Consistent Statements of a Witness

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I. INTRODUCTION

Should prior consistent out-of-court statements\(^1\) of a witness be admissible when the witness gives in-court testimony on the same point? In an action for damages for negligence, when the plaintiff testifies that she was hurt while working for the defendant, should a witness be allowed to testify that, after the accident, the plaintiff told the witness that that accident happened at work?\(^2\) If the defendant in a criminal trial testifies, should an exculpatory statement that he made upon being arrested be admissible?\(^3\) In a divorce proceeding, when the wife denies a charge of adultery, should evidence of a telephone conversation between the wife and a doctor in which she denied the charge and asked the doctor to examine her be admissible?\(^4\)

At common law, these statements are inadmissible under the rule that prohibits proof of consistent statements of a witness\(^5\) because they are thought

\(^{1}\) The out-of-court statements of a declarant (i.e., a person who makes a statement based on first-hand knowledge) who is a witness may be divided into three groups: consistent, inconsistent and supplemental. A prior inconsistent statement is in conflict with the in-court testimony; see, for example, Deacon v. The King, [1947] S.C.R. 531, [1947] 3 D.L.R. 772, 89 C.C.C. 1, 3 C.R. 265. A supplemental statement, on the other hand, provides information about an event or condition that is not contained in the in-court testimony of the witness; some examples of this are R. v. Davey (1970), 68 W.W.R. 142, [1970] 2 C.C.C. 351, 6 C.R.N.S. 288 (B.C.S.C.); Fleming v. Toronto Ry. Co. (1911), 25 O.L.R. 317 (C.A.); and R. v. Gwozdowski (1972), 10 C.C.C. (2d) 434 (Ont. C.A.). For the purposes of this paper, however, discussion will be confined to consistent statements, which contain essentially the same information as the subsequent in-court testimony. The class of consistent statements includes a prior statement that revives the memory of a witness. If the memory is genuinely refreshed, there are two statements: the in-court testimony and the prior statement.


to be inherently unreliable as a result of their self-serving nature and the possibility that prior out-of-court statements could be concocted to support subsequent in-court testimony. "If a statement of that kind were admitted it would be easy to manufacture evidence by telling your various friends, and then calling them as witnesses to prove what you had told them." Quite apart from this concern is the danger of unnecessary costs attributable to the reception of irrelevant testimony. "The reason for the rule appears to the Court to be that the evidential value of such testimony is nil. Because it does not assist in the elucidation of the matters in dispute, it is said to be inadmissible as being irrelevant." There are exceptions to the common law rule, the most important being statements to rebut an allegation of recent fabrication, recent complaints in sexual offences, statements of identification, and res gestae.

The rule is of recent origin. Until the early 1700's it was generally accepted that prior statements of a witness were admissible, but gradually objections to the admission of these statements were sustained, and the current common law rule has been virtually unchanged since 1794. Recently, however, several proposals have been made to change this rule, and

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R. v. Roberts, supra note 5, at 105. Also see the judgment of Morris L.J. in Corke v. Corke, supra note 4.

See infra, notes 59-103 and accompanying text.

See infra, notes 104-84 and accompanying text.

See infra, notes 185-265 and accompanying text.

A discussion of res gestae is beyond the scope of this paper. See the text accompanying note 58, infra.

Freind's Trial (1696), 13 St. Tr. 1 at 32; Squire's Trial (1753), 19 St. Tr. 262 at 270.

Halliday v. Sweeting, discussed in The Case of the Borough of Ivelchester, 1775 3 Doug. El. Cases 151 at 163. (The plaintiff could not call the wife and sister of the witness to testify that the witness had told the same thing to them. No reasons are given.) Also see Wigmore, supra note 5, Vol. V, (1974) at 12-28, ¶1364.

R. v. Hardy (1794), 24 St. Tr. 199 at 1093.

See Model Code of Evidence (Philadelphia: American Law Institute, 1942) [hereinafter Model Code]. Rule 503 provides:

Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable as a witness, or (b) is present and subject to cross-examination.

The Criminal Law Revision Committee Eleventh Report, Evidence (General) (Cmd. 4991, 1972) [hereinafter Eleventh Report] provides, at 190:

s. 31(1) In any proceedings a statement made, whether orally or in a document or otherwise, by any person shall . . . be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible, if— (a) he has been or is to be called as a witness in the proceedings . . .

Also see New South Wales Law Reform Commission, Report on the Rule against Hearsay (1978), 29 L.R.C. at 232. Draft Bill s. 66(1)(b) admits out-of-court statements notwithstanding "(b) that any person concerned in the making of the statement is a witness, whether or not he gives testimony consistent or inconsistent with the statement . . ."
the rule has been abolished in civil proceedings in England. This paper will discuss the common law rule and propose a framework for evaluating proposals for reform; the proposals that will be examined in detail are those of the Law Reform Commission of Canada and the Ontario Law Reform Commission.

II. AN INCLUSIONARY RULE

The Law Reform Commission of Canada issued its Report on Evidence and Draft Evidence Code in 1975. The Commission recommends that all previous statements of a witness be admissible if they "would be admissible if made by [the declarant] while testifying as a witness." Therefore, admissibility depends on other rules of evidence not under discussion here, such as the rules governing testimonial competence and hearsay. The common law rule against the admission of prior statements of a witness is abolished and the provision makes inconsistent and consistent statements admissible to support or attack credibility if they are relevant to that issue. Thus, consistent statements generally will be admissible without the necessity of satisfying the criteria of a common law exception, such as statements to rebut the allegation of recent fabrication.

In the following section, the admission of consistent statements of a witness to support credibility will be discussed first, and then the question of whether consistent statements should be admissible as substantive evidence will be considered.

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16 Civil Evidence Act 1968, c. 64 (U.K.):

s. 2(1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement

(a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(b) without prejudice to paragraph (a) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made, except

(i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or

(ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.


18 Id., s. 62 provides: "Any party, including the party calling him, may examine a witness and introduce other relevant evidence for the purpose of attacking or supporting his credibility, except as otherwise provided in this Code."
A. Credibility

The objection most often raised at common law to the admission of consistent statements is that they are self-serving. There is a danger of fabricated evidence. "[T]he presumption . . . is, that no man would declare anything against himself, unless it were true; but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."\(^9\) The validity of this criticism is questionable. First, while it applies only to parties in the case, the rule excludes consistent statements of all witnesses. Second, a rule that prevents the admission of self-serving statements on the basis that otherwise a party could make evidence on his own behalf rests on an assumption that parties are liable to be motivated by their own interest to such an extent that they will present false evidence. The proposition that parties are so biased in their own favour that their testimony is of no value has been discredited for over a hundred years. The disqualification of witnesses because of interest was abolished in 1851.\(^20\) In any event, it should also be noted that, even if the consistent statement were fabricated, the prior statement and the in-court testimony would be substantially identical. The declarant would be subjected to contemporaneous cross-examination on the in-court statement and to subsequent cross-examination on the prior statement, unless the prior statement was proved by a third party and it was impossible to recall the declarant.\(^21\)

A more substantial objection is that in most cases a prior consistent statement, although logically relevant on the issue of the credibility of the witness,\(^22\) is of slight probative value. The in-court testimony based on the present memory of the witness and subject to contemporaneous cross-examination is usually better evidence than the prior statement. A minority of the English Law Reform Committee that recommended the provisions of the Civil Evidence Act 1968 were of the opinion that admission of out-of-court statements when the declarant is a witness was "a departure from the 'best evidence' principle for which there is no sufficient justification. If the previous statement is consistent with what the witness says in court, it is of little value; . . .."\(^23\)

While it is more likely that a witness who is truthful will make a consistent statement than a witness who is untruthful, evidence that is logically

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10 R. v. Hardy, supra note 14, at 1093 per Eyre C.B.
22 Martin B. in Sheen v. Bumpstead (1862), 7 L.T.N.S. 466 at 468 (Ex. Ct.), defines relevant evidence as "all facts and circumstances which afford a fair presumption or . . . aid the jury in arriving at a just and true conclusion." Justice Learned Hand, in U.S. v. Sherman, 171 F. 2d 619 at 622 (2d Cir. 1948), concluded: "[M]ost persons would probably consider any earlier consistent account, in some measure at least, confirmatory of a witness's testimony. The reason for its exclusion is because it has not been made on oath rather than because it has no probative value, although courts have often spoken as though it had none."
relevant, such as a consistent statement, may not be legally relevant. The courts do not always distinguish between evidence that is inadmissible because it is logically relevant and evidence that is logically relevant but inadmissible on a policy ground, e.g., that it would confuse the issues, waste time or be prejudicial. Consistent statements have been deemed to be legally irrelevant not because they are logically irrelevant, but because their slight probative value does not justify the danger of a multiplication of issues and a waste of time. Sellers L.J. in Corke v. Corke and Cooke concluded: “Whether or not this rule is strictly logical, it is one which keeps the evidence to the main issues. . . .”

A general exclusionary rule, however, can result in the loss of valuable information, information that would change the outcome of the trial. In Corke, a husband brought a petition for divorce on the ground of adultery. The wife denied the charge and offered evidence that immediately after the alleged act of adultery she had called a doctor and asked him to examine her and the co-respondent in order to establish her innocence. Morris L.J., dissenting, was of the opinion that the prior consistent statement to the doctor should have been admissible because it was logically relevant. He concluded that it should have been one of “all the many facts and circumstances which [the trial judge] could review and have in mind when deciding the issue. . . .”

Logically probative evidence will not be lost under a rule that generally admits consistent statements, but the admission of evidence of slight probative value may result in such unjustified costs as delay and multiplication of issues. Under a general inclusionary rule, there are two alternative procedures to avoid these costs. The court can be given a discretion either to admit or to exclude statements of slight probative value. The Civil Evidence Act 1968 admits prior consistent statements with the leave of the court. The Law Reform Committee in its Thirteenth Report, which recommended the adoption of this provision, concluded that the trial judge would only admit statements that “appear to him to be likely to assist in ascertaining the truth,” and, in most cases, “[a] proof of evidence taken from a witness for the purposes of the trial is of small probative value and they would not normally expect a judge to admit it, except in rebuttal of suggestions made in cross-examination.”

The second method of avoiding unjustified costs is to rely on the common law rule of relevancy. A general inclusionary rule would be subject to the requirement that the evidence must be legally relevant. An assessment of legal relevancy allows a judge to consider matters in addition to the question of

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24 See Lempert, Modeling Relevance (1977), 75 Mich. L. Rev. 1021. He defines “logically relevant” in terms of the likelihood ratio of Bayes' Theorem. Does the probability of finding that evidence, given one hypothesis such as “the defendant is guilty,” differ from the probability of finding that evidence, given another hypothesis such as “the defendant is innocent”? If the probability of finding an item of evidence is the same whether the defendant is guilty or innocent, then the evidence is logically irrelevant.

25 Corke v. Corke, supra note 4, at 235.

26 Id. at 234. The trial judge had stated that it was the evidence of the consistent statement that tipped the scales in favour of the defendant.

27 Thirteenth Report, supra note 23, at 17.
whether the evidence renders an event more probable, such as whether it is too remote and/or raises the possibility of a multiplication of issues. A statutory discretion to exclude consistent statements is not necessary—the common law rule is an adequate safeguard against unnecessary costs. The Canada Evidence Code codifies the common law rule by providing that a consistent statement is admissible subject to the trial judge’s discretion to exclude evidence if the “probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time.” In regard to the common law rule on consistent statements, the Commission concludes:

The basis for rejecting such evidence is apparently its superfluity and the danger that witnesses may manufacture such evidence. These seem to be matters that can more sensibly be dealt with by means of the judge’s general discretion to exclude evidence that involves undue waste of time (section 5), and by the ability of counsel to cross-examine. Thus the existing inflexible rule is abolished.

B. Substantive Evidence

Should consistent statements be admitted as substantive evidence? The issue is whether there is any reason for perpetuating the subtle distinction between evidence going to credibility and evidence admissible for the truth of its contents. It is submitted that if the statement is admissible to support credibility, it should be admissible as substantive evidence. Since the statement is substantially the same as the in-court testimony, there is no reason to restrict the use of the statement to supporting the credibility of the witness.

The inadmissibility of prior consistent statements is grounded, in part at least, on their characterization as hearsay, although the strict formulation of the common law hearsay rule probably did not define prior consistent statements of a witness as hearsay. There are few judicial formulations of the hearsay rule, and none of them is comprehensive. One frequently quoted formulation appears in Subramaniam v. Public Prosecutor:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

Phipson defined hearsay in 1902, stating: “Oral or written statements made by persons not called as witnesses are inadmissible to prove the truth of the matters stated. . . .” Both definitions refer to statements of a person who is not called as a witness.

In addition to the rule against hearsay, there is a common law rule against “narrative,” or what is sometimes referred to as “the rule against self-serving evidence.” The rule against narrative prevented a witness from testifying as to his prior statement:

[The witness may not repeat to the court of his own previous narratives or state-

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29 Canada Evidence Code, supra note 17, s. 5.
30 Id. at 100.
ments concerning the relevant facts made to other persons out of court; when he is in the witness-box he must take his mind back directly, so to speak, to the facts he is called to prove, and must give to the court his present recollection of those facts.\textsuperscript{33}

English authority thus supports the proposition that prior statements of a witness did not come within the common law definition of hearsay. There were two separate rules: first, the "strict" rule, which excluded statements of a witness who did not testify, and second, the rule against narrative.\textsuperscript{34}

In contrast, the Americans have adopted the view that all prior statements of a witness are hearsay. Wigmore describes the rule against prior statements of a witness as a later step in the development of the hearsay rule, noting, in reference to the "debate as to the sufficiency of witnesses in number and kind," that "doubt began to be thrown on the propriety of depending on extra-judicial assertions, either alone or as confirming other testimony given in court."\textsuperscript{35} McCormick, in reference to inconsistent statements of a witness, concludes:

The reason for the orthodox view that a previous statement of the witness, though admissible to impeach, is not evidence of the facts stated, is clear and obvious. When used for that purpose, the statement is hearsay. Its value rests on the credit of the declarant, who was not under oath nor subject to cross-examination, when the statement was made.\textsuperscript{36}

Modern definitions of hearsay have combined the strict rule against hearsay and the rule against narrative, and the distinction made at common law in England has not been preserved. The 1976 edition of Phipson defines the rule against hearsay thus: "Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them. ..."\textsuperscript{37} Cross, in his fourth edition, enunciates the hearsay rule as follows: "[A] statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated."\textsuperscript{38}

\textsuperscript{33} Wills, \textit{The Law of Evidence} (3d ed. London: Stevens and Sons, 1894) at 94, quoted in Gooderson, \textit{supra} note 5, at 64.
\textsuperscript{34} Cross, \textit{Evidence, supra} note 5, at 6-7.
\textsuperscript{36} McCormick, \textit{The Turncoat Witness: Previous Statements as Substantive Evidence} (1946-47), 25 Tex. L. Rev. 573 at 575.
\textsuperscript{38} Cross, \textit{Evidence, supra} note 5, at 6. Also see Fed. Rules Evid. Rule 801(c), 28 U.S.C.A.: "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The English \textit{Civil Evidence Act 1968}, c. 64, s. 1 provides:

In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.

