**Summary of general steps**

* Preliminary step: is the CEA or OEA relevant? (generally: criminal proceeding = CEA, civil litigation = OEA)
1. Is the evidence relevant?
2. Is the evidence subject to an exclusionary rule? (e.g. hearsay)
3. Should the trier of law exercise her discretion to reject the evidence? (always has residual discretion to reject the evidence)
4. What weight should the trier of fact assign to the evidence? (not what we are concerned with – evidence is what evidence should be put to the trier of fact)

**Relevance**

**General rule**: Evidence must be relevant to an issue in a case, otherwise it is not admissible.

* Based on human experience, common sense and logic
* Question – does the existence of “Fact A” make the existence (or nonexistence) of “Fact B” more probable than it would be without the existence of “Fact A”?
	+ If so, “Fact A” is relevant to “Fact B”
* Logical relevance, not legal relevance is considered (*Thayer*) – broad interpretation
* Does not require a direct connection between the evidence and material facts or issues
	+ Can be “direct” or “circumstantial”
	+ Direct evidence is always relevant
	+ Circumstantial evidence requires a nexus / link between the evidence and the fact to be proven
		- E.g. from a fingerprint 🡪 that’s him
			* Assuming no on else has that match, not tampered with, etc.
		- Competing inferences does not negate relevance 🡪 as long as it has one competing inference relevant to an issue, it is relevant
* Relevancy of evidence must be assessed in the context of other evidence
	+ It may need to be re-assessed in light of other evidence
* Evidence of **habit** is circumstantial evidence and may support an inference that in the situation in question the person acted in the same way as s/he habitually did in that type of situation
* An **accused’s conduct after an offence** has occurred is a form of circumstantial evidence and may in appropriate cases support an inference of guilt
	+ Other types of after-the-fact conduct include: flight from the jurisdiction, resisting arrest, failure to appear at trial, acts of concealment, attempt to commit suicide etc.

**Relevance of other sexual activity**

* Twin myths: Other consensual sexual activity evidence is not admissible ***solely*** to support the “twin myths”
	+ There is no logical link between a woman's sexual reputation and (1) whether she is a truthful witness, (2) whether she is more likely to have consented (*Seaboyer*)
	+ Those inferences are not reasonable (*Seaboyer*)
* Other consensual sexual activity evidence **is potentially admissible** for other purposes if:
	+ it has probative value on an issue in the trial and
	+ its probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence
	+ **EXAMPLES**:
		- Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the assault
		- Evidence of prior sexual conduct, known to the accused, tending to prove that the accused believed that the complainant was consenting to the act charged
		- Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant
		- Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence
		- Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct

**Statistical evidence**

* 1. Courts may take into account statistical evidence and use it to draw inferences relevant to the issues
* 2. Such evidence is approached with caution and is not determinative
* 3. Trial judge decides what weight, if any, to give to such evidence in light of the evidence as a whole
* 4. On appeal, deference is accorded to the trial judge’s assessment of weight

**Types of Evidence – second lecture**

**Testimonial (oral evidence) – discussed under “examination of witnesses”**

* Proof of facts is normally accomplished through the oral testimony of witnesses
* Order of questioning
	+ Proponent’s Case
		- Examination-in-chief
		- Cross-examination
		- Re-examination
	+ Responding Party’s Case
		- As above
	+ Reply
* Leading questions
* Testimonial factors
* Etc. see “examination of witnesses”

**Documents**

* **Proof of documents**
	+ produce and identify the document
	+ **authenticate the document**
		- author of document
		- witness to its creation
		- witness who attests to handwriting
			* s 8 CEA, s 57 EA: lay opinion evidence re disputed handwriting permitted
		- comparison with genuine document
		- expert testimony
		- admission by opposing side
	+ **Best evidence rule**
		- proof of contents of documents requires the **original document**, *if available*
* Proving the contents
	+ E.g. business records (common law, s 30 CEA, s 35 EA)
		- Exceptions to hearsay – SEE THAT LECTURE
* Possible Reasons to Prefer Documents To Witnesses
	+ contemporaneity of the documents
	+ created before litigation was contemplated
	+ intended use of the documents
	+ steps taken to ensure accuracy
* Possible Reasons to Prefer Witnesses to Documents
	+ trial safeguards – oath, in court, legal consequences
	+ tested by cross-examination
	+ lack of recognition of importance of document at time it was created
	+ consistency with overall events

**Real Evidence**

* Advantages / Disadvantages
	+ May be more effective since no intermediary
	+ Practical / safety concerns
	+ Difficulty fully reflecting in court record
	+ Maintaining items integrity
	+ Dependent on trier of fact’s assessment skills
* **Photographs and Videotapes**
	+ **authentication**
		- accurate representation of facts
		- fairness and no intention to mislead
		- verification on oath, if reasonable
	+ key concern = *undue prejudice*
* **Things**
	+ Basic rules apply – relevance, exclusionary discretion
	+ **Authenticated**
		- Verification on oath
		- Chain of custody
* **Non-things**
	+ Taking a view of a thing or property
	+ Judicial discretion
	+ Proper record
	+ Observation of a witness’ demeanour or appearance
	+ “informal” evidence
	+ No admissibility test

**Demonstrative Aids**

* **Purpose of the “evidence”:**
	+ Illustrate/demonstrate, summarize, and/or explain the primary facts so those facts can be more easily understood / remembered
* **Examples**
	+ Anatomical models / medical diagrams / treatment charts
	+ Overview photographs and maps (i.e., not directly showing the “events” before the court / tribunal)
	+ Scale diagrams (of intersections, locations etc., to explain the locale of the “event” before the court)
	+ Powerpoint presentations summarizing various types of voluminous information such as cellphone tower pings, accounting or banking records, cellphone or “social media” communications
	+ Animations or videos showing current status or expected outcomes (e.g. “day in the life” videos)
	+ Video re-enactments or computer reconstructions of “past events”
	+ In-court demonstrations
* **Advantages of Demonstrative Evidence**
	+ Powerful, and increasingly prevalent, form of “evidence” or “evidential aid”
	+ Visual (rather than oral), simplified, vivid and engaging, etc.
* **Disadvantages**: risk of being misleading and/or overvalued by trier of fact, unequal access to resources (they cost a lot to make – one party may be able to afford and another won’t), time-consuming, difficult to “test” through cross-examination
* **Test For admissibility \*\***
	+ material and relevant
	+ accurate representation
	+ reasonably necessary to illustrate or explain the witness’ evidence
	+ no risk of causing *unfair* prejudice to the opposing side
* **Laying the foundation**
	+ relevance
	+ mode of preparation
	+ authenticity (accurate depiction)
	+ proposed use and utility of aid
* **Consider / Contrast**
	+ Photograph of the car accident, at the intersection, taken immediately after the accident occurred (not demonstrative aid – real evidence)
	+ Aerial photograph of the intersection where the accident occurred, taken shortly after (or even before) the accident occurred (demonstrative aid)

**Courtroom experiments**

* Discretion of judge
* Confusion and delay
* Inability to “record” for appellate review
* Inability to sufficiently replicate the original occurrence

**Electronic Evidence** (slide 44 lecture 2 – many statutory provisions! Make sure you analyze them!!)

* **CEA, s 31.8**
	+ ***electronic document*** means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.
	+ **Two requirements:**
		- **Authenticity of document** (s 31.1)
			* Low standard
			* ”evidence capable of supporting a finding that the electronic document is that which it is purported to be”
			* disputes about genuineness of the document are for the ultimate trier of fact
		- **Best evidence rule** (s 31.2 – 31.4)
			* 1. Proof of the integrity of the document system that recorded or stored the document by evidence (s.31.2(1)(a))
			* 2. Proof of the integrity of the document system that recorded or stored the document using one of the three presumptions provided for in subsection 31.3 (subsection 31.2(a)), namely the “functioning system” presumption, the “opposing party” presumption, and the “third party business record” presumption.
			* 3. For documents bearing secure electronic signatures, proof by the presumption provided for by regulation pursuant to subsection 31.4 (subsection 31.2(b))
			* 4. Absent evidence to the contrary, proof that the document has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in a printout (subsection 31.2(2)).
	+ **Proof of contents** ( s 31.7)
		- Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence
* **FOR EA – need to look at s 34.1**

**Relevancy and Fact-finding**

* **See relevancy above**
* **Principles of fact-finding – slide 62 lecture 2 (types of evidence)**

**Residual discretion to reject evidence** + fundamental concepts of evidence law

Exclusionary discretion: Trial judges have a discretion to exclude otherwise admissible evidence based on an assessment of the probative value of the evidence compared to its prejudicial effect

**Probative value**

* estimate of how significant evidence is, if properly used
	+ the highest value that a jury could reasonably assign to the evidence
	+ the weight that a trier of fact can reasonably assign to the evidence
* *Basic considerations*: (relevant for weight as well)
	+ Source of evidence – first-hand, factual, opinion?
	+ Probability – sensible, believable?
	+ Internal consistency – very few contradictions in evidence itself
	+ External consistency – fits generally with other evidence in the case

**Weight**: ultimate significance the trier of fact places on evidence – we are not concerned with this in law of evidence

**Prejudicial effect**

* **Risk** (potential) that if evidence is admitted, will **unduly** prejudice the *trial process*
	+ Unduly prejudicial = has a specific form of distorting the trial process
	+ All evidence is prejudicial to one party or another – we are looking at undue prejudice
* **Prejudice generally**
	+ Risk that the evidence may:
		1. undermine an accurate result
		2. complicate or frustrate the trial process
		3. assault the dignity of witnesses or parties
* **Specific forms of prejudice**
	+ arouse prejudice, hostility, sympathy
	+ create a side issue that will unduly distract the jury from the main issue in the case
	+ consume an undue amount of time
	+ unfairly surprise the opponent
	+ usurp the function of the jury
* Other forms of prejudice: “any potential that evidence has to undermine an accurate result, to complicate or frustrate the process, or to assault the dignity of witnesses or parties.”
* **Factors to consider in assessing prejudicial effect**
	+ The extent to which the potential prejudice is already present in the trial because of other evidence
	+ The mode of trial in a case
	+ The likelihood that the potential prejudice will occur
	+ The use of limiting instructions

**Criminal Test** (*Seaboyer*)

* Crown’s evidence
	+ Probative value of evidence is outweighed by its prejudicial effect
	+ This exclusionary discretion is a PFJ protected under s 7 of the *Charter* (any violation need to be justified by s 1)
* Defence’s evidence
	+ Probative value of the evidence is **substantially** outweighed by its prejudicial effect

**Civil Test** (*Anderson*)

* probative value of the evidence is outweighed by its prejudicial effect
* precise scope of the discretion is not well defined in civil cases
* used a lot less often in civil cases, and tends not to happen for witness testimony but rather photographs, videos, etc.

**Prior testimony**: *Potvin*

S 715(1) CC: Where, at the trial of an accused, a person whose evidence was given at a previous trial upon the same charge, or whose evidence was taken in the investigation of the charge against the accused or upon the preliminary inquiry into the charge, **refuses to be sworn or to give evidence**, or if facts are proved upon oath from which it can be inferred reasonably that the person:

(a) is dead,

(b) has since become and is insane,

(c) is so ill that he is unable to travel or testify, or

(d) is absent from Canada.

***and*** where it is proved that his evidence was taken in the presence of the accused, it ***may*** be read as evidence in the proceedings without further proof ***unless*** the accused proves **that he did not have full opportunity to cross-examine the witness**.

* “Full opportunity to cross-examine the witness” requires the ***chance*** to cross-examine at the time the statement was made, not whether it was fully exercised (*Potvin*)
* Likely not a “full opportunity” to cross-examine a witness if: (*Potvin*)
	+ accused was deprived of the right to counsel (*Potvin*)
	+ court improperly restricted defence counsel’s cross-examination (*Potvin*)

**NOTE**: court still has a residual discretion to exclude evidence even if s 715 pre-conditions are met (*Potvin*)

* Discretion includes situations where:
	+ the testimony was obtained in a manner which was unfair to the accused or,
	+ admission of the (fairly obtained) testimony at the trial would not be fair to the accused

ALSO: Trial judge should (usually) instruct jury they have not had the benefit of observing the witness given the testimony (*Potvin*)

**Prior Convictions**: s 12 CEA, s 22 OEA, *Corbett*

* s 12 CEA: may use witness’ criminal record to undermine credibility (*Corbett*)
	+ witness may be questioned as to whether the witness has been convicted of any offence
	+ It cannot be used to infer that the P committed the crime though because they committed the same crime or other crimes in the past (*Corbett*)
* Commission of criminal offence means we can infer that they are an untrustworthy person (because they showed a propensity to disregard rules) (*Corbett*)
	+ The amount of untrustworthiness depends on the offence though – e.g. assault vs fraud
* **Factors to consider**
	+ Nature of prior conviction
	+ Similarity of the prior conviction to present charge
	+ Remoteness or nearness of the prior conviction to the present charge
	+ Fairness to the prosecution (i.e. case is a credibility contest)
	+ Nature of the record – length of the record, number of convictions
* Cannot cross-examine people about offences *discharged* (b/c not a conviction)
* Court has discretion to exclude evidence if prejudicial effect is too high
	+ i.e. it presupposes guilt of accused for present charge

**Competency and Compellability**

General rule: Proof of facts is normally accomplished through the testimony of witnesses

* facts directly observed by the witness
* authenticity of documents, real evidence, etc.

