THE LAW ON PRIOR CONSISTENT STATEMENTS

By Marianne Salih

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INTRODUCTION

Prior consistent statements are declarations made by witnesses before they take the stand that are consistent with the testimony they give while on the stand: David M. Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013) 17 Can. Crim. L.R. 181, at p. 1 [Paciocco].

As a general rule, prior consistent statements ("PCS") are inadmissible. There are three primary justifications for this rule:

a) they are self-serving and lack probative value;
b) when adduced for the truth of their contents, they constitute hearsay; and
c) given that they are a repetition of evidence adduced at trial through oral testimony, they are superfluous and redundant, and therefore ought to be excluded on the basis of trial efficiency (*R c. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at para. 36 [*Dinardo*]; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272 [*Stirling*] at para. 5; *R. v. B.(D.),* 2013 ONCA 578, [2013] O.J. No. 4365 [*B.(D.)* at para. 31; see also Paciocco at p. 185-186)).

There are seven exceptions to the general rule. Each of these exceptions exist where the reasons for exclusion do not apply. Briefly, a PCS may be admitted:

1. As part of the narrative;
2. As constituting *res gestae*;

3. To rebut an allegation of recent fabrication or bias;
4. Where the statement is relevant to the accused's state of mind;
5. Where the statement is spontaneously made upon arrest or upon being confronted with an allegation;
6. Where the statement is a mixed statement that is both inculpatory and exculpatory; and
7. Statements made with respect to previous identification of an accused (*R. v. Jones*, 29 O.A.C. 219; 44 C.C.C. (3d) 248 (Ont. C.A.) at para. 28; see also *R. v. Edgar,* 2010 ONCA 529, [2010] O.J. No. 3152 at para. 36).

Exception 1: Part of the Narrative

In some circumstances, a PCS may be admissible as part of the witness' (or the accused's) narrative. Such statements will be admissible where they form part of the witness' account of events, or advance or form the background of the witness' story (*R. v. F.(J.E.),* 67 O.A.C. 251, 16 O.R. (3d) 1 (Ont. C.A.) [*F.(J.E.)*] at para. 37).

Once admitted, the PCS may be used only for the limited purpose of helping the trier of fact understand how the witness' story was initially disclosed[1] or to help the trier of fact understand the witness' account of the events in question (Paciocco at p. 197-198). Additionally, the admission of a complainant's PCS as part of the narrative can establish the fact and timing of a complaint, which can assist the trier of fact in assessing truthfulness or credibility (*Dinardo* at para. 37).

When PCS are admitted as part of the narrative, they cannot be used as proof of the truth of their contents (*Dinardo* at para. 37). Accordingly, when such evidence is admitted, the trial judge must instruct the jury as to the limited value of the evidence.

Because the only function to be served by a PCS under this exception is to help unfold the narrative of the event, the statement should not be admitted if it is not truly essential in unfolding the witness' narrative. Additionally, the statement should only be described in general terms, and "only [in] so much detail as is necessary to provide a comprehensible narration of events" (Paciocco at p. 198).

I note briefly here that Paciocco divides the narrative exception into two exceptions – pure narrative and narrative as circumstantial evidence. The former relates to PCS made simply in the course of narrating the witness' story. The latter relates to situations where narrative evidence containing PCS yields inferences relevant to credibility and reliability based on the very fact that the statement was made and the circumstances in which it was made (p.197-203; see especially *R. v. Engen,* 2011 ONCJ 814, [2011] O.J. No. 6096 at para. 85, cited in Pacoccio at p.201-202).

[1] Note that in *Dinardo* the SCC states that the statements may be used to help understand how the "complainant's story was initially disclosed." However, there is nothing in the decision to indicate that the admissibility of PCS as part of the narrative is limited to complainants. Indeed, the beginning of para. 37 reads generally: "[P]rior consistent statements may be admissible as part of the narrative."

An example of narrative as circumstantial evidence arose in *Dinardo*. In that case, the accused was charged with sexual assault of a resident of a home for mentally challenged persons. The assault occurred while the accused was transporting her in a cab to a youth house, where residents of the home would visit for activities during the day. The complainant spontaneously made these allegations of sexual assault to a teacher and two employees at her home when she returned. In cross-examination of the complainant, the defence elicited contradictory statements from her and lead her into agreeing that she fabricated the story – a concession she later recanted during re-examination.

The SCC held that the spontaneous making of the PCS by the complainant when she returned to the home, and the inclusion in them of details similar to those offered in the complainant's testimony, reduced the risk of concoction and could assist in assessing the credibility of her testimony (see Paciocco at p. 200). In other words, the circumstances surrounding the making of the PCS, as relayed in the complainant's narration of events, was able to yield inferences regarding the reliability and credibility of her testimony. Simply relying on her in court de-contextualized testimony of what happened would have deprived the trier of fact of "contextualized factors that accompanied her earlier disclosure and that may [have] assist[ed] in assessing its credibility and reliability" (*R. v. Engen,* 2011 ONCJ 814, 2011 CarswellOnt 15499 at para. 80, cited in Pocaccio at p. 202).