Estey J., in \textit{McInroy v. The Queen} (1979), 89 D.L.R. (3d) 609 at 630-31, 5 C.R. (3d) 125 at 149-50 (S.C.C.), questions whether a prior statement of a witness narrated by that witness at trial is hearsay. He points out that "The hearsay rule is generally illustrated in cases where the statement in question is made by a third party not in the witness box to the witness. ..." and quotes Archbold, who asserts that the definition of Cross in his fourth edition does not exclude a witness's own prior statements. Archbold, however, is referring to the strict definition of hearsay, not to the conclusion of Cross that
A prior statement comes within these definitions even if the witness testifies as to his own prior statement; that is, it is not one “made by a witness in these proceedings,” but is a statement made at another time. The in-court statement is of the form “I said X at that time.” X is not treated as a statement made while the witness is testifying, and it is hearsay if offered as evidence of the truth of the matter asserted. This is illustrated by the cases that hold that an accused cannot testify as to his exculpatory statements to the police unless they come within an exception to the rule against narrative, and even then they are not substantive evidence unless they are part of the res gestae.

Whether there are two separate rules is of no practical significance since the effect of both rules is the exclusion of out-of-court statements as proof of the matter asserted. Prior statements of a witness are generally inadmissible. Only one of the exceptions to this rule or rules—the res gestae exception—admits statements as proof of the matter asserted. The other exceptions confine the use of the statement to attacking or supporting credibility. This point was stated clearly in R. v. Lillyman by Hawkins J., who said, in reference to evidence of a consistent statement of the prosecutrix in a rape charge:

It clearly is not admissible as evidence of the facts complained of: those facts must be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.

The multiple definitions of hearsay can be categorized in terms of two polar types: “(1) those which focus on the type of statement and the purpose for which it is offered, and (2) those which focus on purported defects in testimony classified as hearsay.” The definitions quoted above are of the first category. For the purposes of analysing whether prior consistent statements should be admissible as substantive evidence, one should concentrate on the definition that emphasizes the hearsay dangers. Hearsay evidence is generally excluded because the trier of fact is not able to view the demeanour of the witness at the time the statement is made, or to see contemporaneous cross-examination of the witness on the statement. The statement usually will not be made under oath. The accuracy of the statement depends on the

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39 Thus, Martin J.A., in R. v. Campbell, supra note 5, held that even the accused could not testify as to his prior statements.

40 Supra note 5, at 170 (Q.B.), 731 (L.T.R.).


42 As Estey J. concludes in McLnroy v. The Queen, supra note 38 at 630 (D.L.R.), 149-50 (C.R.), the “presence or absence of an oath on the occasion of the prior statement does not appear to be the critical test” in deciding whether hearsay evidence is admissible. Thus, former testimony of a witness is inadmissible. In the Earl of Pembroke’s Trial (1678), 6 St. Tr. 1309 at 1338, a physician offered his prior deposition before a magistrate. The Court held: “[Y]ou must give it again viva voce; we must not read your examination before the Court.”
accuracy of the belief of the declarant and the intention of the declarant to communicate that belief correctly. Contemporaneous cross-examination subjects a witness to scrutiny as to his perception, memory and sincerity. Any ambiguity as to how the witness interprets words can be removed. The question is whether the fact that the declarant is a witness will provide sufficient information on the reliability of the prior statement to enable the trier of fact to evaluate the reliability of the statement correctly. Since the declarant has given the same statement on oath and will be subject to cross-examination on both statements, the reliability of the statement can be evaluated. Any motivation to misrepresent can be taken into account by the trier of fact in assigning weight to the evidence. The California Evidence Code commentary remarks that: "It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes the same story given at the hearing is true." It appears to be accepted generally that the instruction on credibility is a verbal ritual that is not understood by the jury. In reality, the distinction is inconsequential. Since there already is an in-court statement on the point, it will be impossible to determine what effect the jury has given the previous statement if the proper direction is given. It may be noted that under the current rules on corroboration, consistency is not corroboration. Whether a consistent statement admitted as substantive evidence under a rule such as the Canada Evidence Code could corroborate other evidence is a question to be discussed in relation to an analysis of the corroboration rule and is not a determining factor in the selection of a rule on the admission of consistent statements as substantive evidence.

III. AN EXCLUSIONARY RULE

At common law, the rule against the introduction of consistent statements of a witness, either as substantive evidence or to support credibility, was subject to some universally accepted exceptions. In order to be admissible, the statement had to serve a further function such as the rehabilitation of the witness or the presentation of more reliable evidence. Statements were admissible to rehabilitate a witness after an allegation of recent fabrication


45 Unless a trial judge makes a specific reference in his reasons to the statement that implies that he has given some weight to the previous statement. See Young v. Denton, [1927] 1 D.L.R. 426 (Sask. C.A.). A document that had revived the memory of the witness was not admissible as evidence. The judge indicated in his reasons that he had given weight to the statement in the document in reaching his decision.


47 See, for example, Ontario Draft Act, supra note 21, s. 28, which provides that a consistent statement admitted to rebut an allegation of recent fabrication "shall not be taken as corroborative of the evidence of the witness who has made the statement," where corroboration is required by law.
or in sexual cases where it was thought that an adverse inference as to credibility arose naturally from the situation. In Canada and England, prior identifications were also admitted to rehabilitate, since an identification made for the first time at trial was suspect. In the case of *res gestae*, statements that presented more reliable evidence were admitted. In England, there is some authority supporting the reception of prior consistent statements of an accused who gives evidence, but this authority has not been followed in Canada.\(^48\)

The Ontario Law Reform Commission issued its *Report on the Law of Evidence* in 1976.\(^49\) The *Report* examined the present law of evidence in Ontario in civil proceedings, in prosecution for provincial offences and, “to the extent that such proceedings are not governed by the provisions of other Acts, of the rules of evidence in proceedings before tribunals or investigatory bodies acting under statutory authority.”\(^50\) The majority of its recommendations are contained in a Draft Evidence Act, which is included in the *Report*.

The Ontario Draft Act is not a codification of all the rules of evidence, but a modification of selected common law rules. The Ontario Commission concluded:

> We have thought it desirable to codify some of the common law, but we do not think it would be wise to attempt to prepare an exhaustive and comprehensive code of evidence. In our view, this would give rise to a whole new course of judicial interpretation creating much uncertainty about the precise meaning of words and phrases used in such a code, a development which could seriously disrupt the administration of justice.\(^61\)

The *Report* recommends only two modifications to the common law rule against the admission of consistent statements of a witness. At common law, consistent statements admissible to rebut an allegation of recent fabrication are only evidence to support credibility and are not evidence of the truth of the matters asserted.\(^52\) The Draft Act provides that statements admissible to “rebut a suggestion that his [a witness’s] evidence as given at the trial has been fabricated” are admissible to support credibility and “as evidence of any fact contained therein of which direct oral evidence by him would be admissible.”\(^53\) A statement admitted under this provision cannot be used to fulfil a legal requirement of corroboration.

The other recommendation of the Commission relates to *res gestae*. At common law statements, including prior consistent statements of a witness, that are part of the *res gestae* are admissible,\(^54\) but there may be some doubt

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\(^{48}\) Gooderson, *supra* note 5, at 66. McDermid J.A. in *R. v. Keeler*, *supra* note 3, at 415, concluded: “Whatever the English practice may be, I have concluded that, in Canada, what the accused said upon arrest is not admissible by the accused by calling the person to whom it was made unless it is part of the *res gestae* or is called to rebut a suggestion of recent fabrication.”

\(^{49}\) *Supra* note 21.

\(^{50}\) *Id.* at ix.

\(^{51}\) *Id.* at xi.

\(^{52}\) See, for example, *R. v. Lillyman*, *supra* note 5.

\(^{53}\) Ontario *Report*, *supra* note 21, at 54, and Ontario Draft Act, s. 28.

about whether in Canada the exception admits spontaneous or contemporaneous statements. The Draft Act provides that statements made "in such conditions of spontaneity or contemporaneity in relation to an event perceived by the witness as to exclude the probability of concoction or distortion" are admissible whether or not a person is called as a witness in the proceedings. This provision admits, among other statements, spontaneous consistent statements of a witness.

The Commission does not give any reasons for its decision to preserve the common law exclusionary rule. The justification for the recommendation on statements to rebut recent fabrication is that these statements are relevant to credibility and "the witness is on the witness stand and available to testify to the facts contained in the statement." This is true, however, of all consistent statements, since in every case the witness has given in-court testimony on the same point.

As described above, the common law rule that consistent statements are not admissible was subject to certain exceptions. The following sections of the paper will discuss the exceptions for recent fabrication, recent complaints in sexual cases and prior identification. The reception of statements under the res gestae exception will not be discussed because the justification for their admission differs from the other exceptions to the rule against consistent statements. It is not a necessary condition for the res gestae exception that there be consistent in-court testimony on the same point. Since the exception also admits supplemental statements and statements of an unavailable witness, the reliability of the statement is more important than is the case with prior consistent statements.

A. Recent Fabrication

At common law, consistent statements are admissible to rebut an allegation that the evidence of the witness had been recently fabricated. A statement to the same effect as the in-court testimony made at a time "sufficiently early to be inconsistent with the suggestion that the account is a late invention or reconstruction" was thought to be legally probative contra the suggestion of recent fabrication. This principle is not challenged by law reformers; rather they question whether the exception should be expanded.

The Ontario Draft Act provides:

s. 28(1) A previous consistent statement made by a witness in a proceeding is admissible in evidence to rebut an allegation that his evidence has been fabricated, and such a statement shall be admitted not only to support the credibility of that

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50 Ontario Draft Act, s. 28; and Ontario Report, supra note 21, at 38.
57 Ontario Report, id. at 54.
58 See note 1, supra, and Gooderson, supra note 54.
60 The Nominal Defendant v. Clements, id. at 479.
witness, but also as evidence of any fact contained therein of which direct oral evidence by him would be admissible.

The common law rule that admits these statements to support credibility will be discussed in conjunction with the first part of the provision. The second part of the provision, which would admit consistent statements as substantive evidence, will be discussed in the next section.

1. Kinds of Allegations

There is some question as to the form of allegation that permits admission of a consistent statement. In Fox v. General Medical Council, Lord Radcliffe, in reference to the rule admitting statements to rebut an allegation of recent fabrication, notes: "Its application must be within limits, a matter of discretion, and its range can only be measured by the reported instances, not in themselves many, in which it has been successfully invoked." 61

The basic allegation is that the witness’s testimony was invented at or after a particular time, and may be expressed by alleging that there is a motive to deceive 62 or that some persuasion or influence has been brought to bear upon the witness 63 or that the witness did not speak when it was natural to do so. 64 If any of these allegations is made, a statement made at a time when these influences did not exist, or before or at the time when it was natural to speak, is admissible to rebut an allegation of recent fabrication. 65 The issue is whether at a particular time the witness said what he is now saying at the trial. As will be discussed, the allegation need not be made expressly, but may be implied by the conduct and circumstances of the case. 66 The first two kinds of allegations may be grouped under the heading of bias.

a) Bias

At common law, prior statements are admissible to rehabilitate a witness if there is an allegation that the witness is influenced by bias or some other improper motive. In these circumstances, a consistent statement would be logically probative, since a statement made before the improper influence implies that the in-court testimony was free of that influence. In Fox v. General Medical Council, Lord Radcliffe gives the example of a witness who had testified that a will was forged and had been cross-examined with a view

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62 The Nominal Defendant v. Clements, supra note 5, at 494. One kind of allegation that will bring the exception into operation is that the witness’s testimony "was the result of some motive, bias, influence or moral duress operating from some particular time and not before." Flanagan v. Fahy, [1918] 2 I.R. 361; Fox v. General Medical Council, id.
65 Cf. Box v. California Date Growers Ass’n, 129 Cal. Rptr. 146, 57 Cal. App. 3d 264 (4th Dist. 1976). When the defendant alleged that the witness was not in a position to be able to observe the accident accurately, there was no allegation of recent fabrication.
66 See infra, notes 89-97 and accompanying text.
to showing that he was biased because of enmity between him and the beneficiary of the propounded will. Lord Radcliffe concludes:

He [the witness] was allowed to call confirmatory evidence to show that before the cause of this enmity had arisen he had told a third party the story he was now telling. In that situation the issue raised by cross-examination was clearly defined: a recent invention due to a specified cause, and if the witness could show that his account had been the same before the cause existed he was certainly adding a relevant fact in support of his credibility.67

The Ontario Draft Act does not provide explicitly for admission in this case. In contrast, in the United States, the Federal Rules of Evidence68 admit consistent statements if there has been "an express or implied charge against him [the witness] of recent fabrication or improper influence or motive."69 The California Evidence Code also states that a prior statement is admissible if there has been a charge that the testimony is "influenced by bias or other improper motive."70 In the interests of clarity, the codified rule on recent fabrication should include statements to rebut a charge that the testimony is influenced by improper motive or bias.

