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# The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated

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# THE RULE IN HODGE'S CASE: RUMOURS OF ITS DEATH ARE GREATLY EXAGGERATED

Benjamin L. Berger\*

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*Certain academic commentators and Canadian courts have announced the death of the rule in Hodge's Case. The author challenges this proclamation of death, observing that Hodge's rule is a particular manifestation of the epistemology that informs our law of evidence. He argues not only that the rule is doctrinally intact, but that the principles and spirit that animate Hodge's rule have broad influence in our law of evidence and have utility in the appellate review of unreasonable verdicts. Hodge's rule, Hodge-like reasoning, and the associated epistemology, are alive and well in Canada.*

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*Certains commentateurs et commentatrices universitaires et certains tribunaux canadiens ont annoncé la mort de la règle de la cause Hodges. L'auteur conteste cette affirmation, faisant valoir que la règle de Hodge est une manifestation spécifique de l'épistémologie qui éclaire la loi de la preuve. Non seulement la doctrine de la règle reste-t-elle intacte, mais les principes et l'esprit qui animent la règle de Hodge exercent une large influence sur notre droit de la preuve et servent à l'examen de verdicts déraisonnables. La règle de Hodge, les raisonnements de même type, et l'épistémologie qui y est associée, sont bien vivantes au Canada.*

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When continental scholars set about the work of creating the Roman-canon law of evidence, they had two principal indigenous sources of inspiration available to them. The first was the Ciceronian school of classical rhetoric, which “tended to associate proof with proper argument.”<sup>1</sup> Although this way of conceiving of proof might have found fertile soil in an adversarial system, it could not on its own take root in Roman-canon procedure, where judges themselves actively engaged in the search for truth. Instead, it was the second source for thinking about facts and proof, Aristotelian epistemology, with its emphasis on and privileging of sensory perception, that most influenced the scholars.<sup>2</sup> Thus inspired, in the twelfth to

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<sup>1</sup> M. Damaška, “Hearsay in Cinquecento Italy,” c. 4 in *Studi in Onore di Vittorio Denti*, Vol. 1 (Padova: Casa Editrice Dott. Antonio Milani, 1994) at 62.

<sup>2</sup> *Ibid.*

fourteenth centuries, church scholars constructed a complex hierarchy of forms of proof grounded in a notion of “truth as revealed by the senses,” a hierarchy that formed the basis for the law of evidence in the ancien régime.<sup>3</sup>

What were the general contours of this system that would rule the continental law of evidence until the late eighteenth century? Damaška describes them as follows:

Among sources of cognition, the pride of place went to the fact-finder’s direct sensory experience: in possession of immediately perceived sense data, the judge needed no proof (in the rhetorical sense of the term). Inferential aspects of cognition were, of course, still unknown. Most of the time, however, the judges had to rely on information conveyed by «intermediaries» (i.e., witnesses) who inserted themselves between his sensory apparatus and the facts of the case. In order to qualify as means of proof, these intermediaries were required to convey sensory perceptions of facts to be proven....At the bottom of this hierarchy was evidence consisting merely of inferences from observed to unobserved facts, evidentiary material, that is, devoid of sensory perceptions (*indicia, argumenta, or praesumptiones*).<sup>4</sup>

This system would not, however, survive the Enlightenment and the revolutionary zeal of the late eighteenth century. Enlightenment philosophers questioned the notion that one could, in the abstract, determine the value of particular modes of proof. Proof, in their view, took its meaning from experience. Accordingly, *a priori* hierarchies of proof no longer made sense: “[I]f one takes the view that the probative effect of evidence depends on the infinite particularity of experience, then rules resting on *ex ante* negative judgment of probative value easily appear as potentially dangerous overgeneralizations.”<sup>5</sup> Revolutionary politicians seized upon this critique and blamed the defects of ancien régime justice upon a flawed form of evidentiary reasoning. The result of the fusion of these philosophical and political attacks was that “the very idea of legally controlling proof became both intellectually discredited and politically suspect.”<sup>6</sup> Thus, in the late eighteenth century, the Roman-canon scheme was rejected in favour of the principle of free-evaluation of evidence “soon to be glorified on the Continent as the cornerstone of enlightened administration of justice.”<sup>7</sup> Evidentiary rules founded on the primacy of sensory-experience were wiped away in favour of a principle freeing the fact finder from rules about how to assess evidence: “[T]he principle was espoused that the law should

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 62-63.

<sup>5</sup> M. Damaška, *Evidence Law Adrift* (New Haven: Yale University Press, 1997) at 21.

<sup>6</sup> *Ibid.* at 20-21.

<sup>7</sup> *Ibid.* at 21.

refrain from regulating the probative effect of evidence, or the necessary quantum and quality of proof. The validity of proof was to be left to the legally unconstrained judgment of the trier of fact – to his *conviction intime*.<sup>8</sup>

At approximately the same time that this revolution in continental evidence law took place, a coherent law of evidence crystallized for the first time across the channel.<sup>9</sup> As late as the seventeenth century, English law placed little constraint on the evidence that a jury could hear.<sup>10</sup> It might be said that, until the eighteenth century, the English jury was left to its *conviction intime*. It was not until lawyers began to play an active role in the English criminal trial that rules of evidence began to develop<sup>11</sup> and “evidentiary doctrine evolved (partly) in the desire to influence decision-making by occasional, amateur triers of fact.”<sup>12</sup> Thus, once it began to regulate proof, the law of evidence aspired to control, *a priori*, the analysis of evidence,<sup>13</sup> and one of the guiding principles adopted by common law evidence was the relative valuation of direct sensory experience over other forms of proof.<sup>14</sup> In that way, the crystallization of the common law of evidence at the end of the eighteenth century tracked the continental revolution, but in reverse. Just as the Continent was rejecting constrictive rules of evidence, similar rules were embraced by the common law.

In this article, I will trace the life of a common law rule of evidence centrally concerned with the distinction between circumstantial and direct evidence. As it is conventionally understood in the common law tradition, the fundamental distinction between direct and circumstantial evidence is that, whereas direct evidence only demands an assessment of credibility,

<sup>8</sup> M. Damaška, “Free Proof and its Detractors” (1995) 43 Am. J. Comp. L. 343 at 344.

<sup>9</sup> See J. Langbein, “Historical Foundations of the Law of Evidence: A View from the Ryder Sources” (1996) 96 Colum. L. Rev. 1168, in which Professor Langbein shows that, contrary to Wigmore’s view that the law of evidence appeared in the sixteenth and seventeenth centuries, the law of evidence was not palpable in England until the mid-eighteenth century and did not coalesce until the late eighteenth or early nineteenth century. See also J. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003). For a concise overview of some aspects of the historical development of the common law of evidence, see S. Hill *et al.*, *McWilliams’ Canadian Criminal Evidence*, 4th ed., looseleaf (Aurora, Ontario: Canada Law Book, 2004) at 1-3 to 1-9.

<sup>10</sup> Beattie notes that “[i]n the seventeenth century there were few controls over the evidence that a criminal jury could hear.” J. Beattie, *Crime and the Courts in England 1660-1800* (Princeton: Princeton University Press, 1986) at 363.

<sup>11</sup> See Beattie, *ibid.* at 362-76 and Langbein (2003), *supra* note 9.

<sup>12</sup> Damaška, *supra* note 8 at 346.

<sup>13</sup> See Damaška, *ibid.* (“Common law was thus never averse to legal instruments specifically designed to affect the analysis of evidence.”)

<sup>14</sup> See, for example, how the description of the system of evidence in the ancien régime given by Damaška, (*supra* note 4) resonates with our current evidentiary system.

circumstantial evidence calls upon the fact finder to draw an inference from accepted facts. That is, direct evidence requires only one determination – whether the evidence is to be believed. Circumstantial evidence, in contrast, adds a second question – even if believed, what conclusions can be drawn from the evidence? Circumstantial evidence demands a layer of inferential reasoning. Where, for example, circumstantial evidence is proffered by the Crown in a criminal case, the prosecution will ask the fact finder to infer the guilt of the accused, whereas the defence will seize upon this moment of inference to argue that the evidence does not point inexorably towards guilt.

