Chapter 50A

Impeaching a Witness's Credibility Through Prior Inconsistent Statements

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50A:10 INTRODUCTION

Frequently, litigation turns on the credibility of a witness. Even after all the pleadings are drafted, volumes of documents have been produced, oral examinations have been conducted, expert reports have been written, and motions have been ruled upon, often a case will still come down to the simple matter of whose witness a judge chooses to believe.

As a result, a witness's credibility is of the utmost importance. If the judge believes your witness's version of events, you may win; if the judge does not find your witness credible, you are likely to lose.

One of the primary purposes of cross-examination is to impeach the credibility of adverse witnesses. By impeaching the credibility of a witness you can reduce or even eliminate the weight the trier of fact gives to their evidence. This is most commonly achieved by pointing the trier of fact to the witness's self-contradictions in prior inconsistent statements written or uttered by the witness.

50A:20 CREDIBILITY

Credibility is defined by Black's Law Dictionary as "The quality that makes something (as a witness or some evidence) worthy of belief".[1]

The Supreme Court of Canada, in *Raymond v. Bosanquet (Township)*,[2] described credibility as:

> . . . not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory — in a word, the trustworthiness of their testimony . . .

Echoing the Supreme Court, Justice Robertson of the Ontario Superior Court of Justice describes credibility as "a function of truthfulness, reliability and accuracy".[3]

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[1] Black's Law Dictionary, 9th ed., *sub verbo* "credibility".

[2] (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 (S.C.C.).

[3] *Family & Children's Services of Lennox & Addington v. W. (S.)*, 2002 CarswellOnt 4917, [2002] O.J. No. 5362 at para. 44 (Ont. S.C.J.).

Justice Doherty, writing for the Ontario Court of Appeal in *R. v. Morrissey*,[4] describes the relationship between reliability and credibility as follows:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable.[5]

Where witnesses provide inconsistent evidence, it becomes necessary to make a determination as to credibility.

Canadian courts have considered a number of factors to assess a witness's credibility.[6] One factor is the consistency of a witness's testimony when subjected to testing under cross-examination:

> Credibility assessment includes consideration of consistency and inconsistency in the evidence given by the witnesses, including the plaintiff, with testimony or evidence otherwise given at other times . . .[7]

50A:20.10 The Importance of Cross-Examination

Cross-examination is critical to the trial process. It is the cross-examiner's primary opportunity to demonstrate to the court that the evidence adduced by the opposing party's witness is not to be believed, *i.e.*, that the witness is not credible. The adversarial system itself is "based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination".[8]

The importance of cross-examination in the criminal context is obvious, in that it is central to the right of an accused person to confront his or her accusers. However, the importance of cross-examination to a fair trial process is equally important in civil cases. Often, the process of cross-examination is critical to the ability of a party to present his or her own case.[9] The adverse party's witnesses can be asked to confirm evidence that is helpful to your own case, or, failing that, their credibility can be impeached.

In *R. v. Osolin*,[10] the Supreme Court of Canada discussed cross-examination as a fundamental aspect of a fair trial and as a tool for assessing credibility. Justice Cory wrote:

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[4] (1995), 22 O.R. (3d) 514, 80 O.A.C. 161 (Ont. C.A.).
[5] *Ibid.*, at p. 17 of the judgment.
[6] See Kevin P. McGuinness and Linda S. Abrams, *The Practitioner's Evidence Law Sourcebook* (Canada: LexisNexis Canada, 2011) [*McGuiness & Abrams*], at p. 623, §6.96, for a list of these factors.
[7] *M. (C.) v. Canada (Attorney General)* (2004), 130 A.C.W.S. (3d) 873, 2004 SKQB 175 at para. 15 (Sask. Q.B).
[8] *R. v. Khelawon* (2006), 274 D.L.R. (4th) 385 at para. 48, [2006] 2 S.C.R. 787 (S.C.C.).
[9] *McGuinness & Abrams*, *op. cit.*, footnote 6, at p. 544, §6.47.
[10] (1993), 109 D.L.R. (4th) 478, [1993] 4 S.C.R. 595 (S.C.C.).