b) Failure to Speak

(1) Current Law

In The Nominal Defendant v. Clements, Windeyer J. of the High Court of Australia quotes the following statement from Commonwealth v. Jenkins:

Another similar class of decisions, resting on a like principle, is also to be distinguished from the case at bar, namely, when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified. In such cases it is competent to show that the witness, at an early day, as soon as a disclosure could reasonably have been made, did declare the facts to which he has testified.71

While Windeyer J. qualifies this ground by adding that the failure to speak must be made the basis for a suggestion that the witness has invented his testimony since that occasion, it must be remembered that this suggestion may be implied. Dixon C.J., in the same case, notes that "counsel himself may proceed with a subtlety which is the outcome of caution in pursuing

67 Fox v. General Medical Council, supra note 61, at 231. See also R. v. Campbell, supra note 5.
68 The Federal Rules of Evidence, 28 U.S.C.A., came into effect on July 1, 1975 as Public Law No. 93-595. They were the result of several drafts. The Supreme Court of the United States in 1972 approved a set of evidence rules [reproduced in 56 F.R.D.] that had been developed by an Advisory Committee appointed under the auspices of the Judicial Conference of the United States and the Chief Justice of the Supreme Court. They are based on the work of the California Law Revision Commission, which produced the California Evidence Code, and on the work of the American Law Institute and the National Conference of Commissioners on Uniform State Laws who had produced the Model Code of Evidence and the Uniform Rules of Evidence, respectively. In 1974, the House of Representatives produced a modified version of the Federal Rules of Evidence. This draft was then modified to some extent by the Senate. These two drafts went to a conference committee which produced the compromise version that was enacted in December, 1974 to come into effect on July 1, 1975.
70 West's Annotated California Codes, Evidence Code, s. 791.
71 Supra note 5, at 494.
what may prove a dangerous course.” 72 In R. v. Neigel, a murder case, a Crown witness, Fieger, testified that the accused had confessed to him that he had poisoned his wife. He was asked on cross-examination whether he had ever mentioned to anyone what the accused had told him and whether he had told a contradictory story to two particular people. Upon his denial that he had told these two people anything about the accused, he was asked why he did not tell them about the accused’s statement. The Alberta Supreme Court upheld the decision of the trial judge to admit a statement made by Fieger to his father that was consistent with Fieger’s testimony. The Court followed the Irish case of R. v. Coll, in which the witness was cross-examined on an earlier statement in which he did not mention the accused. 73 The witness was permitted to give evidence that he had mentioned the accused’s name at an even earlier date.

This situation is not always identified expressly. In R. v. Giraldi, the statement that an accused made the morning after his arrest, explaining his possession of a stolen van, was admitted. 74 There was no implied allegation that the defence was raised subsequent to the statement to the police officer, or that there was a motive to deceive at the time of the statement. While the British Columbia Court of Appeal held that the trial judge had properly “concluded that the Crown would contend or the jury itself might consider the respondent’s testimony to have been concocted by him or for him after he found himself under arrest,” the Court does not examine whether the statement would rebut an allegation of recent fabrication. 75 The case can be explained on the basis that the Crown was alleging implicitly that the accused did not speak when it was natural to do so. 76

(2) Reform: Statements of an Accused

Once the allegation of a failure to speak when it is natural to do so is recognized as a basis of an inference that testimony is contrived, the question arises whether there should be a general rule for admitting statements of

72 The Nominal Defendant v. Clements, supra note 5, at 480.
73 (1889), 24 L.R.I. 522. Also see R. v. Benjamin (1913), 8 Cr. App. R. 146, where the witness was cross-examined about a failure to mention a detail in a statement. He was allowed to refer to an entry in his notebook in order to rebut the allegation of recent contrivance. Martin J.A., in R. v. Campbell, supra note 5, notes, at 20 (C.C.C.), 326 (C.R.), in reference to the situation in which the “failure of witness to mention some circumstance on an earlier occasion when he might have done so, is made the basis for a suggestion that he had invented the story since that occasion,” that it is open to the witness to introduce evidence “that on the very occasion on which it is suggested he omitted to mention the circumstances, he did, in fact, speak of it.”
74 Supra note 59.
75 Id. at 253.
76 Also see R. v. Racine, supra note 64. On a charge of conspiracy to kidnap, the statements that two accomplices had made to the police upon their arrest naming the accused were admitted on direct examination. While the Court did not examine the particular circumstances, it stated, at 472, that “[I]t was one of the principal defences urged on behalf of the accused before the jury that the Crown’s case was dependent on the testimony of ‘tainted witnesses,’” and concluded that an attack would be made on the credibility of the witness on the basis that the testimony had been recently fabricated or contrived. The implication is that a truthful witness would have spoken at the first opportunity.
particular kinds of witnesses. Presently, all recent complaints of victims of sexual offences are admissible without a requirement that an allegation of contrivance arise from the particular case. But what about an accused? Is there always an implication that an innocent person would have given an explanation at the time of arrest? The cases emphasize that there is currently no general rule that it is natural to speak in certain defined situations and that, therefore, an explanation at that time is admissible. Rather it is “the particular circumstances of the case that determine whether or not an earlier statement consistent with the evidence of the witness is itself admissible.”

Dixon C.J., in *The Nominal Defendant v. Clements*, states that a cross-examination with a view to showing certain improbabilities in the accused's story does not bring the exception into play. There is not an implicit allegation that the story is recently contrived in every case where the accused denies the truth of the Crown's case. “The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen and, from the nature of the matter, if there be an appeal, great weight should be given to his opinion by the appellate court.”

Logically, the inference of guilt from a failure to speak before trial arises in every criminal case, but since this inference abrogates the right of an accused to remain silent, evidentiary prohibitions to this logical inference have developed. Unfortunately, these evidentiary rules are ineffectual in protecting this right. First, the rule distinguishes between treating silence as evidence of guilt and “a matter to be regarded with reference to the weight of evidence.” While silence cannot imply guilt, it can be taken into consideration in determining the weight to be assigned to the accused's testimony. This, however, is a “distinction without a difference.” The jury probably is unable to apply this distinction; furthermore, they need not even be told about it. In *R. v. Torbiak*, on a charge of robbery, the accused testified that he had been drunk and comatose in the car that was admittedly used for the robbery. The trial judge asked the accused whether he had given the same story to the police at the time of his arrest, and the accused replied that he had not. The Ontario Court of Appeal held that the evidence was admissible, and that it was not necessary for the trial judge to direct the jury as to its limited use or that the accused had a right to remain silent. Kelly J.A. concluded: “[I]t would have been more damaging to Campbell's cause to have...”

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78 *Id.* at 479.
79 *R. v. Littleboy*, [1934] 2 K.B. 408 at 414. With regard to silence at trial, it is open to the trier of fact to draw an inference as to guilt from the failure of the accused to testify. See *Vezeau v. The Queen*, [1977] 2 S.C.R. 277, 66 D.L.R. (3d) 418. While the accused is protected to some extent by the *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(5), which prohibits comment by the trial judge and Crown counsel in jury trials on the failure to testify, the section does not prohibit the jury from drawing an adverse inference. In contrast, judges in England may comment on the failure of the accused to testify: Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3d ed. London: Stevens and Sons, 1963) at 59-60.
directed the jury's attention to that area and then qualified the use they could make of the fact than to have avoided making any reference to the whole incident."\textsuperscript{82}

Second, while the judge may not tell a jury that they may draw an inference of guilt from pretrial silence, juries will, in any event, do so. This common sense inference from pretrial silence was referred to in \textit{R. v. Sullivan}.\textsuperscript{83} The accused, who was charged with smuggling watches, refused to answer questions after his arrest. The trial judge told the jury that he had "an absolute right to do just that, and it is not to be held against him that he did that. But you might well think that if a man is innocent he would be anxious to answer questions."\textsuperscript{84} Salmon L.J., in referring to this direction, commented: "It seems pretty plain that all the members of that jury, if they had any common sense at all, must have been saying to themselves precisely what the trial judge said to them. The appellant was not obliged to answer, but how odd, if he was innocent, that he should not have been anxious to tell the Customs officer why he had been to Geneva, whether he put the watches in the bag and so on."\textsuperscript{85}

Given these realities, it is unfair to the accused not to admit all pretrial statements if the accused testifies. The current rule admits these statements, when offered by the defence, only if they are part of the \textit{res gestae}\textsuperscript{86} or come within the exception for statements to rebut an allegation of recent fabrication.\textsuperscript{87} Defence counsel will not know before trial whether the statement will be admitted. It is submitted that the evidence should be before the jury when it is deciding what weight to assign to the testimony of the accused. The \textit{dictum} by Kerwin C.J.C. in \textit{Lucas v. The Queen} to the effect that an accused can testify that "he made a statement to the police, following his arrest, which was similar to the evidence he had given at trial,"\textsuperscript{88} should be adopted as the general rule. This is not a case of an accused placing his defence before the jury through out-of-court statements. The possibility that the statement was concocted can be assessed by the jury, since the accused is available for cross-examination on the statement by the Crown. The Ontario \textit{Report} is deficient in not considering the admission of consistent statements of the accused.

2. \textbf{Implied Allegation of Fabrication}

At common law the allegation of recent fabrication did not have to be expressed. The nature of the evidence and the conduct of the trial could imply that the witness did not speak at a time when it would have been natural to

\begin{footnotes}
\item[82] \textit{Id.} at 234.
\item[83] \textit{Id.} at 105.
\item[84] \textit{Id.} at 105.
\item[85] \textit{Id.} This common sense approach was not adopted in \textit{R. v. Keeler, supra} note 3, at 418. The accused had given a statement to the police at the time of his arrest that was consistent with his testimony that the victim had consented. McDermid J.A. states: "I do not think any jury would assume, in the absence of any evidence, that an accused, when arrested, had or had not given the story he was now giving in the witness box."
\item[86] \textit{R. v. Graham, supra} note 54.
\item[87] \textit{R. v. Racine, supra} note 64; \textit{R. v. Giraldi, supra} note 59.
\item[88] [1963] 1 C.C.C. 1 at 10-11 (S.C.C.).
\end{footnotes}
Consistent Statements of a Witness

speak and that the in-court testimony was an afterthought. In 1889 in *R. v. Coll*, Holmes J. noted that “skilful counsel do not always deal in direct imputation. The same effect can be produced in an even more striking way by delicate suggestion.” An allegation may be inferred from cross-examination, the nature of the case, and the conduct of the defence. Two situations in which an allegation of failure to speak is always implied are when the accused gives alibi evidence and when the accused is found in possession of material relevant to a criminal charge.

Prior statements explaining possession of illegal items should be admissible if the accused testifies. Wigmore cites some old authorities that admit statements explaining the possession of stolen goods made both before suspicion arose and after the accused had been found in possession. The implication is that the accused would have given an explanation if the possession was innocent. Admissibility under the current rule, however, depends on the circumstances of the case. The Supreme Court of Canada held, in *R. v. Graham*, that statements made contemporaneously with being found in possession are admissible as part of the *res gestae* even if the accused does not testify. In *R. v. Risby*, the Supreme Court refused to limit *Graham* to statements explaining the possession of stolen goods, and held that an explanation of possession of an illegal drug was admissible. However, in all cases in which possession is an element of the offence, there is an implied allegation that the accused did not speak when it was natural to do so, and explanations of illegal possession are admissible if there has been an allegation of recent fabrication. In *R. v. Giraldi*, the accused testified as to his previous consistent statement, explaining his possession of stolen goods during his direct examination before he had been cross-examined by the Crown. The British Columbia Court of Appeal found that a suggestion of recent fabrication arose “having regard to all the circumstances of the case and the conduct of the trial,” and admitted the testimony. The Court held that “a suggestion of recent fabrication need not necessarily be made expressly but may arise implicitly...” and concluded that: “The Crown would contend or the jury itself might consider the respondent’s testimony to have been concocted by him or for him after he found himself under arrest.”

The Ontario Draft Act does not provide that an implied allegation of contrivance is sufficient. The drafting may be contrasted with the United

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89 Supra note 73, at 542.
91 Supra note 54.
93 Supra note 59. Also see *R. v. Racine*, supra note 64. The Crown was permitted during its examination-in-chief, before the witness was cross-examined, to ask the witness whether he had named his co-conspirators on his arrest. Martin J.A. approved the *Giraldi* decision in *R. v. Campbell*, supra note 5, at 19 (C.C.C.), 325 (C.R.). Cf. *R. v. Pappin* (1970), 12 C.R.N.S. 287 (Ont. C.A.).
95 Id.
States Federal Evidence Rule 801 (a) (1) (B), which provides that an allegation may be "express or implied."

There is no reason to narrow the common law rule. Under the Ontario Draft Act, a party could always prevent the introduction of these statements by avoiding an express allegation of fabrication. Admitting statements to rebut an implied allegation will not result in the admission of all consistent statements. Implied allegations of recent fabrication do not include cross-examination with a view to showing improbabilities in the witness's story. Martin J.A. in R. v. Campbell concludes: "If a witness cannot be cross-examined with a view to showing that his story is improbable, without bringing into play the exception arising from a suggestion of recent fabrication, he cannot be cross-examined at all without making the exception operative." The Ontario Draft Act should be amended to include "express or implied" allegations.

3. Impeachment with Inconsistent Statements

There has been some discussion in the cases whether merely impeaching a witness with an inconsistent statement raises a suggestion of recent fabrication and permits the introduction of a consistent statement. In R. v. Neigel, a majority of the Alberta Supreme Court declined to decide the issue, but Stuart J. was of the opinion that, even if there was only a single prior inconsistent statement, "it would be difficult, even in the face of a disavowal of such a charge by the impeaching counsel, to get rid of at least a veiled suggestion of recent concoction." A better view is that merely impeaching the testimony of a witness in cross-examination, even if that impeachment is in the form of showing that the witness made a prior statement inconsistent with his in-court testimony, is not sufficient to imply an allegation of recent fabrication and allow proof of consistent statements. Holmes J. in R. v. Coll concluded: "There must be something either in the nature of the inconsistent statement or the use made of it by the cross-examiner, to enable such evidence to be given."