The rule was established in *Hodge's Case*.<sup>15</sup> Before convicting an accused on the basis of circumstantial evidence, the jury must be satisfied not only that the evidence is consistent with the guilt of the accused, but *is inconsistent with any other rational inference*. This “rule” has led a varied life. It was rejected in the United States in 1954<sup>16</sup> and discarded by the English in 1973.<sup>17</sup> Although wholeheartedly embraced in Canada in 1938,<sup>18</sup> it was increasingly marginalized until, after the Supreme Court of Canada’s 1978 decision in *R. v. Cooper*,<sup>19</sup> secondary literature declared it dead.<sup>20</sup>

I am concerned with understanding one important element in the continued Canadian common law adherence to a conception of proof that favours sensory perception and controls fact-finding, rather than one that allows for the free evaluation of evidence. As the historical sketch with which I began this article makes clear, Canadian rules of evidence disclose underlying understandings of the nature of fact and fact-finding – a foundational epistemology. Viewed in this light, the declaration that *Hodge's* rule is dead is of great significance. The rule is deeply immersed in the prioritization of sensory perception over free evaluation of evidence. Therefore, when commentators declare that *R. v. Cooper* “removed any relevance of the distinction between direct and circumstantial evidence,” the claim is a profound one and must be carefully scrutinized.<sup>21</sup> If *Hodge's* rule is dead, and the distinction between inferential modes of fact-finding and direct sensory perception is diminished or dissolved, Canadian evidence law has undergone a silent but significant change. I am therefore

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<sup>15</sup> *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136.

<sup>16</sup> *Holland v. United States*, 348 US 121 (1954).

<sup>17</sup> *McGreevy v. D.P.P.*, [1973] 1 All E.R. 503 (H.L.).

<sup>18</sup> *The King v. Comba*, [1938] S.C.R. 396.

<sup>19</sup> [1978] 1 S.C.R. 860.

<sup>20</sup> See, e.g., R. Delisle, “Annotation” (1998), 17 C.R. (5th) 221 at 222 (Annotation to *R. v. Khan*) and D. Watt, *Watt's Manual of Criminal Evidence*, 2003 ed. (Toronto: Carswell, 2002) at 46.

<sup>21</sup> J. Sopinka *et al.*, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 43.

not only concerned with the doctrinal question of the status of the rule in *Hodge's Case*, but with the more foundational question of whether the story of *Hodge's Case* marks an erosion in the (Canadian) common law's *a priori* evaluation of the quality of certain classes of proof.

In the first section, I will examine the rule in *Hodge's Case* in more detail and consider arguments that have been made against its continued application. I conclude that the jurisprudence still assigns *Hodge's* rule an important role and that arguments against its use are ill-founded. In my second section, I will show that not only is the rule in *Hodge's Case* quite alive, but that *Hodge*-like reasoning predicated on limiting inferential fact-finding is abundant in Canadian law. *Hodge*-like reasoning has found its way from the jury charge into substantive doctrines of evidence left for the determination of the trial judge. Further, I will argue that the most active and relevant application of *Hodge's* rule has become appellate review of the reasonableness of convictions. In short, both the rule in *Hodge's Case* and its underlying spirit are alive and well in Canada, as is our basic commitment to Aristotelian understandings of proof.

### *Hodge's Rule: Its Early Life and Times*

At the Liverpool Assizes in 1838, a jury heard a case against a man accused of robbing and murdering a woman who was returning home from market. The report of the trial, *Hodge's Case*, tells us that all of the evidence adduced against the prisoner was circumstantial:

The prisoner was well acquainted with her, and had been seen near the spot (a lane), in or near which the murder was committed, very shortly before. There were also four other persons together in the same lane about the same period of time. The prisoner, also, was seen some hours after, and on the same day, but at a distance of some miles from the spot in question, burying something, which on the following day was taken up, and turned out to be money, and which corresponded generally as to amount with that which the murdered woman was supposed to have had in her possession when she set out on her return home from market, and of which she had been robbed.<sup>22</sup>

Baron Alderson told the jury that because the case was made up entirely of circumstantial evidence, before they could find the accused guilty, they would have to be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."<sup>23</sup> He then pointed to "the proneness of the human mind to look for – and often

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<sup>22</sup> *Supra* note 15 at 227-28, 1136-37.

<sup>23</sup> *Ibid.* at 228, 1137.

slightly to distort the facts in order to establish such a proposition – forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.”<sup>24</sup> The jury acquitted the accused.

The core of this reported charge to the jury was that, before convicting on circumstantial evidence, the jury would have to satisfy itself that the only rational inference to be drawn from the evidence was the guilt of the accused. Why would Baron Alderson craft such a particular charge? What is it about circumstantial evidence that would demand this kind of attention? The answer comes in the latter portion of the report, where it is said that the Baron pointed out to the jury the natural human inclination to distort circumstantial facts to fit a particular narrative. In the intervening years, Baron Alderson’s instincts on this issue have been confirmed by social science evidence.<sup>25</sup> Schum and Martin have shown that “individuals asked to mentally aggregate a large collection of evidence may ignore, discard, or integrate over contradictory evidence and otherwise overlook other subtleties in evidence.”<sup>26</sup> They characterize the core of their findings in the following way:

Perhaps the most striking results of our study concern the manner in which our research subjects assessed the value of contradictory and of redundant testimony. Quite startling is the frequently observed holistic tendency to make contradictory testimony either probatively valueless or, what seems worse, corroborative; such behaviour, however, is certainly not unheard-of in more abstract studies of human inference. Our studies show the existence of local as well as global “primacy” effects in which, apparently, the mind resists changes in the direction of opinion revisions.<sup>27</sup>

Baron Alderson was entirely correct when he spoke of “the proneness of the human mind to look for – and often slightly to distort the facts in order to establish” a proposition of guilt. This psychological understanding has been confirmed by social scientific work that adopts a “story” model of decision-making, asserting that juries decide cases based on a process of selecting the best-fit narrative.<sup>28</sup> Of course, guilt in a criminal trial ought not to be founded upon the “best” story, but upon guilt being the only

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<sup>24</sup> *Ibid.*

<sup>25</sup> D. Schum & A. Martin, “Formal and Empirical Research on Cascaded Inference in Jurisprudence,” c. 6 in R. Hastie, ed., *Inside the Juror: The Psychology of Juror Decision-Making* (Cambridge: Cambridge University Press, 1993).

<sup>26</sup> *Ibid.* at 168.

<sup>27</sup> *Ibid.*

<sup>28</sup> N. Pennington & R. Hastie, “The Story Model for Juror Decision Making,” c. 8 in R. Hastie, *supra* note 25. Pennington and Hastie point to studies supporting the view that decision making works largely on the basis of narratives. See W. Bennett & M. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*

reasonable story. Further, Moore shows that “schemas,” defined as categories in the mind that contain information about a particular subject, predispose jurors to draw particular inferences where such inferences are necessary.<sup>29</sup>

The rule in *Hodge's Case* therefore addresses a particular apprehended danger latent in circumstantial evidence. Direct evidence involves only one evaluation on the part of the fact finder – a determination of whether or not the witness offering direct sensory experience of a crime having been committed is to be believed.<sup>30</sup> In this decision, there is only one opportunity for error on the part of the fact finder. The danger with circumstantial evidence is that there are two potential points of error. The jury must not only decide whether to believe the truth of the evidence proffered, but to imagine or infer what this evidence might mean. This moment of inference, it is thought, is a dangerous one that must be controlled.

If, for example, a witness testifies that he saw the accused point a gun at the victim and fire a shot into his body, the jury need only ask itself whether this evidence is reliable. If the witness can only testify that he saw the accused running from the scene of the murder with a smoking gun in his hand, the jury must not only assess the credibility of the witness, but must ask what this evidence suggests. It would be natural to infer that the accused was the murderer. An equally rational inference, however, is that the accused was merely a bystander who came across the victim and the smoking gun, picked up the latter and ran for help. Baron Alderson's charge to the jury in *Hodge's Case* responds to the danger that a jury would select the first inference without considering the second. The rule in *Hodge's Case* is, therefore, a kind of prophylactic attempt to prevent the jury from too readily inferring the guilt of the accused. It does so by imposing a process of reasoning that would require each juror to test his or her inferences.

One can readily see the extent to which *Hodge's* rule, and with it the very distinction between circumstantial and direct evidence, is steeped in

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(New Brunswick, NJ: Rutgers University Press, 1981); J. Holstein, “Jurors’ Interpretations and Jury Decision Making” (1985) 9 *Law & Hum. Behav.* 83; G. Lopez, “Lay Lawyering” (1984) 32 *UCLA L. Rev.* 1.

<sup>29</sup> A. Moore, “Trial by Schema: Cognitive Filters in the Courtroom” (1989) 37 *UCLA L. Rev.* 273 at 279. Moore states (at 280): “In addition to allowing us to make meaning of a stimulus configuration and decide what to attend to next, schemas also allow us to draw inferences, based on our schematic hypotheses, about what is likely to happen in the future and what has happened in the past.”

<sup>30</sup> Of course, direct (or “testimonial”) evidence might not be worthy of belief for a variety of reasons. Misperception, errors in memory, failures in communication, or fabrication are all sources of potential inaccuracy in testimonial evidence.



the prioritization of sensory experience. The gravamen of the jury instruction is that a juror should be particularly cautious when asked to convict not on the basis of what a person has seen, but on a “mere” inference drawn from secondary observations. In what follows, it is essential to bear this purpose in mind.