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity.[11]

50A:20.20 Prior Inconsistent Statements

A cross-examiner can effectively attack a witness's credibility by pointing to inconsistencies between the evidence the witness has given in their examination-in-chief and in their earlier statements. These are commonly referred to as 'prior inconsistent statements'. Identifying errors or inconsistencies that the witness has made in their recollection of a particular point "may bring into question the accuracy or the veracity, or both, of the witness's entire testimony".[12]

In *McCormick on Evidence*, a leading American text on the law of evidence, the following test is put forward as to whether there is an 'inconsistency' between current testimony and a prior statement: "Could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor?"[13] This test was adopted by the British Columbia Supreme Court in *R. v. Turpin*,[14] where the court was considering whether the Crown could prove in rebuttal evidence two brief oral statements made by the accused to police before he was arrested. The accused claimed that he could not remember any events of the day in question, because he was too intoxicated on that day. The court ruled that there was an inconsistency, as the jury could reasonably find that if the accused believed the truth of his present testimony that he has never had any memory of the events of that day, then he would have been unlikely to make the statements that the police says he did make on that date just prior to his arrest.[15]

If the lack of inconsistency is obvious, the court will probably find that the cross-examination should not be allowed to proceed. Where the presence or absence of inconsistency is not clear, however, counsel can examine the witness in order to lay the foundation for demonstrating that inconsistency exists.[16]

Prior inconsistent statements can take a variety of forms. It can be a sworn statement given by a party under oath in an examination for discovery, an affidavit, or another proceeding. It can also be unsworn, as in a statement given by a witness to a police officer. The statement itself may be written or oral, and may take the form of videotaped or audio recorded speech.

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[11] *Ibid.*, at p. 514 D.L.R.
[12] David M. Paciocco and Lee Stuesser, *Essentials of Canadian Law: The Law of Evidence*, 6th ed. (Toronto: 2011, Irwin Law) [*Paciocco & Stuesser*], at p. 452.
[13] J.W. Strong (ed.), *McCormick on Evidence*, 6th ed. (St. Paul: West Publishing, 2006), s. 34, at 152.
[14] (2005), 65 W.C.B. (2d) 257, 2005 BCSC 506 at para. 6 (B.C.S.C.).
[15] *Ibid.*, at para. 7.
[16] Alan W Bryant, Sydney N. Lederman and Michelle K. Fuerest, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis Canada, 2009) [*Sopinka & Lederman*], at p. 1150, §16.154.

Prior inconsistent statements can be critical to cases which come down to credibility battles on conflicting testimony. In *Peterson v. Wahl*,[17] Justice Yanosik of the Alberta Court of Queen's Bench described how judges use consistency of testimony to assess credibility:

> Conflicting testimony requires an assessment of the credibility of the witnesses in the light of those principles applicable to the assessment of credibility generally, and in the light of the burden of proof in adducing evidence. There is no single rule or test which a judge can apply to tell him when a witness is speaking the truth or an untruth. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his or her story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. The judge should consider what facts are beyond dispute and examine which of the conflicting accounts best accords with those facts according to the ordinary course of human affairs and the usual habits of life or business; the consistency with the testimony; the way the testimony dovetailed in with the admitted or proven facts.[18]

The number and seriousness of the inconsistencies will necessarily weigh into a judge's credibility assessment.

> While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue . . .[19]

Proof that a witness made a prior inconsistent statement may be gained from the witness him- or herself during cross-examination (*i.e.*, the witness admits making the prior inconsistent statement), or, should the witness deny making the prior inconsistent statement, then evidence may be adduced from other witnesses that the statement was made. If necessary, a court reporter could be called to attest to the accuracy of the reading but generally a transcript that is signed by the reporter should be sufficient, as the parties had an opportunity to review it. Denying the making of a prior inconsistent statement which is subsequently proven may further damage the witness's credibility.

50A:30 THE GOALS OF IMPEACHMENT

Justice Archibald, writing with Kenneth Jull in the Advocates Society Journal, states that the impeachment of a witness, when properly conducted, should be linked to the closing address and the goals of the cross-examination. The authors state that an impeachment has three alternative objectives:

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[17] (1994), 46 A.C.W.S. (3d) 1347, 1994 CarswellAlta 910 (Alta. Q.B.).
[18] *Ibid.*, at para. 10.
[19] *R. v. B. (R.W.)* (1993), 40 W.A.C. 1 at para. 29, 24 B.C.A.C. 1 (B.C.C.A.).

1. The witness admits the prior statement as being true, and counsel argues in closing that this is the truth.
2. The witness admits that she was mistaken in one of the versions (either prior or subsequent) and that her powers of observation are thereby weakened. At closing, the argument may range from a narrow conclusion to a broader conclusion. Counsel may argue that the mistake may impact the testimony of the witness only as it relates to one event (for example, where the lighting conditions were not good) or may weaken the entire testimony of the witness (for example, where the error is one of memory in general). On that basis, the argument will be that the witness's testimony is entirely unreliable.
3. The witness admits (or the conclusion is inescapable) that her story changed due to either bias or dishonesty. Such bias or dishonesty of character throws the entire testimony of that witness into real doubt.

The objective will, of necessity, depend on the facts of each case.

