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Do We Need a Code of Evidence?

J. D. Morton  
*Osgoode Hall Law School of York University*

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DO WE NEED A CODE OF EVIDENCE?

J. D. MORTON*

Toronto

Professor Graham Murray in his admirable article in the last issue of this Review urges us to consider the preparation of a code of evidence similar to the American "Uniform Rules of Evidence". He refers to the "hopelessly intricate subject which we common lawyers call evidence". The law of evidence, he maintains, can be "simple and sensible". Professor Murray bases his argument for reform on two propositions; one of Thayer—"that unless excluded by some rule or principle of law, all that is logically probative is admissible" and one of Holmes "A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves and the grounds for designing that end are stated or are ready to be stated in words". He deplores the fact that "most of us in Canada, the United States and England have been taught to study evidence as if its principles were designed to impede freedom of proof". It must be pointed out that the great Thayer himself wrote: "

... the main errand of the law of evidence is to determine not so much what is admissible in proof, as what is inadmissible. Assuming, in general, that what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part not the name of evidence, but the name of admissible evidence. Admissibility is determined, first by relevancy, — an affair of logic and experience, and not at all of law; second, but only indirectly, by the law of evidence, which declares whether any given matter which is logically probative is excluded.

Thayer's "cornerstone", "that unless excluded by some rule or

*J. D. Morton, The Osgoode Hall Law School.


2 Ibid., at p. 576.

3 Ibid., at p. 585.

4 Ibid., at p. 581.

5 Ibid., at p. 585.


7 Murray, op. cit., supra, footnote 1, at p. 585.
principle of law, all that is logically probative is admissible” can not support a positive code of evidence. It is not possible to create a positive code of “logic and experience and not at all of law”. An attempt to do so could only result in an eternally incompelecd structure of the Phipson school. A code of evidence, preaced though it may be by a positive proposition, must still be substantially negative in form in that it will declare what relevant matter is to be excluded. On the question of relevancy we must inevitably depend on the ordinary reasoning powers of Bench and Bar. The necessity for reform will be determined by an examination of whether, by Thayer's definition, the negative rules of evidence can, by Holmes' test “be referred articulately and definitely to an end which [they] subserve”.

It is the purpose of this article to consider whether some recent decisions support or deny this necessity for reform and, if so, whether reform by codification would be desirable.

I. Admissibility of Confessions

R. v. La Plante\(^8\) imports the notorious Hammond\(^9\) case into Canadian criminal law. At the trial of La Plante, a voir dire was held to determine the admissibility of an alleged confession. One of the grounds of appeal was that answers made by the accused to questions put by the Crown on the voir dire showing that the contents of the statement made by him were true were not properly admissible in evidence on the voir dire. Laidlaw J.A. delivering the judgment of the court held that the answers were properly admitted:

The evidence given by the accused in cross-examination . . . that the statements made by him were true, touches the issue of credibility. Likewise, the admission by him that he killed Edwin Jones [with whose murder La Plante was charged] touches the matter of his credibility, and his answers in respect of both matters to the questions put by counsel for the Crown were relevant to the issue as to whether or not the statements made by him were voluntary.

The point of holding a voir dire is to keep from the jury the knowledge that the accused is alleged to have made a confession until the judge has had an opportunity to determine whether or not the confession is voluntary.

The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge . . . .\(^{10}\)

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\(^8\)[1958] O.W.N. 80 (C.A).
\(^{10}\)Care J. in The Queen v. Thompson, [1893] 2 Q.B. 12, at p. 16, Crown Case reserved.
Evidence to be admissible must be relevant to a material issue. According to Rand J., the material issue on the voir dire is "whether the statement is that of a man free in volition from the compulsions or inducements of authority." Although, the rule is frequently based on an alleged doubt that is cast on a statement improperly induced, in no British or Canadian case has the issue on the voir dire been stated to be the truth or falsity of the statement. In considering the correctness of the ruling of the Ontario Court of Appeal in La Plante, we must therefore take it that the only issue was whether the statement was made without improper inducement. Was the evidence as to its truth relevant to such issue? One thing is certain: the American Uniform Rules of Evidence will not provide an answer, rule 63(6) on the subject of confessions offering only a rule of admissibility in terms substantially identical with that found in the cases. How then are we to find an answer? Even if we concede the application of the doctrine of precedent to such a problem, there was at the time, no binding decision.