### *Challenges to the Rule’s Existence*

The “rule” in *Hodge’s Case* is amenable to a spectrum of interpretations. At one end of the spectrum the rule can be understood as imposing a legal obligation to charge the jury in precisely the terms set out by Baron Alderson in *Hodge’s Case* whenever the guilt of an accused turns on circumstantial evidence. At the other end, the “rule” in *Hodge’s Case* can be seen as actually no rule at all. Rather, it simply exemplifies the requirement for proof beyond a reasonable doubt and imposes no obligations on the trial judge with respect to jury instructions. By tracing the development of the jurisprudence on *Hodge’s Case* in Canada, one can expose two fictions. The first is that Canadian law once imposed a strict obligation to follow precisely the words of Baron Alderson’s charge. The second fiction, accepted in an influential evidence treatise in Canada<sup>31</sup> and, more recently, by the Ontario Court of Appeal in *R. v. Fleet*,<sup>32</sup> is that the rule no longer imposes special obligations on trial judges.

In 1933, in *McLean v. The King*, the Supreme Court embraced the rule in *Hodge’s Case*.<sup>33</sup> Five years later, in *Comba*, the rule was said to be a “long settled rule of the common law.”<sup>34</sup> In *McLean*, the court described the rule in the following terms: “It is of last importance, we do not doubt, where the evidence adduced by the Crown is solely or mainly of what is commonly described as circumstantial, that the jury should be brought to realize that they ought not to find a verdict against the accused unless convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence.”<sup>35</sup> Thus, at this point it was clear that the Supreme Court of Canada viewed the rule in *Hodge’s Case* as imposing legal duties on the trial judge. *Hodge’s Case* stood for the proposition that, when faced with a case consisting of circumstantial evidence, the judge was required to instruct the jury not to convict if the circumstantial evidence could support

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<sup>31</sup> See Sopinka *et al.*, *supra* note 21.

<sup>32</sup> [1997] 120 C.C.C. (3d) 457 (Ont. C.A.). See also, *R. v. Tombran* (1999), 142 C.C.C. (3d) 380 at 389-92 (Ont. C.A.) and *R. v. Guiboche* (2004), 183 C.C.C. (3d) 361 (Man. C.A.).

<sup>33</sup> [1933] S.C.R. 688.

<sup>34</sup> *Supra* note 18 at 397. *Comba* is frequently, though mistakenly, cited as the case in which *Hodge’s* rule was adopted into Canadian law.

<sup>35</sup> *Supra* note 33 at 690.

reasonable explanations inconsistent with the guilt of the accused. Yet it was also clear from the outset that the court was not imposing a formulaic requirement upon trial judges to follow the precise words uttered by Baron Alderson. Rather, the court made clear that “there is no single exclusive formula which it is the duty of the trial judge to employ.”<sup>36</sup>

Almost twenty years later, in *Lizotte v. The King*, Justice Cartwright resolved an ambiguity in the rule as enunciated in *McLean* and *Comba*.<sup>37</sup> Whereas *McLean* spoke of a case in which the evidence adduced by the Crown was “solely or mainly” circumstantial, *Comba* focussed on situations where “the *verdict* rests solely upon a basis of circumstantial evidence.”<sup>38</sup> Did that mean that, so long as any point necessary to the determination of the guilt of the accused rested on circumstantial evidence, the charge was required? In *Lizotte*, Justice Cartwright held that it did. Noting that it had been argued before the court that the direction in *Hodge's Case* was only required where there was no direct evidence adduced by the Crown *at all*, Justice Cartwright stated that “it is my opinion that where the proof of *any essential ingredient of the offence charged* depends upon circumstantial evidence it is necessary that the direction be given.”<sup>39</sup> At this point in the jurisprudence, then, the rule in *Hodge's Case* had a robust mandatory (though not formulaic) nature. Further, there was little doubt that it had a legal existence quite distinct from any other rule of evidence.

In 1954, the United States Supreme Court decided *Holland v. U.S.*<sup>40</sup> The court considered the defendant's position that the judge was required to instruct the jury that “where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt.”<sup>41</sup> Although it did not explicitly refer to the rule in *Hodge's Case*, the court rejected the submission (which amounted to a *Hodge*-like charge), concluding that “the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.”<sup>42</sup> With *Holland*, the U.S. Supreme Court issued the first attack in the common law world on the need for the rule in *Hodge's Case*. How would the Supreme Court of Canada respond? Its rejection of the U.S. Supreme Court's position could not have been more clear. One year later,

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<sup>36</sup> *Ibid.* The court nevertheless stated (*ibid.*) that “he would be well advised to adopt the language of Baron Alderson or its equivalent.”

<sup>37</sup> [1951] S.C.R. 115.

<sup>38</sup> *Supra* note 18 at 397 [emphasis added].

<sup>39</sup> *Supra* note 37 at 133 [emphasis added].

<sup>40</sup> *Supra* note 16.

<sup>41</sup> *Ibid.* at 139.

<sup>42</sup> *Ibid.* at 139-140. This reasoning was recently confirmed in *Desert Palace v. Costa*, 123 S. Ct. 2148 at 2154 (2003).

in *Boucher v. The Queen*, the court was faced with two distinct grounds of appeal: a misdirection on reasonable doubt and a misdirection on *Hodge's* rule.<sup>43</sup> The court concluded that the charge on reasonable doubt was adequate, but that the instructions regarding *Hodge's* rule were flawed. As if, given the opposite rulings on two distinct legal points, there could be any question that reasonable doubt and the rule in *Hodge's Case* were discrete doctrines, Justice Cartwright took pains to note that “the rule in *Hodge's Case* is quite distinct from the rule requiring a direction on the question of reasonable doubt.”<sup>44</sup>

Ambiguity in the jurisprudence began to set in with the 1964 case of *R. v. Mitchell*.<sup>45</sup> The Supreme Court was faced with the argument that, with very limited exceptions,<sup>46</sup> determining whether an accused possessed the requisite mens rea is *always* dependent upon circumstantial evidence and therefore the instruction in *Hodge's Case* is *always* necessary. Justice Spence, for the majority, agreed that this would extend the rule too far and looked back to *Hodge's Case* to find some means of limitation. He concluded, accurately, that *Hodge's Case* was a case in which the circumstantial evidence went to the identification of the accused, not his mental state. Justice Spence reasoned that:

By its own terms...the rule is concerned with evidence as to the commission of an act. In my opinion, that limitation is a proper one. A criminal charge is laid as a result of the commission of a certain act or certain acts. If the evidence against the accused is circumstantial in character, then a jury should only find him guilty in respect of those acts if consistent with his having committed them and inconsistent with any other rational conclusion than that he did.<sup>47</sup>

Justice Cartwright dissented on this point and would have maintained the position that he and the rest of the court established in *Lizotte* – that *Hodge's Case* should be applied to all elements of the offence.

*Mitchell* sounded a note that resonated to some extent with *Holland* and anticipated much of the debate to come. In setting the limitation on the rule in *Hodge's Case* at the boundary between mens rea and actus reus, Justice Spence stated that “[t]he direction in *Hodge's* case did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt.”<sup>48</sup> Similarly, Justice Cartwright held that the

<sup>43</sup> [1955] S.C.R. 16.

<sup>44</sup> *Ibid.* at 30. That view has been expressed in other Canadian appellate courts. See *R. v. Ducsharm*, [1955] O.R. 824 at 832-33 (Ont. C.A.); *R. v. Manderville*, [1958] 124 C.C.C. 268 at 273 (N.B.C.A.).

<sup>45</sup> [1964] S.C.R. 471.

<sup>46</sup> For example, cases in which there is a confession by the accused.

<sup>47</sup> *Mitchell*, *supra* note 45 at 478.

<sup>48</sup> *Ibid.* at 479.

rule in *Hodge's Case* was simply “a corollary of the rule that the jury must not convict unless they are satisfied beyond a reasonable doubt of the guilt of the accused.”<sup>49</sup> Accordingly, although *Hodge's* rule was now limited to circumstantial evidence bearing upon the *actus reus* of a crime and was no doubt still being treated as a rule of law quite distinct from the requirement of proof beyond a reasonable doubt, the Canadian Supreme Court had, for the first time, closely linked the two concepts. The link was strengthened when, in *R. v. John*, Justice Ritchie held that “the language used in *Hodge's* case does nothing more than provide a graphic illustration of the principle that where the evidence is purely circumstantial it must be made plain to the jury that in order to be satisfied of the guilt of the accused beyond a reasonable doubt, they must first be satisfied that the circumstances are such as to be inconsistent with any other rational conclusion than that the accused was the guilty person.”<sup>50</sup> Yet, if one looks back to the language used in *McLean*, the essence of the direction is almost identical. Nothing much seems to have changed and, indeed, none of *McLean*, *Comba*, *Boucher*, or *Lizotte* were overruled.

