CHAPTER 1

INTRODUCTION: BASIC CONCEPTS IN THE LAW OF EVIDENCE

I. WHAT IS THE LAW OF EVIDENCE AND WHAT IS IT FOR?

At its core, a criminal trial is all about answering a single question: has the Crown proven the accused's guilt beyond a reasonable doubt? This almost invariably implies a dispute over the "who," "what," "when," "how," or "why" of whatever is alleged to have taken place.[1] If the central facts are not in dispute, the charge will be resolved by a guilty plea or a withdrawal. Where those facts *are* in contention, a trial will usually take place. Evidence is the material put before the court to resolve the factual disputes that have given rise to a trial.[2]

The law of evidence is a set of rules and principles that answer two principal questions:

- What evidence can be considered by the trier of fact?
- Once the evidence is admitted, what can the trier of fact do with it?

One plausible answer to both questions is "anything"—in which case the need for a law of evidence would be reduced or eliminated. Indeed, the existence of a discrete body of law governing the admission and use of evidence is not an inevitability. Bentham famously advocated the admission of *all* relevant evidence, arguing that the only way to reach the truth is to "see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it—the parties."[3]

If all relevant evidence were admissible, we could dispense with much of what we currently know as the law of evidence. And indeed, much of the rest of the world manages without the complex web of exclusionary rules that our common law has developed. The noted evidence scholar Thayer long ago observed:

> At once, when a man raises his eyes from the common-law system of evidence, and looks at foreign methods, he is struck with the fact that our system is radically peculiar. Here, a great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English-speaking countries have what we call a "Law of Evidence;" but no other country has it; we alone have generated and evolved this large, elaborate, and difficult doctrine.[4]

But, for better or worse, this "large, elaborate, and difficult doctrine" is our own. In recent decades, to be sure, the Supreme Court of Canada has made strides toward

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1 The only exception would be where the facts are undisputed and the only contentious issue is whether the undisputed facts disclose the offence charged.

2 If the accused pleads guilty, the need for evidence is almost invariably dispensed with and a finding of guilt is made on the admitted facts. Of course, evidence may subsequently be led at the sentencing hearing. However, the focus of this book is on evidence led at *trial* to resolve the question of guilt or innocence.

3 Jeremy Bentham, "Rationale of Judicial Evidence" in *The Works of Jeremy Bentham*, vol 7 (Edinburgh: William Tait, 1843) at 599.

4 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) at 1-2. It is a mistake to think that Continental (European) systems do not possess their own bodies of evidence law, including rules of privilege and rules excluding illegally obtained evidence. The most salient difference is that Continental courts generally do not exclude otherwise probative evidence on the basis of concerns that it may be misused: Mirjan R Damaska, *Evidence Law Adrift* (New Haven, Conn: Yale University Press, 1997) at 14-17. Common law courts do this all the time.

mitigating some of the difficulty and intricacy of the doctrine, favouring the formulation of broad and flexible principles over esoteric and technical rules. But, as suggested by the heft of this volume, the Canadian law of evidence remains a dense, voluminous subject. What accounts for it?

Certain characteristic features of the Anglo-American criminal trial are usually assigned prime responsibility for the development of a complex law of evidence in common law jurisdictions. One is the adversary system, in which the parties are responsible for marshalling the facts before a largely passive decision-maker. This can be contrasted with the Continental model, in which fact-gathering is traditionally the primary responsibility of a judicial official. Where facts are gathered and presented by parties with an interest in the outcome, there is naturally a heightened risk that the evidence will be skewed in its substance or presentation. In theory, the law of evidence helps to curb the distortionary effects of party presentation by excluding evidence that would cause unfairness to the other side or whose persuasive effect may outstrip its real value.