The California Evidence Code provides that a consistent statement is admissible to support credibility after:

s. 791 (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement;...

The strongest argument against admitting consistent statements in this situation is that the consistency does not explain away the self-contradiction. If there are two inconsistent statements, the fact that the witness also made a consistent one does not answer the question—why was there an inconsistency? This argument, however, rests on an assumption that the prior inconsistent statement was actually made. If there is some doubt about this, the prior consistent statement strengthens that doubt. Thus, if the witness denies

96 Supra note 69.
97 Supra note 5, at 20 (C.C.C.), 327 (C.R.).
98 Supra note 5, at 160 (D.L.R.), 482 (W.W.R.), 238 (C.C.C.).
99 Supra note 73, at 541.
making the inconsistent statement, the fact that he made a prior consistent statement strengthens that denial. If the witness admits making the inconsistent statement, the prior consistent statement is not relevant since it does not explain the inconsistency. However, any requirement of a denial would motivate a witness to deny or claim a faulty memory of inconsistent statements. There would be little time saved, since it would only result in the exclusion of consistent statements if the witness clearly admitted making the statement.\textsuperscript{100} A provision similar to the one in the California Evidence Code avoids the loss of relevant evidence. Therefore, whenever there is some doubt whether the prior inconsistent statement was made, a prior consistent statement should be admissible.

4. Credibility: Conclusion

The Ontario Draft Act provision on statements admissible to rebut an allegation of recent fabrication is inadequate. Consistent statements made before an inconsistent statement offered to impeach credibility, and statements to rebut a charge that the testimony is influenced by bias or improper motive, should be admissible. It is submitted that, rather than the Ontario Draft Act, the following provision of the California Evidence Code should be adopted:

\textbf{791 PRIOR CONSISTENT STATEMENT OF WITNESS}

Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

5. Recent Fabrications: Substantive Evidence

At common law, statements admitted to rebut an allegation of recent fabrication are not substantive evidence. The Ontario Draft Act admits these statements “not only to support the credibility of the witness, but as substantive evidence of the facts stated therein.” The Report does not expressly state the reasons for this change. It merely concludes:

[Where the evidence of a witness is challenged by the opposing party as a fabrication for the purpose of the trial the fact that he made a prior consistent statement may well support the credibility of the witness. In addition the witness is on the witness stand and available to testify to the facts contained in the statement.]\textsuperscript{101}

The Report does not discuss why this reasoning does not justify the substantive use of all the exceptions to the common law rule. As has been pointed out, in each case the statement is relevant and the witness is available for cross-examination. The critical factor is the reliability of the statement: Will the trier of fact be able to assess correctly its truth? Statements to rebut an

\textsuperscript{100} See Thomas, \textit{Rehabilitating the Impeached Witness with Consistent Statements} (1967), 32 Mod. L. Rev. 472.

\textsuperscript{101} Ontario Report, supra note 21, at 54.
allegation of recent fabrication are not necessarily more reliable than the statements admitted under the other common law exceptions.

Putting aside for a moment the question of whether all consistent statements should be admitted as substantive evidence, no objection can be raised to the Ontario Draft Act provision with regard to statements to rebut an allegation of recent fabrication. The witness has already given the same information in the in-court testimony and is available for cross-examination on the consistent statement. The opposite party opens the way to the reception of the statement. In this case the statement is particularly relevant and there is no need to perpetuate the subtle and ineffective distinction between evidence going to credibility and substantive evidence. Both the United States Federal Rules of Evidence\textsuperscript{102} and the California Evidence Code admit these statements as substantive evidence.\textsuperscript{103}

B. Complaints in Sexual Cases

1. Current Law

a) Fact of Complaint

The fact that the victim of a sexual offence made a complaint at the first reasonable opportunity is admissible to support the credibility of the victim.\textsuperscript{104} Originally, the fact of the complaint was received on charges of rape, to rebut the "strong, but not a conclusive, presumption against a woman, that she made no complaint in a reasonable time after the fact."\textsuperscript{105} The old law of hue and cry had required that "the woman should immediately after ... go to the next town and there make discovery to some credible person of the injury she has suffered."\textsuperscript{106} It was assumed that if she "concealed the injury for any considerable time after she had opportunity to complain," there was "a strong, but not conclusive, presumption that her testimony was false or feigned."\textsuperscript{107} A silence before trial was in contradiction to her testimony at trial and implied either that the offence had not occurred or that the complainant had consented. The complaint was admitted to rebut this implication. There is an obligation on the Crown either to show that a complaint was made or to explain its absence.\textsuperscript{108} The complaint is "a virtually essential complement to her story."\textsuperscript{109} An adverse inference as to the truth-


\textsuperscript{103} West's Ann. Evid. Code § 1236.


\textsuperscript{105} Hawkins' Pleas of the Crown, bk. i. c. 41, s. 3, quoted by Hawkins, J. in R. v. Lillyman, supra note 5, at 170 (Q.B.), 731 (L.T.R.).

\textsuperscript{106} IV Blackstone's Commentaries (4th ed. 1770), c. 15 at 211, quoted in R. v. Lillyman, id. at 171 (Q.B.), 731 (L.T.R.).

\textsuperscript{107} IV Blackstone's Commentaries, id., c. 15 at 213, quoted in R. v. Lillyman, id. at 171 (Q.B.), 731 (L.T.R.).


fulness of the victim can be drawn from the failure of a victim to complain at the first reasonable opportunity and, in the absence of special circumstances, the trial judge must so direct the jury. The absence of complaint is not evidence of consent. Barwick C.J., in *R. v. Kilby*, concluded that “the want of a complaint does not found an inference of consent. It does fall against the consistency of the woman’s account and accordingly is clearly relevant to her credibility in that respect.” There is some authority that the victim’s explanation of a failure to complain is admissible, although Dubin J.A. in *R. v. Kistendey* held that the victim need not be given an opportunity to explain before the trial judge is required to give a direction as to the adverse inference that may be drawn from failure to complain at the first reasonable opportunity. He also doubted that the explanation in that case was admissible if it entailed a reference to a complaint that the judge had ruled inadmissible because it had not been made at the first reasonable opportunity. The complainant may testify as to the fact a complaint was made even if the recipient of the complaint is not called.

**b) Details of Complaint**

In England and Canada, the details of the complaint are admissible on the direct examination of the victim. This was not clearly decided until 1898 in *R. v. Lillyman*, when Hawkins J. found that the question was still open, although the practice had been to exclude the details. He noted that the complaint was admissible “as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.” Nevertheless, he wondered how the jury could make this determination if the details of the complaint were not before it. It was “to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand. . . .” Therefore, the particulars of the complaint had to be admissible, not as evidence of the facts complained of, but to show that the complaint was consistent with her testimony and in “accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her.”

The complaint and the particulars are admissible even if the consent of the victim is not in issue, since the purpose of receiving the statement is to show the consistency of the words and behaviour of the victim. The complainant should testify as to the circumstances before third parties give evi-

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110 *Kilby v. The Queen*, id. at 472.
111 *Id.*
113 *Supra* note 109.
117 *Id.* at 178 (Q.B.), 733 (L.T.R.).
118 *Id.* at 177 (Q.B.), 733 (L.T.R.).
119 *R. v. Osborne*, *supra* note 104.
idence of the complaint. Hawkins J. in Lillyman, in referring to complaints, stated "strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted." The trial judge must direct the jury that they are "not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose" except for "enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony. . . ."

The complaint cannot satisfy any rule that requires corroboration of the victim's testimony, although there is no obligation on the trial judge to instruct the jury that a complaint cannot corroborate the victim's evidence once he has told them that it can only be regarded as going to the victim's credibility. At common law, there was a rule of practice requiring corroborating evidence in cases of rape. While the jury could convict on the uncorroborated evidence of the prosecutrix, the judge had to warn them that it is dangerous to do so and could in his discretion advise them not to do so. This rule was codified in 1955 in what was then section 134 of the Criminal Code. In 1976, this section (then section 142) was repealed. The effect of the repeal has been debated. R. v. Firkins, R. v. Daigle and R. v. Camp have held that the old common law rule has not been revived, although Dubin J.A. in R. v. Camp held that in the circumstances of that case it was permissible for the trial judge to tell the jury that "where consent is the serious issue it is often easy for the woman to say that she did not consent, that is that she was raped in circumstances in which it would be very difficult for the man to defend himself." Thus, while it is not a rule of law that the trial judge must warn the jury of the danger of convicting on the uncorroborated evidence of the victim or that he must define what evidence is capable of corroboration, the new rule of R. v. Camp places a duty on the trial judge "in appropriate cases, while commenting on the weight to be given to the evidence of a complainant to caution the jury in simple language as to the risk of relying solely on the evidence of a single witness, and to explain to them the reasons for the necessity of such caution." These cases do not decide

121 Id. at 177-78 (Q.B.), 733 (L.T.R.).
122 Thomas v. The Queen, supra note 46.
125 Criminal Code, S.C. 1953-54, c. 51, s. 134; the section refers only to rape, attempt to commit rape, sexual intercourse with a female person under 14 and with a female person who is between the ages of fourteen and sixteen. R. v. Cullen, [1975] 6 W.W.R. 153, 26 C.C.C. (2d) 79 (B.C.C.A.), held that a corroboration warning is required for other sexual offences under the Code such as gross indecency or buggery.
130 Id. at 110 (O.R.), 176 (C.R.N.S.).
131 Id. at 109 (O.R.), 175 (C.R.N.S.).
whether it is still open to a trial judge to explain the desirability of finding independent evidence that connects the accused with the crime,\textsuperscript{132} and then to point out that a complaint is not independent evidence. It will still be necessary for the trial judge to direct the jury that the complaint is only admitted to support the credibility of the victim.

c) Developments

The original rule was confined to complaints of victims of rape, but it has been expanded subsequently to admit complaints of boys and men,\textsuperscript{133} and complaints in offences of nonsexual violence.\textsuperscript{134} There is no logical distinction among these offences, since the evidence is only admissible to show the consistency between the conduct of the complainant and the in-court testimony. In \textit{R. v. McNamara},\textsuperscript{135} in a charge of attempt to commit an unnatural offence, the Court of Appeal of New Zealand admitted the complaint of a young boy. Chapman J. concluded: "I do not see why we should not follow a logical course of reasoning in connecting two cases which are really of one class..."\textsuperscript{136} The Court reasoned that consistency was as important in sexual assaults on males as on females.

Chapman J. was also of the view that the rule should be extended to assaults other than sexual assaults since "[t]here is the same reason for admitting evidence to show consistency of conduct in one case as in the other."\textsuperscript{137} A recent decision in the British Columbia County Court, \textit{R. v. Frame},\textsuperscript{138} admitted evidence of the fact and the details of a complaint on a charge of forcible confinement of a sixteen-year-old girl. MacDonald Co. Ct. J. reasoned that "if the nature of the offence is one where the complainant might be expected to complain immediately or soon after it was committed, then surely it would be of assistance to any judge or jury to know whether or not such complaint was made, and when it was made."\textsuperscript{139} In essence, he is asking whether there is an implied self-contradiction in the case at hand. Would it be a natural assumption that the victim would make a complaint and, in the absence of such proof, would an adverse inference be drawn as to the credibility of the victim?

2. Analysis of the Rule

At common law, consistent statements of a witness are excluded because, in the absence of special circumstances, they are considered to be legally irrelevant, i.e., the fact that the witness has said the same thing earlier is of


\textsuperscript{135} [1917] N.Z.L.R. 382 (C.A.).

\textsuperscript{136} \textit{Id.} at 402.

\textsuperscript{137} \textit{Id.}


\textsuperscript{139} \textit{Id.} at 194 (W.W.R.), 334 (C.C.C.).
little help in assessing his credibility. Complaints in sexual cases are considered to be more relevant than other consistent statements because it is assumed that the victim of a sexual offence is more likely than the ordinary witness to bring false accusations. The basis for this assumption was expressed by Hale in 1675: "[I]t is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."\textsuperscript{140} There is a belief that it is a charge easily fabricated and that juries will sympathize with the complainant. In 1962, Glanville Williams concluded that "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."\textsuperscript{141} Thus, an \textit{a priori} rule developed at common law based on the nature of the offence and not on the credibility of the particular victim in each case.\textsuperscript{142} The real issue, as was recognized in \textit{R. v. Frame},\textsuperscript{143} is whether the victim in this particular case spoke at a time when it was natural to do so. If the assumption that victims of sexual offences are likely to lie is not correct, then there is no more reason for admitting complaints than for admitting other consistent statements. The logical approach would be to treat sexual complaints in the same manner as other consistent statements and admit them only if they come within recognized exceptions, such as statements to rebut an allegation of recent fabrication or spontaneous declarations.

The courts traditionally have viewed the testimony of certain kinds of witnesses with caution. Lord Morris of Borth-y-Gest in \textit{R. v. Hester} gave the following reasons for this caution:

\begin{quote}
The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can readily be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood. It must, therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based.\textsuperscript{144}
\end{quote}

Thus, the testimony of child witnesses, accomplices, and victims of sexual offences is suspect. Rules, either of practice or of law, requiring corroboration of their testimony have been developed. This section of the paper is limited to rules governing the testimony of adult victims of sexual offences. The testimony of child victims of sexual offences should be regulated by the rules that govern child testimony generally.