The 'narrative as circumstantial evidence' exception may be particularly relevant to cases involving child witnesses recalling evidence of abuse; this is generally because of their youth and their relative inability to articulate past events and to situate events in time. In *R. v. L.O.,* 2015 ONCA 394, the Ontario Court of Appeal explained that:

> The manner in which a child discloses allegations of abuse, including the language used in making that disclosure, may assist a jury in assessing the reliability of the child's testimony. The potential significance of that evidence to the reliability of the child's testimony flows not from the mere consistency between the out-of-court statements and the testimony, but from the manner in which the abuse is revealed by the child (para 11).

Exception 2: As constituting *res gestae*

The phrase '*res gestae*' refers to spontaneous utterances that are made with, or as part of, an act. In *R. v. Sheri,* [2004] O.J. No. 1851, 186 O.A.C. 51 (Ont. C.A.) [*Sheri*], the Ontario Court of Appeal identified two situations in which *res gestae* may apply: a) declarations accompanying and explaining relevant acts; and b) spontaneous exclamations (para. 109).

To qualify as *res gestae* under the first situation, the words must "introduce the fact in issue, explain its nature, or form in connection with it one continuous transaction" (*F.(J.E.)* at para. 29). To qualify under the second situation, the words must be "the result of a startling occurrence or excitement provoking event" (*Sheri* at para. 107). The ONCA explained in *R. v. Nicholas,* [2004] O.J. No. 725, 184 O.A.C. 139 (Ont. C.A.) that the utterance does not have to be made strictly contemporaneously with the event. However, "the stress or pressure from the event must be ongoing at the time of the utterance and the

statement must be made before there has been time to contrive or misrepresent" (*R. v. Ye,* 2013 ONSC 7251, [2013] O.J. No. 5751 at para. 14 summarizing the holding in *Nicholas*).

The rationale for the admission of such statements generally is that they are made in such circumstances that the possibility of concoction can be disregarded (*Retten v. R.* [1971] 3 ALL E.R. 80 (P.C.).

The Ontario Court of Appeal held in *F.(J.E.*) that counsel may lead evidence of a PCS as part of the *res gestae* (para. 15 and 41); This principle has been reiterated in several cases: *S.(W.E.) v. P.(M.M.),* [1997] O.J. No. 2557; 33 O.T.C. 323 (OCJ Gen. Div.) at para. 26 (reversed on other grounds); *Jones* at para. 28; *R. v. Hoffman,* [1994] A.W.L.D. 721, 73 W.A.C. 275 (Alta. C.A.) at para. 7).[2]

Most recently in *R. v. Edgar*, 2010 ONCA 529, [2010] O.J. No. 3152, the ONCA affirmed the *res gestae* exception as applying "where the statement itself forms part of the incident that gives rise to the charge" (para. 35, citing *R. v. Graham* (1972), [1974] S.C.R. 206 (S.C.C.) and *R. v. Risby,* [1978] 2 S.C.R. 139 (S.C.C.)).

Paciocco explains this exception as coming under a broader exception, which he calls "prior consistent admissible hearsay." This exception applies wherever a PCS falls within a hearsay exception. In such circumstances, it is admissible for its truth under the hearsay exception itself. While the admission of a PCS under a hearsay exception might seem at odds with the fact that the declarant is testifying in court, thereby negating the necessity requirement of admitting hearsay, Paciocco explains that the hearsay exceptions do not always have a necessity requirement. This arises where "hearsay evidence is expressed under circumstances that yield tremendously helpful criteria for evaluating the reliability or credibility of a factual claim [and therefore]…do not have necessity components." Among these exceptions Paciocco cites the business records exceptions and the *res gestae* exception. In regards to the latter, Paciocco aptly notes that "in-court testimony may not be better evidence than "excited utterances" or a "statement of present mental state" or "statements of present physical condition" uttered in a natural and spontaneous manner (and generally, though not necessarily, contemporaneously with the event in question) (p. 192-194).

When PCS are adduced under the *res gestae* exception, they are not admissible to corroborate the witness' testimony. Rather, the value of the evidence comes from the context and circumstances in which the prior statement was made (e.g. spontaneity) - which can provide "additional reasons for rationally choosing to believe the witness's in-court testimony containing the same utterance" (p. 194).

[2] While the judgment clearly states that *res gestae* constitutes one of the exceptions to the admission of PCS in these paragraphs, there is one sentence in the judgment which makes this assertion somewhat dubious; at para. 29, the Court states: "I do not regard *res gestae* as a fertile area for enlarging the admissibility of prior consistent statements." However, the Court does not go on to explain this, and concludes at para. 41 that "the Crown can… lead evidence of PCS as part of the *res gestae* (a limited tool) or as part of the narrative."

