

# **Lost in translation? The difference between the hearsay rule's historical rationale and practical application**

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# Abstract

An examination of the difference between the hearsay rule's historical rationale and current application. The analysis occurs in three steps. In section 1, the historical rationale of the hearsay rule is identified through a reconciliation of competing theories. Section 2 analyses the difference between the hearsay rule's historical rationale and the application of the exclusionary hearsay rule. Section 3 analyses the difference between the hearsay rule's historical rationale and the application of some categorical hearsay exceptions.

Overall, the thesis finds that the hearsay rule's historical rationale has three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. Five factors underlie this rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process (this is both a factor and an aspect of the historical rationale).

# Dedication

For Nina, and all her friends.

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# 1. Introduction

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

The spectre of Raleigh’s trial haunts the hearsay rule’s historical rationale and the way it is applied in Canada today. This thesis examines the difference between the hearsay rule’s historical rationale and current application. The analysis occurs in three steps. In section 1, the historical rationale of the hearsay rule is identified through a reconciliation of competing theories. Section 2 analyses the difference between the hearsay rule’s historical rationale and the application of the exclusionary hearsay rule. Section 3 analyses the difference between the hearsay rule’s historical rationale and the application of some categorical hearsay exceptions.

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<sup>1</sup> David Jardine, *Criminal Trials: Vol 1* (London: Charles Knight, 1832) at 427.

<sup>2</sup> Gordon Cudmore, *The Mystery of Hearsay* (Toronto: Carswell, 2009) at 18.

<sup>3</sup> *Ibid.* at 19-20.

Overall, the thesis finds that the hearsay rule's historical rationale has three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. Five factors underlie this rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process (this is both a factor and an aspect of the historical rationale). While there are many differences between the hearsay rule's historical rationale and its practical application, one constant looms: the law remains concerned with preventing injustices created by the use of hearsay evidence – like that of Sir Walter Raleigh's trial.

## 1.1 Scope of the research

Hearsay is express or implied verbal or written statements tendered to prove the truth of its contents made by a declarant who cannot be contemporaneously cross-examined.<sup>4</sup> The scope of hearsay is defined by two factors: the ability to contemporaneously cross-examine the declarant and the use of the statement to prove the truth of its contents.<sup>5</sup>

The academic literature is replete with theories about the hearsay rule's historical and current rationale, respectively. The theories about the historical rationale are discussed at length in section 2.1. As that discussion makes clear, there are competing theories of the hearsay rule's

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<sup>4</sup> *R. v. Khelawon*, 2006 SCC 57, [2006] 2 SCR 787 at paras. 56-58 [*Khelawon* cited to SCC].

<sup>5</sup> Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 4th ed. (Toronto: LexisNexis Canada, 2014) at 238.

historical rationale. Section 2.2 aims to reconcile the theories and identify a new, comprehensive historical rationale of the hearsay rule.

The literature advances a number of overlapping rationales for the application of the current hearsay rule. An epistemological rationale has been advanced. The hearsay rule exists to encourage the presentation of evidence in open court where the adverse party can observe the witness and test the evidence through live cross-examination.<sup>6</sup> Other scholars have focused on the hearsay rule's ability to prohibit prior inconsistent statements, thereby discouraging the police from engaging in improper interrogation techniques.<sup>7</sup> There is the view that the hearsay rule encourages members of the public to participate in the trial process by preventing professional witnesses from relaying the observations of subjects of their investigations.<sup>8</sup> In addition, the state is prevented from using its superior resources to gather remote statements for use against marginalized accused persons.<sup>9</sup> These are just some of the rationales. More abound. There is also a wealth of commentary on the hearsay rule's practical application in Canada.<sup>10</sup> While there is literature on the hearsay rule's historical rationale, and separate literature on the current rule's rationale and application, there is no literature on how the

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<sup>6</sup> Bruce P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (1999) 25 Queen's LJ 1 at 24; See also Kenneth M. Ehrenberg, "Less Evidence, Better Knowledge" (2015) 60:2 McGill LJ 175.

<sup>7</sup> See Charles Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts" (1985) 98:7 Har L Rev 1357; Charles Nesson & Yochai Benkler, "Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontational Clause" (1995) 81 Va L Rev 149.

<sup>8</sup> A.L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford: Clarendon Press, 1993), cited in Archibald, *supra* note 6 at 24.

<sup>9</sup> E. Swift, "Smoke and Mirrors: The failure of the Supreme Court's Accuracy Rationale in *White v. Illinois* Requires a New Look at Confrontation" (1993) 22 Capital UL Rev 145 at 172, cited in Archibald *supra* note 6 at 24.

<sup>10</sup> See generally Mike Madden, "Anchoring the law in a bed of principle: A critique of, and proposal to improve, Canadian and American hearsay and confrontation law" (2012) 35 BC Int'l & Comp L Rev 395; Archibald *supra* note 6 at 24.

hearsay rule's historical rationale differs from its practical application. This thesis breaks new ground by systematically comparing the two.

Such analysis is important for lawyers, evidence scholars, or anyone who testifies in a courtroom. Hearsay is fundamental knowledge for litigation. Understanding the difference between the hearsay rule's historical rationale and current application aids in understanding how the rule has developed and where there is incongruence between the rule's theoretical and practical application. These lessons can guide the doctrine's development to help ensure that the hearsay rule's application is consistent with its theoretical purpose.

## 1.2 Methodology

The thesis is divided into two halves in terms of methodology. The first half considers the hearsay rule's historical rationale. The research primarily consists of books and articles written by scholars who have created theories about the historical rationale. These sources also provide criticisms of the competing theories. Because of the high volume of scholarship, only the six most highly regarded theories are considered. The theories are reconciled to identify the historical rationale of the hearsay rule. The sources used by the theories are relied upon to provide factual support for the reconciled historical rationale. These sources are British cases that developed the hearsay rule between 1550 and 1750.

The second half considers the hearsay rule's practical application in Canada, and compares it with the hearsay rule's historical rationale. The research primarily consists of

appellate and trial case law. It also uses Canadian books and articles that comment on the way the hearsay rule and its exceptions are applied in practice.

Comparing the difference between the hearsay rule's historical rationale and practical application is an abstract exercise. The metric used to test the difference is theoretical. The historical rationale of the hearsay rule has three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. There are five factors that gave rise to the hearsay rule and underlie this rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process. These five factors still hold influence on the application of the hearsay rule and its exceptions. Since they underlie the hearsay rule's historical rationale, they are used to measure the difference between the historical rationale and the hearsay rule's current application. For example, demeanour evidence reflects the inherent and procedural reliability aspects of the historical rationale. If demeanour evidence is found to be less influential in the current application of the hearsay rule than it was historically, this will suggest a difference within these aspects of the rationale.

In addition to tracking the differences between the hearsay rule's historical rationale and practical application, the causes of the differences are identified and evaluated. In many instances, the differences prevent the hearsay rule from achieving its purpose. The discussion occurs on two levels. The hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the doctrine itself. Practical

considerations in the modern practice of criminal law are considered to determine if they create any differences.

Not all of the hearsay exceptions are analyzed. There are over a dozen recognized exceptions to the hearsay rule. The taxonomy of exceptions employed in Canada's leading criminal evidence texts is used to sort the exceptions. The texts are *The Law of Evidence in Canada: Fourth Edition*<sup>11</sup> and *McWilliams' Canadian Criminal Evidence: Fourth Edition*.<sup>12</sup> From this taxonomy, discussion occurs only for exceptions for which there is a difference between the hearsay rule's historical rationale and their practical application. The exceptions are: admissions, *res gestae*, dying declarations, the co-conspirator's exception to the hearsay rule, and prior inconsistent statements. Section 3 discusses prior inconsistent statements in conjunction with the exclusionary hearsay rule. Section 4 discusses the remaining hearsay exceptions.

The Canadian hearsay rule is exclusively considered. Moreover, the analysis is limited to the application of the rule in criminal litigation, where the majority of hearsay case law is generated.

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<sup>11</sup> Bryant, Lederman & Fuerst, *supra* note 5.

<sup>12</sup> S. Casey Hill, David M. Tanovich, & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence, Fifth Edition* (Toronto: Canada Law Book, 2012).

## 2. The Historical Rationale of the Hearsay Rule

### 2.1 Competing theories

There is no consensus on the historical rationale of the hearsay rule. There are six major theories about the rationale. They are advanced by six respective scholars: John Wigmore, John Langbein, Richard Friedman, Edmund Morgan, H.L. Ho, and Fredrick Koch. This section will discuss the six major theories and highlight points of disagreement between them.

It is important to note from the outset that the theories are products of different methodologies approaching the hearsay rule's historical rationale from different angles. As a result, the hearsay rule's historical rationale is described in differing language. However, when the different methodologies are peeled away, it is clear that the theories describe aspects of a common rationale.

#### 2.1.1 John Wigmore

The first theory is advanced by John Wigmore. Wigmore believes that the historical rationale for the hearsay rule is to prevent lay jurors from overvaluing the reliability of hearsay evidence. The locus of Wigmore's theory is that lay jurors will miscalculate testimony. Wigmore's theory is the most commonly accepted account in Canadian jurisprudence.

Wigmore did not explicitly articulate his theory of the hearsay rule's historical rationale. His theory is understood from the discussion of hearsay in his famous text, the *Treatise on the*

*Anglo-American System of Evidence in Trials at Common Law*. According to Wigmore, unsworn hearsay statements were excluded from evidence by common law judges beginning in the 1670s.<sup>13</sup> By 1696 both sworn and unsworn hearsay statements were barred.<sup>14</sup> The equitable courts later adopted the common law bar against hearsay evidence. Although the equitable and common law courts sometimes used different triers of fact – the common law courts allowed for lay jurors and the equitable courts only allowed professional judges – the equitable courts adopted the hearsay rule under the legal maxim that “equity follows the law”.<sup>15</sup> The sole reason for the historical bar against hearsay evidence is the cross-examination of the declarant:<sup>16</sup>

What is further noticeable is that in these utterances of the early 1700s the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; **the reason** is that “the other side hath no opportunity of a cross-examination.”<sup>17</sup>

The value of cross-examination is its ability to show lay jurors the potential sources of unreliability in testimony.<sup>18</sup> Lay jurors will be less inclined to overvalue testimonial evidence if the frailties of the testimony are brought to light under cross-examination. Wigmore’s privileging of cross-examination in the rationale of the hearsay rule is unsurprising. He believed cross-examination to be “beyond any doubt the greatest engine ever invented for the discovery of the truth.”<sup>19</sup>

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<sup>13</sup> John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada*, 4 vols (Boston: Little, Brown, 1904) at vol II, p. 1685-1686, §1364, cited in Frederick W. J. Koch, *Wigmore and Historical Aspects of the Hearsay Rule* (PhD Thesis, Osgoode Hall Law School of York University, 2004) [unpublished] at 89.

<sup>14</sup> Wigmore, *supra* note 13 at §1364, cited in Koch, *supra* note 13 at 90.

<sup>15</sup> Koch, *supra* note 13 at 242.

<sup>16</sup> Wigmore, *supra* note 13 at 1688, §1364, cited in Koch, *supra* note 13.

<sup>17</sup> *Ibid.* [Emphasis added].

<sup>18</sup> Koch, *supra* note 13 at 90

<sup>19</sup> Wigmore, *supra* note 13 at vol. I, p. 27, §1367.

Concomitant with the belief that cross-examination is the greatest engine for the truth, Wigmore strongly distrusted lay jurors' ability to properly evaluate testimonial assertions. Lay jurors were not believed to weigh hearsay evidence with the same competence as professional judges.<sup>20</sup> Cross-examination existed as a corrective measure against lay jurors' inability to properly assess testimony.

It follows that the hearsay rule is not necessary when cross-examination is not necessary to show lay jurors potential sources of unreliability in testimony. Wigmore believed that the hearsay rule is generally not applicable when the trier of fact is a judge alone.<sup>21</sup> Unlike lay jurors, judges can properly assess testimonial evidence.

The rationale of the many exceptions to the hearsay rule follows the same logic. Since the purpose of the hearsay rule is to prevent lay jurors from overvaluing testimonial evidence, and cross-examination is the sole means to show law jurors the potential sources of unreliability in testimonial evidence, hearsay evidence is admissible if in the absence of cross-examination lay jurors will not overvalue the evidence. Wigmore expressed this logic in the terms of his 'necessity' and 'reliability' criteria that have taken a foothold in Canadian hearsay jurisprudence. In Wigmore's lexicon, an exception to the hearsay rule will exist if, first, the declarant of the statement cannot testify; and, second, the testimony will not pose a risk of misvaluation by jurors in the absence of cross-examination.<sup>22</sup> In such an instance, cross-examination is "superfluous" and the statement ought to be admitted for the truth of its contents.<sup>22.1</sup>

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<sup>20</sup> *Ibid.*

<sup>21</sup> Koch, *supra* note 13 at 90-94.

<sup>22</sup> Wigmore, *supra* note 13 at p.1791, §1420, cited in Koch, *supra* note 13 at 92.

<sup>22.1</sup> *Ibid.*

Wigmore also recognized there are hearsay statements for which cross-examination is superfluous because of the circumstances in which the statements are made. In these circumstances the hearsay statements should be admitted into evidence. Modern examples of these statements include utterances that fall under the modern spontaneous declaration and dying declaration exceptions to the hearsay rule. Wigmore said that these statements are “made under circumstances that even a skeptical caution would look it as trustworthy (in the ordinary instance), in a high degree of probability” such that cross-examination “would add little as a security.”<sup>23</sup>

All five theories in the literature agree that part of the historical rationale for the hearsay rule is the lack of opportunity to cross-examine the declarant. Wigmore’s theory is exceptional because he ascribes cross-examination as the sole reason for the creation of the hearsay rule. And he considers the purpose of cross-examination to be to assist lay jurors in properly evaluating testimonial assertions. This is in contrast to the view, taken by some other scholars, that the purpose of cross-examination is to expose the evidence’s reliability.<sup>24</sup>

Wigmore’s focus on cross-examination means that he did not consider the absence of other, more traditional guards against unreliable testimonial evidence as historical reasons for the hearsay rule. Demeanour evidence is the information that can be obtained from a witness’ demeanour while they are testifying.<sup>25</sup> Although demeanour evidence is concomitant with cross-examination, its absence did not form part of Wigmore’s theory. Wigmore was concerned with

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<sup>23</sup> Wigmore, *supra* note 13 at vol. III, p. 154, §1420.

<sup>24</sup> Koch, *supra* note 13 at 90

<sup>25</sup> *Ibid.* at 87.

the opportunity for cross-examination, not the event of cross-examination itself. If there is an opportunity to cross-examine a declarant on his or her statement before trial, the hearsay rule does not apply.<sup>26</sup> Demeanour evidence in this circumstance is a “minor advantage ... not regarded as essential.”<sup>27</sup>

The testimonial oath is treated by Wigmore as an unrelated rule of evidence which serves a purpose different from the hearsay rule. It is designed to “remove, before the evidence is introduced, such sources of danger and distrust as experience may have shown to lurk within it.”<sup>28</sup> This is in contrast to the hearsay rule, which is solely concerned with lay jurors overvaluing testimonial evidence. The oath serves to improve the reliability of testimonial evidence by targeting the declarant. The hearsay rule is unconcerned with improving the reliability of testimonial evidence. Rather, the hearsay rule serves to prevent the trier of fact from overvaluing potentially unreliable hearsay evidence. The testimonial oath applies to all triers of fact while the hearsay rule applies to lay jurors only.

### 2.1.2 The influence of James Thayer

A full appreciation of Wigmore’s theory of the historical rationale of the hearsay rule requires an understanding of the context in which the theory was developed. Wigmore’s theory was developed during a time in which jury control theory was the orthodox academic view. Jury control theory is the hypothesis that exclusionary rules of evidence developed as an attempt by

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<sup>26</sup> Wigmore, *supra* note 13 at p. 1709-1710, §1370, cited in Koch, *supra* note 13 at 87.

<sup>27</sup> *Ibid.* at p. 1695, §1365, cited in Koch, *supra* note 13 at 87.

<sup>28</sup> *Ibid.* at p. 1378, §1172, cited in Koch, *supra* note 13 at 84.

judges to control the conduct of lay jurors. James Thayer is a leading proponent of this view. He was a professor at Harvard Law School while Wigmore was a student at the school. Thayer believed that most common law exclusionary rules of evidence developed to prevent lay jurors from misevaluating evidence.<sup>29</sup> Hearsay was one of several such types of evidence.

The crux of Thayer's theory is that the common law exclusionary rules of evidence enhance fact finding in jury trials by excluding testimonial evidence that will be overvalued by lay jurors. If lay jurors were more competent evaluators of testimonial evidence, the exclusionary rules would not be necessary. Like Wigmore, Thayer believes that the exclusionary rules are not necessary in judge alone trials because judges have a higher competence for evaluating testimonial evidence.

There are two tenets to Thayer's theory, both of which govern Wigmore's theory of the hearsay rule. First, Thayer believed that common law evidentiary rules were not a purely rational system of proof.<sup>30</sup> A purely rational system of proof is one in which "all information [that is] logically probative [is] *prima facie* admitted and considered by the trier of fact."<sup>31</sup> Thayer considered the Continental system to be an example of a purely rational system of proof.<sup>32</sup> He reasoned that if the common law was a purely rational system, one would expect to see the same exclusionary rules of evidence as the Continental system. This symmetry does not exist. Therefore, reasoned Thayer, there must be an additional influence on the common law system.

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<sup>29</sup> Koch, *supra* note 13 at 61.

<sup>30</sup> James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) at 267-268, cited in Koch, *supra* note 13 at 63.

<sup>31</sup> Koch, *supra* note 13 at 62.

<sup>32</sup> *Ibid.*

That influence is role of lay jurors as a trier of fact.<sup>33</sup> This feature resulted in the creation of atypical exclusionary rules of evidence, of which the hearsay rule is one example.

Second, Thayer used historical research to show how judges went about creating exclusionary rules of evidence to guard against the perceived evaluative ability of lay jurors.<sup>34</sup> Wigmore built upon Thayer's work in his discussion of hearsay in the *Treatise on the Anglo-American System of Evidence in Trials at Common Law*. Wigmore's theory of the hearsay rule's historical rationale stands on the shoulders of Thayer's research.

Thayer and Wigmore's endorsement of jury control theory has been profoundly influential in the academic literature. They have been described as "dominating the world of evidence 'like a colossus' during the first half century after the publication of their respective works in 1898 and 1904."<sup>35</sup> Indeed, almost 100 years after their works were published, the *Harvard Law Review* advanced jury control theory as the theoretical foundation of the hearsay rule.<sup>36</sup>

### 2.1.3 John Langbein

The second theory advanced is by John Langbein. A legal historian, Langbein uses historical evidence to nuance jury control theory. Langbein agrees with Wigmore that most exclusionary rules of evidence, including the hearsay rule, were developed by judges to guard against the perceived tendency of lay jurors to overvalue testimonial evidence. However,

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<sup>33</sup> Thayer, *supra* note 30 at 47.

<sup>34</sup> *Ibid.* at 109-114 & 137 *ff*, cited in Koch, *supra* note 13 at 64.

<sup>35</sup> Koch, *supra* note 13 at 64.

<sup>36</sup> "The Theoretical Foundation of the Hearsay Rules" (1979-1980) 93 Harv L Rev 1786.

Langbein believes that the exclusionary rules relating to unsworn hearsay evidence developed later, in the 1700 and 1800s, as defence lawyers began to represent accused persons in felony trials.<sup>37</sup> Wigmore was wrong in taking earlier cases from the late 1600s as establishing a prohibition on hearsay evidence in jury trials. Those cases described the weight to be ascribed to hearsay evidence.<sup>38</sup> The prohibition of unsworn hearsay evidence would come decades later.