Where the prior inconsistent statement is more favourable to your client's case than the later-occurring self-contradictions, the prior inconsistent statement may be adduced for the truth of its contents. As will be discussed later in this paper, where a witness refuses to adopt a prior inconsistent statement, submitting a prior inconsistent statement for the truth of its content will raise hearsay concerns. In such cases counsel will need to introduce evidence which attests to the necessity and reliability of the prior inconsistent statement.

Where the witness is sympathetic, prior inconsistent statements may be characterized as mistakes or lapses in memory. It may be suggested that, while the witness is of good character, their credibility is brought into question by contradictions between earlier and later testimony.

If only parts of a witness's testimony need to be discredited it may be suggested that the witness is generally credible to testify regarding facts helpful to the adverse party, but is not capable of accurately recalling specific information which is harmful to the adverse party's case. For example, in a contractual dispute it may be helpful for an adverse witness to testify that the defendant always fulfilled its contract prior to defaulting, but we may wish to discredit the witness's evidence that the defendant eventually defaulted on his contractual obligations. So we may allow that the witness's general recollection is accurate, but then seek to call into question the witness's recollection of the specific acts of default.

If all of a witness's testimony is harmful, the adverse party may attempt to suggest that the witness is not credible due to the inconsistencies in their testimony and thus all of the testimony is unreliable. It may be suggested that the inconsistencies in the witness's testimony are the result of imperfect memory, false recollection, or willful dishonesty.

50A:40 THE PROCESS FOR IMPEACHING WITNESS'S CREDIBILITY

50A:40.10 Statutory Authority

The authority under which a witness's credibility may be impeached via introduction of a prior inconsistent statement is governed by legislation. The same legislation provides the method of impeachment.

Section 20 of the Ontario *Evidence Act*[21] governs the cross-examination of a witness on a written prior inconsistent statement. It states:

> *Examination of witnesses, proof of contradictory written statements*
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> 20. A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question, without the writing being shown to the witness, but, if it is intended to contradict the witness by the writing, his or her attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting the witness, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his or her inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit. [Emphasis added.]

Where the prior inconsistent statement was made orally, s. 21 of the *O.E.A.* applies. It states:

> *Proof of contradictory oral statements*
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> 21. If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such statement. [Emphasis added.]

The *Canada Evidence Act*[22] has similar provisions for proceedings taking place in courts or tribunals created under federal law, or in provincial courts when hearing matters under federal law (*e.g.*, the *Criminal Code*[23]):

> *Cross-examination as to previous statements*
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> 10(1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for

[21] R.S.O. 1990, c. E.23 ("*O.E.A.*").
[22] R.S.C. 1985, c. C-5 ("*C.E.A.*").
[23] R.S.C. 1985, c. C-46.

inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

. . . . .

Cross-examination as to previous oral statements

11. Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

50A:40.20 Relevance and the Collateral Fact Rule

The collateral fact rule, succinctly stated, requires that "answers given by a witness to questions put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence".[24] This rule is intended to enhance the efficiency of the trial process by ensuring that the evidence presented is relevant to the facts in issue in the case. Without it, there is a risk that trials could be needlessly prolonged by digressions into issues which are of little importance.

What is to be considered a collateral fact has been the subject of much discussion. In *R. v. Krause*,[25] Justice McIntyre, writing for the Supreme Court, stated that collateral matters are "not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case". To distinguish between a collateral and a substantive issue, English courts have suggested the following test:

> . . . if the answer of a witness is a matter which you would be allowed on your part to provide in evidence — if it have such a connection with the issue, that you would be allowed to give it in evidence — then it is a matter on which you may contradict him . . .[26]

Generally, the credibility of a witness was seen as a collateral issue. *Per* the Ontario Court of Appeal in *R. v. Prebtani*,[27] "subject to certain exceptions, the collateral fact rule prohibits a party from adducing extrinsic evidence to contradict a witness unless the extrinsic evidence is relevant to some issue in the case other than merely to contradict the witness" (emphasis added). The collateral fact rule thus functions to limit the scope of evidence which can be presented when impeaching the credibility of a witness.

An exception to the collateral fact rule has been carved out over time for prior inconsistent statements regarding substantive issues tendered on cross-examination to challenge the credibility of a witness.

This exception was eventually enshrined in statute. Sections 20 and 21 of the *O.E.A.* (replicated above) provide that the witness may be examined regarding a prior inconsistent statement that is "relative to the matter". Sections 10 and 11 of the

[24] *Sopinka & Lederman*, *op. cit.*, footnote 16, at p. 1170, §16.200.
[25] (1986), 33 D.L.R. (4th) 267 at p. 274, [1986] 2 S.C.R. 466 (S.C.C.).
[26] *Attorney General v. Hitchcock* (1847), 1 Exch. 91 at p. 99, 154 All E.R. 38 at p. 42.
[27] (2008), 243 O.A.C. 207 at para. 130, 240 C.C.C. (3d) 237 (Ont. C.A.), leave to appeal refused 262 O.A.C. 400 (note), 400 N.R. 384 (note) (S.C.C.).