Importantly, nowhere does the case law suggest that the accused must testify before such evidence can be adduced. In fact, given that *res gestae* forms one of the traditional hearsay exceptions, it is likely that an out-of-court exculpatory statement made by the accused and constituting *res gestae* may be adduced without the accused taking the stand.

Exception 3: To Rebut an Allegation of Recent Fabrication

In *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272 [*Stirling*], the SCC held that PCS can be admitted to rebut an allegation that a witness has recently fabricated parts of his/her evidence. *Stirling* involved an appeal of a conviction of criminal negligence causing death in a motor vehicle accident. The basis of the appeal was, *inter alia,* the admission of a witness' PCS identifying the accused as the driver. The PCS was introduced by the Crown in order to rebut the defence's allegation that the witness' evidence was designed to support the witness' civil action for damages against the accused and because of a deal made between the witness and the Crown regarding drug charges laid on the witness after the accident.

The SCC noted in *Stirling* that the allegation of recent fabrication need not be expressly made. It is sufficient if "the apparent position of the opposing party is that there has been a prior contrivance" (*Stirling* at para. 5, citing *R. v. Evans*, [1993] 2 S.C.R 629 (S.C.C.) at p.643). This point was made long ago by Martin J.A. in *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 at para. 46 - in a case which dealt with an allegation of recent fabrication against the accused:

> I accept the proposition that an express allegation of recent fabrication in cross-examination is not necessary before the exception with respect to rebutting an allegation of recent fabrication becomes operative, and that suggestion that the accused's story has been recently contrived may also arise implicitly from the whole circumstances of the case, the evidence of the witnesses who have been called, and the conduct of the trial. Where the circumstances are such as to raise the suggestion that the accused's evidence is a recent fabrication, counsel may properly anticipate the allegation of recent fabrication in cross-examination and examine the accused in chief with respect to previous statements to other persons, prior to his being cross-examined.

The same point was explained differently by Wigmore in *Evidence in Trials at Common Law,* (Chadbourne rev.) vol. 4, (Toronto: Little, Brown and Company, 1972) at p.270-1 and p.274 (cited at para. 14 of *O'Connor*):

> The charge of recent contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now i.e., as a self contradiction. The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story [previously]….

Importantly, despite the name of this exception, it is unnecessary that the alleged fabrication be *recent*; what matters is the allegation that the witness fabricated a statement at *some* point after the event in

question (*Stirling* at para. 5, citing *R. v. O'Connor* (1995), 100 C.C.C. (3rd) 285 (Ont. C.A.) [*O'Connor*]. Additionally, the allegation need not rest on the fact that the witness deliberately lied: the exception also applies where opposing counsel suggests that additional details provided by the witness after the event in question demonstrate that the witness' memory is unreliable and that his/her testimony should therefore not be believed (Paciocco, p. 190).

It follows from the above that opposing counsel can avoid the application of this exception if their position rests on fabrication *simplicter* - rather than fabrication arising at some point after the event in question (*O'Connor* at para. 14). Logically, the introduction of a PCS cannot serve to rebut an allegation that the witness has been lying from the very beginning.

When a PCS is admissible under this exception, it can have probative value where "[it] can illustrate that the witness's story was the same even before a motivation to fabricate arose" (*Stirling* at para. 5). Beyond this purpose, a PCS does not have any probative value, and cannot be assessed for the truth of its contents. In a similar vein, the PCS cannot be used to assume that, because the witness made the same statement in the past, he/she is more likely to be telling the truth. Indeed, the repetition of a concocted story does not make it any less of a lie. This is especially true where the witness may have had reason to fabricate the evidence immediately after the event in question (*Stirling* at paras. 5-7; see *R. v. B.(D.),* 2013 ONCA 578, [2013] O.J. No. 4365 at paras. 36-37).

However, if the statement tends to prove that the witness gave the same account prior to the point in time when it is suggested the fabrication arose, the trial judge is entitled to use the PCS in assessing the witness' general credibility. This is because the PCS can neutralize an alleged motive to lie – which necessarily bolsters the witness' credibility, or, perhaps more accurately, eliminates a reason to suspect the witness to be discreditable (*Stirling* at paras. 9-11, citing a large number of appellate decisions on this principle).

The distinction between using a PCS for the truth of its contents and to rehabilitate or support a witness' credibility is perhaps not always clear. In an annotation to *Sterling,* Professor Lisa Dufraimont of the University of Queens made the following apt remarks:

> [I]n reality there is little difference between the two. Because the contents of a prior consistent statement are, by definition, essentially similar to the contents of the witness's testimony, it seems artificial to distinguish between using the statement to support the witness's credibility and using it as evidence of its contents. Either way, the result of considering the prior consistent statement is that the witness's story is more likely to be believed.