\textsuperscript{140} I Hale, \textit{History of the Pleas of the Crown} (1st ed., 1736) at 635.
\textsuperscript{142} See Friedman, \textit{The Rape Corroboration Requirement: Repeal Not Reform} (1972), 81 Yale L.J. 1365.
\textsuperscript{143} \textit{Supra} note 138.
\textsuperscript{144} [1973] A.C. 296 at 309 (H.L.).
Consistent Statements of a Witness

Is this suspicion justified? Is there empirical evidence that indicates that victims of sexual offences are no more likely to bring false charges than victims of other offences? There have been several studies of rape and other sexual offences.\textsuperscript{143} One Canadian study done by Clark and Lewis examined 116 rape complaints in Toronto in 1971.\textsuperscript{146} Several studies have also been made in the United States, the most prominent one being \textit{Patterns in Forcible Rape} by Amir, who studied 646 reported rapes in Philadelphia during 1958 and 1960.\textsuperscript{147} Kalven and Zeisel in 1966 studied jury behaviour in rape trials in the United States.\textsuperscript{148}

These studies support the proposition that the credibility of rape complainants is no more suspect than that of other witnesses. First, the number of unreported rapes indicates that it is not a charge that is readily made. Clark and Lewis, in their study of rape in Toronto, state that in Canada the best guess among experts is that "for every ten rapes committed, between 1 and 4 are reported."\textsuperscript{149} Similar estimates have been made in the United States. For example, one survey in the United States estimated that one in four rapes is actually reported.\textsuperscript{150} One author submits the following reasons for this reluctance:

The reasons for this failure to report the crime are varied: Parents may want to protect a child from publicity, ordeal, or emotional injury; the victim may fear being accused of provoking the rape; the victim may fear retaliation by the offender; the victim may desire to protect her reputation and experience a sense of shame from being raped; and, probably most common, a victim fears the treatment she will receive from the police and the courts often make the victim feel or actually believe she is the offender and is the one on trial. From the victim's point of view the decision to make an accusation of rape is not an easy one. It is a decision that few are willing to make.\textsuperscript{151}


\textsuperscript{144} Supra note 145.


\textsuperscript{146} Supra note 146, at 61.


In addition to indicating that victims are reluctant to bring charges, these figures also imply that a victim may be reluctant to discuss the incident with a stranger or even with friends. There may be little basis for the assumption that a "truthful woman" would immediately raise a "hue and cry."

Second, reported rapes are scrutinized by the police. A complaint of rape must be classified as "founded" before it can proceed through the justice system, and a high percentage of complaints are classified as "unfounded." In December, 1977, in British Columbia, 27 percent of sexual offence complaints and 56 per cent of rape complaints were classified as "unfounded." In the Clark and Lewis study, 63.8 percent of reported rapes were classified as "unfounded." Examination of the "unfounded" complaints and of the decision-making processes of police officers indicates that a classification of "unfounded" does not necessarily mean that a rape did not occur. Rather, it was suggested by Clark and Lewis that a classification of "unfounded" is made in the following circumstances: (1) the victim is unsuitable as a witness, (2) there is no corroborative evidence, (3) the complaint has been withdrawn, (4) the finding is unexplained in that there is independent evidence of rape, and (5) the charge is false. Clark and Lewis considered that of 116 reported rapes, of which the police classified seventy-four as unfounded, only twelve were fabrications. Third, a classification of "founded" does not necessarily imply that a charge will be laid. Only a small percentage of rapes that are classified as "founded" result in charges being brought. In British Columbia in 1977, only 35 percent of "founded" complaints of rape resulted in charges being filed. In the Clark and Lewis study, 59.5 percent of the "founded" complaints of rape resulted in charges being brought.

Studies of attitudes of police officers have shown that there is a general belief that complaints of rape are false. A study by Galton concluded that police tend to hold the rape victim to a higher standard of conduct than other victims, and expect her story upon repeated tellings to be errorless. Police, in evaluating a complaint, place great weight on evidence of physical violence, although this is not a necessary element of the offence. In the Clark and

152 R. v. Lillyman, supra note 5, at 177 (Q.B.), 733 (L.T.R.). Hawkins J. states that the jury is to consider whether the conduct of the victim at the time of the offence was "in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her."

153 Victoria, Australia Law Reform Commissioner, Working Paper No. 4: Rape Prosecutions (Court Procedures and Rules of Evidence) (Melbourne, 1976), Appendix C at 40. A survey conducted by the Law Reform Commission found that 50 percent of reported rape complaints in four selected Victorian districts were classified as "not founded." In the United States, it is estimated that "about one-fifth of the rape complaints received by the police are 'unfounded' after they were made." LeGrand, Rape and Rape Laws: Sexism in Society and Law (1973), 61 Cal. L. Rev. 919 at 928.

154 British Columbia Criminal Justice Monthly Report, Dec. 1977 (Unpublished). The percentage of unfounded complaints for offences against the person was 10 percent.

155 Clark and Lewis, supra note 146, at 34.

156 Id. at 35-38; also see LeGrand, supra note 153.

157 Id. at 38.


159 Clark and Lewis, supra note 146, at 55.

160 Galton, supra note 145, at 20.
Consistent Statements of a Witness

Lewis study, physical violence was present in 62.5 percent of the "founded" cases as compared with 38 percent of the "unfounded" cases.\textsuperscript{161} The Galton study on the attitude of police investigators found that "investigators expect a complainant to resist in virtually all cases in which no weapon is exhibited."\textsuperscript{162} These investigators expected resistance to be shown by screaming, an hysterical state upon reporting the rape, and some physical injury. Thus, the fourth point is that complaints that result in charges being laid are usually supported by evidence of violence, presence of a weapon, threats, and resistance by the victim. Of those eventually charged with rape in 1973 in Canada, however, only 39 percent were convicted. In contrast, 66.7 percent of those charged with an offence against the person were convicted.\textsuperscript{163} The general conviction rate in 1973 for all indictable offences was 76 percent.\textsuperscript{164}

Fifth, in addition to this filtering out of false charges, studies on juries show that the accused does not suffer special prejudice on a charge of rape. Kalven and Zeisel, in their study on the American jury, found that "the jury chooses to redefine the crime of rape in terms of its notions of assumption of risk,"\textsuperscript{165} and "is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on [the victim's] part."\textsuperscript{166} The jury "re-writes" the law of rape to favour the defendant especially in cases of "simple" rape, which was defined by Kalven and Zeisel as including all cases in which none of the following circumstances is present: "evidence of extrinsic violence or in which there are several assailants involved, or in which the defendant and the victim are complete strangers at the time of the event."\textsuperscript{167} Yet in the case of simple rape, the common law requires the jury to be warned as to the danger of convicting on the uncorroborated evidence of the victim.

One argument to support the continued special treatment of the testimony of victims of sexual offences is that, since the issue is usually one of consent, the credibility of the victim is more important than in cases in which there is independent evidence of a crime. While there is a fear that the trial will be a credibility contest between the victim and the accused, there is some evidence that this is not the case. In the United States, studies have shown that it is not more likely to be the word of the victim against that of the accused in sexual assault cases than in nonssexual assault, and less likely than in some other offences. Kalven and Zeisel found that eyewitness evidence was presented by the defence in rape prosecutions more frequently than in burglary, narcotics or drunk driving prosecutions. The defendant was less likely to testify in rape prosecution than in assault prosecutions.\textsuperscript{168}

Continuing to segregate complaints into a special class supports the

\begin{flushleft}
\textsuperscript{161} Clark and Lewis, supra note 146, at 68.
\textsuperscript{162} Galton, supra note 145, at 24.
\textsuperscript{164} Id. at 14.
\textsuperscript{165} Kalven and Zeisel, supra note 148, at 254.
\textsuperscript{166} Id. at 249.
\textsuperscript{167} Id. at 252.
\textsuperscript{168} Id. at 143, Table 41.
\end{flushleft}
assumption that the credibility of all victims of sexual offences is suspect, when in reality this depends on the circumstances of each case. Generalizing from the nature of the offence tends to obscure the uniqueness of each case. It places an onus on each victim of a sexual offence to establish his or her credibility. The danger of generalization is illustrated by the common law rule of practice, according to which the trial judge had to warn the jury that it is dangerous to convict on the uncorroborated evidence of the victim of a sexual offence, and he could, in his discretion, advise them not to do so. It is assumed that the victim of every sexual offence is likely to bring false accusations even when the only issue is identification. Logically, if the victim has not had any previous contact with the accused, there is less danger of bias or a motive to deceive. The real issue in this case is the accuracy of the identification. Still, the Court of Criminal Appeal in R. v. Trigg held that a general warning that it is dangerous to convict on the uncorroborated evidence of the complainant must be given even if the only issue is the identity of the accused, although in this case the jury should be told that the principal source of error is the inherent frailty of the identification evidence and not the credibility of the victim. The circumstances vary from case to case. Certainly, more research must be done into the effect on credibility of a relationship between the victim and the defendant, but it is common sense that there is not the same possibility of a motive to deceive in the case of a rape by a stranger. The police assume that previous contact indicates that the complaint is unfounded. In the Clark and Lewis study, only 20 percent of reported rapes where the victim knew the accused previously were classified as "founded."

While empirical studies are subject to error, there has been sufficient replication in this case to suggest that there is a valid basis for stating that the credibility of rape victims should not be singled out as being generally suspect. The problem of the credibility of the victim is the same as in every offence without physical evidence of the crime, such as fraud or conspiracy. The jury should be alerted that the "existence or non-existence of a bias, interest or other motive" will have a bearing on the credibility of the witness. The jury can also be told of the effect of conflicting testimony and that, before they find any fact solely on the basis of a single witness, they "should carefully review all of the testimony upon which proof of such fact depends." The trial judge will also relate the facts to the legal issues and point out the essence of the case for the Crown and defence. A general warning such as "it is often easy for the woman to say that she did not consent, that is that she was raped in circumstances in which it would be very difficult for the man to defend...

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160 Thomas v. The Queen, supra note 46.
171 Clark and Lewis, supra note 146, at 72, suggest that finer distinctions should be drawn in defining the "relationship" between the victim and defendant. They argue that there is no relationship if there has been no prior contact and the victim meets the defendant at a bar, party or while hitchhiking. They point out that it is particularly difficult to infer a "relationship" if the defendant gives the victim false information in order to gain her trust.
172 Clark and Lewis, id. at 71.
174 Id.
himself," or that an adverse inference can be drawn from a failure to complain, should not be given in any case.

3. Reform

Proposals for reform of the law governing sexual offences have recommended abolishing the exception for complaints. The South Australian Law Reform Commission recommended that "unless a complaint be otherwise admissible in evidence on the hearing of a charge of a sexual nature, evidence of that complaint be made inadmissible by statute." This proposal has also been recommended in New South Wales. In Canada, the repeal by Parliament of the statutory requirement that the trial judge direct the jury that it is not safe to convict on the basis of the uncorroborated evidence of the female victim recognizes that there is no basis for an a priori rule based on the nature of the offence.

The Ontario Law Reform Commission, however, does not discuss the admissibility of complaints in sexual offences. In the absence of any change, the common law would prevail under the Ontario Draft Act. A complaint of a witness would be admissible under the Canada Evidence Code, since all prior statements of a witness with first hand knowledge are admissible. It is submitted that the common law rule on complaints should be abolished. If an exclusionary rule is retained, as is recommended by the Ontario Draft Act, a complaint would be admissible if it satisfies the criteria of an exception such as a statement to rebut an allegation of recent fabrication or a spontaneous exclamation, even though it was made some time after the attack or in response to a leading question.

Under the common law rule, a complaint must have been made at the first reasonable opportunity, and it must not have been elicited by questions of a "leading, inducing or intimidating character." It is a question of law whether

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176 Criminal Law and Penal Methods Reform Committee of South Australia, Special Report: Rape and Other Sexual Offences (March 1976) at 48.
178 Criminal Code, R.S.C. 1970, c. C-34, s. 142 (repealed by the Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8).
179 In R. v. Elliott (1928), 62 O.L.R. 1 at 6, [1928] 2 D.L.R. 244 at 250, 49 C.C.C. 302 at 308 (C.A.), on a charge of committing sodomy with a boy under thirteen years of age, the complaint by the boy made one month after the alleged offence was not admissible. Per Hodgins J.A.: the complaint was "open to all the objections that have from time to time been stated against admitting a complaint where opportunity and time have been given to devise and set forth an untrue accusation." R. v. Hill, supra note 104; leave to appeal refused, [1928] S.C.R. 156. The first reasonable opportunity is not necessarily the first opportunity. In the circumstances, it would not have been reasonable for the victim to complain to anyone before she told her husband many hours after the alleged offence. Also see R. v. Lebrun, supra note 133; R. v. Woodworth (1974), 17 C.C.C. (2d) 509 (Ont. C.A.); R. v. Waddell (1975), 28 C.C.C. (2d) 315 (B.C.C.A.); and R. v. Jones, supra note 108.
these criteria have been satisfied, but these two factors should also be matters for the jury to consider in assigning weight to the complaint and should not be a bar to admission. Both the complainant and the recipient are available for cross-examination.

Elimination of the exception for complaints would also result in the abolition of the rule that, if there is no recent complaint, a trial judge must, in the absence of special circumstances, direct the jury that an adverse inference can be drawn from that silence. The victim's explanation of the absence of the complaint would be admissible in every case. Although, in R. v. Kistendey, Dubin J.A. doubted whether the explanation was admissible if it entailed bringing in a complaint that the trial judge had ruled was not recent, the complaint and the explanation should be before the jury. It should be for the jury to decide whether the complaint is probative on the issue of credibility. Information of both the complaint and the explanation is necessary before the jury can decide what inference can be drawn from delay in making a complaint.

C. Identification Evidence

1. Introduction

Eyewitness identification evidence presents special problems. Its unreliability, in combination with the fact that it is often treated as conclusive, has resulted in many miscarriages of justice. Despite the apparently convincing nature of this evidence, expert studies have shown that it is inherently more 

181 R. v. Belliveau (1978), 25 N.S.R. (2d) 698 at 708. See R. v. Hill, supra note 104, at 738 (D.L.R.), 648 (O.L.R.), 163 (C.C.C.): "It was the province of the trial Judge to decide whether the statement was made under circumstances which rendered it properly admissible."


183 R. v. Reardon, supra note 112.

184 Supra note 109.

185 See, for example, Woocher, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification (1977), 29 Stan. L. Rev. 969; Buckhout, Eyewitness Testimony (1974), 231(6) Scientific American 23-31; Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (London: H.M.S.O., 1976) [hereinafter Devlin Report]; Levine and Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby (1973), 121 U. Pa. L. Rev. 1079; Trankell, Reliability of Evidence: Methods for Analyzing and Assessing Witness Statements (Stockholm: Beckmans, 1972); Wall, Eye-Witness Identification in Criminal Cases (Springfield, Ill.: Charles C. Thomas, 1965); and Buckhout and Ellison, The Line-up: A Critical Look, [June, 1977] Psychology Today 82. The term "line-up" will be used to designate a procedure of identification whereby the suspect is placed in a line composed of a number of other persons of similar height, age and general appearance. The eyewitness is then asked whether he recognizes the perpetrator among those in the line. In England this procedure is referred to as an "identification parade." The term "show-up" denotes a confirmation between the eye-witness and the suspect. Also see note 188, infra.