The other main systemic feature seen to be responsible for the development of Anglo-American evidence law is the prevalence of jury trials—and the judiciary's historically ambivalent attitude toward them.[5] On the one hand, the jury trial is seen as an invaluable guarantor of individual liberty and bulwark against tyranny.[6] According to Dickson CJ, "The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense."[7] On the other hand, jurors themselves are seen as dangerously prone to malign influence of all kinds if their access to information about the case is not tightly regulated by the judge. Evidence deemed to be too prejudicial for a jury's consideration can run from the sordid[8] to the mundane.[9] Today, only a relatively small proportion of criminal cases that proceed to trial are tried by a jury. Nonetheless, the presumptively dual structure of the court—judge and jury—continues to inform much of our law of evidence. This is so even though, in the majority of cases, most evidentiary disputes revolve around whether the judge should disabuse themself of evidence they have already seen.

In accordance with this dual structure, as a general rule, the judge decides questions of admissibility and the jury (or the judge in their capacity as trier of fact, if sitting alone) decides questions of weight. But this general division of labour is not airtight. Sometimes the judge needs to instruct the jury on matters of evidentiary weight that may otherwise escape its consideration: for example, the minimal weight to be given to in-dock identification evidence[10] and the frailties of eyewitness identification evidence

5 Thayer, *ibid* at 266 dubbed the common law of evidence to be the "child of the jury system."

6 *R v Turpin*, [1989] 1 SCR 1296 at 1309-10, Wilson J. Indeed, the jury's power to refuse to apply unjust laws (called jury nullification) has been characterized as "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law": *R v Morgentaler*, [1988] 1 SCR 3 at 78, Dickson CJ, quoting Law Reform Commission of Canada, "The Jury in Criminal Trials" (1980) Working Paper No 27.

7 *R v Corbett*, [1988] 1 SCR 670 at 692.

8 See e.g. *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908 (evidence of several prior allegations of sexual assault by the accused excluded from the accused's sexual assault trial as offending the similar fact evidence rule).

9 See e.g. *R v Goldfinch*, 2019 SCC 38 (evidence of a consensual "friends with benefits" relationship between the complainant and accused excluded under Code *s* 276).

10 *R v Jack*, 2013 ONCA 80 at para 17.

more generally.[11] More rarely, the jury even has a subsidiary role in admitting or excluding evidence—the notoriously confusing co-conspirator's exception to the hearsay rule being the main example of this.[12]

To return briefly to the definitional point with which we began: what is evidence? In basic terms., evidence comes in three main forms:

- *oral evidence*: the testimony of witnesses in court,
- *documentary evidence*: this includes both written and electronic documents, and
- *"real" evidence*: physical objects.[13]

To this list we may add admissions—namely, agreements that certain specified facts have been proved *without* the need to call evidence of them.[14] Collectively, these are the raw materials out of which the facts of the case are determined, or "found," by the judge or jury. Regulating the presentation and use of this material, and thereby enabling valid findings of fact to be made, is what the law of evidence is all about.

To some people, and in some circumstances, the law of evidence can seem arid and technical. There is some truth to this impression: debates over whether a given statement is properly characterized as hearsay, or whether a particular document counts as a business record, are unlikely to get the blood boiling. Although the rules can sometimes seem arcane, in reality they engage fundamental and always-evolving questions about human behaviour that are anything but. For example:

- What may cause people to falsely confess to a crime?[15]
- What factors support or detract from the reliability of an eyewitness identification?[16]
- In what circumstances is an out-of-court statement reliable enough to be relied on in lieu of sworn testimony?[17]
- When is evidence of a prior sexual relationship between the accused and complainant relevant to the accused's claim that an alleged sexual assault was actually a consensual encounter?[18]
- Is immediate flight from the scene of the crime indicative of guilt?[19] What about the failure to immediately deny an allegation of criminal conduct?[20]
- In what circumstances does the fact that a complainant made their allegation shortly after the alleged assault enhance the credibility of their in-court testimony?[21]

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11 *R v Hay*, 2013 SCC 61, [2013] 3 SCR 694 at para 40.

12 *R v Carter*, [1982] 1 SCR 938; *R v Mapara*, 2005 SCC 23, [2005] 1 SCR 358.

