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EXCLUSION OF CERTAIN
CIRCUMSTANTIAL EVIDENCE:
CHARACTER AND OTHER
EXCLUSIONARY RULES

By KENNETH L. CHASSE*

A. INTRODUCTION

Circumstantial evidence is real or testimonial evidence which, by means of inference, i.e., indirectly, aids in the deciding of a disputed issue. In contrast, direct evidence does not depend upon inference to aid in the deciding of the issue for which it is adduced. It is used directly to establish the proposition which it contains.

This article will attempt to compare the provisions relating to circumstantial evidence recommended by the Law Reform Commission of Canada in its Report on Evidence with the existing law in Canada. Reference will also be made to the British law and to existing codifications of the law in the United States. The principal American codification is the U.S. Federal Rules of Evidence which became operative on July 1, 1975. Reference will also be made to the California Evidence Code and to the Uniform Rules of Evidence, 1953. The Uniform Rules, published by the National Conference of Commissioners on Uniform State Laws, have been adopted by a number of States. The Ontario Law Reform Commission's Draft Evidence Act in the Report on the Law of Evidence does not address the subject of character evidence with respect to disposition or the use of certain types of circumstantial evidence to show conduct.

B. CHARACTER

1. The Relevancy of Character Evidence

Character evidence may be offered for the following reasons: first,

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1 Law Reform Commission of Canada, Report on Evidence (Ottawa: Ministry of Justice, 1975). The Report recommends in its proposed Evidence Code, a group of ten sections (17 to 26) under the heading, “Exclusion of Certain Circumstantial Evidence.” The sub-headings deal with “Character and Disposition” (sections 17 to 20), “Preventive Action” (sections 21 to 23), and “Compromises” (sections 24 to 26).
4 Uniform Rules of Evidence (U.L.A.) 1953. The second version of these rules, the Uniform Rules of Evidence, 1974, are so similar to the Federal Rules that they do not justify separate comparison, unless one were dealing with the law of privilege.
character evidence may be circumstantial evidence of specific acts; second, character may be in issue; and third, character evidence may be used to impeach or support credibility. This paper will deal only with the first two of these reasons for adducing evidence.

The commentary in the Law Reform Commission of Canada's Report on Evidence sets out the Commission's approach to the use of character evidence to show disposition, and its assessment of the probative value of such evidence in general, as follows:

Section 17: The use of what is called character evidence is one of the most complicated areas of evidence law. The Code attempts to simplify the matter by distinguishing the inadmissibility of character evidence from the manner of proving it when admissible, and by distinguishing its admissibility to attack or support the credibility of witnesses from its admissibility to prove the conduct of the parties. Sections 62 to 66 deal with the admissibility of character evidence when it is being used to attack or support the credibility of witnesses. This section deals with character evidence sought to be admitted to prove the conduct of a party on a specified occasion.

In most other cases character evidence as circumstantial evidence is of slight probative value. Even when it is slightly probative it usually ought to be excluded because of the possibility of prejudice, the consumption of time and the confusion of the issues. But in some cases, for instance civil cases where there is an allegation of moral turpitude, the probative value of character evidence might outweigh these dangers. These matters, however, require no special provision. They can adequately be dealt with under the general rule (section 5) that such evidence may be excluded.\(^6\)

Separating those provisions which relate to character evidence to show disposition or conduct, from those provisions which deal with character evidence in relation to credibility, would be of great assistance in the development and understanding of the law, as demonstrated by some of the cases. But separate provisions as to admissibility and mode of proof would be helpful only insofar as such separation indicates that mode of proof is a distinct and separate factor to be considered in relation to admissibility, but not if separation leads to the belief that mode of proof is unrelated to admissibility.

2. Modes of Proof

Character evidence may take the form of opinion evidence, evidence of reputation, specific instances of conduct, or evidence of habit or custom. Opinion is the summation of one's views on the character or trait of character of another. Reputation is the summation of the views on a person's character or character trait held by a group of people, usually the community. Specific instances of conduct can include individual events which reveal character or a particular trait of character. Habit or custom is narrower than character in that it most often illustrates particular character traits, rather than the whole character and often reflects only a particular aspect of a character trait; for example, an employee's invariable habit of placing the day's receipts in the company vault is only one aspect of the character trait of carefulness or trustworthiness. Character could be said to be the sum of one's habits.

\(^6\) *Supra*, note 1 at 63, 65.
Habit or custom is not treated as a separate area of the law in English and Canadian law, but rather, it is dealt with as a variety of similar fact evidence. American authorities consider habit to be distinct from character, although it is treated as being very similar to evidence of character going to show disposition. In Canadian and English cases, the rules governing the admissibility of evidence of habit are not distinguished from those governing the admissibility of character evidence showing disposition.

The degree of admissibility of the three types of character evidence and evidence of habit depends upon the use to which they are being put. Generally, the law prefers evidence of reputation to evidence of opinion, and prefers opinion evidence to evidence of specific conduct or habit. The reason lies with the degree to which these types of evidence are said to cause undue prejudice, confuse the issues, distract, engender undue consumption of time in side issues or cause unfair surprise. Reputation evidence is seen as the variety of character evidence least likely to antagonize these principles. However, it is also the least revealing of character. Specific acts of conduct are most likely to be the most probative of character, but are also the most likely to cause prejudice.

The most eloquent defence of reputation over other types of character evidence can be found in Michelson v. U.S. Jackson J., delivering the opinion of the Supreme Court of the United States, stated:

When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called "character evidence" is only such when "character" is employed as a synonym for "reputation." The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits; nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as "the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because less prone to suspect. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion." Finch, J., in Badger v. Badger, 88 N.Y. 546, 552, 42 Am. Rep. 263.

While courts have recognized logical grounds for criticism of this type of opinion-based-on-hearsay testimony, it is said to be justified by "overwhelming considerations of practical convenience" in avoiding innumerable collateral issues.

7 For example, see, R. v. Canadian Pacific R. Co. (1912), 5 D.L.R. 176; 2 W.W.R. 627 (Alta. S.C.), where the contents of a box were proved by the usual routine in packing and shipping supplies. In Joy v. Phillips, Mills & Co. Limited, [1916] 1 K.B. 849; 85 L.J.K.B. 770 (C.A.), the cause of a fatal accident was inferred from prior actions of the deceased in teasing horses, and from the habit of the horse in question.

8 335 U.S. 469, 69 S.Ct. 213 (1948).
which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation. People v. Van Gaasbeck, 189 N.Y. 408, 419, 82 N.E. 718, 22 L.R.A., N.S., 650, 12 Ann. Cas. 745.9

The proposed federal Evidence Code formulated by the Law Reform Commission of Canada (hereinafter referred to as the "Evidence Code") would do away with the distinctions made among the various types of character evidence by making them all equally admissible. Section 20 states:

Evidence of a trait of a person's character may be given in the form of opinion, evidence of reputation or evidence of specific instances of conduct.

The commentary on this section implies that the potential probative value of specific instances of conduct outweighs the principles of undue prejudice and time consumption, which are two of the grounds for the present rule.10 The present rule excludes evidence of character to prove conduct where such evidence takes the form of specific instances of conduct except where character is in issue or admissibility is allowed by the rules as to similar fact evidence. The commentary looks to the Evidence Code's residual discretion to exclude evidence in section 5. However, the weighing and balancing of interests, as required by section 5, carries the potential of a voir dire for each piece of evidence which attempts to prove character by a specific instance of previous conduct or by individual opinion. Thus, the Evidence Code sees the potential probative value of all types of character evidence — whether of general reputation, individual opinion or specific instances of conduct — as possibly outweighing the needs of efficient trial administration.

In contrast, Rule 405 of the U.S. Federal Rules of Evidence allows proof of character by reputation or opinion, and restricts proof of character by specific instances of conduct to cases where character is in issue as an essential issue. The proposed Tentative Draft Vermont Rules of Evidence released in October 1977, contain a provision (Rule 405) which is identical to Rule 405 of the U.S. Federal Rules of Evidence.11

Rule 405: (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

The California Evidence Code, section 1102,12 provides that evidence of the defendant's character used to prove conduct may be in the form of opinion or reputation. Section 110313 provides that in a criminal action, character of the victim may be proved by evidence of opinion, reputation or specific instances of conduct. The Uniform Rules, 1953, provide in Rule 4614 for proof of character by opinion, reputation or specific instances of conduct.

9 Id. at 447-78 (U.S.); 219 (S.Ct).
10 Supra, note 1 at 66.
11 Supra, note 2, Rule 405.
12 Supra, note 3, section 1102.
13 Id., section 1103.
14 Supra, note 4, Rule 46.
American codifications deal with evidence of habit in rules which are separate from those dealing with character. Rule 406 of the Federal Rules of Evidence states:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

The reference to eye-witnesses arose from the fact that courts were reluctant to receive evidence of habit to show a particular act except where there were no eye-witnesses. Similar provisions have been placed in the California Evidence Code (sections 1104, 1105), and the Uniform Rules of Evidence, 1953 (Rule 49). Rule 406(b) of the Tentative Draft Vermont Rules of Evidence states that habit or routine practice may be proved by opinion or "by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." The Reporter's Notes under this provision indicate that a similar provision was eliminated from the Federal Rules by Congress to allow case-by-case treatment.\(^{15}\)

Section 19 of the Evidence Code is very similar to Rule 406:

Nothing in section 17 prohibits the admission of evidence of habit or routine practice to prove conduct in conformity with the habit or routine practice on a particular occasion.

Therefore, the Evidence Code differs from the existing Canadian law in that the rule governing evidence of habit or routine practice is separate from the rules which govern similar fact evidence. However, it gives no greater guidance than the present law as to whether evidence of habit should be limited to reputation or opinion or whether the habits of business practice should be more readily admitted than the habits of individuals. These distinctions are made in the American case law.

When one considers the differences among the American codifications, one is, at first, tempted to leave the mode of proving character or habit to case law development, as does the British law. The British Criminal Law Revision Committee in its Eleventh Report, Evidence (General),\(^{16}\) was content to be no more precise as to mode of proof than to recommend the expression, "disposition or reputation," but without defining it.\(^{17}\) However, the Report states that the Committee's intention is to alter the common law rule that the meaning of character is "reputation only and not disposition."\(^{18}\) Therefore, the Committee seems to have left substantial scope for case law development, even if the replacement expression proves not to have the intended effect.

Given the fact that different types of character disposition evidence involve varying degrees of prejudice, confusion, time consumption and surprise,

\(^{15}\) Rule 406(b) of the Draft Vermont Rules comes from Rule 406(b) of the Uniform Rules of Evidence which is one of the few provisions where those rules differ from the U.S. Federal Rules.

\(^{16}\) Cmnd. 4991 (1972).

\(^{17}\) Id., sections 6 and 7 at 169.

\(^{18}\) Id. at 220.
it does seem prudent to leave to the courts the formulation of principles which make the use of evidence of reputation, opinion, specific acts, and habit dependent upon the type of conduct or disposition intended to be proved. For example, Courts may see greater prudence in allowing psychiatrists to refer to specific instances of conduct when giving their expert opinion on character traits than in allowing laymen to do so when testifying with respect to a person's disposition toward peacefulness or violence. The courts may more readily accept opinion in relation to business custom than to individual habit. Or, the courts may exclude psychiatric opinion where it concerns the effect of alcohol on the capacity to form the necessary intent, but admit it where it concerns psychopathy. However, the author interprets the proposed Evidence Code as not excluding such case law development. It can be argued that section 20 goes no further than to change a mandatory common law rule, that character evidence must be in the form of general reputation, into a permissive rule that it may also take the form of opinion or specific instances of conduct. Because of the presence of "the big override," the trial judge's residual discretion in section 5 to exclude evidence otherwise admissible, section 20 should be construed as being permissive, not mandatory. The court should not have to admit character evidence regardless of the form in which it is tendered simply because it is admissible under sections 17, 18 or 19. However, even if the wording of section 20 results in some lack of clarity as to the relationship between admissibility and mode of proof, the presence of a provision such as section 20 makes clear that there are different methods of proving character and that character need no longer be restricted to reputation. The question is whether the Evidence Code makes clear that these different modes of proof should be subject to separate considerations.

3. The Character of the Accused in Criminal Proceedings

In criminal proceedings, the well established rules on character evidence as circumstantial evidence to prove conduct are as follows:

1. Evidence of the accused's bad character cannot be used by the prosecution to establish guilt.
2. As an exception to the general rule against character evidence to prove conduct, the accused can adduce evidence of his own good character.
3. Where the accused adduces evidence of his own good character, the prosecution may adduce evidence of his bad character in reply.
4. Evidence of character must be in the form of general reputation in the community and not evidence of individual opinion or of specific instances of conduct.
5. Character witnesses must qualify by showing such acquaintance with the accused and the community in which he has lived as to be

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This expression is used by Professor Paul Rothstein in relation to the very similar provision in Rule 403 of the Federal Rules. See Rothstein, An Evidence Code: The American Experience (1977), 36 C.R.N.S. 274, which contains an excellent analysis of the Evidence Code's opinion evidence provisions.
able to speak with authority on the manner in which he is generally regarded.\textsuperscript{20}

It should be kept in mind that these are general rules which are subject to more specialized principles relating to psychiatric evidence, \textit{res gestae}, and similar fact evidence which can be thought of as being either exceptions to the general rule or separate areas having their own rules.

The theory underlying the exclusion of bad character evidence for purposes of showing guilt is not that such evidence is irrelevant, but rather, that it may be given undue weight by the jurors. The accused, who is shown to have a bad general reputation or character, would be denied a fair opportunity to defend himself against a particular charge. There would be too great a risk that he would be convicted for what he is and not judged for what he has done. The theory has given rise to an exclusionary rule, the rationale of which is to prevent the probative dangers of confusion of issues, unfair surprise and undue prejudice.\textsuperscript{21} Therefore, the resulting rule would prevent the use of other criminal acts to show that the accused committed the crime for which he is being tried because he is a man of criminal character.\textsuperscript{22}

In contrast, the second rule, which allows proof of good reputation, is justified as an exception to the hearsay rule, because it involves none of the dangers of the first rule of conviction for generally bad conduct or bad reputation. "The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried."\textsuperscript{23} Potentially at least, it does carry the danger of an acquittal


\textsuperscript{21} The term "probative dangers" is found in Edward W. Cleary (ed), \textit{McCormick's Handbook on the Law of Evidence} (2d ed., St. Paul: West Publishing Co., 1972) at 441. The probative dangers are identified as prejudice, confusion, time consumption and surprise: "Judges and text writers have sometimes described the process of excluding evidence having probative value, by reason of these counter-factors of prejudice, confusion, time-consumption and surprise, as the application of a standard of 'legal relevancy.'"