Nevertheless, when the court pronounced its decision in *R. v. Cooper*,<sup>51</sup> Justice Laskin, in dissent, pointed to *Mitchell* and *John*, and the recent House of Lords decision of *McGreevy v. D.P.P.*,<sup>52</sup> as evidence of a retreat from the rule in *Hodge's Case*, and that the rule was now a mere redundancy that could be replaced by a correct charge on reasonable doubt. Justice Laskin reasoned as follows:

The judgment of the House of Lords in *McGreevy v. Director of Public Prosecutions* rejects the notion that there ever was any rule arising from *Hodge's* case which judges in England were required to follow where all or most of the evidence in a jury trial was circumstantial. In *Comba v. The King*, this Court referred to the formula in *Hodge's* case as “the long settled rule of the common law which is the rule of law in Canada” (at p. 397). Notwithstanding this pronouncement, this Court attenuated the rule in its judgment in *The Queen v. Mitchell*, *supra*, and manifested its discomfort with *Hodge's* case in *Alec John v. The Queen*. The time has come to reject the formula in *Hodge's* case as an inexorable rule of law in Canada. Without being dogmatic against any use of the

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<sup>49</sup> *Ibid.* at 483.

<sup>50</sup> [1971] S.C.R. 781 at 791-92.

<sup>51</sup> *Supra* note 19.

<sup>52</sup> *Supra* note 17. In *McGreevy*, the House of Lords held (at 511) that applying the rule in *Hodge's Case* “would...not only be unnecessary but would be undesirable.” The court completely conflated the rule in *Hodge's Case* with the doctrine of reasonable doubt, stating (at 510): “It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion.”

formula of the charge in *Hodge's* case I would leave the matter to the good sense of the trial judge (as was said in *McGreevy*), with the reminder that *a charge in terms of the traditional formula of required proof beyond a reasonable doubt is the safest as well as the simplest way to bring a lay jury to the appreciation of the burden of proof resting on the Crown in a criminal case.*<sup>53</sup>

Reading this passage, *Hodge's* rule seems to have shifted from a mandatory rule of jury instruction to a mere descriptive principle. The passage is the authority offered when Sopinka, Lederman, and Bryant state that *Cooper* dispensed with *Hodge's* rule and denied any legal significance between circumstantial and direct evidence.<sup>54</sup> It is also relied upon by Delisle when he states that the rule received its death knell in *Cooper*.<sup>55</sup> It is this passage that sends the signal to modern trial courts that the rule in *Hodge's Case* is dead.

Justice Laskin was in dissent in *Cooper*. However, Justice Ritchie, for the majority, stated that “[i]n this regard it will be seen that I agree with the Chief Justice in his rejection of the *Hodge* formula as an inexorable rule of law in Canada.”<sup>56</sup> But in what “regard” is he agreeing with Justice Laskin? Careful attention to his reasoning is required to discern the ratio of this case and, with it, the present state of the rule in *Hodge's Case* in Canada. Justice Ritchie referred to the limitation imposed on *Hodge's* rule in *Mitchell* and stated that this limitation “must, I think, be taken to have been accepted as confining the application of the *Hodge's* case formula in the manner there stated.”<sup>57</sup> Recall that the limitation imposed in *Mitchell* was that the rule in *Hodge's Case* ought to apply only to proof of the actus reus. Justice Ritchie merely confirmed the limitation. He went on to state:

This is not to say that, even where the issue is one of identification, the exact words used by Baron Alderson must necessarily be incorporated in a judge's charge. It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. In this regard it will be seen that I agree with the Chief Justice in his rejection of the *Hodge* formula as an inexorable rule of law in Canada.<sup>58</sup>

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<sup>53</sup> *Supra* note 19 at 865-66 [emphasis added].

<sup>54</sup> *Supra* note 21.

<sup>55</sup> *Supra* note 20. See also D. Tanovich, “Upping the Ante in Directed Verdict Cases Where the Evidence is Circumstantial” (1998) 15 C.R. (5th) 21 at 27 (identifying *Cooper* as the case “wherein it was held that the formula used in *Hodge's Case* was not mandatory”).

<sup>56</sup> *Supra* note 19 at 881.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

The majority in *Cooper* agreed with Justice Laskin that there is no particular incantation that must be recited. But that was not controversial. In *McLean*, the Supreme Court had already accepted that Baron Alderson's exact words need not be employed.<sup>59</sup> In *Cooper*, then, the court merely confirms the notion that, when proof of an element of the *actus reus* or identification is dependant upon circumstantial evidence, the judge is under a legal obligation to instruct the jury that they must not only be satisfied that the evidence is consistent with the guilt of the accused, but that it is inconsistent with other reasonable inferences.<sup>60</sup> The courts in *Fleet* and *Tombran* and the commentators who declare the dissolution of the legal distinction between circumstantial and direct evidence are, with respect, mistaken.<sup>61</sup> The rule in *Hodge's Case* is not dead.

### *Justifications for the Rule's Continued Existence*

In light of the Canadian jurisprudential history of the rule in *Hodge's Case*, I have concluded that the rule is still alive in the Canadian law of criminal evidence. However, the foregoing shows that the primary attack on the rule has been a trend of assimilating the rule in *Hodge's Case* to the requirement of proof beyond a reasonable doubt. The argument, advanced in both *McGreevy* and *Holland* and found in Justice Lamer's dissent in *Cooper*,<sup>62</sup> is that the jury instruction from *Hodge's Case* adds nothing to a good charge on reasonable doubt and, much worse, might confuse the jury.<sup>63</sup> This attack on the rule is profound. If nothing is added by the charge, then not only is Canadian adherence to the rule an ill-conceived

<sup>59</sup> See text at note 36 *supra*.

<sup>60</sup> In an obiter statement in *R. v. Mezzo*, [1986] 1 S.C.R. 802 at 843, Justice McIntyre stated that *Cooper* "placed the rule in *Hodge's Case* into the general consideration of reasonable doubt." This statement is ambiguous. It is clear in *Cooper*, *supra* note 19 at 881, that Justice Ritchie did not conflate the charge on reasonable doubt and the charge arising from *Hodge's Case*. It is true that he spoke of satisfaction beyond a reasonable doubt, but importantly, in terms of satisfaction "beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts."

<sup>61</sup> *Supra* note 32.

<sup>62</sup> This form of argument has also been adopted by the Ontario and Manitoba Courts of Appeal. See *Tombran* and *Guiboche*, *supra* note 32.

<sup>63</sup> Reference to the rule in *Hodge's Case* appears frequently in the post-*Lifchus/Starr* jurisprudence on the requirements for charging a jury regarding proof beyond a reasonable doubt. For example in *R. v. Rhee*, [2001] 3 S.C.R. 364 at 382, Justice Arbour held that the trial judge's instruction that "you must be satisfied beyond a reasonable doubt that where it is relied upon to support a guilty verdict the guilt of the accused is the only reasonable inference to be drawn from the facts as you have found them to be" helped to save a charge that did not fully comply with the *Lifchus* guidelines. Such cases suggest a view that *Hodge's* rule and the requirement for proof beyond a reasonable doubt are simply cognates.

historical vestige, but the distinction between circumstantial and direct evidence is less sharp than we might otherwise assume. The question must, therefore, be answered: does the rule in *Hodge's Case* add anything to the charge on reasonable doubt? In my view, the contention that the charge arising from *Hodge's Case* can be entirely displaced by an accurate charge on reasonable doubt is mistaken. The argument can be rebutted on three levels: the purposive, the functional, and the practical.

Consider first the differences in *purpose* between the charge on reasonable doubt and the charge in *Hodge's Case*. The charge on reasonable doubt is meant to explain to the jury the ultimate burden of proof which rests with the Crown, and by that means to convey the fundamental principle of the presumption of innocence. As the Supreme Court of Canada stated in its watershed case on reasonable doubt charges, *R. v. Lifchus*, “the onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence.”<sup>64</sup> Accordingly, the purpose of the charge on reasonable doubt is to impart *the importance of the presumption of innocence and to describe to the jury the ultimate state of mind consistent with that essential presumption*. In contrast, the purpose of the rule in *Hodge's Case* is to *alert the jury to the dangers associated with a particular kind of evidence*. It rests on the assumption that the inferential process essential to evaluating circumstantial evidence (but absent with direct evidence) is a process that carries with it particular dangers and therefore demands the special attention of the jury. This assumption, clearly made by Baron Alderson, is not a vestige of naïve early nineteenth century thinking. Rather, as I have noted above, social science evidence has confirmed that inferential reasoning is fraught with prejudices and presuppositions,<sup>65</sup> and that, when left to a global evaluation of the evidence, jurors will distort and ignore evidence so as to have it conform with a “best-fit” story or narrative understanding of the case.<sup>66</sup> Whereas one charge is concerned with conveying the ultimate burden of proof premised on the presumption of innocence, the other addresses the difficulties latent in particular kinds of evidence. I would suggest that with such disparate purposes, the assimilation of the two charges is conceptually unacceptable.