C.E.A. (replicated above) similarly provide that the prior inconsistent statement must be "relative to the subject-matter of the case".

So, while a prior inconsistent statement can be introduced to challenge a witness's credibility where the inconsistency is relative to the matter/subject-matter of the case, prior inconsistent statements relating to collateral matters, introduced only for the purpose of impeaching credibility, are not admissible.[28]

There still exists some uncertainty over what is "relative to the subject-matter of the case". Some judges have defined the term narrowly, "confining proof of prior inconsistent statements to those relating directly to a fact in issue or to matters that are relevant to credibility, independent of the fact that they are inconsistent".[29] Others have defined the term broadly as "sufficiently connected to the material issues in the case".[30] Paciocco and Stuesser suggest this requires only that the evidence be worth hearing.[31]

50A:40.30 The Rule in Browne v. Dunn

The rule in *Browne v. Dunn*[32] requires that "If counsel is considering the impeachment of credibility of a witness by calling independent evidence, the witness must be confronted with this evidence in cross-examination while he or she is still in the witness box."[33]

The rationale for the rule was provided by Lord Hershell L.C. He wrote:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to

[28] *Sopinka & Lederman*, *op. cit.*, footnote 16, at p. 1151, §16.156.
[29] *Paciocco & Steusser*, *op. cit.*, footnote 12, at p. 454, citing Justice Doherty in *R. V. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.).
[30] *R. v. Eisenhauer* (1998), 165 N.S.R. (2d) 81, 495 A.P.R. 81 (N.S.C.A.), at p. 42 of the judgment, leave to appeal refused 171 N.S.R. (2d) 200 (note), 519 A.P.R. 200 (note) (S.C.C.).
[31] *Paciocco & Stuesser*, *op. cit.*, footnote 12, at p. 454.
[32] (1893), 6 R. 67, at pp. 70-71 (H.L. Eng.).
[33] *Sopinka & Lederman*, *op. cit.*, footnote 16, at p. 1161.

> impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.[34]

Putting the earlier statement which contradicts the witness's current testimony to the witness serves two different purposes. Firstly it promotes fairness by giving the witness an opportunity to explain the contradiction or inconsistency between their earlier testimony and their trial testimony. Secondly, it can save the court's time; the witness, when confronted with the prior statement may admit making it, saving the cross-examiner from calling other witnesses to prove the statement was made.

Previously, the common law required showing the witness the writing before questioning him/her about it. The common law rule was criticized because it negated the cross-examiner's tactical ability by giving the witness an opportunity to spot the inconsistency in their earlier statement and adapt their current testimony to match (*e.g.*, formulating reasons why their earlier statement may have been inaccurate).

The enactment of the *O.E.A.* and *C.E.A.* did away with that requirement. These statutes now only require that if the witness is to be contradicted by the written prior inconsistent statement, the witness's attention shall, before such contradictory proof is given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness. The judge or other person presiding at any time during the trial or proceeding may require the production of the statement for inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit.[35]

The rule in *Browne v. Dunn* is not absolute. The Supreme Court of Canada has confirmed this on at least two separate occasions. In *R. v. Palmer*,[36] Justice McIntyre quoted approvingly from the Court of Appeal of British Columbia's decision in the same case. There, Justice McFarlane of the Court of Appeal said for the court:

> "Reference was made to *Browne v. Dunn* (1894) The Reports 67, and to *R. v. Hart* (1932) 23 Cr. App. R. 202. I respectfully agree with the observation of Lord Morris in the former case at page 79:
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> > 'I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witnesses' credit, that you should take him through the story which he had told, giving him notice by questions that you impeached his credit.'
>
> "In my opinion the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule. It is a matter of weight to be decided by the tribunal of fact.[37]

And again, in *R. v. Lyttle*,[38] Justices Major and Fish confirmed that:

> The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case.[39]

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[34] *Supra*, footnote 32.
[35] *Supra*, footnote 21, at s. 20; *supra*, footnote 22, at s. 10.
[36] (1979), 106 D.L.R. (3d) 212, [1980] 1 S.C.R. 759 (S.C.C.).
[37] *Ibid.*, at p. 224 D.L.R.
[38] (2004), 235 D.L.R. (4th) 244, [2004] 1 S.C.R. 193 (S.C.C.).
[39] *Ibid.*, at para. 65.

