the adversarial system generally, the party producing a witness bears the risk that the witness will not be able to prove his or her anticipated evidence. Second, the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.³⁸

Ho's theory is qualitatively different from most of the major theories in the literature. Ho is an evidence scholar who theorized about the philosophy of evidence. He created a philosophical theory and used historical cases to test it. Premised on philosophy and tested with case law, Ho's theory aims to explain the genesis of the hearsay rule, its exceptions, and, atypically, the route the doctrine should take as it develops in the future.

Sixth, one of the more contemporary theories of the hearsay rule's historical rationale is that of Professor Frederick Koch, a Canadian scholar. Koch believes that the hearsay rule is a merger of seven separate exclusionary evidence rules that formed between 1550 and 1750.³⁹ The seven rules formed for one or both of two reasons. The first reason is the judicial belief that certain kinds of hearsay evidence should be excluded because they are too unreliable.⁴⁰ The second reason is the epistemic need for two elements of testimonial evidence, cross-examination and demeanour evidence.⁴¹

³⁷ HL Ho, "A Theory of Hearsay" (1999) 19:3 Oxford J Leg Stud 403 at 403 [Ho, "Theory of Hearsay"].

³⁸ *Ibid* at 410.

³⁹ Frederick WJ Koch, "The Hearsay Rule's True Reason d'Être: It's Implications for the New Principled Approach to Admitting Hearsay Evidence" (2005) 37:2 Ottawa L Rev 249 at 253 [Koch, "Hearsay's Reason d'Être"].

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

Koch's theory is founded on a robust source of historical case law. He used the nominate case reports, reports in *Cobbett's State Trials*, early published works on evidence law, the *Old Bailey Session Papers*, and *Sir Dudley Ryder's Notes*.⁴² Koch's research represents the most comprehensive examination of the hearsay rule's historical rationale.

These are the six major theories on the hearsay rule's historical rationale. They are presented to outline the prevailing views on the hearsay rule's historical rationale. Although not explicitly engaging with one another, the theories agree some on points and disagree on others. What is necessary is a reconciling of the theories to determine the precise historical rationale of the hearsay rule.

B. The Hearsay Rule's Historical Rationale

Recent research shows that the six major theories about the hearsay rule's historical rationale are reconcilable as parts of a broader, more comprehensive rationale.⁴³ This rationale is premised on five factors which, analytically, underlie three rationales:

1. Inherent Reliability
 - i. The hearsay dangers
 - ii. No demeanour evidence
2. Procedural Reliability
 - iii. The lack of opportunity to cross-examine the declarant
 - iv. The evidence is unsworn
3. Fairness in the adversarial process
 - v. Fairness in the adversarial process

The three rationales are not analytically distinct. They spill into each other, sharing similar concerns.

The first rationale, inherent reliability, is concerned with the accuracy of an untested hearsay statement. The inherent reliability rationale is derived from historical judicial concern with demeanour evidence and the

⁴² Koch, "Hearsay's Reason d'Être", *supra* note 39 at 254.

⁴³ Christopher Lloyd Sewrattan, *Lost in Translation? The Difference Between Hearsay Rule's Historical Rationale and Practical Application* (LLM Thesis, Osgoode Hall, York University, 2016) [unpublished].

hearsay dangers. The absence of demeanour evidence was concerning to judges because it prevented the trier of fact from assessing the sincerity of the hearsay declarant. It was more difficult to assess the accuracy of a declarant's statement without observing the witness' sincerity.⁴⁴ In addition, there was an epistemological concern that a witness testify *viva voce*.⁴⁵ The hearsay dangers are the inability to test the declarant's sincerity, use of language, memory, and perception of the statement in question.

The second rationale, procedural reliability, is closely related to the inherent reliability rationale. It too is concerned with the accuracy of the declarant's statement. However, whereas the inherent reliability rationale is concerned with the accuracy of the hearsay statement when it is initially uttered without testing, the procedural reliability rationale is concerned with the ability to test the statement, in court, through courtroom procedure. The rationale stems from judicial concern with the absence of two features of courtroom procedure: the oath and cross-examination of the declarant. Unlike the factors in the inherent reliability rationale, the oath and cross-examination do not influence the accuracy of a declarant's statement when it is initially uttered. Influence upon the accuracy of the statement is imparted only when the declarant testifies in court. The oath binds the declarant's conscience and cross-examination examines his or her motive and ability to recollect. It is in this manner that the oath and cross-examination increase the reliability of hearsay evidence through courtroom procedure.

The third rationale encompasses one factor, fairness to the opposing party in the adversarial process. The third rationale aligns with Professor Ho's fairness theory.

The spillage of the five historical factors between the three categories of rationales is not neat. Indeed, the factors touch upon all three rationales in varying degrees. The rationales are best conceived as aspects of a broader rationale of the hearsay rule.

⁴⁴ See eg Ho, "Theory of Hearsay", *supra* note 37.

⁴⁵ Koch, "Hearsay's Reason d'Être", *supra* note 39 at 210-223

III. THE EXCLUSIONARY HEARSAY RULE

Using the five factors that gave rise to the hearsay rule's historical rationale, this section identifies the nature and extent of the differences between the hearsay rule's historical rationale and practical application. The discussion centers on instances in which hearsay is admitted under the necessity and reliability principle.

Section A explains how the current hearsay rule is constituted and operates. The remaining sections examine differences between the hearsay rule's historical rationale and its current application. The analysis proceeds by reference to the five factors that gave rise to the hearsay rule. Each of the five factors exhibit problems in their practical application that affects their influence on the decision to admit hearsay evidence. This article explores those problems, and uses them as indicia of differences between the hearsay rule's historical rationale and current application. Since the five factors underlie the hearsay rule's historical rationale, a change in the factors will indicate a change in the application of the hearsay rule's historical rationale. For example, if it is found that there are instances in which demeanour evidence is less influential on the admission of hearsay than it was historically, this will suggest a change within the inherent and procedural reliability aspects of the hearsay rule's rationale.

The analysis is divided according to the five factors for analytical purposes. In practice, the factors are interrelated and affect the same underlying rationale. A difference found in the application of one factor will generally apply to other factors. For example, if demeanour evidence is found in some instances to be less influential than it was historically, the analysis of these instances will apply to the hearsay dangers and fairness in adversarial process.

In addition to tracking the differences between the hearsay rule's historical rationale and practical application, the causes of the differences will be identified and evaluated. In many instances, the differences prevent the hearsay rule from achieving its purpose. This part of the discussion occurs on two levels. The hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the doctrine itself. Practical considerations in the modern practice of criminal law are considered to determine if they create any differences.

A. The Current Hearsay Rule

Hearsay is an out-of-court statement adduced to prove the truth of its contents without a contemporaneous opportunity to cross-examine the declarant.⁴⁶ It is still unclear whether implied non-verbal conduct is captured by the hearsay rule.⁴⁷ The classic occasion on which hearsay is prohibited is the testimony by a witness of what a non-witness said. The hearsay rule also captures some out of court statements made by the very witness testifying in court. For example, prior inconsistent statements are considered hearsay when they are adduced for the truth of their contents.⁴⁸

There are two features of the hearsay rule that limit its scope: the availability of the declarant as a witness and the use of the out of court statement to prove the truth of its contents.⁴⁹ Hearsay evidence is formally defined in Canadian law as an out of court statement by a person not called as a witness tendered in evidence to prove the truth of its contents.⁵⁰ Presumably what is meant by “not called as a witness” is the inability for contemporaneous cross-examination on the utterance. Otherwise, prior inconsistent statements would not be properly considered hearsay.

Hearsay jurisprudence stands at the end of a long road and at the start of another.⁵¹ For over a century the hearsay rule was a blanket prohibition on hearsay evidence. Hearsay would be admitted into evidence if it fit within an ossified exception to the hearsay rule. Today, hearsay evidence must conform to the twin criteria of necessity and reliability in order to be admitted into evidence.⁵² Necessity is the unavailability of the hearsay statement’s content.⁵³ The necessity criterion serves a truth-seeking function. Rather than losing the evidence of an unavailable declarant, the

⁴⁶ *R v Khelawon*, 2006 SCC 57 at paras 56-58 [*Khelawon*];

⁴⁷ *R v Baldree*, 2013 SCC 35 at paras 62-63 [*Baldree*].