According to Langbein, the prohibition of unsworn hearsay evidence emerged alongside the rise of the professional advocate and decline in the judge's role in political trials. As early as the 1500s and throughout the 1600s, accused persons in political trials were prohibited from representation by a lawyer. During this time judges had tremendous influence over both the jury and accused person's case. With respect to the jury, a judge had multiple means of influencing the rectitude of their decision: rejecting verdicts, requiring redeliberation, and commenting on the evidence.<sup>39</sup> With respect to the accused person's case, a judge was closer to that of the inquisitorial judge in the Continental system than to the passive observer in modern Canadian criminal law.<sup>40</sup> The judge was *de facto* counsel for the accused person. The judge could adjust the inchoate standard of proof to account for the prosecution's representation by a professional advocate and the accused person's self-representation. The judge could also control the accused

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<sup>37</sup> John H. Langbein, "The Criminal Trial Before the Lawyers" (1978) 45(2) U. Chi. L. Rev. 263 at 306-15 [*Before Lawyers*]. Langbein did not challenge Wigmore's description of sworn hearsay.

<sup>38</sup> John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at 233-42, cited in Koch, *supra* note 13 at 20.

<sup>39</sup> Lisa Dufrainmont, "Evidence Law and the Jury: A Reassessment" (2008) 53 McGill LJ 199 at 220 [*Evidence Law and the Jury*]

<sup>40</sup> *Ibid.* at 307 & 315.

person's evidence. The orthodox rule was that the accused person did not need an advocate to tell his or her story because he or she was an expert about the facts of the litigation.<sup>41</sup>

This all began to change by the the mid-1700s. A judge's old methods of influence on the jury were eliminated or significantly curtailed.<sup>42</sup> At the same time, accused persons began to receive professional representation in felony trials from defence counsel. The advent of the defence counsel shook up the working relationship between judge, jury, and accused person. Defence counsel now produced evidence through cross-examination. Defence counsel also asserted measures against judicial interference, such as the privilege against self-incrimination and the articulation the criminal standard of proof.<sup>43</sup>

As the judicial role became more passive and the trial more adversarial, evidence law emerged as the new method for judicial influence on the rectitude of the jury's decision in felony trials. Exclusionary rules of evidence such as the hearsay rule were developed to guard against the perceived tendency of lay jurors to overvalue testimonial evidence.<sup>44</sup>

Langbein has been understood by some scholars to disagree with Wigmore on the historical purpose of the hearsay rule.<sup>45</sup> This is a misreading of Langbein's research. Langbein and Wigmore agree that the historical purpose of the hearsay rule is to guard against the perceived tendency of lay jurors to overvalue testimonial evidence. Langbein and Wigmore disagree on the time period in which the rule emerged to achieve this purpose for unsworn hearsay evidence.

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<sup>41</sup> *Ibid.* at 308.

<sup>42</sup> *Ibid.* at 220.

<sup>43</sup> John H. Langbein, "Historical Foundations of the Law of Evidence: A View From the Ryder Sources" (1996) 96 *Colum. L. Rev.* 1168 at 1199 [*Historical Foundations*].

<sup>44</sup> *Ibid.* at 1195-1202

<sup>45</sup> See e.g. criticism of some scholars in the literature levied in *Evidence Law and the Jury*, *supra* note 39 at 222.

Langbein, putting the emergence of the rule in the mid-1700s, sees the rule emerging at the intersection of the rise of the professional advocate, the judge's loss of influence over the jury, and the advent of evidence law as a control on the rectitude of the jury's decision. Wigmore, putting the emergence of the rule much earlier in the 1600s, sees the rule only emerging as a control on the rectitude of the jury's decision.

#### 2.1.4 Richard Friedman

The third theory advanced is by Richard Friedman, who challenges the suggestion that the hearsay rule is a judicial control on the rectitude of the jury's decision. Friedman suggests that the core of the hearsay rule is the right to confront the witness during their testimony.<sup>46</sup> This right applies in judge alone and jury trials and is unconcerned with perceived judicial attitudes about lay jurors. Examining early British cases law on sworn statements, Friedman makes the historical argument that the hearsay rule emerged as a product of the accused person's right to confront their accuser.

Friedman provides a variety of examples from sixteenth to eighteenth century British common law. For instance, the jurisprudence surrounding depositions crystalized during this time. Depositions were not allowed to be used at trial unless the adverse party had an opportunity to cross-examine the declarant.<sup>47</sup> Similarly, Magistrates under the reign of Queen Mary could take statements sworn from witnesses in felony cases for the express purpose of

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<sup>46</sup> Richard D. Friedman, "No Link: The Jury and The Origins of the Confrontation Right and the Hearsay Rule" in John W. Carins & Grant McLeod, eds. *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Oxford: Hard Publishing, 2002) at 93.

<sup>47</sup> *Ibid.* at 95.

preserving their evidence before a trial. If the declarant was alive and able to travel to court, the statement could not be used at trial. The rationale was that the accused person could not be denied their right to confront the witness.<sup>48</sup> These sworn statements were eventually prohibited by the Courts of King's Bench and Common Pleas for misdemeanour cases as well. The Court specifically reasoned that "the defendant not being present when [the statements] were taken before the [examining authority, in this case the mayor], and so had lost the benefit of a cross-examination."<sup>49</sup>

In treason and other politically charged trials, hearsay statements given before trial were sometimes used out of context against the accused. As early as 1521 treason defendants began to demand that witnesses be brought before them "face to face".<sup>50</sup> By the mid-1600s it was understood through acts of Parliament and by the courts that treason witnesses must be cross-examined by the accused.<sup>51</sup>

Freidman readily admits that the right to confrontation was not cleanly applied in the time leading up to the eighteenth century. Some courts enforced the right sporadically. Still, the affirmation or denial of the right was never dependant on the jury's perceived ability to evaluate the hearsay evidence. The concern was always the procedural issue of whether the witness should give their testimony in open court, face to face with the adverse party.<sup>52</sup>

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<sup>48</sup> *Ibid.* at 96.

<sup>49</sup> *R. v. Paine*, 5 Mod. 163 at 165, 87 ER 584 at 585, quoted in *Ibid.*

<sup>50</sup> Friedman, *supra* note 46 at 97.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 98.

Friedman recognizes that the right to confrontation is narrower than the scope of the hearsay rule. The right to confrontation, as conceived by Friedman, only extends to sworn statements taken for the purpose of serving as testimony.<sup>53</sup> It does not extend to out of court statements not made for the purpose of litigation; for example, a casual conversation with a civilian in which an accused person incriminates him or herself. Moreover, the right to confrontation does not extend to implied assertions in which a person's conduct appears to reflect a belief.<sup>54</sup> These types of statements became recognized by courts as inadmissible hearsay after sworn hearsay statements were prohibited at common law. The statements represent the growth of the hearsay doctrine beyond its initial scope, which is aimed at protecting the right to confrontation. These unsworn statements are not congruent with the historical rationale of the hearsay rule. Rather, they are separate policy concerns conflated with the historical rule. Perhaps for this reason, says Friedman, "it is in this same era that we first see the justification for the hearsay rule being laid at the feet of the jury."<sup>55</sup>

#### 2.1.5 Edmund Morgan

The fourth theory advanced is by Edmund Morgan, who suggests that the hearsay rule is a product of a judicial desire to ensure that only reliable evidence is put to the trier of fact. Like most exclusionary rules of evidence, the hearsay rule is unrelated to concerns about the evaluative capacity of lay jurors. Morgan's research reveals three rationales for the hearsay rule

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 99.

until the 1700s, all of which are unrelated to juries.<sup>56</sup> Hearsay is rejected because it is not information based on a witness' observations: it is information based on what the witness is credulous enough to believe. A hearsay statement is not made under oath.<sup>57</sup> And the opposing party in litigation is unable to receive the benefit of cross-examining the hearsay declarant.

Cross-examination is necessary for its ability to shed light on potential sources of unreliability in testimonial evidence. Morgan identified four 'hearsay dangers' that exist whenever a witness testifies about an out of court statement. A court is unable to test the declarant's sincerity, use of language, memory, and perception of the statement in question.<sup>58</sup> Cross-examination allows the opposing party to test these potential sources of unreliability and make them plain to the trier of fact. This allows the trier to better weigh the testimonial evidence. Such insight into the reliability of testimony is lost when hearsay evidence is admitted.

Note that cross-examination is not necessary for its perceived ability to remedy an evaluative issue with lay jurors. Under Morgan's theory, the historical role of cross-examination in the hearsay rule is a product of the adversary system. Cross-examination is required to allow the opposing party an opportunity to expose sources of unreliability in testimony. This applies regardless of whether the trier of fact is a judge or jury.<sup>59</sup>

Morgan acknowledged a caveat to his research. His theory begins to show cracks in its application to the case law after the early 1700s. After the hearsay rule was formed in the 1600s,

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<sup>56</sup> Edmund M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv L Rev 177 at 182-83 [*Hearsay Dangers*].

<sup>57</sup> Edmund M. Morgan, "The Jury and the Exclusionary Rules of Evidence" (1936) 4 U Chi L Rev. 247 at 254 [Jury and Exclusionary Rules]

<sup>58</sup> *Hearsay Dangers*, *supra* note 56.

<sup>59</sup> *Jury and Exclusionary Rules*, *supra* note 57 at 255.

some decisions creating exceptions to the rule referenced perceived issues with the jury's competence. Morgan conceded that these hearsay exceptions were influenced by the jury's role as trier of fact.<sup>60</sup> He reconciles the discrepancy by recognizing that the hearsay doctrine is the product of conflicting considerations. Much of the doctrine, including the creation of the hearsay rule, is influenced by the reliability of hearsay evidence. Some of the exceptions to the rule, however, are influenced by concerns about the jury.<sup>61</sup>

Despite these caveats, Morgan's theory marked a paradigm shift in the literature. His suggestion that the hearsay rule stems from a concern for the reliability of testimonial evidence brought a new dimension to the debate about the historical rationale of the hearsay rule. Equally, his research is one of the most significant challenges to the jury control theory on which Wigmore premises his analysis.

#### 2.1.6 H.L. Ho

H.L. Ho advances the sixth theory. Ho considers fairness to be the lynchpin of the historical rationale of the hearsay rule. Hearsay is based on two conceptions of fairness. First, the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified.<sup>62</sup> Under the adversarial system generally, the party producing a witness bears the risk that the witness will not be able to prove his or her anticipated evidence. There are a number of reasons why a witness' testimony may not prove their

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<sup>60</sup> *Ibid.* at 255.

<sup>61</sup> *Ibid.* at 255-56.

<sup>62</sup> H.L. Ho, "A Theory of Hearsay" (1999) 19(3) *Oxford Journal of Legal Studies* 403 at 403 [*A Theory of Hearsay*].

anticipated evidence. The witness' demeanour may betray their testimony in the opinion of the trier of fact. The witness may not be able to repeat their out of court statement after having their conscience bound by an oath. The witness may fear the threat of a perjury charge now that they are testifying in court. The witness may not have meant what their statement purports to prove. When hearsay evidence is admitted, the court removes the possibility of such risks materializing. Ho theorizes that the lack of fairness caused by this aspect of hearsay evidence shaped the creation of the hearsay rule and its exceptions.<sup>63</sup>

The second conception of fairness is the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.<sup>64</sup> This requires some unpacking. In any trial evidence is adduced to create an inference that will make a material issue more or less likely. The inference created is, generally, adverse to the interest of the opposing party. For instance, when a witness is called by a party and testifies, their testimony creates inferences that are prejudicial to the opposing party. The opposing party has the opportunity to remove the prejudice through cross-examination, which can reveal unreliability in the testimony. When hearsay evidence is admitted, it too creates inferences prejudicial to the opposing party. But the opposing party has no opportunity to remove the prejudice through cross-examination. The opposing party is stuck with the prejudice. At best, the opposing party can impose upon itself a positive burden to adduce evidence that

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<sup>63</sup> *Ibid.* at 409-10.

<sup>64</sup> *Ibid.* at 410.

undermines the credibility of the prejudice.<sup>65</sup> For example, a party may call an alibi witness to challenge a hearsay statement that identifies the party at a crime scene.

Ho provides a number of examples of precedential cases in which the hearsay rule and its exceptions were applied in conformity with his conceptions of fairness.<sup>66</sup> Consider *Teper v. R.*,<sup>67</sup> which conforms to Ho's first conception of fairness. In *Teper* a police officer testified at an arson trial that he heard a woman shouting to a passing motorist: "Your place burning and you [sic] going away from the fire."<sup>68</sup> The statement was tendered as proof that the accused person was running away from a fire that he had started. The Privy Council held that the statement was inadmissible hearsay. Applying Ho's theoretical framework, the statement impermissibly demanded that the trier of fact assume that the woman would have testified that the person to whom she was referring was in fact the accused person, and the accused person was running away from the fire.<sup>69</sup>

*R. v. Kearley*<sup>70</sup> conforms to Ho's second conception of fairness. *Kearley* is a drug trafficking case in which the accused person was arrested at his residence. A police officer testified that after the arrest the accused person's phone received several phone calls. The officer answered the calls and was met with requests for the supply of drugs. The prosecution did not call the individuals placing the calls to testify at the trial because, presumably, these individuals would be difficult to track down and reluctant to testify against the accused. The majority of the House

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<sup>65</sup> *Ibid.*

<sup>66</sup> See for e.g. *Ibid.* at 412-418.

<sup>67</sup> *Teper v. R.*, [1952] AC 480, cited in *Ibid* at 414.

<sup>68</sup> *A Theory of Hearsay*, *supra* note 62 at 414.

<sup>69</sup> *Ibid.*

<sup>70</sup> *R. v. Kearley*, [1992] 2 AC 228, cited in *Ibid.* at 415.

of Lords held that the officer's testimony was inadmissible hearsay to the extent that it implied that the accused person is a drug dealer. Applying Ho's theoretical framework, it is unfair that the police officer's testimony creates the prejudice of inferring that the accused person is a drug dealer. The accused person has no opportunity to remove the prejudice through cross-examination.<sup>71</sup> Equally, it is unfair to impose upon the accused person the burden of producing his own evidence to remove the prejudice caused by the police officer's testimony. This would have been especially difficult in this case because little information was officially known about the declarant callers.<sup>72</sup>

*Subramaniam v. Public Prosecutor*<sup>73</sup> demonstrates how exceptions to the hearsay rule were able to form historically. In this case the accused person was charged with possession of ammunition for the purpose of helping terrorists. The accused person used the duress defence. He wanted to testify that the terrorists threatened to kill him if he did not comply with their demands. The Privy Council held that the proffered testimony was admissible because it is not hearsay. The purpose of the accused person's testimony was to show his state of mind so that the jury could understand his conduct. It was not to show the sincerity of the terrorists' threats. Applying Ho's theoretical framework, the accused person's testimony is admissible because it does not offend either conception of fairness.<sup>74</sup> The state of the accused's mind was at issue, so the accused person was the source evidence. Since he was going to testify, there was no risk that his evidence would not come up to proof. Likewise, the prosecution could remove any prejudice

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<sup>71</sup> *A Theory of Hearsay*, *supra* note 62 at 415.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Subramaniam v. DPP*, [1956] 1 WLR 965, cited in *Ibid.* at 413.

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

caused to its case by the accused person's testimony about his state of mind by cross-examining him on this issue.

The end achieved by cross-examination, for Ho, is exploring the reliability of the evidence. Ho is unconcerned with the competence of the jury. His two conceptions of fairness govern the admission of hearsay evidence regardless of whether the trier of fact is a judge or jury.

Ho's theory is qualitatively different from most of the major theories in the literature. His theory is derived in a manner opposite that of most scholars. Ho is an evidence scholar who theorized about the philosophy of evidence. He created a philosophical theory and used historical cases to test it. Premised on philosophy and tested with case law, Ho's theory aims to explain the genesis of the hearsay rule, its exceptions, and, atypically, the route the doctrine should take as it develops in the future. This is in contrast to legal historians like Langbein, who examined a wealth of historical cases and developed a theory from that data. The result is different theories with different goals. Ho's theory is thin on historical cases for proof and prescriptive in scope. Other theories in the literature are thick on historical cases for proof and descriptive in scope.

### 2.1.7 Frederick Koch

The sixth theory is advanced by Frederick Koch, who believes that the hearsay rule is a merger of seven separate exclusionary evidence rules that formed between 1550 and 1750.<sup>75</sup>

The seven rules formed for one or both of two reasons. The first reason is the judicial belief that

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<sup>75</sup> Frederick Koch, "The Hearsay Rule's True Reason d'etre: It's Implications for the New Principled Approach to Admitting Hearsay Evidence" (2005) 37:2 Ottawa L. Rev. 249 at 253 [*Hearsay's Reason d'etre*].

certain kinds of hearsay evidence should be excluded because they are too unreliable.<sup>76</sup> The second reason is the epistemic need for two elements of testimonial evidence, cross-examination and demeanour evidence.<sup>77</sup> Cross-examination is needed to expose potential flaws in the testimony. Demeanour evidence is the information acquired through a trier of fact's observation of the witness as they testified.<sup>78</sup>

Koch's analysis of the historical rationale for the hearsay rule distinguishes between the historical treatment of sworn and unsworn hearsay statements. These two sets of statements were gradually prohibited in different time periods and for different reasons. Eventually, the separate and various prohibitions merged into one rule prohibiting hearsay evidence.

Sworn hearsay statements were initially banned between 1595 and 1662 because of a judicial distrust of their reliability.<sup>79</sup> The distrust produced five common law exclusionary rules.<sup>80</sup> First, the affidavits rule.<sup>81</sup> The *ex-parte* process of creating affidavits and depositions engendered the spectre of litigants exerting undue pressure on the declarant or altering the written record of their statement. In contrast, *viva viva voce* trial testimony was perceived by the judiciary to be more reliable.

Second, the same parties rule.<sup>82</sup> Depositions taken in one proceeding were prohibited from being used in another if the parties or issues were not the same in both. The common thread

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* at 268-256.

<sup>80</sup> *Ibid.* See also, Koch, *supra* note 13 at 238-239.

<sup>81</sup> Koch, *supra* note 13 at 183-191.

<sup>82</sup> *Ibid.* at 192-209.

of reasoning through the various decisions of the English courts of common law and equity was the possible unreliability of the deposition evidence if the opposing party was unable to cross-examine the declarant.

Third, the *viva voce* rule took hold in the common law courts.<sup>83</sup> During the nascence of the jury, lay jurors had personal knowledge of the litigants, witnesses, and background to the dispute. Later, during the 1600s, the jury's knowledge of these elements decreased alongside a shift to the litigants assuming the role of the suppliers of evidence. An increased concern with the reliability of witness evidence followed. *Viva voce* testimony became the preferred means of witness evidence.

Fourth, the court of record rule changed the practice of the common law courts.<sup>84</sup> The judiciary increasingly perceived the threat of serious punishment for perjury to be an important safeguard for the reliability of evidence. Testimony not given under the threat of perjury was deemed unreliable and excluded from evidence.

Likewise, and fifth, the joinder of issues rule prohibited the use of depositions that were not given at trial under the threat of perjury.<sup>85</sup>

Unsworn hearsay statements were prohibited before sworn hearsay statements. They were first prohibited in the courts of equity and then in the courts of common law. Unsworn hearsay statements were prohibited for one of two reasons related to reliability.<sup>86</sup> First, they were generally perceived by the courts to be too unreliable to be given consideration if other,

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<sup>83</sup> *Ibid.* at 210-223.

<sup>84</sup> *Ibid.* at 223-231.

<sup>85</sup> *Ibid.* at 231-239.

<sup>86</sup> *Ibid.* at 242.

more reliable sources of the same information were available. Second, unsworn hearsay meant that the person with the knowledge of the information generally would not testify at the trial. This in turn meant that the person could not be put to cross-examination or have their demeanour assessed.

Koch's theory is founded on a robust source of historical case law. He used the nominate case reports, reports in *Cobbett's State Trials*, early published works on evidence law, the *Old Bailey Session Papers*, and *Sir Dudley Ryder's Notes*.<sup>87</sup> Koch's research represents the most comprehensive examination of the hearsay rule's historical rationale.

Koch categorically rejects Wigmore's assertion that the hearsay rule emerged out of a judicial concern with the evaluative capacity of lay jurors. The seven distinct exclusionary rules, five for sworn hearsay and two for unsworn hearsay, that merged into a single hearsay rule by 1750 are unconcerned with the evaluative capacity of lay jurors. Rather, the two underlying reasons for the seven exclusionary rules are the unreliability of hearsay evidence and the epistemic need for testimonial evidence; that is, demeanour evidence and cross-examination.