\textsuperscript{22} However, evidence of other criminal acts may be admissible if adduced for some other purpose, and if so, the rule against character evidence is inapplicable. Such purposes are more specific than character and usually relate to particular individual issues. But, as McCormick, \textit{id.} at 448, points out, the range of relevancy outside the character ban is almost infinite: (1) \textit{res gestae} to complete the story by proving its immediate context; (2) to prove a larger plan, scheme or conspiracy of which the present crime is a part, relevant as showing motive and therefore the doing of the criminal act or the identity of the actor and his intention; (3) to prove other crimes by the accused so nearly identical as to label them as the handiwork of the accused, or as carrying his distinctive signature or trademark; (4) to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial or to show certain unnatural sex crimes so unusual that such acts with anyone are strongly probative of like acts; (5) to negative inadvertence, accident or lack of intention or lack of knowledge; (6) to establish motive and therefore identify deliberate malice or specific intent; (7) to show by immediate inference, malice, deliberation, ill will or specific intent; (8) to prove identity, but usually in conjunction with (2), (3) or (6) above, as a means of getting to identity; (9) conduct by the accused to obstruct justice or to avoid punishment for the present crime; (10) proof of prior convictions to impeach the accused when he testifies.

\textsuperscript{23} \textit{R. v. Rowton}, \textit{supra}, note 20 at 1502 (E.R.); 552 (All E.R. Rep.).
of a person who is in fact believed guilty. However, this is one variety of equitable discretion or criminal equity which we are content to leave to juries. In fact, it has been said that evidence of good character, although irrelevant, is received in criminal cases as a gesture of humanity and mercy. However, others argue that evidence of character is always evidence of guilt, meaning that no distinction of substance can be drawn between evidence of facts and evidence of character because character is laid before the jury to induce a belief in the improbability that a person of good character could have conducted himself in the manner alleged by the prosecution. From this analysis, it is only a small step to the argument made more recently, that to abolish this right to lead evidence of good reputation would nullify the rule which requires the removal of any reasonable doubt prior to conviction. It is argued that such evidence bears directly on the question of reasonable doubt and is "part and parcel of our scheme which forbids conviction for other than specific acts criminal in character and which, in their trial, casts over the defendant the presumption of innocence until he is proved guilty beyond all reasonable doubt." The Supreme Court of Canada has stated that evidence of good character can be adduced to show not only that it was unlikely that the accused committed the crime charged, but that he was not the kind of person likely to do so.

The third rule, which allows bad character evidence in rebuttal, is said to be justified by the need to protect the trier of fact from being misled by evidence of the accused's witnesses as to good character, in that, "... if the prisoner thinks proper to raise that issue as one of the elements for the consideration of the jury, nothing could be more unjust than that he should have the advantage of a character which, in point of fact, may be the very reverse of that which he really deserves." Therefore, the accused's good character evidence "opens the door" to the prosecution's bad character evidence. The concern of defrauding the trier of fact outweighs the danger of convicting

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24 Any prosecutor who has worked with grand juries before they were abolished in Ontario has seen this equitable power of human nature to dispose of cases at work, for it accounted for many of the two or three percent of bills of indictment which resulted in "no bills" or partial "true bills." The members of a grand jury might conclude that they should save the taxpayer and the accused the expense of a jury trial on a charge if it were not among the more serious and if the accused had no prior criminal record.


26 In R. v. Stirland (1943), 30 Cr. App. R. 40 (H.L.), Viscount Simon L.C. stated at 54: "This allowing of evidence of a prisoner's good character to be given has grown from a desire to administer this part of our law with mercy as far as possible. It has sprung up from the time when the law was, according to the common estimation of mankind, severer than it should have been."


28 Supra, note 8 at 491 (U.S.); 226 (S.Ct.) per Rutledge J. dissenting (Murphy J. concurring).


30 R. v. Rowton, supra, note 20 at 1502 (E.R.); 551 (All E.R. Rep.).
the accused on the basis that he is a man of criminal character or reputation. However, as in the case of evidence of good character, evidence of bad character should be limited to a trait of character relevant to the charge being tried. But, “if a prisoner put his character in issue, he puts his whole character in issue, not such parts as may be convenient to him, leaving out the inconvenient parts.”

Other arguments used to justify the admission of character reply evidence are first, that it is not the accused's prior conduct or character in fact which is put in issue, but rather his reputation, and second, the accused could have avoided the evidence of bad reputation by not calling witnesses to testify as to his good reputation.

By leading evidence of good character, the accused runs the risk that the prosecution will adduce evidence of prior convictions. Section 593 of the Criminal Code of Canada provides:

Where, at a trial, the accused adduces evidence of his good character the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

Moreover, there is no limitation requiring that the conviction be relevant to the character trait under consideration. This follows from the principle of the indivisibility of the accused's character. However, evidence of good character in the form of personal opinion, rather than general reputation, does not activate the section.

In addition, witnesses testifying as to the accused's good character may be asked questions with respect to his prior convictions and arrests. Cross states:

When dealing with the position at common law, successive editions of Archbold have contained a statement to the following effect:

If the defendant himself endeavours to establish a good character, either by calling witnesses himself, cross-examining the witnesses for the prosecution, or by himself giving evidence to that effect, the prosecution is at liberty, in most cases, to prove his previous convictions.

Although originally based on cases turning on special statutes this passage was approved by a dictum in R. v. Redd, and, in the absence of any judicial expression of doubt on the subject, it may be assumed that any character witness in any criminal proceedings may be asked about a previous conviction of the

32 "... for it is not the man that he is, but the name that he has which is put in issue." Supra, note 8 at 479 (U.S.); 220 (S.Ct.), per Jackson J. delivering the opinion of the U.S. Supreme Court.
34 This principle was not unknown at common law, see text, infra, note 38. As well, the accused when testifying can be questioned as to prior convictions pursuant to section 12 of the Canada Evidence Act. However, such evidence when adduced, can only be used in assessing the accused's credibility as distinguished from character to prove conduct on a particular occasion.
37 [1923] 1 K.B. 104.
accused, and, as a matter of strict law, the accused's previous convictions may, it seems, be proved in rebuttal.\textsuperscript{38}

Again, the prior convictions and arrests need not relate to the charge under investigation.\textsuperscript{39}

The theory which allows cross-examination with respect to arrests is based on the fact that character evidence by way of reputation is a variety of hearsay; therefore, the accused's good character witnesses should be subject to cross-examination as to the contents of the hearsay on which they base their conclusions. One would expect character witnesses, who truly know the accused's reputation in the community, to have heard about an arrest. It is a matter that could be expected to affect reputation. Therefore, according to the theory, the questioning of character witnesses about prior arrests of the accused is permissible, not only to test the reputation testified to, but also to test the qualifications of the witness to testify to the opinion of the community. In the Michelson case, it was stated:

Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans.

A character witness may be cross-examined as to an arrest whether or not it culminated in a conviction, according to the overwhelming weight of authority. This rule is sometimes confused with that which prohibits cross-examination to credibility by asking a witness whether he himself has been arrested.

Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.

Arrest without more may nevertheless impair or cloud one's reputation. False arrest may do that. Even to be acquitted may damage one's good name if the community receives the verdict with a wink and chooses to remember defendant as one who ought to have been convicted. A conviction, on the other hand, may be accepted as a misfortune or an injustice, and even enhance the standing of one who mends his ways and lives it down. Reputation is the net balance of so many debits and credits that the law does not attach the finality to a conviction, when the issue is reputation, that is given to it when the issue is the credibility of the convict.\textsuperscript{40}

The Court then went on to reject what was said to be the Illinois Rule, which limits questions about arrests to closely similar, if not identical, charges.

\textsuperscript{38} Cross, \textit{supra}, note 27 at 349.

\textsuperscript{39} \textit{Id.} at 349. Cross cites \textit{R. v. Winfield, supra}, note 31 at 165 (All E.R.) for this proposition, stating that the Court of Criminal Appeal was clearly of this opinion. Humphreys J. expressed approval of the cross-examination because, "[t]here is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half." However, Cross, at 349, note 7, raises the question whether the cross-examination in question may have been of Winfield himself, in which case different considerations would apply.

\textsuperscript{40} \textit{Supra}, note 8 at 479-80, 482-83 (U.S.); 220, 221-22 (S.Ct.) per Jackson J.
The good character that the defendant sought to establish dealt with “honesty and truthfulness” and “being a law-abiding citizen,” which was broader than the charge of bribing a federal officer. The character witnesses had been cross-examined respecting a twenty year old conviction for violation of trademark law and an even older arrest for receiving stolen goods. It was pointed out that the crimes of bribing and receiving proceed from the same defects of character which the character witnesses said the defendant did not exhibit. The Court held:

It is not only by comparison with the crime on trial but by comparison with the reputation asserted that a court may judge whether the prior arrest should be made the subject of inquiry. By this test the inquiry was permissible. It was proper cross-examination because reports of his arrest for receiving stolen goods, if admitted, would tend to weaken the assertion that he was known as an honest and law-abiding citizen. The cross-examination may take in as much ground as the testimony it is designed to verify.  

However, the court did point out that the trial judge should exercise a discretion to exclude or control such evidence, in order to prevent the true issues from being obscured and confused. The residual discretion in a trial judge in Canada may no longer be that wide.  

In England, subsection 1(f) of The Criminal Evidence Act, 1898, provides that an accused person called as a witness cannot be asked or be required to answer any question tending to show that he has committed or has been convicted or charged with any offence, or that he is of bad character, unless, (1) the offence is admissible to show that he is guilty of the offence wherewith he is then charged, or (2) he has asked questions of prosecution witnesses to establish his own good character, or has given evidence of his good character, or his defence involves imputations on the character of the prosecutor or the witnesses for the prosecution, or (3) he has given evidence against any other person charged with the same offence. Therefore, adducing evidence of good character allows the prosecution to question the accused, if he testifies, as to his prior convictions. In addition, evidence of the accused’s good character allows the prosecution to call character evidence in rebuttal. However, the accused opens the door to the prosecution’s evidence of bad reputation only if he adduces evidence as to his own character, but not if he questions the prosecution witnesses as to their criminal records so as to show that they are unreliable. Cross further points out that cross-examination of the accused under The Criminal Evidence Act, 1898, is very restricted:

Counsel for the prosecution is repeatedly admonished not to drive the accused

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41 Id. at 483-84 (U.S.); 222 (S.Ct.).
42 In The Queen v. Wray, [1970] 4 C.C.C. 1 at 17; 11 D.L.R. (3d) 673 at 690; [1971] S.C.R. 272 at 293, it was said that the trial judge's power to exclude evidence is limited to that which is “gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling.”
44 Cross, supra, note 27 at 347.
45 R. v. Butterwasser, [1948] 1 K.B. 4; [1947] 2 All E.R. 415. See id. at 347 where Cross points out that if he had given evidence after cross-examining the Crown witnesses on their character, he would have exposed himself to questions about his past, pursuant to The Criminal Evidence Act, 1898, supra, note 43.
into throwing his shield away. Even if this was not, in any sense, the purpose of the cross-examination, it may be held to have been improper because the crucial question is its effect upon the minds of the jury, not the purpose with which it was administered. A further safeguard is provided by the requirements that Crown counsel should obtain the approval of the judge before embarking on cross-examination under s. 1(f).

The principal Evidence Code provision dealing with character in relation to disposition is section 17(1):

In criminal proceedings evidence tendered by the prosecution of a trait of character of the accused that is relevant solely to the disposition of the accused to act or fail to act in a particular manner is inadmissible, unless the accused has offered evidence relevant to a trait of his character or to a trait of the character of the victim of the offence.

This provision maintains the character evidence rule in criminal cases established by R. v. Rowton. However, it contains the added feature of allowing the prosecution to lead evidence of bad character where the accused attacks the character of the victim. Yet, the residual discretion given to the trial judge by section 5 of the proposed Evidence Code to exclude evidence, is much wider than the formulation handed down in The Queen v. Wray, and may, therefore, allow bad character evidence to be limited to the character trait in issue and thus, do away with the indivisibility-of-character principle. Section 5 should also allow the trial judge to limit cross-examination of the accused's good character witnesses, particularly where they are tested as to their knowledge of rumour and mere arrests without conviction. Further, this residual discretion to exclude evidence would be even more important in relation to character evidence than it is now because section 20 of the proposed Evidence Code would allow the prosecution to adduce bad character evidence in the form of opinion and specific instances of conduct as well as reputation. Therefore, any good character evidence obtained by the accused through cross-examination of Crown witnesses or adduced by his own witnesses would open the door to a wide variety of bad character evidence, subject only to whatever limitation section 5 provided.

In England, the Criminal Law Revision Committee in its Eleventh Report, Evidence (General) of June 1972, recommended a provision of similar effect, except that it does not refer to a trait of character of the victim. In addition, it does allow a co-accused to adduce evidence of the accused's bad "disposition or reputation" where the accused adduces good

49 Cross, supra, note 27 at 359.
51 Supra, note 1, section 5 states: "Evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusing the issues, misleading the jury, or undue consumption of time."
52 Supra, note 42.
53 Supra, note 16, section 7 of the Draft Criminal Evidence Bill at 178.
character evidence. Section 17 of the proposed Evidence Code is silent in regard to the co-accused. However, the Evidence Code is, in general, inclusive, and only in particular exclusive; therefore, its main theme should prevail: "All evidence is admissible except as provided in this Code or any other Act." Also, the Criminal Law Revision Committee recommended a provision similar to section 593 of the Criminal Code rather than leaving the same matter dependent upon the dictum in R. v. Redd.

Rule 404 of the U.S. Federal Rules of Evidence is very similar to section 17, except that in addition, it deals more specifically with the character trait of peacefulness of the victim in homicide cases:

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait or peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609 [credibility].

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, of absence of mistake or accident.

The Evidence Code deals more specifically with the character of the victim of a sexual offence than do the U.S. Federal Rules. Section 17(2) states:

In criminal proceedings, evidence of a trait of the character of the victim of a sexual offence that is relevant solely to the disposition of the victim to act or fail to act in a particular manner is inadmissible, unless the judge at the hearing in camera is satisfied that the admission of such evidence is necessary for a fair determination of the issue of guilt or innocence.

This provision is similar to the present section 142 of the Criminal Code, unless there is a substantial difference resulting from the phraseology: "just determination of an issue of fact in the proceedings, including the credibility of the complainant," as opposed to section 17's, "fair determination."