⁴⁸ *R v B(KG)*, [1993] 1 SCR 740, [1993] SCJ No 22 (CanLII) [*KGB*].

⁴⁹ Alan W Bryant, Sidney N Lederman, & Michelle K Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis Canada, 2014) at 238.

⁵⁰ *Baldree*, *supra* note 47 at para 1, Fish J.

⁵¹ S Casey Hill, David M Tanovich, & Louis P Strezos, *McWilliams' Canadian Criminal Evidence, Fifth Edition* (Toronto: Canada Law Book, 2012) at 7-5.

⁵² *Khelawon*, *supra* note 46 at paras 2-3.

⁵³ *Ibid* at para 78.

law deems it necessary to admit the evidence as an exception to the hearsay rule.⁵⁴ If the declarant is deceased, ill, incompetent to testify, or otherwise unavailable, the content of their statement is trapped without the admission of hearsay. Hearsay evidence must be ‘necessary’ in this sense of being trapped in order to be admissible. Reliability is the ability to negate the likelihood that the declarant of a hearsay statement was mistaken or untruthful.⁵⁵ The reliability criterion is concerned with ensuring the integrity of the trial process.⁵⁶ Reliability is satisfied in two overlapping instances.⁵⁷ First, the circumstances in which the hearsay statement came about produced a statement so reliable that contemporaneous cross-examination of the declarant would add little to the trial process.⁵⁸ This is called procedural reliability. It examines whether there is a satisfactory basis to rationally evaluate the statement.⁵⁹ Second, the hearsay statement can be tested by means other than contemporaneous cross-examination.⁶⁰ This is called substantive reliability. It examines whether the circumstances “provide a rational basis to reject alternative explanations for the statement, other than the declarant’s truthfulness or accuracy.”⁶¹ The trier of law will allow a statement admission into evidence if there is a sufficient basis for the trier of fact to assess the statement’s truth and accuracy. This is called the threshold reliability test.⁶²

Necessity and reliability operate in tandem. A deficiency in one can be overcome by strength in the other.⁶³ However, even if a hearsay statement satisfies the necessity and reliability principle, it will be excluded from evidence if its probative value is outweighed by its prejudicial effect.⁶⁴

The hearsay rule’s rationale is tied to the justice system’s value on *viva voce* testimony. The Supreme Court stated in *Khelawon*:

Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact,

⁵⁴ *Ibid.*

⁵⁵ *R v Smith*, [1992] 2 SCR 915 at 933, 1992 CanLII 79 (SCC) [*Smith*].

⁵⁶ *Ibid.*

⁵⁷ *Khelawon*, supra note 46 at para 49.

⁵⁸ *R v Bradshaw*, 2017 SCC 35 at para 40, Karakatsanis J.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Baldree*, supra note 47 at para 72, Fish J.

⁶⁴ *Khelawon*, supra note 46 at para 3.

and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.⁶⁵

The three aspects of the hearsay rule's historical rationale are present in this statement. There is, of course, not always congruity between the way a rule is described and applied in practice. This section will discuss in detail the extent to which the hearsay rule's historical rationale differs from the way it is applied. For now, what is notable is that all aspects of the hearsay rule's rationale are present in the text of the jurisprudence.

This is perhaps surprising considering that Wigmore's theory of the hearsay rule's rationale is by far the most explicitly endorsed theory in the jurisprudence. The necessity and reliability principle are drawn directly from Wigmore's scholarship.⁶⁶ In *R v Smith*, Chief Justice Lamer (as he then was) stated that the principles underlying the exceptions to the hearsay rule also underlie the rule itself.⁶⁷ Lamer C.J.C. cited Wigmore for this statement. He then quoted Wigmore's description of the necessity and reliability criteria and his emphasis on the importance of cross-examination to test hearsay evidence.⁶⁸ It appears that Canadian jurisprudence has either misinterpreted Wigmore's theory or chosen to disregard aspects with which it does not agree. Wigmore was solely concerned that lay jurors could not properly evaluate hearsay; he regarded cross-examination as invaluable because it could remedy the evaluative incapacity of lay jurors. Canadian hearsay jurisprudence has adopted this concern, to be sure, but it is not the sole concern. The jurisprudence has adopted aspects of other theories as well, like Morgan's hearsay dangers and Koch's focus on demeanor evidence and the oath.⁶⁹ Although Wigmore's theory is by far the most referenced,

⁶⁵ *Ibid* at para 35.

⁶⁶ *Smith*, *supra* note 55 at 929-934.

⁶⁷ *Ibid* at 932.

⁶⁸ *Ibid* at 929-930.

⁶⁹ Koch's scholarship post-dates much of the hearsay revolution. The jurisprudence has not adopted aspects of his theory. It has adopted ideas shared by his theory.

the jurisprudence actually comprises a mash of different theories of the hearsay rule's historical rationale. This makes sense considering that the various theories describe aspects of the same rationale. The hearsay rule's historical rationale is a fusion of concerns relating to the reliability of hearsay and fairness in the adversarial process.

B. The Hearsay Dangers

The hearsay dangers, as defined by Morgan, exist whenever a witness testifies about an out of court statement. The “danger” particular to hearsay evidence is the inability of a court to test the declarant's sincerity, use of language, memory, and perception of the statement in question.⁷⁰ Historically, cross-examination was deemed necessary to allow an opposing party the opportunity to test these potential sources of unreliability and expose them to the trier of fact.

The hearsay dangers are at the forefront of the hearsay rule's current application, as they were during the rule's development in the 1600s and 1700s. The Supreme Court identifies the inability to test the reliability of hearsay evidence as the “central concern” underlying the hearsay rule.⁷¹ Testing the reliability of hearsay evidence is believed to enhance the accuracy of a court's decision and guard against unjust verdicts. According to the Supreme Court, testing reliability means testing the declarant's perception, memory, narration, and sincerity, as well as observing the declarant's demeanour.⁷²

It has taken the case law some time to consistently identify the hearsay dangers. Beginning in 1993 in *R v K.G.B.*, the Supreme Court identified the hearsay dangers as the source of the hearsay rule's reliability concern. They were described differently than Morgan's formulation of the hearsay dangers:

[The hearsay dangers are] the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed), and the lack of contemporaneous cross-examination by the opponent.⁷³

⁷⁰ Morgan, “Hearsay Dangers”, *supra* note 28.

⁷¹ *R v Starr*, 2000 SCC 40 at para 159 [*Starr*].

⁷² *Baldree*, *supra* note 47 at para 31; *Khelawon*, *supra* note 46 at paras 1-2.

⁷³ *KGB*, *supra* note 48 at 764.

The Court would repeat this description of the hearsay dangers multiple times in the 1990s.⁷⁴ These factors underlie the hearsay rule's historical rationale. Inexplicably, the case law now recognizes the hearsay dangers in Morgan's formulation.⁷⁵ The factors identified as hearsay dangers previously are now labelled as their own terms.⁷⁶

There are two overlapping methods to allay the concern posed by the hearsay dangers. One method is to show that the circumstances in which a hearsay statement came about safeguard against any real concern about the declarant's perception, memory, narration, and sincerity. The admission of a child's statement to her mother in *R v Khan* is a classic example.⁷⁷ In *Khan* a three-year-old girl was sexually assaulted by her doctor. Approximately 15 minutes later, she told her mother that the doctor "put his birdie in my mouth, shook it and peed in my mouth."⁷⁸ The child had a wet spot on her jogging suit that was determined to be a mixture of semen and saliva.⁷⁹ At trial, the child was held to be incompetent to testify.⁸⁰ Her statement to her mother was hearsay, and it did not fall under an exception to the hearsay rule. Nevertheless, the Supreme Court admitted the child's hearsay statement to her mother into evidence. The circumstances in which the statement was made satisfied the Court that the child's statement did not suffer from difficulties in perception, memory, narration, and sincerity.⁸¹ The child made the statement shortly after the assault, eliminating concern that her memory was inaccurate. Being three years old, she had no motive to lie. Her statement was made naturally and without prompting, suggesting that her mother did not coax her into making the statement.⁸² The content of her statement was about a subject outside the experience of a three-year-

⁷⁴ *R v Hawkins*, [1996] 3 SCR 1043 at para 60, 1996 CanLII 154 (SCC) [*Hawkins*]; *Khan*, *supra* note 66; *KGB*, *supra* note 48; *Smith*, *supra* note 55.