Perhaps in anticipation of such criticism, the SCC noted in *Stirling* that, where a PCS removes a motive for fabrication (because made before a motive or opportunity to fabricate arose), this will positively impact general credibility without corroborating the witness's evidence or necessarily leading to the conclusion that the witness is telling the truth (para. 11). At paragraph 12, the SCC explained this point further:

> [W]hile it would clearly be an error to conclude that because someone has been saying the same thing repeatedly their evidence is more likely to be correct, there is no error in finding that because there is no evidence that an individual has a motive to lie, their evidence is more likely to be honest.

Paciocco explained the distinction in a different way, which may be particularly useful to judges. At p. 191 he wrote:

> "Recent fabrication" is a rebuttal rule. If at the end of the case the decision-maker believes the prior consistent statement to have been made, it will neutralize the challenge to the litigant's case without in any way adding corroboration, confirmation, or affirmative weight to the credibility or reliability of the witness who was challenged. Their evidence remains in the state it was before the failed "recent fabrication" challenge.
>
> Judges must therefore be cautious to avoid language which suggests they are treating the prior consistent statement as adding to the credibility of the witness. Where judges do use terms such as "supports" or "bolsters" or "strengthens", so long as it is clear from their decision as a whole that they are simply suggesting that the evidence of the witness is "supported" or "bolstered" or "strengthened" in the limited sense that the prior consistent statement shows their evidence to be more believable than if the "recent fabrication" challenge went unanswered, there will be no error. If the comments go farther and imply that the prior consistent statement adds affirmatively to the credibility of the witness, the judge will fall into error.

It is also necessary to note that the raising of an allegation of fabrication does not automatically render admissible all PCS made by the witness; rather, the trial judge must determine:

a) Whether evidence of the PCS can assist in assessing the witness' credibility;
b) Whether the admission of the PCS would unfairly prejudice the accused or unduly prolong or complicate the proceedings; and
c) Whether all or part of the contents of the PCS should be admitted, or whether it is preferable to allow counsel to only lead evidence that a consistent statement was previously made (*R. v. Hunter,* [2004] O.J. No. 328, 182 O.A.C. 161 (Ont. C.A.) at para. 5).

Importantly, an accused who relies on this exception in relation to his/her own PCS is not permitted to adduce prior statements before s/he takes the stand and testifies. In other words, the accused cannot elicit those statements through cross-examination of Crown witnesses or through calling other persons to testify to those statements when presenting his/her case. This condition applies even if counsel provides an undertaking to call the accused as a witness, as the accused always maintains the right to alter his instructions to counsel or change his mind about testifying (*Campbell* at para. 46).

If the allegation of recent fabrication arises during cross-examination of the accused, the defence may attempt to rebut the allegation in re-examination or, if necessary, by calling or recalling witnesses. In any case, however, counsel should announce its intention to the court so that the trial judge and opposing counsel are aware of the problem (*F.(J.E.)* at para. 28).

Finally, it is also important to note that, in addition to using the PCS to rebut an allegation of recent fabrication, the party adducing the statements may also use them to rebut an allegation that the witness is unreliable because of alleged inconsistencies between his/her prior and in-court statements. In such circumstances, the party responding to the attack on the witnesses' reliability may highlight the consistencies in the witness' prior and in-court statements: *R. v. L.O.,* 2015 ONCA 394.

In summary, the admission of a PCS to rebut an allegation of recent fabrication can be used to show that the witness' evidence did not change as a result of a new motive to fabricate; in doing so, the PCS can strengthen the witness' general credibility, but cannot be used to support the truthfulness of his/her statement or to corroborate his/her evidence. In addition, the accused may not tender evidence of his/her own PCS without first testifying.

Exception 4: Statements as to state of mind

A fourth exception to the exclusionary rule applies where the PCS is introduced not for the truth of its contents but as evidence of the state of mind of the accused. This principle was affirmed in *R. v. Edgar,* [2000] O.J. No. 137, 128 O.A.C. 125 [*Edgar* 2000]. In that case, the accused was convicted of second degree murder in the stabbing of his girlfriend while allegedly intoxicated on drugs and alcohol. In an appeal of his conviction, the accused argued that the trial judge erred in excluding post-arrest statements made by him to police because those statements were relevant to the psychiatric evidence called by the defence at trial, which sought to establish that the accused was in a state of psychosis at the time of the offence.

Justice Charron, who wrote the decision for a unanimous three-panel bench, allowed this ground of appeal. In doing so, she reasoned that the probative value of the evidence lay in the fact that the utterances appeared to be irrational or delusional; therefore, they were relevant to the accused's defence of intoxication (para. 24).