**Competency** = whether witness is legally permitted to testify

* Special procedure on inquiry, see lecture 5 slides 37 and on – one for CEA and one for EA
* General rule: every person is presumed competent to testify (OEA s 18)
* General rule: witness must wear on oath or solemnly affirm to tell truth before any evidence is taken from him/her in court (CEA s 13-14, OEA s 16-17)
	+ A person can given sworn testimony only if he/she understands the **nature and consequences** of the oath or solemn affirmation
		- Understand nature and consequences:
			* Appreciate the solemnity of the occasion
			* Appreciate the added responsibility to tell the truth involved in taking an oath or affirmation, beyond the ordinary duty to tell the truth in normal social conduct
			* Understand what it means to tell the truth in court
			* Understand in both a practical and moral sense when a lie is told in court
	+ **Where to conduct an inquiry**: Persons age 14 or older whose mental capacity is challenged (CEA s 16) OR competency is challenged (EA s 18) – based on statute you’re dealing with
	+ **CEA** s 16(3) person who is 14+ whose mental capacity is challenged and who does not understand nature of oath may testify on *promising to tell the truth* (note for under 14, separate provision below)
		- (3.1) person shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth
		- (5) burden on party challenging mental capacity of witness age 14+
	+ **Persons who are under the age of 14** (CEA s 16.1, EA s 18.1) – may testify under promise to tell the truth
		- CEA s 18.1(7) cannot question what it means to promise to tell truth
		- EA s 16.1(2) must understand what it means to tell the truth
		- EA s 16.1(3) broader discretion to permit person to testify if person’s evidence is “sufficiently reliable”
	+ Possible outcomes:
		- Person is permitted to testify on making a promise to tell the truth
		- Person is permitted to testify without promising to tell the truth, in one situation
		- Person is not permitted to testify
* General Rule: In all cases TJ must be determine if witness is **able to *communicate* evidence** which requires:
	+ *Capacity* to observe, recollect and communicate (e.g. can ask questions like what colour is my shirt, etc.) – not whether actually able to recall the events in question
* General rule: A person is **not incompetent** to give evidence by reason of interest or crime (CEA s 3, OEA ss 6-7)
	+ CEA s 3 A person is not incompetent to give evidence by reason of interest or crime
	+ OEA s 6 No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest
	+ OEA s 7 Every person offered as a witness shall be admitted to give evidence although he or she has an interest in the matter in question or in the event of the action and although he or she has been previously convicted of a crime or offence
* Common law rules re spousal incompetence, etc. were **abolished** for the most part by statute – some compellability rules exist though

**Compellability** = whether witness can be forced to testify

* **Civil**: OEA s 8: **parties to an action, as well as their spouses**, *except as hereinafter otherwise provided*, **are competent and compellable to give evidence** on behalf of any of the parties
	+ Provincial offences act s 46(5): D not compellable witness for the prosecution
* **Criminal: Non-compellability of accused** constitutionally protected: s 11(c) Charter
* CEA s 4(6): **Failure of accused to testify – no “negative” comment by judge/counsel** – The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution
	+ Scope Judge/Crown
		- No negative comments
			* *Except*: about alibi defences
		- Neutral comments permissive but not encouraged
		- Positive comments by TJ permissible and sometimes required (i.e. you shouldn’t use failure of accused to testify as evidence of his/her guilt)
	+ Scope – defence counsel
		- Positive comments on right not to testify permissible but cannot go beyond evidence
		- Positive comments on client’s testimony vs co-accused’s failure to testify are permissible
		- Negative comments on co-accused’s failure to testify are *not permissible*
* **Fail to call party or call material evidence**
	+ Trier of fact may draw an adverse inference against a party who fails to call a witness (including testifying personally) in certain circumstances
		- But again **not in a criminal proceeding** against accused testifying
	+ Factors to Consider
		- Whether there is a legitimate explanation for the failure to call the witness/testify
		- Whether the witness is within the exclusive control of the party or “equally available” to both parties
		- Whether the witness has material evidence to provide
		- Whether the witness is the only person or the best person who can provide the evidence
	+ NOTE: RCP 53.07 allows party to call and cross-examine an adverse party
		- If you can compel to testify, ability to draw adverse inference is limited
* Privilege is related to this – **cannot compel to testify if information is privileged** – e.g. spousal privilege, solicitor-client privilege, etc. (see later parts of lecture)

**Examination of Witnesses**

* **Examination-in-Chief (“direct”)**
	+ “Rule” against leading questions
		- **test**: question suggests the answer or presupposes a fact not given in evidence by the witness
		- **Exceptions**:
			* introductory matters
			* identifying persons, places or things
			* contradictory statements
			* complicated or technical matters
			* hostile or adverse witnesses, with leave
			* necessary in the interests of justice
			* uncontroversial facts
	+ impact: may reduce the weight to be given to the evidence
	+ **Repetitive questions**
		- test: purpose is to obtain a different answer or to underscore damaging evidence
		- permissible to a degree if witness’ answers are entirely or partially non-responsive
		- caveat: no badgering or harassing witness
	+ Rule against splitting the case: applicant calls all of its evidence before closing case
* **Cross-examination**
	+ Relevant to the material issues
		- includes questions relevant to the credibility of a witness
	+ Good faith basis for question
		- honestly advanced on the strength of reasonable inference, experience or intuition
		- no putting facts to witness known to be false
	+ Improper Questioning:
		- question is unfair or the answer will not be meaningful to the trier of fact
			* e.g. irrelevant, argumentative, rude, overly reputative, harassing questions
			* Factors: age, knowledge, sophistication
* **Testimonial Factors:**
	+ Narration = witness’s ability to communicate what they perceived to the court
	+ Sincerity = witness’s willingness to tell the truth
	+ Memory = witness’s ability to recall what they perceived
	+ Perception = witness’s ability to perceive accurately (see, hear, etc.) the events in question
	+ **Assessing Witnesses**
		1. honesty of the witness
		2. accuracy of his/her observations
		3. reliability of his or her memory
		- For **contradictory witnesses**: must assess the relative credibility of each witness, in the context of the overall evidence in the case
			* Factors to consider:
				+ testimony is consistent with the witness’ conduct before, during, and after the event
				+ inherent plausibility of the events stated by the witness
				+ presence of plausible collateral
				+ details supporting the witness
				+ absence or presence of corroboration
				+ consistency with the other evidence
				+ witness’ demeanour

relevant but do not overemphasize its importance

* **Re-examination**
	+ limited to matters that first came out on cross-examination *and* that could not have been reasonably anticipated
	+ clarify relevant testimony
	+ rehabilitate credibility
* **Reply (Rebuttal) Evidence**
	+ purpose: respond to ***new*** matters
		- impermissible to “split the case”
		- no contradiction on collateral matters
	+ **test**: matter could not reasonably have been anticipated
		- evidence that merely confirms or reinforces earlier evidence is not proper reply evidence
* **Re-opening the case**
	+ purpose of re-opening
	+ allow the applicant to adduce evidence that was not adduced even though its importance should have been recognized
	+ application of the test
		- discretion to re-open narrows as the case proceeds through its various stages

**Credibility Two Aspects:**

* is the witness a truthful person?
* Is the witness telling the truth?

**The Rule In *Browne v Dunn* – confronting witnesses you intend to contradict on any matter of substance**

* **Rule**: Counsel should confront (cross-examine) a witness on any “matter of substance” on which counsel intends to contradict the witness, whether by calling evidence or in closing submissions
	+ Gives the witness a chance to explain the inconsistency
* **Scope of rule**
	+ Only matters of substance, does not apply to inconsequential details
	+ TJ has discretion re remedies – none are required, some options:
		- Allow witness to be recalled
		- Instruct jury that failure to cross-examine may be considered when assessing how much to believe: (1) evidence of witness who was not confronted, and (2) witness who gave contradictory evidence
	+ Factors to consider:
		- Seriousness of the breach
		- Context in which the breach occurred
		- Timing of the objection and the impact of any delay
		- Positions of the objecting party and the offending party
		- Impact on and availability of the witness to be recalled, and the practicalities of doing so
		- Impact on the orderly and timely completion of the trial
		- Type of trial (judge alone or jury)
		- Adequacy of an instruction to correct the failure and preserve trial fairness

**Collateral Fact Rule**

* **Rule**: witness’ answer to questions put on cross-examination concerning collateral facts is **final** and *cannot be contradicted by extrinsic evidence*
	+ Modern rule re collateral vs not: **important = not collateral** (*Younger*)
* **Not a collateral fact**
	+ Evidence that has a connection to an issue in the case (*Hitchcock*)
	+ The fact can be shown in evidence for a purpose independent of the contradiction (*Wigmore*)
		- (1) facts relevant to some issue in the case
		- (2) facts relevant to discrediting of a witness
			* E.g. that they accepted a bribe, etc.
* **Exceptions**
	+ Bias, interest and corruption
		- Bias = hostility or prejudice against the opponent personally or in favour of the proponent personally
		- interest = personal connection of some sort to a party or matter in the trial
		- corruption = willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony
	+ Prior convictions
	+ Prior inconsistent statements
	+ Medical evidence relating to physical or mental incapacities
	+ General reputation for veracity
	+ **“Linchpin” Facts** (*McCormick*)
		- Any fact in the witness’ account of the background and circumstances of the relevant event that the witness could not have been mistaken about if his story was in fact true

**Present Memory Refreshed**

* witness may refresh his or her memory before or while testifying
* witness may use any means that will rekindle his/her recollection
* **recollection is the evidence, not the stimulus used to refresh that memory** (Fliss)
* practically speaking: usually notes, documents, transcripts, etc. used to refresh memory
	+ no requirement that document created by witness, prepared contemporaneously with events or that it’s even accurate
* Safeguards:
	+ Counsel must first try to get the witness to recall through questioning without external aids, e.g., leading questions.
	+ If document is used, witness is not allowed to simply read from the document: it must “refresh” memory.
	+ Opposing party has the right to examine the refreshing document, and cross-examine based on it

**Past Recollection Recorded**

* witness who cannot remember the relevant events **may testify from a record of his or her past recollection**
	+ **record is the evidence, not the testimony**
* **Criteria** (*Fliss*)
	+ recorded in some reliable way – easier if police/other official under a duty to make notes
	+ sufficiently fresh and vivid to be probably accurate at that time it was recorded
	+ confirmation of the accuracy of the record – did person who wrote it down show it to the witness to confirm, etc.?
	+ original record, if available

**Enhancing credibility**

* **General rule**: party may ***not*** ask questions or adduce evidence for the sole purpose of bolstering the credibility of one of his or her **own** witnesses.
* **Exceptions**:
	+ expert evidence
	+ Reputation for veracity
	+ Prior consistent statements – prior consistent statements of a witness are generally not admissible to enhance the witness’ credibility, however, the following are *exceptions* to this:
		- **recent fabrication**
			* prior consistent statement is admissible to rebut an allegation of recent fabrication.
			* Statement must have been made prior to time when it is alleged the fabrication began
			* Allegation of recent fabrication can be made expressly or implicitly from the whole circumstances of the case
				+ Counsel may anticipate the allegation of recent fabrication and examine the witness in chief with respect to prior consistent statements where the circumstances of the case are such as to raise the suggestion that the witness’ evidence is a recent fabrication
		- prior identification
		- recent complaint
		- narrative
		- statements by accused on arrest (in specific situations)
		- section 715.1 CC
		- as circumstantial evidence

**Impeaching Credibility**

* **methods of impeachment:**
	+ **Reputation for Veracity**
	+ **Expert Evidence**
	+ **Prior Convictions**
	+ **Prior Inconsistent Statements**
		- Inconsistent = Whether the trier of fact could reasonably conclude that a witness who believed the truth of the facts they are testifying to would have been unlikely to make the prior statement that are alleged to have made — if so, it is inconsistent
			* Whether proof of the statement will assist trier of fact in assessing credibility without causing undue prejudice to the witness or the calling party
		- **CEA s 10-11 (other side’s witness), s 9 (your witness)**
		- **EA s 20-21 (other side’s witness), s 23 (your witness)**
		- SLIDE **80** LECTURE **6** GO THROUGH REQUIREMENTS (**OR SEE BELOW**)
		- **Essentially:**
			* Meaning of **adverse**: The word ‘adverse’ is a more comprehensive expression than ‘hostile’. It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position (*Wawanesa*)
			* **Impeachment of witness at common law (superseded below)**
				+ party may cross-examine his own witness if the court declares the witness to be a *hostile* witness

hostile means that the witness has a motive to harm the calling party or assist the opposing party