⁷⁵ See e.g. *Baldree*, *supra* note 47 at para 31.

⁷⁶ See e.g. *Baldree*, *supra* note 47.

⁷⁷ *Khan*, *supra* note 66.

⁷⁸ *Ibid* at 534.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at 534-535.

⁸¹ *Ibid* at 546-548.

⁸² *Ibid* at 548..

old, suggesting that the statement was not fabricated or remembered and narrated incorrectly. The statement was also corroborated by the semen stain on her clothing.⁸³

Wigmore's scholarship is the basis for this method of allaying the concern posed by the hearsay dangers. When Wigmore wrote about the hearsay rule, most trials were judged by lay jurors. The terms 'trier of fact' and 'lay juror' could have been treated as synonymous during this time. Those circumstances do not exist in Canada today. Wigmore also believed that cross-examination was "beyond any doubt the greatest engine ever invented for the discovery of the truth."⁸⁴ A hearsay statement should be admitted into evidence if the declarant could not testify and the statement did not pose a risk of misvaluation in jurors in the absence of cross-examination. In such an instance cross-examination would be "superfluous."⁸⁵ The Supreme Court explicitly adopted Wigmore's scholarship on this issue in *R v Khelawon*:

One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.⁸⁶

In adopting Wigmore's scholarship in this manner the Court tied the admission of hearsay to the utility of cross-examination.⁸⁷ This causes some concern. Wigmore believed that the hearsay rule was created to guard against the evaluative capacity of lay jurors, and cross-examination was the best method to expose frailties in testimonial evidence to lay jurors. The

⁸³ *Ibid.*

⁸⁴ Wigmore, *supra* note 8, vol 1 at 27, §1367.

⁸⁵ *Ibid* at 1791, §1420 cited in Koch, *supra* note 8 at 92

⁸⁶ *Khelawon*, *supra* note 46 at para 62.

⁸⁷ Unlike Wigmore, however, the jurisprudence will not allow for an exception to the hearsay rule on the basis of a non-contemporaneous opportunity to cross-examine the declarant of a hearsay statement (*Starr*, *supra* note 71 at paras 58-60).

locus of Wigmore's concern was lay jurors' ability to evaluate the reliability of hearsay.

This can be contrasted with the concern of the hearsay dangers. The hearsay dangers are the ability to test potential flaws in a declarant's perception, memory, narration, and sincerity. They are distinct from the trier of fact's ability to evaluate hearsay evidence. The locus of concern is the ability to test hearsay evidence, and the concern applies to lay jurors and judges alike. To be sure, the Supreme Court is entitled to pick and choose from aspects of Wigmore's scholarship. However, Wigmore's scholarship on this issue is premised on lay jurors' ability to evaluate the reliability of hearsay. That premise is inapplicable and unsound. Inapplicable because the vast majority of trials in Canada today are conducted by judges alone.⁸⁸ It is unsound because there is a lack of evidence suggesting that lay jurors are less adept than judges at evaluating hearsay. Indeed, the existing research almost suggests the opposite: when deciding a case, lay jurors are not less competent than judges.⁸⁹

Another concern is that the hearsay dangers may not be allayed by cross-examination alone. To be clear, the need to allay the hearsay dangers stops when there is a sufficient basis for the trier of fact to assess the hearsay statement's truth and accuracy. This is the test for threshold reliability. In assessing the threshold reliability test, the hearsay dangers sometimes require additional safeguards, such as the oath or need to receive *viva voce* demeanour evidence. There is considerable overlap between Wigmore's concern and the concern posed by the hearsay dangers. It is often the case that both concerns are allayed by the circumstantial guarantees of reliability in the way a hearsay statement was made. There are occasions, however, when the hearsay dangers are not allayed simply because the circumstances in which a hearsay statement was made does not call for cross-examination. There may still be a need to test the declarant with an oath and *viva voce* demeanour evidence to expose potential flaws in the declarant's perception, memory, narration, and sincerity.

⁸⁸ Neil Vidmar, "The Canadian Criminal Jury: Searching For a Middle Ground" (1999) 62:2 Law & Contemp Probs 141 at 147.

⁸⁹ See generally Neil Vidmar, "Foreword: Empirical Research and the Issue of Jury Competence" (1989) 52:4 Law & Contemp Probs 1 at 4.

*R v Sheriffe*⁹⁰ demonstrates this nicely. In that case the accused was convicted of first-degree murder after an expert witness testified about the accused person's alleged ties to gangs. The expert witness based his opinion on information received from confidential informants. The accused person argued on appeal that the basis of the expert witness' opinion was hearsay and ought to have been excluded from evidence. The Court of Appeal for Ontario held that the confidential informants' information was admissible under the hearsay rule.⁹¹ Though hearsay, the information was necessary because the confidential informants could not be called as witnesses. The information was sufficiently reliable because the informants had a history of providing accurate and truthful information to the police.⁹²

Clearly, the Court of Appeal was comfortable with the veracity of the informants' information. This was only part of the equation, though, and the Court should have looked further. More relevant was the expert's actual opinion – and how he derived that opinion from the information available to him. In this respect, the Court of Appeal ought to have treated demeanour evidence as critical. The informants were unlikely to be savory characters. They were confidential informants, with a history of speaking to the police, who chose to disclose gang ties about an accused murderer. These are not the type of people who look trustworthy in a courtroom, and they are not known for being careful with their words. The trier of fact, in this case a jury, should have been able to see the informants testify to determine whether the expert's opinion was credible in light of having based his opinion on their information. Even if the informants' information was in fact accurate, the jury should have been allowed to see if the informants were trying to be accurate. Do they look like they were under the influence of drugs or alcohol? Can you see them thinking about their answers before they speak? Are they being flippant? When the source of information is a confidential informant speaking about gang ties, these are all live issues. They all relate to reliability. And to resolve these issues you need to see the declarant's demeanour. Of course, since confidential informants could never testify in a court, the proper remedy would have been to prohibit the expert's evidence.

The hearsay dangers will not be allayed if the test adopted in the jurisprudence is applied too loosely. It is not difficult to imagine a situation

⁹⁰ *R v Sheriffe*, 2015 ONCA 880.

⁹¹ *Ibid* at para 120.

⁹² *Ibid* at para 92.

in which a loose application of the threshold reliability test is tempting. For example, consider a dark night in which a person is pushed under a bus and dies. No one sees the pusher, but a male witness is able to give a vague description of him. The statement is the strongest evidence pointing to the pusher committing the crime. The witness' statement is videotaped shortly after the push. When the witness gives the description of the pusher, he is high on heroin, has motive to lie, and specifically tells the police that he does not want to go to court. The witness' statement is not sworn and is both confirmed and contradicted by other evidence. Someone matching the witness' description of the pusher is arrested and charged. At trial, the witness claims to have no knowledge of the push or even giving the statement to the police. Meaningful cross-examination on his statement is meaningless now that his memory has failed him. Are the hearsay dangers of his statement allayed? Hardly. But this is evidence necessary to secure a conviction. This factual situation happened in *R v Groves*.⁹³ The application judge admitted the statement into evidence, reasoning that the statement's documentation on videotape and relative contemporaneity with the push provided sufficient reliability for admission.⁹⁴ The admission is too loose an application of the threshold reliability test. It is in line with the modern motivation to use the hearsay rule to effectively prosecute alleged offenders. Looking plainly at the hearsay dangers, the statement should never have been admitted. Although the witness' narration was preserved in the videotape, without meaningful cross-examination there was no light shed on his perception and memory of the push or the sincerity of his statement.

Returning to the methods of allaying the concern posed by the hearsay dangers, the second method is to show that there are adequate substitutes to test the truth and accuracy of the hearsay statement.⁹⁵ The classic example is when a statement is made at another court proceeding under oath and cross-examination. In *R v Hawkins*,⁹⁶ for example, the accused person's then-girlfriend testified against him at the preliminary inquiry. Her statement was given under oath and she was cross-examined by the accused person's

⁹³ *R v Groves*, 2011 BCSC 1935, aff'd 2013 BCCA 446.

⁹⁴ *Ibid* at para 17.

⁹⁵ *Khelawon*, *supra* note 46 at para 63.