13 These are not watertight categories. For instance, electronic evidence often blurs the distinction between documentary and "real" evidence. See Chapter 12, "Digital Evidence."

14 Because the trier of fact must accept the facts contained in admissions, they are not "evidence" but may nonetheless contribute to the factual substrate of the case.

15 *R v Oickle*, 2000 SCC 38, [2000] 2 SCR 3; *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544.

16 *R v Hibbert*, 2002 SCC 39, [2002] 2 SCR 445; *Hay*, *supra* note 11.

17 *R v Khan*, [1990] 2 SCR 531; *R v B(KG)*, [1993] 1 SCR 740; *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787.

18 *Goldfinch*, *supra* note 9.

19 *R v White*, 2011 SCC 13, [2011] 1 SCR 433 [*White 2011*].

20 *R v Levert* (2001), 159 CCC (3d) 71 (Ont CA); *R v Chafe*, 2019 ONCA 113.

21 *R v Khan*, 2017 ONCA 114; *R v Dinardo*, 2008 SCC 24, [2008] 1 SCR 788

All of these questions, and many more, are the stuff of which the law of evidence is made. The answers are not self-evident. Indeed, they have received disparate answers from lawyers, academics, and judges, right up to our highest court.

II. THE SOURCES OF EVIDENCE LAW

Evidence law has three main sources: the common law, statute law, and the Constitution. Of these, the common law has been by far the most influential. For instance, the common law has given us the rule against hearsay, the categorical exceptions to it, and (more recently, with a Charter[22] flavouring) the "principled approach." The common law has also given us the confessions rule, the similar fact evidence rule, and most of the rules regulating the proper scope of opinion evidence.

By contrast, Parliament's contribution to the law of evidence has been more modest. The *Canada Evidence Act*,[23] which applies to all criminal trials, is far from a complete codification of evidence law.[24] Instead, it covers a limited range of topics, and its provisions have themselves been subject to considerable judicial gloss. Notable topics governed by the *Canada Evidence Act* include the following:

- the competence and compellability of witnesses, including spousal privilege (ss 3-4),
- immunity for answers to self-incriminating questions (s 5),
- the process for dealing with adverse witnesses (s 9),
- cross-examination on previous statements (ss 10-11),
- examination on prior convictions (s 12),
- judicial notice of laws (ss 17-18),
- admission of certain official government documents (ss 19-26),
- authentication and admission of electronic documents (ss 31.1-31.8),
- public interest privilege (ss 37-37.3),
- national security privilege (ss 38-38.17),
- Cabinet privilege (s 39),
- journalistic source privilege (s 39.1).

Additionally, the *Criminal Code*[25] contains a patchwork of offence-specific evidentiary provisions. For instance, Code s 276 governs the admission of the complainant's extraneous sexual conduct in sexual offence prosecutions, and s 278.93 dictates the procedure for the *voir dire* in those cases. In a prosecution for perjury, Code s 133 provides that the accused cannot be convicted on the evidence of a single witness "unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused." Also, Code ss 320.31 to 320.35 create a number of evidentiary

22 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

23 RSC 1985, c C-5.

24 In the 1970s, the Law Reform Commission produced a draft *Evidence Code* and urged Parliament to enact it, but this was never done. See *Report on Evidence* (Ottawa: Law Reform Commission of Canada, 1975). The possibility of comprehensive codification now seems remote.

25 RSC 1985, c C-46 [Code].

rules and presumptions applicable to alcohol- and drug-impaired driving prosecutions. Accordingly, while the Code contains little in the way of generally applicable evidence law, it does govern the evidentiary mechanisms by which numerous specific offences can be prosecuted or defended.