The California Evidence Code provisions, sections 1102 and 1103, are similar in effect to those of the Federal Rules and the proposed Vermont Rules (Rule 404). However, Rule 47 of the Uniform Rules of Evidence, 1953, would also require rejection of evidence of specific behaviour to prove a character trait, except for evidence of conviction of a crime.

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55 Supra, note 1, section 4(1).
56 Supra, note 16, section 7(2).
57 Supra, note 37 and accompanying text.
Generally, codifications do not define what is character evidence or what type of evidence puts character in issue. Is character put in issue only when a witness is asked the standard question, “Do you know the reputation of Mr. Smith for honesty in business matters in the community where he lives?” Or, almost invariably, counsel will lead each of his witnesses through a brief biographical sketch, including details about family life and work record; in addition, witnesses are instructed as to appropriate dress for court. Although these are matters intended to give the trier of fact some indication of the moral flavour, respectability and reliability of the witness, it would be very unusual, in Canada, if such practices were understood to put character in issue. However, in England, the Criminal Law Revision Committee was concerned that such devices had attained a degree of sophistication that enabled good character evidence to be adduced without putting character in issue. The Committee members referred to this matter as “hinting indirectly that the accused is a respectable person.” Therefore, they recommended that in lieu of the phrase, “has personally or by his advocate asked questions of witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character,” which appears in section 1(f)(ii) of The Criminal Evidence Act, 1898, that the phrase, “personally or by his advocate asked questions of any witness with a view to establishing directly or by implication that the accused is generally or in a particular respect a person of good disposition or reputation,” be substituted. The Committee’s reasons are worth quoting in full:

135. There is an important question as to what should count as claiming to be of ‘good character’ for the purpose of the rule. At present a person is treated as setting up his good character not only when he expressly claims this but also when he tries to achieve the same effect indirectly by evidence suggesting that he is a respectable person. For example in Coulman60 Swift, J., during the argument in the Court of Criminal Appeal, gave as an instance of setting up character that of asking a man ‘whether he is a married man with a family, in regular work, and has a wife and three children’. But the ingenuity of modern criminals has developed a practice of giving the impression that the criminal is a respectable person while avoiding taking any course which clearly enables the court to hold that the accused ‘has personally or by his advocate asked questions of witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character’ within the meaning of paragraph (f)(ii). An example is provided by a case which was tried at the Central Criminal Court about three years ago. One of two men charged with conspiracy to rob (both had long criminal records) went into the witness box wearing a dark suit and looking as if he were a respectable business man. When asked by his counsel when and where he met his co-accused, he said: ‘About eighteen months ago at my golf club. I was looking for a game. The secretary introduced us’. In another case the defence contrived to introduce evidence suggesting that the accused, who lived on crime, was negotiating for the purchase of a substantial property. We think that it would be useful to strengthen the law by applying the rule to the introduction of evidence ‘with a view to establishing generally or in a particular respect a person of good disposition or reputation’.61

In contrast, section 17 of the proposed Evidence Code is much more
character evidence relevant to a trait of his character.” This is the course to be preferred, thus leaving to the trial judge greater latitude to determine, from all the circumstances, including the context of the evidence and the demeanour of the witnesses, whether evidence of good character has been led and whether character has been put in issue, not only by the implication of the speaker, but also by the inference of the listener.

4. Psychiatric Evidence of Propensity or Disposition

Psychiatric evidence, as demonstrated by the recent cases, is an area where the rules respecting character evidence conflict with and must be reconciled with those respecting expert opinion evidence, and where the distinction between character evidence as to disposition or propensity, and character as to credibility, becomes blurred. For example, the principal rule of character evidence is that such evidence must be given in the form of general reputation in the community and not in the form of individual opinion or specific instances of conduct. But psychiatric evidence, in dealing with traits of character, must be in the form of individual opinion and must reveal specific instances of conduct in order to provide a foundation for that opinion. When the psychiatrist supports the accused’s testimony by stating that his psychological testing reveals a lack of intent, or a lack of capacity to form the necessary intent, the question arises whether the psychiatrist is giving an opinion on the accused’s capacity for veracity, i.e., credibility, or upon his disposition to commit a particular act.

Therefore, it is not unreasonable to expect that psychiatric evidence will develop in the future into a separate branch of the law of evidence, rather than make its reconciliation with any single part of it. Psychiatric evidence will develop its own rules by reaching a partial reconciliation with the rules of opinion evidence, with the rules of character evidence to show disposition, and with the rules of character evidence as to credibility. However, at present psychiatric evidence is still struggling with these three branches of the law of evidence as though it were intended that it become the exclusive possession of one of them rather than establish its own independent domain, which is, in the opinion of this author, more appropriate. Therefore, to understand the present position of psychiatric evidence in relation to psychological propensity, it is necessary to consider its position in relation to all three of these areas.

62 The distinction between character evidence in proof of conduct on a particular occasion and character evidence in relation to credibility is usually made by use of the terms, “character as to disposition or propensity,” and “character as to credibility.” This terminology is confusing in that one can have a disposition or propensity to lie, in which case the character evidence relates to credibility. The Evidence Code uses the heading “Character and Disposition” in relation to character going to conduct (sections 17-20) and within section 17 it uses the phrase “disposition . . . to act or fail to act in a particular manner,” in relation to the term “character.” Therefore, because of this terminology and the previous practice, “character as to disposition” should be understood to refer to proof of conduct on a particular occasion as distinguished from “character as to credibility.”
The following issues are the main concerns of the law of expert opinion evidence.

(a) The Ultimate Issue Doctrine

Expert opinion evidence will not be received on the very issue the jury has to decide; such evidence is said to usurp the function of the jury. The ultimate issue doctrine is quickly losing its force as a rule of evidence, particularly in the area of psychiatric testimony. It is coming to be regarded as having been used as a convenient means of excluding suspect evidence and of compensating a fear that juries would accept expert opinion blindly.

Section 69 of the proposed Evidence Code follows the modern trend:

Testimony in the form of an opinion or inference otherwise admissible may be

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63 In R. v. Fisher, [1961] O.W.N. 94; 34 C.R. 320 (Ont. C.A.) aff'd. [1961] S.C.R. 535; 35 C.R. 107; 130 C.C.C. 1 (S.C.C.), a murder trial involving the testimony of psychiatrists, Aylesworth J.A. of the Ontario Court of Appeal, delivering the opinion of the majority, stated at 341 (C.R.) that, "[i]n many instances opinion evidence is received upon the very issue the Court has to decide . . . ." In R. v. Lupien, [1970] S.C.R. 263; [1970] 2 C.C.C. 193; 9 C.R.N.S. 165, on a charge of attempting to commit an act of gross indecency, the trial judge refused to admit evidence of a psychiatrist that the accused had a strong aversion to acts of homosexuality and would not have knowingly engaged in such acts. In the Supreme Court of Canada, three of five justices, (Ritchie, Spence, and Hall J.) were against treating the ultimate issue doctrine as a rule of evidence. The doctrine plays no part in the criteria established for the admissibility of psychiatric opinion evidence by the Ontario Court of Appeal in the subsequent cases of R. v. McMillan (1975), 29 C.R.N.S. 191; 23 C.C.C. (2d) 160; 7 O.R. (2d) 750 (Ont. C.A.) aff'd (1977), 73 D.L.R. (3d) 759 (S.C.C.), and R. v. Robertson (1975), 29 C.R.N.S. 141; 21 C.C.C. (2d) 385 (Ont. C.A.). However, the same court seems to be willing to revive it for special occasions, such as the new field of polygraphy, see R. v. Phillion (1975), 20 C.C.C. (2d) 191; 53 D.L.R. (3d) 319; 5 O.R. (2d) 656 (Ont. C.A.) aff'd (1977), 37 C.R.N.S. 361; 33 C.C.C. (2d) 535 (S.C.C.).

64 Cross, supra, note 27 at 389. Philip C. Stenning, Expert Evidence—The Hearsay Rule and the 'Ultimate Issue' Doctrine (1970), 9 C.R.N.S. 181. The Ontario Law Reform Commission's Report on the Law of Evidence, supra, note 5 at 153 first points out that no such rule was recognized in decisions in the first half of the last century, and then argues that the rule is illogical in that all testimony relates to an ultimate issue and therefore, "In theory, no expert, bound by the rules of relevancy and materiality would be permitted to testify to anything under a broad formulation of the ultimate issue rule." (at 155). However, the Ontario Court of Appeal in R. v. Phillion, id., was not prepared to rule admissible, evidence of a polygraph examiner that the accused truthfully answered questions during a polygraph test as to whether he had killed the victim. The Court held this evidence was properly rejected because, "the witness was being asked to express his opinion directly, that the accused had not committed the act constituting the offence charged." (at 192 (C.C.C.); 320 (D.L.R.); 657 (O.R.)). However, the Supreme Court in Phillion v. The Queen, id., made no similar reference to testimony prohibited because it deals directly with the ultimate issue for the trier of fact, but instead dismissed the appeal because the polygraph examiner had neither the qualifications nor the opportunity to form a mature opinion of the propensity of the man tested, either as to truthfulness or otherwise, and because the statements made to him by the accused were self-serving. The reconciliation of Phillion with Lupien is discussed infra at p. 465. McCormick, On Evidence, supra, note 21, commenting on the trend in the American cases to abandon or reject the ultimate issue doctrine, states at 27: "This change in judicial opinion has resulted from the fact that the rule excluding opinion on ultimate facts in issue is unduly restrictive, pregnant with close questions of application and the possibility of misapplication, and often unfairly obstructive to the presentation of a party's case, to say nothing concerning the illogic of the idea that these opinions usurp the function of the jury."
received in evidence notwithstanding that it embraces an ultimate issue to be
decided by the trier of fact.

It is almost an exact copy of Rule 704 of the U.S. Federal Rules of Evidence:

Opinion on Ultimate Issue. Testimony in the form of an opinion or inference
otherwise admissible is not objectionable because it embraces an ultimate issue to
be decided by the trier of fact.

The Ontario Law Reform Commission, in its Report on the Law of Evi-
dence, recommends a similar provision.\(^6\) In addition, the English Civil Ev-
dence Act 1972, section 3(1), allows expert evidence, “on any relevant
matter on which he is qualified to give expert evidence;” this provision has
given effect to a recommendation of the English Law Reform Committee in
1970.\(^6\) A similar recommendation was made in respect of criminal proceed-
ings by the Criminal Law Revision Committee in 1972.\(^6\)

(b) The Common Knowledge or ‘Normal Facts’ Rule

The subject matter of the inquiry must be such that ordinary people
are unlikely to form a correct judgment about it if unassisted by persons
with special knowledge. If the issue is held to concern a matter of common
knowledge, expert evidence will not be received on that issue;\(^6\) the expert
testimony is said to be superfluous,\(^6\) or unnecessary. The ‘normal facts’ rule
has much vitality; in fact, in relation to psychiatric and psychological testing,
it is increasing.\(^7\) The main concerns used to justify the rule are the fear

\(^6\) Section 15 of the Draft Evidence Act of the Ontario Report, supra, note 5 at
256, states: “Where a witness in a proceeding is qualified to give opinion evidence, his
evidence in the form of opinions or inferences is not made inadmissible because it
embraces an ultimate issue of fact.”

\(^6\) Seventeenth Report of the Law Reform Committee, Evidence of Opinion and

\(^6\) Supra, note 16 at 203. Section 43(1) of the Draft Criminal Evidence Bill of the
Report puts forward substantially the same provision that was enacted in the English
Civil Evidence Act of 1972.

\(^6\) For example, in R. v. Chard (1971), 56 Cr. App. R. 268, it was held that the
intent of the ordinary man is not a proper subject for receiving expert opinion evidence,
for such is a matter within the realm of common knowledge. See also R. v. Robertson,
supra note 63 and R. v. French (1977), 37 C.C.C. (2d) 201 (Ont. C.A.) discussed
infra, note 70.

\(^6\) The common knowledge, normal facts rule is sometimes referred to as the super-
fluous rule. However, a similar designation is given to the rule which prevents expert
opinion evidence being received on questions of law or mixed questions of law and
fact. See also the discussion infra, note 75 and accompanying text.

\(^6\) In R. v. Robertson, supra, note 63, the Ontario Court of Appeal held that a
crime calling for a mere disposition for violence was not so uncommon as to allow for
psychiatric evidence even though the evidence showed that the murder in question was
committed by acts of great brutality. In R. v. French, supra, note 68, the same court
upheld the trial judge’s exclusion of psychiatric evidence that a Crown witness (to whom
the accused allegedly confessed murder), had a character disorder such that she was
quite capable of lying under oath. The psychiatrist agreed with the suggestion that a
layman could come to the same conclusion as he did from observing the witness, which
agreement foreclosed admissibility. The Court feared the jury would be overwhelmed
by the expert and deviate from its task of assessing credibility on the basis of its own
observations, and thus there would be a usurpation of the jury’s function. See also R. v.
Dubois (1976), 30 C.C.C. (2d) 412 (Ont. C.A.). However, the current strength of the
that the jury will be overwhelmed by the testimony of the expert, and will, therefore, not make its own assessments of fact. Secondly, there is the concern that the jury's function will be usurped, which seems to be expressing the same concern in different ways.\(^7\)

The Evidence Code, instead of requiring a determination of what matters lie within common knowledge, merely requires that expert opinion evidence, "assist the trier of fact." Section 70 states:

When scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine an issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

This test should be much easier to apply than the 'normal facts' rule which forces an inappropriate extension of the power of judicial notice in order to determine which matters are of common knowledge. On the other hand, it may lessen the power of the judge to keep from juries suspect expert opinion evidence where it is feared such evidence may unduly influence them.

Section 70 of the proposed Evidence Code is taken almost verbatim from Rule 702 of the U.S. Federal Rules of Evidence. The provision is consistent with the present trend of law reformers to rely more upon the increasing sophistication of juries rather than upon exclusionary rules which keep potentially dangerous information from them. However, the Ontario and British law reform reports propose no amendments to the existing law on admissibility.\(^7\)

(c) Questions of Law

Opinion evidence will not be received on questions of law or on mixed questions of law and fact.\(^7\) It is argued that expressions of opinion on such

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\(^7\) For example, see R. v. Fisher, supra, note 63.

\(^7\) The Ontario Law Reform Commission's Report on the Law of Evidence, supra, note 5, does not deal with the 'normal facts' rule in its recommendations. The Criminal Law Revision Committee's Eleventh Report, Evidence (General), supra, note 16, recommends a provision (section 43(4)) taken from the Civil Evidence Act 1972, section 3(4), which expressly preserves "any rule of law as to the topics on which expert evidence is or is not admissible."

