Starr Gazing: Looking into the Future of Hearsay in Canada

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In the law of evidence, the hearsay rule has long functioned to exclude third party out-of-court statements unless they could be made to fit into one of the recognized and enumerated hearsay exceptions. Recent developments mark a departure from this strict reliance on the common law exceptions and a move toward a more relaxed and flexible approach, known as the principled approach, which uses the criteria of necessity and reliability to determine the admissibility of otherwise prohibited hearsay evidence. This allows the admission of a wider range of relevant evidence, and facilitates the search for truth within the context of a fair trial for the accused.

The author contends that the principled approach is consistent with the Supreme Court of Canada’s global vision for the law of evidence. He identifies three critical objectives of that vision: replacing formalistic rules with simplicity and judicial discretion, removing stereotypes from the law of evidence, and reducing wrongful convictions. In considering the “present intention” and “prior identification” exceptions to the hearsay rule, the leading case of R. v. Starr placed less emphasis on the purpose for which the evidence was led and more emphasis on whether it raised the risks traditionally associated with hearsay. The author provides a framework for analyzing the necessity and reliability requirements of the principled approach, and considers how its application may affect some of the common law exceptions to the hearsay rule. He predicts that the principled approach, and the Starr decision in particular, will bring significant and far-reaching changes to this area of the law.

Introduction

A. The Ossified Pigeon-Hole Constellation
B. Boldly Going Where No Court Has Gone Before
   (i) Replacing Formalistic Rules with Simplicity and Discretion
   (ii) Cleansing the Law of Evidence of Stereotypes
   (iii) Protecting against Wrongful Convictions

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Introduction

A. The Ossified Pigeon-Hole Constellation

The hearsay rule is the best known of the common law exclusionary rules of evidence. However, its raison d’être has long been the subject of debate. Whether it stemmed from a judicial distrust of jurors or
witnesses or a concern about adversarial fairness, the common law courts in the latter half of the eighteenth century began routinely to apply a rule prohibiting parties from relying on acts or declarations made out of court for the truth of their contents. \(^2\) Ironically, the same courts were not prepared to exclude all hearsay evidence, no doubt because of its importance to the adversarial trial process. \(^3\) Consequently, exceptions to the general exclusionary rule were created, and as Professor Delisle observed, “[t]he exceptions, like Topsy,” just

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\(^2\) The exact timing of the hearsay rule is also the subject of some debate. Relying on cases such as *Re Braddon and Speke* (1684), 9 Howell’s State Trials 1127 and *Charnock’s Trial* (1696), 12 Howell’s State Trials 1377, Wigmore fixed the date of the uniform application of the hearsay rule as between 1675 and 1690: Wigmore, *ibid.* at 18–19. However, using sources not uncovered by Wigmore, evidence historian John Langbein found an inconsistent application of the hearsay rule in the first part of the eighteenth century. See Langbein, *ibid.* at 301–302 and John H. Langbein, “Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources” (1983) 50 U. Chicago L. Rev. 1. See also, Stephan Landsman, “The Rise Of The Contentious Spirit: Adversary Procedure In Eighteenth Century England” (1990) 75 Cornell L. Rev. 497 at 564–572. Another reason to doubt Wigmore’s assertion is his reliance on the State Trials as reliable sources. He writes: “By ‘State Trials’ is meant trials of state, that is, affairs of state—cases involving high politics. Here are to be found the trials of Thomas More, Walter Raleigh, Guy Fawkes . . . . These were the cases that held interest for the Whig editors and their gentle, predominantly nonlawyer readership . . . .”(*supra* note 1 at 265) According to Langbein, *supra* note 1 at 266, they were therefore “grossly unrepresentative . . . .” and sometimes applied rules not used in common criminal trials. A similar warning about the use of State Trials is issued by Mike Macnair, *The Law of Proof in Early Modern Equity* (Oxford University: The British Library–British Thesis Service, 1991) at 3 [unpublished].

\(^3\) For example, by the end of the seventeenth century, jurors were no longer selected because they had personal knowledge of the relevant facts, nor were they called upon to investigate and marshal the evidence themselves. By this time, witnesses had become the primary source of evidence in criminal trials, and it was sometimes necessary to rely on what the witness had heard or had previously put to writing in order for the prosecution to make its case. See Ronald J. Delisle and Don Stuart, *Evidence: Principles and Problems*, 6th ed. (Scarborough: Carswell, 2001) at 481–485.
Litigating hearsay by trying to fit the evidence under an exception became known as the “pigeonholed approach.”

While the use of a pigeonholed approach over the last two hundred years was simple and expedient, it did not necessarily improve our ability to determine accurately “what happened.” One of the reasons, as noted by Professors Morgan and McGuire, is that there was no animating principle to guide the creation of the exceptions:

There is in truth no one theory which will account for the decisions. Sometimes an historical accident is the explanation; in some instances sheer need for the evidence overrides the court’s distrust for the jury; in others only the adversary notion of litigation can account for the reception; and in still others either the absence of a motive to falsify, or a positive urge to tell the truth as the declarant believes it to be, can be found to justify admissibility. Within a single exception are found refinements and qualifications inconsistent with the reason upon which the exception is built. In short, a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.

Given the absence of a threshold reliability requirement and the fact that some of the exceptions were based on rigid and arbitrary conceptions, reliable evidence would often be excluded and unreliable evidence admitted. Moreover, the prevailing view for many years was that the hearsay exceptions were frozen in time, subject to parliamentary reform, which only further increased the likelihood that reliable evidence would be excluded. Thus, for the better part of the twentieth century, Canadian courts were forced to decide the

6. Edmund M. Morgan and John A. Maguire, “Looking Backward and Forward at Evidence” (1937) 50 Harv. L. Rev. 909 at 921. Indeed, in Sturla v. Freccia (1880), 5 A.C. 623 at 640 (H.L.), Lord Blackburn candidly admitted: “I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more . . . .” See also the discussion in Delisle, supra note 4 at 276; John Sopinka, Sidney N. Lederman & Alan W. Bryant, The Law of Evidence In Canada, 2d ed. (Toronto: Butterworths, 1999) at 188.
admissibility of hearsay evidence with what Chief Justice Lamer referred to as "ossified judicially created categories."8

B. Boldly Going Where No Court Has Gone Before

In the last quarter of a century, the litigation of hearsay evidence has come a long way. In civil cases, the changes began in 1970 with the Supreme Court of Canada’s decision in Ares v. Venner.9 In Ares, the Court rejected the English approach that hearsay reform could only be undertaken by Parliament, and admitted hospital records that did not fit within any of the existing exceptions. With an eye to the circumstances surrounding the making of hospital records, Justice Hall held:

Hospital records, including nurses’ notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses’ notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.10

In the criminal context, the modern era started a little more than a decade ago with Justice McLachlin’s brief but foundational judgment in R. v. Khan.11 Khan involved the admissibility of a child’s statement to her mother to the effect that she had been sexually assaulted by her doctor. Although the statement did not fall within an existing hearsay exception, the Supreme Court of Canada held that it was admissible because it was necessary (that is to say, the trial judge had concluded that the child was incompetent to testify) and there was other evidence tending to establish its reliability. Khan thus signalled a departure

10. Ibid. at 626.
“from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions,” and a move toward “an approach governed by the principles which underlie the rule and its exceptions alike.” This approach is now referred to as the “principled approach,” and its organizing principles are necessity and reliability. Following Khan, the foundation for the principled approach was largely provided by Chief Justice Lamer in a quartet of cases.\(^\text{13}\) In many respects, the Supreme Court of Canada’s principled approach to hearsay mirrors its global vision for the law of evidence. Three critical components of this vision include: replacing formalistic rules with simplicity and discretion, cleansing the law of evidence of stereotypes, and protecting against wrongful convictions.