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

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<sup>87</sup> *Ibid.* at 33. *Hearsay's Reason d'etre*, *supra* note 75 at 254.

## 2.2 The historical rationale of the hearsay rule

This section will reconcile the perceived debate in the literature and advance a single historical rationale of the hearsay rule. It will explain that the hearsay rule is the product of five historical factors which underlie a rationale that has three aspects. The scholarship in the literature captures aspects of the rationale. Scholars have failed to capture the complete scope of the rationale due in large part to limitations in their methodologies.

This section will proceed in two steps. It will first outline the historical rationale of the hearsay rule. Then it will reconcile the perceived debate in the literature by explaining why the various scholars are describing aspects of the same, broad rationale. Methodological differences between the scholars will be examined to show how the literature emphasizes and expresses different aspects of the hearsay rule's historical rationale. The following section will explain how each of the five factors gave rise to the hearsay rule and its underlying historical rationale.

### 2.2.1 Outline of the hearsay rule's historical rationale

The review of the literature reveals that historically the hearsay rule was premised on five factors. Analytically, the factors underlie three rationales:

#### **1. Inherent Reliability**

- i. The hearsay dangers
- ii. No demeanour evidence

#### **2. Procedural Reliability**

- iii. The lack of opportunity to cross-examine the declarant
- iv. The evidence is unsworn

#### **3. Fairness in the adversarial process**

- v. Fairness in the adversarial process

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

The first rationale, inherent reliability, is concerned with the accuracy of an untested hearsay statement. The locus of judicial concern is the accuracy of a statement when it is made out of court and without any of the tests of courtroom procedure (for example, the oath or cross-examination). The inherent reliability rationale is derived from historical judicial concern with demeanour evidence and the hearsay dangers. The absence of demeanour evidence was concerning to judges because it prevented the trier of fact from assessing the sincerity of the hearsay declarant. It was more difficult to assess the accuracy of a declarant's statement without observing the witness' sincerity. In addition, there was an epistemological concern that a witness testify *viva voce*. The hearsay dangers are the inability to test the declarant's sincerity, use of language, memory, and perception of the statement in question.

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

testifies in court. The oath binds the declarant's conscience and cross-examination examines his or her motive and ability to recollect. It is in this manner that the oath and cross-examination increase the reliability of hearsay evidence through courtroom procedure.

The third rationale encompasses one factor, fairness to the opposing party in the adversarial process.

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

### 2.2.2 The literature is discussing the same theory

This section will examine why there is a perceived debate in the literature. The theorists may not have intended to enter a debate on the hearsay rule's historical rationale. However, the conclusions inferred from their research contribute to the debate. In this real sense, the theories deserve reconciliation. This section will reconcile the debate and explain how methodological limitations prevent scholars from articulating the same historical rationale of the hearsay rule. It will further examine how methodology limited the ability of scholars to articulate all aspects of the historical rationale.

The scholars are unwittingly describing different aspects of the same rationale. That rationale has three aspects: the inherent reliability of hearsay evidence, the procedural reliability in admitting the evidence, and fairness in the adversarial process. The hearsay rule was

developed over 155 years. It began in 1595 with the establishment of the affidavits rule.<sup>88</sup> It crystallized in 1750 with the fusion of various exclusionary rules.<sup>89</sup> During this 155-year span the doctrine that became the hearsay rule was curated, gradually, by different judges in the different courts of common law and equity. It makes sense that as the doctrine developed judges emphasized different aspects of the rationale, and at different times. For example, the courts of equity did not use lay jurors. It makes sense that these courts did not exclude hearsay evidence out of a concern for the evaluative capacity of lay jurors.

The scholars discussing the historical rationale of the hearsay rule developed their theories through an examination of different courts during differing time periods. It too makes sense that their theories would emphasize different aspects of the hearsay rule's historical rationale. Their theories ought to be thought of as circles in a Venn diagram. The area in which all of the circles converge is the hearsay rule's historical rationale. The remaining areas are the result of the different theories emphasizing different aspects of the rationale.

There is one exception. All of the theories agree that at least part of the hearsay rule's rationale is the need to cross-examine the declarant. The theories disagree on the purpose for which cross-examination is necessary. Some hold that cross-examination is necessary to show the trier of fact potential sources of unreliability in the testimony. Others hold that cross-examination is necessary to remedy the evaluative capacity of lay jurors. As will be discussed in

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<sup>88</sup> Koch, *supra* note 13 at 183.

<sup>89</sup> Koch, *supra* note 13 at 31.

section 2.2.3, these two purposes are not the same. The different positions on the issue cannot be attributed to methodology; that is, the study of specific courts over specific time periods.

Not all scholars in the literature would accept their theories are different aspects of the same theory. Some scholars did not intend to enter a debate on the historical rationale of the hearsay rule. Some theories are derived from their larger body of work on the rules of evidence. Wigmore's theory, for example, is derived from his *Treatise on the Anglo-American System of Evidence in Trials at Common Law*.<sup>90</sup> He made no mention of the literature when he advanced his philosophical theory for the hearsay rule's rationale. Conversely, some scholars intentionally entered the debate on the hearsay rule's historical rationale but disagreed with the conclusion of other scholars. For example, Morgan and Koch disagreed with Wigmore's conclusion that the hearsay rule did not arise out of reliability concerns.

Whatever the disagreement amongst scholars, the difference is largely methodological. When methodological divergence is peeled away and the theories are laid bare, there is surprising agreement between all scholars on the basic tenets of the hearsay rule's historical rationale. Those basic tenets are concerns with the inherent and procedural reliability of hearsay evidence and fairness in the adversarial process. The methodological disagreements in the literature create two points of divergence among the scholars. Their research either focuses on different parts of the hearsay rule's historical rationale, or agrees on the historical rationale but attributes its ascendance to different factors.

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<sup>90</sup> Wigmore, *supra* note 13.

Consider the first instance, where divergence occurs over focus on different parts of the hearsay rule's historical rationale. Ho's theory appears to advance a different rationale than Koch or Morgan's theories. Ho's methodology causes him to focus on a limited aspect of the hearsay rule, fairness in the adversarial process. Ho starts his theory from a philosophical position and tests it with historical cases. The theory is coloured from start to finish in the language of philosophical fairness. Looking beyond the words reveals that Ho attributed the hearsay rule's historical rationale to more than fairness concerns. Ho's theory captures concerns with the fairness and reliability of hearsay. One conception of fairness in Ho's theory is the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement had they testified.<sup>91</sup> Stripped of the philosophical language in which Ho dresses it, this conception of fairness has Morgan's hearsay dangers at its locus. Hearsay dangers refers to four qualities of testimonial evidence that the trier of fact must accept untested when considering hearsay: the declarant's sincerity, use of language, memory, and perception of the statement in question. The unfairness in assuming that a declarant would have proven his or her hearsay statement had they testified is, at its core, a concern that the hearsay dangers will not be exposed in the declarant's direct examination. The declarant is unable to show the trier of fact how sincere they are, how well they remember the observation they are describing, and what they meant when they said the statement in question. Hearsay evidence encourages the trier of fact to either speculate how well the declarant would have performed if his or her statement was tested for the hearsay dangers, or assume that statement would have been unaffected by testing entirely.

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<sup>91</sup> *A Theory of Hearsay*, *supra* note 62 at 403.

It may appear axiomatic that a concern with fairness encompasses a concern with the reliability of the evidence. That is just the point. The three aspects of the hearsay rule's rationale are connected. Ho did not acknowledge this because of his methodology, which was centred on a narrow philosophical proposition about fairness. The way in which he framed his starting point – the hearsay rule excludes evidence because of fairness – precluded him from considering other rationales.<sup>92</sup> Moreover, Ho's methodology caused him to not emphasize procedural reliability as an aspect of the hearsay rule's rationale.

Consider now the second instance, where theories agree on the historical rationale of the hearsay rule but their different methodologies attribute the rule's creation to different factors. Wigmore and Langbein agree on the same aspect of the hearsay rule's rationale but, because of their different methodologies, attribute the rule's ascendance to different factors. Wigmore examined case law between 1550 and 1750 and concluded that the hearsay rule became an evidentiary doctrine of the common law courts between 1675 and 1696.<sup>93</sup> The hearsay rule was subsequently adopted in the courts of equity under the maxim "equity follows the law".<sup>94</sup> Based on the time period examined, Wigmore concluded that the hearsay rule emerged out of a judicial concern that testimonial evidence would be overvalued by lay jurors because the evidence was not subject to cross-examination.<sup>95</sup> The historical rationale for the hearsay rule was squarely placed within a concern for the rectitude of the decision.

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<sup>92</sup> If Ho realized that the reliability of hearsay evidence is tied to this theory, he failed to articulate it.

<sup>93</sup> Wigmore, *supra* note 13 at pp. 1685-1686, §1364, cited in Koch, *supra* note 13 at 3.

<sup>94</sup> Koch, *supra* note 13 at 242.

<sup>95</sup> Wigmore, *supra* note 13 at p. 1688, §1364

Langbein reached substantially the same conclusion but attributed the rationale to different factors. In addition to examining Wigmore's sources, Langbein examined published pamphlets he labelled the *Old Bailey Session Papers* and *Sir Dudley Ryder's Notes*.<sup>96</sup> From this methodology Langbein too concluded that the prohibition of unsworn hearsay evidence emerged out of judicial concern that lay jurors would overvalue testimonial evidence.<sup>97</sup> This squarely placed the hearsay rule's historical rationale with a concern for the rectitude of the decision. However, instead of attributing the concern to the absence of cross-examination, Langbein attributed it to the intersection of the rise of the professional advocate, the judge's loss of influence over the jury, and the advent of evidence law as a control on the jury's decision.<sup>98</sup> These factors occurred in the late 1700s, whereas Wigmore placed the emergence of the hearsay rule in the common law courts in the late 1600s.

Langbein saw the hearsay rule emerge at a later time because he was able to use Wigmore's sources, learn from Wigmore's mistakes with them, and look at additional sets of data. For Langbein, *Ryder's Notes* suggested that the hearsay rule was not established in the late 1600s.<sup>99</sup> *Ryder's Notes* are the most detailed judge's notes from 1550 to 1750.<sup>100</sup> The *Old Bailey Session Papers* encouraged Langbein to interpret decisions that disapproved of the use of hearsay evidence differently from Wigmore. Wigmore interpreted these comments as establishing the hearsay rule in the late 1600s. Langbein interpreted these comments as attributing weight to

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<sup>96</sup> Langbein, *supra* note 38; *Historical Foundations*, *supra* note 43.

<sup>97</sup> Langbein, *supra* note 38.

<sup>98</sup> Langbein did not challenge Wigmore's description of the development of sworn hearsay: see e.g. *Before Lawyers*, *supra* note 37.

<sup>99</sup> Koch, *supra* note 13 at 19-20.

<sup>100</sup> *Historical Foundations*, *supra* note 43 at 1180, cited in Koch, *supra* note 13 at 46.

admissible hearsay evidence.<sup>101</sup> This is not to suggest that Langbein was more correct than Wigmore because Langbein used more sources. To the contrary, Langbein has been criticized for drawing invalid conclusions from *Ryder's Notes* and the *Old Bailey Session Papers*.<sup>102</sup> The point is that Langbein's different methodology explains why he drew different conclusions than did Wigmore.

The different methodologies used by Wigmore and Langbein have a twin effect on their ability to map the hearsay rule's historical rationale. At the one end, the different methodologies cause different factors to be attributed to the hearsay rule's creation, as discussed above. At the other end, the similar nature of the methodologies prevents each scholar from emphasizing the full scope of the hearsay rule's historical rationale. Both scholars base their theories in historical descriptions of the hearsay rule, in particular the link between the rule's development and the use of lay jurors. As a result, it is principled to place less emphasis on other aspects of the hearsay rule's rationale,<sup>103</sup> such as concern with inherent reliability and fairness in the adversarial process. These rationales share no nexus with the evaluative capacity of lay jurors. This is not to suggest that Wigmore and Langbein believed that concerns with the inherent reliability and fairness of hearsay evidence had no role in the creation of the hearsay rule. Wigmore and Langbein believed that these rationales had a role, but their methodologies caused them to deemphasize the rationales and express their role as a function of judicial concern with the evaluative capacity of lay jurors.

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<sup>101</sup> Langbein, *supra* note 38 at 234-242, cited in Koch, *supra* note 13 at 20.

<sup>102</sup> *Hearsay's Reason d'etre*, *supra* note 75 at 265-66.

<sup>103</sup> Koch, *supra* note 13 at 4.

This section has explained why there is a perceived debate in the literature. Although the theorists may not have intended to enter a debate on the hearsay rule's historical rationale, the conclusions inferred from their research contribute to the debate. In this real sense, the theories deserve reconciliation. This section has explained how the theories describe different aspects of the same rationale. Perceived differences are the produced of methodological limitations.

### 2.2.3 Koch most closely maps all aspects of the hearsay rule's historical rationale

Koch's research deserves special mention on the topic of methodology. Koch published his research in 2004, making him the most contemporary scholar in the literature.<sup>104</sup> His data includes the sources covered by all other scholars in the literature. With the benefit of hindsight, Koch was able to take notice of where sources of case law might be unreliable. For example, building on Langbein's research on the reliability of historical cases, Koch was aware that the *State Trials* included cases that occurred decades or centuries before they were first published.<sup>105</sup> The accuracy of some of these cases is suspect. To remedy this, at least in part, Koch confirmed the accuracy of the trials by reference to the juristic literature of the period.<sup>106</sup> In all, Koch's research is the most comprehensive and robust examination of the hearsay rule's historical rationale.

It is not surprising, then, that Koch identifies all aspects of the hearsay rule's historical rationale. Koch asserts that the hearsay rule began as seven distinct exclusionary rules of

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<sup>104</sup> Koch, *supra* note 13.

<sup>105</sup> *Ibid.* at 36-41.

<sup>106</sup> *Ibid.* at 41

evidence that merged into a single hearsay rule by the mid-1700s. The seven rules formed for one of two underlying reasons: the unreliability of the evidence and the epistemic need for testimonial evidence; demeanour evidence and cross-examination. The inherent and procedural reliability aspects of the historical hearsay rationale are explicitly recognized. Fairness in the adversarial process is implicit in the requirement for demeanour evidence and cross-examination. Both of these epistemological tools are products of *viva voce* testimony. As recognized by Ho, there is an unfairness in assuming that a declarant would have proven his or her hearsay statement if he or she testified.<sup>107</sup> It is axiomatic that the requirement for demeanour evidence and cross-examination is, in part, a requirement that the declarant testify and prove their hearsay statement. Indeed, one of the seven exclusionary rules of evidence that merged to create the hearsay rule is the *viva voce* rule, a prohibition on unsworn hearsay evidence because the declarant is unable to testify at trial.<sup>108</sup>

### 2.3 The five factors that gave rise to the hearsay rule and its rationale

It remains to be shown, through evidenced how and why the hearsay rule was historically created. Using existing research in the literature, this section will explain how five factors contributed to the creation of the hearsay rule. For analytical purposes, the factors are categorized under one of the three aspects of the hearsay rule's historical rationale. It should be remembered, however, that each of the factors spill into more than one of the three aspects.

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<sup>107</sup> *A Theory of Hearsay*, *supra* note 62 at 403.

<sup>108</sup> Koch, *supra* note 13 at 210-223.

### 2.3.1 Inherent Reliability: The hearsay dangers

The hearsay dangers described by Morgan are the heart of the inherent reliability aspect of the hearsay rule's rationale. There are four hearsay dangers: the inability to test the declarant's sincerity, use of language, memory, and perception of the statement in question. There are many cases from the common law courts of the 1600s in which hearsay evidence is not admitted because of the inability to test the hearsay dangers. The written reasons are not detailed, so some inferences need to be made to appreciate the concern of the courts. In the 1680 high treason case of *Anderson*<sup>109</sup> an unsworn letter was tendered as evidence. The judge refused to admit the letter; however, he asked if anyone was able to testify to the letter's contents. If they were able to testify their testimony would be admissible, presumably due to the epistemic advantage of testimonial evidence.<sup>110</sup> The court could test the witness' sincerity, the accuracy of the letter's language, how well the letter reflected the witness' understanding of what happened, and the difference in perception, if any, between the witness and the content of the letter. Similarly, in *R v. Pyke*, a case from 1696, the court suggested that a letter about a testator's will could be admitted into evidence "after the death of the stranger" but not before.<sup>111</sup> Presumably the court wanted the testator to testify, in order to shed light on the integrity of the words in the will. The same experience was realized in the equitable courts. According to Koch, by the mid-

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<sup>109</sup> *The Trials of Lionel Anderson alia Murray, William Russell alias Napper, Charles Parris alias Parry, Henry Starkey, James Corker, William Marshal, and Alexander Lumsden, with the Arrignment of David Joseph Kemish, at the Old Bailey, for High Treason, being Romish Priests* (1680), 7 Cobb St Tr 811 at 865 (Comms of O & T), cited in *Hearsay's Reason d'etre*, *supra* note 75 at 283-284.

<sup>110</sup> *Ibid.*

<sup>111</sup> *R. v. Pyke* (1696), 1 Ld. RAYM 730, 91 ER 1387, cited in *Hearsay's Reason d'etre*, *supra* note 75 at 284.

1700s the equitable courts would not consider unsworn written hearsay evidence if the author could be formally examined.<sup>112</sup>

There are multiple reasons why a court may have preferred live testimony over hearsay. The court may have been concerned about the hearsay dangers. In addition, it may have been concerned about fairness in allowing the opposing party to test the evidence, or with the absence of an oath. There may have been skepticism about litigants manipulating written hearsay evidence before it was presented to the court. These alternative reasons do not preclude the hearsay dangers from influencing a decision to exclude hearsay evidence. At their core, each alternative reason shares the same concern as the hearsay dangers. Fairness in allowing the opposing party to test the evidence is partially concerned with the opposing party being able to test evidence for the hearsay dangers. The other alternative factors – the need for an oath and risk of manipulation by a litigant – are all partially concerned with whether the hearsay dangers are present. They ask whether the declarant’s statement is sincere, reflective of the declarant’s memory, articulated to reflect their memory, and from a reliable perspective. This is not their only concern, but it is a common one. Moreover, when courts excluded hearsay for reliability reasons their decision was unlikely motivated by just one factor. Multiple factors concerning reliability would have influenced the decision. Whatever the reason for exclusion, if a court did not consider hearsay evidence because of its reliability, concern about the hearsay dangers was part at least part of the rationale.

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<sup>112</sup> *Hearsay’s Reason d’etre*, *supra* note 75 at 284-85.

### 2.2.2 Inherent Reliability: No demeanor evidence

Demeanor evidence is the information that can be obtained from a declarant's demeanor while they are testifying.<sup>113</sup> Demeanor evidence is an acute indicator of the declarant's sincerity. It strikes at the heart of the inherent reliability rationale.

Sworn hearsay evidence was excluded from the common law and equitable courts in part because it deprived the trier of fact of demeanor evidence. There was concern that the trier of fact might make the wrong factual decision because it could not observe the declarant's sincerity as the statement was made. This applied regardless of whether the trier of fact was a judge or jury.

In the common law courts, hearsay evidence was excluded because of a lack of demeanor evidence in the late 1600s. In *Fenwick's Trial*,<sup>114</sup> a decision from the House of Commons in 1696, Fenwick's counsel argued that a sworn hearsay statement should not be considered. Counsel submitted:

Our law requires persons to appear and give their testimony *viva voce*; and we see that their testimony appears credible, or not, by their very countenances, and the manner of their delivery: and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances.<sup>115</sup>

In 1606 the Chief Justice of the King's Bench said *viva voce* testimony was preferable to depositions, at least in part because jurors could better weigh the testimony after observing the

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<sup>113</sup> Koch, *supra* note 13 at 87.

<sup>114</sup> *Fenwick's Trial* (1696), 13 Cobb. St. Tr. 537 (Parl.), quoted in Koch, *supra* note 13 at 138.