\(^7\) For recent decisions on the rule see R. v. Neil, [1957] S.C.R. 685; 26 C.R. 281; 111 C.C.C. 1; 11 D.L.R. (2d) 545, where a psychiatrist was asked to deal with the Criminal Code definition of "criminal sexual psychopath." See also R. v. Fisher, supra, note 63, where a psychiatrist was allowed to testify as to the accused's capacity to form the intent to cause death and capacity to form the intent to cause bodily harm that he knew was likely to cause death.
Character Evidence

questions are superfluous, since a jury which has been properly instructed is as capable of applying the law as is the witness. Therefore, this rule and the ultimate issue doctrine have a similar rationale—to avoid superfluity; however, they serve different purposes. The former avoids a duplication of the judge’s rulings on the law, whereas the latter avoids a duplication of the jury’s findings of fact and the application of law to fact.

This rule can be justified in that it forces expert opinion evidence to be given in a form which makes its relevance to the issues more apparent. Therefore, it is more useful to the jury. For example, it is not nearly as helpful to the trier of fact to have a psychiatrist testify that the accused acted out of insanity, as to have him testify whether the accused appreciated the nature and quality of his act or knew that it was wrong.

(d) The Need for the Hypothetical Question

Until recently, it was common practice to elicit expert opinion evidence on the basis of a hypothetical question. The question stated certain facts which the witness was asked to assume were true for purposes of providing a foundation for the opinion sought to be elicited. This hypothetical form served two purposes; first, it indicated upon which facts the opinion was based; and second, it avoided having the expert make a decision on which witnesses or evidence were to be believed. However, it has now been decided that the failure of counsel to put such questions in hypothetical form does not, of itself, make the answers inadmissible.

In the United States, the hypothetical question has been greatly criticised as providing too great an opportunity for summing-up in the middle of the case, as being overly time-consuming, and as encouraging partisan bias by improperly restricting the witness so that the full nature of his opinion is not revealed. If these criticisms apply in Canada as well, the hypothetical form of questioning should be put aside. But the court should have the power to require that the foundation facts upon which an opinion is based be articulated by the witness. Therefore, the proposed Evidence Code provides:

Section 68: The judge may require that a witness be examined with respect to the facts upon which he is relying before giving evidence in the form of an opinion or inference.

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74 Therefore, this rule is sometimes referred to as the superfluous rule, as is the ultimate issue doctrine.

76 The Ontario Law Reform Commission’s Report, supra, note 5 at 155, suggests the one rule should be dissolved into the other: “were the ultimate issue rule narrowly interpreted to prohibit only expressions of opinion on issues which are mixed questions of fact and law, as in the Wright and Neil cases, it would be generally justifiable on the general basis that opinion testimony ought to be received only when is necessary and helpful.”

78 See R. v. Wright (1821), 168 E.R. 895.

77 Bleta v. The Queen, [1964] S.C.R. 561; 48 D.L.R. (2d) 139; [1965] 1 C.C.C. 1. However, it was also held that the trial judge could require the hypothetical form in order to make clear on what evidence the expert opinion is based.

78 For example, see the comments to Federal Rule 705 made by the Advisory Committee on Evidence which prepared the Proposed Federal Rules on Evidence (The Supreme Court Draft), as reproduced in, Federal Rules of Evidence for United States Courts and Magistrates (St. Paul: West Publishing Co., 1975).
However, the Evidence Code also contains a marginal note "Hypothetical questions," which accompanies the following provision:

Section 71: An expert may base an opinion or inference on any of the following:

(c) facts admitted or to be admitted in evidence in the proceedings and assumed by the expert to be true for the purpose of giving the opinion or making the inference.

(e) Strict Proof of Foundation Facts

One theory holds that since expert opinion evidence is completely dependent for its reliability on the foundation facts upon which it is based, those facts should be strictly proved by admissible evidence.\(^7\) An opposing theory holds that the foundation for the reliability of expert opinion evidence lies not in the strict proof of the foundation facts, but in the qualification of the witness as a true expert testifying in a valid field of expertise and solely within his field of expertise. The expert opinion is itself a new evidentiary fact. Because the witness qualifies as an expert, his skill and training are to be relied upon to sort out those pieces of information which are reliable, rather than the sorting-out being done by strict proof of foundation facts. The expert bases his opinion not upon such strictly proven facts, but rather upon the types of information obtained by the methods normally used by those in his field.

It is now well established in the case law that the opinion of an expert can be adduced without strict proof of the foundation facts.\(^8\) The proposed Evidence Code would allow similar latitude. Section 71 states:

An expert witness may base an opinion or inference on any of the following:

(a) facts perceived by him;
(b) facts made known to him before the hearing, even if such facts are not admitted or admissible in evidence, so long as they are of a kind reasonably relied upon by experts in the field in forming opinions or inferences on the subject; and
(c) facts admitted or to be admitted in evidence in the proceedings and assumed by the expert to be true for the purpose of giving the opinion or making the inference.\(^9\)

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\(^7\) In *R. v. Turner*, [1975] 1 All E.R. 70 (C.A. Crim. Div.), psychiatric evidence was called on a defence of provocation to murder, to show why the appellant was likely to be provoked and to support the credibility of his version of what had happened. Lawton L.J., delivering the judgment of the Court, stated at 73:

He could have said that all the facts on which the psychiatrist based his opinion were hearsay save for those which he observed for himself during his examination of the appellant such as his appearance of depression and his becoming emotional when discussing the deceased girl and his own family. It is not for this court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts on which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked.


\(^9\) *Supra*, note 2. Rule 703 is very similar, but to the first two paragraphs only.
However, under the present case law, the expert opinion may be excluded in a situation where the accused has chosen not to testify and the foundation facts consist of self-serving statements of the accused. In *R. v. Rosik*, the psychiatrist's opinion that the accused lacked the capacity to form the necessary intent was based on out-of-court statements of the accused that he had consumed librium and whiskey on the day of the killing. The Ontario Court of Appeal split equally on the issue of whether the psychiatrist's opinion was inadmissible because it was based on hearsay in the absence of the accused's testimony. In *Phillion v. The Queen*, the evidence of a polygraph examiner as to the truthfulness of statements made by the accused during a polygraph test, that he did not kill the victim, was excluded. The Supreme Court of Canada upheld this ruling, giving as one of its reasons the fact that the opinion evidence was based on "self-serving, second hand evidence tendered in proof of its truth on behalf of an accused who did not see fit to testify..." In both of these cases the expert was asked to testify, not upon a character trait going to disposition, (i.e., not upon character going to prove conduct), but rather upon the credibility of the accused's out-of-court statements. The same could be said of *R. v. Dietrich*, wherein similar psychiatric testimony was allowed. However, in *Dietrich*, the accused testified. In both *Dietrich* and *Phillion*, the expert opinion evidence was tendered to explain away out-of-court confessions. For that purpose it was admissible. But in *Phillion* it was said to offend the rule against self-serving statements because the accused did not testify. The Court in *R. v. Lupien* also required the psychiatrist to assess the veracity of out-of-court statements by the accused. But in that case, the psychiatrist was testifying as to a character trait or disposition (homosexuality) in relation to conduct on a particular occasion, and not simply as to the credibility of out-of-court statements; in addition, the accused testified.

The cases analyzed thus far suggest that with respect to the character of the accused, distinctions can be drawn between expert opinion evidence as to disposition going to conduct on the one hand, and credibility on the other, and between those cases where the accused does, or does not testify. These distinctions give rise to an important exception to the principle that expert opinion evidence can be adduced without strict proof of the founda-
tion facts. The parameters of this exception should be further clarified; is it operable with respect to both distinctions or merely with respect to the distinction as to whether the accused testifies? Similarly, is it applicable regardless of whether the issue is identity or intent?

Now that the main rules concerning character evidence and expert opinion evidence have been set out, an attempt can be made to formulate rules of psychiatric evidence respecting propensity or disposition to prove conduct on a particular occasion, by examining the interaction between these two bodies of rules.

**Character Evidence**

1. Evidence of the accused's bad character cannot be used by the prosecution to establish guilt.

2. As an exception to the general rule against character evidence to prove conduct, the accused can adduce evidence of his own good character.

3. Where the accused adduces evidence of his own good character, the prosecution may adduce evidence of his bad character in reply.

4. Evidence of character must be in the form of general reputation in the community and not evidence of individual opinion or of specific instances of conduct.

5. Character witnesses must qualify by showing such acquaintance with the accused and the community in which he has lived so as to be able to speak with authority as to the manner in which he is generally regarded.

**Expert Opinion Evidence**

1. The ultimate issue doctrine: expert opinion evidence will not be received on the very issue the jury has to decide, for such is said to usurp the function of the jury.

2. The 'normal facts' rule: the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special knowledge; expert evidence will not be received in regard to a matter within the realm of common knowledge.

3. Questions of law: opinion evidence will not be received on questions of law or on mixed questions of law and fact.

4. The hypothetical question: expert opinion evidence need not be elicited by means of a hypothetical question, however, the trial judge can require this form of questioning be used in order to make clear what evidence the opinion elicited is based upon.

5. Proof of foundation facts: the opinion of an expert can be adduced without strict proof of the foundation facts used in formulating that opinion.

Neither group, nor both of these groups of rules together, will adequately explain the admissibility of psychiatric evidence. A separate body of rules is necessary. For example, the analysis of the interaction of these two groups of rules has shown a need for the following modification to the ultimate issue rule (or more appropriately, an exception to the present waning importance of the ultimate issue rule) in relation to psychiatric evidence:

Psychiatric opinion evidence adduced by the defence may be given on the ultimate issue or on any issue for the jury, except where the main thrust of such evidence deals with the credibility of out-of-court statements of the accused, and the accused has not testified.88

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88 Author's own formulation.
Next, one must consider psychiatric evidence in relation to conduct on a particular occasion as distinguished from credibility.

The leading decision on psychiatric evidence for propensity or disposition to show conduct on a particular occasion (or disprove conduct on a particular occasion) in Canada is *McMillan v. The Queen.* The Supreme Court of Canada adopted the reasons of Martin J.A. who delivered the judgment of the Ontario Court of Appeal. Mr. Justice Martin first resolves the conflict between the character evidence rule which requires that such evidence be in the form of general reputation in the community, and the opinion evidence rule, which allows a witness, properly qualified, to give his own individual expert opinion, instead of mere general reputation evidence:

One of the exceptions to the general rule that the character of the accused, in the sense of disposition, when admissible, can only be evidenced by general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.

The psychiatrist is not bound by the general reputation rule if his evidence relates to a crime which the evidence indicates was committed by an abnormal group. This 'abnormal group' element also satisfies the 'normal facts' rule of the law of opinion evidence, because laymen are unlikely to have knowledge of such matters and reach a correct decision in regard to them. In addition, the 'abnormal group' concept helps to satisfy the rule of opinion evidence that the expert may testify as an expert only on subjects strictly within his field. The fact that the expert is properly within his field in dealing with a particular subject also helps to satisfy the 'normal facts' rule.

Martin J.A. then goes on to hold that if, on the other hand, the evidence does not support the existence of an 'abnormal group crime,' then defence psychiatric evidence as to the accused's particular disposition or lack of a particular disposition, amounts to nothing more than good character evidence. Such psychiatric opinion evidence is not admissible because the law of character evidence requires that good character evidence take the form of general reputation and not expert opinion:

Where the crime under consideration does not have features which indicate that the perpetrator was a member of an abnormal group, psychiatric evidence that the accused has a normal mental makeup but does not have a disposition for violence or dishonesty or other relevant character traits frequently found in ordinary people is inadmissible.

While such evidence is relevant as bearing on the probability of the accused having committed the crime, the psychiatric evidence proffered in such circumstances really amounts to an attempt to introduce evidence of the accused's good character, as a normal person, through a psychiatrist. Such evidence does not fall within the proper sphere of expert evidence and is subject to the ordinary rule applicable to character evidence which, in general, requires the character of the accused to be evidenced by proof of general reputation.

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91 *Id.* at 201 (C.R.N.S.); 169 (C.C.C.); 759 (O.R.) (Ont. C.A.).
92 *Id.* at 206 (C.R.N.S.); 174 (C.C.C.); 764 (O.R.) (Ont. C.A.).
93 *Id.* at 207 (C.R.N.S.); 175 (C.C.C.); 765 (O.R.) (Ont. C.A.).
Therefore, it can be said that where the accused wishes to lead evidence of his own good character, he cannot do so by adducing psychiatric opinion evidence.

The next issue taken from McMillan concerns the character of third parties. Can the accused lead psychiatric opinion evidence as to the disposition of a third party in order to show that it was more probable that the third party committed the crime? Is such evidence admissible only in relation to 'abnormal group crimes'? Can the accused lead psychiatric evidence to show that some third party is an 'abnormal group' person, even though the crime could have been committed by normal persons as well as 'abnormal group' persons? The distinction is between psychiatric evidence as to 'abnormal group' third parties in relation to 'abnormal group crimes,' and psychiatric evidence as to 'abnormal group' third parties in relation to crimes which are not exclusively 'abnormal group crimes.' If it is admissible, can the prosecution call psychiatric evidence in reply relating to the third party's disposition or to the accused's disposition?

In McMillan, the psychiatric evidence relating to an 'abnormal group' concerned the disposition of the wife of the accused as constituting a psychopathic personality disturbance. Therefore, it was proper expert evidence by a psychiatrist. But, was it rendered inadmissible by the rules of character evidence? This evidence was led by the defence to suggest that the wife of the accused may have been the perpetrator of the crime, the murderer of their child. The Crown argued that the injuries were not of such a character that they could only have been inflicted by a person with a special or abnormal propensity, and, therefore, psychiatric evidence of the wife's mental makeup was not admissible. Martin J.A. replied that although the crime in question was not one that could only be committed by a person with an abnormal propensity, it did not necessarily follow that psychiatric evidence as to Mrs. McMillan's disposition was, therefore, inadmissible. Such evidence might be admissible for another purpose, such as the probability of the accused, or another, having committed the offence.

Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:
(a) the evidence is relevant to some issue in the case;
(b) the evidence is not excluded by a policy rule;
(c) the evidence falls within the proper sphere of expert evidence.

One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime.