If the person making the prior inconsistent statement was given an opportunity to deal with the alleged inconsistency when testifying at trial, or if an opportunity is afforded by re-calling that person to testify, the court may find strict compliance unnecessary. In such cases "the fairness concerns which underlie not only s. 21 but also *Palmer* and other cases interpreting and applying *Browne v. Dunn* have been satisfied."[40]

Judges have some discretion as to how a contravention of the rule in *Browne v. Dunn* is to be treated. Rather than excluding the contradictory evidence, the judge may permit it but regard the failure to have confronted the witness with it as negatively impacting on the credibility of the contradictory evidence. Alternatively, the trial judge may permit counsel to respond to the contradictory evidence.[41]

There are some authorities which suggest that the rule in *Browne v. Dunn* should be relaxed in civil cases in light of the liberal rules relating to pretrial discovery. While this has some support in jurisprudence, it seems that, on the whole, the effect of a failure to put contradictory evidence to a witness will be fact-specific.[42]

As a result of the rule in *Browne v. Dunn* and the corresponding sections in the *O.E.A.* and *C.E.A.*, it is important, prior to tendering evidence, to clarify to the court the reason for which it is being tendered. If the evidence is being tendered to attack a witness's credibility, the rule in *Browne v. Dunn* will apply.

50A:40.40 Admitting a Prior Inconsistent Statement For Its Truth

Suppose that you are involved in a case where your client, the defendant, is being accused of failing to properly salt the sidewalk outside his house, leading to a slip and fall. The plaintiff makes an insurance claim the next day and says that when he fell he hit his head and cannot remember very well exactly where he slipped, but it was somewhere on the block where the defendant lives. Later, at trial, the plaintiff is on the stand and claims that he has perfect recollection of the time of the fall and is absolutely positive that he slipped on the sidewalk outside of the defendant's house.

Here, it is likely more advantageous to prove that the prior inconsistent statement was true, than to use it solely to impeach the credibility of the witness. If, as the plaintiff initially reported to his insurance company, he doesn't know where on the block he slipped, then the entire case against your client disintegrates. Rather than arguing that the plaintiff lacks credibility because he is contradicting his earlier statement, you would be better served to argue that the plaintiff's statement, made closely following the accident, was the true version of events.

However, the plaintiff will strenuously deny that the statement to his insurance company was true. In such a situation, hearsay concerns will arise and the evidence may not be accepted.

Though hearsay traditionally concerned an out-of-court statement, adduced for the truth of its content, where there is not a contemporaneous opportunity to cross-

[40] *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 at p. 65, 32 O.T.C. 321 (Ont. Gen. Div.), additional reasons 152 D.L.R. (4th) 102, 38 O.T.C. 345 (Ont. Gen. Div.).

[41] *Sopinka & Lederman, op. cit.*, footnote 16, at p. 1163.

[42] F. Paul Morrison & Christoper A. Wayland, "Browne v. Dunn and Similar Fact Evidence — Isles of change in a Calm Civil Evidence Sea", McCarthy Tetrault (1 May 2003), online: McCarthy Tetrault http://mccarthy.ca/pubs/Brown_v_Dunn_and_Similar_Fact_Evicence.pdf.

examine the declarant,[43] the modern interpretation of hearsay also encompasses prior out-of-court statements of the witness who is testifying.[44]

Hearsay concerns can arise when the witness either recants an earlier out-of-court statement or testifies that they have no memory of making the statement. The issue in both cases is that:

> The trier of fact does not see or hear the witness making the statement and, because there is no opportunity to cross-examine the witness *contemporaneously* with the making of the statement, there may be limited opportunity for a meaningful testing of its truth. In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.[45]

Traditionally, prior inconsistent statements of a witness were available only to impeach the witness's credibility.[46] However, in *R. v. B. (K.G.)*, the Supreme Court of Canada found that a prior inconsistent statement could sometimes be admitted for its truth.[47] It is necessary that sufficient standards of necessity and reliability under the "principled approach" to hearsay are met.[48] Necessity relates to the availability of relevant evidence; reliability relates to circumstantial guarantees of trustworthiness.

Necessity, in many cases, is demonstrated by showing that a witness who holds key information, previously recorded, is now unable to testify. Where the witness who is testifying recants their earlier statements, it is obviously not the case that they are unavailable. The Supreme Court of Canada in *R. v. B. (K.G.)* commented on the application of the necessity criterion to prior inconsistent statements of a witness who is testifying. Justice Lamer wrote:

> In the case of prior inconsistent statements, it is patent that we cannot expect to get evidence of the same value from the recanting witness or other sources: as counsel for the appellant claimed, the recanting witness holds the prior statement, and thus the relevant evidence, "hostage". The different "value" of the evidence is found in the fact that something has radically changed between the time when the statement was made and the trial and, assuming that there is a sufficient degree of reliability established under the first criterion, the trier of fact should be allowed to weigh both statements in light of the witness's explanation of the change.[49]

Where non-hearsay statements are made in court, their reliability is supported by the oath taken by the witness, the trier of fact's ability to observe the witness, and the contemporaneous cross-examination by the adverse party. Where these safeguards are absent, as with prior inconsistent statements being tendered for their truth, "there must be some substitute factor to demonstrate sufficient reliability to make it safe to admit the evidence".[50]

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[43] *Sopinka & Lederman*, *op. cit.*, footnote 16, at p. 229, citing Justice Charron in *R. v. Khelawon* (2006), 274 D.L.R. (4th) 385 at paras. 35 and 38, [2006] 2 S.C.R. 787 (S.C.C.).