(i) Replacing Formalistic Rules with Simplicity and Discretion

Over the last decade, the Supreme Court has recognized that the search for truth is best facilitated by relaxed standards that allow the admission of all relevant evidence.\(^\text{14}\) So, for example, in R. v. L.(D.O.), Justice L’Heureux-Dubé observed that “[t]he modern trend in [the law of evidence] has been to admit all relevant and probative evidence and allow the trier of fact to decide the weight to be given to that evidence

\(^{12}\) See Smith, supra note 8 at 932. In a further observation on Khan’s principled approach, Chief Justice Lamer in Smith observed that “[t]he movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination.” (Smith, ibid.)


in order to arrive at a result which will be just.”15 This approach comes close to what Professor MacCrimmon has called the “principle of free proof.” According to this principle, “fact determination should as much as possible be free of ‘formal rules that interfere with free inquiry and natural or common sense reasoning.”16 The flexibility of the Khan approach to hearsay is consistent with this principle.

This relaxed approach to evidence has been tempered by the Supreme Court’s concern that in some cases, the admission of evidence can distort the truth-seeking function of the trial or operate unfairly. Consequently, the Court has given trial judges a common law and constitutional gatekeeping function in the form of an exclusionary discretion to be exercised on a case-by-case basis.17 As a result of these two themes, “free proof” and “discretion,” the Supreme Court has adopted a relatively simple yet principled approach to the admissibility of evidence.18 This principled approach can be stated as follows: if the probative value of the evidence in the particular circumstances is


17. Rather than characterizing this as an exclusionary rule, I prefer the approach of Justice McLachlin in Seaboyer, supra note 15 at 399-400, where she described it as “less a rule of exclusion than a means of setting certain conditions for the reception of evidence which might otherwise be unreliable.” An application of this discretionary approach can be seen in the contexts of expert opinion and similar fact evidence. See R. v. Mohan, [1994] 2 S.C.R. 9 and R. v. Handy, [2002] S.C.J. No. 57 (QL).

18. One of the first commentators to reflect on the Court’s shift towards a principled approach was Marc Rosenberg (now Justice Rosenberg) in “Developments in the Law of Evidence: The 1992–93 Term: Applying the Rules” (1994) 5 Sup. Ct. L. Rev. (2d) 421 at 421–422. As Rosenberg noted, “[p]rinciple rather than precedent has helped the Court devise rules which it hopes are fairer, more likely to lead to accurate fact-finding and more responsive to the needs of the present society.” See also R.J. Delisle, “Discretion and the L.R.C.’s Code of Evidence” in Marilyn T. MacCrimmon and Monique Ouellette, eds., Filtering And Analyzing Evidence In An Age Of Diversity (CIAJ Publication, 1993).
sufficient to override an identifiable prejudicial effect, it will be admitted. Justice McLachlin described this approach in *Seaboyer*:

[T]he exclusionary rules of evidence are based on the justification that the evidence excluded is likely to do more harm than good to the trial process. Moreover, these rules, as they have developed in recent years, admit of a great deal of flexibility, allowing considerable discretion to the trial judge to admit evidence in cases where the value of the evidence outweighs its potential prejudice.19

(ii) Cleansing the Law of Evidence of Stereotypes

Over the last two decades, Parliament and the Supreme Court of Canada have attempted to rid the law of evidence of the stereotypical assumptions that made it difficult for the state to prosecute sex abuse cases and undoubtedly deterred some vulnerable complainants from turning to the courts for redress.20 For example, for most of the twentieth century the rules of evidence reflected an inherent suspicion of the testimony of women and children. This suspicion translated into a corroboration requirement for sex offences and cases involving the unsworn testimony of children,21 and led to the belief that a woman’s


20. While gender and age stereotypes are the focus of this social context discussion, the Supreme Court of Canada has also begun to recognize that stereotypes based on race are present and can infect the fact finding process: see *R. v. Williams*, [1998] 1 S.C.R. 1128. However, the Court has yet to develop a satisfactory theoretical approach to the problem. The seeds of an approach can be seen in *R. v. R.D.S.*, [1997] 3 S.C.R. 484. In addition, the Court did consider the relationship between race and hearsay in the context of Aboriginal land claims and oral histories in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1065. See the discussion of these issues in Sandra A. Forbes, “Developments in the Law of Evidence: The 1997–98 Term” (1999) 10 Sup. Ct. L. Rev. (2d) 385.

21. For some offences, such as incest, there was an actual corroboration requirement. For other sex offences, there was a de facto requirement, as the *Criminal Code* required judges to warn jurors that it would be dangerous to convict on the uncorroborated evidence of the complainant. See the *Criminal Code*, R.S.C.
prior sexual history and her failure to make a timely complaint were relevant to her credibility. These stereotypes have largely been abolished. In 1983, Parliament abrogated the law of recent complaint, and by 1988 all of the requirements for corroboration and warnings were abolished. In addition, an evidence “counter-revolution” has led to the creation of new rules to promote equality and, as the Court put it in R. v. F.(C.C.), a “sensitive judicial system.” As part of this counter-revolution, the evidence of children is now treated with common sense and not scrutinized with adult lenses. Children can testify behind a screen, in closed courtrooms and with a counselor to reduce trauma. Videotaped statements made within a reasonable time after the offence are now admissible as a testimonial aid. Finally, strict statutory provisions guide cross-examination on prior sexual history and the production of private records.

Cleansing the law of evidence of gender and age-based stereotypes has been part of the motivation for the development of the principled approach to hearsay. Commenting on Khan in F.(W.J.), Justice McLachlin said:

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1970, c. C-34, ss. 139(1), 142, and 586 and the Canada Evidence Act, R.S.C. 1970, c. E-10, s. 16(2).
The Court’s decision in Khan to permit a child’s out-of-court statement to be received where necessity and reliability are present was in keeping with the increasing sensitivity of the justice system to the special problems children may face in giving their evidence and the need to get children’s evidence before the court if justice is to be done.29

Similarly, in R. v. Parrott, Justice LeBel, in dissent, observed:

A hallmark of the principled approach to hearsay is flexibility. In moving away from the categorical approach of the past to hearsay exceptions, the Court signaled in the last decade an intention to render the rules governing the reception of hearsay evidence more responsive to individual situations . . . . When dealing with young children or people with mental disabilities, this approach seeks to address the necessity and reliability required for the admission of the evidence while at the same time safeguarding the dignity and integrity of the complainants or witnesses.30

Not surprisingly, this approach to hearsay has had its biggest impact in facilitating prosecutions for sex offences and domestic abuse against women and children.

(iii) Protecting against Wrongful Convictions

The recent exposure of several wrongful murder convictions in Canada has placed our criminal justice system under a microscope as we try to understand the etiology of miscarriages of justice. We now have some limited empirical evidence that the admission of out-of-court statements is linked to wrongful convictions. In the United States, a recent study of 74 cases of DNA exonerations done by Cardozo Law School’s Innocence Project found that 81 per cent of the cases involved unreliable identification evidence and 22 per cent involved false confessions.31

30. [2001] 1 S.C.R. 178 at 183–184 [Parrott] [citations omitted].
31. Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence When Justice Goes Wrong and How to Make it Right (New York: Signet, 2001) at 361. Many of these cases involved more than one cause.
Common sense also tells us that the exclusion of defence hearsay evidence has also likely contributed to wrongful convictions. Unfortunately, as was the case with the testimony of women and children, defence evidence has historically been viewed as suspect. This suspicion arose out of a deep-seated fear that the evidence of an accused, or his or her witnesses, would be manufactured because of the accused’s obvious “interest in the outcome.” As Lord Eyre put it in 1794: “[T]he presumption . . . is, that no man would declare anything against himself, unless it were true, but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself.”