The state of mind exception has also been endorsed by subsequent appellate case law: *R. v. Edgar,* 2010 ONCA 529 at para. 36*; R. v. Mathisen,* 2008 ONCA 747, [2008] O.J. No. 4382 at para. 101.

Paccioco describes this exception more broadly as arising where the PCS constitutes circumstantial evidence. In explaining this, he cites *R. v. Pattison,* 2011 CSC 1595, 2011 CarswellBC 3415, paras. 39-41 – a case in which the Crown sought to adduce a 911 call made by the accused to report the death of the victim in which he blamed others for the shooting. The call was admissible not for proof that others had shot the victim, but to demonstrate the demeanour and emotional state of the accused when the call was made. The prior consistent statement therefore constituted circumstantial evidence of the accused's intent to commit murder (p.5). While the PCS in *Pattison* was admissible to demonstrate the accused's state of mind, Paciocco suggests that the exception applies when a PCS is adduced as circumstantial evidence going to any fact in issue (p. 188).

In short, therefore, a PCS may be admitted where it is probative of the accused's state of mind, or possibly also where it constitutes circumstantial evidence of another fact in issue. If admissible, the statement can be used as proof of state of mind or as circumstantial evidence of another fact in issue, but it cannot be used to prove the truth of its contents.

Exception 5: Statements made on arrest or allegation

A fifth exception to the admission of PCS is based on spontaneous statements made upon arrest or in response to an allegation. This was confirmed by the ONCA in *R. v. Edgar,* 2010 ONCA 529, [2010] O.J. No. 3152 [*Edgar 2010*]. *Edgar 2010* involved the same case as *Edgar* 2000 in which the accused was convicted at trial for second-degree murder for stabbing his girlfriend. After having been sent back for a re-trial, the accused was again convicted and again appealed the decision. The central issue on this appeal was whether the trial judge erred by refusing to admit prior exculpatory statements made by the accused shortly after his arrest.

Writing for a unanimous four-panel bench, Sharpe J.A. held that prior exculpatory statements made spontaneously upon arrest or when first confronted with an accusation by police can be admitted by the accused (para. 41). Such statements were said to be "of vital relevance" and "one of the best pieces of evidence that an innocent man can produce" (para. 65; see especially *R. v. Liard,* 2015 ONCA 414 [*Laird*] at para. 48 for a fuller discussion of the reasons underlying the admissibility of such statements).

PCS admitted under this exception can be used for the purpose of showing the accused's reaction when first confronted or arrested. This reaction may be more probative and reliable than his/her decontextualized in-court testimony, given years later. The spontaneity of the reaction adds credibility to the accused's denial because of the limited time for concoction. Further, the spontaneous insistence on innocence by the accused can furnish an inference of "consciousness of innocence." Therefore, the statements can constitute circumstantial evidence bearing on the accused's guilt or innocence (*Edgar 2010* at para. 24, 66, 68 and 72; Paciocco at p. 210-211).

Such statements are also admissible to show consistency in an accused's trial testimony, and are therefore relevant to the accused's credibility. However, unlike with the *res gestae* exception, such statements *cannot* be used as proof of the contents therein (*Laird* at para. 49).

Edgar 2010 established one important precondition to this 'upon arrest' exception: the accused must testify (para. 68). In fact, the defence itself in that case conceded that an accused should only be permitted to advance out-of-court exculpatory statements if he takes the stand and exposes himself to cross-examination.

The Court further held that, even though the defence gave an undertaking to call the accused as a witness, the trial judge did not err in refusing to admit the statements *at that point in the trial* (para. 79; see also paras. 58-62; See *R. v. Suzack,* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal to S.C.C. refused, (2001), [2000] S.C.C.A. No. 583 (S.C.C.) at paras. 178-181). The rationale for this is that an

accused remains free to change his mind about testifying; therefore, if the accused introduced his self-serving statement and then decided not to testify, this would cause disruption in the trial and may even produce a mistrial (*R. v. Campbelll,* (1977), 17 O.R. (2d) 673, 1 C.R. (3d) 309 (Ont. C.A.) [*Campbell*] cited in *Edgar 2010* at para. 30). Importantly, however, once the accused has testified and given evidence of the PCS, s/he may go on to corroborate the giving of the statement by calling other witnesses who heard it made (Paciocco at p. 208).

Interestingly, in *Edgar 2010,* Sharpe J.A. also observed that the fact that the accused could not recall making the statement in question did not mean that s/he could not be effectively cross-examined on "the facts depicted in those statements" where those facts were also found in the accused's trial evidence (para 77).

In applying the new exception to the case at hand, Sharpe J.A. found that two of the excluded statements made within ten minutes of the appellant's arrest for murder ought to have been admitted. Interestingly, His Honour also admitted a third statement made four hours after the arrest while the appellant was in hospital because it was "really a continuation of the first two statements" and could therefore "fairly be described as [a] statement[t] made by an accused person upon his arrest and upon being first confronted with the allegation of murder" (para. 76).