[44] *Sopinka & Lederman*, *op. cit.*, footnote 16, at p. 229 citing: *R. v. Khelawon*, *supra*, footnote 43, at para. 37; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at pp. 763-64, 61 O.A.C. 1 (S.C.C.); *R. v. Starr* (2000), 190 D.L.R. (4th) 591 at para. 158, [2000] 2 S.C.R. 144 (S.C.C.).

[45] *R. v. Khelawon*, *supra*, footnote 43, at para. 40.

[46] Hamish Stewart, "Special Issue: Education, Administration, and Justice: Essays in Honour of Frank Iacobucci: IV. Public Law: Justice Frank Iacobucci and the Revolution in the Common Law of Evidence" (2007), 57 Univ. of Toronto L.J. 479.

[47] *R. v. B. (K.G.)*, *supra*, footnote 44, at p. 818 S.C.R.

[48] *R. v. Starr*, *supra*, footnote 44.

[49] *R. v. B. (K.G.)*, *supra*, footnote 44, at p. 799 S.C.R.

[50] *Ibid.*, at p. 787 S.C.R.

R. v. B. (K.G.) offers guidance as to what will qualify as adequate substitutes for the safeguards:

> . . . if (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement.[51]

These are not absolute requirements though. The sufficient reliability of a non-accused witness' prior inconsistent statement may be established by:

i. the presence of adequate substitutes for testing truth and accuracy (procedural reliability); and
ii. sufficient circumstantial guaranties of reliability or inherent trustworthiness (substantive reliability).[52]

For example, the oath requirement can be satisfied by tendering evidence from which it can be inferred that the speaker appreciated the solemnity of the occasion and the importance of telling the truth, and external evidence which confirms the reliability of the out-of-court statement.[53]

If the witness is a party in a civil proceeding, and their statement was voluntarily given, it may also be admitted under the admission exception to the hearsay rule.[54]

50A:40.50 Entering the Prior Inconsistent Statement As an Exhibit

It is important to note that contradicting statements put to a witness to impeach their credibility do not necessarily have to be entered as evidence themselves. This is of particular importance where part of a document is being used to impeach the witness's credibility and other portions of the document contain information damaging to the cross-examiner's case.

Paciocco and Stuesser caution practitioners that although the discretion exists to have documents produced,

> This discretion should not be used to introduce prior inconsistent statements as a matter of course simply because there has been some cross-examination on them. The inconsistencies are on the record. Much will depend, however, on the extent of the use made of the writing.[55]

The trial judge has the discretion to order the prior inconsistent statement entered as evidence. This will depend on the use to which the document is put. The British Columbia Court of Appeal addressed this issue in the context of the *C.E.A.* in *R. v. Rodney*.[56] The court stated:

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[51] *Ibid.*, at p. 795 S.C.R.
[52] *R. v. Adjei* (2013), 309 O.A.C. 328, 290 C.R.R. (2d) 42 (Ont. C.A.), citing *R. v. B. (K.G.)*, *supra*, footnote 44, at pp. 796-797 S.C.R.
[53] *R. v. Adjei*, *ibid.*, at para. 39, citing *R. v. Trieu* (2005), 74 O.R. (3d) 481 at para. 85, 195 O.A.C. 263 (Ont. C.A.).
[54] *Sopinka & Lederman*, *op. cit.*, footnote 16, at p. 1151, §16.157.
[55] *Paciocco & Steusser*, *op. cit.*, footnote 12.
[56] (1988), 33 B.C.L.R. (2d) 280, 46 C.C.C. (3d) 323 (B.C.C.A.).

> If there is extensive cross-examination, as in *R. v. Smith* and *R. v. Newall*, *supra*, then it may be necessary to have the statements marked as exhibits so that the court and counsel, and possibly the jury if the trial judge orders, may properly understand the extent to which he has been contradicted or impeached. On the other hand, if the cross-examination has not been extensive the proper exercise of the discretion under s. 10(1) may lead the judge to permit only edited parts of the writing to be marked or for none of them to be marked.[57]

50A:40.60 Use of Discovery Transcripts

Ontario's Rules of Civil Procedure,[58] explicitly allow for the discovery evidence of an adverse party to be read into the record to impeach a witness. Rule 31.11(2) states:

> *Impeachment*
>
> (2) The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

As with other written prior inconsistent statements, if the cross-examiner intends to use a transcript from an examination for discovery to impeach a witness, the provisions of ss. 20 and 21 of the *O.E.A.* must be complied with.