186 See note 204 and accompanying text, infra.

187 The Devlin Report, supra note 185, Appendix K, at 189, lists relevant cases that have arisen over the last one hundred years. Also see Williams, The Proof of Guilt: A Study of the English Criminal Trial, supra note 79; Borchard, Convicting the Innocent " (New Haven: Yale University Press, 1932); and Frankfurter, The Case of Sacco and Vanzetti (Boston: Little, Brown, 1927).
Experimental psychologists have demonstrated that, even if the witness is honestly attempting to describe an event accurately, errors may be caused by the processes of perception and memory. The brain does not operate as a mechanical recording device—a witness in describing an event does not merely reproduce his original perception of the event. Perception is a constructive process. Only a few stimuli can be remembered and individuals differ as to the stimuli that are selected. In addition, an event stored in memory will change over time. New information may alter the memory, parts may be forgotten and details may be added. Despite these dangers, the trier of fact must assess the reliability of the testimony. To counter these dangers, the common law requires that the declarant testify. Information is then provided from the demeanour and cross-examination of the declarant-witness. It is assumed that this information is sufficient, and that it is possible to reach a correct decision on the basis of this information.

Eyewitness identification evidence is more unreliable than other testimonial evidence. “Unreliable evidence” denotes evidence that will not be evaluated correctly by the trier of fact. Four causes of this unreliability that will be discussed are: first, identification evidence is subject to incremental errors in perception and memory; second, identification evidence is particularly susceptible to bias; third, the trier of fact may possess some misconceptions about identification evidence; and fourth, the trier of fact may assume that it is conclusive evidence of guilt.

First, empirical studies have shown that eyewitness identification evidence is subject to additional errors in perception and memory. People generally have difficulty in recognizing faces. Experiments in which the possibility of bias has been minimized have shown that few witnesses make accurate identifications. In one experiment, only 14 percent of the subjects were able to identify the perpetrator correctly. Witnesses also make a great number of errors in their descriptions, often relying on the height, weight and age of the population or of themselves. The study of the process of recognition of a human face is relatively undeveloped. Some work has been done on which particular features of a human face convey the most information for recognition. It has been found, for example, that the eyes themselves convey relatively little information and that the upper portions of the face are more helpful in identification than the lower portions. It has also been suggested that certain people may be recog-

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188 For an examination of psychological studies of person identification and a comprehensive bibliography, see Clifford and Bull, The Psychology of Person Identification (London: Routledge & Kegan Paul, 1978). There are numerous psychological studies illustrating the sources of unreliability in person identification. A useful framework that differentiates between variables about which the legal system can do something and those about which it cannot is presented in Clifford and Scott, Individual and Situational Factors in Eyewitness Testimony (1978), 63 J. of Applied Psych. 352.


190 Buckhout, Figueroa and Hoff, Eyewitness identification: Effects of suggestion and bias in identification from photographs (1975), 6(1) Bull. of the Psychonomic Soc'y 71.

191 Goldstein and Mackenberg, Recognition of human faces from isolated facial features: A developmental study (1966), 6(4) Psychonomic Science 149.
ized from one or more unique features, while other faces possess features that are consistently confused with ones that they resemble. It has been shown that stress reduces perceptual ability and may direct attention from facial features. A victim may fixate on certain objects such as the hands or a knife and remember little of facial features. Good viewing conditions and length of viewing time greatly improve accuracy, but observations often occur in poor viewing conditions and are of a brief duration. These circumstances are not as important in the evaluation of other testimonial evidence as, for example, the time and location of a theft. It has also been shown that when a number of witnesses compare descriptions, more errors are made than in the case of an individual witness.

Second, there is a real possibility of bias in the identification process itself, a bias that may not be recognized by the trier of fact. The witness has a civic-minded desire to bring a criminal to justice. He will be motivated to identify someone in a line-up if he knows that a suspect is in custody. There will be a tendency to pick someone who conforms to the original description, rather than the actual offender. Studies have shown the possibility of bias in the way in which photographs are shown to a victim. Subtle signals from a police officer, such as a photograph at an angle that implies that it has been recently added, can influence the choice. The line-up itself may be a source of error and must be carefully scrutinized to determine whether the accused possesses any distinctive characteristics. If a witness has seen a photograph, he may simply attempt to choose the line-up participant who most closely resembles the picture.

Third, the layman has several misconceptions about eyewitness identification that may lead to an error in evaluation. Although stress adversely affects perceptual ability, a jury may believe that the presence of violence, for example, indicates that every detail made a deep impression in the mind of the victim. Studies have also shown that, contrary to popular belief, a witness with a high degree of confidence is less likely to be correct. As has been mentioned,
although it could be assumed that a number of identifications are more reliable than one identification, discussion between witnesses will compound errors.\textsuperscript{203}

Fourth, juries treat identification evidence as conclusive. One experiment simulated a jury trial, using 150 students as jurors.\textsuperscript{204} Each juror received a description of a grocery store robbery and murder and a summary of the evidence and arguments presented at trial. One-third of the jurors were told that there had been no identification evidence, one-third that a clerk had identified the accused but that the defence claimed he was mistaken, and one-third that the clerk had identified the accused but that the defence had discredited his testimony by showing he had not been wearing his glasses at the time and had uncorrected vision poorer than 20/400. Of the jurors in the "no witness" group, 18 percent voted for conviction compared with 72 percent of the jurors in the second group, who heard of the eyewitness testimony. In the third group, which was told of the completely discredited eyewitness testimony, 68 percent convicted the accused.

In addition to this inherent unreliability, in-court cross-examination provides little information with which to assess the accuracy of the identification.\textsuperscript{205} Witnesses, in recounting an event, do make errors in details, but normally a court does not have to determine all of the details in order to decide the point at issue. The test is whether the story is probable and coherent. In contrast, it is possible that an identification may be the only evidence connecting the defendant with the event. In this situation, there is no story and the verdict must rest on a single observation that is difficult to evaluate. The demeanour of the witness is useless, since a witness will often be honestly mistaken and absolutely sincere in asserting the truth of an identification. Witnesses differ widely in their ability to recognize faces, but there is no information on the ability of this particular witness to recognize faces. In \textit{R. v. Sutton}, Jessup J.A. notes that the frailty of identification evidence is not merely a matter of the inability of the witness, but arises "from the psychological fact of the unreliability of human observation and recollection."\textsuperscript{206}

Miscarriages of justice caused by mistaken identification have been documented.\textsuperscript{207} Two recent convictions in England based on a mistaken identification resulted in the appointment by the Home Secretary of a committee chaired by Lord Devlin to consider the question of identification evidence. The \textit{Report on Evidence in Criminal Cases}, issued in April, 1976, recommends several changes in pre-trial and trial procedure concerning identification evidence.\textsuperscript{208} The Devlin Report concluded: "We are satisfied that in cases which depend wholly or mainly on eye-witness evidence of identification there is a special

\textsuperscript{203} \textit{Supra} note 191 and accompanying text.


\textsuperscript{205} Devlin Report, \textit{supra} note 185, at 76, para. 4.25. Also see \textit{R. v. Harrison (No. 3)} (1952), 2 W.W.R. (N.S.) 318, 100 C.C.C. 143, 12 C.R. 314 (B.C.C.A.), for an example of a case in which there were no surrounding inculpatory circumstances.


\textsuperscript{207} See note 187, \textit{supra}.

\textsuperscript{208} \textit{Supra} note 185.
risk of wrong conviction. It arises because the value of such evidence is excep-
tionally difficult to assess; the witness who has sincerely convinced himself and
whose sincerity carries conviction is not infrequently mistaken.\footnote{200}

Should out-of-court identifications be admissible? An in-court identification
is particularly suspect. It is in effect a leading question, the answer to
which is suggested by the circumstances. If there is any similarity between the
accused and the person the witness saw commit the offence, the witness natu-
really tends to identify the accused as the offender. An out-of-court identification
made before the “suggestions of others and the circumstances of trial may have
intervened to create a fancied recognition in the witness’ mind”\footnote{210} is to
be preferred. Certainly, the reliability of an out-of-court identification depends
upon the circumstances and all procedures are subject to some objections, but
it is this identification, rather than that given in court, that should be evaluated
by the court. The Devlin Report concluded that, in the absence of any alterna-
tive suggestions, they were “bound to regard the identification parade as still
the fairest and most practical test available of a person’s ability to recognise
a face previously seen.”\footnote{211} The Report recommends that “[i]dentification on
parade or in some other similar way in which the witness takes the initiative
in picking out the accused should be made a condition precedent to identifica-
tion in court, the fulfilment of the condition to be dispensed with only when
the holding of a parade would have been impracticable or unnecessary.”\footnote{212}
Thus, the out-of-court identification is not only admitted as substantive evi-
dence, but in most cases it is a necessary condition of conviction.

This paper will examine the issue of identification evidence in criminal
proceedings from both an English and a Canadian perspective. First, the current
rule in Canada and England will be described, and then reform of that rule
will be discussed. The Ontario Law Reform Commission is silent on the issue
of identification evidence, but the Law Reform Commission of Canada recom-
mandation that prior statements of a witness be admissible as substantive evi-
dence would admit out-of-court identifications.

2. Current Rule
a) England

A prior out-of-court identification by a witness who identifies the accused
at trial is admissible. Prior to \cite{R. v. Osborne, R. v. Virtue,213} the leading English

\footnote{200} Devlin Report, \textit{id.} at 149, s. 8.1.
evidence has little force in the case of witnesses, such as those here involved, who are
available for cross-examination. We also think that juries in criminal cases, before being
called upon to decide the awesome question of guilt or innocence, are entitled to know
more of the circumstances which culminate in a courtroom identification—an event
which, standing alone, often means very little to a conscientious and intelligent juror,
who routinely expects the witnesses to identify the defendant in court and who may not
attach great weight to such an identification in the absence of corroboration.”

\footnote{211} \textit{Devlin Report}, \textit{supra} note 185, at 114, para. 5.31.
\footnote{212} \textit{Id.} at 150, para. 8.7.
\footnote{213} [1973] 1 All E.R. 649 (C.A.); see Gooderson, \textit{Alibi} (London: Heinemann
Educational Books Ltd., 1977) at 186-244.
authority was R. v. Christie.\textsuperscript{214} The five-year-old victim of an indecent assault identified the accused at trial, but was not asked whether he had previously identified the accused. The mother of the victim and a policeman gave evidence that the victim had identified the accused at the time of the arrest. The majority were of the opinion that the victim's statements were admissible as statements made in the presence of the accused, but Viscount Haldane also stated:

\begin{quote}
Had the boy [the eye-witness-victim] after he had identified the accused in the dock, been asked if he had identified the accused in the field as the man who assaulted him, and answered affirmatively, then that fact might also have been proved by the policeman and the mother who saw the identification. Its relevancy is to shew that the boy was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake.\textsuperscript{215}
\end{quote}

Thus, Viscount Haldane thought that the prior identification was only admissible to support an in-court identification. The Court of Appeal in R. v. Osborne, R. v. Virtue disagreed with this statement of the rule and held that in England a prior identification of a witness is admissible even if the witness does not identify the accused in court. The Court of Appeal admitted as substantive evidence the prior identifications of two witnesses: the first, who could not remember identifying anyone at the identity parade and did not adopt the prior identification, and the second, who gave confusing and contradictory evidence, finally stating that she did not think that the accused was the man that she had picked out. The second witness admitted making the previous identification, but did not say whether it was correct. The prior identifications were admissible. Lawton L.J. concluded:

\begin{quote}
It is pertinent to point out that in 1914 when the House of Lords came to consider R. v. Christie the modern practice of identity parades did not exist. The whole object of identity parades is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth. It would be wrong, in the judgment of this court, to set up artificial rules of evidence, which hinder the administration of justice.\textsuperscript{216}
\end{quote}

b) Canada

(1) Prior Identifications: To Support Credibility

Canadian courts do not discuss whether prior identifications consistent with the in-court testimony of a witness are admissible, but rather assume that they are, and admit them without any discussion.\textsuperscript{217} In R. v. Howarth, Gale C.J.O., in dismissing an appeal that the trial judge failed to direct the jury

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\textsuperscript{214} [1914] A.C. 545 (H.L.).
\textsuperscript{215} Id. at 551.
\textsuperscript{216} R. v. Osborne, R. v. Virtue, supra note 213, at 657.
\end{flushright}
properly on the frailties of identification evidence, notes: "Further, Mrs. Mady, the identifying witness, picked out the accused in a line-up without hesitation, and no attack is made upon the form or circumstances of that line-up or the identification made from it."

Instead of discussing the admissibility of the prior identification, courts proceed to a consideration of the circumstances surrounding that identification. In R. v. Goldhar, Robertson C.J.O. stated:

The other matter upon which we desire to make observation is the evidence of identification obtained by what is commonly called a 'line-up.' No doubt strong evidence of identification may sometimes be obtained by this method. It would be well, however, if in the evidence at the trial the procedure followed on the occasion of the line-up were described in more detail than is usually done.

The court will reject an identification made in a line-up conducted in a manner that suggests that the accused is the principal suspect. The courts emphasize that care must be taken to secure an unbiased identification. It has been held that it is "highly improper to exhibit a photograph or photographs to see whether the intended witness is able to identify the person already under arrest, and whom they are afterwards going to see in person in a line-up."

In R. v. Sutton, the witness was shown a photograph of the accused before the line-up in which the witness identified the accused as the offender.

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218 (1970), 1 C.C.C. (2d) 546 at 548, 13 C.R.N.S. 329 at 331 (Ont. C.A.).