Next, though not entirely unrelated to the purposes of the charges, consider the *functional* differences between the charge on reasonable doubt and the rule in *Hodge's Case*. The charge explaining reasonable doubt describes a state of mind. The charge in *Hodge's Case* charts out a path of reasoning specific to particular evidence.

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<sup>64</sup> [1997] 3 S.C.R. 320 at 326.

<sup>65</sup> See Moore, *supra* note 29.

<sup>66</sup> See Pennington & Hastie, *supra* note 28.

In *Lifchus*, the court provided a suggested charge on reasonable doubt.<sup>67</sup> When one looks at the charge, it is apparent that although it amply describes the state of mind called “satisfied beyond a reasonable doubt,” it does not give the jury any guidance about *how* this state of mind is to be achieved when faced with inferential reasoning. The jurors are told that a reasonable doubt is based on reason and common sense, is not “frivolous” or “imaginary” and involves being “sure” of the accused’s guilt. Although a highly sophisticated juror might apply this description to the inferential aspect of circumstantial evidence and generate a rule like that in *Hodge’s Case*,<sup>68</sup> I would argue that this is beside the point – the functional difference between the judicial charges remains. One describes a state of mind, while the other lays out a process of reasoning. To suggest that the second is unnecessary because it is logically implicit in the first is analogous to saying that a sufficient description of the address and surroundings of your home dispenses with any need to give a guest directions.

Finally, there are two *practical* imperatives that reinforce a meaningful distinction between the two charges. The first derives from the social science evidence cited above. Recall that Shum and Martin show that “individuals asked to mentally aggregate a large collection of evidence may ignore, discard, or integrate over contradictory evidence and otherwise overlook other subtleties in evidence.”<sup>69</sup> At the same time, they recognize that “attentive factfinders with reasonable intellectual skills can incorporate the many subtleties in evidence *if, at least, they are alerted to the existence of these subtleties.*”<sup>70</sup> I would argue that *Hodge’s* rule is a practical judicial means of achieving that result.

The other practical imperative for specifically alerting the jury to the problems associated with the inferential reasoning inherent in circumstantial evidence is the Canadian experience of wrongful convictions. The concern for protecting against wrongful convictions has placed the Canadian law of evidence under close scrutiny. A number of commissions have pointed to evidentiary failures (including inadequate disclosure, the unreliability of jailhouse informants and problems with expert evidence, identification procedures and the use of demeanour evidence) as factors in wrongful convictions.<sup>71</sup> A theme running through the report into the wrongful murder conviction of Guy Paul Morin is the unique set of dangers associated with circumstantially-based cases.<sup>72</sup> With

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<sup>67</sup> *Supra* note 65 at 336-37.

<sup>68</sup> This is, fundamentally, the picture painted by the court in *McGreevy*, *supra* note 17.

<sup>69</sup> *Supra* note 25 at 168.

<sup>70</sup> *Ibid.* [emphasis added].

<sup>71</sup> See Hill, *supra* note 9 at 3-18 to 3-21.

<sup>72</sup> F. Kaufman, Commissioner, *The Commission on Proceedings Involving Guy Paul*



our increased awareness of wrongful verdicts rendered by well-intentioned juries, it would seem decidedly counter-productive to remove from criminal trials a charge designed to aid the jury's appreciation of the difficulties inherent in drawing inferences from evidence.

Each of these reasons – the purposive, the functional, and the practical – mutually reinforce one another. In my view, the result is a clear picture of distinct charges, with distinct lives. *Hodge's* rule cannot, without loss, be tucked within the folds of reasonable doubt. As a result, I can now link the historical review of *Hodge's* life in Canada with a principled defence of its existence. The remaining analysis in this article will seek to resuscitate *Hodge's Case* by demonstrating the immense theoretical and practical influence that the rule, and the reasoning that underlies it, exerts on Canadian criminal law and evidence.

### *Resuscitating Hodge's Rule*

I will argue that *Hodge's* rule is embedded in Canadian law much deeper than at the level of jury instruction. The influence of the rule can be found in two aspects of Canadian criminal evidence and procedure. First, *Hodge*-like thinking can be traced through the modern law of admissibility and, as such, the rule has informed many of the evidentiary doctrines that are laid in the hands of the trial judge. Second, in the context of criminal appeals, it is used as a kind of yard-stick in the appellate review of the "reasonableness" of convictions.

Both of these arguments are, in some fashion, a response to the assertion that *Cooper* "removed any relevance of the distinction between direct and circumstantial evidence."<sup>73</sup> The claim embedded in this statement is that direct and circumstantial evidence are now treated in exactly the same manner, with the related implication that, at least in this dimension of the law of evidence, Canada has moved to something akin to a principle of the free evaluation of evidence. The arguments that follow are tendered to emphasize that, for better or worse, nothing could be further from the truth. Circumstantial evidence, and the attendant process of inferential reasoning, is still treated with suspicion and care in Canadian law, plainly demonstrating our continued commitment to an Aristotelian privileging of and trust in direct sensory perception.

I have used the term "*Hodge*-like reasoning" at points in this article and it is now necessary to clearly define what is meant. As I have emphasized, the rule in *Hodge's Case* is animated by a concern with the moment of inference. Unlike direct evidence, circumstantial evidence

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*Morin: Report* (Toronto: Ontario Ministry of the Attorney General, 1998). The concern comes through most clearly in the section dealing with forensic evidence (e.g. at 312).

<sup>73</sup> J. Sopinka *et al.*, *supra* note 21 at 43.

requires the fact finder not only to assess the credibility of the witness, but to suppose what the implications of that evidence, if believed, might be. *Hodge*-like reasoning imposes rules that seek to limit the dangers involved in this act of inference. That is the core and spirit of the rule in *Hodge's Case*. *Hodge*-like reasoning denotes, then, patterns of reasoning about evidence that reflect concern with the troublesome moment of inference. Understood in this way, *Hodge*-like reasoning actually appears in the judicially-controlled law of admissibility in two manifestations.<sup>74</sup>

First, the law of evidence routinely seeks to use judges to limit the range of possible inferences that a jury may draw from evidence: "One of the most important functions of a judge is to minimize jury inferential error so that verdicts are based on an accurate estimation of the pertinent facts."<sup>75</sup> The most encompassing rule of evidence that demonstrates this aspect of *Hodge*-like reasoning is the general rule of balancing, *viz.*, that evidence ought to be excluded if its potential for prejudice outweighs its probative value.<sup>76</sup> The term "potential for prejudice" is, in that context, really code for "may lead the juror to make an improper inference."

A number of discrete rules of admissibility provide concrete instances of the general inclination to guard against fact finders drawing particular inferences. I will offer two examples.<sup>77</sup> A statutory example is section 276 of the *Criminal Code* dealing with sexual violence:<sup>78</sup>

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<sup>74</sup> One might fairly note that, in the realm of admissibility, the analogy to *Hodge's Case* is incomplete. That is, whatever concern there might be with the dangers of inferential reasoning, admissibility is distinct from reliance and once evidence is admitted, there is no assurance – or instruction, for that matter – that the trier of fact will in fact draw only *one* possible inference. In this sense, there is a functional difference between the rule in *Hodge's Case* and the examples that I discuss in this section. My point, however, is that the core of *Hodge's* rule is an attempt to limit the dangers inherent in inferential reasoning. One can instructively trace this concern – a concern that gives rise to "*Hodge*-like reasoning" – in other areas of the law of evidence.

<sup>75</sup> V. Gold, "Jury Wobble: Judicial Tolerance of Jury Inferential Error" (1985-86) 59 S. Cal. L. Rev. 391 at 391.

<sup>76</sup> *R. v. Harrer*, [1995] 3 S.C.R. 562, confirms the general discretion of a trial judge to exclude Crown offers of evidence where the probative value is outweighed by its potential for prejudice. In *R. v. Shearing*, [2002] 3 S.C.R. 33, the court made clear that where the evidence is offered by the accused, it is to be excluded only where the probative value is *substantially* outweighed by the danger of prejudice to the administration of justice.

<sup>77</sup> In addition to the rules explored below, limitations on the uses to which flight or other post offence conduct can be put, rules about the use of demeanour evidence, the inadmissibility of plea negotiations and a host of other evidentiary rules could serve as examples of this kind of reasoning.

<sup>78</sup> R.S.C. 1985, c. C-46.

[E]vidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge; or, is less worthy of belief.