La Plante swore that the statement had been improperly obtained, his credibility thereby being brought into issue. Was the truth of the confession relevant to the issue of his credibility? Here we must use logic and experience. The question was asked by the Crown on cross-examination and, according to Laidlaw J.A. touched the issue of credibility—it must be taken that the Crown was attacking the accused’s credibility. The question, “Is the statement true?” can be answered affirmatively or negatively. If answered negatively, no inference as to credibility is possible pending the outcome of the trial proper; if answered affirmatively, the answer would appear to support the credibility of the accused in that he is demonstrated to be one who will disclose unfavourable facts under oath. Surely it cannot be contended that it is proper for the Crown to put a question, the answer to which can have only one direct result, to support the credibility of the accused; having at the same time a most powerful indirect result in that from the admission forward, the trial judge knows that the accused admits the truth of something offered as a confession. Even though the confession be rejected, this knowledge may well affect the trial judge in his subsequent conduct of the case and in his ability to give an impartial summing-up. In the case of a trial without a jury, where such a question is asked and answered affirmatively, the accused is deprived of his hallowed privilege against self-in-

11 Boudreau v. The King (1949), 94 C.C.C. 1, at p. 8.
crimination, in that it would suppose super-human qualities in a judge to expect that he could ignore the admission.\textsuperscript{12}

This conclusion that the evidence was wrongly admitted on the issue of credibility is based on reason. It is submitted that the need here is for clear thinking, not precedent or codes. Similarly, on the proposition of Laidlaw J.A. that the answers were relevant to the issue as to whether or not the statements made by the accused were voluntary, it is submitted that no logical connection exists in the absence of a generally observed rule of experience that truthful confessions are more or less likely to be improperly induced than false confessions.

It is interesting to note that when the problem arose in the course of a \textit{voir dire} before the Saskatchewan Court of Queen's Bench,\textsuperscript{18} Hall C.J. refused to follow the \textit{La Plante} and \textit{Hammond} decisions referring to the "guise of credibility"\textsuperscript{14} and the well settled proposition that "the issue in a trial within a trial is the admissibility of the confession and not the truth of it."\textsuperscript{15}

This restriction of the judge's function on the voir-dire to the admissibility and not the truth of the confession is supported by the first case to be considered under the next topic.

\textbf{II. The Proper Functions of Judge and Jury}

Under the previous topic, some matters of what Professor Murray would call "ordinary horse-sense" have been discussed. Here, some technical matters will be considered.

\textit{R. v. McAloon}\textsuperscript{16} concerned the proper direction to a jury as to the tests to be applied by them to an alleged confession. It has been submitted that the judge, in his capacity as arbiter of admissibility, must apply certain tests to determine whether or not the alleged confession is to go before the jury. The question before the court in \textit{McAloon} was whether the jury was to be directed to apply the same tests. Clearly the jury must decide whether an alleged confession was, in fact, made. Having so decided, they must, before acting upon it, be satisfied beyond a reasonable doubt that it was true. Need they also be directed to apply the tests of "hope and fear" and to reject the confession completely if they are not satisfied beyond a reasonable doubt that it was that of a "man free in volition from the compulsions or inducements of authority"?\textsuperscript{17} It was clear from \textit{R. v. Mulligan}\textsuperscript{18} that, the trial judge hav-

\textsuperscript{13} \textit{R. v. Hnedish} (1959), 29 C.R. 347.
\textsuperscript{14} \textit{Ibid.}, at p. 350.
\textsuperscript{16} \textit{Boudreau v. The King}, supra, footnote 11, at p. 8.
\textsuperscript{17} \textit{[1955]} O.R. 240 (C.A.).
ing admitted an alleged confession, defence counsel was entitled to cross-examine witnesses before the jury as to the circumstances under which it was alleged to have been made. *R. v. Bass* had decided that in such circumstances the trial judge must direct the jury to reject the confession even if they thought it true, if they were not satisfied that it was voluntary.

The Ontario Court of Appeal refusing to follow the *Bass* case, held that, once admitted, the statement was “in the same position as any other relevant and admissible evidence ...”; in other words, the circumstances of the making of the alleged confession may be disclosed to the jury in order that they may determine, firstly if it was actually made and secondly if it was true.