⁹⁶ *Hawkins*, *supra* note 74 at 1.

counsel.⁹⁷ She was recalled at the preliminary inquiry and, with explanation, recanted much of what she said.⁹⁸ The accused person married his girlfriend between the preliminary inquiry and the trial, rendering her incompetent to testify at trial as a Crown witness.⁹⁹ At the trial the Crown sought to admit the girlfriend's preliminary inquiry testimony under the principled exception to the hearsay rule. The Supreme Court held that statements given before a preliminary inquiry will generally allay the hearsay dangers because the statements are given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues.¹⁰⁰ In addition, the statements are recorded in a court certified transcript and the opposing party can observe the declarant's demeanour during cross-examination.¹⁰¹ In short, there are ample substitutes to test the truth and accuracy of the declarant's statement.

To summarize, the hearsay dangers remain at the forefront of the hearsay rule's current application. While the jurisprudence has taken some time to correctly identify the hearsay dangers, the test for threshold reliability is premised on testing for them. The hearsay rule assumes that cross-examination will generally allay the hearsay dangers. The basis of the assumption is Wigmore's belief that lay jurors overvalue the reliability of hearsay. This causes some concerns. The hearsay dangers may not be allayed by cross-examination alone or when the threshold reliability test is applied too loosely. In these situations, the concern with the hearsay dangers is less than it was under the hearsay rule's historical rationale.

C. No Demeanour Evidence

The absence of demeanour evidence remains a core concept of the hearsay rule, as it was during the historical development of the rule. The influence of demeanour evidence on the admission of hearsay is substantial, though it is sometimes subsumed by the role of cross-examination. Though initially labeled a hearsay danger, demeanour evidence is characterized today as an independent factor in the test for threshold reliability.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at para 14.

⁹⁹ *Ibid* at para 1.

¹⁰⁰ *Ibid* at para 76.

¹⁰¹ *Ibid* at para 77.

Under the case law, the inability to observe the demeanour of a hearsay statement's declarant impairs the trier of fact's ability to properly assess the statement. In *K.G.B.* the Supreme Court held:

When the witness is on the stand, the trier can observe the witness's reaction to questions, hesitation, degree of commitment to the statement being made, etc. Most importantly, and subsuming all of these factors, the trier can assess the relationship between the interviewer and the witness to observe the extent to which the testimony of the witness is the product of the investigator's questioning. Such subtle observations and cues cannot be gleaned from a transcript, read in court in counsel's monotone, where the atmosphere of the exchange is entirely lost.¹⁰²

K.G.B. addressed the issue of whether a videotaped statement can be admitted for the truth of its contents when the declarant recants its content at trial. Due to the specificity of the issue, the Court was acutely focused on the importance of demeanour evidence in its comments. Compared to the rest of the case law on the issue,¹⁰³ it is possible that the above passage is an inflated endorsement of demeanour evidence from the Supreme Court.

In general practice, demeanour evidence is an important consideration in the calculus to admit hearsay evidence. Consider *R v Baldree*. In that case the Supreme Court held inadmissible a drug purchase call made by an unknown caller because:

[n]o effort was made to find and interview him, still less to call him as a witness - where the assertion imputed to him could have been evaluated by the trier of fact in the light of cross-examination and the benefit of observing his demeanour.¹⁰⁴

The jurisprudence has gone so far as to outline potential methods of preserving demeanour evidence when taking a statement so that the statement can be admitted as an exception to the hearsay rule if the declarant becomes unavailable to testify. The statement can be video and audio recorded or, in exceptional cases, an independent third party can observe the making of the statement and testify about the declarant's demeanour.¹⁰⁵

¹⁰² *KGB*, *supra* note 48 at 792.

¹⁰³ See especially *Starr*, *supra* note 71 at para 77.

¹⁰⁴ *Baldree*, *supra* note 47 at para 73 [emphasis added].

¹⁰⁵ *KGB*, *supra* note 48 at 794.

The case law has generally endorsed the value of demeanour evidence in relation to hearsay admissibility. The treatment of demeanour evidence generally, though, is far more conflicted. In *R v N.S.*, the Supreme Court addressed directly the value of demeanour evidence in court proceedings. The Court considered it an “axiom of appellate review” that deference be shown to the trier of fact on credibility issues because judges and juries have the “overwhelming advantage” of observing the witness’ demeanour.¹⁰⁶ That strong endorsement of demeanour evidence was in 2012. Notwithstanding, appellate courts have in the same time period cautioned against strong reliance on demeanour evidence. In 2015 the Court of Appeal for Ontario cautioned trial judges “to bear in mind that, to the extent possible, they should try to decide cases that require assessing credibility without undue reliance on such fallible considerations as demeanour evidence.”¹⁰⁷ Other appellate cautions abound.¹⁰⁸ It remains to be seen whether this trend of appellate skepticism will trickle its way into hearsay case law.

In terms of testing the reliability of a hearsay statement, the value of demeanour evidence is its ability to shed light on the declarant’s sincerity. Observing the declarant allows the trier of fact to determine how certain or honest the declarant is attempting to be. Nonetheless, the jurisprudence has long held to Wigmore’s belief that cross-examination is the best method for discovering the truth. As a result, the opportunity to cross-examine a hearsay statement’s declarant is often deemed sufficient to satisfy sincerity concerns. Indeed, in *Hawkins* the preliminary inquiry testimony was admitted into evidence despite deep contradictions within the hearsay statement.¹⁰⁹ The absence of demeanour evidence was not fatal. The Supreme Court was fundamentally satisfied by the declarant being cross-examined at the preliminary inquiry.¹¹⁰ In addition she provided her statement under oath and there was a court transcript of her testimony.¹¹¹

Cross-examination and demeanour evidence will often shed the same light on a declarant’s sincerity. The value of demeanour evidence is subsumed in cross-examination when a witness testifies in court and is contemporaneously cross-examined. This was the procedure in the 1600s

¹⁰⁶ *R v NS*, 2012 SCC 72 at para 25 [NS].

¹⁰⁷ *R v Rhayel*, 2015 ONCA 377 at para 89 [Rhayel] [emphasis added].

¹⁰⁸ See e.g. *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193 at para 66.

¹⁰⁹ *Hawkins*, *supra* note 74 at para 26.

¹¹⁰ *Ibid* at paras 78-79.

¹¹¹ *Ibid* at para 89.

and 1700s when the hearsay rule was developed. The difficulty is that such intersection does not always occur anymore. Due to technological advancements, there are two types of cross-examination, contemporaneous and non-contemporaneous. In non-contemporaneous cross-examination, the declarant of a hearsay statement will be subjected to cross-examination by the opposing party before the hearing. If the cross-examination is not video recorded, the trier of fact at the hearing will be unable to observe the declarant's demeanour during the prior cross-examination. If the declarant's statement is admitted at the hearing under the hearsay rule, the trier of fact may only have a transcript of the cross-examination. The declarant's demeanour in giving the evidence will be lost. This is not an uncommon occurrence. It happens every time hearsay is admitted because a witness testified at a preliminary inquiry or non-videoed deposition and failed to attend the trial or hearing. On these occasions, the influence of demeanour evidence on the admission of hearsay is less than it was historically.

Non-contemporaneous cross-examination can also raise epistemic concerns. The ability to see a witness' face is deeply rooted in the criminal justice system.¹¹² A witness' demeanour can provide non-verbal insights that may uncover uncertainty or deception and assist at discovering the truth.¹¹³ A cross-examiner may use this information to recalibrate questions, ask new questions, or refrain from asking questions on a particular topic. The process is fluid. As the witness testifies, they disclose information through their demeanour. The cross-examiner reacts with questions. The witness discloses new information with their answers. The process repeats itself until the cross-examination concludes. All the while the trier of fact observes the witness' answers, demeanour, and weighs accordingly. The information from this fluid interaction is absent if a written hearsay statement is admitted due to non-contemporaneous cross-examination. Again, this occurs every time a witness testifies at a preliminary inquiry or non-videoed

¹¹² NS, *supra* note 106 at para 27. The Supreme Court made this ruling notwithstanding that that no expert evidence was put before the Court on the importance of seeing a witness's face to effective cross-examination and accurate assessment of a witness's credibility (para 17).

¹¹³ *Ibid* at para 24.

deposition and does not attend the trial or hearing. The vibrancy of the witness' cross-examination is reduced to black words on white paper.