When the offence is of a kind that is committed only by members of an 'abnormal group,' for example, offences involving homosexuality, psychiatric evidence that the accused did or did not possess the distinguishing characteristics of that 'abnormal group' is relevant either to bring him within, or to exclude him from, the special class of which the perpetrator of the crime is a member. In order for psychiatric evidence to be relevant for that purpose, the offence must be one which indicates that it was committed by a person with an abnormal propensity or disposition which stamps him as a member of a special and extraordinary class.

Psychiatric evidence with respect to the personality traits or disposition of the accused, or another, if it meets the three conditions of admissibility above set out, is also admissible, however, as bearing on the probability of the accused, or another, having committed the offence.
As I have already indicated, Mrs. McMillan's disposition was relevant, in the circumstances of this case, as bearing on the probability that the acts in question were committed by her rather than her husband. Since her personality traits were characteristic, indeed diagnostic, of the abnormal personality disturbance from which she suffered, their existence and description fell within the proper sphere of the psychiatrist. Moreover, there is no policy rule which required the exclusion of the evidence as to Mrs. McMillan's personality traits or disposition when tendered by the accused. All the conditions of the admissibility of such evidence have accordingly been met.\footnote{Id. at 205-07 (C.R.N.S.); 173-75 (C.C.C.); 763-65 (O.R.) (Ont. C.A.).}

Mrs. McMillan had testified, as a defence witness, that she did not know how the injuries in question occurred. As a result, the evidence of the defence psychiatrist that she had a psychopathic personality, and, therefore, might have committed the crime, raised the objection that the defence had impeached the credibility of its own witness.\footnote{The rule as to impeaching the credibility of one's own witness is to be distinguished from contradicting one's witness on a matter of fact. Witnesses called by the same party may contradict one another on various issues of fact without being held to have impeached each other's credibility. See Harper v. Griffiths, [1930] 2 D.L.R. 565 at 566; 64 O.L.R. 688 at 670 (Ont. C.A.); Cariboo Observer Ltd. v. Carson Truck Lines Ltd. and Tyrell (1961), 32 D.L.R. (2d) 36; 37 W.W.R. 209 (B.C.C.A.); R. v. Hutchinson (1904), 8 C.C.C. 485 (B.C.C.A.).}

It was conceded by the Crown, however, that if the evidence was admissible for another purpose, the fact of such impeachment did not require its exclusion. This principle provides a reconciliation between the character-credibility rule against impeaching one's own witness and the character-disposition rule, discussed by Martin J.A., which allows for evidence of disposition when it goes to identity.

Martin J.A. next turned to the question whether the Crown could adduce evidence of the accused's mental makeup if the evidence of Mrs. McMillan's mental makeup was admissible. His Lordship construed the psychiatric evidence of Mrs. McMillan's psychopathic propensity, plus the arguments based upon it, as amounting to an assertion that the accused was a person of normal mental makeup. Therefore, evidence of the accused's own psychopathic nature could be adduced by the Crown:

In those circumstances, Crown counsel was entitled to show, if he could, that there were two persons present in the house who were psychopaths, not one. Any other conclusion would permit an accused to present an entirely distorted picture to the jury. The respondent having introduced psychiatric evidence to show that it was more probable that his wife had caused the injuries to the child than that he had caused them, because he lacked her dangerous characteristics, lost his protection, in the circumstances of this case, against having his own mental makeup revealed to the jury.\footnote{R. v. McMillan, supra, note 63 at 209-10 (C.R.N.S.); 177-78 (C.C.C.); 767-68 (O.R.).}

One could argue from this statement, that the rule which allows the Crown to lead bad character evidence of disposition if the accused leads evidence of his own good character, is applicable if the accused leads bad character evidence as to a third party witness, even if it is his own witness.

Moreover, it may not be necessary to limit this principle to third parties...
who are witnesses, for the thrust of the defence evidence was simply that there was another person who had an opportunity, and a disposition, to commit the crime in question. The second principle that can be extracted from this statement is that where the accused leads evidence of good character in the form of expert opinion, the prosecution can similarly reply with opinion evidence, rather than evidence of general reputation.

However, must a co-accused similarly wait for the accused to "open the door" before leading evidence of the accused's psychopathic tendencies? This situation is similar to that in *McMillan*; Martin J.A., therefore, argued that the discussion in *Lowery v. The Queen*97 was relevant. The co-accused, in that case, King, called a psychologist who testified regarding the accused Lowery's psychopathic personality. The defence of each of the accused was that the other had committed the killing in question. Martin J.A. construed the admissibility of the evidence of the psychologist as being based upon the probability that one of the accused had committed the offence, although, he added: "the features of the offence in that case were sufficiently indicative of the possession of an abnormal propensity by the perpetrator that the expert evidence might have been relevant to the issue of identity as well."98 He then concluded:

Since in that case the evidence was offered by the accused King, it was not excluded by the policy rule which prevents the prosecution from introducing evidence to prove that the accused by reason of his criminal propensities is likely to have committed the crime charged.99

Guidance can be obtained from *McMillan* on one other issue in relation to character evidence; namely, must the prosecution wait until the accused puts his own character in issue before adducing bad character evidence in the form of psychiatric opinion? Some of the statements in Martin J.A.'s judgement would suggest that the Crown need not wait for good character evidence as a condition precedent to admissibility.100

Parallels can be drawn between psychiatric evidence and similar fact evidence, which is a variety of character evidence exempted from the rules which apply to character evidence because of its particular probative value. Similar fact evidence takes the form of specific instances of conduct rather than general reputation, and the prosecution need not wait until character is put in issue before similar fact evidence is led. If psychiatric evidence is an equally unique form of character evidence, for example, if it is equally probative of the issue of identity as is true similar fact evidence, then it should be equally admissible. Psychiatric evidence should be governed by its own rules of admissibility as is similar fact evidence. The language of Martin J.A. leads one to suggest, for example, that psychiatric evidence, going directly to identity, as distinguished from psychiatric evidence going merely to

97 *Supra*, note 54.
98 *R. v. McMillan*, *supra*, note 63 at 206 (C.R.N.S.); 174 (C.C.C.); 764 (O.R.) (Ont. C.A.).
99 *Id.*
100 See note 94 and accompanying text.
probability, should be admissible according to the same rules that govern similar fact evidence.

Such a distinction between identity and crimes of abnormal propensity on the one hand, and probability and particular persons of abnormal propensity on the other, can be justified by considering the two main factors which govern the admissibility of similar fact evidence: prejudice and probative value. If the evidence indicates that the crime in question could have been committed by normal persons as well as by those of an abnormal group, then evidence that the accused is a member of that abnormal group might well increase the probability that he committed the crime, but it would also carry a heavy prejudicial value. That is to say, the jury might well give it an importance which is beyond the statistical reality respecting the incidence of people of that abnormal group committing the crime in question. Therefore, the prosecution should not be able to lead such evidence unless the accused leads evidence of good character. For example, a robbery with no unusual features might be considered more likely to have been committed by a psychopath prone to crimes of violence. But the features of the crime would not keep normal persons from also being suspected. Proof that the accused was a criminally violent psychopath would involve the danger that undue emphasis might be placed on such evidence with respect to the issue of identity. But, allowing good character evidence without allowing bad character evidence in reply, would create a false picture. Therefore, the psychiatric evidence should be admissible, but only if the accused "opens the door" by putting his character in issue. The facts in McMillan were said to have fitted into this category. The accused led evidence of his wife's psychopathic tendencies, but it was in relation to a crime which could have been committed by normal people or people violent within normal bounds, as well as by people within that abnormal group. Once the accused led such evidence, it was open to the prosecution to show that the accused was also a member of that abnormal group. On the other hand, if the evidence shows that the crime could only have been committed by those within a particular abnormal group then psychiatric evidence that the accused was a member of that group, has a probative value which outweighs any prejudicial effect. Such psychiatric evidence shows a "trademark" and not simply a mere propensity as in the former example. It raises more than a mere probability and, therefore, goes more directly to identity. Therefore, it should be admissible regardless of whether the accused leads good character evidence or not.

The same distinction is made in regard to the admissibility of similar fact evidence in general, and prior criminal convictions in particular. If the similar fact evidence can be said to be so similar to the crime in question as to demonstrate a "trademark" in relation to its commission, then it is admissible as similar fact evidence. If it cannot, then it is admissible, if at all, not as similar fact evidence, but as evidence of bad character in reply to good character evidence adduced by the accused. Similarly, evidence of prior crimes committed by the accused is admissible as similar fact evidence if it can satisfy the high degree of similarity to the crime in question demanded by the rules of similar fact evidence. If not, it is admissible on the issue of
probability (i.e., identity), but only in reply to evidence of good character—see Criminal Code, section 593. 101

However, although the language of Martin J.A. in McMillan would easily support an argument that he was drawing a distinction between crimes of abnormal propensity and accused or third parties of abnormal propensity in relation to crimes that don't necessarily require an abnormal propensity and between evidence going directly to identity, and evidence going merely to probability, it is not as clear that he intended different conditions of admissibility to apply to these two types of evidence. 102 It is not completely clear that he intended to put forward the proposition that psychiatric evidence in relation to a crime of abnormal disposition is admissible whether or not the accused puts his character in issue. Portions of his judgment103 in McMillan suggest that the prosecution must wait until the accused leads evidence of his own good character (or at least evidence of the bad character of a third party who had an opportunity to commit the crime in question) before it can adduce any psychiatric evidence of propensity.

On the other hand, the following two paragraphs from the judgment of Mr. Justice Martin in R. v. Robertson, 104 would support a strong argument that he did intend to create new rules for the admissibility of psychiatric opinion evidence of propensity or disposition. What is new about them is that they make the conditions of admissibility dependent upon the type of psychiatric evidence offered, or upon the type of crime in relation to which it is offered:

Evidence of disposition is also relevant to prove guilt but the introduction of

101 See the text accompanying note 33. There is a third route of admissibility of prior criminal convictions. Section 12 of the Canada Evidence Act provides that a witness may be questioned as to his prior offences and such offences proved if the witness denies the fact or refuses to answer. However, the trier of fact is to be instructed that such evidence can be used only in relation to the credibility of the witness and not in proof of a substantive issue in the trial such as identity, intent, or whether the crime was in fact committed. In theory such caution is supposed to remove the danger that such evidence will be used for this prohibited purpose, i.e., on issues of conduct and intent to commit crimes, as distinguished from in-court credibility. The jury may use a conviction admitted to in cross-examination to establish that the accused is a member of an abnormal group and, therefore, infer that he is more likely to have committed the crime in question. This danger and the compensating caution to the jury, therefore, become particularly important in relation to trials of crimes which could have been committed by normal persons as well as by abnormal persons, or by persons of a different abnormal group. If the crime being tried could only have been committed by a certain abnormal group, and the crime being cross-examined as to under section 12 would stamp the accused as a member of that abnormal group, then in theory, such prior conviction could be used for a similar fact purpose as well as for credibility, if there existed the required high degree of similarity demanded by the rules of similar fact evidence. Therefore, the cross-examination on such prior conviction would have to go further than merely establishing the fact of the prior offence in order to establish the necessary points of close similarity. If such similar fact evidence could have been given in reply as well as in chief, there should be no argument that the prosecution was splitting its case by asking that the results of its cross-examination under section 12 be used in relation to substantive issues as well as credibility.

102 See R. v. Robertson, supra, note 63 at 185 (C.R.N.S.); 425 (C.C.C.).

103 Supra, note 99.

104 R. v. Robertson, supra, note 63.
Character Evidence

evidence by the prosecution which proves no more than that the accused had a propensity or disposition to commit the crime in question is excluded on grounds of policy, unless the accused gives evidence of good character, in which case the prosecution is entitled to rebut such evidence.

Where the disposition in question is characteristic of an abnormal group, it is a proper subject for expert evidence and hence may be proved or disproved by psychiatric evidence, when otherwise relevant and admissible. The first paragraph refers to evidence, the effect of which is merely to increase the probability that the accused committed the crime; therefore, its admissibility is conditional on the accused adducing evidence of good character. The second paragraph deals with evidence of the accused's abnormal propensity in relation to crimes requiring an abnormal propensity. Therefore, it is more probative. It raises more than a mere probability as to identity. It goes directly to proof of identity. It is more than mere evidence of good or bad character; it is not dealt with as being within those categories of evidence, although it does deal with character. Therefore, its admissibility is not conditional on or limited by the rules as to good or bad character evidence. It is not dependent on the accused's "opening the door" by putting his character in issue, nor is it subject to the rule requiring that character evidence be in the form of general reputation in the community. Rather, it may be "proved or disproved" directly, for it is not "excluded on grounds of policy" as in the type of psychiatric evidence mentioned in the first paragraph, and it may be proved by expert opinion evidence. In other words, the rules of admissibility are dependent upon the type of crimes in relation to which the psychiatric evidence is offered. If it attempts to show that the accused had a peculiar or abnormal propensity or disposition, but is in relation to a crime which could have been committed by normal people as well as by those within some particular abnormal group, it is inadmissible (unless the accused adduces good character evidence) under the principle stated in the first paragraph. But if the same type of psychiatric evidence as to the accused's disposition is offered in relation to a crime which could only be committed by those within a particular abnormal group, then it is admissible without the need of the accused's first putting his character in issue. This is the important issue in relation to which the law of psychiatric evidence awaits clear and binding authority: can the prosecution adduce evidence of the accused's abnormal propensity if the crime at issue is one requiring an abnormal propensity, without the condition precedent of the accused's adding evidence of his good character? This issue can be further clarified by re-wording: Is psychiatric evidence of an abnormal disposition in the accused (or a lack thereof) when offered in relation to crimes requiring an abnormal disposition, evidence, the admissibility of which is independent of the rules as to good and bad character evidence?

However, the issue did not arise in McMillan, for the accused was held to have given what amounted to good character evidence and thus to have put his character in issue. Nor did it arise in Robertson. The distinction was not taken up by the Supreme Court of Canada in McMillan, although that decision was largely dependent upon the reasons of Mr. Justice Martin of

105 Id. at 185 (C.R.N.S.); 425 (C.C.C.).
the Ontario Court of Appeal. However, it is suggested that if one had to make a decision on the issue based solely on the language used by the Supreme Court in *McMillan*, one would have to conclude that that language supports the proposition that the first three rules of character evidence apply equally to all psychiatric evidence of disposition. Those three rules state that evidence of the accused's bad character cannot be used by the prosecution to establish guilt unless the accused adduces evidence of good character. For example, Spence J., delivering the judgment of the Supreme Court of Canada, comments upon a quotation from *Lowery*:

'It is, we think, one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt. We see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person.'