This concern for manufactured evidence has been so prominent in evidence jurisprudence that it led one scholar to observe: “In large measure, it also explained why an out-of-court statement, even if it could be shown to be of virtually indisputable reliability, was generally excluded as evidence of the truth of its contents under the rule against hearsay.”

32. Indeed, only recently have appellate courts in Canada begun to question instructions that invite the jury to consider the accused’s “great” or “strong” interest in the outcome when assessing his or her evidence. In R. v. B.(L.) (1993), 13 O.R. (3d) 796, 82 C.C.C. (3d) 189 at 190 (C.A.), a new trial was ordered because of the trial judge’s direction (to himself) that “the accused, of course, has a motive for not telling the truth, he does not wish to be convicted.” See also the discussion in R. v. Zurmati, [1993] O.J. No. 1520 (C.A.) (QL); R. v. Fabian (1994), 23 W.C.B. (2d) 456 (Ont. C.A.); R. v. P.(G.F.) (1994), 18 O.R. (3d) 1 (C.A.); R. v. Trombley (1998), 40 O.R. (3d) 382 (C.A.). In the context of defence witnesses, the Ontario Court of Appeal recently found nothing improper in the following instruction: “[W]hile [the accused’s wife] may well not have been consciously lying, her evidence was very much influenced by her desire to defend her husband.” See R. v. K. A. (1999), 123 O.A.C. 161, 137 C.C.C. (3d) 554 at 569.

33. R. v. Hardy (1794), 24 State T. 199 at 1093. This fear of manufactured evidence explains, in part, why it was not until 1898 that an accused could testify on his own behalf in England. In Canada, an accused was made competent to testify five years earlier. See s. 4(1) of the Canada Evidence Act, S.C. 1893, c. 31 [re-en. 1906, c. 10. s.1]. It also serves to explain, in part, the rule against the admission of prior consistent statements.

In the last few years, the Supreme Court of Canada has begun to acknowledge that wrongful convictions occur and that the rules of admission and exclusion of evidence play a significant role. Hearsay has not escaped the Court’s attention. With respect to Crown hearsay, Justice Iacobucci, for the majority in *Starr*, observed that: “It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception”.

With respect to defence hearsay, the Supreme Court first recognized in *R. v. Finta* that hearsay rules may at times have to be relaxed to allow an accused to make full answer and defence. This theme was recently picked up in *Brown*, where Justice Major, for the majority, held that “where there are some assurances of reliability and where necessary to avoid wrongful conviction, some rules of evidence may be applied with something less than their usual degree of rigour.”

In her concurring opinion, Justice Arbour observed:

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go on to state that the court had a residual discretion to relax strict rules of evidence
in favour of the accused when necessary to prevent a miscarriage of justice.40

.......

In the case of hearsay, threshold concerns about necessity and reliability, which
reflect issues of fairness to the opponent in the adversary system, should be weighed
against the dangers of convicting an innocent person . . . . .41

Consequently, just as we have become less skeptical about the
evidence of women and children, it is hoped that we will now see a
greater judicial willingness to admit defence hearsay. Indeed, given
Finta, Starr and Brown, I suspect that we can now finally put to rest
these troubling comments of Justice Sopinka in Dersch v. Canada
(Attorney General):

The right to full answer and defence does not imply that an accused can have, under
the rubric of the Charter, an overhaul of the whole law of evidence such that a
statement inadmissible under, for instance, the hearsay exclusion, would be
admissible if it tended to prove his or her innocence.42

As we move into this new era of hearsay litigation, it will be
interesting to see whether the Crown or the defence will benefit most
from the principled approach.43 Some have argued that the courts’ track
record following the liberalization of hearsay suggests that the balance
has tilted in favour of the state, and will continue to do so. For example,
Professor Thompson, relying on American data, showed that under the
principled approach, the state is far more likely than the accused to
attempt to introduce hearsay evidence and far more likely to be
successful in having it admitted.44 Similarly, Professor Archibald
studied 86 appellate decisions in Canada that applied the principled
approach and found that the Crown was the moving party in 71, or 82

40. Ibid. at para. 116.
41. Ibid. at para. 119.
42. [1990] 2 S.C.R. 1505 at 1515. This observation was repeated by Justice
43. The concern about who benefits from a relaxed hearsay rule was something the
Supreme Court alluded to in B.(K.G.), supra note 13 at 781–782.
44. See D.A. Rollie Thompson, “The Supreme Court Goes Hunting And Nearly
per cent, of those cases. He also found a discrepancy in the success rate of the moving party, with the state succeeding in 68 per cent of the cases and the defence in 40 per cent.

C. What’s in the “Starrs” for Hearsay

In the early morning hours of August 21, 1994, Bernard Cook and Darlene Weselowski, Cook’s former girlfriend, were repeatedly shot in the head with a 9 mm handgun. In the hours before the killings, Robert Starr, Weselowski and Cook were all drinking at a bar in the north end of Winnipeg. At around 1:50 a.m., another patron heard Starr say to Cook “if we are going to get this done, we better get this done now.” Cook and Starr left the bar. Outside, Cook and Weselowski offered Cheryl and Daniel Ball a ride to the Balls’ residence in St. Norbert, a twenty to thirty-minute drive. They left in Weselowski’s station wagon. Starr left in a smaller car.

On the way to the Balls’ house, Weselowski stopped at a gas station where Cook encountered his current girlfriend, Jodie Giesbrecht. Giesbrecht was apparently upset that Cook was with Weselowski rather than her. Cook replied that he had to “go and do an Autopac scam with Robert” and that he was to receive $500 for his involvement in wrecking a car for insurance purposes. During the conversation, Giesbrecht saw Starr in another car beside the gas station. According to two police officers, Cheryl Ball also identified Starr, in a photo lineup, as the man talking to Cook at the gas station and “probably driving the other car.”


46. It is important to qualify this data. First, it is not surprising that the Crown attempts to introduce hearsay more often than the defence. After all, it is the Crown that bears the burden of presenting evidence. Second, with respect to the differential success rate, the state has an arsenal of professionals who can ensure that a statement is taken in circumstances that will satisfy a threshold standard of reliability. The taking of videotaped statements under oath by the police (i.e. K.G.B. statements) is one such example. It is to be hoped that this practical reality, which stems from an imbalance of resources, will not be lost on our courts when they determine whether defence hearsay evidence should be admitted.
Cook, Weselowski and the Balls left the gas station and stopped again on Le Maire Street in St. Norbert where the Balls got out of the car. Cheryl Ball looked back and observed a smaller car alongside the station wagon. Later that morning, Cook and Weselowski were found dead a few kilometres from the Ball residence. A small car was found in the ditch. Weselowski’s station wagon was eventually found one and a half blocks from the home of Starr’s brother. Some of Starr’s scalp hairs were found on the floor of the driver’s side of the vehicle. At trial, Starr was convicted of two counts of first degree murder.