* + - * OEA (civil) s 20-21 (other side’s witness), s 23 (own witness)
				+ s 20: may be cross-examined on previous statements relative to the subject-matter of the case, BUT if you intend to contradict the witness by a statement made by him/her (in writing or reduced into writing), you must first bring to his/her attention to those parts of the writing

judge may require production of statement and may use it as he sees fit

note: must be relative to subject matter of the case

* + - * + s 21: inconsistent oral statements – on cross-examination as to a former oral statement made by him relative to the subject matter, if the person does not admit that he/she made that statement, proof may be given that the witness did in fact make it, **BUT before** such proof is given, the circumstances of the statement sufficient to designate the occasion shall be mentioned to the witness **AND** the witness shall be asked whether or not they made the statement
				+ s 23: may not impeach his/her credit by general evidence of bad character, but party may contradict the witness by other evidence

OR if witness is adverse, the party may with leave prove that the statement the witness made is inconsistent with his/her present testimony, BUT before such proof is given, the circumstances of the statement sufficient to designate the occasion shall be mentioned to the witness AND the witness shall be asked whether or not they made the statement

* + - * CEA (criminal) s 10-11 (other side’s witness), s 9 (your witness)
				+ s 10: may be cross-examined on previous statements relative to the subject-matter of the case, BUT if you intend to contradict the witness by a statement made by him/her (in writing or reduced into writing), you must first bring to his/her attention to those parts of the writing

judge may require production of statement and may use it as he sees fit

note: must be relative to subject matter of the case

* + - * + s 11: inconsistent oral statements – on cross-examination as to a former oral statement made by him relative to the subject matter, if the person does not admit that he/she made that statement, proof may be given that the witness did in fact make it, **BUT before** such proof is given, the circumstances of the statement sufficient to designate the occasion shall be mentioned to the witness **AND** the witness shall be asked whether or not they made the statement
				+ adverse witnesses – s 9(1): may not impeach his/her credit by general evidence of bad character, but party may contradict the witness by other evidence

OR if witness is adverse, the party may with leave prove that the statement the witness made is inconsistent with his/her present testimony, BUT before such proof is given, the circumstances of the statement sufficient to designate the occasion shall be mentioned to the witness AND the witness shall be asked whether or not they made the statement

* + - * + Witness *not* proved to be adverse – S 9(2) where party alleges that witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness’ present testimony, **the court may, without proof that the witness is adverse**, grant leave to that party to cross-examine the witness *as to the statement* and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse

**Rehabilitating witness**

* Methods of rehabilitation
	+ Re-examination
	+ Reputation for Veracity
	+ Expert Evidence

**Hearsay**

**(1) Statement hearsay?** Is the statement hearsay?

**Hearsay is:** (1) an out-of-court statement that is (2) offered to prove the truth of the matter asserted in it

* It is VERY important to know the purpose for which the statement is being admitted for
	+ Otherwise do not know if #2 criteria is met or not
* E.g. witness testifies: “On October 15, I was in Atlanta. I spoke with my brother, Simon, who was in London over the telephone. My brother said to me: ‘It’s raining in London.’”
	+ The fact that she spoke to her brother by telephone is not hearsay.
	+ If the purpose is to prove the telephones were working? – Not hearsay. Fact that she spoke with her brother, regardless of what was said, helps to prove the phones were working.
	+ If the purpose is to prove Elaine believed it was raining? – Not hearsay. Mere fact the statement was made, even if it was not true, is relevant to establish why Elaine believes it was raining
	+ If the purpose is to prove it was raining? — Hearsay. The statement is being offered for the truth of its contents. What the statement says –- its contents — are exactly what is to be proved and (hopefully) accepted to show that it was raining in London.

**Not hearsay:**

1. proof the statement was made
2. proof of an agreement (e.g. saying “I do” to marriage 🡪 operative legal fact)
3. proof of the listener’s state of mind (*Subramaniam*) – SEE the traditional exceptions to common law (state of mind)
	1. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.
4. proof of the source of the listener’s knowledge (*Wildman*) – SEE state of mind exception
5. “Automated” statements
	1. “Statements” that are the process of *pure* automation are not hearsay statements
	2. E.g. metadata that automatically attaches to that record
		1. But regular computer-stored records are not (unless purely automatically generated)
6. Past Recollection Recorded – **Criteria**: (*Fliss*)
	1. (1) recorded in some reliable way
	2. (2) sufficiently fresh and vivid to be probably accurate at that time it was recorded
	3. (3) confirmation of the accuracy of the record, and
	4. (4) original record, if available
7. Prior inconsistent statements of *witness*
	1. (1) orthodox rule: admissible for the purpose of impeaching the witness’ credibility (*B(KG)*)
	2. (2) **modern rule**:
		1. admissible for substantive purposes if necessary (recantation or feigned loss of memory satisfies this), and the standard or substitute indicia of reliability are present (**see below!**)
		2. statement was made voluntarily if made to a person in authority
		3. no other factors that would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence
		4. So long as procedural safeguards are met, other reliability concerns need not be considered at threshold stage (for trier of fact to assess) (*Devine*)
	3. **Standard Indicia of Reliability**
		1. sworn or affirmed statement made after a proper warning
			1. Substitutes for oath and warning
				1. Indicia of reliability

“near oath”

Given caution / Charter warnings

Location (e.g. police station)

* + - * 1. Indicia of unreliability

Refused to be sworn

Told would not have to testify

* + 1. videotaped in its entirety
			1. Substitutes
				1. judicial transcripts
				2. audiotapes
				3. (signed) written statements
				4. oral statements / police notes
				5. independent third parties

justices of the peace

commissioner of oaths

court clerk

translator

witness’ own lawyer

counsel, parents, or adult relatives

* + 1. full opportunity to cross examine the witness at trial on the statement
			1. *Devine*
				1. P asserted that someone said D was assailant
				2. Then recanted her testimony
				3. Initial statement held reliable b/c meaningful opportunity to cross-examine P (but also P initially sworn, video-recorded statement, P warned about seriousness of lying, etc.)
			2. *C(JR)*
				1. Reliability facts:

1. audiotaped statement

2. no oath or warning

3. no information on what witness was told

about the importance of telling the truth

4. mother was present but drunk

5. police officer believed the complainant

6. complainant recanted shortly after

making the statement

7. witness could be cross-examined

* + - * 1. Reliability concerns, but witness could be cross-examined. Depends on how much weight you put on the cross-examination
	1. **“striking similarity” test – substitute indicia of reliability**
		1. (1) striking similarity between the statement and another independently admissible statement
		2. (2) full opportunity to cross-examine
		3. (3) other bases for similarity are negated
			1. collusion
			2. prior knowledge
			3. third party influence
		4. can be used when there are two statements given and accused/other person refuse to testify after or recant their testimony, for instance
			1. *FJU*
				1. “will-say” statement alleging father committed acts of oral and anal sex against child and physically assaulted her
				2. no oath or warning
				3. accused gave a statement to the police admitting to instances of oral and anal sex and physical violence
				4. complainant and accused recanted the allegations/admissions of sexual assault
		5. test is available in the context of unavailable declarants

**Is hearsay:**

1. Prior statements of witnesses
	1. Unless adopted by witness on the stand
	2. see later: admitting prior inconsistent statements for their truth
2. Assertive conduct
	1. Explicitly assertive conduct – i.e. conduct that is meant to convey meaning is hearsay
	2. E.g. Pointing in a direction. Hand-signals (stop, go …). Nodding or shaking one’s head.
3. Implied assertions (*Wright, Baldtree*)
	1. A statement or conduct that implies some fact that the trier of fact is being asked to believe is true is hearsay
		1. Verbal implied assertions are hearsay
		2. Non-assertive conduct is normally not hearsay (but sometimes it might be)
	2. *Wright*: wealthy man, M, left all he owned to servant W. T was M’s heir at law (would inherent everything if will is invalid). T challenged will on basis that M was not mentally competent when he executed the will. W wanted to into evidence 3 letters to M which dealt with subjects and written in a manner which were appropriate to the understanding of a reasonably intelligent person (go to issue of competence). Issue: letters hearsay? Held: hearsay. Letters go to author’s belief that M was competent (otherwise they would not have written it), which can be used as an inference to find M as competent
		1. But admitted under state of mind exception (traditional common law exception)
	3. *Baldree*: police arrested B for trafficking drugs, B’s cellphone rings and officer answers it, someone called to ask Baldree for weed. Issue: Hearsay? Held: Yes. Call tendered to show caller’s belief that Baldree sold drugs, and thus could support the inference that Badree was a drug dealer.
	4. *NOTE*: in both cases, must assume that this evidence can infer that Baldree was a drug dealer (for Wright, that he was competent), because if not then it is not relevant evidence (to an issue in the case) and therefore excluded

**Tough calls?** Remember **main rationale for rule:**

1. weaknesses of oral testimony (sincerity, perception, memory/recall, narration/communication); and
2. absence of traditional safeguards (oath or its equivalent, presence in court, cross-examination)
3. Who is the real (i.e. the most important) witness?
	1. The person who made the statement?
	2. The person who heard the statement?

**(2) Traditional exception?** Does a traditional (common law or statutory) exception apply?

1. Does the exception conform to the principled approach? (all existing exceptions have to be tested against principled approach (*Starr*) – unlikely that they will not be found to meet principled approach though)
	1. ***State assumption*** that it conforms to the principled approach. Make sure to go through the necessary and reliable criteria for each exception to see if it complies with the principled approach.
	2. **The slides are great for relating necessity/reliability!** Lecture 9-10 for each exception!
2. If not, can you reformulate the exception and does it apply?
3. Is the exception sufficient on the facts of the case?
4. Should the judge use the residual discretion to exclude the evidence?

**(a) *removed (do not use – move on to (b) and on)***

**(b) Admissions by a party offered by an opponent to the litigation**

* Admissions: (a) statements (oral or written) by a party that is an opponent to the litigation
* (b) statements by an employee or agent (of the party that is an opponent to the litigation)
* (c) confession to a person in authority by an accused charged with an offence
	+ NOTE: this is covered by confession rule which has many more requirements
* **Basic Rule**: **Any oral or written statement (or conduct) made by a party to the litigation is admissible against that party at the request of an adverse party**.
* **Additional Points/Requirements**:
	+ 1. Admissions can only be used in evidence against the party that made the statement
	+ 2. Admissions are only evidence against the party that made the statement
	+ 3. Admissions do not have to be based on personal knowledge of the facts asserted.
	+ 4. It must be possible to ascertain the meaning of the statement.
	+ 5. Age of the party goes to the weight to be given to the statement, not its admissibility
	+ 6. Admissions by an accused to a person in authority are governed by the confessions rule
* **“Adoptive” Admissions**
	+ A statement by a non-party that is adopted by a party is admissible as a party admission.
	+ A party adopts a statement by indicating she/he believes or accepts it
	+ Adoption can occur by words, actions, conduct, demeanour and/or silence
		- Adoption by silence requires that:
			* (1) The statement was made in the presence of the party
			* (2) The circumstances in which it was made are such that the party could reasonably be expected to reply to it, and
			* (3) In such circumstances, silence permits an “inference of assent”.
* Any statement made by the party!! (so long as they are an opponent to litigation)
	+ E.g. a party stating that they ran a red light in a motor vehicle collision lawsuit
	+ E.g. 2: A party's testimony or affidavit in another proceeding is an admission
	+ E.g. 3: a plea of guilty in a proceeding can be tendered as an admission of the facts relating to the plea in a subsequent proceeding, criminal or civil
* **Rationale for the rule**
	+ Adversarial theory: a party cannot complain about the inability to cross-examine because the party adopted the statement and can choose to testify and explain the statement
		- Not as many reliability concerns b/c assumed what party says is reliable, and can explain under oath if a lie/etc
* E.g. *Streu*
	+ Streu was charged with possession of stolen property. Streu sold the goods to an undercover police officer who was posing as a purchaser for discounted price. The Crown wishes to call the officer to testify that during the conversation leading to the sale, Streu admitted that the tires and rims belonged to a friend who had "ripped them off".
	+ Held: Streu’s statement is admissible under admission exception for the purpose of establishing belief/knowledge that it was a stolen good (required element of the offence)

**(b.1) statements made by an employee or agent – admissions extension**

* **Basic Rule**: A statement by an employee or agent acting **with the scope of his or her authority** during the existence of the relationship is admissible as an admission by the employer or principal
* **Criteria broken down**:
	+ (1) Employer/employee or principal/agent relationship exists,
	+ (2) Statement made by employee or agent,
	+ (3) Employee or agent was acting within the scope of his/her authority, and
	+ (4) Statement is offered in evidence *against* the employer or principal (recall admission rules)
* Rationale for exception
	+ Adversarial theory: a party cannot complain about the inability to cross-examine because:
		- The party made (expressly or impliedly) authorized the statement
		- The party can chose to testify to explain the statement