Section 276(2) then lists a narrow set of exceptions to this general exclusionary rule. It may appear that this rule is far removed from *Hodge's Case*. There is no doubt that the specific purposes are vastly different. Nevertheless, the section 276 exclusionary rule can be thought of as a judicialized mechanism for avoiding the dangers of inferential error attendant upon particular kinds of evidence. Evidence of past sexual conduct is not direct evidence of the act in question. It is a kind of circumstantial evidence from which, in addition to a limited set of legitimate inferences, the jury might infer that consent existed or that the victim is not credible. Rather than leaving this matter to a charge touching upon the dangers associated with the process of inference, section 276 removes the matter to the domain of the trial judge in the form of a presumptive exclusionary rule rebuttable only where certain conditions and a strict balancing test are met.<sup>79</sup>

A common law example of *Hodge*-like reasoning in rules of admissibility is the rule governing the introduction of evidence of the accused's prior convictions. Section 12 of the *Canada Evidence Act* provides that any witness "may be questioned as to whether the witness has been convicted of any offence."<sup>80</sup> The rationale for this rule is that evidence of prior convictions can bear upon the question of credibility.<sup>81</sup> In *R. v. Corbett*, the Supreme Court of Canada held that the trial judge has the discretion to exclude evidence of prior convictions if the probative value of the evidence is outweighed by its potential for prejudice.<sup>82</sup> What is happening here? The *Corbett* rule takes note of the potential that, faced with circumstantial evidence of prior convictions, a jury might draw a flawed inference that would put the fairness of the trial into question. The remedy is found in a discretionary exclusionary rule whereby the judge may withdraw the evidence from the consideration of the jury, thereby removing any possibility that an unsound inference would be drawn. Again, although the particularities of the rule seem to place it a

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<sup>79</sup> To admit evidence of sexual activity, section 276(2)(a-c) requires that the judge determine that the evidence "is of specific instances of sexual activity," "is relevant to an issue at trial," and "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." See *R. v. Darrach*, [2000] 2 S.C.R. 443 at 456.

<sup>80</sup> R.S.C. 1985, c. C-5.

<sup>81</sup> See Sopinka *et al.*, *supra* note 21 at 951.

<sup>82</sup> [1988] 1 S.C.R. 670.

considerable distance from the rule in *Hodge's Case*, there is a commonality of underlying concern that, in my view, qualifies the *Corbett* rule as *Hodge*-like reasoning.

The second manifestation of *Hodge*-like reasoning in rules of admissibility subtly shifts the focus from the *purpose* of trial judges' evidentiary rulings to the *process* of their decision making. In this form, admissibility hinges not on what the jury may do with the evidence, but on the result of the judge's own inferential reasoning. In this manifestation, rather than relying on a judge's exclusionary ruling to *avoid an apprehended danger in the jury's potential inferences*, the law of evidence *requires judges to subject their own inferences to a Hodge-like filter*. That is an even more palpable way in which *Hodge's* rule can be understood as having shifted from jury to judge. Rather than telling the jury to test their inferences against other reasonable hypotheses, or even simply withdrawing the evidence for fear of the inferences that a jury might draw, here the judge does the inferential testing.

Perhaps the best example of this second manifestation of *Hodge*-like reasoning is the modern Canadian treatment of similar fact evidence. The Supreme Court of Canada decision in *R. v. Handy* is the guiding case on when evidence of prior bad acts can be admitted under the similar fact evidence rule.<sup>83</sup> The court recognized that kind of evidence presents a significant risk of prejudicial reasoning because, although evidence of similar acts can suggest that the accused was, in fact, the person who committed this crime (the permitted "identity" inference), it is also amenable to the dangerous reasoning that this was the *sort of person* likely to have committed the crime (the impermissible character inference). In effect, similar fact evidence walks the fine line between closely related inferences.<sup>84</sup> As a result, the court has established a high threshold for the admission of similar fact evidence. Similar fact evidence is "presumptively inadmissible."<sup>85</sup> In order to become admissible, "[t]he *onus is on the prosecution to satisfy the trial judge on a balance of probabilities* that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception."<sup>86</sup> The court explained that the probative value of similar fact evidence will outweigh its potential for prejudice where "the force of similar circumstances defies coincidence or other innocent explanation."<sup>87</sup>

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<sup>83</sup> [2002] 2 S.C.R. 908.

<sup>84</sup> *R. v. Arp*, [1998] 3 S.C.R. 339 at 363.

<sup>85</sup> *Handy*, *supra* note 83 at 932.

<sup>86</sup> *Ibid.* [emphasis added]. The imposition of this formal burden on the Crown was the central revolution in *Handy*, which clearly raised the bar for the admission of similar fact evidence.

<sup>87</sup> *Ibid.* at 929.

The practical result of this doctrine for the trial judge is that, before admitting such evidence, the judge must be convinced by the Crown on a balance of probabilities that the similar fact evidence meets the high threshold of *objective improbability of coincidence*. In *R. v. Scopelliti*, Justice Martin stated that similar fact evidence ought to be admitted and put before the jury only where “the propensity is so highly distinctive or unique as to constitute a *signature*.”<sup>88</sup> Similarly, the Supreme Court has stated that “the acts compared [must be] so unusual and strikingly similar that their similarities *cannot be attributed to coincidence*.”<sup>89</sup> As Justice Binnie wrote for the unanimous court in *Handy*: “References to ‘calling cards’ or ‘signatures’ or ‘hallmarks’ or ‘fingerprints’ similarly describe propensity at the admissible end of the spectrum precisely because the pattern of circumstances in which an accused is disposed to act in a certain way are so clearly linked to the offence charged that the possibility of mere coincidence, or mistaken identity or a mistake in the character of the act, is so slight as to justify consideration of the similar fact evidence by the trier of fact.”<sup>90</sup> At this point, we can see the judge being subjected to *Hodge*-like reasoning requirements. I suggest that this evidentiary law effectively requires, as a pre-requisite to admission, the judge conclude that he can draw no reasonable inference from the evidence other than that the accused was the person who committed both acts.

Imagine that the judge could see a reasonable inference *other* than that the accused committed both acts. Would the acts be so distinctive as to constitute a signature? The judge would have concluded, in effect, that the similarities between the two acts *could* reasonably be attributed to coincidence. By refusing to admit the evidence, the trial judge is still limiting the potential inferences drawn by the jury from this circumstantial evidence. However, in contrast to the last two examples, he is doing so by subjecting his own reasoning to *Hodge*-like tests to determine the matter of admissibility. Canadian law shifts the inferential problem arising from similar fact evidence from the jury box to the judge, and solves it by requiring the judge to undertake *Hodge*-like reasoning.

The requirement that judges engage in *Hodge*-like reasoning also occurs with the modern approach to hearsay evidence. In *R. v. Khan*<sup>91</sup> and *R. v. Smith*,<sup>92</sup> the Supreme Court established an omnibus “principled”

<sup>88</sup> (1981), 63 C.C.C. (2d) 481 at 496 (Ont. C.A.) [emphasis added].

<sup>89</sup> *R. v. C.(M.H.)*, [1991] 1 S.C.R. 763 at 771 [emphasis added].

<sup>90</sup> *Supra* note 83 at 944. The court goes on (at 944-46) to formally reject a “conclusiveness” rule that would require that the similar fact evidence be consistent only with a finding of guilt. As I will show, however, the focus on “signatures,” “hallmarks,” “fingerprints” and the unlikelihood of coincidence effectively amounts to the imposition of a *Hodge*-like test.

<sup>91</sup> [1990] 2 S.C.R. 531.

<sup>92</sup> [1992] 2 S.C.R. 915.

approach to the admissibility of hearsay whereby hearsay evidence would be admissible where necessary and reliable.<sup>93</sup> Evidence would be deemed “necessary” where it was the only means of proving the fact in issue. “Reliability” was a more complicated concept: “The criterion of ‘reliability’...is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be ‘reliable,’ i.e., a circumstantial guarantee of trustworthiness is established.”<sup>94</sup> Strong resonances with *Hodge*-like reasoning can be found embedded in this test for reliability. Note that reliability is based on an assessment of the circumstances surrounding the utterance. The judge is put in the position of inferring truth from circumstantial evidence. That is a task that might otherwise have been left to a jury armed with *Hodge's* rule. Yet the true shadows of *Hodge's* rule are cast by the way judges are expected to reason about the reliability of the circumstances. Since, by definition, the declarant is not available to explain the circumstances, the judge is left to try to preclude interpretations of the circumstances that would suggest mistake or untruthfulness. I suggest that is *Hodge's* rule at play in the judge's mind.