Starr appealed all the way to the Supreme Court of Canada. The case was heard on December 3, 1998. The Court reserved its judgment and, recognizing that the case had the potential to be a blockbuster hearsay decision, decided to re-hear it on February 24, 2000 with a full complement of judges. On September 29, 2000 the Court handed down its decision. By the slimmest of majorities, the Court ordered a new trial. The decision addressed the meaning and vitality of the hearsay rule in a comprehensive fashion. Three hearsay issues were considered: (1) under the “present intention exception,” the admissibility of Cook’s statement that he had to “go and do an Autopac scam with Robert”; (2) under the “prior identification exception,” the admissibility of the testimony of one of the police officers that Ball had earlier identified Starr as the man who was talking to Cook at the gas station; and (3) the application of the “principled approach” to the traditional hearsay exceptions.

In short, Justice Iacobucci, for the majority, concluded that all hearsay evidence must be reliable and necessary in order to be admissible. He further held that to the extent that the traditional

47. Other evidence linking Starr to the murders included a receipt for 9 mm ammunition found in his home.
48. Justice Cory had retired after the first hearing.
49. The five-four split confirmed the importance of Justice Cory’s vote.
50. At his new trial, the Crown introduced a statement given by Starr after his first trial in which he admitted being involved in the killings. He stated that he had lured Cook to the isolated area on the pretext of an Autopac scam. The plan was to break Cook’s legs. Two other individuals were involved, one of whom was responsible for the shooting. At his second trial, Starr was only convicted of one count of manslaughter. See R. v. Starr (2002), 166 Man. R. (2d) 152 (C.A.).
exceptions do not incorporate these criteria, the exceptions may have to
be modified under the principled approach. The “present intention” or
“state of mind” exception was the focus of the case. While Iacobucci J.
did not explicitly state that he was doing so, it is implicit in his
reasons that he scrutinized this exception with the principled approach
in mind. Thus, he determined that in order for the exception to apply,
the moving party would have to establish that the statement was not
made in circumstances of suspicion and that it was not being used to
prove the intentions of someone other than the declarant.

The purpose of this article is to examine the impact that Starr may
have on future hearsay litigation. In my view, the application of Starr
to future hearsay problems should further the trend toward ensuring
that reliable fact finding, fairness and equality are not trumped by
stereotypical reasoning, efficiency and rigidity. With its emphasis on
principle and fairness, Starr will force us to examine more carefully

51. Justice Iacobucci declined to address the scope of the prior identification
exception because the witness, Ball, was not asked basic questions by the Crown to
trigger the exception. For example, she “did not testify at trial as to why the person
in the photo shown to her . . . looked familiar, or where she had seen the person.”
She was not “asked whether she had seen [Starr] on the night of the murders, and
she did not testify that she had done so.” Finally, “she did not mention [Starr] in her
Iacobucci was also not prepared to admit the evidence under the principled approach
because the evidence was not necessary (i.e. Ball was not asked to identify Starr)
and there was “strong indication” that the identification was unreliable because of
inconsistencies between her description of the man she saw and Starr. See Starr,
supra note 35 at 535–540. What Justice Iacobucci did say about hearsay and
identification evidence is discussed in more detail below.

52. Starr, supra note 35 at 513, 517–533. Justice Iacobucci concluded that Cook’s
statement was inadmissible because both criteria were not satisfied. First, the
statement involved the intentions of third persons (i.e. Starr). At trial, the Crown
relied on the statement to demonstrate that Starr had “proposed that [Autopac] scheme
to Cook because it would isolate Cook if he followed along with it, without
alarming him.” In addition, the statement was not made in circumstances free of
suspicion. In particular, according to Justice Iacobucci, Cook “may have had a
motive to lie in order to make it seem that he was not romantically involved with
Weselowski.” He then concluded that “[f]or much the same reasons why the
statement did not meet the requirements for admissibility under the present
intentions exception, I conclude that the statement is not admissible under the
principled approach either.” See Starr, supra note 35 at 517, 520–522, 532.
what we mean when we talk about hearsay, necessity, and reliability and to re-examine many of the traditional hearsay exceptions. In the next part of this article, I will look at the impact *Starr* may have on the problem of hearsay identification. I will then examine the organizing principles of the principled approach—necessity and reliability—with a view to predicting what modifications might be made to a number of the existing hearsay exceptions.

I. Identifying Hearsay after *Starr*

Traditionally, the critical identifying feature of hearsay evidence has been the purpose for which the evidence is being adduced; that is to say, to what is it relevant? If an out-of-court statement is being introduced because its truth is relevant to a fact in issue, then it is hearsay. If, on the other hand, one can use the making of the statement as a piece of circumstantial evidence to draw an inference the relevance of which does not depend on the truth of the statement, then the evidence is characterized as original rather than hearsay evidence. Examples of a non-hearsay use of an out-of-court statement include demonstrating that a person was put on notice (for example, that his or her licence had been suspended) or providing justification for a course of action (for example, it may give reasonable and probable grounds for making an arrest).53

There is, however, a more flexible approach to hearsay identification. This approach focuses not just on the purpose for which the evidence is being led, but also on whether its admission raises one of the hearsay dangers (that is to say, the lack of an oath, the lack of contemporaneous cross-examination, and the lack of evidence of the witness’s demeanour). As Chief Justice Lamer recognized in *Smith*, the purpose for which the evidence is led will not necessarily cleanse it of hearsay dangers:

What is important is that the evidentiary dangers traditionally associated with statements by persons not called as witnesses—principally, the unavailability of the declarant for cross-examination—are not present, or are present to a far less

significant degree, when the relevance of such statements lies simply in the fact that they were made.54

This functional approach to hearsay was explicitly adopted in *Starr*. As Justice Iacobucci observed:

In short, the essential defining features of hearsay are the *purpose* for which the evidence is adduced, and the absence of a meaningful opportunity to *cross-examine* the declarant in court under oath or solemn affirmation as to the truth of its contents.55

If courts are prepared to apply this functional approach, we may see more evidence identified as hearsay. Relevant factors to consider in the application of a functional approach include: whether the declarant is available to testify; whether the evidence forms a material part of the Crown’s case, as opposed to narrative or context evidence; whether the relevance of the evidence can only be assessed through an assessment of whether the underlying facts are true; and whether the evidence raises heightened reliability concerns.

Another relevant factor is whether the Crown or the defence is seeking to proffer the evidence. In light of the Crown’s burden of proof, it may be more equitable, for example, to strictly apply this functional approach when the evidence is being led by the Crown.

Over the years, there has been vigorous debate on a number of vexing hearsay identification problems. *Starr* provides us with an opportunity to reconsider these problems. In particular, the treatment of implied assertions and prior identifications would be well served by an application of *Starr’s* functional approach.

### A. Implied Assertions

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54. *Supra* note 8 at 924–925.
55. *Starr, supra* note 35 at 516 [emphasis in original].
Perhaps the most interesting collection of hearsay jurisprudence relates to whether implied assertions trigger the hearsay prohibition.\(^{56}\) Consider the following example: The police are conducting a search of X’s premises for crack cocaine. A small quantity of cocaine is found at the house. During the search, the police intercept two telephone calls from unknown persons looking to purchase crack cocaine. They also encounter a prospective purchaser at the front door. At X’s trial for possession for the purpose of trafficking, the Crown seeks to introduce the evidence of the phone calls and the front door inquiry as evidence that X is a drug trafficker.