The helpfulness of demeanour evidence to the trier of fact is debatable. Courts regularly caution triers of fact to not overly rely on demeanour evidence in assessing a witness' sincerity.¹¹⁴ The caution is backed by empirical research suggesting that triers of fact are fooled by a witness' purported sincerity.¹¹⁵ However, there is another line of research suggesting that in certain contexts a witness' demeanour aids the assessment of sincerity.¹¹⁶

More important is the epistemic value of demeanour evidence. Demeanour evidence aids the cross-examiner by providing cues for cross-examination. And it allows the trier of fact to assess how a witness holds up over time through the process of cross-examination. This is something that is difficult to quantify with empirical research. The value of watching over a time a witness' demeanour chipped away during cross-examination cannot be understated.

Overall, demeanour evidence remains as important a factor in the hearsay rule as it was historically. It is a core concept of the hearsay rule for its ability to shed light on the declarant's sincerity. The value of demeanour evidence is sometimes subsumed by cross-examination. This generally does not diminish the ability of demeanour evidence to shed light on the declarant's sincerity. However, due to advancements in technology since the 1600-1700s, demeanour evidence can on occasion be lost when hearsay is admitted because the declarant received an opportunity for non-contemporaneous cross-examination.

D. The Lack of Opportunity to Cross-Examine the Declarant

The lack of opportunity to cross-examine the declarant remains as influential a factor as when it became a late justification for the hearsay rule. It is complicated in practice by the disjunction between its theoretical role

¹¹⁴ See e. g. *R v Levert* (2001), 150 O.A.C. 208 at paras 24-27; *R v Trotta* (2004), 191 OAC 322 at paras. 40-43

¹¹⁵ See generally Jeremy A Blumenthal, "A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility" (1993) 72:4 Neb L Rev 1157.

¹¹⁶ Aldert Vrij et al, "Rapid Judgements in Assessing Verbal and Nonverbal Cues: Their Potential for Deception Researchers and Lie Detection" (2004) 18 Applied Cognitive Psychology 283; Max Minzner, "Detecting Lies Using Demeanor, Bias, and Context" (2008) 29 Cardozo L Rev 2557.

in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers.

With regard to its influence, cross-examination frames the principled exception to the hearsay rule. It is based on Wigmore's belief in it as the best method for ascertaining the truth in a trial. In *R v Smith*, the Supreme Court shaped the contours of the principled exception to the hearsay rule in the mold of Wigmore's high regard for cross-examination:

It has long been recognized that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it...

Of the criterion of necessity, Wigmore stated:

Where the test of cross-examination is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative...[I]t is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception.

And of the companion principle of reliability ~ the circumstantial guarantee of trustworthiness ~ the following:

There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.¹¹⁷

Of the two overlapping ways in which a hearsay statement can be deemed sufficiently reliable for admission, the ability to cross-examine the declarant is acutely important when reliance is placed on the latter, the use of adequate substitutes for contemporaneous cross-examination.¹¹⁸ Non-contemporaneous cross-examination goes a long way to satisfying the

¹¹⁷ *Smith*, *supra* note 55 at 929-930.

¹¹⁸ *Khelawon*, *supra* note 46 at paras 62-63.

reliability requirement.¹¹⁹ When considering the admissibility of prior inconsistent statements for example, the ability to cross-examine the declarant is the most important factor supporting admissibility.¹²⁰ It was the controlling factor when the Supreme Court admitted prior inconsistent statements under the hearsay rule in *K.G.B.*¹²¹ and *R v F.J.U.*¹²²

Cross-examination is deemed necessary in the case law because of its ability to expose the hearsay dangers to the trier of fact.¹²³ Through questioning, an opposing party can test the declarant's sincerity, use of language, memory, and perception of the statement in question. The purpose for which cross-examination is deemed necessary is surprising in light of the Supreme Court's explicit adoption of Wigmore's scholarship to create the necessity and reliability principle. It is another instance of the Court selectively choosing from Wigmore's scholarship on the hearsay rule. Wigmore believed that, historically and currently, cross-examination of a hearsay statement's declarant is necessary to prevent lay jurors from overvaluing the statement.¹²⁴ Cross-examination is not necessary in situations where lay jurors are not the trier of fact or cross-examination would "add little security"¹²⁵ to the statement's accuracy. Despite claiming to adopt Wigmore's scholarship, the Supreme Court has averted Wigmore on these important tenets. The case law is steadfast that the hearsay rule is concerned with exposing the hearsay dangers, and the role of cross-examination is to test for them. Only Justice L'Heureux-Dubé has adopted Wigmore's view. Writing in dissent (not on this issue) in *R v Starr*, she stated:

The rule against hearsay developed at the same time as the modern form of trial and is associated with a deep-seated distrust of the jury system. It is premised on a belief that the jury will erroneously assess the probative value of evidence and the retention of the rule reflects continued suspicions about jury deliberations. The rule against hearsay is "founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement."¹²⁶

Based on this premise, L'Heureux-Dubé J. sought to loosen the hearsay rule to reflect the full competency of lay jurors. L'Heureux-Dubé sought a

¹¹⁹ *R v Couture*, 2007 SCC 28 at para 92 [*Couture*].

¹²⁰ *Ibid* at para 35.

¹²¹ *KGB*, *supra* note 48.

¹²² *R v U(FJ)*, [1995] 3 SCR 764, [1995] SCJ No 82 (QL).

¹²³ *Khelawon*, *supra* note 46 at paras 61-64.

¹²⁴ Koch, *supra* note 8 at 90-94.

¹²⁵ Wigmore, *supra* note 8, vol 3 at 154, §1420.

¹²⁶ *Starr*, *supra* note 71 at para 31, citing *Smith*, *supra* note 55 at 935 [citations omitted].

solution in search of a problem however. The hearsay rule's historical rationale was not developed out of a concern for the evaluative capacity of lay jurors. Cross-examination has always been deemed necessary to shed light on potential sources of unreliability in hearsay evidence.

There is congruence in the role cross-examination played under the hearsay rule's historical rationale and the role assigned to it in the current jurisprudence. According to the jurisprudence, the "central concern" of hearsay evidence is its reliability.¹²⁷ Reliability is conceptualized as the hearsay dangers; that is, concern with the declarant's perception, memory, narration, and sincerity.¹²⁸ The hearsay jurisprudence endorses methods of testing hearsay for the hearsay dangers, and of the methods cross-examination is privileged.

We just distinguished between the theoretical and practical role of cross-examination. The roles are not the same. The theoretical role of cross-examination is to test the veracity of the declarant's statement. For example, the Supreme Court views cross-examination as the "ultimate means of demonstrating truth and of testing veracity."¹²⁹ Without cross-examination, according to the Supreme Court, there may be "no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed."¹³⁰ While the historical hearsay rule privileged cross-examination, there is no indication that it did so to such an extent. The jurisprudence is more in line with Wigmore's profound faith in cross-examination.

The practical role of cross-examination in criminal law is broader. In criminal practice, the goal of the cross-examining defence counsel is to raise a reasonable doubt on the evidence. Though not formally recognized, considerations other than the reliability of the evidence are employed in criminal practice to raise a reasonable doubt. There is tremendous overlap between the reliability of the evidence and raising a reasonable doubt; but the overlap is not perfect. The difference between the theoretical and practical roles of cross-exemption allow an accused person to cross-examine

¹²⁷ *Ibid* at para 159.

¹²⁸ *Baldree*, *supra* note 47.

¹²⁹ *R v Osolin*, [1993] 4 SCR 595 at 663, [1993] SCJ No 135 (QL) [*Osolin* cited to CanLII].

¹³⁰ *R v Lyttle*, 2004 SCC 5 at para 1 [emphasis in original].

on considerations broader than reliability. When this occurs, cross-examination takes on epistemic and practical qualities that are beyond the scope of testing the reliability of the evidence. This method of cross-examination is not explicitly accepted in the hearsay jurisprudence. It is, however, accepted in practice by judges and counsel. Indeed, it is a regular occurrence.

In terms of epistemic qualities, a witness may have difficulty articulating their evidence to the court. The witness may suffer from crippling anxiety or be unfamiliar with courtroom procedure or unclear about what details they ought to include in their testimony. All of these difficulties are unrelated to the reliability of the witness' evidence. Nonetheless, a skilled cross-examiner is duty bound to expose these difficulties in cross-examination, if it is in his or her client's best interest, to convince the trier of fact to not rely on the witness' evidence. The cross-examination will have little to do with shedding light on the reliability of the witness' evidence and much to do with preventing the witness from articulating that evidence.