**(b.3) Confessions Rule:**

* Any statement by an accused **to a person in authority** is not admissible *unless* the Crown proves *beyond a reasonable doubt* that the statement was made **voluntarily**
* Rationale:
	+ reliability of confessions
	+ Impact of confessions
	+ fundamental fairness
		- right against self-incrimination
* **Who is a person in authority?**
	+ 1. Person formally engaged in the arrest, detention, examination or prosecution of the accused
	+ 2. Person who is *deemed* to be a person in authority based on the circumstances surrounding the making of the statement
		- Test: (*Hodgson*)
			* (1) Accused subjectively believed the receiver of the statement had the ability to influence the course of the proceeding, and
			* (2) Accused’s belief was objectively reasonable in the circumstances
		- Case-by-Case Examples
			* parole officer
			* insurance adjuster
			* social worker
			* parents (accused, complainant)
			* employer
			* teacher
			* physician
	+ **Allocation of burdens**
		- (1) The accused bears the evidential burden of pointing to some evidence to support the claim that the statement was made to a person in authority
		- (2) The Crown bears the persuasive burden of proving beyond a reasonable doubt that the:
			* statement was not made to a person in authority, OR
			* it was made voluntarily.
* **What happens in the *voir dire* concerning voluntariness**
	+ Issue is *voluntariness of the statement*, **not its truth**
	+ Voir dire is **mandatory** absent a concession of voluntariness (otherwise could be a mistrial)
	+ Crown must prove the statement is voluntary before using it for any purpose, including impeachment
	+ The accused may testify on the voir dire
	+ The accused may be asked if the statement is true
	+ The Crown may not use the accused’s testimony in its case in the main trial
	+ Evidence adduced during the voir dire may be used in the main trial with the consent of both parties
* **On what grounds may a statement be found to be involuntary?** (SEE BELOW RE HOW TO APPLY THESE)
	+ Meaning of voluntariness: inducements, operating mind, oppression, police trickery
	+ Inducements = threats or promises (*Ibrahim, Oickle*)
		- key concept: “quid pro quo”
		- classic threats & promises
		- spiritual or moral inducements
		- problematic phrases – “it would be better if…” (*Oickle*)
		- alleged threats against fiancée or spouse (*Oickle*)
	+ operating mind = know what you are saying, know it can be used against you (*Ward*)
		- low threshold
	+ oppression = conduct and circumstances of the detention and interrogation (*Serack*)
		- denial of food, water, clothing, sleep, bathroom facilities
		- denial of access to counsel, medical attention, family
		- overly aggressive and prolonged questioning
		- exaggerated or non-existent or fabricated evidence
			* use of the polygraph test and results – on its own not bad but if fabricated or exaggerated then bad (*Oickle*)
	+ police trickery = shock the conscience test (how the statement was obtained, societal values implicated, seriousness of charge, effect of exclusion on the proceedings (*Rothman*)
		- e.g. police pretended to be a priest in order to get confession
		- this one is a discrete issue (*Oickle*)
	+ **How to apply it**
		- first three components are not independent factors; contextual analysis of all facts is required (*Oickle*) – police trickery independent
		- causal connection is essential (b/w involuntariness and statement given)
	+ **“Tainting”**
		- A subsequent statement is inadmissible if the improper conduct leading to the first involuntary statement is still operating on the accused at the time of the subsequent statement.
		- **Factors to Consider**
			* time lapse between the statements
			* statements made to the same officer
			* accused’s attention was directed to the first statement prior to the making of the subsequent statement
			* accused re-cautioned before making the subsequent statement

**(c) Declarations against pecuniary and proprietary interest** (requires unavailability of declarant\*\*)

* **Basic rule**: statement against a person’s pecuniary or proprietary interest is admissible for its truth.
* **Criteria**:
	+ Unavailable declarant
	+ Personal knowledge of the facts asserted in the statement
	+ Statement was against the person’s interests when made
	+ Knowledge when made that the statement is against one’s interests
* Rationale for the Exception
	+ Necessity
		- Declarant dead or otherwise unavailable
	+ Reliability
		- person is unlikely to knowingly speak against their interest unless what they say is true

**(d) Prior testimony** (requires unavailability of declarant\*\*)

* Basic Rule (common law):
	+ Declarant is unavailable
	+ Former proceeding between the same parties
	+ Substantially the same facts in issue
	+ Full *opportunity* to cross-examine at the prior hearing
* Rationale for the exception
	+ Necessity: unavailable
	+ Reliability: procedural safeguards
		- Solemn occasion / open court
		- Statement made under oath
		- Subject to cross-examination
		- Accurate transcript / recording

The following exceptions do NOT require the declarant to be unavailable (including admissions)

**(e) Business Records**

**Common law exception (note expanded under statute but state that common law exception still exists) (*Ares*)**

* Basic rule at common law:
	+ Record was made in the ordinary course of business
	+ Record was made contemporaneously
	+ Person had “personal knowledge” of the matters being recorded
	+ Person was under a duty to make the entry or record
	+ No motive or interest to misrepresent matters stated in record
* Rationale for the exception
	+ Necessity – expediency
	+ Reliability – personal knowledge, contemporaneity, motive to make an accurate record

**Statutory exceptions**

**Ontario Evidence Act** (typically use this for civil matters unless otherwise specified)

* dual ordinary course of business
	+ (1) made in the usual and ordinary course of any business
	+ (2) in the usual and ordinary course of such business to make such writing
* personal knowledge not required (i.e. double hearsay permitted)
* statements of fact
	+ not opinion!! Unlike CEA
* contemporaneity requirement
* broad definition of business and of record
* seven day notice requirement

**Canada Evidence Act – s 30** (typically use this for criminal matters unless otherwise specified)

* ordinary course of business
* personal knowledge not required (i.e. double hearsay permitted)
* statements of fact *and* opinion
* contemporaneity not required
* broad definition of business and of record
	+ nb. investigative records excluded
* seven day notice requirement

**(f) past recollection recorded**

* witness who cannot remember the relevant events **may testify from a record of his or her past recollection**
	+ **record is the evidence, not the testimony**
* **Criteria** (*Fliss*)
	+ recorded in some reliable way – easier if police/other official under a duty to make notes
	+ sufficiently fresh and vivid to be probably accurate at that time it was recorded
	+ confirmation of the accuracy of the record – did person who wrote it down show it to the witness to confirm, etc.?
	+ original record, if available

**(g) spontaneous utterances**

* **Basic rule**: A statement made before or after a dramatic or startling event is admissible for its truth if made in circumstances of “spontaneity” such the possibility of fabrication or concoction can be disregarded
* **Criteria**:
	+ 1. Statement relates to a startling event or condition
	+ 2. Excitement caused by the event or condition is still operating at the time of the statement such that the possibility of concoction or fabrication can be excluded
	+ 3. Statement is “reasonably contemporaneous” with the event
	+ 4. Another implied requirement – must not be made in a circumstance of suspicion (*Starr*)
* Guidelines:
	+ 1. So startlingly an event that there was no real opportunity for reasoned reflection
	+ 2. Declarant’s mind was still dominated by the event when the statement was made
	+ 3. No special features raising the possibility of concoction or distortion
	+ 4. No special features giving rise to the possibility of error in the narrated facts
* Rationale for the Exception
	+ Necessity:
		- expediency/best evidence
		- but: *exception is not to be used to avoid calling an available declarant*
			* can supplement it
	+ Reliability:
		- spontaneity and reasonable
		- contemporaneity
		- no real risk of concoction
		- no real concerns about memory
		- heightened perceptions
* e.g. *Nurse*:
	+ Nurse is charged with murdering Kumar. Kumar had been violently stabbed at the side of the road – he had serious abdominal injuries and his vocal cords had been severed. While Kumar was being treated by EMS, Nurse approached. Officers at the scene saw Kumar point to his abdominal injury and then gesture towards Nurse
	+ Held: gesture is a spontaneous utterance and admissible

**(h) statements about physical sensations**

* **Basic Rule**: A statement of a person’s present bodily condition is admissible to prove how the person was feeling at the time the statement was made
	+ e.g. at a doctor’s office you say “ouch” when the doctor touches a part of your body
	+ e.g. 2 Jane is planting a garden. She turns over the soil and then puts in all the new plants. Jane then sits down and says, “Boy, is my back killing me!”
* **Criteria**:
	+ The statement relates to present bodily condition.
	+ The statement is contemporaneous with the bodily condition.
	+ The exception applies to *only* to the declaration of the physical sensation
	+ Another implied requirement – must not be made in a circumstance of suspicion (*Starr*)
* Rationale for the exception
	+ Necessity:
		- expediency or convenience / best evidence available
		- but: exception is not to be used to avoid calling an available declarant
	+ Reliability:
		- contemporaneity or spontaneity with the events in question

**(i) State of Mind / Present Intentions**

* **Basic Rule**: A statement of a person’s present mental state is admissible to prove what the person’s **mental state was *at the time* the statement was made**.
* **Rule as SCC laid out**: The “state of mind” or “present intentions” exception permits the admission into evidence of
	+ (1) statements of *intent or of other mental states* for the truth of their contents
	+ (2) *and* also, in the case of statements of intention in particular, *to support an inference that the declarant followed through on the intended course of action*, provided it is reasonable on the evidence for the trier of fact to infer that the declarant did so
	+ A statement of intention cannot be admitted to prove the intentions of someone other than the declarant, unless a hearsay exception can be established for each level of hearsay.
* **Criteria**:
	+ (1) Statement of the declarant’s present state of mind or present intentions
	+ (2) Statement was not made under circumstances of suspicion (*Starr*)
* **Admission for certain purposes**
	+ (1) Evidence of the declarant’s state of mind/intention at the time the statement was made
	+ (2) Evidence that the declarant acted in accordance with that state of mind/intention
* **Not Admissible for Other Purposes**
	+ (1) State of mind of persons *other than* the declarant, unless a hearsay exception exists for both levels of hearsay.
	+ (2) Persons *other than* the declarant acted in accordance with the declarant’s stated intentions.
	+ (3) Past acts or event referred to in the statement occurred. (only evidence of state of mind admissible at time of statement)
* E.g.
	+ (1) I intend to kill myself
		- Admissible 🡪 direct statement of intention at time statement was made
	+ (2) James intends to kill me
		- Can use it as evidence that accused believed James intends to kill her but not as James intention to kill her
	+ (3) I tried to kill myself last night but did not take enough pills and just got sick
		- Can’t use this statement b/c it involves a prior act and mental state during prior act (said they were suicidal not at the time of statement 🡪 last night when they took the pills)
		- Can argue contemporaneous but it will likely fail
	+ (4) No one likes me; no one would miss me.
		- Not a direct statement of intention or mental state 🡪 but can make an inference that they were lonely or depressed
* **Rationale for exception**
	+ Necessity:
		- expediency or convenience / best evidence available
		- but: exception is not to be used to avoid calling an available declarant
	+ reliability
		- contemporaneity or spontaneity with the events in question

 **(j) prior convictions**

* prima facie proof that the person convicted committed the acts in question
* rebuttal is governed by the abuse of process doctrine
	+ tainted first proceeding
	+ fresh evidence
	+ fairness
* EA s 22.1 – use this for civil matters
	+ Proof a person has been convicted or discharged in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person.
* *But not proof of everything in the trial*
	+ Only get to prove the conviction itself

**(3) Principled approach?**

1. Are the necessity and reliability criteria of the principled approach satisfied?
2. Should the judge use the residual discretion to exclude the evidence?

**Principled approach**: Hearsay that does not fall within a traditional (common law or statutory) exception may nonetheless be admitted if it is *necessary* and *reliable* evidence. (*Khan, Smith, Starr*)

**Necessary**

* **Necessity means “reasonably necessary” to a fact in issue**
	+ Unavailability of declarant
		- true unavailability: dead (*Smith, Starr*), seriously ill, incompetent (*Khan*), refuses to testify
		- absent witness: cannot be located, unknown, out of jurisdiction, failed to respond to subpoena
		- functionally absent: partial or complete lack of memory (e.g. due to injuries after car crash, not giving the same evidence (i.e. evidence required to supplement a present witness’ testimony)
	+ relative necessity: hearsay is the better evidence, undue consumption of time or money
		- Expediency or convenience
		- Necessity can include situations where the witness would be traumatized or suffer emotional harm if required to testify
			* To prove this: “sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child”
				+ E.g. through expert evidence
				+ It may also be established in *rare cases* where it is “self-evident” that trauma or harm will result
	+ Necessity does not always require expert evidence; it can be established by the judge’s observations of the witness in court

**Sufficiently Reliable**

* Note (preface): So long as procedural safeguards are met, other reliability concerns need not be considered at threshold stage (for trier of fact to assess) (*Devine*)
* **Two key components:**
	+ **(1) circumstantial guarantees of trustworthiness: circumstances under which the statement was made provide assurance it is trustworthy (SEE BELOW FOR FACTORS – consider them before going to #2)**
		- statement was made “under such circumstances that even a sceptical caution would look upon it as trustworthy” (*Khelawon*)
			* when “there is no real concern about whether the statement is true or not because of the circumstances in which it came about” (*Khelawon*)
			* when the only likely explanation is that the statement is true *(U(FJ))*
		- statement is so reliable that it is “unlikely to change under cross-examination” (*Khelawon*)
		- note: it “does not require that reliability be established with absolute certainty” (*Smith*)
	+ **(2) adequate substitutes: alternate procedural protections minimize some of the concerns related to hearsay**
		- Procedures that were in place replicate procedures generally available in court
		- **procedural safeguards – standard indicia of reliability**
		- **(1) sworn or affirmed statement made after a proper warning**
			* Substitutes for oath and warning
				+ Indicia of reliability