In *Smith*, Justice Lamer demonstrates how this process of reasoning about reliability should look. I submit that his model evidences the similarity between the application of the hearsay rule and the rule in *Hodge's Case*. In *Smith*, the Crown's theory was that the deceased (Ms. King) had been travelling with the accused, a drug smuggler. The accused asked her to smuggle cocaine back into the U.S. in her body and, when Ms. King refused, he abandoned her at a hotel. From the hotel, Ms. King then placed two telephone calls to her mother, the first informing her that the accused had abandoned her at the hotel, and the second to tell her that he had not yet returned. The mother then arranged for a taxi to pick her up, but when the taxi arrived, the driver refused the fare to Detroit because she did not have a credit card. Ms. King was then seen leaving the cab and going directly to a payphone, at which point she again called her mother, telling her that the accused had returned and she no longer needed a ride. A final call was placed shortly thereafter, stating simply that she was “on her way.” The Crown sought to introduce into evidence all of these

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<sup>93</sup> The test also required that the evidence's probative value outweigh its potential for prejudice. That is, in my view, a redundancy given that this requirement applies to all relevant evidence. See *Harrer and Shearing*, *supra* note 76. In *R. v. Starr*, [2000] 2 S.C.R. 144, the court held that this “principled approach” now eclipsed the old categorical exceptions to the hearsay rule, such that despite the applicability of one of the old exceptions, the admissibility of evidence would ultimately depend on the application of the necessary and reliable test.

<sup>94</sup> *Smith*, *supra* note 92 at 933.

telephone conversations, on the theory that the accused had returned, driven her somewhere and killed her.

Justice Lamer had no difficulty admitting the first two telephone calls. The declarant was dead, so necessity was made out, and there was nothing to suggest that the statements made in these phone calls were unreliable. However, he excluded the third, and critical, conversation. The reasons illuminate the point addressed in this section. Justice Lamer could imagine a number of reasons why this evidence might not be reliable. First, it was entirely possible that Ms. King had been mistaken and that she had only seen a car that looked like the accused's. In any event, he noted that "it does seem somewhat curious that she would make the statement 'Larry has come back and I no longer need a ride' before having spoken to the [accused] to ascertain whether he proposed to allow her to continue to travel with him."<sup>95</sup> Second, in the earlier conversations, Ms. King had vehemently resisted her mother's suggestion that a man named "Philip" come to pick her up. There was some evidence that Philip had previously assaulted Ms. King, and Justice Lamer hypothesized that, faced with the choice of lying to her mother or taking a ride with Philip, she may have chosen the former. Finally, Justice Lamer noted that Ms. King had been travelling under an assumed name and had been using a stolen or forged credit card: "She was, therefore, at least capable of deceit," and she may have lied to conceal her activities from her mother, or simply to allay her fears.<sup>96</sup>

I have given the facts of *Smith* and Justice Lamer's reasoning at length to demonstrate that the reliability branch of the hearsay rule requires the judge to test the circumstantial evidence to see if it will bear not only an inference of reliability, but alternate inferences consistent with deceit or mistake. Justice Lamer makes abundantly clear, I suggest, that this *Hodge*-like reasoning is precisely what is required by the reliability test:

I wish to emphasize that I do not advance these alternative hypotheses as accurate reconstructions of what occurred on the night of Ms. King's murder. I engage in such speculation only for the purpose of showing that the circumstances under which Ms. King made the third telephone call to her mother were not such as to provide that circumstantial guarantee of trustworthiness that would justify the admission of its contents by way of hearsay evidence, without the possibility of cross-examination. Indeed, at the highest, it can only be said that hearsay evidence of the third telephone call is equally consistent with the accuracy of Ms. King's statements, and also with a number of other hypotheses.<sup>97</sup>

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<sup>95</sup> *Ibid.* at 936.

<sup>96</sup> *Ibid.* It is unclear why this ground for disbelief ought not to have applied to the previous two conversations.

<sup>97</sup> *Ibid.* at 936-37.

As with the rule in *Hodge's Case* as it relates to a finding of guilt, the multiplicity of available inferences is fatal to a finding of reliability.

Although I have divided the examples in this section into two “manifestations” – those rules of admissibility in which the judge simply excludes evidence for fear of what inferences the jury might draw and those rules that require the judge to apply *Hodge*-like reasoning – all are joined by a common theme. I have argued that rape-shield rules, the law of prior convictions, similar fact evidence and the modern approach to hearsay can all be viewed as instantiations of the same attitude that informed the rule in *Hodge's Case* – that the need for inferential reasoning makes circumstantial evidence somehow more “dangerous” than direct evidence. Thus, even if it were true that the formal rule in *Hodge's Case* were dead in Canada, as it is in England and the United States, the spirit of *Hodge's Case* survives in the body of judicially-enforced rules of evidence.

I now turn to the relevance of the rule at the appellate level. Not only does *Hodge*-like reasoning presently operate at the appellate level, recent developments in the law of appellate review suggest a strong basis for appellate judges to increase their use of the principles found in *Hodge's Case*.

The *Criminal Code* provides that a court of appeal may allow an appeal against conviction where it is of the opinion that “the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.”<sup>98</sup> The power lies in appeals from convictions only. The Supreme Court made clear in *R. v. Biniaris* that *acquittals* cannot be appealed “on the sole basis that it is unreasonable, without asserting any other error of law leading to it.”<sup>99</sup> If an appellate court concludes that a conviction is unreasonable, the court is then required to quash the conviction and direct that a judgment or verdict of acquittal be entered.<sup>100</sup> The obvious question is what criteria may an appellate court apply in making this finding of unreasonableness. In *R. v. Corbett*, the Supreme Court held that “[t]he function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.”<sup>101</sup> In so doing, the court is entitled “to review, analyse and, within the limits of appellate

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<sup>98</sup> Section 686(1)(a)(i).

<sup>99</sup> [2000] 1 S.C.R. 381 at 402.

<sup>100</sup> Although section 686(2) states that an appellate court may direct an acquittal *or* order a new trial, in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 219 (Ont. C.A.), the court makes clear that where a verdict is unreasonable, an acquittal should be the result. If no reasonable trier of fact could convict on the evidence adduced, it would be unfair to order a new trial, thereby giving the Crown a second opportunity to present better evidence.

<sup>101</sup> [1975] 2 S.C.R. 275 at 282. This test was confirmed in *R. v. Yeves*, [1987] 2 S.C.R. 168.



disadvantage, weigh the evidence.”<sup>102</sup> Although cast in terms of a jury trial, these powers lie equally from a verdict rendered by a judge sitting alone and one rendered by a jury.<sup>103</sup>

When appellate judges undertake the task of reviewing the reasonableness of a verdict, they are placed within earshot of the sirens’ call to assume the role of the trial judge or jury. Appellate judges must find a means of expressing the unreasonableness of the conviction beyond merely “a vague unease, or a lingering or lurking doubt based on [their] own review of the evidence.”<sup>104</sup> In the case of the review of a trial judge’s verdict, the process is made somewhat easier by virtue of the fact that judges give reasons for their decisions. In such cases, the Supreme Court has made clear “that in trials by judge alone, the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached.”<sup>105</sup> Where the conviction is rendered by a jury, the process is significantly complicated by the absence of reasons. Since the correctness of the judge’s instructions on the law must be presumed for this analysis, the appellate court must conclude, without the benefit of reasons for judgment, that the jury “was not acting judicially.”<sup>106</sup> Justice Arbour explained:

This conclusion does not imply an impeachment of the integrity of the jury. It may be that the jury reached its verdict pursuant to an analytical flaw similar to the errors occasionally incurred in the analysis of trial judges and revealed in their reasons for judgment. Such error would of course not be apparent on the face of the verdict by a jury. But the unreasonableness itself of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury....[A]fter the jury has been adequately charged as to the applicable law, and warned, if necessary, about drawing possibly unwarranted conclusions, it remains that in some cases, the totality of the evidence and the peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial was flawed in light of the unreasonable result that it produced.<sup>107</sup>

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<sup>102</sup> *Biniaris*, *supra* note 99 at 405.

<sup>103</sup> This power to review a jury’s assessment of the evidence for reasonableness is, from an historical standpoint, a momentous change in the structure of adjudication. Somewhat oddly, the historical development of this power does not appear to have been the subject of academic commentary.

<sup>104</sup> *Biniaris*, *supra* note 99 at 407.

<sup>105</sup> *Ibid.* at 406-407.

<sup>106</sup> *Ibid.* at 408.

<sup>107</sup> *Ibid.* at 408-409.

In either circumstance, however, the law “requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention.”<sup>108</sup> Without usurping the role of the trial judge or jury, and not being permitted to rely upon a lingering or lurking discomfort with the result, the appellate court must weigh the evidence, look to the verdict (and reasons, if they exist) and then produce an explanation for why the conviction is unreasonable. That is a substantial challenge for appellate judges.

It is at this point that *Hodge's Case* offers obvious and substantial assistance where convictions turn on circumstantial evidence. It must be remembered that in *Cooper*, even Justice Laskin did not reject the truth of the assertion in *Hodge's Case*.<sup>109</sup> The most that any court has held, including the House of Lords and the U.S. Supreme Court, is that the rule in *Hodge's Case* is *unnecessary* or *redundant* – not that it is incorrect. It remains a rule of law that, where proof of a constituent element of an offence turns on circumstantial evidence, the evidence must be not only consistent with the guilt of the accused, but inconsistent with all other reasonable interpretations. I would argue that the rule in *Hodge's Case* is a powerful resource for appellate judges called upon to decide cases where unreasonable convictions are alleged.