In *R. v. Liard,* 2015 ONCA 414, the Ontario Court of Appeal considered the spontaneity requirement in more depth. *Liard* involved a first-degree murder trial of two accused – a mother and her boyfriend - who were charged with the stabbing of the mother's daughter. Defence counsel sought to introduce prior statements made by both accused to the police several hours after the murder. In his reasons, the trial judge, D.L. Corbett J., concluded that *Edgar 2010* is not limited to circumstances where an accused is literally caught in the act without a moment to reflect on what has happened. Rather, "spontaneity is a matter of degree, and may be a proper matter for judicial comment or direction to the jury" and "the analysis must be contextual, based on all of the circumstances of the case, to assess the degree of "spontaneity" with which a statement is given" (*R. v. Liard*, 2013 ONSC 5457, [2013] O.J. No. 4000 [*Liard 2013*] paras. 321 and 331).

In application to his case, D.L. Corbett J. ruled that, despite the fact that both accused were picked up by police approximately 15 to 16 hours after the killing, and had spent approximately 6 to 8 hours together after the killing, the police statements of both accused were admissible under the *Edgar 2010* exception, provided that they testified.

In coming to his conclusion, Justice D.L. Corbett acknowledged that there was "plenty of time for the two of them to concoct a story to tell police [and] clearly [they] had time to think things through" (para. 323). However, rather than automatically excluding the statements on that basis, D.L. Corbett J. went on to analyze the circumstances surrounding the taking of the statements. In particular, he pointed to the graphic nature of both of the accused's demeanour during their interviews. Additionally, he highlighted the fact that when the mother's interview began, she was considered a witness. Once she told the police that she helped her boyfriend to clean up after the killing, she was cautioned as an accessory after-the-

fact, and later she was also told that she would be charged with first-degree murder. Her reaction to both of those facts are caught on video, which D.L. Corbett J. considered to be "powerful evidence of her state of mind" – not all of which was necessarily favourable to her (paras. 337-341).

As it turned out in *Liard*, only the mother testified; therefore, hers was the only prior statement that was adduced. At paragraphs 343 to 344, D.L. Corbett J. includes his jury instruction regarding her prior statement, which references the use to which the statement can be made, and also includes a limiting instruction regarding the risk of concoction.

The mother, *Liard*, was acquitted at trial and the Crown appealed on the basis that, *inter alia,* the trial judge erred in finding that her statements during the police interview were spontaneous. The ONCA affirmed the trial judge's decision. The Court reiterated that the spontaneity requirement is essential, because it gives the statement its probative value and therefore justifies its admission. However, the Court went on to say:

> No single consideration, no single point in time, determines whether the spontaneity requirement has been met. The passage of time between the crime and the accused's reaction to an accusation of committing it, and any intervening events, are undoubtedly relevant. But spontaneity lies along a spectrum. And along that spectrum, the degree of spontaneity may vary…In *R. v. Johnson*, 2010 ONCA 646, 262 C.C.C. (3d) 404, in an *obiter* comment at para. 71, Rouleau J.A. said he would have admitted under the *Edgar* exception a statement given by the accused on arrest, even though the arrest took place more than a month after the victim's disappearance and over a week after her body was discovered [para. 63; see also *R. v. Kailayapilla*, 2013 ONCA 248 at para. 60]

Importantly, both *Edgar 2010* and *Liard* confirm that, when spontaneity is in question, the trial judge should admit the statement and allow the jury to assess its weight. Under such circumstances, the statement may be dealt with through cross-examination that looks to the degree of spontaneity attached to it (*Edgar* at para. 69; *Liard* at para. 64).

The Court of Appeal in *Liard* also decided that there is no requirement that the accusation of a crime come from the police. By necessary implication, the prior statements may be made to third parties. This position was previously adopted by Forestell J. in *R. v. Ye,* 2013 ONSC 7251, [2013] O.J. No. 5751 [*Ye*], where Her Honour explained at paragraph 38:

> The relationship of the recipient of the statement to the accused is one relevant consideration. Clearly, not every statement made to a friend, family member or co-perpetrator will be admitted. The fundamental issue to be considered is whether the relationship and context provide circumstantial guarantees of trustworthiness. This will depend on the circumstances of the individual case. Where the accused had a clear motive to lie to the recipient, the reliability of the statement is reduced.

Further, the fact that others may have confronted an accused about the crime "will not affect the spontaneity of an accused's reaction to a later police accusation of a crime" provided that the prior confrontations were not accusatory (*Liard* at para. 56).

Another illustrative example of the 'upon-arrest' exception arises in *Ye*. In that case, Forestell J. considered the applicability of the exception in a trial for first-degree murder where the accused told his two accomplices (who were attempting to rob the deceased) that his shooting of the deceased was *accidental*. The statement was made approximately twenty minutes after the incident when the three were driving away from the crime scene.