<sup>115</sup> *Ibid.* at 593

witness give evidence.<sup>116</sup> The Star Chamber referred a disputed fact to a jury in 1619 because the jury's ability to see and hear would assist in weighing the evidence.<sup>117</sup>

In the equitable courts, the absence of demeanor evidence affected the admissibility of hearsay evidence, albeit in a subtler fashion. In the late 1500s the Court of Chancery received evidence by sworn written depositions. By 1600 the Court of Chancery began to refer contentious factual issues to juries, where witnesses testified *viva voce* and were subject to cross-examination.<sup>118</sup> The change suggests that when factual issues were in dispute, the Court of Chancery wanted the trier of fact to assess the declarant's sincerity by observing his or her demeanor, in addition to subjecting the witness to cross-examination. It would be a stretch to conclude that hearsay evidence was 'excluded' when factual issues were referred to juries, however. The common practice in the Court of Chancery was to try cases through the use of sworn depositions. It is only when factual issues were atypically contentious that matters were referred to juries for the receipt of live testimony.

### 2.2.3 Procedural Reliability: The lack of opportunity to cross-examine the declarant

There is consensus in the literature that the hearsay rule was created at least in part because of the lack of opportunity to cross-examine the declarant. This factor engages all three aspects of the hearsay rule's historical rationale: inherent reliability, procedural reliability, and fairness in the adversarial process. It is classified under procedural reliability because, historically,

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<sup>116</sup> *Le Case del Union, del Realm, D'Escose, ove Angleterre* (1606), Moo KB 790 at 798, 72 ER 908 (KB) at 913 [cited to ER], cited in *Hearsay's Reason d'etre*, *supra* note 75 at 277.

<sup>117</sup> *Dame Darcy v. Leigh* (1619), Hob 324, 80 ER 466 at 467 [cited to ER], cited in *Hearsay's Reason d'etre*, *supra* note 75 at 277.

<sup>118</sup> *Hearsay's Reason d'etre*, *supra* note 75 at 277

cross-examination has been a method of courtroom procedure to test the accuracy of a declarant's statement.

The lack of opportunity for cross-examination is a recent justification in the 150-year development of the hearsay rule. Much of the surviving case law suggests that the concern with the lack of cross-examination became a main factor for the exclusion of hearsay evidence around 1700, post-dating concerns with both the absence of an oath and demeanour evidence.<sup>119</sup> There are earlier references to the lack of opportunity for cross-examination but during those time periods the factor is not the main influence for the exclusion of hearsay evidence.<sup>120</sup> Instead, concerns with the lack of oath and demeanour evidence drive the reasoning toward exclusion.

A judicial emphasis on the lack of opportunity for cross-examination begins to appear in the surviving case law in the 1700s. The same parties rule prohibited depositions taken in one proceeding from being used in another if the parties or issues were not the same in both. The rule was created in large part because of the lack of opportunity to cross-examine the declarant. In *Rushworth v. Pembroke*, a 1737 case from the Court of Chancery, the court held that depositions from prior proceedings could not be introduced as evidence because the opposing party did not have an opportunity to cross-examine the deponents.<sup>121</sup>

The joinder of issues rule prohibited the use of depositions that were not given at trial under the threat of perjury. The rule was initially created out of a judicial concern with the lack of a testimonial oath. The lack of opportunity to cross-examine the declarant of the deposition

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<sup>119</sup> Koch, *supra* note 13 at 288-300

<sup>120</sup> See for e.g. Koch, *supra* note 13 at 197.

<sup>121</sup> *Rushworth et al. v. Pembroke (Countess of) et al.* (1668-69), Hard 472, 145 ER 553 (Ex Ct), cited in Koch, *supra* note 13 at 202.

was added as a reason in the late 1600s. After this time such depositions were considered voluntary affidavits and excluded because the declarant could not be cross-examined.<sup>122</sup> Conversely, in the 1692 case of *Howard v. Tremain* a hearsay deposition was admitted into evidence because the opposing party “did cross-examine” the declarant at an earlier proceeding.<sup>123</sup>

By 1701, unsworn hearsay was beginning to be excluded from serious criminal trials because of judicial concerns with the reliability of the evidence, the absence of demeanour evidence, and the lack of opportunity for cross-examination.<sup>124</sup>

Special mention must be made on the scholarly debate about the purpose for which cross-examination was historically deemed necessary. It is the biggest debate in the literature that is not attributable to methodology. All scholars agree that the hearsay rule was at least in part created out of a judicial concern for the rectitude of the decision. All scholars further agree that the lack of opportunity for cross-examination was a factor that caused judges to be concerned with the rectitude of the decision. Scholars disagree, however, on the purpose for which cross-examination was thought necessary. Wigmore and to a lesser extent Langbein believe that cross-examination is necessary to shed light on potential sources of unreliability in hearsay evidence to lay jurors because they are inexperienced as triers of fact and overvalue testimonial evidence. Wigmore in particular places the need for cross-examination with the perceived tendency of lay jurors to overvalue testimonial evidence. Under this view, the lack of opportunity to cross-

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<sup>122</sup> Henry Bathurst, *The Theory of Evidence* (Dublin: Sarah Cotter, 1761) cited in Koch, *supra* note 13 at 236.

<sup>123</sup> *Howard v. Tremain* (1692), 4 Mod 146, 87 ER. 314 (KB) (sub. nom. *Howard v. Tremaine*) 1 Show 363, 89 ER 641, Carth 265, 90 ER 757, 1 Salk 278, 91 ER 243, cited in Koch, *supra* note 13 at 236.

<sup>124</sup> Koch, *supra* note 13 at 299.

examine the declarant of a hearsay statement was not relevant historically if the trier of fact was a judge. Hearsay evidence could be readily admitted if the trial was before a judge alone.<sup>125</sup> Other scholars, including Morgan and Koch, believe that cross-examination is necessary to shed light on potential sources of unreliability in hearsay evidence because hearsay evidence lacks reliability. The need for cross-examination is placed with the unreliability of hearsay evidence itself. Under this view, the importance of cross-examination historically was dependent on the reliability of the statement, not on the trier of fact.

The axis of debate in the literature is a philosophical view on an empirical issue: how concerned was the judiciary with the ability of lay jurors to evaluate hearsay evidence? While methodology does not cause the debate, it does shed light on the answer. If one considers the entire 155-year span in which the hearsay rule developed, it is clear that historical judicial concern with the lack of opportunity to cross-examine a hearsay statement's declarant was premised on the unreliability of hearsay evidence. Conclusions to the contrary are belied by the historical record. Wigmore's research was based on an incomplete and temporally limited analysis of case law. His sources led him to believe that the hearsay rule first formed in the common law courts as a ban on unsworn extra-judicial statements. The courts of equity later adopted the hearsay rule because of the maxim "equity follows the law."<sup>126</sup> This is how one can explain why the hearsay rule existed in the equitable courts despite the trier of fact being a judge alone.

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<sup>125</sup> *Ibid.* at 49-50.

<sup>126</sup> Koch, *supra* note 13 at 242.

Two historical facts belie Wigmore's research. The hearsay rule emerged out of the equitable courts in cases that did not use lay jurors as the trier of fact.<sup>127</sup> It is impossible for the hearsay rule to have been initially created for reasons relating to lay jurors. This undermines Wigmore's assertion that the courts of equity adopted the hearsay rule merely to follow the rules of the common law.<sup>128</sup> Additionally, the first mention of the hearsay rule and the lack of opportunity for cross-examination in the surviving case law is in the 1700s. By this time the hearsay rule had already been developed out of concerns with the lack of an oath and demeanour evidence.<sup>129</sup> Both of these factors relate to the reliability of hearsay evidence. They have no relation to the evaluative capacity of lay jurors. Even if the judicial need for cross-examination stemmed from a concern with the evaluative capacity of lay jurors, this is not the initial reason for the hearsay rule. The lack of opportunity for cross-examination is a subsequently added reason in the hearsay rule's rationale.<sup>130</sup>

Wigmore's belief in the purpose of cross-examination is premised on the hearsay rule first appearing in the common law courts, where some cases were tried by lay jurors. Wigmore's premise is undermined by subsequent research, which employed different methodologies. J.M. Beattie examined the case law of felony trials between 1660 and 1800 and concluded that unsworn oral hearsay was admitted in jury trials until the mid-1700s.<sup>131</sup> This is later than the time period in which Wigmore placed the establishment of the hearsay rule in the common law court,

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<sup>127</sup> *Ibid.* at 303.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.* at 304.

<sup>130</sup> *Ibid.*

<sup>131</sup> J.M. Beattie, *Crime and the Courts of England, 1660-1800* (Princeton: Princeton University Press, 1986) at 232-33, cited in Koch, *supra* note 13 at 24-25.

the late 1600s. Likewise, Stephan Landsman's research suggests that unsworn oral hearsay was not prohibited from evidence in the Old Bailey until the 1770s.<sup>132</sup> Between 1717 and 1730 judges at the Old Bailey allowed juries to hear significant volumes of unsworn oral hearsay. Hearsay became more frequently excluded between 1730 and 1770.<sup>133</sup> Langbein revisited Wigmore's sources and noted that between 1675 and 1735 common law judges presiding over felony trials in the Old Bailey were not inclined to exclude unsworn oral hearsay.<sup>134</sup> Langbein too places the hearsay rule's creation in the 1700s.

In all, then, the debate in the literature over the purpose for which cross-examination was deemed necessary is not attributable to methodology, but methodology sheds light on the answer. The lack of opportunity for cross-examination is undoubtedly a factor that led to the creation of the hearsay rule. There was a need for cross-examination because judges were concerned about the ability to shed light on potential sources of unreliability in hearsay evidence. This could lead any trier of fact, judge or jury, to make the wrong decision.

#### 2.3.4 Procedural Reliability: The evidence is unsworn

Unsworn hearsay evidence was historically prohibited because of concerns with its reliability, which would affect the rectitude of the court's decision. In the common law courts, judges placed a premium on testimony given after the declarant had sworn a religious oath to

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<sup>132</sup> Stephan Landsman, "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 Cornell L Rev 496 [*Adversary Procedure*].

<sup>133</sup> *Ibid.*

<sup>134</sup> Koch, *supra* note 13 at 19.

tell the truth and was subject the threat of serious state punishment for lying. There was thought to be four potential insulators of reliability in a testimonial oath:

1. The oath was thought to increase the inclination of witnesses to tell the truth and give caution to their words.<sup>135</sup>
2. The threat of divine punishment for breaking the oath through untruthfulness was thought to increase the witness' sincerity.
3. The threat of earthy punishment for lying was believed to increase truthfulness.<sup>136</sup>
4. The formality of the oath was thought to cause witnesses to be more careful in their testimony compared to statements made in casual conversation.<sup>137</sup>

In the mid-1600s the common law courts began to insist on sworn testimony.<sup>138</sup> During this time judges began to refuse receiving out of court statements that were not confirmed by witnesses at the trial under oath. Hence unsworn hearsay evidence was excluded from evidence because of its unsworn nature. In the 1670 treason trial of *White*, a pamphlet was excluded from evidence because the judge believed that a live witness would be more cautious if their statement was given under oath.<sup>139</sup> In *Langhorn*,<sup>140</sup> a 1679 case from the Old Bailey, a witness testified that "another person told him that the accused was involved in a plot to kill the King."<sup>141</sup> The testimony was characterized as hearsay because of its unsworn nature.<sup>142</sup> In *R. v. Hebden &*

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<sup>135</sup> *Hearsay's Reason d'etre*, *supra* note 75 at 261-62.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* at 258.

<sup>139</sup> *The Trial of Thomas White alias Whitebread*, (1679), 7 Cobb St Tr 311 at 331, cited in *Ibid.* at 259.

<sup>140</sup> *The Trial of Richard Langhorn, esq. at the Old Bailey, for High Treason* (1679), 7 Cobb St Tr 417, cited in *Hearsay's Reason d'etre*, *supra* note 75 at 258-59.

<sup>141</sup> *Ibid.* at 259.

<sup>142</sup> *Ibid.*

*Williams*, a 1664 case from the Court of King's Bench, Justice Kelyng dissented when unsworn hearsay evidence was entered into evidence. Kelyng J. characterized it as no evidence because the declarant had not been under oath when he made the statement.<sup>143</sup> According to Koch, in the late 1600s "Crown counsel and judges either stopped witnesses from completing statements that consisted of unsworn hearsay or they told juries to disregard them."<sup>144</sup>

The different implications of a divine and state punishment for violating the oath was a narrow distinction in the 1600s. A witness' conscience was similarly bound out of fear of divine retribution for lying and the threat of state punishment. In our modern, increasingly secular society the oath's ability to bind a declarant's conscience is more one-sided. Today, the threat of state punishment for dishonesty is the heart of the oath's value. Of less but valid importance is the fear of divine retribution; or in the case of an affirmation, moral disapprobation.

### 2.2.5 Fairness in the adversarial process

The hearsay rule developed in an adversarial justice system. As the rule developed the supply of evidence shifted from the judge and juries to the litigant parties. With this change the trier of fact was required to make factual decisions on unfamiliar and potentially unreliable evidence. There was a perceived risk that the evidence supplied by the litigant parties was incorrect, misleading, or fabricated. A need developed to test the evidence. There were multiple ways of testing the evidence, including the testimonial oath, demeanour evidence, and cross-examination.

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<sup>143</sup> *R. v. Hebdon and Williams* (1664), 83 ER 1225 (KB) cited in *Hearsay's Reason d'etre*, *supra* note 75 at 258-59.

<sup>144</sup> *Hearsay's Reason d'etre*, *supra* note 75 at 259.

Aside from reliability concerns, there is a measure of unfairness in allowing a party to adduce evidence that an adverse party cannot test. Hearsay in particular removes the opportunity to test a declarant's statement. Generally, the declarant of a hearsay statement is not bound by divine or earthly punishment for lying. The adverse party and trier of fact cannot assess the declarant's demeanour while they provide their statement. The declarant cannot be cross-examined. This can produce two types of unfairness, each of which has been articulated by Ho: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified; and the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.<sup>145</sup> The development of the hearsay rule is, in part, an attempt to stymie the unfairness of admitting untested hearsay evidence.

The fairness rationale of the hearsay rule is difficult to track because of the lack of surviving records from the 1600s and 1700s. Much of the surviving records are case law and judicial notes taken during trials. These records articulate judicial reasoning in the language of reliability. There are no empirical studies of judicial attitudes toward hearsay, nor are there academic articles on evidentiary or epistemological concerns with hearsay. These sources are more likely to capture a fairness rationale for the exclusion of hearsay. Although the surviving records do not explicitly discuss a fairness rationale, the reasoning is implicitly present. For example, as discussed in section 2.2.3, the historical judicial requirement for demeanour evidence and cross-examination of a hearsay statement's declarant is an implicit requirement of

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<sup>145</sup> *A Theory of Hearsay*, *supra* note 62 at 410.

fairness for the adverse party. Demeanour evidence and cross-examination are axiomatic results of *viva voce* testimony. When courts historically excluded hearsay statements because of the lack of demeanour evidence or cross-examination, they were implicitly voicing concern that the declarant testify to prove his or her hearsay statement. As Ho recognized, there is an unfairness in assuming that the declarant would have proven his or her hearsay statement if he or she testified.<sup>146</sup> Indeed, any historical exclusion of hearsay for reliability concerns has been, in part, a concern with fairness to the adverse party. At its core, a reliability concern is a recognition that the adverse party must receive an opportunity to test the hearsay statement.

This is particularly clear with respect to cross-examination which, it will be remembered, is a subsequently added reason for the hearsay rule. The historical judicial concern with hearsay was never with the unreliability of a statement *per se*. It was with providing the adverse party the opportunity to test the reliability of the statement. If a party presented an unsworn oral hearsay statement at the Old Bailey after 1770, that statement would likely have been excluded. Part of the reason would have been because the declarant could not be cross-examined by the adverse party. If, however, the declarant came to the Old Bailey and testified to the contents of the statement, and the adverse party declined to cross-examine the declarant, that same statement would now be admissible.

There is empirical research indicating that triers of fact want to exclude hearsay evidence for reasons relating to fairness in the adversarial process. Justin Sevier, an American scholar in

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<sup>146</sup> *Ibid.* at 403.

law and psychology, recently conducted two studies with American adults.<sup>147</sup> In the first study, 321 people watched a hearing in which there was one key piece of evidence, either a hearsay statement, a live witness who was not cross-examined, or a live witness who was cross-examined. The study found that the participants could effectively weigh the less reliable hearsay evidence.<sup>148</sup> As triers of fact, they were “far less satisfied” with the trial proceeding when hearsay was present.<sup>149</sup> Their dissatisfaction was specifically tied to the fairness in allowing the accused person the opportunity to cross-examine the declarant of the key piece of evidence. In the second study, 164 people read two variations of a summary of Sir Walter Raleigh’s trial. Raleigh was charged with treason for his alleged involvement in a plot to remove King James I from the throne.<sup>150</sup> The entire case against Raleigh consisted of hearsay, a sworn written confession by Henry Brooke, 11th Baron Cobham. Raleigh objected to the hearsay, demanding that Cobham testify in person and be subjected to cross-examination. His objection failed and he was convicted of treason. The participants in the study were asked questions about their satisfaction with the case. They also rated the degree to which they believed the trial was fair and the court was able to uncover the case’s facts. The second study confirmed the results of the first study more broadly. Participants in the second study expressed fairness based dissatisfaction with the trial of the Raleigh. The vast majority were dissatisfied because of the unfairness in using Raleigh’s

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<sup>147</sup> Sevier, Justin, Popularizing Hearsay (October 2, 2015). Georgetown Law Journal, Vol. 104, 2016, Forthcoming; FSU College of Law, Public Law Research Paper No 774. Available at SSRN: <http://ssrn.com/abstract=2668760> [*Popularizing Hearsay*].

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.* at 51.

<sup>150</sup> Cudmore, *supra* note 2 at 18.

hearsay confession to obtain a conviction.<sup>151</sup> Their dissatisfaction was not linked to rectitude, that is, any effects that the confession might have had on the court's ability to reach the correct decision.<sup>152</sup>

What does the existence of the fairness rationale in this research tell us? It does not necessarily suggest that the fairness rationale influenced the historical development of the hearsay rule. A rule of evidence can have multiple and different purposes over time. Mirjan Damaška points out that there can be a difference between the historical cause of an evidentiary rule and its analytical rationale.<sup>153</sup> The two are often the same, but not always. Damaška cautions:

[The historical cause of an evidentiary rule and its analytical rationale] are closely connected: a factor that provides a good justification for an evidentiary rule can – as part of the motivational syndrome for its acceptance – easily find a place in the causal story describing the rule's origin. But this is not always the case: persuasive reasons can be advanced in favour of a particular evidentiary doctrine or practice although it is also clear that these reasons played no part in its genesis.<sup>154</sup>

The fairness rationale could be a modern justification for the hearsay rule that did not contribute to its historical creation. Perhaps this is why the adults in Sevier's study – and a scholar with a non-historical methodology like H.L. Ho – perceive fairness to be the controlling influence over the use of hearsay evidence. Perhaps this is why there is an absence of discussion about fairness in the case law that created the hearsay rule. On the other hand, the fairness rationale's presence in Sevier's study shows, at the least, that triers of fact link the admission of hearsay evidence to a concern with fairness. Judges of the 1600s and 1700s may have shared the same concern. There

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<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> Mirjan Damaška, *Evidence Law Adrift* (New Haven: Yale University Press, 1997) at 2-3.

<sup>154</sup> *Ibid.* at 3.

is no way to tell one way or the other from the surviving records. On the balance, it would be unreasonable to assume that fairness did not influence judicial decisions to exclude hearsay evidence. Fairness is too closely tied to inherent and procedural reliability concerns which, we do know from the case law, greatly influenced the hearsay rule's development. It would be naïve to assume that judges in the 1600s and 1700s compartmentalized their thinking strictly to reliability concerns.

Using the sources relied upon by the prevailing scholars in the literature, the foregoing has shown how five factors gave rise to the historical hearsay rule. We turn our attention now to the current application of the hearsay rule. The five factors are used as indicia of difference between the hearsay rule's historical rationale and current application.

# 3. The Hearsay Rule

This section will discuss the practical application of the general exclusionary hearsay rule. Using the five factors that gave rise to the hearsay rule's historical rationale, the section will identify the nature and extent of the differences between the rule's historical rationale and practical application. The discussion centers on instances in which hearsay is admitted under the necessity and reliability principle and some traditional exceptions to the rule, in particular prior inconsistent statements. Section 4 will discuss in detail the other side of the hearsay rule – the categorical exceptions to the rule.