I further agree with Martin, J.A., that when such evidence is adduced by the defence there is no policy preventing its admission such as the requirement of fairness to the accused which applies to prevent its being adduced by the Crown.

There is no support here for the proposition that the prosecution may adduce evidence of the accused's peculiar propensity without there having to be evidence of the accused's good character as a condition precedent, even if the crime is one requiring a peculiar or abnormal propensity.

But one does not have to base one's decision on this issue upon the language of the Supreme Court of Canada in *McMillan* if it is reasonable to conclude either that Spence J. did not deal with it, or if he did, his comments were *obiter dicta* because the facts did not require, or lend themselves to, a decision on the issue. If so, it would be open to future courts to hold that this distinction in the rules regarding the admissibility of psychiatric evidence as to propensity or disposition in proof of conduct is a valid one, and that it is supported by the judgments of Martin J.A. in *McMillan* and *Robertson*.

In *Robertson*, Martin J.A. adds one further principle and some insight. That case also involved a crime held not to be exclusively an 'abnormal group' crime. *McMillan* dealt with the admissibility of Crown psychiatric evidence of the accused's abnormal propensity in relation to such crimes. *Robertson* deals with defence psychiatric evidence regarding a lack of such propensity in relation to such crimes. The issue in *Robertson* was the admissibility of defence psychiatric evidence to the effect that, "he [the accused] did not show any violent or aggressive tendencies as character traits or psychiatric makeup and the type of individual who would commit this type of offence is likely one who would show these characteristics." The appellant was convicted of the non-capital murder of a nine year old girl who was found dead in the basement of her home. The physical evidence suggested that death was caused by kicking. Martin J.A., in delivering the unanimous opinion of the Court on

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107 See note 20 and accompanying text.
109 *R. v. Robertson*, supra, note 63 at 181 (C.R.N.S.); 421 (C.C.C.).
this branch of the case, summarized the conditions for the admissibility of defence psychiatric evidence as to the disposition of the accused:

In my view, psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes a characteristic feature of an abnormal group falling within the range of a study of the psychiatrist, and from whom the jury can, therefore, receive appreciable assistance with respect to a matter outside the knowledge of persons who have not made a special study of the subject. A mere disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused.

In this case the evidence shows no more than that the young deceased was killed by an act of great brutality. It cannot be said that such an act would only be committed by a person with recognizable personality characteristics or traits. In these circumstances, I am not persuaded that the evidence in the present case justifies us in holding that the killing of the deceased was marked by features which identify its perpetrator as a member of a special class more readily identifiable than the ordinary criminal, which I consider to be a condition of the admissibility of psychiatric evidence of absence of disposition or behavioural incapacity when it is tendered on the basis advanced before us.110

These are the conditions of admissibility of that variety of circumstantial evidence in proof of conduct or absence of conduct on a particular occasion, known as psychiatric evidence of disposition on behalf of the defence. The first condition is relevancy to an issue in the case (as distinguished from credibility). Second, this opinion evidence must relate to the features of an abnormal group in order to escape the rule that character evidence must be in the form of general reputation in the community. Third, it must satisfy the opinion evidence rule that the subject matter in question (the abnormal group), falls within the range of study of the expert. Fourth, the 'normal facts' rule of opinion evidence must be satisfied by showing that the trier of fact will be assisted in regard to a matter outside the knowledge of laymen. The fifth condition is the new requirement added to the analysis that Mr. Justice Martin began in McMillan, namely, a mere disposition for violence will not establish the crime in question as necessarily having been committed only by an abnormal group, nor will an act of great brutality necessarily do so either. Sixth, the necessary 'abnormal group' cannot be established if the evidence goes no further than to show that the crime in question was more likely committed by members of some abnormal group, but does not exclude or sufficiently diminish the possibility that it could have been committed by normal persons as well.

In an attempt to formulate rules which are specifically applicable to psychiatric evidence, this discussion may be summed up thus far by the following statements:

(a) General Rule as to Psychiatric Evidence

Psychiatric evidence with respect to the personality traits or disposition of an accused or another is admissible provided that first, the evidence is

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110 Id. at 189-90 (C.R.N.S.); 429-30 (C.C.C.).
relevant to some issue in the case; second, the evidence is not excluded by a policy rule; and third, the evidence falls within the proper sphere of expert evidence.

(b) Evidence on the Ultimate Issue

Psychiatric evidence may be given on the ultimate issue or on any other issue for the jury.

(c) Limitation as to Matters of Common Knowledge, Normal Facts

Psychiatric evidence must concern a matter about which ordinary people are unlikely to form a correct judgment if unassisted by such persons with special knowledge. If the issue is held to be one of common knowledge, such expert evidence will not be received on that issue, for it is superfluous. Psychiatric evidence defining, identifying or explaining an abnormal character trait, or a character trait of an abnormal group, concerns matters outside the common knowledge of ordinary people.

(d) Limitation as to Matters of Law

Psychiatrists cannot testify directly upon questions of law or upon mixed questions of law and fact, for these questions are within the province of the trial judge.

(e) Hypothetical Questions

In examination-in-chief, failure to elicit the opinion of a testifying psychiatrist by means of hypothetical questions does not of itself make the answers inadmissible; however, the trial judge can require the hypothetical form of questioning in order to make clear on what evidence the expert opinion is based.

(f) Limitation Where Accused Does Not Testify

Psychiatric evidence may be given without strict proof by admissible evidence of the foundation facts upon which it is based, except where such opinion evidence, adduced by the defence, does not concern a character trait going to disposition, but rather concerns the credibility of the accused’s out-of-court statements and the accused does not testify.

(g) Exceptions to General Reputation Evidence

Psychiatric evidence concerning a particular trait which is properly admissible into evidence, may be given in the form of opinion evidence, and therefore, it is not caught by the rule requiring that character evidence be given in the form of general reputation in the community.

(h) Abnormal Group Exception to General Reputation Evidence

One of the exceptions to the rule that the character of the accused in the sense of disposition, when admissible, can only be by evidence of general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.
(i) Limitation as to Good Character Evidence

Where the evidence does not indicate that the crime in question was necessarily committed by an abnormal group, defence psychiatric evidence as to the accused's particular disposition or lack of a particular disposition, (although relevant as bearing upon the probability of the accused having committed the crime), is inadmissible, for it is evidence of good character and, therefore, violates the rule that such evidence must be given in the form of general reputation in the community.

(j) Impeaching Credibility

Psychiatric evidence which impeaches the credibility of a witness of the same party who called the psychiatrist is not rendered inadmissible by the rule against impeaching the credibility of one's own witness, if such evidence is relevant to another purpose.

(k) Distinction Between Probability and Identity

Psychiatric evidence as to the probability that one has committed an offence is distinguishable from psychiatric evidence going directly to identity. Where the crime in question is one which was not necessarily committed by a member of some identifiable abnormal group, evidence that the accused or another had or lacked an abnormal propensity, goes merely to the probability that the accused committed the crime. Where the crime in question is one which the evidence indicates was committed by a member of an identifiable abnormal group, evidence that the accused or another had or lacked such abnormal propensity goes directly to identity. Both varieties of evidence relate to identification of the person who committed the crime. However, the former variety is much less probative than the latter, and, therefore, falls under different considerations as to admissibility.

(l) Evidence as to Probability

Although the evidence does not indicate that the crime in question was necessarily committed by an abnormal group, psychiatric evidence as to the abnormal disposition of a third party who had an opportunity to commit the crime is nonetheless relevant, for it bears upon the probability of the accused's having committed the crime. It is also admissible, for there is no policy rule which requires its exclusion when tendered by the accused.

(m) Evidence as to Identity

Where the offence is of a kind that is committed only by members of an abnormal group, psychiatric evidence that the accused did not possess the distinguishing characteristics of that abnormal group is relevant either to bring him within or exclude him from the special class of which the perpetrator of the crime is a member.

(n) Limitation Upon Evidence of Disposition for Violence

A mere disposition for violence will not establish the crime in question as necessarily having been committed only by an abnormal group, nor will an act of great brutality.
(o) Third Party Disposition as Evidence of Good Character

Psychiatric evidence adduced by the accused as to the propensity of a third party may be construed as evidence of the accused's good character, in which case, the prosecution may lead evidence of the accused's bad character, also in the form of psychiatric evidence.

(p) Evidence Adduced by Co-Accused

Psychiatric evidence adduced by an accused as to the propensity of a co-accused to act or fail to act in a particular manner, is not excluded by the policy rule which prevents the prosecution from introducing evidence to prove that the accused by reason of his criminal propensities is likely to have committed the crime.

The proposed Evidence Code provisions on character and disposition do not encompass the detailed rules that seem to be emerging from the most recent cases on psychiatric evidence. However, the provisions are capable of incorporating them, or rules similar to them. For example, section 17(1) contains a rule comparable to the present rule that bad character evidence cannot be adduced by the prosecution, except in reply to the character evidence offered by the accused dealing with the character of the accused or the victim of the offence. It would seem, therefore, that the Evidence Code would not allow the prosecution to adduce psychiatric evidence about whether the accused fell within an abnormal group even if the crime can be said to be exclusively that of an abnormal group, until the accused has first adduced evidence of a trait of either his or the victim's character. And, section 17(2) places a limitation on character evidence in relation to the victim in sexual offences, by requiring that a \textit{voir dire} be held to determine the admissibility of such evidence. The present rule allows evidence of general reputation for morality to be adduced without a \textit{voir dire}. However, given the breadth of sections 18 to 20, the court would be free to develop rules for psychiatric evidence as to disposition, and for character evidence in general, limited only by the spirit of the residual discretion to exclude such evidence by section 5, and the rule which requires exclusion of evidence that would bring the administration of justice into disrepute in section 15. These are not substantial limitations upon the court's freedom to develop specific rules. The more limiting of the two sections is section 5, which will be no more limiting upon the creativity of the court than to provide guidance by citing the fundamental principles which gave rise to most of the existing exclusionary rules of evidence—probative value, prejudice, confusion of issues, misleading the jury and undue consumption of time.

5. Character of the Victim

The disposition of the victim of a crime is usually treated as a separate area of the law of character evidence. The proposed Evidence Code does not deal directly with the admissibility of evidence as to character of the victim. However, by inference, such must be admissible if relevant. Section 17(1) allows the prosecution to lead evidence of a character trait of the accused if the accused has offered evidence relevant to a character trait of the victim of the offence. In England, \textit{The Criminal Evidence Act, 1898}, section 1(f) (ii),
permits the accused to be asked about previous convictions if he adduces evidence as to his own good character, or if "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." Federal Rule 404(a)(2) also allows evidence of a pertinent character trait of the victim of the crime offered by the accused, or by the prosecution to rebut the same, and in addition, allows "evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." Martin J.A. actually went further in the McMillan case by allowing reply evidence where the accused attacks a third party who is not the victim.

At common law, the accused can adduce evidence as to the disposition of the alleged victim of a rape in the form of reputation evidence. The following landmark quotation makes an important distinction between character evidence going to credibility and character evidence going to disposition:

The prosecutrix may be asked the questions to shew that her general character of chastity is bad. She is bound to answer such questions and if she refuses to do so the fact may be shewn: Rex v. Clarke (1817), 2 Stark. 244; Rex v. Barker (1829), 3 C. & P. 589, 172 E.R. 558; Regina v. Holmes (1871), L.R. 1 C.C.R. 334, 337. So too she may be asked whether she has previously had connection with prisoner and if she denies it that may be shewn: Rex v. Martin (1834), 6 C. & P. 562. Such evidence is relevant to the issue since in both cases it bears directly upon the question of consent and the improbability of the connection complained of having taken place against the will of the prosecutrix.

And she may be asked, but, inasmuch as the question is one going strictly to her credit, she is not generally compellable to answer whether she has had connection with persons other than the prisoner. This seems to rest to some extent in the discretion of the trial Judge. Whether, however, she answers it or not that is an end of the matter, otherwise as many collateral, and therefore irrelevant issues might be raised as there were specific charges of immorality suggested, and the prosecutrix could not be expected to come prepared to meet them, though she might well be prepared to repel an attack upon her general character for chastity: Rex v. Hodgson (1811), R. & R. 211; Regina v. Latibérté 1 S.C.R. 117; Regina v. Holmes (1871), L.R. 1 C.C.R. 334; Phipson on Evidence, 3rd ed. 158, 453.112

Questions as to sexual conduct with people other than the accused are now dealt with under section 142 of the Criminal Code of Canada. Section 17(2) of the Evidence Code establishes a similar voir dire procedure, but deals with a wider category of evidence: "a trait of the character of the victim of a sexual offence that is relevant solely to the disposition of the victim to act or fail to act in a particular manner..." This phrase would submit disposition evidence in the form of general reputation for chastity to a voir dire procedure. In contrast, section 142 of the Criminal Code refers only to the "credibility evidence" of sexual conduct with persons other than the accused. Does such evidence also relate to disposition so as to come within section

111 In England, evidence of specific instances of conduct has been allowed in the case of prostitutes or to show indiscriminate sexual habit. See R. v. Krausz (1973), 57 Cr. App. R. 466.

17(2), or would such evidence be dealt with under the credibility provisions of the proposed Evidence Code (sections 62-66), which do not require a voir dire (although there is a power of exclusion in section 66)? Also, the Evidence Code does not limit evidence of such disposition evidence to reputation evidence. Section 20 allows evidence of a trait of a person's character to be given in the form of opinion, reputation, or "evidence of specific instances of conduct."

There is also some authority for allowing evidence of the violent disposition of the victim in homicide cases. In The King v. Drouin,118 the accused was acquitted of the murder of his father. Evidence, known to the accused, tending to show that the deceased had beaten members of his family and endangered their lives on several occasions, was admitted. Evidence was also admitted to show that the reputation of the deceased in regard to members of his family was that of a cruel and violent man. In The King v. Martha Scott,114 on a charge of murder and a defence of self-defence, evidence was allowed as to "the violence of the temper" of the deceased and of various assaults by him upon the accused.

The proposed Evidence Code makes no specific reference to the character of the homicide victim other than the reference to all victims in section 17(1). However, such evidence would be admissible, subject to the definition of "relevant evidence" in section 4, and the general power to exclude evidence in section 5.