The Crown's position was that the passage of 20 minutes from the shooting to the utterance rendered the statement insufficiently spontaneous.

Justice Forestell rejected the argument that the spontaneity threshold was as high as the Crown contended. Further, Forestell J. stated that the level of spontaneity does not have to meet the threshold required under the *res gestae* exception (see para. 27). Her Honour reasoned that, in *Edgar 2010,* Sharpe J.A. had indicated that the test was "partly that of spontaneity, partly that of relevance and partly that of asking whether the statement which is sought to be admitted adds any weight to the other testimony which has been given in the case" (*Ye* at para. 27). Justice Forestell held that, in considering whether a statement is sufficiently spontaneous, "the passage of time is a relevant but not determining factor" and "the risk of fabrication must be reduced but it need not be eliminated for a statement to have probative value" (paras. 31-31).

Justice Forestell thereafter concluded that the statement was sufficiently spontaneous to be admissible. Her Honour also concluded that the statements made by the accused to his accomplices (rather than the police) when first being confronted with the shooting qualified under the exception. The statements were therefore admissible as evidence of the accused's reaction upon first being confronted with the accusation (paras. 39-41).

Thus, in short, the within exception allows an accused to adduce a prior exculpatory statement made spontaneously upon arrest or when first confronted with an allegation. The statement can be used as evidence of the reaction of the accused when first arrested or confronted. It can also be relevant to assessing the reliability of the accused's in-court testimony, and may constitute circumstantial evidence bearing on guilt or innocence. However, the statement cannot be used for the truth of its contents. Further, in order to adduce such evidence, the accused must *first* testify and thereby subject himself to cross-examination.

Exception 6: Mixed statements that are both inculpatory and exculpatory

The exception based on mixed statements[3] applies when the Crown seeks to introduce prior statements made by the accused that are both inculpatory and exculpatory.[4]

As a general rule, and subject to the above exceptions, out-of-court statements made by the accused are inadmissible for the truth of their contents when adduced by the accused himself. This exclusionary rule applies whether the statements are inculpatory or exculpatory. When the statement is exculpatory in particular, it is inadmissible because: a) it is viewed as self-serving and lacking in probative value; and b) it would be unjust to allow the accused to introduce an unsworn statement into evidence through other witnesses without being put on oath and being subjected to cross-examination (*R. v. Rojas,* 2008 SCC 56, [2008] 3 S.C.R. 111 [*Rojas*] at paras. 35-36 citing *R. v. Simpson,* [1988] 1 S.C.R. 3, [1988] S.C.J. No. 4 (S.C.C.),).

However, inculpatory statements made by an accused can be admissible when adduced by the Crown as an exception to the hearsay rule known as "party admissions" – which permits the introduction of hearsay statements made by a party when offered by the opposing party. The rationale for this is grounded in the adversarial nature of the legal system, which supports the admission of statements made by an opposing party "in whose mouth it does not lie to complain of the unreliability of his or her statement" (*R. v. Dipietro*, (1993), [1993] 3 S.C.R. 653, 85 C.C.C. (3d) 97 (S.C.C.) at p.104, cited in *R. v. Foreman*, [2002] O.J. No. 4332, 166 O.A.C. 60 (Ont. C.A.) at para. 37. When such statements are made to persons in authority, they must be proved voluntary beyond a reasonable doubt before they can be admitted (*R. v. Singh*, 2007 SCC 48, [2007] 3 SCR 405).

That being said, the Crown remains subject to the general exclusionary rule against out-of-court *exculpatory* statements made by an accused. However, in *Rojas*, the SCC affirmed an exception to this rule in the case of mixed statements – that is, statements that are both inculpatory and exculpatory. *Rojas* involved an appeal of second degree murder by two accused brothers. During the trial, the Crown sought to tender the accused's out-of-court statement, which contained both inculpatory and exculpatory parts. The trial judge admitted the statement, but instructed the jury that inculpatory statements are generally of more weight and reliability than exculpatory statements. The accused appealed on the grounds that this instruction ought not to have been given.

Writing for a unanimous seven-member bench, Charron J. held that despite the exclusionary rule against exculpatory out-of-court statements, the Crown is permitted to adduce mixed statements. However, if the Crown does adduce such a statement, it must produce the statement in its entirety. Most importantly, both the inculpatory and the exculpatory parts *may be used for the truth of their contents*. Thus, this case confirmed an exception to the exclusionary rule against the admission of out-of-court exculpatory statements where such statements are mixed statements adduced by the Crown.

[3] Also known as the "entire statement rule" (see Paciocco at p.194-196).