Section 3.1 will explain how the current hearsay rule is constituted and operates. The remaining sections will examine differences between the hearsay rule's historical rationale and its current application. The analysis will proceed by reference to the five factors that gave rise to the hearsay rule. Each of the five factors exhibit problems in their practical application that nuance their influence on the decision to admit hearsay evidence. This thesis explores those problems, and uses them as indicia of differences between the hearsay rule's historical rationale and current application. Since the five factors underlie the hearsay rule's historical rationale, a change in the factors will indicate a change in the application of the hearsay rule's historical rationale. For example, if it is found that there are instances in which demeanour evidence is less influential on the admission of hearsay than it was historically, this will suggest a change within the inherent and procedural reliability aspects of the hearsay rule's rationale.

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

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

### 3.1 The current hearsay rule

The conduct captured under the hearsay rule is express or implied verbal or written statements made by a person not called as a witness at a hearing.<sup>155</sup> It is still unclear whether implied non-verbal conduct is captured by the hearsay rule.<sup>156</sup> The classic occasion on which hearsay is prohibited is the testimony by a witness of what a non-witness said. The hearsay rule also captures some out of court statements made by the very witness testifying in court. For

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<sup>155</sup> *Khelawon*, *supra* note 4 at paras. 56-58.

<sup>156</sup> *R. v. Baldree*, 2013 SCC 35, [2013] 2 SCR 520 at paras. 62-63 [*Baldree* cited to SCC].

example, prior inconsistent statements are considered hearsay when they are adduced for the truth of their contents.<sup>157</sup>

There are two features of the hearsay rule that limit its scope: the availability of the declarant as a witness and the use of the out of court statement to prove the truth of its contents.<sup>158</sup> Hearsay evidence is formally defined in Canadian law as an out of court statement by a person not called as a witness tendered in evidence to prove the truth of its contents.<sup>159</sup> Presumably what is meant by “not called as a witness” is the inability for contemporaneous cross-examination on the utterance. Otherwise, prior inconsistent statements would not be properly considered hearsay.

Hearsay jurisprudence stands at the end of a long road and at the start of another.<sup>160</sup> For over a century the hearsay rule was a blanket prohibition on hearsay evidence. Hearsay would be admitted into evidence if it fit within an ossified exception to the hearsay rule. This occasionally resulted in the stretch of exceptions beyond their functional purpose.<sup>161</sup> In the 1960s, courts of appeal, including the Supreme Court, began to admit hearsay evidence that did not fall under the traditional exceptions.<sup>162</sup> This foreshadowed a revolution in hearsay jurisprudence that began in earnest in 1990<sup>163</sup> and was canonized in the 2006 case *R. v. Khelawon*.<sup>164</sup>

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<sup>157</sup> *R. v. B. (K.G.)*, [1993] 1 SCR 740; [1993] SCJ No 22 (CanLII) [*KGB* cited to CanLII].

<sup>158</sup> Bryant, Lederman & Fuerst, *supra* note 5 at 238.

<sup>159</sup> *Baldree*, *supra* note 156 at para. 1 per Fish J.

<sup>160</sup> Hill, Tanovich, & Strezos, *supra* note 12 at 7-5.

<sup>161</sup> See e.g. *R. v. Khan*, [1988] OJ No 578 (CA).

<sup>162</sup> See e.g. *Omand, v. Alberta Milling Co.*, [1922] AJ No 63 (CA); *J. H. Ashdown Hardware Co. Ltd. v. Singer et al.*, [1951] AJ No 60 (CA); *Ares v. Venner*, [1970] SCR 608.

<sup>163</sup> *R. v. Khan*, [1990] 2 SCR 531, 1990 CanLII 77 (SCC) [*Khan* cited to CanLII].

<sup>164</sup> *Khelawon*, *supra* note 4.

Today the hearsay rule stares down a new long road in which the admission of hearsay evidence is governed by a principled rule. All hearsay evidence must conform to the twin criteria of necessity and reliability in order to be admitted into evidence. Necessity is the unavailability of the hearsay statement's content. The necessity criterion serves a truth-seeking function. Rather than losing the evidence of an unavailable declarant, the law deems it necessary to admit the evidence as an exception to the hearsay rule.<sup>165.1</sup> If the declarant is deceased, ill, incompetent to testify, or otherwise unavailable, the content of their statement is trapped without the admission of hearsay. Hearsay evidence must be 'necessary' in this sense of being trapped in order to be admissible. Reliability is the ability to negate the likelihood that the declarant of a hearsay statement was mistaken or untruthful.<sup>165</sup> The reliability criterion is concerned with ensuring the integrity of the trial process.<sup>166</sup> Reliability is satisfied in two overlapping instances.<sup>167</sup> First, the circumstances in which the hearsay statement came about produced a statement so reliable that contemporaneous cross-examination of the declarant would add little to the trial process. Second, the hearsay statement can be tested by means other than contemporaneous cross-examination. The trier of law will allow a statement admission into evidence if there is a sufficient basis for the trier of fact to assess the statement's truth and accuracy. This is called the threshold reliability test.<sup>168</sup> Necessity and reliability operate in tandem. A deficiency in one can be overcome by strength in the other.<sup>169</sup> However, even if a hearsay statement satisfies the

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<sup>165.1</sup> *Khelawon*, *supra* note 4 at para. 49.

<sup>165</sup> *R. v. Smith*, [1992] 2 SCR 915, 1992 CanLII 79 (SCC) at para. 33 [*Smith* cited to CanLII].

<sup>166</sup> *Ibid.*

<sup>167</sup> *Khelawon*, *supra* note 4 at para. 49.

<sup>168</sup> *Ibid.* at para. 92.

<sup>169</sup> *Baldree*, *supra* note 156 at para. 72 per Fish J.

necessity and reliability principle, it will be excluded from evidence if its probative value is outweighed by its prejudicial effect.<sup>170</sup>

The hearsay rule's rationale is tied to the justice system's value on *viva voce* testimony.

The Supreme Court stated in *Khelawon*:

Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.<sup>171</sup>

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

This is perhaps surprising considering that Wigmore's theory of the hearsay rule's rationale is by far the most explicitly endorsed theory in the jurisprudence. The necessity and reliability principle are drawn directly from Wigmore's scholarship.<sup>172</sup> In *R. v. Smith*, Chief Justice Lamer (as he then was) stated that the principles underlying the exceptions to the hearsay rule also underlie the rule itself.<sup>173</sup> Lamer C.J.C. cited Wigmore for this statement. He then quoted

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<sup>170</sup> *Khelawon*, *supra* note 4 at para. 3.

<sup>171</sup> *Ibid.* at para. 56.

<sup>172</sup> *Khan*, *supra* note 163; *Smith*, *supra* note 165 at paras. 29-36.

<sup>173</sup> *Smith*, *supra* note 165 at para. 29.

Wigmore's description of the necessity and reliability criteria and his emphasis on the importance of cross-examination to test hearsay evidence.<sup>174</sup> It appears that Canadian jurisprudence has either misinterpreted Wigmore's theory or chosen to disregard aspects with which it does not agree. The jurisprudence has not adopted Wigmore's central beliefs, such as the hearsay rule's primary concern with the evaluative capacity of lay jurors, and the need for cross-examination to remedy this deficiency. In place of these views the jurisprudence has adopted aspects of other theories, like Morgan's hearsay dangers and Koch's focus on demeanor evidence and the oath.<sup>175</sup> Although Wigmore's theory is by far the most referenced, the jurisprudence actually comprises a mash of different theories of the hearsay rule's historical rationale. This makes sense considering that the various theories describe aspects of the same rationale. The hearsay rule's historical rationale is a fusion of concerns relating to the reliability of hearsay and fairness in the adversarial process.

The procedure for adducing hearsay evidence is governed by a series of evidentiary presumptions. All hearsay evidence is presumptively inadmissible. The traditional exceptions to the hearsay rule remain in place, and a statement falling under an exception is presumptively admissible. However, the presumption may be defeated if the evidence falling under the exception does not satisfy the necessity and reliability principle.<sup>176</sup> Indeed, an entire hearsay exception can be judicially eliminated if it does not comply with the necessity and reliability

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<sup>174</sup> *Ibid.*

<sup>175</sup> Koch's scholarship post-dates much of the hearsay revolution. The jurisprudence has not adopted aspects of his theory. It has adopted ideas shared by his theory.

<sup>176</sup> *R. v. Mapara*, 2005 1 SCR 358, 2005 SCC 23 at para. 15 [*Mapara* cited to SCC].

principle. If a hearsay statement does not fall under an existing exception it will still be admitted into evidence if, on a balance of probabilities, it satisfies the necessity and reliability principle.<sup>177</sup>

The new long road that the hearsay rule stares down lies at the intersection of two movements in Canadian evidence. The first is the free proof movement. It experienced a resurgence in Canada in 1990s. During this time courts moved toward relaxing rules of evidence to allow for the admission of more information in trials. Justice L'Heureux-Dubé observed in 1993 in *R. v. L.(D.O.)* that “[t]he modern trend [in the law of evidence] has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence in order to arrive at a result which will be just.”<sup>178</sup> The second is the movement toward facilitating the prosecution of sex and abuse crimes committed against children. As Professor David Tanovitch notes, the removal of gender and age-based stereotypes shaped the then-nascent principled approach to hearsay.<sup>179</sup> Chief Justice McLachlin reflected on this movement’s influence on the hearsay rule in *R. v. W.J.F.*:

The Court's decision in *Khan* to permit a child's out-of-court statement to be received where necessity and reliability are present was in keeping with the increasing sensitivity of the justice system to the special problems children may face in giving their evidence and the need to get children's evidence before the court if justice is to be done.<sup>180</sup>

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<sup>177</sup> *Ibid.*

<sup>178</sup> *R. v. L. (D.O.)*, [1993] 4 SCR 419, 1993 CanLII 46 (SCC) at para. 50 [*LDO* cited to CanLII], quoted in David M. Tanovitch, “Starr Gazing: Looking into the Future of Hearsay in Canada” (2003) 28 Queen’s LJ 371 at 378-79 [*Starr Gazing*].

<sup>179</sup> *Starr Gazing*, *supra* note 178 at 380.

<sup>180</sup> *R. v. W.J.F.*, [1999] 3 SCR 569, [1999] SCJ No 61 (CanLII) at para. 42 [*WJF* cited to CanLII], quoted in *Starr Gazing*, *supra* note 178 at 380.

The movements were not created in a vacuum. They were created in criminal trials, where the prosecution bears a heavy burden of proof. They were motivated by the desire to more effectively prosecute alleged offenders. The hearsay rule's revolution, standing at the intersection of these two movements, was influenced by the same context. The reformation of the rule from ossified exceptions to a principled one was spurred in large part by a desire to facilitate the prosecution of alleged offenders. This informs the way the hearsay rule is currently applied.

### 3.2 The hearsay dangers

The hearsay dangers, as defined by Morgan, exist whenever a witness testifies about an out of court statement. The “danger” particular to hearsay evidence is the inability of a court to test the declarant's sincerity, use of language, memory, and perception of the statement in question.<sup>181</sup> Historically, cross-examination was deemed necessary to allow an opposing party the opportunity to test these potential sources of unreliability and expose them to the trier of fact.

The hearsay dangers are at the forefront of the hearsay rule's current application, as they were during the rule's development in the 1600s and 1700s. The Supreme Court identifies the inability to test the reliability of hearsay evidence as the “central concern” underlying the hearsay rule.<sup>182</sup> Testing the reliability of hearsay evidence is believed to enhance the accuracy of a court's

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<sup>181</sup> *Hearsay Dangers*, *supra* note 56.

<sup>182</sup> *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at para. 159 [*Starr* cited to SCC].

decision and guard against unjust verdicts. According to the Supreme Court, testing reliability means testing the declarant's perception, memory, narration, and sincerity, as well as observing the declarant's demeanour.<sup>183</sup>

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

[The hearsay dangers are] the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed), and the lack of contemporaneous cross-examination by the opponent.<sup>184</sup>

The Court would repeat this description of the hearsay dangers multiple times in the 1990s.<sup>185</sup> These factors underlie the hearsay rule's historical rationale. Inexplicably, the case law now recognizes the hearsay dangers in Morgan's formulation.<sup>186</sup> The factors identified as hearsay dangers previously are now labelled as their own terms.<sup>187</sup>

There are two overlapping methods to allay the concern posed by the hearsay dangers. One method is to show that the circumstances in which a hearsay statement came about safeguard against any real concern about the declarant's perception, memory, narration, and

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<sup>183</sup> *Baldree*, *supra* note 156 at para. 31; *Khelawon*, *supra* note 4 at para. 1.

<sup>184</sup> *KGB*, *supra* note 157 at para. 32

<sup>185</sup> *R. v. Hawkins*, [1996] 3 SCR 1043, 1996 CanLII 154 (SCC) at para. 60 [*Hawkins* cited to CanLII]; *Starr*, *supra* note 182 at para. 160.

<sup>186</sup> See e.g. *Baldree*, *supra* note 156 at para. 31.

<sup>187</sup> See e.g. *Baldree*, *supra* note 156.

sincerity. The admission of a child's statement to her mother in *R. v. Khan* is a classic example.<sup>188</sup> In *Khan* a three-year-old girl was sexually assaulted by her doctor. Approximately 15 minutes later, she told her mother that the doctor "put his birdie in my mouth, shook it and peed in my mouth." The child had a wet spot on her jogging suit that was determined to be a mixture of semen and saliva. At trial, the child was held to be incompetent to testify. Her statement to her mother was hearsay, and it did not fall under an exception to the hearsay rule. Nevertheless, the Supreme Court admitted the child's hearsay statement to her mother into evidence. The circumstances in which the statement was made satisfied the Court that the child's statement did not suffer from difficulties in perception, memory, narration, and sincerity. The child made the statement immediately after the assault, eliminating any concern that her memory was inaccurate. Being three years old, she had no motive to lie. Her statement was made naturally and without prompting, suggesting that her mother did not coax her into making the statement.<sup>189</sup> The content of her statement was about a subject outside the experience of a three-year-old, suggesting that the statement was not fabricated or remembered and narrated incorrectly. The statement was also corroborated by the semen stain on her clothing.

Wigmore's scholarship is the basis for this method of allaying the concern posed by the hearsay dangers. When Wigmore wrote about the the hearsay rule most trials were judged by lay jurors. The terms 'trier of fact' and 'lay juror' could have been treated as synonymous during this time. Those circumstances do not exist in Canada today. Wigmore also believed that cross-

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<sup>188</sup> *Khan*, *supra* note 163.

<sup>189</sup> *Khelawon*, *supra* note 4 at para. 67.

examination was “beyond any doubt the greatest engine ever invented for the discovery of the truth.”<sup>190</sup> A hearsay statement should be admitted into evidence if the declarant could not testify and the statement did not pose a risk of misvaluation in jurors in the absence of cross-examination. In such an instance cross-examination would be “superfluous”.<sup>191</sup> The Supreme Court explicitly adopted Wigmore’s scholarship on this issue in *R. v. Khelawon*:

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

There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.<sup>192</sup>

In adopting Wigmore’s scholarship in this manner the Court tied the admission of hearsay to the utility of cross-examination.<sup>193</sup> This causes some concern. Wigmore believed that the hearsay rule was created to guard against the evaluative capacity of lay jurors, and cross-examination was the best method to expose frailties in testimonial evidence to lay jurors. The locus of Wigmore’s concern was lay jurors’ ability to evaluate the reliability of hearsay.

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<sup>190</sup> Wigmore, *supra* note 13 at vol. I, p. 27, §1367.

<sup>191</sup> *Ibid.* at p. 1791, §1420 cited in Koch, *supra* note 13 at 92

<sup>192</sup> *Khelawon*, *supra* note 4 at para. 62.

<sup>193</sup> Unlike Wigmore, however, the jurisprudence will not allow for an exception to the hearsay rule on the basis of a non-contemporaneous opportunity to cross-examine the declarant of a hearsay statement (*Hawkins*, *supra* note 185 at paras. 58-60).

This can be contrasted with the concern of the hearsay dangers. The hearsay dangers are the ability *to test* potential flaws in a declarant's perception, memory, narration, and sincerity. They are distinct from the trier of fact's ability *to evaluate* hearsay evidence. The locus of concern is the ability to test hearsay evidence, and the concern applies to lay jurors and judges alike. To be sure, the Supreme Court is entitled to pick and choose from aspects of Wigmore's scholarship. However, Wigmore's scholarship on this issue is premised on lay jurors' ability to evaluate the reliability of hearsay. That premise is inapplicable and unsound. Inapplicable because the vast majority of trials in Canada today are conducted by judges alone.<sup>194</sup> Unsound because there is a lack of evidence suggesting that lay jurors are less adept than judges at evaluating hearsay. Indeed, the existing research suggests almost the opposite: when deciding a case, lay jurors are not less competent than judges.<sup>195</sup>

Another concern is that the hearsay dangers may not be allayed by cross-examination alone. Sometimes the hearsay dangers call for additional safeguards, such as the oath or need to receive *viva voce* demeanour evidence. There is considerable overlap between Wigmore's concern and the concern posed by the hearsay dangers. It is often the case that both concerns are allayed by the circumstantial guarantees of reliability in the way a hearsay statement was made. There are occasions, however, when the hearsay dangers are not allayed simply because the circumstances in which a hearsay statement was made does not call for cross-examination.

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<sup>194</sup> Neil Vidmar, "The Canadian Criminal Jury: Searching For a Middle Ground" (1999) 62:2 Law & Contemp Probs 141 at 147 [*Searching for a Middle Ground*].

<sup>195</sup> See generally Neil Vidmar, "Foreword: Empirical Research and the Issue of Jury Competence" (1989) 52:4 Law & Contemp Probs 1 at 4 [*Empirical Research*].

There may still be a need to test the declarant with an oath and *viva voce* demeanour evidence to expose potential flaws in the declarant's perception, memory, narration, and sincerity.

*R. v. Sheriffe*<sup>196</sup> demonstrates this nicely. In that case the accused was convicted of first degree murder after an expert witness testified about the accused person's alleged ties to gangs. The expert witness based his opinion on information received from confidential informants. The accused person argued on appeal that the basis of the expert witness' opinion was hearsay and ought to have been excluded from evidence. The Court of Appeal for Ontario held that the confidential informants' information was admissible under the hearsay rule.<sup>197</sup> Though hearsay, the information was necessary because the confidential informants could not be called as witnesses. The information was sufficiently reliable because the informants had a history of providing accurate and truthful information to the police.

Clearly, the Court of Appeal was comfortable with the veracity of the informants' information. This was only part of the equation, though, and the Court should have looked further. More relevant was the expert's actual opinion – and how he derived that opinion from the information available to him. In this respect, the Court of Appeal ought to have treated demeanour evidence as critical. The informants were unlikely to be savory characters. They were confidential informants, with a history of speaking to the police, who chose to disclose gang ties about an accused murderer. These are not the type of people who look trustworthy in a courtroom, and they are not known for being careful with their words. The trier of fact, in this

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<sup>196</sup> *R. v. Sheriffe*, 2015 ONCA 880, [2015] OJ No 6609.

<sup>197</sup> *Ibid.* at para. 120.

case a jury, should have been able to see the informants testify to determine whether the expert's opinion was credible in light of having based his opinion on their information. Even if the informants' information was in fact accurate, the jury should have been allowed to see if the informants were trying to be accurate. Do they look like they were under the influence of drugs or alcohol? Can you see them thinking about their answers before they speak? Are they being flippant? When the source of information is a confidential informant speaking about gang ties, these are all live issues. They all relate to reliability. And to resolve these issues you need to see the declarant's demeanour. Of course, since confidential informants could never testify in a court, the proper remedy would have been to prohibit the expert's evidence.