Over the years, courts and commentators have reached different conclusions on how to characterize this evidence. Some have argued that it is hearsay because the statements are only relevant if the implicit assertion (that is to say, I am looking to buy drugs from X because I know or hear that he is a drug trafficker) is accepted as true.\(^{57}\) Others have asserted that the evidence is not hearsay because whether or not the purchaser’s belief is correct is irrelevant—what is relevant is the repeated drug-related conduct made at a place linked to X.\(^{58}\)

In this context, the debate has centered on whether the relevance of the evidence can be determined without looking to the truth of the underlying facts. This artificial approach may appeal to evidence scholars, but one wonders whether most people would be able to appreciate the subtle distinction. Moreover, in some cases there may be serious reliability concerns about inferences drawn from the fact that the statement was made. A preferable approach is to treat implied assertions more liberally as hearsay and determine their admissibility on a case-by-case assessment of reliability and necessity. In \textit{R. v. Edwards}, for example, the Ontario Court of Appeal applied the


principled approach to a fact situation not unlike that presented above. The Court was satisfied that the implied assertion was reliable, given the number of individuals who called Edwards’ pager and cellphone. As Chief Justice McMurtry observed in a subsequent case, this created an “irresistible inference” as to the nature of the enterprise. 59

B. Prior Identifications

A similar debate has arisen in the context of prior identifications. There are two classic scenarios where the admissibility of a prior identification may be challenged. The first is where the witness identifies the accused in court as the perpetrator and also testifies that on a previous occasion she identified the accused in a photo or live line-up. The second is where the witness cannot identify the accused in court but testifies that on a prior occasion she made an accurate identification of the perpetrator. In both scenarios, there will usually be evidence from a police officer confirming the witness’s prior identification of the accused.

In R. v. Tat, 60 the Ontario Court of Appeal held that neither of these two scenarios triggers the hearsay rule. With respect to the first scenario, Justice Doherty held:

Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose. . . . When such evidence is tendered, the trier of fact is not asked to accept the out-of-court statements as independent evidence of identification, but is told to look at the entirety of the identification process before deciding what weight should be given to the identifying witness’ testimony. In this respect, evidence that the witness previously gave a description which matched the accused or previously selected the accused in a line-up serves no different evidentiary purpose than would evidence showing that the identifying witness had an ideal vantage point from which to

59. See Wilson, supra note 57 at 71. This approach may, however, require an exception to the general rule, discussed below, prohibiting the use of confirmatory or corroborative evidence to demonstrate threshold reliability.

observe the perpetrator of the offence. Both are factors which will assist in weighing the witness’ in-court testimony.61

With respect to the second scenario, Justice Doherty adopted the following passage from *R. v. Alexander*:

> [W]hen the identifying witness says in the witness box that he did on a previous occasion identify somebody as the person connected with the crime, but that he cannot now remember who it was that he identified. . . . In such a case, . . . evidence is admissible to prove who was the person thus identified. Such evidence would not be hearsay: it is not tendered to prove the truth of what the identifying witness asserted on the prior occasion. . . . Such evidence is material to show that a particular photograph was indicated, not that it was correctly indicated or that the person portrayed was the person who had committed the crime. The evidence of the observer of the earlier act of identification is in such a case admitted as original evidence. It explains and gives meaning to the evidence of identification given by the identifying witness in the witness box.62

*Tat* thus stands for the proposition that there is no prior identification exception to the hearsay rule. According to *Tat*, prior identification evidence only triggers the hearsay prohibition where the out-of-court statement is relied upon as evidence that the person identified committed the crime.63 In these cases, the evidence is only admissible where it satisfies the requirements of the principled approach.64

In *Starr*, however, the Supreme Court appeared to be prepared to accept that there is a prior identification exception. Justice Iacobucci said:


63. *Tat*, *ibid.* at 139.

It is not necessary in this case to review the entirety of the “prior identification” exception to the hearsay rule. . . . The scope of the “prior identification” exception to the hearsay rule was recently thoroughly canvassed in the lucid reasons of Doherty J.A. in Tat . . . . As Doherty J.A. sets out, there are two situations in which out-of-court statements of identification may be admitted for the truth of their contents. First, “prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial” . . . . Second, such statements are admissible “where the identifying witness is unable to identify the accused at trial, but can testify that he or she previously gave an accurate description or made an accurate identification . . . .” In the latter circumstance, Doherty J.A. explained, “the identifying witness may testify to what he or she said or did on those earlier occasions and those who heard the description given by the witness or witnessed the identification made by the witness may give evidence of what the witness said or did” . . . .

Starr’s reliance on Tat is puzzling, as Tat says just the opposite—that in neither scenario is the evidence being used as hearsay.

Further confusion emerges when Justice Iacobucci discusses the second scenario, which he recognizes may (as opposed to does) involve the use of hearsay evidence:

Part of the rationale underlying the second branch of the exception is that the testimony that is being admitted to complement the testimony of the identifying witness does not constitute hearsay. If the witness can at least testify that at some point she made an accurate identification, then a police officer’s testimony that he or she observed the identifying witness in the act of identification is original evidence that the identifying witness did indeed select a particular person, and that that person is the accused. However, for this rationale to apply, the identifying witness must confirm that the person he or she identified in the police officer’s presence was the person who committed an act that is relevant in the immediate proceeding. The testimony of the identifying witness may thus have its own hearsay component, but this is beyond the scope of this appeal: see H. Stewart, Prior Identifications and Hearsay: A Note on R. v. Tat (1998), 3 Can. Crim. L. Rev. 61 . . . .

65. Supra note 35 at 536. Earlier in the judgment, Justice Iacobucci stated (at 514) that “[t]he breadth of the hearsay rule is illustrated in this case by the hearsay evidence of Cheryl Ball’s out-of-court identification . . . .” 66. Ibid. at 537. Like the Stewart piece cited in Starr, Professor Delisle also supports the characterization of the use of prior identification evidence in the second
Because identification evidence is often dispositive of the Crown’s case, because of the heightened reliability concerns surrounding this class of evidence, and because of the relationship between identification evidence and wrongful convictions, our courts should recognize that prior identifications will always trigger the hearsay rule. Such an approach would permit the scrutiny of evidence on a case-by-case basis, thereby ensuring that there will be some vetting of the reliability of the identification evidence.

Not only does the spectre of wrongful convictions warrant a reliability assessment of prior identification evidence. Our courts now recognize that an in-court identification has little if any evidentiary value and that the most relevant evidence is the out-of-court identification. In Hibbert, Justice Arbour, for the majority, observed:

One might ask . . . why the in-court identification should be permitted to occur. In this case, as in most, it of course served to confirm that the accused was, in the opinion of Mrs. McLeod and Mrs. Baker, the same man they saw throughout the chain of events (from arrest through to the second trial). In that sense, despite its scenario as hearsay. See R.J. Delisle, “Annotation to R. v. Tat” (1998) 14 C.R. (5th) 118 at 120–121. However, neither would go so far as to characterize the first scenario as hearsay, as I suggest should be done.


68. Following the Sophonow Inquiry, Justice Cory issued a number of recommendations on how lineup procedures should be conducted. Those recommendations could be used as the basis for a reliability assessment. They include videotaping the line-up and the use of sequential line-ups. See Peter deC. Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Winnipeg: Manitoba, 2001) at 31–33. In Hibbert, supra note 35 at 242, Justice Arbour referred to Justice Cory’s recommendations and noted that “[w]hile it is unnecessary to consider these recommendations in detail, I share the concern expressed by the Commissioner . . . .”
almost total absence of value as reliable positive identification, the evidence of the witnesses may be given some weight at least for that purpose. In addition, generally a jury might be concerned if a witness was not asked to identify an accused in court as the perpetrator and might draw an unjustified adverse inference against the Crown if the question was not asked. Moreover, the inability of a witness to identify the accused in court as the perpetrator is entitled to some weight.