Where only part of the evidence given on an examination for discovery is read into or used in evidence, the adverse party may request that the trial judge introduce any other part of the evidence (*i.e.*, of that same transcript) that qualifies or explains the part of the transcript that was introduced.[59] This may be done where additional portions of the transcript are required in order to accurately reflect the evidence given on discovery.[60] However,

> . . . if the answer to a question put on discovery is complete in itself, this rule does not entitle an adverse party to have read in other parts which explain only why the answer was given. It is for the adverse party to request that additional portions of the transcript be read in at trial, and if he or she fails to do so, the court will not intervene.[61]

The portions of discovery transcripts read in by a party become part of its case. It is recommended that great care be exercised when choosing those portions of the discovery evidence to be read in. If that evidence is unfavourable, it can end up being relied upon by the trier of fact to support a finding against the party which tendered the evidence.[62]

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[57] *Ibid.*, at p. 331 C.C.C.
[58] R.R.O. 1990, Reg. 194.
[59] Rule 31.11(3).
[60] L. Craig Brown, "Use of Discovery Transcripts at Trial" (Paper, delivered at the Ontario Trial Lawyers Association New Lawyers Division Conference, 28 September 2012), online: Thomson Rogers http://www.thomsonrogers.com/lcb-use-of-discovery-transcripts-at-trial.
[61] *Ibid.*, citing *Basil v. Spratt* (1918), 44 O.L.R. 155 at p. 169 (C.A.).
[62] *Ibid.*, citing *Capital Trust Corp. v. Fowler* (1921), 50 O.L.R. 48 at pp. 59-90, 64 D.L.R. 298 (C.A.), *per* Hodgins J.A.

50A:50 SUGGESTED TECHNIQUES

In *Fundamentals of Trial Techniques*, the authors write that effective impeachment requires a demonstration of the difference between the witness's testimony and their prior inconsistent statement. They suggest that the two contradictory statements should be presented one immediately after the other, to make the contrast clear.[63]

Justice Archibald and Kenneth Jull[64] canvass a number of different approaches to confronting a witness with a prior inconsistent statement. They suggest the following methods:

- The classic method
  1. Recommit the witness to the evidence they have given at trial — Repeat the evidence verbatim to them and ask them to confirm that that is their evidence.
  2. Validate the circumstances of reliability underlying the making of the prior statement – Get the witness to describe the circumstances in which they made the statement, focusing on factors which support the accuracy and veracity of the prior statement.
  3. Confront the witness with the prior statement — *per* the rule in *Browne v. Dunn* and the provisions of the *O.E.A.* and *C.E.A.*, the cross-examiner must now call the witness's attention to the contradicting parts of the earlier statement.[65]
- The elegant method
  1. Attempt to recommit the witness to the evidence they gave in their prior inconsistent statement. They may deny it.
  2. Validate. It is important to suggest reasons why the earlier statement is more likely to be true (*e.g.*, it was given closer to the event).
  3. Confront.
- The dramatic method
  1. Recommit the witness to the present evidence (if impeaching credibility) or state the proposition to the witness (if introducing the prior statement for its truth).
  2. Confront.
  3. Validate.
- The avoiding reactance method
  1. Validate.
  2. Show the prior statement to the witness.
  3. Compare the prior statement to the evidence-in-chief.
  4. Ensure the goal is achieved.

Each of the suggested methods calls for the cross-examiner to validate the witness's testimony (either the evidence given at trial, or in the prior inconsistent statement). When validating a witness's testimony, the following points should be examined:

> The witness must be asked about the particular occasion upon which the statement was made or testimony given. Emphasis may be placed on the proximity in time between the original event and the making of that statement, the opportunity for the witness to

[63] Thomas A. Mauet, Donald G. Casswell & Gordon P. MacDonald, *Fundamentals of Trial Techniques*, 2nd Canadian Ed. (New York: Aspen Publishers, 1995), at p. 231 (*Fundamentals of Trial Techniques*).
[64] *Archibald & Jull*, *op. cit.*, footnote 20.
[65] *Ibid.*, at paras. 22-34.

> consider what information was given at that time and the ability to have done so accurately and truthfully, the accuracy of the recording of the statement on that occasion and the witness' awareness of the importance of being accurate and complete at that time. Without letting the witness read the statement or transcript, he should be asked to or identify or acknowledge that he made the statement or gave evidence on the date in question.[66]

The authors of *Fundamentals of Trial Techniques* caution that validating the prior statement should only be done if you want the jury to accept it as the truth. If, however, your theory of the case is that neither statement is true, then you should not validate the prior statement.[67]

The above methods come with certain advantages and risks and serve different uses.