The hearsay dangers will not be allayed if the test adopted in the jurisprudence is applied too loosely. It is not difficult to imagine a situation in which a loose application of the threshold reliability test is tempting. For example, consider a dark night in which a person is pushed under a bus and dies. No one sees the pusher, but a male witness is able to give a vague description of him. The statement is the strongest evidence pointing to the pusher committing the crime. The witness' statement is videotaped shortly after the push. When the witness gives the description of the pusher, he is high on heroin, has motive to lie, and specifically tells the police that he does not want to go to court. The witness' statement is not sworn and is both confirmed and contradicted by other evidence. Someone matching the witness' description of the pusher is arrested and charged. At trial, the witness claims to have no knowledge of the push or even giving the statement to the police. Meaningful cross-examination on his statement is meaningless now that his memory has failed him. Are the hearsay dangers of his statement allayed? Hardly. But

this is evidence necessary to secure a conviction. This factual situation happened in *R. v. Groves*.<sup>198</sup> The application judge admitted the statement into evidence, reasoning that the statement's documentation on videotape and relative contemporaneity with the push provided sufficient reliability for admission.<sup>199</sup> The admission is too loose an application of the threshold reliability test. It is in line with the modern motivation to use the the hearsay rule to effectively prosecute alleged offenders. Looking plainly at the hearsay dangers, the statement should never have been admitted. Although the witness' narration was preserved in the videotape, without meaningful cross-examination there was no light shed on his perception and memory of the push or the sincerity of his statement.

Returning to the methods of allaying the concern posed by the hearsay dangers, the second method is to show that there are adequate substitutes to test the truth and accuracy of the hearsay statement.<sup>200</sup> The classic example is when a statement is made at another court proceeding under oath and cross-examination. In *R. v. Hawkins*,<sup>201</sup> for example, the accused person's then-girlfriend testified against him at the preliminary inquiry. Her statement was given under oath and she was cross-examined by the accused person's counsel. She was recalled at the preliminary inquiry and, with explanation, recanted much of what she said. The accused person married his girlfriend between the preliminary inquiry and the trial, rendering her incompetent to testify at trial as a Crown witness. At the trial the Crown sought to admit the girlfriend's preliminary inquiry testimony under the principled exception to the hearsay rule. The Supreme

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<sup>198</sup> *R. v. Groves*, 2011 BCSC 1935, [2013] BCJ No 2258 affirm'd in 2013 BCCA 446.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Khelawon*, *supra* note 4 at 63.

<sup>201</sup> *Hawkins*, *supra* note 185.

Court held that statements given before a preliminary inquiry will generally allay the hearsay dangers because the statements are given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues.<sup>202</sup> In addition, the statements are recorded in a court certified transcript and the opposing party can observe the declarant's demeanour during cross-examination.<sup>203</sup> In short, there are ample substitutes to test the truth and accuracy of the declarant's statement.

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

### 3.3 No demeanour evidence

The absence of demeanour evidence remains a core concept of the hearsay rule, as it was during the historical development of the rule. The influence of demeanour evidence on the admission of hearsay is substantial, though it is sometimes subsumed by the role of cross-

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<sup>202</sup> *Ibid.* at 76.

<sup>203</sup> *Ibid.* at para. 77.

examination. Though initially labeled a hearsay danger, demeanour evidence is characterized today as an independent factor in the test for threshold reliability.

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

When the witness is on the stand, the trier can observe the witness's reaction to questions, hesitation, degree of commitment to the statement being made, etc. Most importantly, and subsuming all of these factors, the trier can assess the relationship between the interviewer and the witness to observe the extent to which the testimony of the witness is the product of the investigator's questioning. Such subtle observations and cues cannot be gleaned from a transcript, read in court in counsel's monotone, where the atmosphere of the exchange is entirely lost.<sup>204</sup>

*K.G.B.* addressed the issue of whether a videotaped statement can be admitted for the truth of its contents when the declarant recants its content at trial. Due to the specificity of the issue, the Court was acutely focused on the importance of demeanour evidence in its comments. Compared to the rest of the case law on the issue,<sup>205.1</sup> it is possible that the above passage is an inflated endorsement of demeanour evidence from the Supreme Court.

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

[n]o effort was made to find and interview him, still less to call him as a witness - where the assertion imputed to him could have been evaluated by the trier of fact in the light of cross-examination and **the benefit of observing his demeanour.**<sup>205</sup>

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<sup>204</sup> *KGB*, *supra* note 157 at para. 97.

<sup>205.1</sup> See especially *Hawkins*, *supra* note 185 at para. 77.

<sup>205</sup> *Baldree*, *supra* note 156 at para. 73 [emphasis added].

The jurisprudence has gone so far as to outline potential methods of preserving demeanour evidence when taking a statement so that the statement can be admitted as an exception to the hearsay rule if the declarant becomes unavailable to testify. The statement can be video and audio recorded or, in exceptional cases, an independent third party can observe the making of the statement and testify about the declarant's demeanour.<sup>206</sup>

The case law has generally endorsed the value of demeanour evidence in relation to hearsay admissibility. The treatment of demeanour evidence generally, though, is far more conflicted. In *R. v. N.S.*, the Supreme Court addressed directly the value of demeanour evidence in court proceedings. The Court considered it an “axiom of appellate review” that deference be shown to the trier of fact on credibility issues because judges and juries have the “overwhelming advantage” of observing the witness' demeanour.<sup>206.1</sup> That strong endorsement of demeanour evidence was in 2012. Notwithstanding, appellate courts have in the same time period cautioned against strong reliance on demeanour evidence. In 2015 the Court of Appeal for Ontario cautioned trial judges “to bear in mind that, to the extent possible, they should try to decide cases that require assessing credibility without undue reliance on such fallible considerations as demeanour evidence. [Emphasis added.]”<sup>206.2</sup> Other appellate cautions abound.<sup>206.3</sup> It remains to be seen whether this trend of appellate skepticism will trickle its way into hearsay jurisprudence.

In terms of testing the reliability of a hearsay statement, the value of demeanour evidence is its ability to shed light on the declarant's sincerity. Observing the declarant allows the trier of

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<sup>206</sup> *KGB*, *supra* note 157 at para. 101.

fact to determine how certain or honest the declarant is attempting to be. Nonetheless, the jurisprudence has long held to Wigmore's belief that cross-examination is the best method for discovering the truth. As a result, the opportunity to cross-examine a hearsay statement's declarant is often deemed sufficient to satisfy sincerity concerns. Indeed, in *Hawkins* the preliminary inquiry testimony was admitted into evidence despite deep contradictions within the hearsay statement. The absence of demeanour evidence was not fatal. The Supreme Court was fundamentally satisfied by the declarant being cross-examined at the preliminary inquiry.<sup>207</sup> In addition she provided her statement under oath and there was a court transcript of her testimony.

Cross-examination and demeanour evidence will often shed the same light on a declarant's sincerity. The value of demeanour evidence is subsumed in cross-examination when a witness testifies in court and is contemporaneously cross-examined. This was the procedure in the 1600s and 1700s when the hearsay rule was developed. The difficulty is that such intersection does not always occur anymore. Due to technological advancements, there are two types of cross-examination, contemporaneous and non-contemporaneous. In non-contemporaneous cross-examination, the declarant of a hearsay statement will be subjected to cross-examination by the opposing party before the hearing. If the cross-examination is not video recorded, the trier of fact at the hearing will be unable to observe the declarant's demeanour during the prior cross-examination. If the declarant's statement is admitted at the hearing under the hearsay rule, the

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<sup>206.1</sup> *R. v. N.S.*, 2012 SCC 72, [2012] 3 SCR 726, at para. 25 [*NS* cited to SCC].

<sup>206.2</sup> *R. v. Rhayel*, 2015 ONCA 377 at para. 89, [2015] O.J. No. 2675 [*Rhayel* cited to ONCA].

<sup>206.3</sup> See e.g. *Law Society of Upper Canada v. Neinstein* (2010), 99 OR (3d) 1 (CA) at para. 66.

<sup>207</sup> *Hawkins*, *supra* note 185 at para. 77.

trier of fact may only have a transcript of the cross-examination. The declarant's demeanour in giving the evidence will be lost. This is not an uncommon occurrence. It happens every time hearsay is admitted because a witness testified at a preliminary inquiry or non-videoed deposition and failed to attend the trial or hearing. On these occasions, the influence of demeanour evidence on the admission of hearsay is less than it was historically.

Non-contemporaneous cross-examination can also raise epistemic concerns. The ability to see a witness' face is deeply rooted in the criminal justice system.<sup>208</sup> A witness' demeanour can provide non-verbal insights that may uncover uncertainty or deception and assist at discovering the truth.<sup>209</sup> A cross-examiner may use this information to recalibrate questions, ask new questions, or refrain from asking questions on a particular topics. The process is fluid. As the witness testifies, they disclose information through their demeanour. The cross-examiner reacts with questions. The witness discloses new information with their answers. The process repeats itself until the cross-examination concludes. All the while the trier of fact observes the witness' answers, demeanour, and weighs accordingly. The information from this fluid interaction is absent if a written hearsay statement is admitted due to non-contemporaneous cross-examination. Again, this occurs every time a witness testifies at a preliminary inquiry or non-videoed deposition and does not attend the trial or hearing. The vibrancy of the witness' cross-examination is reduced to black words on white paper.

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<sup>208</sup> *N.S.*, *supra* note 206.1 at para. 27. The Supreme Court made this ruling notwithstanding that that no expert evidence was put before the Court on the importance of seeing a witness's face to effective cross-examination and accurate assessment of a witness's credibility (para. 17).

<sup>209</sup> *Ibid.* at para. 24.

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

### 3.4 The lack of opportunity to cross-examine the declarant

The lack of opportunity to cross-examine the declarant remains as influential a factor as when it became a late justification for the hearsay rule. It is complicated in practice by the disjunction between its theoretical role in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers.

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

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

Of the criterion of necessity, Wigmore stated:

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

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

There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.<sup>210</sup>

Of the two overlapping ways in which a hearsay statement can be deemed sufficiently reliable for admission, the ability to cross-examine the declarant is acutely important when reliance is placed on the latter, the use of adequate substitutes for contemporaneous cross-examination.<sup>211</sup> Non-contemporaneous cross-examination goes a long way to satisfying the reliability requirement.<sup>212</sup> When considering the admissibility of prior inconsistent statements for example, the ability to cross-examine the declarant is the most important factor supporting

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<sup>210</sup> *Smith, supra* note 165 at para. 29.

<sup>211</sup> *Khelawon, supra* note 4 at paras. 62-63.

<sup>212</sup> *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517 at para. 92 [*Couture* cited to SCC].

admissibility.<sup>213</sup> It was the controlling factor when the Supreme Court admitted prior inconsistent statements under the hearsay rule in *K.G.B.*<sup>214</sup> and *R. v. F.J.U.*<sup>215</sup>

Cross-examination is deemed necessary in the case law because of its ability to expose the hearsay dangers to the trier of fact.<sup>216</sup> Through questioning, an opposing party can test the declarant's sincerity, use of language, memory, and perception of the statement in question. The purpose for which cross-examination is deemed necessary is surprising in light of the Supreme Court's explicit adoption of Wigmore's scholarship to create the necessity and reliability principle. It is another instance of the Court selectively choosing from Wigmore's scholarship on the hearsay rule. Wigmore believed that, historically and currently, cross-examination of a hearsay statement's declarant is necessary to prevent lay jurors from overvaluing the statement.<sup>217</sup> Cross-examination is not necessary in situations where lay jurors are not the trier of fact or cross-examination would "add little security"<sup>218</sup> to the statement's accuracy. Despite claiming to adopt Wigmore's scholarship, the Supreme Court has averted Wigmore on these important tenets. The case law is steadfast that the hearsay rule is concerned with exposing the hearsay dangers, and the role of cross-examination is to test for them. Only Justice L'Heureux-Dubé has adopted Wigmore's view. Writing in dissent (not on this issue) in *R. v. Starr*, she stated:

The rule against hearsay developed at the same time as the modern form of trial and is associated with a deep-seated distrust of the jury system. It is premised on a belief that the jury will erroneously assess the probative value of evidence and the retention of the rule reflects continued suspicions about jury deliberations. The rule

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<sup>213</sup> *Ibid.* at para. 35.

<sup>214</sup> *KGB*, *supra* note 157.

<sup>215</sup> *R. v. U. (F.J.)*, [1995] 3 SCR 764, 1995 CanLII 74 (SCC) [*FJU* cited to CanLII].

<sup>216</sup> *Khelawon*, *supra* note 4 at paras. 61-64.

<sup>217</sup> *Koch*, *supra* note 13 at 90-94.

<sup>218</sup> *Wigmore*, *supra* note 13 at vol. III, p. 154, §1420.

against hearsay is "founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement".<sup>219</sup>

Based on this premise, L'Heureux-Dubé J. sought to loosen the hearsay rule to reflect the full competency of lay jurors. L'Heureux-Dubé sought a solution in search of a problem however. The hearsay rule's historical rationale was not developed out of a concern for the evaluative capacity of lay jurors. Cross-examination has always been deemed necessary to shed light on potential sources of unreliability in hearsay evidence.

There is congruence in the role cross-examination played under the hearsay rule's historical rationale and the role assigned to it in the current jurisprudence. According to the jurisprudence, the "central concern" of hearsay evidence is its reliability.<sup>220</sup> Reliability is conceptualized as the hearsay dangers; that is, concern with the declarant's perception, memory, narration, and sincerity.<sup>221</sup> The hearsay jurisprudence endorses methods of testing hearsay for the hearsay dangers, and of the methods cross-examination is privileged.

We just distinguish between the theoretical and practical role of cross-examination. The roles are not the same. The theoretical role of cross-examination is to test the veracity of the declarant's statement. For example, the Supreme Court views cross-examination as the "ultimate means of demonstrating truth and of testing veracity."<sup>222</sup> Without cross-examination, according to the Supreme Court, there may be "no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever

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<sup>219</sup> *Starr, supra* note 182 at para. 30 [citations omitted].

<sup>220</sup> *Starr, supra* note 182 at para. 159.

<sup>221</sup> *Baldree, supra* note 156.

<sup>222</sup> *R. v. Osolin*, [1993] 4 SCR 595, [1993] SCJ No 135 (CanLII) at para. 157 [*Osolin* cited to CanLII].

concealed.”<sup>223</sup> While the historical hearsay rule privileged cross-examination, there is no indication that it did so to such an extent. The jurisprudence is more in line with Wigmore’s profound faith in cross-examination.

The practical role of cross-examination in criminal law is broader. In criminal practice, the goal of the cross-examining defence counsel is to raise a reasonable doubt on the evidence. Though not formally recognized, considerations other than the reliability of the evidence are employed in criminal practice to raise a reasonable doubt. There is tremendous overlap between the reliability of the evidence and raising a reasonable doubt; but the overlap is not perfect. The difference between the theoretical and practical roles of cross-exemption allow an accused person to cross-examine on considerations broader than reliability. When this occurs, cross-examination takes on epistemic and practical qualities that are beyond the scope of testing the reliability of the evidence. This method of cross-examination is not explicitly accepted in the hearsay jurisprudence. It is, however, accepted in practice by judges and counsel. Indeed, it is a regular occurrence.

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

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<sup>223</sup> *R. v. Lyttle*, [2004] 1 SCR 193, [2004] SCJ No 8 (CanLII) at para. 1 [emphasis in original] [*Lyttle* cited to CanLII].

examination will have little to do with shedding light on the reliability of the witness' evidence and much to do with preventing the witness from articulating that evidence.

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

Perhaps most poignant in terms of practical qualities is the occasion on which a witness' evidence is acutely tied to their credibility.<sup>224</sup> Granted, reliability is always implicated when a witness' credibility is questioned. Reliability becomes divorced from credibility when cross-examination focuses the trier of facts' attention on the witness' character to the exclusion of their evidence. Consider the common dynamic when a witness is the former co-accused of a defendant. Cross-examination can be used to paint the witness as needing to testify in a manner that secures the accused person's conviction in order to receive a lighter sentence. This may or may not be true. While in theory cross-examination must shed light on the truth, in practice the cross-examination is intended to tie the witness' evidence to their character so tightly that the trier of fact is unwilling to put any faith in the witness' evidence. This is not the same as testing the reliability of the evidence. Cross-examination may permissibly explore whether a witness has incentive to lie, but it cannot allow a truthful witness to be cast as a liar.

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<sup>224</sup> Cudmore, *supra* note 2 at 107-118.

This occurs frequently. Take Edward Greenspan's cross-examination of David Radler in the *United States of America v. Conrad M. Black and others*.<sup>225</sup> The cross-examination is examined by Gordon Cudmore in *The Mystery of Hearsay*.<sup>226</sup> Conrad Black was charged with multiple fraud-related offences. David Radler was Black's business partner. Radler signed a plea agreement with the prosecution and became the star prosecution witness against Black. The plea agreement turned on Radler testifying 'to the truth' against Black before Radler's trial. If Radler told the truth at Black's trial, he would receive a favourable sentence at his subsequent trial. Greenspan's cross-examination of Radler painted him as an opportunist who tells the truth in line with his interest: when Radler's interest changes, so too does his version of the truth:

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

WITNESS: I have no script, sir.

DEFENCE: Is that your answer:

WITNESS: That's my answer.

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

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

(Laughter)

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

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<sup>225</sup> *Ibid.* at 107.

<sup>226</sup> *Ibid.* at 107-118.

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

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

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

WITNESS: Yes.

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

WITNESS: No, I haven't

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

....

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

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

WITNESS: That's my answer, yes.

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

WITNESS: I will answer your questions truthfully.

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

WITNESS: I now know, yes, certainly.<sup>227</sup>

Did Radler have to testify in a manner which convicted Black in order to receive his plea agreement with the prosecution? Would Radler's observations, unadulterated, produce

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<sup>227</sup> *Ibid.* at 116-117.

testimony that achieved this result? We will never know. Greenspan's cross-examination focussed so intensely on Radler's character that the truth of his evidence was obscured. The jury was encouraged to disregard the content of Radler's evidence because he was so deeply mired in an incentive to lie. The strategy worked too. Black was acquitted of all of the charges that relied upon Radler's testimony.<sup>228</sup> Surely this is not what the Supreme Court had in mind when it deemed cross-examination the "ultimate means of demonstrating truth and of testing veracity."<sup>229</sup>

This is not to say that the cross-examination strategy is improper or even undesirable. To the contrary, it can be proper. Criminal defense counsel in Ontario are duty bound to advance this strategy if it helps their client.<sup>230</sup> As part of the duty the practical role of cross-examination must be to raise a reasonable doubt. The role is laudable; the disjunction between it and the theoretical role of cross-examination is the problem. The hearsay jurisprudence assumes that an accused person's lawyer will cross-examine the declarant to expose reliability issues, but the lawyer may, and in many instances will, cross-examine more broadly, and emotionally, for the purpose of raising a reasonable doubt.

It is unclear whether the epistemic and practical qualities imbued in raising a reasonable doubt through cross-examination were present when the hearsay rule was developed in the 1600s and 1700s. Cross-examination was a relatively late justification for the hearsay rule's development, post-dating concerns with absence of an oath and demeanour evidence.<sup>231</sup> The

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<sup>228</sup> *Ibid.* at 117.

<sup>229</sup> *Osolin*, *supra* note 225 at para. 157 per Cory J.

<sup>230</sup> Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2016, R 4.01(1) [Rules].

<sup>231</sup> Koch, *supra* note 13 at 288-300.

same parties rule prohibited depositions taken in one proceeding from being used in another if the parties or issues were not the same in both. The rule was created in large part because of the lack of opportunity to cross-examine the declarant. Likewise, the joinder of issues rule prohibited the use of depositions that were not given at trial under the threat of perjury. It was eventually justified in the late 1600s in part because of the lack of opportunity to cross-examine the declarant of the disposition.<sup>232</sup> These two rules did not delineate between cross-examination for the purposes of testing reliability and raising a reasonable doubt.

On the other hand, Richard Friedman's scholarship on the nexus between the modern hearsay rule and the right to confront the witness shows that by the mid-1600s accused persons in treason trials had the right to confront the sworn testimony of their accusers "face to face".<sup>233</sup> Confrontation in treason trials suggests a right to cross-examine for the purpose of raising a reasonable doubt. It is unlikely that the accused person was limited to shedding light on the accuser's sincerity, use of language, memory, and perception of the statement in question.

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

If cross-examination was not practiced to raise a reasonable doubt – that is to say, the epistemic and practical qualities in raising a reasonable doubt were not present - there is a

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<sup>232</sup> Bathurst, *supra* note 123, cited in Koch, *supra* note 13 at 236.