I think it is important to remember that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it. I am not persuaded that the instruction quoted above, to the effect that such identification should be accorded “little weight”, goes far enough to displace the danger that the jury could still give it weight that it does not deserve.69

II. The Methodology of Hearsay Litigation

Given Starr’s emphasis on the principled approach, it is worth considering how this will affect the methodology of hearsay litigation in the future. The application of Starr is likely to lead to the predominance of one or the other of the following two approaches. Under the first approach, all hearsay will be analyzed ab initio under the principled approach, and the exceptions will become historical relics. Under the second approach, the exceptions will remain, and the principled approach will be used to modify them and in some cases to further test the putative reliability and necessity of a statement that would otherwise qualify for admission under an exception.

A. Applying the Principled Approach in All Cases

The first approach is by far the more controversial interpretation of Starr. However, a number of commentators and cases have recognized its attraction. For example, Professor Stewart observed:

If the traditional exceptions are to be encrusted with exceptions to their own operation based on the facts thrown up in a given case, why not simply ask whether

69. Ibid. at 241 [emphasis added].

(2003) 28 Queen’s L.J.
any given piece of hearsay evidence is necessary and reliable? There seems to be no logical reason to resist this extension of the principled approach.\(^{70}\)

A case-by-case approach may be the inevitable result of *Starr*, given that the focus of the reliability prong is now on factors surrounding the particular declarant (for example, motive to fabricate, perception, sincerity and memory). Similarly, to the extent that some of the exceptions will need to be modified because they lack a necessity requirement, this reformulation can only realistically be done on a case-by-case basis. Finally, *Starr* recognizes that in some instances, the case-by-case approach can be applied to scrutinize evidence that is otherwise admissible under an exception, presumably even one that has been revamped.\(^{71}\)

The problem, of course, is that this is not *Starr*’s methodology. As Justice Iacobucci noted:

> [T]he issues I have referred to are sufficient to illustrate that it is neither desirable nor necessary to abolish these exceptions outright. The more appropriate approach is to seek to derive the benefits of certainty, efficiency, and guidance that the exceptions offer, while adding the benefits of fairness and logic that the principled approach provides. The task is to rid the exceptions of their arbitrary aspects, in order to avoid admitting hearsay evidence that should be excluded.\(^{72}\)

Indeed, *Starr* suggests that it will only be in “rare cases” where evidence admissible under a traditional exception will not pass muster under the principled approach.\(^{73}\)

Another problem with the case-by-case methodology relates to the burden of proof. If one were to apply the normal rule that the burden falls on the person seeking to admit the evidence, this would mean that

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73. *Starr*, supra note 35 at 534.
the Crown would bear the burden of establishing compliance with the principled approach in all cases where it is the moving party. This too would be inconsistent with *Starr*, where the Court is clear that the burden of demonstrating non-compliance with the principled approach for evidence falling within a traditional hearsay exception rests with the party seeking exclusion.\footnote{\textit{Ibid.} at 534.}

**B. Applying the Principled Approach to the Existing Exceptions**

A more moderate interpretation of *Starr* is one that invites us to reconsider the existing hearsay exceptions using the following road map:

1. What exception applies?
2. Are the foundations of the exception based on indicia of reliability and necessity?
   (a) If no, reconfigure the exception using the principled approach. Once reconfigured, go on to determine whether a case-by-case approach is required.
   (b) If yes, go on to consider whether the case-by-case approach should be applied.
3. In assessing whether to apply the case-by-case approach, one should have regard to whether the traditional safeguards of reliability built into the exception comport with modern conditions or whether the newly created or traditional reliability safeguards are sufficient in the circumstances of the particular case to ensure that unreliable evidence does not taint the trial process.
Before turning to the exceptions that might be ripe for review, I will provide a brief framework that can be applied in the assessment of whether the evidence is necessary and reliable.

III. A Framework for Assessing Necessity

The necessity or “reasonably necessary” prong of the principled approach has been given a general and specific interpretation. General, as opposed to specific, necessity arises where the declarant is unavailable and there is no other source for the evidence. The critical threshold issue is whether the declarant is unable to testify, rather than merely unwilling. General necessity is not made out simply by asserting that the declarant is disinclined to testify, has failed to appear, cannot be found, or is unlikely to co-operate.75 General necessity can legitimately arise, for example, where the declarant is dead or is found not to be competent to testify. It can also arise where the witness would suffer trauma or other adverse effects from testifying, or has no memory of the event.

How is general necessity established? The Supreme Court of Canada has held that while there must be a foundation for the conclusion that the witness is unable to testify, that foundation does not have to be based on extrinsic evidence such as expert evidence.76 In F.(W.J.), the Court recognized that necessity may be founded on “the facts and circumstances of the case as revealed to the trial judge, or from evidence called by the Crown.”77 Does this mean that the declarant does not have to testify even if available? The Court recently answered this question in Parrott. Justice Binnie, for the majority, held:

While in this country an accused does not have an absolute right to confront his or her accuser in the course of a criminal trial, the right to make full answer and defence generally produces this result. . . . In my view, if the witness is physically

76. F.(W.J.), supra note 29 at 17–21.
77. Ibid. at 18.
available and there is no suggestion that he or she would suffer trauma by attempting to give evidence, that evidence should generally not be pre-empted by hearsay unless the trial judge has first had an opportunity to hear the potential witness and form his or her own opinion as to testimonial competence.\textsuperscript{78}

Specific necessity arises where the declarant is available to testify but the hearsay evidence is the best evidence available. In these cases, the witness is physically available and competent to testify, but because of age, problems of communication, trauma, mental deficiency or other reasons is unable to provide the most complete and frank rendition of the facts and there is no other evidence of “equal value” available.\textsuperscript{79} It is in this context that necessity is sometimes referred to as “an expediency or convenience.”\textsuperscript{80} Specific necessity also arises where the witness recants and, in some cases, where he or she proffers a conflicting version of events.\textsuperscript{81}

IV. A Framework for Assessing Reliability

The reliability of a statement of fact is measured by a testing of the declarant’s sincerity, perception, memory, and ability to communicate at the time the statement was made. The first factor is relevant to detecting fabrication, the others to detecting a mistaken (or false) account. The adversary system gives litigants an opportunity to test a person’s perception, credibility and memory through cross-examination. As well, the system offers some assurance of sincerity through its requirement of an oath and the threat of perjury charges. The following comment by an experienced trial judge highlights the importance of these tools:

Many times as a trial judge, I have accepted the evidence of a witness after examination in-chief. The demeanour of the witness and the nature of the evidence makes sense. Then after cross-examination, fabrication and motives to fabricate are

\textsuperscript{78} Parrott, supra note 30 at 470, 476–477 [emphasis in original].
\textsuperscript{80} See Smith, supra note 8 at 271.
\textsuperscript{81} See B.(K.G.), supra note 13 at 799.
revealed. Evidence, which seemed acceptable after examination in-chief, was then rejected as a result of the cross-examination.82

In cases where the declarant does not testify or has no recollection of the contents of his or her statement, or even of making it, these safeguards are not present.