219 R. v. Goldhar, R. v. Smokler, [1941] 2 D.L.R. 480 at 480-81, 76 C.C.C. 270 at 271 (Ont. C.A.); in R. v. Smith (N.S.C.A.), supra note 217, MacDonald J.A. examined a photograph of the line-up and concluded that the construction of the line-up was unsatisfactory, but despite this the identification was of sufficient weight to support the conviction; also see R. v. Cosgrove (No. 2), 34 C.C.C. (2d) 100 (Ont. C.A.); R. v. Olbey, supra note 217; R. v. Armstrong (1959), 29 W.W.R. (N.S.) 141, 125 C.C.C. 56, 31 C.R. 127 (B.C.A.) (in the line-up were six men, all of whom except the accused were occidentals); R. v. Dean, supra note 217; R. v. Opalchuk (1958), 122 C.C.C. 85 (Ont. C.A.); Wall, supra note 185, at 52-53; U.S. v. Wade, 388 U.S. at 232-33, 87 S. Ct. 1926 at 1935 (1967); and Simmons v. United States, 390 U.S. at 377, 88 S. Ct. 967 at 971 (1968).

220 Sommer v. The Queen (1958), 29 C.R. 357 (Qué. Q.B.). Also see R. v. Opalchuk, id. at 92; R. v. Watson, [1944] 2 D.L.R. 801 at 803, [1944] O.W.N. 258 at 260, 81 C.C.C. 212 at 215 (C.A.). The leading authority is R. v. Dwyer, [1925] 2 K.B. 799 per Lord Hewart C.J.; in R. v. Bagley, supra note 217, at 362 (B.C.R.), 724 (D.L.R.), 519 (W.W.R.), 264 (C.R.), the Court discusses the procedure to be followed in identifying the offender from a photograph; R. v. Baldwin, supra note 217; R. v. Smierciak, [1946] O.W.N. 871 at 872, [1947] 2 D.L.R. 156 at 157, 87 C.C.C. 175 at 177, 2 C.R. 434 at 436 (C.A.), discusses the impropriety of showing a single photograph to the witness: "If a witness has no previous knowledge of the accused person, so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance or bias, created directly or indirectly. ... Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust. Likewise, permitting a witness to see a single photograph of a suspected person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person."


222 Supra note 206.
The Ontario Court of Appeal held that the trial judge should have drawn this to the attention of the jury and that a failure to do so entitled the accused to a new trial. In *R. v. Goldhar*, Robertson C.J.O. said “there is always the risk that thereafter the person who has seen the photograph will have stamped upon his memory the face he has seen in the photograph, rather than the face he saw on the occasion of the crime.”

An unsupported in-court identification is considered by the courts to be of doubtful reliability and, in the absence of other incriminating evidence or a physical description, may be of insufficient weight to convict. In *R. v. Gardner*, Avory J. stated:

The case of Hancox is on a different footing. The only evidence of identification was that of witnesses who said they saw him coming away from the neighbourhood of the cottage carrying a bag. Not one of them had an opportunity of picking him out from a number of other men. Each of them saw him for the first time after that day in the dock. It is impossible to say that any jury would have been justified in convicting him on that evidence alone.

The prior identification may be proved by the eye-witness or by a person who saw the prior identification taking place. In *R. v. McGuire*, testimony of a police officer as to the prior identification of the accused by the witness at a line-up was admitted. The court would also have admitted testimony by police officers as to identifications made by two other witnesses if these witnesses had made an in-court identification. In *R. v. Sutton*, police officers testified that the witness made a tentative identification of the accused from a photograph.

(2) Prior Identifications; Substantive Evidence

Viscount Haldane, in *R. v. Christie*, was of the view that a prior identification was admissible “to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake.” Whether a prior identification is only admissible to support credibility or is also substantive evidence is not of importance when the witness makes an in-court identification and this issue is, therefore, rarely discussed. In Canada, a recent authority that does raise the issue is *R. v. McGuire*, in which evidence of a prior identification was ad-

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223 Supra note 219, at 480 (D.L.R.), 271 (C.C.C).
224 In *R. v. Browne* (1951), 1 W.W.R. (N.S.) 449, 99 C.C.C. 141, 11 C.R. 297 (B.C.C.A.), the first identification by the witness was at trial. O'Halloran J.A. stated, at 455 (W.W.R.), 147 (C.C.C.), 302 (C.R.): "Unless the witness is able to testify with confidence what characteristics and what 'something' has stirred and clarified his memory or recognition, then an identification confined to 'that is the man,' standing by itself, cannot be more than a vague general description and is untrustworthy in any sphere of life where certitude is essential." Also see *R. v. Harrison*, supra note 205; *R. v. Smith* (Ont. C.A.), supra note 217. Although the witness had picked the accused out in a beverage room, the inability to support the identification with a description resulted in the quashing of the conviction.
226 (1975), 23 C.C.C. (2d) 385.
227 Supra note 206.
228 Supra note 214, at 551.
mitted to support the credibility of an in-court identification. Two other witnesses, who had previously identified the accused, denied in court that the accused was the killer. The British Columbia Court of Appeal held that the prior identifications of these witnesses were only admissible as inconsistent statements to impeach credibility and, since the witnesses had not been found by the trial judge to be adverse, the statements were not admissible. Robertson J.A. quotes with approval a passage from Wigmore, in which it is stated that the admission of prior identifications is based on the same reasoning as the reception of statements to rebut an allegation of recent fabrication:

The psychology of the situation [a prior identification] is practically the same as when recent contrivance is alleged. To corroborate the witness, therefore, it is entirely proper to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person was then so placed among others that all probability of suggestion (by seeing him handcuffed, for example) is still further removed, the evidence becomes stronger.

The in-court identification is of little weight because "after all that has intervened, it would seldom happen that the witness would not come to believe in the person's identity," and there is an implication that circumstances occurring after the event have created a "fancied recognition" in the witness's mind. Robertson J.A. concludes that an in-court identification "may be supported by evidence that the person had identified the accused on an earlier occasion."

3. Reform

a) In-Court Identification

A prior identification by a witness consistent with an in-court identification should be substantive evidence. It is a fiction to say that a prior identification supports the credibility of the witness making an in-court identification. In this situation, the in-court identification is essentially a statement such as: "That is the man I identified earlier." The most probative identification is one made soon after the event before any particular suspect has been suggested to the witness.

The admission of prior identifications as substantive evidence when there is an in-court identification will have little effect on current practices. Admission as substantive evidence will require an assessment of the reliability of the prior identification, and Canadian courts currently engage in such an examination.

Recognition of the fact that the out-of-court identification is the most

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229 Supra note 226. Also see R. v. Pelletier (1973), 13 C.C.C. (2d) 266 at 275 (B.C.C.A.). The defendant argued that the trial judge should have directed the jury that evidence of a prior identification was not substantive evidence, but only supported the credibility of the witness. Bull J.A. concluded that in the circumstances the jury could not have failed to conclude that the prior statement "involved nothing more than the credibility of [the witness]."

230 Wigmore, supra note 5, Vol. IV (1972) at 277, ¶1130.

probative will encourage the courts to develop criteria for evaluating the reliability of these identifications. In the United States, one model direction to the jury on identification evidence stresses, among other factors, the circumstances surrounding any out-of-court identification, such as whether the prior identification "was the product of his [the witness's] own recollection," and "the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see [the] defendant." Criteria for a "fair" line-up can be made explicit. One test to evaluate the fairness of a line-up is to examine a photograph of it. The persons in a line-up have been referred to as "distractions." The object is to "distract the witness from the suspect so that the witness will not pick the suspect automatically," and, therefore, the distractions should have physical characteristics similar to those of the suspect. The Devlin Report recommended that it be a practice to take one black and white photograph of the line-up which the jury could use to judge "whether or not the suspect stands out." The usefulness of a photograph is illustrated by the results of empirical studies. Doob and Kirshenbaum have found that a witness, in his effort to be a good witness, is committed to the first description given to the police and will tend to identify someone who fits that description. The photograph of the line-up can be tested to determine whether the suspect is unique in possessing a trait mentioned in the description.

b) No In-Court Identification

If the eye-witness cannot make an in-court identification, is a prior out-of-court identification admissible? May another witness give evidence that the eye-witness previously identified the accused? Since there is no in-court testimony, the rules on consistent statements of a witness do not apply. Are there other rules that permit the introduction of the prior identification? While the answer to this question is outside the scope of this paper, a brief discussion is necessary for completeness. Three situations in which there is no in-court identification must be distinguished. In the first case, the witness, who cannot identify the accused because he does not remember the perpetrator, states that the prior identification is true. In the second case, the witness also cannot identify the accused because he does not remember the perpetrator, but in addition he is unwilling or unable to say that the prior identification is true. He may deny its truth, deny that it was made, or claim no memory of the statement. For example, in R. v. Osborne, one witness said that she did not remember picking anyone out of the line-up. In the third case, the witness has a memory of the perpetrator, but he denies in court that the accused is that person. With regard to the prior identification, the witness will either deny its truth, deny that it was made, or claim no memory of the statement. For the purposes of the following discussion, the last two cases will be

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232 U.S. v. Telfaire, 469 F. 2d 552 at 558 (D.C. Cir. 1972); also see U.S. v. Zeiler, 470 F. 2d 717 (3d Cir. 1972).
233 Doob and Kirshenbaum, supra note 197, at 289.
234 Devlin Report, supra note 185, paras. 5.46-5.48, 8.15.
235 Supra note 197.
236 Supra note 213.
grouped together, since in both cases the witness casts doubt on the prior identification.

(1) No In-Court Identification—The Witness Adopts the Prior Identification

A witness who cannot identify the accused at trial may adopt a record of a prior identification that meets the criteria for a document that may be used to refresh memory. The witness need not have a present memory of the person identified, but the witness must state under oath that at the time the prior identification was made he or she believed it to be true. In Fleming v. Toronto Railway Co., the Ontario Court of Appeal held that a witness who had no memory of the event could adopt a report made contemporaneously with the event. Meredith J.A. said:

If looking at the report, the witness could have said, "That is my report, it refers to the car in question, and shews that it was examined at that time, and, though I cannot from memory say that it was then examined, I can now swear that it was because I signed no report that was untrue, and at the time I signed this report I knew that it was true," that would, of course, be very good evidence, but the defendants were not allowed to get that far; and so the defendants are entitled to a new trial.

Adoption of a prior identification is clearly supported by authority, but the question that remains open is whether the record of the prior identification must satisfy the criteria for documents used to refresh memory. Must the record of the prior identification be a writing made contemporaneously with the event and either verified or recorded by the declarant?

237 There may also be a distinction between groups two and three on the basis of whether there is inconsistency between the prior statement and the in-court statement for the purposes of the Canada Evidence Act, R.S.C. 1970, c. E-10, s. 9. In R. v. Gushue (No. 4) (1975), 30 C.R.N.S. 178 at 180-81 (Ont. Co. Ct.), Graburn Co. Ct. J. concluded: "nor is it necessary for me to decide ... whether, [under s. 9(2) of the Canada Evidence Act] when a witness indicates he cannot remember, or has no recollection whether something was said in a positive way at some other time, it can be considered to be evidence inconsistent with his present testimony." Also see California v. Green, 399 U.S. 149 at 169, 90 S. Ct. 1930 at 1941, n. 18 (1970). The Supreme Court of Canada, in McNeney v. The Queen, supra note 38, at 623 (D.L.R.), held that a finding of the trial judge that a witness who claims to have no memory of the events is lying constitutes "evidence of an inconsistency between what she [the witness] said at the trial, i.e., that she had no recollection of a conversation, and what was contained in her written statement, i.e., a detailed recollection of it."

238 R. v. Davey, supra note 1; R. v. McLean (1967), 52 Cr. App. R. 80; Wigmore, supra note 5, Vol. III (1970) at 78, §735; cf. Jones v. Metcalfe, [1967] 3 All E.R. 205 where Lord Parker C.J. suggests that the police officer could have been called to prove a number told him by a witness with no present memory. Cattermole v. Millar, [1977] Crim. L. Rev. 553 (Q.B. Div. Ct.), follows the decision in R. v. McLean. The Court held that the evidence of a witness that she told a certain licence number to a police officer cannot be combined with evidence that the officer recorded the number to establish the number as evidence that the officer recorded the number that she told to a witness with no present memory.

239 Supra note 1, at 325-26; R. v. Inhabitants of St. Martin's, Leicester (1834), 2 Ad. & E. 210, 111 E.R. 81. The term used in the United States to refer to statements adopted by a witness who has no memory of events is "past recollection recorded." This term was approved by the British Columbia Court of Appeal in R. v. Rouse, [1977] 4 W.W.R. 734. Also see Federal Rules of Evidence, Pub. L. No. 93-595, Rule 803(5), "Recorded Recollection."

240 See, for example, R. v. Gwozdowski, supra note 1; Phipson on Evidence (11th ed. London: Sweet & Maxwell, 1970) at 632-33, art. 1528.
There is some authority indicating that a prior identification that is adopted by the witness need not meet these criteria. In 1847, in *R. v. Burke*, the witness could not identify the accused at trial, but said that at the police station he had identified the person who committed the offence, and that he was certain that he had identified the right person. The Court permitted other witnesses to be called to prove that the accused was the same person identified on the earlier occasion. This case also illustrates the point that the adopted statement is substantive evidence of the facts asserted. In *R. v. Moir*, the witness who could not identify the accused at trial made a prior identification of the accused to the police. The witness did not adopt the prior identification at trial, but Morden J. indicates that it would have been possible for her to do so, although he does not state that the prior identification was in a record verified by the witness.

Two recent cases in British Columbia on the definition of hearsay also support the proposition that the criteria for a document to refresh memory will not be required in every case. In *R. v. Penno*, the British Columbia Court of Appeal permitted the recorder of a statement by a declarant who could not remember the contents of the statement to testify as to that statement although the declarant had not verified the record. The issue was the ownership of property found in the possession of the accused. The Crown called two employees of the alleged owner to prove that the inventory numbers on the property found in the possession of the accused were the same as the inventory numbers on the property of the alleged owner. One employee, the declarant, had read off the inventory numbers, and the second employee had recorded the numbers on an inventory sheet. Apparently the declarant could not remember the numbers at trial, but testified that she had correctly stated the numbers. The Court permitted the second clerk to testify as to the numbers. The Court reasoned that the testimony of the second clerk was admissible because it was not hearsay, and did not discuss the rules on refreshing memory. It held that it was not hearsay since the clerk was not asserting the truth of the observations by the declarant, but was merely testifying that certain words were uttered by the witness.