<sup>233</sup> Friedman, *supra* note 46 at 97.

difference between the hearsay rule's historical rationale and current application. Contemporaneous cross-examination is deemed important in the historical and current hearsay jurisprudence because of its ability to shed light on the hearsay dangers. In practice, however, cross-examination is employed to fill a broader array of roles. This brings into question the importance of cross-examination in the hearsay jurisprudence. Its truth gathering function may be overstated; or it may be stated correctly and applied differently by defence lawyers.

### 3.5 The evidence is unsworn

Like demeanour evidence, the absence of sworn evidence remains one of the core concepts of the hearsay rule. It was previously identified as a 'hearsay danger' and is now labelled as its own factor.

The role of sworn evidence has changed with the times. Gone is the suggestion that supernatural retribution will follow if a witness lies under oath.<sup>234</sup> The spectre of such punishment remains a consequence of the oath for some witnesses, but it is no longer part of the the oath's philosophical significance. Rather, like the solemn affirmation, the oath's significance is its impression upon the witness of the moral obligation to tell the truth.<sup>235</sup> The oath and solemn affirmation are court procedures that augment the reliability of testimonial evidence. They are employed to aid the trier of fact in arriving at the correct decision.

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<sup>234</sup> *KGB*, *supra* note 157 at para. 86.

<sup>235</sup> *Ibid.* at para. 87.

In practice the oath and affirmation operate in tandem with criminal law. A witness who describes one version of events to the police and another version at trial is liable for prosecution for a number of offences. Under the *Criminal Code*, the witness could be found guilty for obstruction of justice (s. 139), public mischief (s. 140), or fabricating evidence (s. 137). In addition, if a witness provides contradictory statements, both of which are under oath or solemn affirmation, the witness could be further prosecuted for perjury (s. 131). Together, the threat of state punishment and the moral suasion of the oath or solemn affirmation increase a witness' inclination to tell the truth at trial - or at least be cautious with their words.<sup>236</sup> Between the two, the threat of state punishment is a far greater influence on the truthfulness of a witness' statement than the moral obligation to tell the truth.

So important is sworn evidence to the hearsay rule that it is almost a necessary requirement for the admission of prior inconsistent statements. In *K.G.B.* the Supreme Court held that the oath and solemn affirmation augment the reliability of a statement to such an extent that, all things being equal, their absence in a prior inconsistent statement strongly suggests inadmissibility.<sup>237</sup> Among other considerations, requiring a prior inconsistent statement to be sworn at its utterance prevents the trier of fact from accepting unsworn testimony over sworn testimony.<sup>238</sup> It also prevents the trier from potentially convicting the accused person solely on unsworn testimony.<sup>239</sup> Currently statements taken for the purpose of preserving their words and

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<sup>236</sup> *Ibid.* at para. 89.

<sup>237</sup> *KGB*, *supra* note 157.

<sup>238</sup> *Ibid* at para. 90.

<sup>239</sup> *Ibid.*

veracity ought to be made under oath or solemn affirmation and follow an explicit warning of criminal prosecution for lying.<sup>240</sup>

Sworn evidence is not a mandatory requirement for the admission of hearsay. The need is acute for prior inconsistent statements. The overriding concern for the admission of hearsay evidence is always necessity and reliability. The absence of an oath or solemn affirmation for any hearsay statement can be overcome by the circumstances in which the statement was made and other means of testing it. Indeed, even for prior inconsistent statements, alternative measures for impressing the importance of telling the truth upon the witness can substitute for the oath or solemn affirmation.<sup>241</sup>

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

### 3.6 Fairness in the adversarial process

The admission of hearsay evidence occasions two types of unfairness: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified; and the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that

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<sup>240</sup> *Ibid.* at para. 94.

<sup>241</sup> *Ibid.* at para. 96

evidence.<sup>242</sup> These two types of unfairness primarily comprise the factor ‘fairness in the adversarial process.’

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

We begin with the first type of unfairness: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified. It is not guaranteed that the declarant would have uttered the hearsay statement if he or she knew that they were subject to an oath or affirmation, cross-examination, and observation by the the adverse party, judge, and, potentially, lay jurors. In determining the admissibility of hearsay evidence, courts are concerned with whether the hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact “a satisfactory basis for evaluating the truth of the statement.”<sup>243</sup> This is the test for threshold reliability, and it is supposed to minimize unfairness in the adversarial process by screening out hearsay statements that are devoid of a basis for testing its truth or accuracy. The test is concerned with the basis for evaluating the statement’s truth, not the actual truth of the statement. The actual truth of the statement is left for the trier

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<sup>242</sup> *A Theory of Hearsay*, *supra* note 62 at 410.

<sup>243</sup> *Baldree*, *supra* note 156 at 83, quoting *Hawkins*, *supra* note 185 at para. 75.

of fact to determine. Hence if a declarant testifies at a preliminary inquiry that she saw “the accused and an alien kill the victim with a spaceship”, and the declarant cannot be found at trial, her hearsay statement would likely be admitted into evidence under the hearsay rule. The declarant would have made the statement under oath or solemn affirmation, been visible to the adverse party when making the statement, and would have been cross-examined. Although the truth of the statement is clearly false, the basis to determine its falsity is clear.

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

Take preliminary inquiries. Evidence is presented by the prosecution to show that there is evidence upon which a jury acting reasonably could convict the accused person.<sup>244</sup> One purpose of the preliminary inquiry is to screen out charges for which the prosecution does not

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<sup>244</sup> *United States of America v. Shephard*, [1977] 2 SCR 1067.

have any evidence that could result in a conviction. The evidence is not weighed by the preliminary inquiry judge. Every inference in the evidence is taken at its highest to afford the opportunity to commit the accused person to trial, where he or she can be judged in full by a trier of fact.<sup>245</sup> These conditions can set up a perfect storm of unfairness, one which is not uncommon in Canadian courtrooms. A hypothetical illustrates the point: A completely fanciful and untrue hearsay statement is tendered at a preliminary inquiry. The declarant does not attend and the statement meets the test for threshold reliability. The hearsay statement will be admitted into evidence and deemed true. Assume that the hearsay statement is the lynchpin for the prosecution, giving it enough evidence to commit the accused person to trial. There is a great deal of unfairness here. The prosecution is permitted to tender a statement that the court assumes would have been proven by the declarant if he or she testified – and, worse, the statement is deemed to be true. The unfairness cascades onto other unfairness. The accused person is unable to discover the hearsay statement through cross-examination. The statement, despite being fanciful and untrue, commits the accused person to trial. Typically, that trial is four to six months away. If the accused person is detained in custody, they must remain detained for that time. By contrast, if the statement had been weighed for the untruth that it is, the accused person would have been discharged at the preliminary inquiry. Their ordeal with the criminal justice system would have been at an end, barring the exceptional use of a preferred indictment.<sup>246</sup>

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<sup>245</sup> *R. v. Arcuri*, 2001 SCC 54, [2001] 2 SCR 828 [*Arcuri* cited to SCC].

<sup>246</sup> *Criminal Code*, RSC 1985, c C-46, s. 577.

The second type of unfairness in ‘fairness in the adversarial process’ is the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice.<sup>247</sup> This unfairness can manifest in directed verdict applications at trial. An accused person can apply for a directed verdict of acquittal at the end of the prosecution’s case. The test is the same as at a preliminary inquiry: is there evidence upon which a jury acting reasonably could convict the accused person?<sup>248</sup> Every inference available on the evidence is taken at its highest in the prosecution’s favour. A successful directed verdict application has strategic implications for the accused person. If the application is granted, the accused person is acquitted by the judge. They do not have to call evidence in their defence to defeat the charge. If the directed verdict application is denied, the accused person is in the same position they were in before the application was made. They may need to call evidence in their defence.

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

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<sup>247</sup> *A Theory of Hearsay*, *supra* note 62 at 410.

<sup>248</sup> *Arcuri*, *supra* note 248.

by the untrue hearsay statement, the accused person will have to call evidence in their defence, or gamble that the trier of fact will weigh the statement as untrue.

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

A witness' testimony before a preliminary inquiry will generally be admitted as hearsay evidence if the witness is unavailable to testify at trial. The fact that the witness' statement was made under oath or solemn affirmation and subject to contemporaneous cross-examination by the adverse party on the same issues will be sufficient to satisfy the test for threshold reliability.<sup>249</sup> Driving admissibility is the adverse party's ability to cross-examine the declarant. In almost all instances, the cross-examining party in a preliminary inquiry is the accused person. Litigation procedure may cause the accused person's litigation strategy to change between the preliminary inquiry and trial. The cross-examination conducted at the preliminary inquiry will serve a purpose different than cross-examination at trial. However, if the declarant does not attend the trial, the accused person will be unable to implement the new cross-examination strategy. Instead, the accused person will be stuck with the cross-examination from the preliminary inquiry.

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<sup>249</sup> *Hawkins, supra* note 185 at 76.

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

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

A common example makes this clearer. Imagine that two men are charged with illegally possessing a shotgun. The prosecution is not sure which of the two men is the culprit, so both

are prosecuted. At the preliminary inquiry an eyewitness testifies that she saw a man holding the shotgun. The witness cannot identify which of the two accused men possessed the shotgun. The cross-examination strategy of the accused parties at the preliminary inquiry will be to cast the eyewitness' observation as too unreliable to identify the offender. This all changes if one of the accused parties pleads guilty in exchange for testifying against the other. Assume that one of the accused parties, X, pleads guilty to possessing the shotgun and is set to testify at the trial that his former co-accused, Y, was in joint possession of that weapon with him. Y's cross-examination strategy of the eyewitness will change. Y would likely want to cross-examine the eyewitness in a manner that suggests X was in sole possession of the shotgun. The cross-examination would fit into a new defence theory for Y, created after the preliminary inquiry and before the trial, that X was in sole possession of the shotgun and is testifying against Y to secure a lower sentence from the prosecution. The strategy is similar to Edward Greenspan's cross-examination of David Radler in *United States of America v. Conrad M. Black and others*.<sup>250</sup> The strategy comes crashing down if the eyewitness is unable to be found at the time of trial and her statement is admitted into evidence under the hearsay rule. The hearsay jurisprudence assumes that Y had the opportunity to cross-examine the eyewitness at the preliminary inquiry. In reality, that opportunity is hollowed by X's guilty plea and anticipated testimony.

The same dynamic can occur when multiple accused persons are tried together at a preliminary inquiry and severed in prosecution before the trial. The accused persons will share a preliminary inquiry but not share a trial. Often, the prosecution decides to sever the accused

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<sup>250</sup> Cudmore, *supra* note 2 at 107.

parties before the trial so that they can be compelled to testify against one another at each other's respective trials. The anticipated testimony of the severed accused party can change each defendant's cross-examination strategy of the witnesses from the preliminary inquiry. The example of the 'shotgun eyewitness' is applicable to this situation, as is the resulting unfairness. If a witness from the preliminary inquiry cannot be found at the time of trial, the accused person will be unable to initiate his or her new cross-examination strategy. Instead, the hearsay jurisprudence will deem the accused person to have applied their strategy at the preliminary inquiry. The hearsay evidence will be admitted despite a hollow cross-examination of the declarant at the preliminary inquiry.

The unfairness created by preliminary inquiry procedure is not generated by the hearsay rule in all instances. Under section 715(1) of the *Criminal Code*, preliminary inquiry testimony will generally be admitted into evidence at trial if the declarant refuses to be sworn or to give evidence, is dead, insane, so ill as to be unable to travel or testify, or is absent from Canada.<sup>251</sup> The hearsay rule allows for the admission of preliminary inquiry testimony not captured by s. 715(1).<sup>252</sup> This occurs quite frequently in practice. It is not uncommon for a witness to not show up to the trial. Without contact with the witness, the prosecution cannot prove that the conditions precedent of s. 715(1) are met. It falls to the hearsay rule to determine whether the testimony can be admitted into evidence.

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<sup>251</sup> *Criminal Code*, RSC 1985, c C-46, s. 715(1)

<sup>252</sup> *R. v. Saleh*, 2013 ONCA 742, [2013] OJ No 5554 at para. 76 [*Saleh*].

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

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

This section has used the lens of the five factors that underlie hearsay rule's historical rationale to identify the difference between the hearsay rule's historical rationale and the practical application of the exclusionary rule. The hearsay dangers remain at the forefront of the

hearsay rule's current application. However, the hearsay dangers may not be allayed by cross-examination alone or when the threshold reliability test is applied too loosely.

Demeanour evidence remains as important a factor in the hearsay rule as it was historically. The value of demeanour evidence is sometimes subsumed by cross-examination, and this may render demeanour evidence's influence less than it was during the historical creation of the hearsay rule.

The oath remains an important concept of the hearsay rule. Its influence upon a witness has shifted with the times, focusing today on the threat of state punishment.

The lack of opportunity to cross-examine the declarant remains a paramount factor in the hearsay rule's application. It is complicated in practice by the disjunction between its theoretical role in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers.

Fairness in the adversarial process remains an underlying factor in the current application of the hearsay rule. The test for threshold reliability aims to attenuate the two types of unfairness in admitting hearsay evidence. A third type of unfairness exists due to criminal litigation procedures that change the strategy of cross-examination for accused parties.

The attention turns now the other side of the rule's current application, the hearsay exceptions.

## 4. The Hearsay Exceptions

This section discusses the nature and extent of differences between the hearsay rule's historical rationale and the practical application of the rule's exceptions. The analysis proceeds by reference to the relevant hearsay exceptions. Once again, the five factors that gave rise to the hearsay rule frame the discussion. The five factors are indicia of differences between the hearsay rule's historical rationale and current application. A change in any of the factors indicates a difference between the application of the hearsay rule and its historical rationale.

There are over a dozen recognized exceptions to the hearsay rule. Some are well known, others are far more obscure. The taxonomy of exceptions employed in Canada's leading criminal evidence texts is used to sort the exceptions. The texts are *The Law of Evidence in Canada: Fourth Edition*<sup>253</sup> and *McWilliams' Canadian Criminal Evidence: Fourth Edition*.<sup>254</sup> From this taxonomy, discussion will occur only for exceptions for which there is a difference between the hearsay rule's historical rationale and their practical application. The exceptions are: admissions, *res gestae*, dying declarations, and the co-conspirator's exception to the hearsay rule. Prior inconsistent statements could be added; however, they are excluded from discussion because the difference between their practical application and the hearsay rule's historical rationale was analyzed in section 3, namely with respect to demeanour evidence.

A statement falling under an exception to the hearsay rule is presumptively admissible. The presumption may be defeated if the statement does not satisfy the necessity and reliability

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<sup>253</sup> Bryant, Lederman & Fuerst, *supra* note 5.

<sup>254</sup> Hill, Tanovich, & Strezos, *supra* note 12.

principle.<sup>255</sup> Moreover, an exception to the hearsay rule can be challenged to determine if it conforms to the necessity and reliability principle.<sup>256</sup>

What follows is an analysis of the following hearsay exceptions: admissions, *res gestae*, dying declarations, and the co-conspirator's exception to the hearsay rule. Each exception is explained and analysis is provided on the difference between its current application the hearsay rule's historical rationale.

## 4.1 Admissions

The admissions exception is a loose thread in the fabric of the hearsay rule. Theoretically, it renders the principled exception to the hearsay rule incoherent. In practice, it renders fairness in the adversarial process less influential than it was historically.

An admission is an out of court statement made by a litigant and tendered as evidence at trial by the opposing party.<sup>257</sup> Hearsay is governed by the necessity and reliability principle. Though characterized as hearsay evidence, admissions are excepted from the hearsay rule for a different reason. Admissions are accepted under a theory of the adversarial system which holds that a party cannot complain of their own statement's unreliability.<sup>258</sup> The declarant party is presumed to have satisfied him or herself of the statement's reliability upon utterance of the

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<sup>255</sup> *Khelawon*, *supra* note 4 at para. 42.

<sup>256</sup> *Ibid.*

<sup>257</sup> *R. v. Foreman* (2002), 62 OR (3d) 204 (Ont CA) at 215-216 [*Foreman*].

<sup>258</sup> *R. v. Evans*, [1993] 3 SCR 653, [1993] SCJ No 115 (CanLII) at para. 24 [*Evans* cited to CanLII].

statement. The trier of fact is left to weigh the statement's lack of an oath or affirmation and the absence of the declarant's demeanour.

The admissions exception extends to out of court statements that are not against the party's interest<sup>259</sup> and statements made by another and adopted by the party out of court.<sup>260</sup> The key to bringing a statement within the admissions exception is the declarant's belief when the statement was uttered. The declarant must have some belief that the statement is true.<sup>261</sup> The standard is low. In criminal trials the admissions exception serves a prime vehicle for the admission of evidence.

An admission is entered into evidence under different schemes depending on whether it is uttered to a person in authority. If an admission is uttered to a person in authority, such as a police officer, the confessions rule applies.<sup>262</sup> The prosecution must prove that the admission was given voluntarily beyond a reasonable doubt. In addition, as a result of the hearsay rule's concern with the hearsay dangers, the police have an obligation to record all custodial statements where feasible.<sup>263</sup> If an admission is not uttered to a person in authority, such as a parent or friend, the confessions rule does not apply. The utterance will be admitted after it satisfies the requirements of the admissions exception.

The admissions exception belies the second aspect of fairness in the adversarial process. When hearsay is admitted into evidence the adverse party is not given a chance to remove the

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<sup>259</sup> *Falcon v. Famous Players Film Co.*, [1926] 2 KB 474, 489 [*Famous Players*].

<sup>260</sup> See e.g. *Stowe v. Grand Turk Ry.* (1918), 39 DLR 127 (Alta CA) [*Grand Turk Ry.*].

<sup>261</sup> See e.g. *R. v. Matte*, 2012 ONCA 504, [2012] OJ No 3327 [*Matte*].

<sup>262</sup> *R. v. Oickle*, 2000 SCC 38, [2000] 2 SCR 3 [*Oickle* cited to SCC].

<sup>263</sup> *R. v. Moore-McFarlane*, [2001] OJ No 4646 (CA) at para. 58 [*Moore-McFarlane*].

prejudice caused by that evidence.<sup>264</sup> Instead, the party that wishes to remove the prejudice must call its own evidence. This unfairness is the backbone of adversarial theory supporting the admissions exception. The theory presumes that reliability issues with an admission can be cured by the adverse party taking the witness stand, testifying, and exposing him or herself to cross-examination. In the context of criminal trials, this introduces a strategic element that did not exist during the hearsay rule's development. During the 1600s and 1700s, an accused person did not enjoy a right to silence. The right only became recognized in earnest in 1848, well after the hearsay rule crystallized.<sup>265</sup> The hearsay rule's historical rationale does not contemplate strategic decisions by accused persons to testify to remove the prejudice caused by hearsay evidence. Rather, that decision is assumed.

In practice the decision to testify and expose oneself to cross-examination is one of the most important decisions an accused person can make. Unlike when the hearsay rule was developed, the right to silence is constitutionally protected.<sup>266</sup> There are a number of reasons why an accused person may not want to testify:

- there may be unsavory characteristics about the accused person exposed in cross-examination that are best left hidden from the trier of fact;
- the accused person may not want to disclose his or her criminal record to the trier of fact;

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<sup>264</sup> *Ibid.* at 410.

<sup>265</sup> Christopher Sherrini, "The Privilege Against Self-Incrimination in Regulatory Proceedings: Beginnings (That Never Began)" (2004) 30 Man. L.J. 315 – 352 [Privilege Against Self-Incrimination].

<sup>266</sup> *Oickle*, *supra* note 265.

- the accused person may hold information that would incriminate his or her co-accused; and,
- the accused person may have difficulty remembering details or narrating his or her story.

All of these considerations are unrelated to the accused person's factual guilt or innocence. These considerations must be sacrificed, however, if a hearsay admission is entered into evidence and the accused person wants to remove the prejudice caused by that evidence. Even testifying on a hearsay *voir dire* poses problems. The accused person is open to a broad right of cross-examination that can reveal strategic information about his or her defence. In all, the calculus determining whether to testify often results in accused persons remaining silent.