“near oath”

Given caution / Charter warnings

Location (e.g. police station)

* + - * + Indicia of unreliability

Refused to be sworn

Told would not have to testify

* + - **(2) videotaped in its entirety** (also formality of the location – e.g. court, police station)
			* Substitutes
				+ judicial transcripts
				+ audiotapes
				+ (signed) written statements
				+ oral statements / police notes
				+ independent third parties

justices of the peace

commissioner of oaths

court clerk

translator

witness’ own lawyer

counsel, parents, or adult relatives

* + - **(3) full opportunity to cross examine the witness at trial on the statement**
			* *Devine*
				+ P asserted that someone said D was assailant
				+ Then recanted her testimony
				+ Initial statement held reliable b/c meaningful opportunity to cross-examine P (but also P initially sworn, video-recorded statement, P warned about seriousness of lying, etc.)
* **Considerations** when making arguments about reliability
	+ Understand why we exclude hearsay
	+ The focus is on the statement-maker not the witness testifying about the statement
	+ Consider what you would ask in cross-examination if the statement-maker was present on the stand
* **Factors to consider re circumstantial guarantees of trustworthiness:**
	+ **Sincerity**
		- motive to be truthful (oath or substitute, possible penalty)
		- **motive to fabricate** (*Khelawon* – dissatisfaction w/ management & K) (*Bradshaw* – motive to lie to minimize own involvement) (*Blackman* – no motive to lie) (*Khan* – no motive to lie)
			* Cross-examination of recipient of statement can address concerns about motives to lie, inconsistent statements, and potential tainting of statement (*Blackman*)
		- availability for cross-examination (e.g. during examination for discovery)
		- evidence of demeanour
		- “Vetrovec witness” (suspect or unsavory witness) (*Bradshaw*)
		- location and its influence on truth-telling
		- role or influence of recipient
		- no memory but an assertion of past accuracy
		- spontaneity and contemporaneity
		- immediate correction of inaccuracies
		- made prior to litigation
	+ **Perception**
		- significance of the event for the declarant
		- influence of alcohol or drugs
		- duress, emotional turmoil mental illness
		- declarant had peculiar means of knowledge
	+ **Memory**
		- passage of time since the statement was made
		- memorable event or a duty to record the statement
		- impact of the declarant’s characteristics (age, mental ability, other characteristic)
	+ **Narration**
		- type of statement – oral, document, audio/video-recording
		- leading, suggestive, coercive questions
		- influence of alcohol or drugs
		- duty to record or report events
		- duress, emotional turmoil, mental illness
		- internal coherence, ambiguity, translation, presentation in court
* **Use of corroborating evidence** (**extrinsic evidence**)
	+ Corroborating evidence: evidence that independently tends to support / undermine the reliability of the statement
	+ *Khelawon*/*Bradshaw*: corroborating (confirmatory) evidence **may** be considered at the threshold reliability stage
		- if extrinsic evidence not consistent, lots of reliability concerns
	+ **Test**: (restrictive) *Khelawon*:
		- (1) corroborative evidence must go to the truthfulness or accuracy of the material aspectsof the hearsay statement (not case), and
		- (2) corroborative evidence must assist in overcoming the specific hearsay dangers raised by the tendered statement
		- (3) based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
		- (4) determine whether the corroborative evidence rules out these alternative explanations such that the *only* remaining likely explanation for the statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement
	+ Safeguards
		- Right to make submissions (voir dire) and cross examination
	+ *Khelawon*: Extrinsic evidence inconclusive – injuries consistent with assault or a fall, and S could have filled the garbage bags himself
* **“striking similarity” test**
	+ (1) striking similarity between the statement and another independently admissible statement
	+ (2) full opportunity to cross-examine
	+ (3) other bases for similarity are negated
		- collusion
		- prior knowledge
		- third party influence
	+ can be used when there are two statements given and accused/other person refuse to testify after or recant their testimony, for instance
		- *FJU*
			* “will-say” statement alleging father committed acts of oral and anal sex against child and physically assaulted her
			* no oath or warning
			* accused gave a statement to the police admitting to instances of oral and anal sex and physical violence
			* complainant and accused recanted the allegations/admissions of sexual assault
	+ test is available in the context of unavailable declarants

**Residual Discretion to Exclude (SEE ABOVE ALREADY TALKED ABOUT)**

* (1) probative value is slight and undue prejudice might result (*Smith*)
* (2) prejudicial effect of the admission of [the] statement … outweighed its probative value (*Starr*)

*Khan*:

* mother took 3.5 yr old child to doctor. Child left alone for a few minutes. 15 min after leaving office, child says doctor told her to close her eyes and he would give her candy but instead put his “birdie” in her mouth. Child was found incompetent to testify.
* Issue: hearsay evidence allowed?
* Held: yes, satisfies principled approach – **necessary** b/c child was found incompetent to testify, **reliable** b/c child had no motive to falsify story, statement emerged naturally with minimal questioning, she was not expected to have knowledge of such sexual acts which increases reliability, and corroborate evidence (semen/saliva)

*Smith* (1992)

* accused charged with murder, Crown’s theory that S abandoned K (deceased) after refusing to carry drugs over border, but later returned and picked her up, and then murdered her
* Crown wants to admit 3 phone calls: (1) K tells mother she had been abandoned by S and needed a ride home, (2) K told her mother S still had not returned, (3) K told her mother S had returned and would drive her home.
* First two admitted based on **state of mind exception** (not for truth of contents of statement, but that K wanted to go home).
* Third not admitted based on principled approach – **necessary** (K deceased), but **not sufficiently reliable** (no known reason to lie, no specific concerns re perception, memory, credibility, HOWEVER K may have been mistaken or wanted to deceive her mother (motive to lie) to avoid her sending someone to pick her up; Timing of call indicates simply observed car, and it may not have been accused; Timing also suggests had not even spoken to accused yet (if it was him) to confirm he would drive her home; King was capable of deceit (travelling under an assumed name and was knowingly using forged/stolen credit cards).

*Starr*

* S charged w/ 1st degree murder. Was drinking with C+W at hotel. After he left, C+W drove away together. Approached by G, C’s girlfriend who was angry at C who was out with W rather than her. Told her he could not come home with her b/c he had to go and do an “autopac scam” with S.
* Issue: whether hearsay re autopac scam is admissible
* Held: inadmissible under principled approach. **Necessary** (C deceased), but **not sufficiently reliable** (C could have lied to G to continue hanging out w/ others, G was angry, C did not usually discuss biz w/ G)
* And in any case probative value outweighed by its prejudicial effect
	+ Risk that jury would use the statement as evidence of Starr’s intention and subsequent actions (rather than C’s)
	+ Risk that jury would use the statement to conclude Starr was a criminal generally and a bad person, and thus guilty

**Opinion Evidence**

**Basic Rule:** Witnesses are permitted to testify to the facts that they perceived, ***not*** the inferences (i.e. the opinions) that they draw from those facts

* **FIRST QUESTION TO ASK**: Is the witness’ testimony a fact or opinion? If a fact, then it’s fine; if opinion then need to fit it in one of the exceptions below (lay opinion evidence or expert opinion evidence)

**Lay Opinion Evidence**

**Basic Rule**: A lay witness may provide his or her opinion if this allows the witness to more accurately express the perceived facts (*Graat*)

* **Full quote of rule**: A lay witness may provide opinion evidence if the opinion constitutes a “compendious statement” of the witness’ observations *in relation to matters of common experience* **and** the opinion is so close to the facts that it is impossible to separate the two (*Graat*)
	+ Remember the matter of common experience part!
	+ TJ has significant discretion to accept or not accept testimony – especially on basis of “common experience” – what is common for an adult (would know what a car going fast is), may not be common for a young child (they don’t really know how to accurately estimate how fast a car was going)
* **Criteria**:
	+ opinion is relevant (logical relevance, as required anyway – legal relevance dealt with later)
	+ not excluded by any exclusionary rule or policy
	+ opportunity for personal observation
	+ better position than the trier of fact to “justify” the inference
	+ sufficient relevant experience to draw the inference
	+ “compendious mode of speaking”
		- i.e. concise summary of subtle or complicated facts otherwise difficult to articulate
	+ guidance of an expert is not needed
* **Common Examples:**
	+ identification of handwriting, persons, and things
	+ apparent age
	+ person’s bodily plight or condition (illness/death)
	+ person’s emotional state (distressed, angry, depressed)
	+ condition of things (worn, new, used)
	+ certain questions of value
	+ estimates of speed and distance
* CED definition: A lay witness is permitted to express an opinion when the facts from which a witness received an impression are too complicated to be separately and distinctly narrated, and the opinion is upon a subject that ordinary people with ordinary experience would know about

**Statutory Lay Opinion**: comparison of disputed writing with genuine writing

* E.g. witness testifies this looks like Josh’s handwriting when compared
* S 8 CEA (criminal matters usually): Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.
* S 57 EA (civil matters usually): Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses respecting them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute.

**Expert Evidence**

**Basic Rule**: Expert opinion evidence is admissible if the following criteria are satisfied: (1) properly qualified expert (+ independent!), (2) necessary to assist the trier of fact, (3) relevant (reliable), (4) no exclusionary rule