In terms of practical qualities, a witness may be quick to anger or have an otherwise unpleasant disposition. For example, they may be a gang member distrustful of the police, court process, and trier of fact. The accused person's lawyer may choose to cross-examine in a manner that brings out the witness' unfavourable personality, tying their distasteful character to the reliability of their evidence. Trials are a human process. The trier of fact may be unwilling to believe the witness' evidence despite whatever veracity it may possess.

Perhaps most poignant in terms of practical qualities is the occasion on which a witness' evidence is acutely tied to their credibility.¹³¹ Granted, reliability is always implicated when a witness' credibility is questioned. Reliability becomes divorced from credibility when cross-examination focuses the trier of facts' attention on the witness' character to the exclusion of their evidence. Consider the common dynamic when a witness is the former co-accused of a defendant. Cross-examination can be used to paint the witness as needing to testify in a manner that secures the accused person's conviction in order to receive a lighter sentence. This may or may not be true. While in theory cross-examination must shed light on the truth, in practice the cross-examination is intended to tie the witness' evidence to their character so tightly that the trier of fact is unwilling to put any faith in

¹³¹ Cudmore, *supra* note 4 at 107-118.

the witness' evidence. This is not the same as testing the reliability of the evidence. Cross-examination may permissibly explore whether a witness has incentive to lie, but it cannot allow a truthful witness to be cast as a liar.

This occurs frequently. Take Edward Greenspan's cross-examination of David Radler in the *United States of America v Conrad M. Black and others*.¹³² The cross-examination is examined by Gordon Cudmore in *The Mystery of Hearsay*.¹³³ Conrad Black was charged with multiple fraud-related offences. David Radler was Black's business partner. Radler signed a plea agreement with the prosecution and became the star prosecution witness against Black. The plea agreement turned on Radler testifying 'to the truth' against Black before Radler's trial. If Radler told the truth at Black's trial, he would receive a favourable sentence at his subsequent trial. Greenspan's cross-examination of Radler painted him as an opportunist who tells the truth in line with his interest: when Radler's interest changes, so too does his version of the truth:

THE COURT: [Restating a question asked by defence counsel] "And I'm going to suggest to you, you know full well that if you come off your script, you know that the government will tell the judge that you're a liar, don't you?"

WITNESS: I have no script, sir.

DEFENCE: Is that your answer:

WITNESS: That's my answer.

DEFENCE: Okay. And so the key to your future in this courtroom, I put it to you, is [the prosecutor]. Do you appreciate that?

WITNESS: Well, I'm getting a greater appreciation of it from you in any case.

(Laughter)

DEFENCE: Maybe you should have hired me a long time ago. Now, the government wants to make absolutely sure that you say what they want because they added a clause to your agreement stating that

¹³² *Black v United States*, 561 US 465 (2010).

¹³³ Cudmore, *supra* note 4 at 107-118.

you will not be sentenced until you have testified in this trial. Isn't that right?

WITNESS: The clause is in there that I will not be sentenced until I testified, yes.

DEFENCE: So, there's a clause in that plea agreement, right?

WITNESS: Yes.

DEFENCE: And you signed the plea agreement on September 20th, 2005, that you will not be sentenced until the others have been prosecuted, correct? The fact is you haven't been sentenced yet, have you?

WITNESS: No, I haven't

DEFENCE: The fact is that you must perform here or lose your deal, correct?

....

WITNESS: I'm here to tell the truth, sir.

DEFENCE: I see. I see. And that's your answer to my question?

WITNESS: That's my answer, yes.

DEFENCE: Okay. You'll tell the truth even if it hurts [the prosecutor] and makes him angry at you, right? You're just going to tell the truth, correct?

WITNESS: I will answer your questions truthfully.

DEFENCE: If he thinks you're lying, you know you're in big trouble, don't you?

WITNESS: I now know, yes, certainly.¹³⁴

Did Radler have to testify in a manner which convicted Black in order to receive his plea agreement with the prosecution? Would Radler's observations, unadulterated, produce testimony that achieved this result? We will never know. Greenspan's cross-examination focused so intensely on Radler's character that the truth of his evidence was obscured. The jury was encouraged to disregard the content of Radler's evidence because he was so deeply mired in an incentive to lie. The strategy worked too. Black was

¹³⁴ *Ibid* at 116-117.

acquitted of all of the charges that relied upon Radler's testimony.¹³⁵ Surely this is not what the Supreme Court had in mind when it deemed cross-examination the "ultimate means of demonstrating truth and of testing veracity."¹³⁶

This is not to say that the cross-examination strategy is improper or even undesirable. To the contrary, it can be proper. Criminal defense counsel in Ontario are duty bound to advance this strategy if it helps their client.¹³⁷ As part of the duty the practical role of cross-examination must be to raise a reasonable doubt. The role is laudable; the disjunction between it and the theoretical role of cross-examination is the problem. The hearsay jurisprudence assumes that an accused person's lawyer will cross-examine the declarant to expose reliability issues, but the lawyer may, and in many instances will, cross-examine more broadly, and emotionally, for the purpose of raising a reasonable doubt.

It is unclear whether the epistemic and practical qualities imbued in raising a reasonable doubt through cross-examination were present when the hearsay rule was developed in the 1600s and 1700s. Cross-examination was a relatively late justification for the hearsay rule's development, post-dating concerns with absence of an oath and demeanour evidence.¹³⁸ The same parties rule prohibited depositions taken in one proceeding from being used in another if the parties or issues were not the same in both. The rule was created in large part because of the lack of opportunity to cross-examine the declarant. Likewise, the joinder of issues rule prohibited the use of depositions that were not given at trial under the threat of perjury. It was eventually justified in the late 1600s in part because of the lack of opportunity to cross-examine the declarant of the disposition.¹³⁹ These two rules did not delineate between cross-examination for the purposes of testing reliability and raising a reasonable doubt.

¹³⁵ *Ibid* at 117.

¹³⁶ *Osolin*, *supra* note 129 at 663, per Cory J.

¹³⁷ Law Society of Ontario, *Complete Rules of Professional Conduct*, Toronto: LSO, 2019, ch 5.1-1 [*Rules*].

¹³⁸ Koch, *supra* note 8 at 288-300.

¹³⁹ Henry Bathurst, *The Theory of Evidence* (Dublin: Sarah Cotter, 1761) cited in Koch, *supra* note 8 at 236.

On the other hand, Richard Friedman's scholarship on the nexus between the modern hearsay rule and the right to confront the witness shows that by the mid-1600s accused persons in treason trials had the right to confront the sworn testimony of their accusers "face to face."¹⁴⁰ Confrontation in treason trials suggests a right to cross-examine for the purpose of raising a reasonable doubt. It is unlikely that the accused person was limited to shedding light on the accuser's sincerity, use of language, memory, and perception of the statement in question.

A third possibility is that the historical hearsay jurisprudence advanced a truth-seeking role for cross-examination and the lawyers of the day practiced beyond that role. This is what occurs today in varying degrees. The surviving historical records do not make clear how cross-examination was practiced in court.

If cross-examination was not practiced to raise a reasonable doubt – that is to say, the epistemic and practical qualities in raising a reasonable doubt were not present – there is a difference between the hearsay rule's historical rationale and current application. Contemporaneous cross-examination is deemed important in the historical and current hearsay jurisprudence because of its ability to shed light on the hearsay dangers. In practice, however, cross-examination is employed to fill a broader array of roles. This brings into question the importance of cross-examination in the hearsay jurisprudence. Its truth gathering function may be overstated; or it may be stated correctly and applied differently by defence lawyers.

E. The Evidence is Unsworn

Like demeanour evidence, the absence of sworn evidence remains one of the core concepts of the hearsay rule. The role of sworn evidence has changed with the times. Gone is the suggestion that supernatural retribution will follow if a witness lies under oath.¹⁴¹ The spectre of such punishment remains a consequence of the oath for some witnesses, but it is no longer part of the oath's philosophical significance. Rather, like the solemn affirmation, the oath's significance is its impression upon the witness of the moral obligation to tell the truth.¹⁴² The oath and solemn affirmation are court procedures that augment the reliability of testimonial

¹⁴⁰ Friedman, *supra* note 23 at 97.

¹⁴¹ KGB, *supra* note 48 at 788.

¹⁴² *Ibid.*

evidence. They are employed to aid the trier of fact in arriving at the correct decision.