How can this decision be tested? Rule 8 of the Uniform Rules merely provides that the rule that a judge must, if requested, hold a *voir dire* on the admissibility of a confession “shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility”. Rule 63(6) already cited does not refer to the function of the jury. It is submitted that once again a code would only help by way of an express rule and as such would be of no more help than a precedent. The decision must be tested by reference to the general division of functions between judge and jury. Despite the traditional reliance upon the doubtfulness of an improperly induced confession as a basis for its exclusion, it would seem that there is another reason for keeping out confessions improperly obtained. There is a clear sense of fairness implicit in the cases. It might not be exaggerated to say that there is a public policy against third-degree methods and that the courts have implemented this policy by rejecting evidence obtained under reprehensible conditions even though the evidence might well be true. In this view, the test of voluntariness involves the implementation of this public policy and the trial judge is therefore to ask himself:

1. Is there evidence upon which a reasonable jury could find that this statement was made?
2. Is there evidence upon which a reasonable jury might find it true?
3. Am I satisfied beyond a reasonable doubt that there are no circumstances, quite apart from its truth or falsity, which would compel me to reject the confession on the grounds of this public policy?

The public interest being adequately secured by the preliminary
testing on the *voir dire*, a confession will put to the jury on the questions of existence and truth only. It is conceded that such cases as *R. v. McNamara* on the admissibility of improperly obtained real evidence do not appear to bear out the existence of the public policy here argued, but it is noteworthy that in none of the reports does there appear mention of such impropriety as would compel exclusion under question three above. In assenting to the *McNamara* doctrine in his judgment in *A.-G. for Quebec v. Begin*, Kerwin C.J. was at pains to point out that there was "no suggestion in the present case that any force had been exercised". It is not over-optimistic to believe that a Canadian court would follow *Rochin v. California* if faced with the question of the admissibility of evidence obtained from an accused by the forceable application of a stomach pump.

What we need here, if anything, is not a code but an articulately stated end to be subserved.

One of the perennial problems in the field of evidence has been the definition of "burden of proof" and the consequent dispute as to whether more than one legal notion is concealed under this one title. I have come in for my own share of abuse, in that I have persistently advocated a retitling of the two separate legal risks of non-persuasion and non-production under the rubrics "Primary" and "Secondary burdens". Indeed as recently as July of last year, I was described as a "long-haired egghead" for so advocating, the same critic describing my analysis as "[riding] off on a hobby horse of his own in some subtle division of burden of proof . . . ." In these circumstances, it would be asking too much of me that I should view the decision of the Supreme Court of Canada in *Rose v. the Queen* with anything but gratification. In that case the appellant had been tried and acquitted of criminal negligence by a trial judge sitting alone. The Appellate Division of the Supreme Court of Alberta quashed the judgment of acquittal and ordered a new trial. The question before the Supreme Court of Canada was the right of the Crown to appeal in such circumstances. The acquittal had not been the result of a motion

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20 The *McAlloon* decision may be supported on the further practical ground that under the *Bass* rule, a court of appeal does not know whether the jury in convicting found the confession voluntary or not. See *Stein v. New York* (1953), 346 U.S. 156.


23 (1959), 342 U.S. 165.


25 (1959), 2 Crim.L.Q. 199.


27 (1959), 122 C.C.C. 185.
to dismiss as in R. v. *Morabito* but had come after the defence had declared that it had no evidence to offer and the case was complete. Clearly, from *Morabito*, a dismissal from a motion to dismiss is "a matter of law alone" within section 584 of the Criminal Code, which limits the right to appeal an acquittal to grounds that "involve a matter of law alone".

There are two hurdles which the prosecution must clear in any criminal case:

1. the Crown must introduce evidence upon which a reasonable jury properly directed might convict. The judge will determine as a matter of law whether or not they have satisfied this test. The risk of failing this test has been referred to as the "secondary burden of proof".

2. having passed test (1), the Crown must persuade the trier (jury or judge sitting alone) beyond reasonable doubt of the guilt of the accused. This risk of losing on a reasonable doubt has been referred to as the "primary burden of proof".

Taschereau J. delivering the judgment of the court in the *Rose* case held in part:

... I have reached the conclusion that appellant's argument on this point must prevail, as the question raised was not a matter of law alone.

... The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the functions of a judge, and also the duties of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may reasonably be inferred. As a jury, he had to say whether from those facts submitted, criminal negligence ought to be inferred. [cases cited]. I think that the trial judge directed himself properly, and that when he decided on the facts submitted to him that criminal negligence ought not to be inferred, he was fulfilling the function of a jury on a question of fact.

The Uniform Rules treat these two tests in substantially similar language under the titles "Burden of Proof" and "Burden of Producing Evidence."

Rule 1(4): "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion".

Rule 1(5): "Burden of Producing Evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a

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directed verdict or peremptory finding against him on a material issue of fact.

From the *Rose* case it would appear that the Supreme Court of Canada needs no help from a code on this area of evidence.