* Expert = witness who has been shown to have acquired special or peculiar knowledge (above common knowledge) through study or experience *in respect of the matters on which the witness will testify*
	+ remember: not allowed to testify outside the scope of their expertise – otherwise lay opinion evidence rule applies
* Types of experts
	+ factual witness
	+ pure expertise
	+ expertise applied to facts
	+ opinion derived from an investigation of (admissible and inadmissible) facts
* **Role of expert**
	+ expert is not an advocate
	+ expert’s primary duty is to the court, ***not*** *the retaining party*
	+ expert must be independent and impartial 🡪 lack of independence and impartiality may lead to the rejection of expert evidence
* Voir dire
	+ Not required if:
		- Common law admissibility requirements are met
		- Probative value outweighs its prejudicial effect
	+ If required:
		- Identify nature and scope of proposed expert testimony, threshold admissibility inquiry, gatekeeper exclusionary function
* **Properly qualified expert**
	+ witness who has been shown to have acquired special or peculiar knowledge (above common knowledge) through study or experience *in respect of the matters on which the witness will testify*
		- special or peculiar knowledge beyond that of trier of fact
		- requisite knowledge acquired through study/experience
		- expertise is in relevant area
		- low threshold – once satisfied deficiencies go only to weight
	+ Factors to consider:
		- Academic requirements
		- Additional training
		- Practical experience
		- Publications
		- Peer-reviewed books and articles
		- Professional papers and presentations
		- Merit-based memberships
		- Honour and awards
		- Prior acceptance as an expert
			* Note: must look at what area the expert was accepted as an expert for (e.g. doctor admitted for medicinal expertise would not help him get admitted as an expert witness for vehicle mechanical issues)
	+ **Novel science** *(J-LJ*)
		- “basic threshold of reliability”
		- Adoption of Daubert factors
		- Hands-on approach
		- Contested theories of novel application
		- Testing of the theory o technique
		- Peer review and publication of theory/technique
		- Known or potential rate of error
		- Acceptance of the theory/technique within the relevant field of knowledge
* Expert has a **duty to the court to be fair, objective and non-partisan (RCP 4.1, but also through common law) – if not independent/not unbiased then TJ may refuse the testimony**
	+ **Impartial** – opinion reflects expert’s objective assessment of the case
	+ **Independent** – opinion is the product of the expert’s independent judgment uninfluenced by outcome or retained expert
	+ **Unbiased** – opinion does not unfairly favour one party over another
	+ **TEST**: whether the expert’s lack of independence renders the expert incapable of giving an impartial opinion in the specific circumstances of the case
		- expert’s evidence recognizing and accepting duty to the court is generally sufficient to satisfy threshold
		- burden shifts to other party to show realistic concern the expert is unable and/or unwilling to comply with the duty
		- if established, the burden shifts back to the party proposing to call the evidence on the balance of probabilities
		- not onerous burden
		- considerations include nature and extent of expert’s connection to the litigant
		- mere employment by a party is not sufficient to discredit a proposed expert
	+ relevant considerations include:
		- direct financial interest in the outcome?
		- very close familial relationship with a party?
		- exposure to professional liability if one’s opinion is rejected by the court?
		- acting as advocate, not as an expert?
	+ Typically not excluded for bias – instead goes to weight
		- anything less than a clear unwillingness or inability to provide the court with fair, objective, and non-partisan evidence should not result in exclusion
* **Hearsay evidence allowed for expert evidence**
	+ Just mention that it is hearsay if they are relying on lab technicians, etc.
	+ SEE “use of hearsay evidence” BELOW
* **Necessity**
	+ expert evidence is **required** to permit the trier of fact to appreciate the matters in issue by providing information outside the experience and knowledge of the trier of fact
		- more than merely helpful
		- risk of wrong conclusion – needed to form correct judgment about the matter
		- loss of access to important information
		- outside the experience and knowledge of triers of fact
			* evolution of general knowledge and experience – e.g. FB in 2006 may have needed an expert witness but not anymore
			* **technical evidence**, computer by-product evidence, “mundane” technologies
	+ need for the evidence is sufficient to overcome its potential prejudicial effect
		- availability of other evidence
		- complexity of the evidence
* **Relevance**
	+ Logical relevance – see above
* **Exclusionary discretion**
	+ whether the proposed evidence is sufficiently beneficial to outweigh the potential harms of admitting it?
	+ Consideration of bias
	+ *Mohan* factors
		- materiality, weight, reliability, availability of other evidence, risk of uncritical acceptance, undue consumption of time, risk of confusion, undue complexity
	+ “ultimate issue” rule does not exist anymore – which states that expert witness may not give an opinion that touches on the “ultimate issue” in the case (*Mohan*) – instead it is a factor
* **Use of hearsay evidence**
	1. expert opinion is admissible even if it is based on second-hand evidence
	2. second-hand evidence is admitted to show the facts on which the opinion is based, not to prove the facts themselves
	3. use of second-hand evidence affects the weight to be attributed to the opinion
	4. (some) facts on which the opinion is based must be found to exist before any weight can be given to the opinion
* Hypothetical questions
	+ hypothetical questions may be used to elicit the expert’s opinion
	+ opinion is based on disputed facts
	+ evidence will be lead at trial to establish the facts
	+ questions cannot be put that rely on inadmissible evidence
* **authoritative works**
	+ examination in chief
		- expert must adopt the opinion expressed in the book, article etc. to rely upon it in his/her testimony
	+ cross-examination
		- expert must acknowledge the book, article etc. as authoritative before s/he can be cross-examined using it (*Marquart*)
* Exceeding qualifications
	+ Beyond area of qualification – evidence disregarded
* **Weighing of evidence**
	+ Assessed in context of whole case
	+ May accept or reject in whole/part
	+ Weight may be diminished by reliance on facts not proven by admissible evidence
	+ Hypothetical facts must be substantially true to accept an opinion based on them
	+ Uncontradicted expert evidence should be given a great deal of consideration
	+ Extent of expertise is a matter of weight
* **Relevant Statutes**
	+ S 657.3 CC
		- Expert opinion admissible through expert report
		- Affidavits required
		- Court recognizes proposed witness as expert
		- Reasonable notice required (30 days before trial or as otherwise set by court)
		- May require expert to appear for cross-examination
		- Defence vs Crown differences – Crown before trial but defence does not need to provide reports until close of prosecution’s case
	+ Number of experts
		- CEA s 7: no more than 5/party w/o leave
		- OEA s 12: no more than 3/party w/o leave
	+ RCP 4.1: expert’s duty to court
	+ RCP 53.03: timelines for expert reports, content of report, etc.
	+ Family law rules – two types of experts – litigation vs participant
		- litigation experts
			* 20.1 duty of expert
			* 20.2 content of expert report
			* Unique aspects – e.g. “description of any substantial influence a person’s gender, etc. may have had on test results”
		- participant experts (minimal requirements, notice period)
			* 7 day notice
			* If witness opinion, must provide a copy at the time as well as any supporting documents
			* **Opinion must be based on their observation or participation of the actual events**
				+ Otherwise, they must comply with the requirements of the litigation expert rules (i.e. if they stray beyond that)
	+ Small claims court rules 18
	+ Parliament can override requirement of expert evidence if they use clear statutory language (for instance, provision below)
	+ S 320.31(5) common law displaced for officer evaluating person on impairment of vehicle
		- evaluating officer’s opinion relating to the impairment (by drug or by alcohol and drug) of a person’s ability to operate a conveyance is admissible **without** qualifying the evaluating officer as an expert
	+ **Practical considerations**
		- Discussions b/w counsel and experts
			* *Moore v gatoon* (2015 ONCA): consultation and collaboration b/w counsel and experts is necessary to ensure they understand their duties and write their reports
				+ Court recognized that there are safeguards in place to ensure that the expert’s opinion is their own and not of counsel
				+ Ethical obligations imposed by law societies and courts, expert’s duty to the court, and the fact that the expert can be cross-examined and any errors/omissions can be addressed at that stage
		- Disclosure of draft reports and working papers
			* **Basic rule is that expert reports in a draft form and notes/consultations b/w counsel and expert are not subject to automatic disclosure**
				+ Instead they are generally ***protected by litigation privilege***

However, litigation privilege is not absolute

Counsel who is calling an expert witness must comply w/ disclosure obligations set by rules (RCP, etc.)

Litigation privilege does not protect against improper conduct

If opposing party is able to suggest reasonable grounds to suspect that counsel communicate w/ expert witness in a manner likely to interfere w/ expert’s duty of independence and objectivity, then that party may ask court to order production of draft reports, notes and discussions b/w counsels

Absent this though, there is no right to production and courts will not order it

* + - **Use of expert reports at trial**
			* Must be clear as whether evidence report is used as evidence at trial or an aid for the judge (*aide memorie*)
			* *If expert report is evidence, it must be made an exhibit at trial*
				+ In contrast, if simply providing expert report so it can help them follow along w/ the expert, what is the evidence is the expert’s testimony, then the report should not be noted as an exhibit

**Privileged communications**

General Information

Exclusionary rule 🡪 even though evidence is relevant, excluded b/c of certain type of relationship or societal interest

Certain Relationships Protected

* **Class** = blanket or categorial privileges
	+ Once the criteria for privileges is satisfies, unless exception applies, it is inadmissible at court
* **Case-by-case** privileges
	+ Depends on the circumstances of the case
	+ There is **no limit** on case-by-case privilege 🡪 the examples in the slides are frequent ones that are subject to privilege
	+ *Always involve a balancing interests*
		- Unlike class privilege
* Some are statutory (spousal, journalist-informant, etc.), But most are common law privileges
* Some have constitutional implications 🡪 e.g. solicitor-client and journalist-informant

Societal Interest

* Privilege against self-incrimination (only one relevant for us)
	+ Statutory and constitutional component
* Public interest immunity
* Access to third party records

Standard/burden of proof varies depending on the type of privilege

* Class = prima facie privileged
	+ Do not need to reveal content’s documents in order to satisfy it, must only show that they meet certain conditions of privilege
	+ Balance of probabilities

**Solicitor-client privilege**

* Nearly absolute in application and it is a substantive right 🡪 **PFJ under s 7**
* **Rule: protects confidential communications between a solicitor and a client made for the purpose of obtaining legal advice**
	+ TEST:
	+ **Communication**
		- Oral or written statements
		- Does not apply to observations (e.g. blood on client’s shirt)
		- Does not apply to pre-existing documents; only those created for the purpose of obtaining legal advice
		- Things connected to obtaining legal advice also privileged (e.g. fees are privileged)
	+ **Professional legal adviser**
		- Solicitor must be licenced to practice law, although not necessarily in jurisdiction in which it is being given
		- Individual must be acting as a lawyer at the time; not as a biz partner, friend, etc.
		- Extends to paralegal, assistant, etc.
		- May extend to a third party who is acting as a conduit b/w the solicitor and the client
			* E.g. client who asks lawyer to hire expert to prepare safety report on his factory
			* Is the report caught by solicitor-client privilege?
			* Courts adopted: functional approach
				+ Focuses on the role that the third party plays in giving legal advice
				+ Is it essential to existence or relationship of solicitor client privilege? If so, protected

Two ways for this to occur:

(1) TP is a communication channel b/w solicitor and client

(2) TP is a party who assembles, analyzes, and translates client’s information so that it can be used by a lawyer

E.g. client authorizes solicitor

E.g. TP only authorized to gather info on other sources

* + - * **Third party cases are usually argued under litigation privilege rather than solicitor-client privilege**
	+ **Purpose is to obtain legal advice**
		- Includes information that client provides to lawyer when lawyer is debating whether or not to accept the retainer
			* May arise before formal retainer exists
		- Type of solicitor does not matter (e.g. private practice, in house counsel, etc.) 🡪 issues can apply though as to whether it was for the purpose of obtaining legal advice as these people often perform non-legal duties
			* **FACTORS** TO DETERMINE IF IT IS FOR OBTAINING LEGAL ADVICE:
				+ Nature of relationship
				+ Content of advice
				+ Surrounding circumstances
			* No requirement that it be ongoing or contemplated
			* Protects communications going from the client to the lawyer but also from the lawyer to the client
	+ **Made in confidence**
		- Client must have intended communication to be made in confidence
		- Communications that client expressly states is confidential or communications that can be reasonably assumed is intended to be confidential in the circumstances
		- If an unnecessary third party is present, that can undermine the intent that it is confidential
			* Important to make sure that the only people in the room are people in the sphere of relationship protected by solicitor-client privilege
* **Permanent** = after death of client or if business, then after biz winds down
* **Solicitor cannot disclose absent a waiver or exception**
* **Waiver vs inadvertent disclosure**
	+ When considering waiver, also consider inadvertent disclosure
	+ **Waiver may be express or implied**
		- express – voluntary and informed disclosure by the client
		- implied – client takes a position that is inconsistent with maintaining the privilege
			* much more difficult
			* usually arise in circumstances of litigation
			* required in fairness to opposing party
			* THREE FACTORS:
				+ Intention of the client
				+ Fairness to opposing party
				+ Consistency
			* Generally if a party asserts reliance upon legal advice received or understanding of law, then it can be said that there is an implied waiver of privilege
			* e.g. dept of justice gives legal opinion that shooting was lawful … must be disclosed
	+ **inadvertent disclosure** – related issue to consider. No waiver situation b/c no intention to disclose it and not implied b/c not inconsistent w/ maintaining privilege – **looks at whether holder of privilege was at fault**
		- FACTORS:
		- excusable error
		- immediate attempt to retrieve the disclosed information
		- preservation of the privilege would cause unfairness to the opponent
		- public policy that a person should not benefit from his own impropriety
			* e.g. if person got access to privileged communications through stealth
		- TJ has significant discretion contemplated by modern approach to determine if privilege is lost in these circumstances
* **Exceptions**
	+ **Future crimes**
		- Excluded communications:
			* Communications that are criminal in themselves
			* AND communications made with a view to obtaining legal advice to facilitate the commission of a crime
		- Extends to future and ongoing crimes 🡪 ***not*** past crimes
		- MERELY asking about legality of transaction is not sufficient, even if transaction is illegal
		- Necessary that the advice is being sought for the PURPOSE of facilitating the crime
			* Client must know that the act itself is in fact unlawful
		- Communication may be edited to ensure that non-privileged material is disclosed but privileged material is still privileged
	+ **Public safety**
		- *imminent* risk of serious bodily harm or death to an *identifiable* person or group
		- factors to consider:
			* clarity of the risk, seriousness of the risk, imminence of the risk
	+ **Innocence at stake**
		- no protection if there are core issues going to the accused’s guilt and a genuine risk of wrongful conviction (*McClure*)
		- two step approach:
			* (1) threshold test
				+ (1) Whether information is available from any other source that is admissible in court or (2) another way accused can raise reasonable doubt

If there is another way, then solicitor client privilege stands

* + - * + Both questions must be answered in the negative to consider substantive test
			* (2) substantive test
				+ 2 part: (1) privileged communication exists – some evidence/knowledge of the communication (2) demonstrate that communication must be able to raise a reasonable doubt as to his/her guilt. It must relate to a substantive issue (element of the offence) (issues re credibility or a collateral matter will rarely satisfy the test)

If stage 1 satisfies, judge will examine privileged communications and determine if any of it satisfies #2 and then gives it to the defence

* + - * + disclosure is made to the defence, not the Crown
				+ can re-new application alter in trial if TJ initially denied it
				+ person whose privilege is being challenged is entitled to be heard on application

**Litigation Privilege**

* + Distinct privilege that is related to but different from solicitor-client privilege
	+ **rule**: **protects communications between third parties and counsel (or an unrepresented litigant) obtained for the purpose of litigation**
		- e.g. medical advisors, insurance adjustors, etc.
	+ **applies** where litigation is a *reality* ***or*** where it has commenced. Does ***not*** apply there is possibility of litigation or even reasonable prospect of litigation
	+ different rationale
		- facilitate process rather than protect relationship
		- based upon need to protect area to facilitate investigation and preparation of case by an adversarial advocate without fear that they will help the other side
		- creates “zone of privacy”
		- but also ensures relevant information is available to the other side in order to ensure fairness in adjudicative process – therefore has limits
	+ **Key attributes**
		- privilege belongs to the client
		- confidentiality is not required
		- applies to both actual and anticipated litigation
		- **dominant purpose test** (*Blank*)
			* allows for communication to be prepared for more than one purpose but litigation privilege *only applies if the* ***dominant purpose*** *for making the communication was for use in or advice about litigation*
			* e.g. inspector employed by railway who completes accident report
				+ could have been prepared for number of reasons: safety, discipline, litigation, etc.
				+ under dominant purpose test: probably not, unless dominant purpose was litigation

only dominant purpose – not substantial purpose!!