In practice the oath and affirmation operate in tandem with criminal law. A witness who describes one version of events to the police and another version at trial is liable for prosecution for a number of offences. Under the *Criminal Code*, the witness could be found guilty for obstruction of justice (s. 139), public mischief (s. 140), or fabricating evidence (s. 137). In addition, if a witness provides contradictory statements, both of which are under oath or solemn affirmation, the witness could be further prosecuted for perjury (s. 131). Together, the threat of state punishment and the moral suasion of the oath or solemn affirmation increase a witness' inclination to tell the truth at trial - or at least be cautious with their words.¹⁴³ Between the two, the threat of state punishment is a far greater influence on the truthfulness of a witness' statement than the moral obligation to tell the truth.

So important is sworn evidence to the hearsay rule that it is almost a necessary requirement for the admission of prior inconsistent statements. In *K.G.B.* the Supreme Court held that the oath and solemn affirmation augment the reliability of a statement to such an extent that, all things being equal, their absence in a prior inconsistent statement strongly suggests inadmissibility.¹⁴⁴ Among other considerations, requiring a prior inconsistent statement to be sworn at its utterance prevents the trier of fact from accepting unsworn testimony over sworn testimony.¹⁴⁵ It also prevents the trier from potentially convicting the accused person solely on unsworn testimony.¹⁴⁶ Currently statements taken for the purpose of preserving their words and veracity ought to be made under oath or solemn affirmation and follow an explicit warning of criminal prosecution for lying.¹⁴⁷

Sworn evidence is not a mandatory requirement for the admission of hearsay. The need is acute for prior inconsistent statements. The overriding concern for the admission of hearsay evidence is always necessity and

¹⁴³ *Ibid* at 788-789.

¹⁴⁴ *Ibid* at 789-790.

¹⁴⁵ *Ibid* at 789-791.

¹⁴⁶ *Ibid* at 791.

¹⁴⁷ *Ibid*.

reliability. The absence of an oath or solemn affirmation for any hearsay statement can be overcome by the circumstances in which the statement was made and other means of testing it. Indeed, even for prior inconsistent statements, alternative measures for impressing the importance of telling the truth upon the witness can substitute for the oath or solemn affirmation.¹⁴⁸

In all, then, the oath remains an important concept of the hearsay rule. Its influence upon a witness has shifted with the times, focusing today on the threat of state punishment. As a court procedure intended to augment the reliability of testimonial evidence, the oath serves to aid the trier of fact in arriving at the correct decision.

F. Fairness in the Adversarial Process

The admission of hearsay evidence occasions two types of unfairness: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified; and the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.¹⁴⁹ These two types of unfairness primarily comprise the factor ‘fairness in the adversarial process.’

Fairness in the adversarial process is one of three aspects of the hearsay rule’s historical rationale and remains a factor in the current application of the hearsay rule. The test for threshold reliability aims to attenuate the two types of unfairness inherent in admitting hearsay evidence. However, the test’s influence is affected by changes in litigation procedure. Indeed, modern litigation procedure in preliminary inquiries has created a third type of prejudice for people accused of serious criminal offences.

We begin with the first type of unfairness: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified. It is not guaranteed that the declarant would have uttered the hearsay statement if he or she knew that they were subject to an oath or affirmation, cross-examination, and observation by the adverse party, judge, and, potentially, lay jurors. In determining the admissibility of hearsay evidence, courts are concerned with whether the hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact “a

¹⁴⁸ *Ibid* at 792.

¹⁴⁹ Ho “Theory of Hearsay”, *supra* note 37 at 410.

satisfactory basis for evaluating the truth of the statement."¹⁵⁰ This is the test for threshold reliability, and it is supposed to minimize unfairness in the adversarial process by screening out hearsay statements that are devoid of a basis for testing its truth or accuracy. The test is concerned with the basis for evaluating the statement's truth, not the actual truth of the statement. The actual truth of the statement is left for the trier of fact to determine. Hence if a declarant testifies at a preliminary inquiry that she saw "the accused and an alien kill the victim with a spaceship," and the declarant cannot be found at trial, her hearsay statement would likely be admitted into evidence under the hearsay rule. The declarant would have made the statement under oath or solemn affirmation, been visible to the adverse party when making the statement, and would have been cross-examined. Although the truth of the statement is clearly false, the basis to determine its falsity is clear.

While this may make sense in isolation, in modern criminal trials it can exacerbate unfairness. There are sub-proceedings in criminal trials where evidence is not weighed. The sub-proceedings include preliminary inquiries and directed verdict applications. In these sub-proceedings, a hearsay statement admitted into evidence is taken at its highest. This creates a tension. The hearsay rule assumes that hearsay evidence will be appropriately weighed by the trier of fact, including the possibility that it will be disregarded. In a preliminary inquiry or directed verdict application, admitted hearsay is never disregarded. It is assumed to be true. Significantly, if a hearsay statement is not admitted into evidence in a preliminary inquiry or directed verdict application, its omission has the potential to end the prosecution. The tension between the different assumptions of weight in the hearsay rule and the sub-proceedings did not exist during the hearsay rule's creation and is still not accounted for in the current hearsay jurisprudence.

Take preliminary inquiries. Evidence is presented by the prosecution to show that there is evidence upon which a jury acting reasonably could convict the accused person.¹⁵¹ One purpose of the preliminary inquiry is to

¹⁵⁰ Baldree, *supra* note 47 at para 83, citing *Hawkins*, *supra* note 74 at para 75.

¹⁵¹ *United States of America v Shephard*, [1977] 2 SCR 1067, [1977] SCJ No 106 (QL).

screen out charges for which the prosecution does not have any evidence that could result in a conviction. The evidence is not weighed by the preliminary inquiry judge. Every inference in the evidence is taken at its highest to afford the opportunity to commit the accused person to trial, where he or she can be judged in full by a trier of fact.¹⁵² These conditions can set up a perfect storm of unfairness, one which is not uncommon in Canadian courtrooms. A hypothetical illustrates the point: A completely fanciful and untrue hearsay statement is tendered at a preliminary inquiry. The declarant does not attend and the statement meets the test for threshold reliability. The hearsay statement will be admitted into evidence and deemed true. Assume that the hearsay statement is the lynchpin for the prosecution, giving it enough evidence to commit the accused person to trial. There is a great deal of unfairness here. The prosecution is permitted to tender a statement that the court assumes would have been proven by the declarant if he or she testified – and, worse, the statement is deemed to be true. The unfairness cascades onto other unfairness. The accused person is unable to discover the hearsay statement through cross-examination. The statement, despite being fanciful and untrue, commits the accused person to trial. Typically, that trial is four to six months away. If the accused person is detained in custody, they must remain detained for that time. By contrast, if the statement had been weighed for the untruth that it is, the accused person would have been discharged at the preliminary inquiry. Their ordeal with the criminal justice system would have been at an end, barring the exceptional use of a preferred indictment.¹⁵³

The second type of unfairness in ‘fairness in the adversarial process’ is the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice.¹⁵⁴ This unfairness can manifest in directed verdict applications at trial. An accused person can apply for a directed verdict of acquittal at the end of the prosecution’s case. The test is the same as at a preliminary inquiry: is there evidence upon which a jury acting reasonably could convict the accused person?¹⁵⁵ Every inference available on the evidence is taken at its highest in the prosecution’s favour. A successful directed verdict application has strategic implications for the accused person. If the application is granted,

¹⁵² *R v Arcuri*, 2001 SCC 54 [Arcuri].

¹⁵³ *Criminal Code*, RSC 1985, c C-46, s 577 [Criminal Code].

¹⁵⁴ Ho, “Theory of Hearsay”, *supra* note 37 at 410.

¹⁵⁵ *Arcuri*, *supra* note 152 at para 26.

the accused person is acquitted by the judge. They do not have to call evidence in their defence to defeat the charge. If the directed verdict application is denied, the accused person is in the same position they were in before the application was made. They may need to call evidence in their defence.

Apply the previously discussed hypothetical into the context of a directed verdict application. A completely fanciful and untrue hearsay statement is admitted during the prosecution's case at trial. The statement is the lynchpin of the charge surviving the directed verdict application. An application to direct a verdict of acquittal is made by the accused person. The hearsay jurisprudence assumes that the hearsay statement will be weighed by the trier of fact as untrue. However, in the directed verdict application the statement is deemed to be true. As a result, the directed verdict application is denied. In order to remove the prejudice created by the untrue hearsay statement, the accused person will have to call evidence in their defence, or gamble that the trier of fact will weigh the statement as untrue.