[4] Paciocco suggests that, while this exception ordinarily applies to the Crown's presentation of mixed statements made by the accused, the exception would apply whenever a party adduces a mixed out-of-court statement made by *anyone* (see p. 196).

The reason that the exculpatory portions of the statement were held to be substantively admissible in favour of the accused (in addition to the inculpatory parts that would be substantively admissible against him/her) was based on:

a) fairness to the accused – which would be undermined if the Crown were permitted to lead his/her previous statements in a misleadingly selective way; and
b) the pragmatic consideration that it is often difficult to discern which part of a statement is inculpatory and which part exculpatory.

For similar reasons, when charging the jury, the SCC held that trial judge should *not* instruct them to give more weight to the inculpatory statements over the exculpatory statements (Rojas at para. 37-41).

In his article on PCS, Paciocco clarifies that the 'mixed statement' only technically becomes a PCS where the accused testifies and repeats the same claim of innocence contained in the prior statement already adduced by the Crown. When introduced as a PCS by the accused on the stand, however, the prior statement cannot be used to bolster the accused's credibility, or to corroborate his evidence (p. 195-196). This is because the statements are still self-serving (and therefore cannot enhance credibility under these circumstances) and because the source of the corroboration is the same person (the accused himself). In the end, however, this fact is rendered somewhat moot by the fact that the statement has already been substantively admitted in the Crown's case.

Thus, the exception based on mixed statements allows exculpatory out-of-court statements to be led in favour of the accused, but only where the Crown introduces such statements. If the Crown does so, the accused is then also permitted to lead evidence of the prior exculpatory statements during his testimony, but cannot do so to bolster his credibility or to corroborate his evidence.

Exception 7: Identification Evidence

The identification evidence exception permits the admission of prior witness statements relating to the identification of accused persons. This exception generally applies only after a witness identifies the accused in court as the perpetrator; thereafter, the Crown is permitted to adduce evidence that the witness previously identified the accused. The Crown can also call evidence regarding previous descriptions the witness gave about the perpetrator (*R. v. Starr,* 2000 SCC 40, [2000] 2 S.C.R. 144; Paciocco at p.211).

The rationale for this exception is that in-court identification of an accused is logically suspect – his very presence in the courtroom is highly suggestive of him being the perpetrator. Accordingly, evidence of prior identification is more reliable and can demonstrate the continuity of that identification in court (Paciocco at p. 212 citing *R. v. A.(F.),* [2004] O.J. No. 1119, 183 C.C.C. (3d) 518) (Ont. C.A.). Paciocco explains that its function in this regard is similar to the rebuttal function of the 'recent fabrication' exception: "the fact that the witness has previously identified the accused effectively neutralizes the

concern that the identification occurred for the first time in the suggestive environment of a courtroom" (p. 212).[5]

In other words, such evidence can be used to bolster the reliability of the witness' in court identification. However, the prior identification cannot be used for the truth of its contents; nor can it be used to corroborate the in-court identification, because the source of the evidence is the same – i.e., the witness testifying (Paciocco at p. 212).

CONCLUSION

The general rule is that prior consistent statements are inadmissible. However, the case law has developed several exceptions to this rule. In each of those exceptions, the statements can be adduced for limited reasons – i.e., as part of the witness' narrative, to rebut an allegation of recent fabrication, to demonstrate the declarant's state of mind at the time the utterances were made, to demonstrate the accused's reaction upon being first confronted with an accusation, thereby constituting circumstantial evidence of innocence, and to bolster the reliability of a witness' in court identification. The only exception in which the statements can be adduced for their truth arises where PCS are introduced under the *res gestae* hearsay exception and as mixed-statements that are introduced by the Crown.

When prior consistent statements are admissible for a limited purpose, the trial judge must give a limiting instruction as to the proper and prohibited use of the statement. However, the failure to give a full limiting instruction is not necessarily an error of law; the instructions as a whole must be assessed in the context of the particular case. For example, In R. v. A.M.V., 2015 ONCA 457, the Crown lead prior consistent statements of a complainant disclosing allegaitons of sexual assault by the accused. The Ontario Court of Appeal held that the trial judge's failiure to give a limiting instruction was not fatal. Because the statements contained no details, there was no danger that the contents of the statements would be used to corroborate her in-court testimony. Further, the defence relid on the prior disclosures to undermine the complainant's credibility, and the trial judge referred to this when explaining the prior statements. In these circumstances, the instructions were found to be adequate.

Finally, defence counsel must bear in mind that, when the accused seeks to rely upon his own PCS as part of the narrative, to rebut an allegation of recent fabrication, or as a statement made upon arrest or allegation, s/he must testify and subject herself/himself to cross-examination before the statement can be adduced. Such statements *cannot* be elicited through cross-examination of Crown witnesses, even if the accused undertakes to testify.

[5] Note however that prior identification evidence is admissible regardless of whether the opposing party suggests recent fabrication

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