* + - limited duration – expires once the litigation, and any related litigation, has ended
		- meaning of related litigation
			* non-exhaustive definition; same/related parties & cause of action, common issues & purpose; exception: improper misconduct
				+ includes separate proceedings that arise from same or related parties
				+ includes litigation related to cause of action
				+ does **not** include actionable misconduct – the party seeking their disclosure may be granted access to them upon a *prima facie*showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed

Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground

* + - **Ingathered documents**
			* Documents gathered from public and private sources in contemplation of litigation (to prepare for it)
			* conflicting case law on whether or not it applies to these communications
				+ broad view – privileged if the collection involves the exercise of legal knowledge, skill, judgment and industry

considered to be preparation by the lawyer and privilege may be warranted b/c may relate to lawyer’s theory of the case

even on the broad view, one cannot gather a bunch of public documents and make them privileged by giving them to their lawyer

* + - * + narrow view – privilege never attaches to copies of non-privileged documents

**Dispute/Settlement Privilege**

* Covers attempts to settle litigation without trial
* Protects offer to settle 🡪 cannot be raised in pleadings or court
* Exists to encourage communications and discussions b/w parties; concessions, etc.
* **Test:**
	+ **litigation has commenced or is contemplated**
	+ **express or implied intention of non-disclosure**
		- express or implied intention that it will not be disclosed if the settlement discussions were to be failed
		- one of the classic indicators that there is settlement privilege is if you state discussions are “without prejudice” – but *not required* for privilege to attach
			* if overall circumstances show that intended to not be disclosed, then privileged
	+ **purpose is to reach a settlement**
		- applies to all communications that parties are engaged in in an attempt to settle the dispute (not just formal offers)

**Spousal privilege**

* **Rule: no spouse can be compelled to disclose any communication made to them by the other spouse during the marriage**
	+ CEA, s. 4(3) and EA, s. 11
	+ no restriction on if spouse is accused, etc. applies in all contexts where may be required to testify
* **Scope of privilege**
	+ holder of the privilege is the party who *received* the communication (**not** the one who said it)
	+ applies only in relation to communications “during the marriage”
		- interpreted to mean that marriage existed at the time the communication was made AND at the time disclosure is sought
			* privilege does not cover pre or post marriage discussions
		- does not include common law marriages 🡪 only legal marriages included
		- marriage that has irreconcilable separation, marriage by duress, etc. is not covered
	+ protects all **communications**, whether or not intended to be confidential
		- it does ***not*** protect **observations of fact** or events that were not intended to be expressed – this is not a “communication” \*\*IMPORTANT
		- e.g. if spouse came home with a bloody shirt and said “omg I stabbed him”
			* communication “stabbed him” could be protected if receiving spouse wanted it to be protected, but the observation of the bloody shirt would not be protected
	+ does not preclude disclosure by a third party who overheard the conversation (whether deliberately or accidentally)
		- exception: authorized wiretap – privilege can be asserted by receiving spouse

**Informer Privilege**

* “**informer**” = any person who gives information to the police relating to a criminal investigation *in exchange for a promise of confidentiality*
	+ Includes individuals who are from police perspective anonymous
		- E.g. call crime stoppers 🡪 treated as confidential informers under law
	+ Contrasted w/ police agents (play an active role), versus confidential informers which merely relay their observations to police
	+ Determining if informer or not?
		- *in camera* hearing
		- informer, Crown, *amicus curiae*
			* if person claiming informer status and Crown tend to be the same interest 🡪 appoint amicus curiae
		- civil balance of probabilities
			* issue determined by TJ on a preponderance of doubt
* **Rule: no person can be compelled to disclose any information that might tend to identify a confidential informer, or narrow the pool of potential persons who could be that informer.**
	+ “tend to identify”
		- very broad range of information
		- e.g., CI characteristics
		- e.g., CI associates and activities
		- GENERALLY: age, gender, occupation, health related issues, lifestyle choices, associates, connections w/ arrest of other persons, dates/times, criminal convictions, discharges, withdrawals, bound by undertaking, probation, prohibition order, geographic areas frequented, length of time in community, length
		- Question that must be asked is whether ***in this specific case*** would this type of information tend to identify this informer?
			* **Not always automatic**
	+ applies to all proceedings 🡪 criminal, civil, administrative, etc. can’t be compelled to testify if within scope of the rule
* **Criteria**:
	+ privilege arises when a police officer **guarantees** protection and confidentiality to a person in exchange for information or assistance about criminal activity
		- guarantee of confidentiality can be express or implied
			* implicit 🡪 whether police conduct would have led the reasonable person in the circumstances of the informer on reasonable grounds to believe that his/her identity would be protected
* **Loss of privilege (+ exceptions)**
	+ waiver by Crown and CI
	+ communicating w/ police in order to further criminal activity
		- similar to future crimes exception
	+ innocence at stake – operates just like in solicitor-client context
		- evidence shows a basis to conclude disclosure of the CI’s identity is necessary to establish the accused’s innocence, and,
			* information must not be available elsewhere (that is not protected by privilege)
			* information must relate to one of the elements of the crime
				+ does not apply if accused relying upon defence of entrapment (b/c it’s determined after accused already found guilty of offence charged)
		- it is the only way to establish the accused’s innocence
			* accused must not be able to raise reasonable doubt any other way

**Case by Case Privileges**

* Includes (potentially): journalists, doctors, accountants, clerics, social workers, counsellors, mediators, other financial experts, etc.
* For case by case privilege, starting point is that communication not protected 🡪 onus is on the party claiming privilege!
	+ Fact-specific analysis based on circumstances in each case
	+ Whether policy reasons for excluding evidence outweigh the benefit of having relevant evidence admitted
	+ Standard: Balance of probabilities
* Usually occurs in *voir dire*
	+ Otherwise difficult to assess factors
* **Universal Criteria** (*Wigmore*)
	+ **(1) confidential communication**
		- Must have originated in confidence – expectation that it would be disclosed to other persons
		- Expectation of absolute confidence is not required – mere possibility of disclosure is not enough to negate the confidential aspect
		- E.g. form stated the information would be kept confidential, confess to priest
		- When looking at religious/spiritual communication, ***no*** requirement that communication had been made to priest or minister or that it be part of formal aspect of confession
			* **Factors**: persons involved and expectations as to confidentiality, place where communication took place, context which communication took place
	+ **(2) confidentiality is essential to maintain relationship**
		- In professional relationships, not difficult to establish
			* Clients give sensitive information to professionals and would be reluctant to provide information absent confidentiality (e.g. doctor patient relationships)
		- Can show why relationship is important to their client
	+ **(3) relationship is one that community believes should be fostered**
		- in the opinion of the community, relationship ought to be promoted
		- in professional relationship, not difficult to establish (they serve important functions)
	+ **(4) injury would outweigh the benefit** – Most important
		- Injury that would result from disclosure must outweigh correct disposal of litigation – high standard
		- Factors to consider:
			* Short term interests of specific parties in immediate case
				+ Benefits and harms to parties themselves (both parties to litigation and the disclosing party)
				+ Benefits caused by disclosure

If required to achieve a correct verdict or not

In criminal cases, higher benefit of disclosure (imprisonment possibility) – compared to civil

* + - * Long term interests of relationship in general
				+ How society would benefit if we protected this type of relationship or alternatively how society would be injured if we didn’t protect this type of relationship
				+ E.g. guarantee of doctor-patient privilege = people more willing to disclose problems and be treated and therefore become fully functioning members of society
	+ Even if court holds that disclosure is required, it can screen the disclosure in order to provide no more than necessary
* **Journalist-informant claims**
	+ Under case-by-case common law privilege for provincial jurisdiction, statutory privilege for federal jurisdiction!!!
	+ **see, e.g., National Post (SCC, 2010) – case by case claim**
		- first three criteria were satisfied
			* source given a blanket unconditional promise of confidentiality
			* source would not have provided the communication (the bank loan authorization) without the promise of confidentiality
			* investigative journalism into government conflict of interests (and thus journalist-informant relationship) should be fostered
		- **but**, no privilege granted due to failure to satisfy the fourth criteria
			* serious criminal allegations
			* reasonable grounds to believe to believe the “communication” (the bank loan authorization) was forged
			* authorization was thus physical evidence of the crime, and indeed the *actus reus* of it
			* forensic analysis of it might identify the perpetrator of the crime
	+ **statutory privilege: CEA, s. 39.1 (only matters within FEDERAL JURISDICTION – TYPICALLY CRIMINAL MATTERS)**
		- definition of journalist and journalistic source
			* journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person
			* journalistic source means a source that confidentially transmits information to a journalist on the journalist’s undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source
		- objection to disclosure because it will or is likely to identify the source
			* journalist can raise issue or court can raise it on its own motion
		- **criteria for disclosure** – balancing of interest reflected by fourth criteria in common law
			* **CEA, s. 39.1(7) : criteria for disclosure**
				+ no other reasonable means to obtain the information or document, AND
				+ interest of disclosure outweighs injury caused by disclosure

balancing of interests considering the importance of the information/document to a central issue in the case; freedom of the press; the impact of disclosure on the journalist and the source

* + - * (8) court may impose conditions on disclosure
		- *DIFFERENCE B/W COMMON LAW AND STATUTE*: **assigns burden of proof to person who seeks disclosure (s 39.1(9))**
			* Presumption of non-disclosure

**Principle against self-incrimination**

* + not a privilege in the sense of others we have discussed – not to protect certain type of relationship but rather to protect other societal interests
	+ **#1 CEA, s. 5 / EA, s. 9** – they have differences so determine which one applies
		- witness must answer ***but*** receives protection against subsequent incriminatory uses
		- **CEA**: Can’t be used against them in criminal proceedings other than narrow perjury exception
		- **EA**: Can’t be used against them in subsequent criminal **OR civil proceedings** (including provincial offences)
		- protection must be invoked by witness – ***do not apply automatically***
		- **scope of protection**
			* voluntary and compelled testimony
			* “use” is assessed at the ***first*** proceeding
			* witness must show the evidence is incriminatory
			* absolute protection against later use
	+ **#2 Charter s 13**
		- witness must answer but receives protection against subsequent incriminatory uses
		- ***criminal*** prosecution only
		- protection is **automatic**
			* **does not require witness to invoke protection; applies even though witness is not aware of protection**
		- **Scope of Protection**
			* Applies to all witnesses
			* voluntary and compelled testimony
			* “use” is assessed at the *second proceeding*
				+ If in subsequent proceeding it is incriminatory
			* re-trial is “any other proceeding”
			* voluntary witness or compelled witness at first trial
			* if NOT incriminating, can be used by the Crown to impeach accused’s credibility if he/she chooses to testify
				+ but if incriminating then they have protection

**Proof Without Evidence**

Two types: (1) formal admissions, (2) judicial notice

“Presumptions” are discussed in the next lecture.

**Formal Admissions: Criminal**

* **guilty plea**
	+ formal admission by accused of facts necessary to prove elements of offence including any facts particularized in the indictment or information
		- e.g. if information specifies that accused charged with possession w/ purpose of trafficking heroin, guilty plea is an admission by accused that drugs were possessed for the purpose of trafficking and that the drugs were indeed heroin
	+ not necessarily an admission of all facts alleged by the Crown – only those necessary to prove that elements of the offence
	+ If accused pleads guilty to lesser offence: Crown can accept plea and charge him with lesser crime, refuse plea and continue with prosecution, or accept plea for the facts provided but continue prosecuting accused for more serious offence
		- e.g. 2: if accused gives guilty plea of manslaughter but states it wasn’t intentional so not murder, Crown can continue to prosecute accused and use the admission as the admission that accused did indeed kill the person (still must prove that it’s intentional though)
	+ But remember: guilty plea must be voluntary, unequivocal and informed
		- Accused must be aware of allegations made, effect of the plea and consequences of the plea
		- TJ makes “plea inquiry” to ensure this typically
* **s. 655 CC – criminal cases – admissions by accused of certain facts (but not entire offence)**
	+ S 655: Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.
	+ Admissions that *fall short of a full admission to the offence charged with*
	+ In indictable offences, allows accused to make admissions when on trial for indictable offence
	+ E.g. admits completing the offence but states complete defence (e.g. duress)
	+ E.g. 2 admits actus reus but denies mental element (e.g. consent in sexual assault case)
	+ Can also be something small such as where accused was at a certain date and time
	+ Once admitted, fact is presumed to be proven and Crown not entitled to call evidence on that issue
		- But Crown is not required to accept admission where it admits to a different state of facts than Crown alleges
		- However, Crown cannot reject an admission in order to keep an issue alive for the purpose of introducing evidence that is prejudicial
* **agreed statement of facts**
	+ Crown may admit something that is against their case (while still arguing that other things constitute the element of the offence in question)
	+ Must be: Clear, unambiguous, unequivocal
		- If accused’s evidence conflicts w/ statement of fact, TJ calls on Crown to provide evidence supporting the admission
* **admissions at common law**
	+ A formal admission in one proceeding is an informal admission in a subsequent proceeding – meaning that accused can call evidence such as an informal admission to contest the admission