These examples of character evidence of third parties deal with disposition and not credibility. Distinctions as to admissibility are made between disposition and credibility. Similarly, it is suggested that a comparable distinction seems to be emerging in relation to psychiatric evidence. Admissibility appears to be much more difficult to achieve when such evidence goes to credibility rather than disposition to show conduct on a particular occasion. For example, in R. v. French,115 a psychiatrist testified on a voir dire that a prosecution witness, to whom the accused allegedly confessed murder, had a character disorder such that she was quite capable of lying under oath. The Court of Appeal upheld the trial judge’s rejection of the evidence, holding that assessing credibility “is a matter peculiarly within the province of a jury and it is only in unusual circumstances, which do not obtain here, that that credibility can be attacked by the calling of expert medical evidence.”117 In R. v. Burkart and Sawatsky,117 a conviction for rape was overturned on the basis that evidence from a physician to the effect that the complainant was likely to be a truthful person because of her low mental classification should have been rejected. The court held that such evidence went only to

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114 (1910), 15 C.C.C. 442 (Ont. H.C.).

115 R. v. French, supra, note 68.

116 Id. at 211.

the weight to be attributed to the complainant's testimony and, therefore, it should have been rejected. A similar decision was reached by the Ontario Court of Appeal in *R. v. Kyselka*.118

In relation to credibility, psychiatric evidence, like all evidence related to credibility, is seen as raising unwanted collateral issues. It is suggested that this same concern, in connection with credibility, explains the split decision in the *Rosik*119 case and the rejection of the evidence in *Phillion*.120 The evidence, although related to conduct or disposition, was heavily dependent upon out-of-court statements by an accused who did not testify. Therefore, these judgments express concern about self-serving statements being adduced by an expert without the opportunity to cross-examine the accused who made the statements.

However, some might argue that *Toohey v. Metropolitan Police Commissioner*121 represents a decision wherein expert opinion as to the credibility of a witness was allowed into evidence. In a trial for assault with intent to rob, evidence by a doctor as to the victim's hysterical nature was first rejected; this ruling was upheld by the Court of Criminal Appeal.122 The issue, as stated by Lord Pearce, "was whether, as the prosecution alleged, the episode created the hysteria, or whether, on the other hand, as the defence alleged, the hysteria created the episode."123 The evidence went as much to disposition as it did to the credibility of the witness. The House of Lords, in ruling that the evidence was admissible, pointed out that the lower court had failed to distinguish between evidence going to credibility and evidence going to an issue.

The proposed Evidence Code separates provisions of character evidence going to disposition from those dealing with character evidence in relation to credibility. Any analysis of cases on character evidence would demonstrate the wisdom of that separation.

6. **Character Evidence in Civil Cases**

The general rule in civil cases is that character evidence cannot be used to prove a particular act, or a failure to act, on a particular occasion.124 In criminal cases, evidence of good or bad character gives rise to an inference that a person of good or bad character would or would not commit a crime. But, in civil cases, good character is said to be irrelevant to the question of whether a person was negligent or did not fulfill a contract. An exception exists in relation to similar fact evidence. It has been argued that the reason

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119 Supra, note 82.
120 *R. v. Phillion*, *supra*, note 63.
123 *Supra*, note 121 at 604 (A.C.); 510 (All E.R.); 158 (Cr. App. R.).
given for the distinction between civil and criminal cases is illogical, and that the real reason is the needs of trial administration.

If the logical relevance of the evidence were the test of admissibility, it would be difficult to rationalize its exclusion in civil cases and its admission in criminal cases. In tort actions such as assault, deceit and negligence, evidence of good character on the part of the defendant would appear to be as relevant as the evidence of good character of the accused in a criminal case.

While the courts appear to exclude character evidence in civil cases on the basis of irrelevance, the real rationale is the policy to restrain civil proceedings within manageable limits and to prevent unfairness to civil litigants, who cannot be expected to be prepared to protect themselves against imputations which may range over their whole career, without previous notice.125

However, the use of character evidence to diminish credibility is distinguishable from the use of character evidence to show conduct on a particular occasion. Evidence indicative of character can be led to show that a particular witness suffers a bias against, or partiality for, a particular party, or suffers a medical condition that affects his truthfulness. And credibility by way of character evidence can come in the form of testimony relating to general reputation for untruthfulness or cross-examination relating to prior criminal convictions.126

The proposed Evidence Code has no specific provision dealing expressly with character and disposition in relation to civil proceedings. Therefore, one would assume that since such evidence is relevant, it is admissible even in civil proceedings unless rendered inadmissible by the principles of the residual power of exclusion in section 5. This is confirmed by the Comments in the Report on Evidence:

Although we may at times place too much importance upon a trait of a person's character, there is no question that it is relevant in proving his conduct on a specific occasion. Thus if an aggressive and a peaceable person were involved in a physical altercation, we might, on the basis of their character traits, assume that the aggressive person was more likely to have begun the fight. Consequently in the absence of a specific rule excluding it, character evidence in many cases would be admissible under section 4.

... In most other cases character evidence as circumstantial evidence is of slight probative value. Even when it is slightly probative it usually ought to be excluded because of the possibility of prejudice, the consumption of time and the confusion of the issues. But in some cases, for instance civil cases where there is an allegation of moral turpitude, the probative value of character evidence might outweigh these dangers. These matters, however, require no special provision. They can adequately be dealt with under the general rule (section 5) that such evidence may be excluded.127

7. Character as a Fact in Issue

Character is in issue when it is one of the elements to be proved directly in the proceedings. For example, the “dangerous offender” provisions of the

126 The Ontario Evidence Act, R.S.O. 1970, c. 151, s. 23.
127 Supra, note 1 at 64-65.
Criminal Code require proof of such character issues as, "a pattern of repetitive behaviour," "a likelihood of his causing death or injury," "a pattern of persistent aggressive behaviour," "his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint," and "failure in the future to control his sexual impulses." Similarly, character may be proved directly in civil proceedings. For example, character may be directly in issue on liability or quantum of damages in actions for defamation, seduction or indecent assault. The cases vary as to whether character may be proved by specific acts or only by reputation. A preference is given to evidence of prior convictions over other specific acts.

The proposed Evidence Code deals expressly with character evidence going to disposition and credibility, but not expressly with character evidence when character is directly in issue. Strictly speaking, the topic is outside the scope of this article, which is limited to those sections dealing with character evidence as a variety of circumstantial evidence (i.e., character used to prove some other issue indirectly, such as conduct on a particular occasion, rather than character evidence used directly in proof of an issue as to character per se).

8. Similar Fact Evidence

The proposed Evidence Code does expressly deal with similar fact evidence:

18. Nothing in section 17 prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his disposition to commit such act, such as evidence to prove absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

Wisely, the Evidence Code does not try to codify all of the many rules, exceptions, inconsistencies and peculiarities of this very difficult area of law. Rather, by this section, it preserves the mechanism of similar fact evidence as a mode of proof and leaves the further development of refinements and guidelines to case law. Section 18 invites recourse to the previous law for guidance.

Similar fact evidence is admissible in both civil and criminal cases to prove intent by showing system, guilty knowledge, design or malice, or by rebutting a defence of innocent or lawful purpose, mistake or accident. It is also used to show identity or the actus reus of a crime. It is used to prove the state or condition of places or things in connection with previous accidents, to prove ownership, agency and business practice. The latter are more in the nature of habit than character; however, Canadian law treats habit as a variety of similar fact evidence.

Much difficulty in analysis and application is caused by maintaining

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130 Supra, note 7 and accompanying text.
these categories, rather than formulating rules which demonstrate the principles shared in common by all varieties of similar fact evidence. This was the approach towards simplification taken by the House of Lords in *D.P.P. v. Boardman*;\(^{132}\) it also seems to have been the approach used by the drafters of section 18.

C. PREVENTIVE ACTIONS

The topic of preventive actions concerns the admissibility of evidence with respect to subsequent remedial measures, liability insurance and the payment of medical and similar expenses. Because of certain policy considerations, special rules have been created to govern the use of these types of evidence. Remedial measures and the payment of expenses are to be encouraged and may be taken or made for reasons other than awareness of culpable conduct or negligence; therefore, the law sanctions the use of such evidence. Furthermore, proof of insurance presents the potential danger of an unwarranted confusion of the issues of liability to pay with the ability to pay.

In regard to subsequent remedial measures, the theme of the present case law is that a sensible person takes precautions to prevent an accident from happening again. Therefore, it has been held that either such evidence, although admissible, is not evidence of an admission of negligence when standing alone,\(^{132}\) or alternatively, such evidence is completely inadmissible as evidence of neglience.\(^{185}\) However, it may afford evidence on other issues, such as whether the object or situation remedied was a source of danger or in a state of disrepair.\(^{184}\)

The proposed Evidence Code would exclude evidence of subsequent remedial measures except on one narrow issue:

Section 21: Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is inadmissible to prove negligence or culpable conduct in connection with the event, except when offered to rebut an allegation regarding the feasibility of precautionary measures.

This provision is very similar to the U.S. Federal Rule 407:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeached.

The first branch, or exclusionary branch, of section 21 can be justified as encouraging the provision of remedies and as ruling inadmissible evidence which is often equally consistent with accident and contributory negligence as with negligence or an admission of negligence. The second branch of the rule

\(^{181}\) [1973] 3 W.L.R. 673.


\(^{183}\) MacKay v. City of Saskatoon (1960), 26 D.L.R. (2d) 506 (Sask. C.A.).

seems to allow remedial measures as proof of negligence where the feasibility of precautions is raised. Therefore, the rule, taken as a whole, does not exclude remedial measures adduced in proof of issues other than negligence and culpable conduct. There is no statement to that effect as in Rule 407. But, there does not need to be, for the Evidence Code as a true code excludes all other sources of the law as authoritative and fills the space thus vacated by stating that all evidence is admissible unless otherwise provided by statute.\textsuperscript{106}

Section 22 of the proposed Evidence Code deals with liability insurance as follows:

Section 22: Evidence that a person was or was not insured against liability is inadmissible as tending to prove negligence or other wrong-doing unless the probative value of such evidence substantially outweighs the danger of undue prejudice.

The Supreme Court has held that where something occurs during the course of the trial from which the jury may reasonably infer that the defendant is insured, the services of that particular jury should be dispensed with; that the trial judge should afford counsel a full opportunity of making submissions before deciding what course should then be followed; and, that having done so, it is for the trial judge to decide whether to continue the trial himself without a jury or to direct that the case should proceed before another jury.\textsuperscript{138} Evidence of insurance is considered to be irrelevant. It is argued that one who is insured against negligent conduct is not, therefore, less careful than he would otherwise be or than others who are not insured. Such evidence is also considered very prejudicial; the argument being that those who are known to be able to assume the loss are more likely to be found liable.

However, the commentary relating to section 22\textsuperscript{137} argues that evidence of insurance might be highly probative. Therefore, the section provides the trial judge with a discretion to admit such evidence where its probative value substantially outweighs the danger of undue prejudice. The example given in support of this rule is of an allegation that a defendant wilfully destroyed his property to realize the insurance monies. This is an example of the second branch of the phrase, “to prove negligence or other wrongdoing.” But section 22 would allow the trial judge to admit evidence of insurance on the question of negligence if he thought such evidence was of sufficient probative value to outweigh the potential prejudice. Or perhaps it is intended that the “discretion” apply only to questions of “other wrongdoing.”\textsuperscript{138}

\textsuperscript{106} Supra, note 1, section 4(1).
\textsuperscript{137} Supra, note 1 at 67.
\textsuperscript{138} It is doubtful that section 22 does incorporate a true discretion as the commentary states, i.e., a point of decision left to the opinion of the trial judge which cannot be appealed, which means that the appeal court cannot substitute its decision or opinions for that of the trial judge, e.g., an assessment of the credibility of witnesses. Given the present case law on the powers of appeal courts, it is more likely that they would feel that, in regard to section 22, they are in as good a position to determine
Rule 411 of the U.S. Federal Rules does not leave to the judge any discretion whether evidence of insurance should be admitted on issues of negligence or other wrong-doing. The rule states:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Section 54 of the Uniform Rules of Evidence, 1953, and Rule 411 of the Draft Vermont Rules of Evidence and of the Uniform Rules of Evidence, 1974 are identical to this provision. Section 1155 of the California Evidence Code is substantially the same as the first sentence of Rule 411. Some argue that juries assume defendants are insured; therefore, if it were admitted, such evidence would not be creating a prejudice which would not otherwise be there. Since there may be factual situations where such evidence may be highly probative, the rules should allow for its admission in such cases. Section 22 would give effect to such an argument. However, at present, both Canadian case law and American codifications are more absolute than section 22 in excluding all evidence of insurance.

These positions are reversed in regard to evidence of payment of medical and similar expenses. The leading decisions say that such payments are not necessarily an admission of liability; it depends on the circumstances. Section 23 of the Evidence Code, however, would allow no weighing of circumstances, but rather, would bar such evidence on issues of liability absolutely.

Evidence that a person has furnished or offered or promised to pay medical, hospital or similar expenses occasioned by an injury is inadmissible to prove liability for the injury.

This provision closely resembles the U.S. Federal Rule 411, which in turn, has a very similar counterpart in each of the other more noteworthy American codifications.

Payment, or offers of payment, if made by a party to the proceeding, would not be rendered inadmissible by the rule against hearsay because it...
would fall within the well-recognized exception as to admissions by a party-litigant. Conduct, however, can be hearsay, because inferences can be drawn from it, so that actions speak as loudly as words. Similarly conduct, such as the making of a payment or the offering of payment, can be taken as an admission by a party-litigant, even though at the time of the admission, there was no litigation and no dispute. But, although such payment or offer would be saved from the hearsay rule by this exception, it might be ruled inadmissible under the present case law if the judge’s examination of the motivating factors underlying the payment or offer shows that no acknowledgment of liability was intended. However, if the payment or offer was accompanied by a statement acknowledging liability, that separate statement would not be caught by a rule such as section 23, and would be admissible as an admission by a party-litigant. Also, this statement would show that the payment or offer was, in effect, an acknowledgment of liability. However, although section 23 would bar the payment or offer, it would not affect the admissibility of the separate statement. Most likely the statement would reveal the fact of the offer. Therefore, section 23 would have to be extended beyond its literal meaning so as to be interpreted as barring the statement as well, in order to maintain the integrity of the rule. Should the plaintiff be barred from using such cogent evidence? It appears that such payments or offers which show an acceptance of liability were never intended to be caught by section 23. The commentary to section 23 in the Report on Evidence speaks of people not giving assistance for “fear that such conduct may later be regarded as an admission of liability.”

An express or implied acknowledgment of liability does not show fear that such will be taken as an admission of such. This example may lead one to suspect that there may be greater wisdom in dealing with such evidence of payments and offers by an examination of motivating factors and surrounding circumstances than by an absolute bar to admissibility in the form of a rule such as section 23. But this analysis considers only the need for relevant evidence and the quality of the evidence. There are other considerations.