III. Corroboration

*R. v. Ethier* was an appeal by the accused from a conviction for rape. The facts as taken from the report, were the following:

The complainant gave evidence that she accepted a drive home from the accused whom she had never seen before. She entered his car and in the course of conversation they exchanged names. He did not drive her directly home but turned off the main highway into a lonely road leading to a dump, stopped the car and then committed the alleged offence. He then drove her home. Upon her arrival there she told her mother and father what had occurred, giving them the name of the accused and the licence number, year and make of the accused's car. At the trial she gave evidence that there were foot marks on the ceiling of the car made by her while she was being assaulted and that the interior handle of the left door was missing. There was medical and scientific evidence of the complainant's condition and stains on the clothing of the complainant and of the accused. The accused, his car and clothing all answered the complainant's description of them. The accused gave evidence denying that he had anything to do with the complainant on the evening of the assault and that the first time he saw her was at the police line-up. He described his movements during the evening, and his evidence in this particular was supported by other defence witnesses.

At the conclusion of the argument the court allowed the appeal and directed a new trial for the reasons subsequently given by Morden J.A. speaking for the whole court. The learned judge pointed out that there were two issues at this trial: Had the offence of rape been committed? And, had it been committed by the accused? He went on to point out that on both issues the burden rested on the Crown and that, in the circumstances, the trial judge must warn the jury that it is unsafe to convict in the absence of corroboration. The court endorsed the definition of corroboration in *R. v. Baskerville* that the evidence must tend to show that the crime was committed and that it was committed by the accused, and emphasised that evidence which is confirmatory of the complainant's evidence in one area may not so qualify in another. One of the grounds on which a new trial was ordered was that the trial judge failed to distinguish the two issues, crime and identity, and as a result misdirected the jury on corroboration.

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29 *Supra*, footnote 26, at pp. 442-3, italics partly mine.
The trial judge had directed the jury that they might find corroboration in respect of the following: (1) the human blood on the accused's shorts, (2) hair found in the car was similar to the girl's, (3) the handle on the car was broken, (4) the person who assaulted her was wearing brown pants and a checkered shirt, (5) the licence number of the car, (6) the bruise on her left cheek, (7) the marks on the ceiling of his car, (8) her emotional condition upon arriving at home.

Morden J.A. held:

... Upon either issue many of the above items of evidence were not capable of being corroborative upon the short ground that they lacked the essential quality of being independent: *Hubin v. The King*, [1927] S.C.R. 442. I refer particularly to the evidence identifying the accused and his car.

On the issue whether or not the crime of rape was committed, the condition of the girl and of her clothing were matters which were independent of her story. There is no absolute rule that such evidence is or is not capable of being corroborative upon this issue. This difficult matter is fully discussed by Aylesworth, J.A., in *Reg. v. Harrison*, [1956] O.R. 509. It depends upon the circumstances of the particular case and, in my view, would turn in large measure upon the extent of the girl's physical injuries, her emotional condition and damage to her clothing. It would be a matter to be decided by a trial Judge whether such evidence in all the circumstances of the case before him was sufficiently cogent to be left to the jury as possible corroboration: *Reg. v. Huffman*, [1958] 28 C.R. 1, at pp. 16-8, 120 C.C.C. 323, at p. 333.

The second issue—the identity of the accused—was at the trial the more vital issue of the two. The accused denied that he had had anything to do with the girl upon the evening in question. With all respect to the learned trial Judge, the matters mentioned by him were not capable of being corroborative of the girl's testimony on this issue. As I have said, many of the matters mentioned by the learned trial Judge depended solely upon her evidence to connect the accused with the alleged crime. I refer to her description of the accused and of his car. The condition of the girl and of her clothing were independently proved, but this evidence was equally consistent with the truth as with the falsity of her story on the issue of identity: *Thomas v. The Queen*, [1952] 2 S.C.R., at p. 354. The scientific evidence with respect to the hair found in the car and type of blood found upon the clothing of the girl and of the accused failed by the same test. ... 

In my opinion, the evidence pointed out to the jury as capable of being corroborative did not so qualify because (a) much of it was not independent of the complainant and (b) that which was, did not connect or tend to connect the accused with the crime. In short, the jury should have been told that there was no corroboration. The evidence which the learned trial Judge pointed out as possible corroboration was, however, admissible evidence in the case. Much of it, if
believed by the jury, could have been considered by them as adding to the credibility of the girl's story, but it was not corroborative of it...”