The classic method is the most commonly used method of impeachment and is generally what is taught in trial advocacy courses. The authors of *Fundamentals of Trial Techniques* teach a fundamentally similar method of impeachment.[68] Archibald and Jull suggest that the classic method is ideally suited to impeaching the credibility of the witness, because it sets up a clear contrast between the present testimony and the prior inconsistent statements by putting them side by side.[69]

The elegant method, on the other hand, is best suited to introducing a prior inconsistent statement for its truth.[70] The advantages of this approach are that it clearly signals to the trier of fact that counsel's theory of the case is that the prior inconsistent statement is the truth, and it avoids unnecessary repetition of the damaging evidence. In some cases, the witness may simply agree with the prior inconsistent statement, saving the cross-examiner from adducing evidence related to its truth.[71]

The dramatic method is the riskiest method put forward by Archibald and Jull. By confronting the witness with the statement prior to attempting to validate it, witnesses may resist validating the circumstances of reliability of the prior inconsistent statement. They may claim not to remember key details that would support the reliability of the statement.[72] The benefit of this method is that it places the tediousness of validation at the end of a witness's testimony and the confrontation provides the context for why the validation is necessary.

Archibald and Jull argue that the avoiding reactance method is the optimal approach to impeachment, based on the psychological forces at play when a witness's testimony is impeached and the authors' anecdotal experience.[73]

The authors claim that witness will have little reaction to a line of questioning that begins with a question about the making of a prior statement and may not even understand why it is relevant. Once the witness has validated the statement, it will be more difficult for them to deny making the statement once they are shown it. The

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[66] Jeffrey Manishen, "Getting Maximum Impact From Prior Inconsistent Statements" (27 June 2005), online: Ross & McBride LLP http://www.rossmcbride.com/news/getting-maximum-impact-from-prior-inconsistent-statements-2/.
[67] *Fundamentals of Trial Techniques*, *op. cit.*, footnote 63.
[68] *Ibid.*
[69] *Archibald & Jull*, *op. cit.*, footnote 20, at para. 23.
[70] *Ibid.*, at para. 35.
[71] *Ibid.*, at para. 37.
[72] *Ibid.*, at paras. 33-44.
[73] *Ibid.*, at para. 62.

authors claim that their approach avoids the reaction that confronting the witness with the contradictory statement in the elegant method may provoke.[74]

If the goal of the cross-examination is to attack the witness's credibility, the cross-examiner simply juxtaposes the two statements and explains how they are inconsistent.

If the goal of the cross-examination is to adduce the truth of the prior inconsistent statement, the cross-examiner should provide the witness a means of saving face by suggesting ways they may have inadvertently given incorrect evidence-in-chief.[75]

With all of the above methods, the cross-examiner should conclude by ensuring that the goal which the impeachment is intended to serve is achieved:

> 1. Where the witness admits the prior statement as being true and this is the desired result of counsel, counsel should tie up the remaining loose end by suggesting to the witness that the evidence-in-chief was a mistake. The purpose of this added question is to cut off any chance of opposing counsel to re-examine on this point in an effort to rehabilitate the evidence-in-chief.
>
> 2. Where the witness admits that he was mistaken in one of the versions (either prior or subsequent) and that his powers of observation are thereby weakened, counsel should be precise about the scope of this mistake. If counsel intends to argue the broader conclusion at closing, that other parts of the testimony are also subject to the weakened powers of observation, this proposition ought to be put to the witness. For example, if counsel wish to argue that the witness was mistaken in seeing a red car and, by virtue of this, could be mistaken about other details of the accident, some of those details should be canvassed. This approach will only serve to underline the inadequacies in the witness's testimony.
>
> 3. Where witnesses admit (or the conclusion is inescapable) that their story changed due to either bias or dishonesty, no more needs to be done, as that bias or dishonesty will submarine their testimony in its entirety.[76]

Though cross-examination will necessarily be conducted according to the circumstances of the case, it is important that it be conducted with a clear purpose in mind. Kevin P. McGuinness and Linda S. Abrams, in *The Practitioner's Evidence Law Sourcebook*, suggest that "a short effective cross-examination is far more effective than a long rambling one. It is better to focus on the most critical weaknesses in the evidence given, than to attempt to discredit every word that has been said."[77]

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[74] *Ibid.*, at para. 67.
[75] *Ibid.*, at paras. 61 and 69-73.
[76] *Ibid.*, at para. 76.
[77] *McGuinness & Abrams*, *op. cit.*, footnote 6, at p. 54, §6.55.