The goal of the principled approach is to ensure that the triers of fact will have a workable methodology that can be used to assess the ultimate reliability of the evidence. This methodology is now known as the “circumstantial guarantees of trustworthiness” test. The principled approach has also assigned a gatekeeping role to the trial judge who must first determine what hearsay concerns are triggered by the statement and whether the facts surrounding its making offer sufficient circumstantial guarantees of trustworthiness to compensate for those concerns. If such guarantees do not exist, the evidence should be excluded.

A. The Relevant Factors

A review of the post-Khan hearsay jurisprudence reveals a number of relevant circumstances surrounding the making of an out-of-court statement that can be looked at in assessing sincerity, perception, and memory.

(i) Sincerity

The relevant factors in assessing sincerity are: whether the declarant had a motive to lie;83 whether the statement was made under circumstances of suspicion;84 whether there are alternative explanations for the content of the utterance;85 whether there is evidence of the declarant’s demeanour when the statement was made; whether there is

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83. Starr, supra note 35 at 534.
84. Ibid. at 532. The Supreme Court appears to recognize that a trial judge is “entitled to speculate within reason” as to possible motive and suspicion. See Rosenberg, supra note 13 at 129.
a record of the statement (for example, a videotape); whether the statement was made with an appreciation of the consequences of telling a lie; the place where the prior statement was made, and whether the declarant who claims to have no present memory is prepared to admit under oath that he or she gave an accurate statement at the time it was made.

(ii) Perception

The relevant factors in assessing perception are: whether the statement was made in response to a leading, suggestive or coercive question; whether the declarant was under the influence of alcohol or drugs; whether the declarant was under duress or other emotional turmoil; and whether the declarant had a peculiar means of knowledge.

(iii) Memory

The relevant factors in assessing memory are the proximity to the event or occurrence described in the utterance, and whether the recipient was under a duty to record the statement accurately.

Finally, reliability concerns can also be addressed where there is an opportunity at trial for cross-examination of either the recipient or the declarant.

86. See K.(G.B.), supra note 13 at 292–293.
89. See Fleet, ibid. at 42–43.
90. See Khan, supra note 11 at 548 and Lauzon, supra note 70 at para. 52.
92. See Ares, supra note 9.
93. See Lauzon, supra note 70 at para. 4.
95. See F.J.U., supra note 13 at 116, 118–119.
B. The Irrelevant Factors

One of the most significant aspects of *Starr* is its clarification of the factors that cannot be used to assess threshold reliability. These include the declarant’s general reputation for honesty, the consistency or inconsistency of prior or subsequent statements, and external confirmatory or corroborative evidence. The last factor is both controversial and puzzling. It would mean, for example, that forensic evidence confirming that a child was sexually assaulted cannot be used to demonstrate the threshold reliability of the child’s out-of-court statement, as was done in *Khan*. What makes this part of the judgment so troubling is that it is stated in a single paragraph and not addressed by any of the other judges. In particular, the Court did not address the conflicting judgments of *Khan* and *U.(F.J.*), nor did it consider the academic literature.

While the Court was obviously concerned about bootstrapping putatively unreliable evidence, it is hard to reconcile this valid concern with cases such as *Khan*, where there was reliable forensic evidence to confirm the reliability of the statement. Moreover, as one commentator observed: “One of the most reliable means of testing the accuracy of a piece of evidence is by seeing how well it fits into the picture described by the other evidence . . . .”

A number of traditional exceptions have corroborative requirements. The exception for declarations against penal interest is one such example. I suspect that the Court will likely revisit this issue again, as it is hard to imagine that the decision has foreclosed the use of corroborative evidence in all cases. For example, why should the

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96. See *Starr*, supra note 35 at 535.
defence not be entitled to rely on external corroboration where it seeks to tender the evidence in order to make full answer and defence."\(^{100}\)

**V. Refining the Hearsay Exceptions**

Given the absence of a uniform theory to explain all of the traditional hearsay exceptions, it is not surprising that many of these exceptions may need to be modified, abandoned, or subjected to case-by-case scrutiny if we are to apply the principled approach.\(^{101}\) The exceptions that appear most in need of attention include those for dying declarations, spontaneous exclamations, statements of co-conspirators, and admissions.

**A. Dying Declarations**

One of the classic, although rare, hearsay exceptions involves statements made by individuals on their deathbed. Consider the following case: X is found lying on the floor of a bedroom by the paramedics following a 911 call. One of them says to X, “You’re not going to make it.” X calls out, “Rose, she stabbed me!”\(^{102}\)

Under the traditional exception, this utterance would be admissible. It is made under the “settled expectation of death,” and is therefore presumed to be made at a time when “the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to

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\(^{100}\) In this context, the concern should be with ensuring fairness rather than advancing a theoretically sound conception of threshold reliability.

\(^{101}\) This need for revision has been recognized in the academic hearsay literature. See Delisle, *supra* note 4 at 276–277; Stewart, *supra* note 70 at 13–16; and Stuesser, *supra* note 97. See also, Derek Rowsell, “Necessity and Reliability: What is the Impact of Khan on the Admissibility of Hearsay in Canada?” (1991) 49 U.T. Fac. L. Rev. 294 at 304–308.

\(^{102}\) This is a variation of the facts in Leland, *supra* note 8.
that which is imposed by a positive oath administered in a Court of Justice."103

The main problem with dying declarations is not so much one of sincerity or faulty memory, but one of perception. While X’s statement may be sincere, how do we know that he was in a position to see who stabbed him? What if, for example, he was at a party where he had been drinking and the lights went out. Moreover, what if he did in fact have a motive to lie? As one commentator observed:

In his discussion of dying declarations, Wigmore offers several reasons to doubt the cogency of the inclusionary rationale which forms the basis of [the dying declaration exception] . . . . He suggests that motives of hatred and revenge may lead a declarant to make false statements, even with the approach of death. Further, that courts should not over-estimate the strength of religious compulsion upon the declarant without some guarantee that he or she is in fact a religious person.104

None of these circumstances (for example, motive to lie) would be explored under the traditional approach. This makes the exception ripe for review, or alternatively, for the application of the case-by-case approach. Additionally, the limitation that dying declarations are only admissible in homicide cases is another aspect of the exception that is likely to be reformed in light of Starr.

B. Spontaneous Utterances

One of the more common cases of spontaneous utterances appear to be “911” calls, particularly in domestic assault prosecutions.105 Excited utterances have traditionally been regarded as reliable where they are made under the stress or pressure of an event, and are made so close in time to the event that the possibility of concoction is remote.106 Consequently, while the exception may not need to be reconfigured, it may be appropriate for the application of the case-by-case approach.

104. Rowsell, supra note 101 at 306. See also Stewart, supra note 70 at 14.
106. See Khan, supra note 11 at 99–100. See also R. v. Dakin (1995), 80 O.A.C. 253 and Folland, supra note 38.
Contemporaneity and stress may offer some assurance that one’s memory is accurate, but we have all had “the experience of describing an event and later reflecting ‘on second thought that’s not what happened’.”\textsuperscript{107} Indeed, as one commentator has noted:

\begin{quote}
[T]he credibility of the statements must be judged on the totality of the evidence, and not merely on the pressure of the moment upon the declarant. Indeed, the greater the pressure, the more likely that the stress may produce erratic and unreliable perceptions or statements.\textsuperscript{108}
\end{quote}

Moreover, not all spontaneous utterances are necessarily sincere. Consider this example: X is charged with murder. His defence was that Y committed suicide. To rebut this defence, the Crown calls Z, who testifies that minutes after X walked into the house, Y rushed out with her throat cut and said “See what X has done!”\textsuperscript{109}

It is arguable that the statement is not reliable because it is equally consistent with the hypothesis that Y blamed X for driving her to suicide. Another troubling aspect of the exception is its lack of a necessity requirement.