I propose to examine only that part of the judgment dealing with the evidence identifying the accused. It will have been noted that the defence as stated by Morden J.A. was that the accused “denied that he had had anything to do with the girl upon the evening in question”. In the facts as set out by the reporter it is stated that “the accused gave evidence denying that he had anything to do with the complainant on the evening of the assault and that the first time he saw her was at the police line-up.” From the transcript it is clear that the defence was that the accused did not know the girl at all and had never seen her until the police line-up.

The rule requiring a warning against convicting of rape on the uncorroborated evidence of the complainant, is based on long experience of cases of this type. In this area there is great danger of false accusation and from the knowledge of this danger came the common law rule now enacted in the Criminal Code. The danger is that the complainant will tell a fabricated story which will result in the conviction of the accused.

Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime... which confirms in some material particular... that the prisoner committed [the crime].

It is submitted that, by “independent”, Lord Reading meant “not capable of having been fabricated by the complainant”. In Hubin v. The King, the evidence offered as corroboration was “her statement that a certain licence number was that carried by the car in which she was conveyed to the scene of the crime and her subsequent identification of a cushion found in the car bearing that number.” Anglin C.J.C. held that this was not independent evidence in that the facts were inadmissible only by reason of the girl's own story connecting them with the crime. The application of the test is clear. The complainant might have selected the accused as victim and used the licence number of his car in a fabricated story. On being shown a car bearing the number, she might then have falsely identified it by reference to a cushion.

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33 Supra, footnote 30, at pp. 537-538.
34 Ibid., at p. 537, italics mine.
35 Ibid., at p. 534, italics mine.
36 Examination in chief of the accused, at p. 217.
37 S. 134.
40 Ibid., at p. 445, italics mine.
41 Ibid.
Hubin v. The King was relied upon by the Ontario Court of Appeal in holding that the evidence in R. v. Ethier did not satisfy this test of independence. It is submitted that the key to Ethier is the denial of the accused that he knew the girl at all. Before considering identity it would be necessary for the jury to conclude that the girl had been raped by someone. The issue would then be: Did Ethier do it? The complainant swore that he did. Did any of the evidence qualify as independent evidence tending to connect him with the crime? Clearly had the complainant merely given the licence number and, on being shown the accused's car, identified it with reference to the broken handle and the marks upon the ceiling, her story would have lacked the essential quality of independence. However, the complainant described the broken handle and the marks, before the car was taken by the police. The description of the car was demonstrated to be accurate. For it to form part of a fabricated story, the complainant must have had detailed knowledge of the interior prior to the charge. The accused denied that he had ever seen the girl before and there was no suggestion that she might have had an opportunity to observe the interior without his knowledge. It is submitted, with deference, that corroboration on identity might have been found in respect, at least, of the broken door handle and the marks on the ceiling; corroboration in this respect being found not merely in the complainant's evidence but jointly in that of the police officer who testified that her description was accurate and in that of the accused that he did not know the girl.

As the Court of Appeal noted, there is no absolute rule that evidence of the condition of the girl or her clothing is or is not capable of being corroborative on the issue of whether or not the crime was committed. Similarly, it is submitted that there is no absolute rule as to what evidence may amount to corroboration on the issue of identity. The Ontario Court of Appeal says that the evidence here could not be corroborative; I submit that it could; the Uniform Rules say nothing!

Conclusion

Nothing has been said about R. v. Miller, in which O'Halloran J.A. admitted opinion evidence on very much the same terms as permitted by rule 56(1) of the Uniform Rules, and many other

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42 Supra, footnote 30.
44 (1959), 125 C.C.C. 8 (B.C.C.A.).
important Canadian cases on evidence decided during the last year. Enough has been covered, it is hoped, to indicate that Professor Murray may be over-pessimistic about the current state of evidence and over-optimistic about the therapeutic effect of a code. Codes, not merely suggested but enacted, exist in many countries using the Anglo-American system of trial. Indeed in Canada, during the past year we have acquired a code of our own, of limited application it is true. In the Canada Gazette, Part II, dated Wednesday, September 9th, 1959, there appear the “Regulations Respecting The Rules of Evidence at Trial by Court Martial”. Examination of these rules must await another opportunity. That there is material for another article is demonstrated by one short quotation from the section entitled “Evidence of Similar Facts”:

s.22(2) When attempting to prove the charge against the accused, the prosecutor shall establish a real suspicion of the guilt of the accused on issues of state of mind or identity with evidence other than that of essentially similar acts of the accused, before he may introduce evidence of essentially similar acts of the accused.

A code may answer some questions, at the same time posing some problems.

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46 Vol. 93, no. 17.