A dissonance between the hearsay jurisprudence and criminal litigation procedure can create a third type of unfairness that did not exist during the hearsay rule's development. There exists in preliminary inquiries procedures not accounted for in the hearsay jurisprudence. These procedures change the purpose for which cross-examination is conducted. The effect is unfairness to the cross-examining party.

A witness' testimony before a preliminary inquiry will generally be admitted as hearsay evidence if the witness is unavailable to testify at trial. The fact that the witness' statement was made under oath or solemn affirmation and subject to contemporaneous cross-examination by the adverse party on the same issues will be sufficient to satisfy the test for threshold reliability.¹⁵⁶ Driving admissibility is the adverse party's ability to cross-examine the declarant. In almost all instances, the cross-examining party in a preliminary inquiry is the accused person. Litigation procedure may cause the accused person's litigation strategy to change between the preliminary inquiry and trial. The cross-examination conducted at the

¹⁵⁶ *Hawkins*, supra note 74 at para 76.

preliminary inquiry will serve a purpose different than cross-examination at trial. However, if the declarant does not attend the trial, the accused person will be unable to implement the new cross-examination strategy. Instead, the accused person will be stuck with the cross-examination from the preliminary inquiry.

A change in cross-examination strategy can occur for a variety of reasons. One reason is that the accused person faces a number of charges at the preliminary inquiry and reasonably believes that they can be discharged on the weaker charges through cross-examination. The accused person may choose to cross-examine the declarant extensively on the subject of the weaker charges in the hope of obtaining a discharge. The witness' evidence on the other charges will be left unchallenged, saving the surprise of cross-examination on these issues for the trial. The tactic is a strategic one. It assumes, fairly, that the witness will be available for cross-examination at trial. If the witness' evidence is admitted at trial under the hearsay rule, however, the accused person is unable to implement the second half of their strategy. The hearsay jurisprudence assumes, unfairly, that the witness has been fully cross-examined.

Cross-examination strategy between a preliminary inquiry and trial can also change when the preliminary inquiry is held for jointly charged accused persons. The prosecution's witnesses will almost always be cross-examined on the assumption that none of the accused persons will plead guilty and testify against their former co-accused at trial. It is not uncommon though for this very thing to happen between the preliminary inquiry and trial. One cannot anticipate it, but it is a real risk. The change is a tactical decision initiated by the prosecution and accepted by the pleading accused person. If one of the accused parties pleads guilty and testifies against his or her former co-accuseds at trial, there may need to be recalibration for the cross-examination of *other* witnesses from the preliminary inquiry.

A common example makes this clearer. Imagine that two men are charged with shooting at a police officer. The prosecution is not sure which of the two men is the culprit, so both are prosecuted. At the preliminary inquiry an eyewitness testifies that she saw a man a gun, but she is not sure who it was. The cross-examination strategy of the accused parties at the preliminary inquiry will be to challenge the eyewitness' ability to identify the shooter.

This all changes if one of the accused parties pleads guilty in exchange for testifying against the other. The remaining accused person would want

to cross-examine the eyewitness to suggest that the (former) co-accused was the shooter. The cross-examination would fit into a new defence theory that the co-accused shot at a police officer and is now testifying to deflect blame and secure a lower sentence. The strategy is similar to Edward Greenspan's cross-examination of David Radler in *United States of America v Conrad M. Black and others*.¹⁵⁷ The strategy comes crashing down, though, if the eyewitness does not attend at the trial. Her evidence would likely be admitted into evidence under s. 715 of the *Criminal Code* or the hearsay rule. The law assumes that the accused person had the opportunity to cross-examine the eyewitness at the preliminary inquiry. In reality, that opportunity is hollowed by the former co-accused's guilty plea and anticipated testimony.

The same dynamic can occur when multiple accused persons are tried together at a preliminary inquiry and severed in prosecution before the trial. The accused persons will share a preliminary inquiry but not share a trial. Often, the prosecution decides to sever the accused parties before the trial so that they can be compelled to testify against one another at each other's respective trials. The anticipated testimony of the severed accused party can change each defendant's cross-examination strategy of the witnesses from the preliminary inquiry. The example of the 'police shooter' is applicable to this situation, as is the resulting unfairness. If a witness from the preliminary inquiry cannot be found at the time of trial, the accused person will be unable to initiate his or her new cross-examination strategy. Instead, the hearsay jurisprudence will deem the accused person to have applied their strategy at the preliminary inquiry. The hearsay evidence will be admitted despite a hollow cross-examination of the declarant at the preliminary inquiry.

The unfairness created by preliminary inquiry procedure is not generated by the hearsay rule in all instances. Under section 715(1) of the *Criminal Code*, preliminary inquiry testimony will generally be admitted into evidence at trial if the declarant refuses to be sworn or to give evidence, is dead, insane, so ill as to be unable to travel or testify, or is absent from

¹⁵⁷ Cudmore, *supra* note 4 at 107.

Canada.¹⁵⁸ The hearsay rule allows for the admission of preliminary inquiry testimony not captured by s. 715(1).¹⁵⁹ This occurs quite frequently in practice. It is not uncommon for a witness to not show up to the trial. Without contact with the witness, the prosecution cannot prove that the conditions precedent of s. 715(1) are met. It falls to the hearsay rule to determine whether the testimony can be admitted into evidence.

Section 715(1) of the *Criminal Code* is a statutory exception to the hearsay rule. However, it does not consider the necessity and reliability principle to determine admissibility. Hearsay evidence falling within s. 715(1) is automatically admitted into evidence. In this respect, it is an exception to the hearsay rule that operates differently than the common law exceptions. The admissibility of hearsay falling within s. 715(1) is rarely challenged, and it is not successfully challenged for the types of prejudice discussed in this section. Admissibility under s. 715(1) can be challenged by asserting that the hearsay's probative value does not outweigh its prejudicial effect. Even more rare, s. 715(1) can be constitutionally challenged for operating in a manner that renders the trial unfair. Under a constitutional challenge, the trier of law would likely determine admissibility with reference to the necessity and reliability principle.

In summary, fairness in the adversarial process remains an underlying factor in the current application of the hearsay rule. The test for threshold reliability aims to attenuate the two types of unfairness in admitting hearsay evidence: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified; and the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence. However, the test fails to recognize litigation procedures that exacerbate the two types of unfairness. A third type of unfairness exists due to criminal litigation procedures that change the strategy of cross-examination for accused parties.

IV. CONCLUSION

The hearsay rule has come a long way since Sir Walter Raleigh was convicted and sentenced to death on the strength of hearsay evidence. An exclusionary evidence rule has formed with a historical rationale that has

¹⁵⁸ *Criminal Code*, *supra* note 153, s 715(1).

¹⁵⁹ *R v Saleh*, 2013 ONCA 742 at para 76 [Saleh].

three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. There are five factors that gave rise to the hearsay rule and underlie this rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process. These five factors still hold influence on the application of the hearsay rule and its exceptions.

Using the five factors as indicia of difference between the hearsay rule's historical rationale and current practical application, it is clear that there are a number of differences. The hearsay dangers may not be allayed by cross-examination alone or when the threshold reliability test is applied too loosely. In these situations, the concern with the hearsay dangers is less than it is under the hearsay rule's historical rationale. The value of demeanour evidence is sometimes subsumed by cross-examination. The testimonial oath or affirmation's influence upon a witness has shifted with the times, focusing today on the threat of state punishment. The opportunity to cross-examine the declarant is complicated in practice by the disjunction between its theoretical role in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers. The test for threshold reliability fails to recognize litigation procedures that augment unfairness in the adversarial process. Moreover, a third type of unfairness exists due to criminal litigation procedures that change the strategy of cross-examination for accused parties.

As early as the trial of Sir Walter Raleigh in 1603, criminal cases have been won and lost on the application of the hearsay rule. The doctrine is complex and not instinctual. The analysis in this article is important for lawyers, evidence scholars, or anyone who testifies in a courtroom. It aids in understanding what the hearsay rule is, where it comes from, and where there exists incongruence between the rule's theoretical purpose and practical application. These lessons can guide the doctrine's development to help ensure that the hearsay rule's application is consistent with its theoretical purpose.