Why would the American codifiers uniformly recommend provisions which are similar to section 23? The answer does not lie within the most frequent sources of the rules of evidence—reliability of the evidence; necessity due to the unavailability of other evidence; the needs of efficient trial administration; the principles of the adversarial process. Rather, it lies within another fundamental principle which is a less frequent source of rules of evidence—exclusion for purposes of policies which are extrinsic to the needs of the trial process. The present rule, which allows consideration of surrounding circumstances in determining if payments and offers should be used in proof of liability as an admission, recognizes that payments and offers made for humanitarian reasons should be encouraged so as to reduce the need for litigation. This public interest could be better served by a policy which bars such evidence entirely so as to completely remove any fear that

141 The whole explanatory commentary to section 23 is very short; supra, note 1 at 67 states: “People should not be discouraged from assisting others involved in an accident by fear that such conduct may later be regarded as an admission of liability. This section renders the offer of payment of medical expenses inadmissible to prove liability.”
such conduct will be used in proof of liability. In theory, at least, a potential plaintiff will be compensated for the loss of what might be taken as very probative evidence by an increased possibility that the potential defendant will make payment.

Therefore, taking sections 21, 22, and 23 together, the proposed Evidence Code would bar evidence of efforts to compensate for damage or to set things aright, except in certain limited situations. These three rules as to remedial measures, liability insurance and payment of expenses, draw no distinction between time periods before and after the dispute arises. All apply after the event, giving rise to a question of liability without distinction as to whether the parties are in agreement or in dispute. The next three rules deal with similar matters occurring after a dispute has arisen or litigation has commenced. Although they also may involve preventive actions, they are more appropriately placed under the heading “Compromises.”

D. COMPROMISES

Compromises are also a variety of circumstantial evidence from which one can infer an acknowledgment of liability. But despite their probative value, similar policy principles have led to rules limiting use of discussions or conduct as part of attempts at settlement by negotiation. If the disputants know that their statements and writings in pursuit of settlement cannot be used as evidence in proof of liability or guilt, they will be encouraged to settle civil and criminal matters and thus avoid litigation. If the policy involves a sound principle, one might expect to find rules barring use of communications and actions to seek settlement of civil liability, barring withdrawn guilty pleas and offers to plead guilty, and barring use against the accused of statements by which the accused or his counsel are connected with attempted settlements of criminal charges or complaints.

At present, statements made during negotiations in search of settlement are subject to the “without prejudice” rule which prevents the contents of the statement being put into evidence without the consent of both parties. When communications are understood as being “without prejudice,” a situation of joint privilege arises. The public interest that disputes be settled and litigation be reduced to a minimum is the basis of the rule—a policy very similar to one considered in the previous portion of this article, that compensation for expenses due to injury and the taking of remedial measures be encouraged. Also, offers of settlement and the surrounding negotiations often arise simply from a desire to avoid litigation and not a belief in liability or in the weakness of one’s defences. However, threats of perjury and of bribery of witnesses made during negotiations will not be protected by the privilege as to “without prejudice” discussions and can be admitted as circumstantial evidence of one’s belief that his defences are bad.142

Under section 24 of the proposed Evidence Code there would be similar protection for such privileged statements and the practice of specifically designating communications in the course of compromise negotiations “without

Character Evidence

prejudice” to protect against their being misunderstood or treated as admissions, would be unnecessary:

24. Evidence of attempts to compromise a disputed claim or of conduct or statements made in compromise negotiations is inadmissible to prove liability for, or invalidity of the claim or its amount, but nothing in this section prevents the use of such evidence for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The provision in the latter part of section 24 comes from the U.S. Federal Rule 408.143 That rule is similar, but provides, in addition, that evidence otherwise discoverable is not inadmissible merely because it had been presented during compromise negotiations. The present case law contains a similar rule that evidence of facts discovered during negotiations is not inadmissible. Such a rule prevents the use of negotiations as a device for rendering certain items inadmissible. Therefore, the privilege renders inadmissible the fact of negotiation and attempted compromise, but relevant information obtained during the course of negotiations may be proved.

The payment into court in satisfaction of a claim or cause of action would come within section 24. Presently, similar protection against evidence of such payments being used as an admission of the cause of action is given by rules of practice and procedure.144

Section 25 renders inadmissible in proof of guilt pleas of guilty which are later withdrawn, and offers to plead guilty:

25. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to a crime, or of statements made in connection with any such plea or offer, are inadmissible against the person who made the plea or offer for the purpose of determining guilt.

At present, withdrawn pleas of guilty are inadmissible in proof of guilt at the trial which follows from the withdrawal of the plea of guilty.146 But where a plea of guilty is declared to be illegal, as distinguished from being allowed to be withdrawn as an exercise of judicial discretion, evidence of the guilty plea may be adduced at the subsequent trial.146 The accused has been allowed to

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143 Similar rules can be found in section 52 of the Uniform Rules of Evidence 1953, supra, note 4; Section 1154 of the California Evidence Code, supra, note 3; and Rule 408 of the Draft Vermont Rules of Evidence, supra, note 11.

144 For example, Rule 307 of the Ontario Rules of Practice, James J. Carthy & W. A. Derry Millar (Toronto: Canada Law Book, 1977) states: “Payment of money into court shall not, unless expressly so stated, be deemed an admission of the cause of action in respect of which it is paid.” And, Rule 317 prohibits reference to payments into court in the pleadings and prohibits communication of that fact being made to the judge or jury until all questions of liability and damages have been decided.

145 Thibodeau v. The Queen, [1955] S.C.R. 646; 21 C.R. 265. Cartwright J., in delivering the judgment of the Supreme Court of Canada, held that when the plea of guilty was permitted to be withdrawn, for all purposes it was as though it had never been made, and therefore, evidence that it had been made was inadmissible.

146 R. v. Dietrich, supra, note 85. Gale C.J.O., delivering the judgment of the court stated at 30 (C.R.N.S.); 56 (C.C.C.); 732-33 (O.R.) that: “The cases referred to other than Thibodeau establish that testimony or statements of an accused on a previous trial or occasion may be treated as an admission at a subsequent trial for the same offence.
change his plea to one of not guilty where he satisfies the court that he did not understand the legal consequences of a guilty plea,\textsuperscript{147} where he pleaded guilty under the influence of drugs,\textsuperscript{148} or that the guilty plea was entered without proper understanding of the charge, where the plea was induced by threats or by an improper bargain or where a question of law is involved,\textsuperscript{149} or where the guilty plea was induced by the misrepresentations of his own solicitor.\textsuperscript{150} Therefore, one can say that it is very clearly established in the present case law that a change of plea is not as a matter of right available to the accused, but rather requires an exercise of discretion by the trial judge and the exercise of that discretion, if judicially exercised, will not be lightly interfered with.\textsuperscript{151}

Section 25 does not contain any reference to this discretion nor to the distinction between pleas allowed to be withdrawn and those nullified by a collateral quashing of a conviction on grounds other than the accused's ability to enter or understand a plea of guilty. Section 25 speaks simply of "a plea of guilty later withdrawn." However, these topics are usually considered matters of criminal procedure, therefore, one would not expect to find them in a statute on evidence.

Turning from the plea of guilty to the offer to plead guilty, section 25 would likely be interpreted as changing the law, if it were enacted. A distinction has been drawn in the case law between plea discussions or plea bargaining, and mere offers to plead guilty. It has been held that an offer to plead guilty made to a police officer by the accused, which could not be said to be part of negotiations to plead guilty, was simply a voluntary statement made by the accused, and therefore, could be adduced by the prosecution at


\textsuperscript{151} Adgey v. The Queen, supra, note 147. Surprisingly, the commentary to section 25 speaks of a "right to have a plea withdrawn": "Indeed the right to have a plea withdrawn would be illusory if it could be used against the accused at a subsequent trial." Supra, note 1 at 68.
the trial which followed. In contrast, section 25 would render such statements inadmissible for purposes of determining guilt (as distinguished from use in regard to credibility).

Rule 410 of the U.S. Federal Rules of Evidence provides similar protection in regard to offers and withdrawn pleas of guilty. But the protection is expressly extended to civil proceedings as well, and not merely to purposes "of determining guilt" as in section 25. It extends its protection to attacks on credibility. But, Rule 410 states that exclusion of offers and withdrawn pleas do not extend to in-court statements in connection with such offers or withdrawn pleas, "where offered for impeachment purposes." Section 1153 of the California Evidence Code is not so limited, in that evidence of withdrawn guilty pleas and of offers is inadmissible for all purposes "in any proceeding of any nature." Rule 410 of the Draft Vermont Rules is identical to Federal Rule 410. The Reporter's Notes to the Draft Vermont Rules point out that, "the rule is silent on the effect of the collateral overturning of a judgment based on a plea of guilty." As pointed out above, section 25 is silent on guilty pleas nullified by convictions quashed, as distinguished from guilty pleas withdrawn. The Notes continue: "In such a case, the plea should be treated as withdrawn." This view has its supporters in Canada who criticize the distinction made in the Canadian cases between the "procedural and substantive aspects of legal invalidity" of guilty pleas; the former being those aspects which lead to the nullifying of guilty pleas, the latter being those which proceed from the withdrawing of guilty pleas.

The purpose of rules such as those in section 25 and Rule 410 is to promote the disposition of criminal matters by settlement and compromise. Therefore, the protection by way of an exclusionary rule should extend to civil as well as criminal proceedings. However, in Canadian law, this raises

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152 R. v. Draskovic (1972), 5 C.C.C. (2d) 186 (Ont. C.A.). The accused, while in the prisoner's dock, prior to the opening of court, called a police officer over and offered to plead guilty to five of several charges if a charge of armed robbery were dropped.

153 Quite possibly, section 25 might not bar use of an offer to plead guilty in cross-examination for purposes of attacking credibility. Section 25 speaks of such offers being "inadmissible against the person who made them," which is open to the interpretation that section 25 deals only with such evidence being used in proof of issues of guilt as distinguished from credibility, particularly having regard to the fact that section 25 is in a portion of the Evidence Code dealing with circumstantial evidence in proof of conduct. However, section 64(2), which appears under the heading "credibility" provides that, "No evidence of the accused's character, including evidence that he has been convicted of a crime, is admissible for the sole purpose of attacking his credibility as a witness, unless he has first introduced evidence admissible solely for the purpose of supporting his credibility." An offer to plead guilty to a charge of criminal conduct is easily interpreted as being "evidence of the accused's character." But even so, such offer would be conditionally admissible on credibility, dependent upon the accused's adducing evidence in support of his credibility.

154 See supra, notes 145 and 146 and accompanying text.
155 See the Tentative Draft Evidence Vermont Rules of Evidence, supra, note 11 at 59.
156 The case law is discussed at supra, notes 145 and 146. The phrase comes from an annotation by Stenning, supra, note 146.
that uncertainty which surrounds an attempt by a federal statute to exclude matters connected with federal legislative jurisdiction from proceedings governed by a provincial evidence act.

The last section in the portion of the proposed Evidence Code dealing with exclusion of certain circumstantial evidence, section 26, carries the marginal note "Pre-Trial Settlement of Criminal Complaint."

A statement made in the course of an attempt to reach a pre-trial settlement of a criminal complaint is inadmissible against the accused in a criminal proceeding in which the accused is charged with having committed an act constituting the subject matter of the attempted settlement.

Section 26 would provide protection against use of a broader field of statements than those covered in section 25 which excludes statements connected with withdrawn pleas of guilty and offers to plead guilty. The key words distinguishing section 26 from section 25 are "pre-trial settlement," and "criminal complaint," which are broad enough to cover statements made at a time before a charge is laid and all statements connected with attempts to settle criminal matters, as long as such statements are made before trial. Such statements need not concern potential guilty pleas or offers of such. Therefore, section 26 would apply to attempts to negotiate diversion agreements.157

In order for diversion to be a successful concept in practice, a provision such as section 26 would have to operate in law or administrative practice. The essential purpose of diversion is to provide a solution to the problem that too many minor social problems are submitted to the criminal justice system for resolution instead of to social agencies.

There is no rule comparable to section 26 in the existing law, although a residual discretion in the trial judge to exclude evidence which is thought to operate unfairly against the accused might be applied to the same effect.158 However, in Canada, that residual discretion no longer has such scope.159 But the present case law does offer more promise for establishing a more specific rule in relation to a principle or discretion which would allow the trial judge

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157 Diversion can be defined as a process whereby other social or legal means are used as alternatives to the criminal court process. Diversion is an alternative to trial. It can take the form of a negotiated settlement for restitution or reconciliation between the person suspected of having committed an offence and the victim, an agreement to carry out some community service, or to undertake treatment, training or counselling, or perhaps simply to make an apology. The purpose is to avoid the laying of charges or to secure the withdrawal of charges by providing an acceptable alternative to prosecution of less serious criminal matters. For a very sound analysis of the diversion concept see the Law Reform Commission of Canada, Working Paper No. 7, Diversion (Ottawa: Ministry of Justice, 1974) and the Law Reform Commission of Canada, Our Criminal Law (Ottawa: Ministry of Justice, 1973).


159 The Queen v. Wray, supra, note 42. Martland J., in delivering the judgment of the majority stated at 17 (C.C.C.); 690 (D.L.R.); 293 (S.C.R.): "It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly."
to exclude confidential communications. Attempts at pre-trial settlement could satisfy the elements of such a rule of privilege.

E. CONCLUSION

To place the rules that come under the heading “exclusion of certain circumstantial evidence” in statutory form is desirable. The rules as to character and disposition concern a difficult area of the law, an area which is not well understood. The greatest advantage provided by this portion of the proposed Evidence Code (sections 17 to 20 inclusive), is the separation of character evidence going to conduct or disposition in proof of conduct on a particular occasion, from character evidence going to credibility. The provisions dealing with preventive actions and compromises are, for the most part, the present law. They are reasonably clear and should cause no more difficulty in interpretation than the comparable rules in the existing case law, but with the advantage that they are more accessible. The one exception to this conclusion that sections 17 to 26 of the Evidence Code are workable and should be put in statutory form, is section 20, and the rule that character evidence going to disposition may be received in the form of specific instances of conduct. That provision should make trial administration and the control of time consumption much more difficult. Theoretically, allowing all witnesses to give character evidence in the form of individual opinion would seem to present the same threat. But in actual practice, character witnesses do that frequently, although such character evidence in general is infrequent. Therefore, the same objection is not made in regard to that loosening of the rules as to character evidence as is made in regard to evidence of specific instances of conduct in proof of a trait of character.