\textbf{C. Statements in Furtherance of a Conspiracy or Joint Venture}

The co-conspirator’s, or joint venture, exception is really a variant of the admissions exception. Its premise is that where there is evidence of membership in a joint venture, the acts and utterances of all members, in furtherance of the common design, are attributable to each other as admissions. This is not based on circumstantial

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\textsuperscript{107} Delisle, \textit{supra} note 4 at 276. \\
\textsuperscript{108} Roswell, \textit{supra} note 101 at 308. \\
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guarantees of reliability or on the adversarial system, but on the law of agency.\textsuperscript{110} As the Supreme Court of Canada recognized in \textit{R. v. Gagnon}:

\begin{quote}
[B]y entering into the agreement, each party adopts all of his confederates as agents to assist him in carrying it out. Consequently by the general doctrine as to principal and agent, any act done for that purpose by any one of them may be admissible as evidence against the principal.\textsuperscript{111}
\end{quote}

The exception is triggered where the trier of fact is satisfied beyond a reasonable doubt of the common design and is also satisfied, on all of the admissible evidence, that it is more probable than not that the accused is a member of the conspiracy.\textsuperscript{112} David Layton articulates the traditional reasoning as to why these factors offer some assurance of reliability:

If one can be sure beyond a reasonable doubt that a joint venture exists, and also be satisfied on a balance of probabilities that the declarant and accused are both participants, then reliability \textit{may} be bolstered with respect to statements made by the declarant in an effort to advance the common design. In other words, because the accused and declarant share the same objective, the declarant’s utterances seeking to attain the joint purpose may bear some stamp of accuracy \textit{vis-a-vis} the accused.

\textsuperscript{110} There is also some authority to the effect that the exception is grounded in the \textit{res gestae} exception. See \textit{R. v. Pilarinos}, [2002] B.C.J. No. 1324 at paras. 34–40, 68 (B.C.S.C.) and the criticism in David Layton, “\textit{R. v. Pilarinos: Evaluating the Co-Conspirators or Joint Venture Exception to the Hearsay Rule}” (2002), 2 C.R. (6th) 293 at 300-301.


\textsuperscript{112} This has become known as the \textit{Carter} test. See \textit{Carter}, \textit{ibid.} at 575. There is conflicting authority on whether hearsay evidence can be used by the jury in deciding whether a conspiracy exists. For example, see \textit{R. v. Collins} (1999) 172 Nfld. & P.E.I.R. 1, 133 C.C.C. (3d) 8 at 48 (Nfld. C.A.) and \textit{R. v. Proulx}, [1995] R.J.Q. 2092, 101 C.C.C. (3d) 560 at 570 (Que. C.A.). This is highly problematic, for as Layton observes, “the integrity of the exercise is surely tainted and the principled approach is undermined.” See Layton, \textit{supra} note 110 at 305–306 for a discussion of all of the relevant authority on this issue.
existence of a common design and the “in furtherance” requirement link the accused to the statement in a way that potentially provides some assurance that the statement is true.113

There are however, a number of problems with this approach. First, “in apparent contravention” of Starr, “[a]ny existing reliability is . . . derived from compatibility with non-hearsay evidence that will only rarely comprise part of the circumstances immediately surrounding the hearsay statement in question.”114 Second, there is no requirement of a credibility assessment of the declarant (for example, whether he or she has a motive to lie or exaggerate the accused’s role), and in cases where the declarant is jointly tried with the accused, there may not be an opportunity for cross-examination. Nor is there any requirement of necessity. Finally, in contrast to all of the other exceptions, it is the trier of fact rather than the voir dire judge who decides whether the evidence is admissible. This exception is therefore ripe for review.115

There is now some lower court authority on the matter. In the recent case of R. v. Hape,116 a challenge to the co-conspirator’s exception failed. Other courts, while not overhauling the exception, nevertheless seem willing to apply a case-by-case approach.117

D. Admissions

The hearsay revolution has already had a significant impact on one of the most commonly relied upon hearsay exceptions—admissions of an accused to persons in authority. In R. v. Moore-McFarlane, the Ontario Court of Appeal imposed a de facto obligation to record, where

113. Layton, ibid. at 303 [emphasis in original].
114. Ibid. at 306.
115. In R. v. Sutton, [2000] 2 S.C.R. 595, the Court specifically noted that a Starr challenge had not been made in the case, leaving the impression that the Court would be prepared to entertain such an argument. In September 2002, the Ontario Court of Appeal heard a challenge to this exception in R. v. Chang, [2003] O.J. No. 1076 (C.A.) (QL).
feasible, all custodial statements made to the police. Justice Charron, for the Court, held:

[T]he Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resultant non-recorded interrogation suspect. In such cases, it will be a matter for the trial judge on the voir dire to determine whether or not a sufficient substitute for an audio or video tape has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.118

In creating this new rule, Justice Charron specifically alluded to the developments in the law of hearsay and, in particular, to Starr and its concern for wrongful convictions:

Since voluntary confessions are admitted as an exception to the hearsay rule, it should come as no surprise that concerns over reliability of the evidence are at the root of the confessions rule. . . . Again here, it is noteworthy that the relationship between reliability and fairness underlies the modern principled approach to hearsay exceptions in general. As noted by the Supreme Court of Canada in R. v. Starr . . . it would compromise trial fairness and raise the spectre of wrongful convictions, if the Crown were allowed to introduce unreliable hearsay against the accused. . . . Hence, it is only consonant with the general principled approach to hearsay exceptions that the court, as part of its inquiry into the voluntariness of a confession, should look for circumstantial guarantees of trustworthiness that sufficiently address the dangers associated with this kind of evidence.119

Other evidence scholars have commented on the implications of Starr for the admissions exception. Professor Stewart, for example, suggests that admissions to individuals not in authority may be reconsidered after Starr, particularly where the statements are made under duress or coercion.120 Further, Professor Delisle questions whether admissions

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119. Ibid. at 513–515.
not based on first hand knowledge or experience can be sustained under 

Starr.\textsuperscript{121}

\section*{Conclusion}

In this article, I have predicted that Starr will have a significant impact on our law of evidence, and in particular on how we litigate the admissibility of hearsay evidence. The full extent of its influence will, however, be impossible to assess until we have answers to the questions I have raised. For example, who will benefit from Starr and its progeny? Will more state evidence be excluded through a principled application of necessity and reliability, or will more defence evidence necessary to make out full answer and defence be admitted? Will hearsay litigation focus less on identifying the purpose for which the evidence is being led and more on its integrity? What traditional exceptions, if any, will be overhauled? What role, if any, will external corroboration play in assessing reliability? Finally, is Justice Iacobucci right in predicting that the principled approach will only be used in rare cases to scrutinize hearsay that is admissible under one of the exceptions, or will we see most if not all hearsay evidence assessed under the principled approach?

\textsuperscript{517} Instead of applying the principled approach, the Court addressed the issue from the perspective of whether the recipients were persons in authority so as to trigger the common law voluntariness rule.

\textsuperscript{121} Delisle, \textit{supra} note 4 at 276. This aspect of the admissions exception was confirmed in \textit{R. v. Streu}, [1989] 1 S.C.R. 1521, 70 C.R. (3d) 1 at 9.