The calculus is affected by the ease with which admissions are admitted under the exception. Small details of evidence are readily admitted. The details are relevant to the case but not important enough to justify the risk of testifying. For example, a member of a criminal organization may be charged with conspiracy to commit drug and gun offences after having his phone wiretapped for a number of weeks. At trial the prosecution will use the wiretapped calls as evidence of the accused person's criminal acts. In doing so, the prosecution will need to connect the accused person to the voice on the wiretapped phone. A way of achieving the connection is to play a wiretapped conversation in which the accused person states his address. This is a common occurrence. The conversation can be as trivial as a delivery order for pizza. The law presumes that the accused person is honest when he provides his name and address to the pizza operator. This creates two difficulties that compromise fairness. First, people may lie in

commonplace interactions for various reasons. They are not under oath or otherwise compelled to be honest, nor do they know that the information might be used against their interest in a criminal trial. In the context of ordering a pizza, it is not uncommon to give another person's name and address. Second, if the address is in fact incorrect, the factual detail may not be large enough to warrant testifying and exposing oneself to cross-examination. This situation occurred in *R. v. Gardner et al.*<sup>267</sup> In that case, one of the alleged gang members provided his address and phone number to a pizza operator. He determined that it was not worth the risk to testify on a hearsay *voir dire*. If he did, the prosecutor almost certainly would have cross-examined him on the guilt of his co-accused and the inner workings of his alleged criminal organization. That in itself could have been a death sentence from his co-accused.

In conclusion, the admissions exception is built upon the unfairness to the adverse party of not having a chance to remove the prejudice caused by hearsay evidence. This forces accused persons in criminal trials to make a strategic decision that did not exist when the hearsay rule was developed. The impact of fairness in the adversarial process is rendered less influential than it was historically.

## 4.2 *Res Gestae*

Three subcategories comprise the *res gestae* exception to the hearsay rule. They are declarations of bodily and mental findings and conditions, declarations accompanying and

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<sup>267</sup> *R. v. Gardner et al.*, 2013 ONCJ 351. The strategic decision by the alleged gang member is not captured in the decision.

explaining relevant acts, and spontaneous declarations.<sup>268</sup> The preconditions and inner workings of each of the subcategories are not relevant for the purpose of this thesis. What is important is that the subcategories are premised on a notion of reliability derived from the circumstances in which a hearsay statement is created. The *res gestae* exception as a whole presumes that a statement made with relative contemporaneity to an event or feeling will allay against two of the four hearsay dangers.<sup>269</sup> The declarant's memory will be fresh and there will be little time to concoct an insincere statement.<sup>270</sup> These factors compensate for the statement's lack of oath and demeanour evidence, and inability to contemporaneously cross-examine the declarant, giving the statement sufficient reliability for admission.

The *res gestae* exception did not exist during the hearsay rule's development. The presumption that reliability is derived from contemporaneity is not always borne in practice. The *res gestae* exception in all of its forms can cause the factors of lack of oath, demeanour evidence, and opportunity to cross-examine the declarant to wield less influence than they did under the hearsay rule's historical rationale. Central to this diminished influence is the conflation that contemporaneity between an event or feeling and a statement results in reliability. It does not. At best it results in a sincere statement.<sup>271</sup> Sincerity may on occasion overlap neatly with reliability, but reliability encompasses more than sincerity. Cross-examination is needed to prod the declarant's perception of the event or feeling and what they meant when they said their

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<sup>268</sup> See e.g. Bryant, Lederman & Fuerst, *supra* note 5 at 332.

<sup>269</sup> *Ibid.*

<sup>270</sup> Kevin P. Doyle, *The "New Approach" to the Admission of Hearsay Evidence* (LLM Thesis, University of Alberta Faculty of Law, 1994) [unpublished] at 73-105.

<sup>271</sup> *Ibid.* at 77

statement. Through these avenues of questioning, the adverse party and trier of fact can determine if the declarant's sincere statement is true.

Worse is the occasion when the declarant is not sincere. The heart of the *res gestae* exception is an assumption that the declarant is sincere because he or she lacks opportunity to concoct an untrue statement. In the context of a declaration of bodily condition, this assumption is stretched to a tautology. The exception assumes that a declarant is sincerely speaking about their bodily condition because they are contemporaneously experiencing it, and they are experiencing the bodily condition because they are speaking about it.<sup>272</sup> Declarations of bodily condition require cross-examination and an oath to guard against insincerity.

The contemporaneity that allows the declarant's memory of an event or feeling to be accurate may also disallow the declarant from properly narrating their statement. The result is a true statement expressed in a way that allows for misinterpretation. Cross-examination is needed to explore the declarant's narration. Consider this example:<sup>273</sup> A man, X, catches his wife in their bedroom cheating with her lover, Y. Overcome with emotion, X takes a gun and shoots himself above his heart. Bleeding, X follows the fleeing Y outside where he is observed by his neighbours screaming at Y, "look at what you've done." X is hit by a car and dies on the road. Although X's statement is factually true, and undoubtedly sincere, his statement is consistent with being shot by Y and shooting himself. The statement should never go to the trier of fact for interpretation. It lacks an oath, demeanour evidence, and cross-examination, and it would likely

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<sup>272</sup> *Ibid.* at 77.

<sup>273</sup> The example is adopted from the hypothetical in Tanovitch, *supra* note 178 at 405.

require the accused person to tender evidence to rebut its prejudice. The only guarantee of reliability for the statement is its contemporaneity with the fatal injury, and that factor has caused confusion rather than clarity.

Most problematic with the *res gestae* exception is its lack of a necessity requirement. The declarant need not testify.<sup>274</sup> A statement falling within the exception is presumed to have such a high circumstantial guarantee of reliability that it possesses greater evidentiary value than *viva voce* testimony.<sup>275</sup> Even if the declarant testifies his or her prior consistent *res gestae* statement can be admitted into evidence under the exception.<sup>276</sup> The problem is that the superior circumstantial guarantee of reliability that is believed to negate a necessity requirement is, for the reasons already explained, not well founded. Where a declarant is available to testify, the content of the *res gestae* statement should be received in court, under oath or affirmation, with the benefit of demeanour evidence and cross-examination.

In all, the presumption in the *res gestae* exception that reliability is derived from contemporaneity can cause the factors of lack of oath, demeanour evidence, and opportunity to cross-examine the declarant to wield less influence than they did under the hearsay rule's historical rationale.

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<sup>274</sup> *R. v. Shea*, 2011 NSCA 107, [2011] NSJ No 653 at paras. 69-75 [*Shea*].

<sup>275</sup> *Ibid.*

<sup>276</sup> Hill, Tanovich, & Strezos, *supra* note 12 at 7-80.

### 4.3 Dying Declarations

The dying declaration exception can be discussed in short order. It suffers from the same deficit as the *res gestae* exception in relation to the hearsay rule's historical rationale. A dying declaration occurs when a person makes a statement about their mortal injury while having "a solemn conviction that he or she will soon die and there is no hope whatsoever of recovery."<sup>277</sup> The statement must be made by a victim in a homicide trial.<sup>278</sup>

The dying declaration exception is based on a religious theory that the declarant believes in a Judeo-Christian creator and fears divine retribution, causing him or her to speak truthfully at the time of death.<sup>279</sup> Since the deceased are a difficult population to survey, this theory has never been statistically supported. It carries even less weight in today's increasingly secular society.

Like the *res gestae* exception, dying declarations are premised on a conflation between sincerity and reliability. Cross-examination and an oath are needed to carefully explore the declarant's perception of what caused their injury and what they meant by their statement. Sincerity is a concern as well. Dying men and women do not lose their ability to lie.<sup>280</sup>

The dying declaration exception is still applied in practice.<sup>281</sup> Increasingly, though, prosecutors are abandoning the exception in favour of admission through the necessity and reliability analysis.<sup>282</sup> Under this framework, the necessity of the statement is emphasized and corroborating evidence is presented to compensate for the lack of reliability.

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<sup>277</sup> Bryant, Lederman & Fuerst, *supra* note 5 at 358-359.

<sup>278</sup> *R. v. Jurtyan*, [1958] OJ No 229 (CA) [*Jurtyan*].

<sup>279</sup> Doyle, *supra* note 273 at 65.

<sup>280</sup> This expression is adapted from *Baldree*, *supra* note 156 at para. 115

<sup>281</sup> See e. g. *R. v. Muise*, 2013 NSSC 141, [2013] NSJ No 290 [*Muise*].

<sup>282</sup> See e. g. *R. v. Byers*, ONSC April 2, 2011 (Unreported) [*Byers*].

## 4.4 Co-Conspirators Exception

The co-conspirators exception is applied mainly (but not exclusively)<sup>283</sup> in criminal conspiracy cases. The Supreme Court justifies the exception in large part on the need to prosecute conspiracy charges. In *R. v. Mapara* the Court candidly admitted that depriving the prosecution “of the right to use double hearsay evidence of co-conspirators as to what they variously said in furtherance of the conspiracy would mean that serious criminal conspiracies would often go unpunished.”<sup>284</sup> While there are many criticisms of the co-conspirators exception, a narrow issue can be examined for the purpose of identifying the differences between the hearsay rule’s historical rationale and practical application. The co-conspirators exception allows for the admission of words and acts of any unindicted person alleged to be a co-conspirator. In so doing, the exception can operate in a manner completely inconsistent with the hearsay rule’s historical rationale.

In order to appreciate the issue, some explanation of the co-conspirator’s exception is required. A trier of fact may consider certain words and acts of the accused person’s co-conspirators in determining whether the prosecution has proven beyond a reasonable doubt that an accused person is a party of a conspiracy. The analysis is described in three steps known as the *Carter* approach:<sup>285</sup>

1. The trier of fact must first be satisfied beyond reasonable doubt that the alleged conspiracy in fact existed.
2. If the alleged conspiracy is found to exist then the trier of fact must review all

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<sup>283</sup> See, e.g. the facts of *R. v. Dieckmann*, 2014 ONSC 717, [2013] OJ No 6154 [*Dieckmann*].

<sup>284</sup> *Mapara*, *supra* note 176 at para. 29.

<sup>285</sup> *R. v. Chang*, [2003] OJ No 1076 (CanLII) at para. 53 [*Chang*], quoting *R. v. Barrow*, [1987] 2 SCR 694, [1987] SCJ No 84 (CanLII) at para. 73 [*Barrow* cited to CanLII].

the evidence that is directly admissible against the accused and decide on a balance of probabilities whether or not [the accused] is a member of the conspiracy.

3. If the trier of fact concludes on a balance of probabilities that the accused is a member of the conspiracy then [the trier] must go on and decide whether the Crown has established such membership beyond reasonable doubt. In this last step only, the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the conspiracy as evidence against the accused on the issue of his guilt.

In the last step, the trier of fact can apply the co-conspirators exception to the hearsay rule and consider a co-conspirator's acts and declarations done in furtherance of the object of the conspiracy against the accused person.

Implicit in the co-conspirators exception to the hearsay rule is the trier of fact's finding that the person the prosecution alleges is a co-conspirator is, in fact, a member of the conspiracy. Without this finding, the rationale behind the rule falls away. Co-conspirators are held responsible for each other's words and acts on the premise that, in agreeing to engage in a common design, co-conspirators have agreed to act as each other's agents.<sup>286</sup> A co-conspirator's statements are also effectively part of the *actus reus* of the offence of conspiracy. Once it is established that parties are involved in the same conspiracy, the acts and words of one are admissions against all. The theoretical foundation for the co-conspirators exception is a mix of the admissions and *res gestae* exceptions.<sup>287</sup> The differences between the practical application of those exceptions and the historical rationale (discussed in sections 4.1 and 4.2) are applicable to the co-conspirators exception.

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<sup>286</sup> *Chang, supra* note 288 at paras. 55 & 82-84.

<sup>287</sup> *Ibid.* 55, 82-84 & 123.

The trier of fact must be satisfied that an alleged co-conspirator is probably a part of the conspiracy with the accused person in order for the alleged co-conspirator's words and acts to be attributable to the accused person. The words and acts of a co-conspirator are reliable evidence against the accused person because they were done to further a common enterprise – an agreed-upon scheme – between the accused person and co-conspirator.<sup>288</sup> It is this context that provides the circumstantial guarantee of reliability.<sup>289</sup> Without this established connection, the co-conspirator's words and acts are not relevant and reliable evidence respecting the accused person.

Nevertheless, in Ontario there is no need to prove that an alleged co-conspirator is a probable member of the conspiracy before that person's words and acts can be used to incriminate the accused person.<sup>290</sup> In *R. v. Farinacci* the Court of Appeal for Ontario curiously reasoned that the co-conspirators exception possesses sufficient reliability from the requirement that the only statements considered are those made in furtherance of the conspiracy.<sup>291</sup> This reasoning misunderstands threshold reliability under the co-conspirators exception. Anyone can make a statement in furtherance of a conspiracy. What matters, and what gives a statement threshold reliability, is that the statement made in furtherance of the conspiracy *is made by a member of the conspiracy*. Otherwise, the words and acts of any person who advances a conspiracy, however unattached they may be from the conspiracy, will be used to incriminate the accused person.

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<sup>288</sup> *Ibid* at paras. 116-117

<sup>289</sup> *Ibid*.

<sup>290</sup> *R. v. Farinacci*, 2015 ONCA 392 [*Farinacci*].

<sup>291</sup> *Ibid* at para. 55.

The co-conspirators exception admits statements made in furtherance of the conspiracy for reasons relating to relevance and reliability. With regard to relevance, the words and acts of alleged co-conspirators that are unrelated to the advancement of the conspiracy are not relevant to a conspiracy charge. With regard to reliability, the agency principle which partly underlies the co-conspirators exception only extends to statements made in furtherance of the conspiracy. Each party to the conspiracy implicitly authorizes the others to speak and act on his or her behalf only insofar as they further the conspiracy.<sup>292</sup> Acts or words not in furtherance of the conspiracy are not authorized and therefore not reliable.

A word or act made in furtherance of the conspiracy is not relevant if it is not made by a probable member of the conspiracy. The facts of *Farinacci* are instructive.<sup>293</sup> Lucas and Len Farinacci were brothers engaged in mid-level cocaine dealing in St. Catharines, Ontario. They were charged with conspiring to move a large amount of cocaine to another mid-level cocaine dealer located in Toronto. That drug dealer had his own, separate conspiracy to resell the cocaine in smaller quantities to low-level drug dealers. The low-level drug dealers in turn sold the cocaine on the street. Wiretapped conversations of the low-level drug dealers were played in court and used to convict Lucas and Len Farinacci, despite the fact that the Farinacci brothers were alleged to engage in a separate conspiracy. There was no indication, other than speculation, that the low-level drug dealers' conversations were about a conspiracy related to the Farinacci brothers or trustworthy.

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<sup>292</sup> *Chang, supra* note 288 at para. 55

<sup>293</sup> *Farinacci, supra* note 293.

The blind spot created by *Farinacci* allows for the potential admission of unreliable and irrelevant evidence. In addition to sharing some of the differences between the historical rationale and the admission and *res gestae* exceptions, the co-conspirators exception completely departs from the historical rationale when evidence is admitted of unindicted persons who are not probable members of the conspiracy.

In summary, this section has considered the difference between the current application of four hearsay exceptions, admissions, *res gestae*, dying declarations, and the co-conspirator's exception, and the hearsay rule's historical rationale. The admissions exception is built upon the unfairness to the adverse party of not having a chance to remove the prejudice caused by hearsay evidence. This forces accused persons in criminal trials to make a strategic decision that did not exist when the hearsay rule was developed. The impact of fairness in the adversarial process is rendered less influential than it was historically.

The presumption in the *res gestae* exception that reliability is derived from contemporaneity can cause the factors of lack of oath, demeanour evidence, and opportunity to cross-examine the declarant to wield less influence than they did under the hearsay rule's historical rationale.

Like the *res gestae* exception, dying declarations are premised on a conflation between sincerity and reliability. This exception can also cause the factors of lack of oath, demeanour evidence, and opportunity to cross-examine the declarant to wield less influence than they did under the hearsay rule's historical rationale.

The theoretical foundation upon which the co-conspirators exception rests is a mix of the admissions and *res gestae* exceptions. The differences between the practical application of those exceptions and the hearsay rule's historical rationale are applicable to the co-conspirators exception. In addition, the co-conspirators exception can operate in a manner entirely inconsistent with the hearsay rule's historical rationale when evidence is admitted of unindicted persons who are not probable members of the conspiracy.

## 5. Conclusion

This thesis has examined the difference between the hearsay rule's historical rationale and current application. The hearsay rule's historical rationale has three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. Five factors underlie this rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process. The six major theories in the literature describe aspects of the same historical rationale. Methodological differences between the theories and deficiencies within them cause them to capture only a portion of the hearsay rule's historical rationale. The only debate within the literature that cannot be attributed to methodological differences is disagreement over the purpose for which cross-examination is necessary.

While methodology does not cause the disagreement, it helps to resolve the the issue. Historically, cross-examination was deemed necessary to shed light on potential sources of unreliability in hearsay evidence. Cross-examination was not deemed necessary because of a concern with the ability of lay jurors to evaluate testimonial evidence.

The difference between the hearsay rule's historical rationale and current application is measured through the five factors that gave rise to the hearsay rule. Since the five factors underpin the hearsay rule's historical rationale, a change in the factors indicates a change in the application of the hearsay rule's historical rationale.

The hearsay dangers remain at the forefront of the hearsay rule's current application. The test for threshold reliability is premised on testing for the hearsay dangers. The hearsay rule assumes that cross-examination will generally allay the hearsay dangers. However, the hearsay dangers may not be allayed by cross-examination alone or when the threshold reliability test is applied too loosely. In these situations, the concern with the hearsay dangers is less than it is under the hearsay rule's historical rationale.

Demeanour evidence remains as important a factor in the hearsay rule as it was historically. The value of demeanour evidence is sometimes subsumed by cross-examination. Specifically, in non-contemporaneous cross-examination, the declarant of a hearsay statement will be subjected to cross-examination by the opposing party before the hearing. If the cross-examination is not video recorded, the trier of fact at the hearing will be unable to observe the declarant's demeanour during the prior cross-examination. If the declarant's statement is admitted at the hearing under the hearsay rule, the trier of fact may only have a transcript of the cross-examination. The declarant's demeanour in giving the evidence will be lost.

The oath remains an important concept of the hearsay rule. Its influence upon a witness has shifted with the times, focusing today on the threat of state punishment.

The lack of opportunity to cross-examine the declarant remains a paramount factor in the hearsay rule's application. It is complicated in practice by the disjunction between its theoretical role in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers.

Fairness in the adversarial process remains an underlying factor in the current application of the hearsay rule. The test for threshold reliability aims to attenuate the two types of unfairness in admitting hearsay evidence. However, the test fails to recognize litigation procedures that enhance the two types of unfairness. A third type of unfairness exists due to criminal litigation procedures that change the strategy of cross-examination for accused parties.

There is a difference between the hearsay rule's historical rationale and the practical application of the following exceptions to the hearsay rule: admissions, *res gestae*, dying declarations, the co-conspirator's exception, and prior inconsistent statements. Prior inconsistent statements are discussed in conjunction with the exclusionary hearsay rule in section 2.

The admissions exception is built upon the unfairness to the adverse party of not having a chance to remove the prejudice caused by hearsay evidence. This forces accused persons in criminal trials to make a strategic decision that did not exist when the hearsay rule was developed. The impact of fairness in the adversarial process is rendered less influential than it was historically.

The presumption in the *res gestae* exception that reliability is derived from contemporaneity can cause the factors of lack of oath, demeanour evidence, and opportunity to cross-examine the declarant to wield less influence than they did under the hearsay rule's historical rationale.

Like the *res gestae* exception, dying declarations are premised on a conflation between sincerity and reliability. This exception can also cause the factors of lack of oath, demeanour

evidence, and opportunity to cross-examine the declarant to wield less influence than they did under the hearsay rule's historical rationale.

The theoretical foundation upon which the co-conspirators exception rests is a mix of the admissions and *res gestae* exceptions. The differences between the practical application of those exceptions and the hearsay rule's historical rationale are applicable to the co-conspirators exception. In addition, the co-conspirators exception can operate in a manner entirely inconsistent with the hearsay rule's historical rationale when evidence is admitted of unindicted persons who are not probable members of the conspiracy.

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

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