**Formal admissions: Civil**

* Formal admissions can be made in relation to facts that are not in dispute. Can be made by client or counsel and once made, admission is conclusive regarding matters admitted
* They are binding unless party gets leave; leave only given if admission not voluntary (e.g. duress), triable issue regarding whether admitted fact exists, no prejudice to the other party, etc.
* Counsel can make admission when incidental to lawsuit (implied authority)
* Variety of ways:
* statement in the pleadings
* failure to deliver pleadings in some cases
* agreed statement of facts filed at the trial
* oral statement made by counsel at trial
* silence of counsel in some cases
* letter written by party’s solicitor before trial
* reply to a request to admit facts
* failure to reply to a request to admit facts

**Judicial Notice (doctrine)**

* once judicial notice is taken of a fact, you cannot dispute it
* discretionary – Just b/c a judge can take judicial notice does not mean they have to
* limits are inexact
	+ no bright-line rules
* intersects with other doctrines
	+ common sense inferences
	+ expert opinion evidence
	+ Judicial notice applies in between those two areas!
* **“informal notice”**
	+ day to day application of “**common sense**”/“knowledge and experience” of the trier of fact about how the world generally works \*\*\*IMPORTANT IF COMMON SENSE FACT THAT JUDICIAL NOTICE IS NOT NEEDED!!!!
	+ This is not judicial notice
	+ E.g. 1 The cost of raising a child increases as the child grows older.
	+ E.g. 2 Abuse of children is a serious concern in our society
* **Expertise required**
	+ information required is “beyond the scope of experience and knowledge of the trier of fact”
	+ Judicial notice cannot take note of anything where expert evidence is required
* **Judicial Notice**
	+ See common sense fact vs expertise required – judicial notice is in b/w them
	+ **Courts more inclined to take notice of facts when they are legislative facts rather than adjudicative facts**
	+ **adjudicative facts** – who, what, where, when, how and why
		- General rule: adjudicative facts must be proven through evidence. **However** two *exceptions* below
		- “Rule of Thumb” – exceptions (judicial notice can be taken if below)
			* Any idiot knows the fact
			* Any idiot can find the book
		- **Notorious Facts Test** – any idiot knows the fact
			* common or general knowledge in the community
				+ vary according to time and place
				+ community does not need to mean entire community – can mean particular subset of community
			* no reasonably informed person would dispute the fact
			* TJ cannot act on his/her knowledge alone
			* E.g. geographical facts (Latvia is a country), landmarks (rivers, etc.), human needs and behaviors (e.g. being pregnant takes about 9 months), business and trade practices (e.g. standard means of calculating pension benefits)
		- **Indisputable Source Test** – any idiot can find the book
			* readily accessible source with indisputably accuracy
			* dictionary, encyclopedia, historical documents, almanac, atlas, calendar, chart, maps, internet sources recognized to be reliable such as Google Maps, Google Earth and Google Street View
	+ **legislative facts** – **background information of legislation** (used when interpreting legislation and deciding if it is constitutional)
		- social, economic, cultural and historical context of legislation
		- fact is accepted by reasonable people who have properly informed themselves on the topic as not being subject to reasonable dispute for the purpose for which it is to be used
			* **more lenient standard than adjudicative facts**
			* the more central the fact is to the issue in dispute, the greater the need to determine that it is reliable and thus may be heightened risk that the court may exclude it
	+ **social framework facts**
		- general social context
		- relevant only if you can link framework facts to an issue in the case
			* appropriate to be skeptical – look at underlying research behind this
		- fact is accepted by reasonable people who have properly informed themselves on the topic as not being subject to reasonable dispute for the purpose for which it is to be used – same test as legislative facts?

**Judicial Notice of Law**

* general rule:
	+ courts take judicial notice of domestic (federal/provincial) law, but not foreign law
	+ see: CEA, ss. 17, 18; Legislation Act, 2006, ss. 13, 29, 74
	+ nb. does not usually include municipal by-laws
* foreign and municipal laws need to be introduced through other means, e.g. expert evidence

**Burden of proof, standard of proof, and presumptions**

Three topics in this lecture: Burden of proof, standard of proof, and presumptions

**Burden of Proof**

* important to distinguish between two types of burdens:
	+ **persuasive burden** rests on the party who is required by the law to prove the relevant facts to succeed
		- **if the party does not establish the facts, the party will lose the case**
		- this is a matter of law; persuasive burden does not shift throughout case
	+ **evidentiary burden** rests on the party whose duty it is to ***raise*** the **issue**
		- party must deduce or point some evidence on the issue before the issue is to be considered by the trier of fact
			* e.g. affirmative defences in the context of criminal law
		- up to that party to show that it is the live issue in the case

**Standard of Proof**

* how much evidence the party needs to discharge the burden assigned to him/her
* number of different standards that can be used: (easiest to make out 🡪 hardest)
	+ **H → RS → RPG → PFC → BOP→ BRD → AC**
	+ H = mere hunch
		- Intuition – you think it’s the case but you cannot articulate reasons for why
	+ RS = reasonable suspicion
		- Situation where you are able to articulate to some degree an underlying fact which lead you to a conclusion to suspect that X is true
		- Common in criminal cases where police officers are required to have this in order to undertake something
	+ R(P)G = reasonable (& probable) grounds
		- Greater degree of proof (probability) than reasonable suspicion
		- Common standard in criminal cases 🡪 e.g. police officers need reasonable grounds to obtain arrest, obtain search warrants, etc.
	+ PFC = prima facie case
		- In absence of anything to contrary, you conclude that there is sufficient evidence to be able to establish the case
		- Some evidence that may be sufficient to win your case
	+ BOP = balance of probabilities
		- More probable than not that facts lie in your favour
	+ BRD = beyond a reasonable doubt
		- In criminal cases, required to find accused guilty
	+ AC = absolute certainty
		- Not required in our law – highest standard
* These are some of the most common standards of proof ^
* **Balance of probabilities**
	+ one standard, differing degrees of certainty
		- “preponderance of evidence”
		- “detailed and convincing evidence”
		- “cogent and sensible evidence”
	+ These additional qualifying terms do not refer to a different standard but rather differing degrees of certainty required to meet that standard
		- Amount of evidence you need to meet balance of probabilities standard may depend on seriousness of the case and nature of allegations

**Civil Cases**

* **P usually bears the evidentiary and persuasive burden**
	+ P must usually prove allegations as set out in statement of claim
	+ **D must usually prove any *affirmative defence* provided** (evidentiary and persuasive burden)
		- E.g. P alleges breach of K (persuasive burden on P that there is a K and it was breached) and D alleges that they lacked capacity to K (persuasive burden on D)
* standard of proof is usually proof on the balance of probabilities
* **D** may make **motion for a non-suit** may be brought at the close of the plaintiff’s case
	+ Motion that P failed to adduce evidence that is *capable* of meeting their standard of proof
	+ Judge would then consider the evidence and all reasonable inferences that jury would be permitted to draw from the evidence, and determine whether it is able to meet the standard of proof
	+ If P defeats motion of non-suit, it does not defeat the case, just means that it will go to the trier of fact to determines

**Criminal Cases**

* **prosecution** bears the persuasive and evidentiary burden with respect to the elements of the offence charged
* **defence** bears the **evidentiary** burden on ***most defences***, but the persuasive burden only on a few defences
	+ D bears persuasive burden on mental disorder defence, non-insane automatism, intoxication – balance of probabilities (not BRD – unlike Crown’s standard)
	+ **Evidentiary burden – “air of reality”** – judge shall consider all evidence and decide whether on that evidence there is a real issue to be decided on by the jury. There must be evidence going to every element of the defence such that a jury acting reasonably could acquit the accused based on the evidence. Judge presumes witnesses are truthful – does not make reliability determination, except for circumstantial evidence where they determine if certain inferences that could be made are reasonable
		- Judge required to put all defences to the jury that have an “air of reality” whether or not specifically raised by the accused (except those limited defences mentioned which have a persuasive burden)
		- Judge also has a positive duty to keep all defences that do not have an air of reality from the jury
* **standard - beyond a reasonable doubt**
	+ higher than civil case but lower than absolute certainty
	+ **11(d) Charter – constitutional requirement** – **BRD on ultimate issue in the case**
		- Judge must instruct jury on what BRD means (*Lifchus*)
			* b/c it is a technical legal standard, may differ from what average person
			* Components:
				+ Stressing vital importance of standard given accused’s liberty at stake
				+ Burden of proving guilt rests on the prosecution
				+ Reasonable doubt is based on evidence and one that can arise on absence of evidence
				+ Not equivalent to moral certainty – not the same standard they use to make decisions in their everyday life
			* BUT it is not required to be stated verbatim
			* Ultimate question is whether charge as a whole to the jury is consistent with principles to that case
		- Any infringement must be justified under s 1 (e.g. *Sault Ste Marie*)
* Accused may bring motion for a directed verdict can be made at the close of the Crown’s case
	+ jury is **not** to assess each individual piece of evidence on a reasonable doubt standard. It is whether ***as a whole*** (totality of each evidence and its cumulative effect BRD to that element of the offence) the jury is satisfied that the accused is guilty beyond a reasonable doubt (remember, each element of the offence BRD, not necessarily each piece of evidence)
	+ **accused** entitled to bring **directed verdict** at end of the Crown’s case (similar to motion for non-suit in civil context brought by D) – accused alleges that Crown has not provided enough evidence to establish one or more elements of the offence – *Crown has not established prima facie case*
		- judge determines whether evidence with reasonable inferences is able to find accused BRD – if so then put to the jury

**Presumptions**

* often confused – some ppl state some things are presumptions when they are really rules of law (E.g. common sense)
* **Four types of presumptions:**
	+ **Mandatory vs permissive, rebuttable vs irrebuttable**
		- I.e.: mandatory rebuttable, mandatory irrebuttable, permissive rebuttable, permissive irrebuttable
		- **Only mandatory rebuttable presumptions are true presumptions**
	+ ON EXAM: identify which one it is
* presumptions without basic facts versus presumptions with basic facts (\*\*NOT very important)
	+ without basic fact – conclusion that must be drawn until contrary is proven
		- e.g. presumption of innocence, presumption of sanity (s 16 CC)
			* accused presumed to be innocent until standard of BRD is met
	+ with basic facts – mandates or allows for drawing of conclusion based on proof of the basic fact
		- e.g. you threw a baseball at a window – can be presumed or inferred that you intended to break the window
* **permissive versus mandatory presumption**
	+ permissive and mandatory
		- permissive if inference able to be drawn (not a presumption in a strict sense)
		- mandatory if inference REQUIRED to be drawn (these are true presumptions)
* **rebuttable versus irrebuttable presumption**
	+ **rebuttable** – law allows party to dispute it by pointing to sufficient evidence to negate trier of fact’s ability to draw inference
		- without a basic fact – must point sufficient evidence to meet requisite standard set by law (E.g. BRD)
		- with a basic fact – usually only point enough evidence to put basic fact into question (evidentiary burden)
	+ **irrebuttable** – not really a presumption at all – not able to rebut presumption
		- in effect is a **deeming provision**, states something is X even if it conflicts with human experience or actual evidence in the case
		- e.g. presumption that everyone knows the law
			* this is obviously not true
		- e.g. 2 place equipped with slot machine = deemed to be gaming house
			* can’t call evidence to the contrary
			* can only attack whether there is a slot machine, not that it’s not a gaming house even w/ the slot machine
* **presumptions of law versus of fact**
	+ presumption of law – exists as a matter of law
		- arises pursuant to statute or constitution
			* assigns burden of proof to one party or another usually
			* does not have to be true as a matter of human experience
			* presumption that judges know the law, jurors will abide by their oath
	+ *presumptions of fact* – based on *recurring cases of circumstantial evidence*
		- shortcuts to prove based on human experience
		- b/c we find that the existence of fact A leads us to believe fact B also exists
		- mandatory but does not arise at law b/c party may rebut the presumption
		- e.g. presumption of legitimacy
		- e.g. 2 presumption of regularity regarding appointment of evidence
		- **some presumptions exist for policy reasons**
			* impaired driving over 80 milligrams of alcohol in your blood
				+ presumptions that read back alcohol level at the time of driving to alcohol level at the time it was administered

usually not accurate but exists to avoid calling toxicologist

* **true presumptions = mandatory rebuttable presumptions**
* if area of law restricted to these, then would make it easier

**Reverse Onus Provisions**

* legal rule that places the **legal** (*persuasive*) burden of proof on the party who does ***not* *normally*** bear it
	+ e.g. criminal case 🡪 accused; civil case 🡪 defendant
	+ **if it does not place persuasive or legal burden on party, then usually referred to as mandatory presumption rather than reverse onus provision**
		- LANGAUGE USED:
		- **reverse onus** 🡪 if he establishes, if he proves, the proof of which lies upon him, etc.
		- **mandatory presumptions** 🡪 in absence of evidence to the contrary
* criminal cases (or where imprisonment is a possibility)
	+ reverse onus provisions that place the persuasive burden on the accused violate s. 11(d), and must be justified under s. 1