Technically, the testimony as to the inventory numbers by the recorder was hearsay. The fact that the declarant dictated a number to the clerk is only relevant as evidence of what the declarant observed. It is an assertion that

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241 (1847), 2 Cox C.C. 295.
242 (1974), 15 C.C.C. (2d) 305 (Ont. H.C.); see *R. v. Harvey* (1918), 42 O.L.R. 187, 30 C.C.C. 160 (S.C.). The testimony is confusing. Although the accused at one point testified that his previous identification was correct, it appears at trial that he knew that the man he had identified was the accused, but that he was now uncertain that the accused was the guilty person. At the conclusion of his testimony, the witness was able to say that "to the best of my knowledge he is the man" and the Court held that there was some evidence to go to the jury.
the declarant saw these particular numbers, and, if the numbers are inaccurate, the Crown has failed to prove its case. It is a technical infringement, however, since the possibility of error is minimal. The statement is stored in a written record and not in the memory of the declarant. The principal source of error is deception by the declarant, and any motive to deceive can be explored on cross-examination.

If one extends the reasoning in Penno to all records of out-of-court statements, the rules on documents that may be used to refresh memory are superfluous. A recorder of a statement could testify as to what was said by a declarant with firsthand knowledge in order to complete the testimony of the declarant. The conditions of admissibility in Penno are that both the recorder and the declarant testify and that the record be made contemporaneously with the statement. A person who recorded an identification by the declarant could testify as to that identification even if the declarant could not identify the accused at trial and had not verified the record.

This result is theoretically correct. A record of a prior identification should be admissible even if there is no in-court identification by the declarant as a witness at trial. In this situation, there are external circumstances that indicate the correctness of the recorder's memory of the declarant's statement. The accuracy of the recording goes to the point not of the identity of the guilty actor with the accused, but of identity of the person identified with the accused. On this point a most thorough examination is possible and there is usually no dispute. The previous identification that is conducted under the proper conditions is more reliable than the in-court testimony.

(2) No In-Court Identification: The Witness Does Not Adopt the Prior Identification

In England, a prior identification made by a witness is admissible as substantive evidence even if the witness does not identify the accused at trial and does not adopt the prior identification as true. The United States Federal Rule of Evidence 801(d)(1)(c) admits prior statements of a witness of "identification of a person made after perceiving him." The identification is admissible even if there is no in-court identification or if the in-court identification is inconsistent with the prior identification. As in England, the prior identification is admitted as substantive evidence, but admissibility is subject to the requirements of the United States Constitution. A violation of a defendant's right to counsel at a post-indictment line-up will make the identifi-

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244 Morgan, The Relation Between Hearsay and Preserved Memory (1927), 40 Harv. L. Rev. 712 at 725-26.
Consistent Statements of a Witness

ication inadmissible. The Fourteenth Amendment due process standard of fundamental fairness protects a defendant against an identification that is the result of suggestion or is made in circumstances conducive to mistake. A procedure that has been found to be "impermissibly suggestive" involves showing the witness a picture of the accused before a line-up is conducted. An identification obtained by suggestive procedures is not per se inadmissible. Rather, the court examines whether the totality of the circumstances indicates that the identification is reliable. Thus, the due process standard ensures that only identifications above a threshold level of reliability are admissible as substantive evidence.

Detailed discussion of the rationale for admitting prior identifications when there is no in-court identification or an adoption of a prior identification, as is provided by the Federal Rules of Evidence, is beyond the scope of this paper. In this case, the prior identification supplements the in-court testimony and, therefore, questions different from those considered in deciding whether to admit consistent statements must be answered. The principal questions are: first, to what extent should a party be permitted to supplement the testimony of a forgetful, confused or hostile witness; second, what rights should an accused have to a full, effective cross-examination of the witness; and third, is there sufficient information to enable the trier of fact to evaluate correctly the prior out-of-court statement? While these factors will not be discussed here, suffice it to say that perhaps the reliability of a prior identification meets all objections raised by these three questions. As has been pointed out, the prior identification is the best evidence available. There is more information on the reliability of the prior identification than on the in-court identification. With

248 There is no Sixth Amendment right to counsel in confrontations held before formal initiation of adversary judicial proceedings: Kirby v. Illinois, 406 U.S. 682 at 689-90 (1972).


250 Id.

251 The Manson court adopted the following five factors enunciated in Neil v. Biggers, 409 U.S. 188 at 199-200, 93 S. Ct. 375 at 382 (1972), as quoted in U.S. v. Medina, 552 F. 2d 181 (Ill. Ct. App. 7th Cir. 1977) at 190: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the witness' prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." The court is only required to consider these factors if the defendant shows that the identification procedure used was "impermissibly suggestive." See Manson, id. at 2250-54; Medina at 189-90.

252 See California v. Green, supra note 237, at 157-58 (U.S.), 1934 (S. Ct.), for a discussion of the reasons for the Sixth Amendment right of the accused to be confronted with the witness testifying against him:

The particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys "would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers' i.e. the witnesses against him, brought before him face to face."

respect to the right of the accused to confront his accuser with meaningful questions, the issue is whether the prior identification is as reliable as statements admitted under exceptions to the hearsay rule, such as dying declarations against interest. Since these hearsay statements are admissible, although the accused does not have an opportunity to cross-examine the witness, a reliable prior identification by a witness that is subject to subsequent cross-examination should be admissible.\(^{253}\)

4. Description

a) Current Practice

The admissibility of the original description has not been examined by Canadian courts; rather, it has been assumed that the description is admissible. Several judgments refer to the original description.\(^{254}\) The Ontario Court of Appeal, in \(R. \text{ v. } \text{Audy (No. 2)}\), notes that one basis of the defendant’s claim that the identification evidence was so unsound that it was unsafe to permit the conviction to stand was the “conflicting descriptions given to the police by the eyewitness shortly after the robbery occurred.”\(^{255}\) In \(R. \text{ v. } \text{Olbe},\) the trial judge in his charge to the jury points out that the witness had given a description identical to her in-court description to the police before she had any opportunity to see the accused.\(^{256}\) In \(R. \text{ v. } \text{Sutton},\) Jessup J.A. notes that the witness “provided the police with a detailed description including the features that the man had a reddish goatee on the chin only, wore black suede
shoes and had a word which looked like 'Love' tattooed across the knuckles of one hand." \[227\] The trial judge had failed to direct the jury that the identification by the witness may have been affected by the police bringing to her attention a photograph of the accused before the line-up. Jessup J.A. ordered a new trial noting, however, that "it would ... have been quite proper and desirable for the learned trial Judge to point out to the jury that the goatee and the tattoo marks in particular were unusual features which would lend themselves to a vivid impression on the recollection of a witness." \[258\]

The original description is a prior out-of-court statement that is consistent with the testimony of the accused. It would clearly be a hearsay statement if it were admitted as evidence of the truth of the facts asserted. Although it is not discussed in the cases, it appears that the description is admitted to support the witness's in-court identification. In R. v. Spatola, Laskin J.A. (as he then was), in deciding that in this case the trial judge should have directed the jury concerning the frailties of the identification evidence, pointed out that the witness had known the accused prior to the incident and "previous to being shown the photographs [including one of the accused] had given a detailed description of appellant as to height, clothing and such distinctive features as sideburns and a goatee." \[259\] The original description supported the quality of the identification.

Canadian courts note the importance of consistency between a physical description and the physical characteristics of the accused. O'Halloran J.A. in R. v. Harrison thought that:

A generalized statement by a witness "that is the man," cannot be accepted as a substitute for a trustworthy statement of physical characteristics. A witness can say "that is the man," only if it is founded on physical features, characteristics, traits or mannerisms which the witness is able to describe, and which when reliably described are peculiar to accused, and are not common in a populous area to many people who could easily have been at the place at the time. \[260\]

It is not clear whether the description referred to includes the original description, but one would assume that it does, given the many cases that admit the original description. The original description made before any suggestion that the accused is suspected is better evidence than an in-court description based on present recollection in the presence of the accused.

b) Reform

A prior description is logically probative on the issue of the accuracy of the identification. Although it has been shown that witnesses generally have difficulty in describing people accurately even when they are looking at them and, therefore, it is possible for a witness who cannot describe the perpetrator or gives a description that does not fit the suspect to make an accurate identification, the absence of a description or an inaccurate description can provide

\[227\] Supra note 206, at 359 (O.R.), 154 (C.C.C.), 46 (C.R.N.S.).

\[258\] Id. at 368 (O.R.), 162 (C.C.C.), 56 (C.R.N.S.).

\[259\] Supra note 217, at 78 (O.R.), 245 (C.C.C.), 148 (C.R.N.S.), Aylesworth J.A. notes, at 75 (O.R.), 242 (C.C.C.), 145 (C.R.N.S.), that the witness "was cross-examined in detail and at length before the jury on every aspect of his identification and of what he had said about it previously."

\[260\] Supra note 205, at 320 (W.W.R.), 145 (C.C.C.), 316 (C.R.).
valuable information, particularly if there is a serious discrepancy or an omission of an obvious physical characteristic of the suspect who is later identified. In the English case of R. v. Turnbull, Lord Widgery lists as a criterion of the quality of the identification whether there was "any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance." He also advises that, in all cases in which the defence asks for particulars of the description, the Crown should provide them.

The Devlin Report recommended that a description by an identifying witness "given to the police at the first convenient opportunity, and in particular before the witness has seen the accused again . . . or any photograph of him, or received any description of him from another source" be admissible. The description would constitute substantive evidence, but should not "normally be sufficient by itself to raise the identification from the level of probability to that of reasonable certainty." Strangely, the Devlin Report would require that the description should be in writing and signed by the witness. An analogy is drawn with recent complaints of a sexual offence, but neither recent complaints nor prior identifications need be in writing under the current law.

Any proposal to reform the rules on consistent statements should consider the admissibility of prior descriptions. The current sub silentio practice should be stated expressly. There does not appear to be any strong objection to their admission as substantive evidence since the witness is available for cross-examination.

IV. CONCLUSION

This paper has examined the rationale for the exclusion of consistent statements of a witness and considered alternative rules. The choice is between a rule that sets up a priori classes of statements that are considered to be especially relevant and a rule under which the trial judge decides in each case whether the evidence is sufficiently relevant to justify admission. There is no obvious "correct" choice. Neither the argument that the evidence is necessary to reinforce testimony nor that it is superfluous and unnecessary is compelling. There are costs involved in both exclusion and inclusion. The exclusion of statements would require a complicated rule that would be difficult to understand and administer, e.g., the common law. Admission of all statements, while simple, might result in costly and unnecessary court delays.

One may decide that the reinforcement value of consistent statements is not a sufficient reason for their admission. An a priori exclusionary rule may be chosen to avoid the possibility of admitting superfluous information and causing unnecessary delay. Under an exclusionary rule, statements will be admissible only if they perform a function in addition to reinforcement, such as rehabilitation of the witness. Statements to rebut an allegation of recent

261 Wall, supra note 185, at 100.
262 [1976] 3 All E.R. 549 at 552.
263 Supra note 185, at 106, para. 5.10.
264 Id. at 107, para. 5.15.
265 Id. at 151, para. 8.10.
Consistent Statements of a Witness

fabrication were analysed. It was concluded that the California Evidence Code provision on recent fabrication is to be preferred to the Ontario Draft Act because it offers a more exhaustive definition of the situations in which a previous statement would be logically probative. The Ontario Law Reform Commission recommendation that statements admitted to rebut a suggestion that evidence has been fabricated be substantive evidence should be adopted, since the distinction between evidence going to credibility and substantive evidence in this context has little meaning. Consistent statements of an accused were also examined and it was suggested that any proposal for reform should study their admission carefully. The exception for complaints in sexual cases should be abolished. This would eliminate the direction to the jury that an adverse inference can be drawn from a failure to complain and would make admissibility of these statements dependent on whether the criteria for another exception are satisfied. Finally, it was submitted that prior identifications should be substantive evidence since they are more reliable than in-court identifications.

On the other hand, there are strong arguments that can be made for the admission of all consistent statements. While the choice of a rule will be partly dependent on the assumption that one makes about the ability of judges and juries to evaluate correctly the probative value of the evidence, it should be noted that, since in the case of consistent statements the same evidence has been given in court, the risk of an error in estimation of the probative value is minimized. Although the choice is also dependent on the ordering of the conflicting goals of predictability of the evidence that will be admissible and the admissibility of all relevant information, surprise does not appear to be a problem under either form of rule. In addition, the trial judge will have a discretion to exclude evidence of trifling probative value.

The Law Reform Commission of Canada has undertaken to reformulate the common law rules of evidence along "broader lines." Its objective is to adopt "easily available, clear and flexible rules" based on the premise that all relevant evidence should be admissible unless there is a "clear justification for the exclusion of evidence that would assist in arriving at the truth." It is submitted that in the case of consistent statements no such justification exists and that they should be one of the circumstances before the jury.

266 A principal criticism of a rule that admits all statements is that it would reduce the ability of the adversaries to predict what evidence would be admissible. See the reaction of lawyers in the United States to the Model Code in Report of Committee on Administration of Justice on Model Code of Evidence (1944), 19 J. State Bar of Calif. 262 at 266: "How could any lawyer know how to prepare a case for a plaintiff or defendant, or advise a client whether he had a cause of action or defense. One judge might admit evidence offered by a party which it would require quite an effort on the part of the opposite party to meet and rebut, and yet, if at vast expense he prepared to do so, his efforts might be a useless expense since the judge might exclude it. How could any trial counsel in advance of trial know whether evidence which his client could bring against his opponent, or which the adversary could bring against his client and which, under present rules, would be excluded as too remote, would be admitted or excluded by the judge?"

267 Canada Evidence Code, supra note 17, at 30.

268 Id. at 32.