When a case turns on circumstantial evidence, Canadian appellate courts can set out this evidentiary matrix and test the inferences that the evidence can bear. When there is a reasonable inference that is inconsistent with the guilt of the accused, appellate courts have a legal rule at their disposal to explain why, viewed “through the lens of judicial experience,” the verdict is, as a matter of law, unreasonable.<sup>110</sup> Since this mode of appellate reasoning is dependent upon the evidence adduced rather than the reasons offered by the finder of fact, *Hodge's* rule is an effective instrument for cases heard both by judge and jury and by judge alone. The rule in *Hodge's Case* can serve as a kind of inferential litmus test to be applied by appellate courts to the evidence adduced at trial. Using *Hodge's* rule in this way, appellate judges are not just substituting their view of the evidence for that of the finder of fact. Rather, they are applying an evidentiary rule to determine, as a matter of law, whether the verdict is unreasonable.

In fact, some appellate courts have used the rule in *Hodge's Case* in precisely this manner. In *R. v. Liu*, the Alberta Court of Appeal instructed itself as to the test from *Corbett/Yebes* for determining whether a conviction is unreasonable.<sup>111</sup> The court then noted that all of the evidence

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<sup>108</sup> *Ibid.* at 411.

<sup>109</sup> *Supra* note 19.

<sup>110</sup> *Biniaris*, *supra* note 99 at 409.

<sup>111</sup> [1989] 5 W.W.R. 67 (Alta. C.A.).

against the accused was circumstantial. Justice Harradence concluded that the trial judge had erred by convicting in the presence of reasonable inferences inconsistent with the guilt of the accused. Although an inference could be made consistent with the guilt of the accused, “other inferences [were] consistent with the innocence of the Appellant” and, as a result, the verdict was an unreasonable one.<sup>112</sup>

In *R. v. Keysaywaysemat*, the Saskatchewan Court of Appeal took the (by now familiar) view that *Cooper* had done away with the rule in *Hodge’s Case*.<sup>113</sup> It nevertheless felt that the rule still had utility at the appellate level: “[T]he rule in *Hodge’s Case* remains a useful test in determining the reasonableness of a jury’s verdict.”<sup>114</sup> In that case, though the court held that the verdict was not an unreasonable one, the court’s reasoning is demonstrative of the point that I have argued: “This analysis of the evidence indicates a strong circumstantial case, supported by some direct inculpatory evidence against the appellant. The evidence, however, to meet the rule in *Hodge’s Case*, should also be inconsistent with any other rational conclusion. And, as already noted, the appellant did not have the exclusive opportunity to commit the crime.”<sup>115</sup> However, reviewing the totality of the evidence bearing upon identity, the court rejected the accused’s contention that the circumstantial evidence could bear the inference that someone other than the accused had committed the offence:

Given all this, it is pure speculation to suggest that some unknown intruder entered the house which contained five people and managed to sexually assault and kill the victim, and then to leave, unnoticed by anyone in the house, and without leaving any trace of his presence. It was reasonable for the jury to reject such a hypothesis as unfounded in any evidence and totally speculative. It was reasonable for the jury to find that the hypothesis was not a rational inference capable of raising a reasonable doubt.<sup>116</sup>

Although the court did not quash the conviction, its approach to the evidence shows the utility of *Hodge’s* rule at the appellate level.<sup>117</sup>

These cases show that some appellate courts have seized upon the rule in *Hodge’s Case* as a means of expressing the unreasonable nature of a conviction. Further, I suggest that, owing to a recent jurisprudential

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<sup>112</sup> *Ibid.* at 74. See also *R. v. S.L.R.*, [2003] A.J. 566 (C.A.); *R. v. Cardinal* (1990), 106 A.R. 91 (C.A.); *R. v. Vallieres* (1973), 15 C.C.C. (2d) 241 (Que. C.A.).

<sup>113</sup> (1992), 97 Sask. R. 66 (C.A.).

<sup>114</sup> *Ibid.* at 71.

<sup>115</sup> *Ibid.* at 73.

<sup>116</sup> *Ibid.* at 74.

<sup>117</sup> See also *R. v. Pinsent* (2000), 34 C.R. (5th) 61 at 73 (Nfld. C.A.), where Justice Marshall uses *Hodge’s* rule in precisely this fashion. He stated that the rule is a “logical substantive means of testing” the evidence adduced at trial and, in this respect, “the rule in *Hodge’s Case* is not extinct.”

development, *Hodge's* rule will become an increasingly useful tool in criminal appeals. In *R. v. Sheppard*, Justice Binnie held that trial judges had a legal duty to give reasons, satisfaction of which was to be tested on a "functional basis."<sup>118</sup> Most critical for the purposes of this article, Justice Binnie emphasized a trial judge's obligation to provide reasons sufficient "to preserve and enhance meaningful appellate review of the correctness of the decision."<sup>119</sup> In order to properly assess the reasonableness of the decision on appeal, appellate judges need to know what inferences trial judges are drawing from circumstantial evidence. As trial judges begin to conform to Justice Binnie's instruction, the result will be an increasingly clear appellate appreciation of the inferences relied upon by judges given the circumstantial facts before them. Consequently, as *Sheppard* takes root in the Canadian judicial system, one might reasonably expect that the appellate use of the *Hodge's Case* "litmus-test" will prove more and more prevalent in criminal appeals based upon unreasonable verdicts.

If the foregoing is true – if *Hodge's* rule has become increasingly germane to appeals based on "unreasonable verdicts" – then, even if dead in the jury box, the rule is assured a new and vibrant life, raised up to the plane of appellate review.

### *Conclusion*

The purpose of this discussion has been twofold. On one level, I have been concerned with the life of a particular evidentiary rule, tracing its history, considering the bases for its existence and suggesting ways in which it (or its spirit) appears in various aspects of Canadian evidentiary and procedural law. I have argued that, contrary to the view of some courts and commentators, the rule in *Hodge's Case* still has mandatory force in Canada. The rule is not simply a redundant articulation of the burden of proof. Rather, it serves to address the distinct risks associated with circumstantial evidence. I have also argued that the premises and reasoning processes underlying *Hodge's* rule can now be found in various aspects of judicially controlled rules of evidence and the criminal appellate process.

This analysis can also be understood as having used the life of a very discrete and, perhaps to some, eccentric rule to draw into high relief the extent to which particular epistemological assumptions suffuse Canadian

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<sup>118</sup> [2002] 1 S.C.R. 869.

<sup>119</sup> *Ibid.* at 882. In my view, a significant corollary of this holding in *Sheppard* is that when forced to submit to trial by jury, the accused is deprived of a meaningful right of appeal. The implications of *Sheppard* for trial by jury in Canada have not yet been explored. See B. Berger, "Peine Forte et Dure: Compelled Jury Trials and Legal Rights in Canada" (2003) 48 *Crim. L.Q.* 205.

evidence law. I began this article with a consideration of the divergent trends in continental and common law approaches to evidence around the turn of the eighteenth century. In response to philosophical criticisms by enlightenment thinkers and political criticisms made by revolutionary leaders, the continental system, which had developed a rather rigid hierarchy of the presumptive value of evidence, rejected this *a priori* assessment of evidence in favour of a “principle of free evaluation of the evidence.” At the same time, the common law system of evidence was just crystallizing, and in a form that would embrace the Aristotelian valuation of sensory perception over inferential reasoning. It is out of this movement that *Hodge’s Case* emerged, a case where this prioritization formed the principled foundation for the rule that it spawned. Accordingly, this analysis was understood as an exploration of one way in which the Canadian law of evidence is thoroughly embedded in this epistemological milieu. As I have shown, even apart from the rule of jury instruction in *Hodge’s Case*, the law of evidence and the process of appellate review currently presuppose the view that, in a de-contextualized manner, we can evaluate what forms of proof are “better” and “worse” – “trustworthy” or “dangerous.”

Implicit in the way I have framed this discussion is the notion that our approach to the law of evidence is not a necessary one. Continental systems have successfully rejected it, and there are even strands of thought in the common law that would seem to question the wisdom of this kind of *a priori* evaluation. The growing suspicion with which eyewitness identifications (and, in particular, dock-identifications) are regarded and the common law’s increasing concern with the testimony of accomplices or “unsavoury characters” are two examples. Perhaps, some two centuries after the hierarchical approach to evidence was discarded on the Continent, the seeds of a change in the common law have been planted. In the meantime, *Hodge’s* rule, in both its classic form and in the way that it resonates with approaches to inferential reasoning throughout the law, is still with us. For better or for worse, so too is the epistemology upon which it is founded.