Since 1982, the Charter has likewise made incursions into the law of evidence. Most obviously, it introduced new substantive constraints on the ability of the state to gather evidence, and an exclusionary mechanism in s 24(2) for evidence obtained in breach of the Charter. Although the ultimate aim of a Charter s 8 search and seizure claim or a s 10(b) right to counsel argument is usually to exclude evidence thereby obtained, the subject matter belongs principally to criminal procedure and constitutional law rather than the law of evidence. We therefore do not deal with these topics in any detail in this book, except where they overlap and intersect with matters of evidence law—for instance, where the Charter-entrenched right against compelled self-incrimination informs and supplements the common law confessions rule.[26] Readers will want to consult other texts for in-depth treatment of substantive Charter provisions and the s 24 remedial jurisdiction.[27]

Somewhat less directly, the Charter has also informed the development of the common law of evidence. As explained by the Supreme Court in *Salituro*,[28] courts are expected to make incremental changes to the common law of evidence to ensure that it reflects contemporary values, including those embedded in the Charter. In that case, the Court created an exception to the rule of spousal incompetency—the ineligibility of one spouse to testify against the other—for spouses who are irreconcilably separated. More dramatically, the collection of common law and statutory rules concerning self-incrimination has been significantly strengthened and expanded by way of judicial interpretation of the "principles of fundamental justice" in Charter s 7.[29] Additionally, the common law confessions rule, once concerned solely with the reliability of confessions, has been refined to embrace Charter values of autonomy and freedom from state oppression.[30]

This book is about the law of *criminal* evidence. We do not discuss rules that arise only in civil cases. However, even for a civil litigator, most of what needs to be known about the law of evidence is contained within the law of criminal evidence. This is because most of the doctrines that comprise this body of law have developed in the context of criminal cases. Some reasons for this are easy to surmise. Jury trials have always been more common in the criminal courts, and with them comes the division between trier of law and trier of fact that lends impetus to exclusionary rules. Additionally, the kinds of prejudice that motivate many exclusionary doctrines—for instance,

26 See Chapter 10, "Confessions and Self-Incrimination."

27 See e.g. Don Stuart, *Charter Justice in Canadian Criminal Law*, 7th ed (Toronto: Carswell, 2018); Steven Penney, Vincenzo Rondinelli, and James Stribopoulos, *Criminal Procedure in Canada*, 2nd ed (Markham, Ont: LexisNexis, 2017); Matthew Asma and Matthew Gourlay, *Charter Remedies in Criminal Cases: A Practitioner's Handbook* (Toronto: Emond, 2018).

28 *R v Salituro*, [1991] 3 SCR 654. Parliament later abolished the rule of spousal incompetency entirely: see *Canada Evidence Act*, s 4(2).

29 See e.g. *R v S(RJ)*, [1995] 1 SCR 451; *R v White*, [1999] 2 SCR 417.

30 *Oickle*, *supra* note 15.

the danger of bad character reasoning—have their greatest resonance in the criminal sphere where the presumption of innocence is at stake. In civil cases, some doctrines are applied in virtually the same way as in criminal law—for instance, the rules around expert opinion evidence. But some that concern the accused's vulnerability vis-à-vis the state, like the confessions rule, are simply inapplicable.

III. THE BASIC RULE OF EVIDENCE

The basic rule of evidence in Canada can be stated as follows: "All evidence which is relevant to a material issue at trial is admissible unless excluded by a specific rule of law."[31]

This apparently inclusionary formulation can be deceptive. Most of the body of evidence law is encapsulated in the final clause: exclusionary rules. And most of those rules deal with specific kinds of evidence and contain their own exceptions—for instance, the rule against hearsay, or the rule against prior consistent statements. But there is also a more general exclusionary rule: the trial judge may exclude evidence whose probative value is outweighed by its prejudicial effect.[32] As McLachlin J observed in *Seaboyer*, "the exclusionary rules of evidence are based on the justification that the evidence excluded is likely to do more harm than good to the trial process."[33]

With that in mind, another way to formulate the basic rule was proposed by La Forest J in *Corbett*:

> All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.[34]

As already alluded to, the "grounds of law or policy" giving rise to exclusionary rules mainly have their origins in the jury trial and the adversary system of party presentation. But what specific policy concerns motivate courts to exclude evidence altogether or limit its permissible use?

IV. THE OBJECTIVES OF EVIDENCE LAW

Most obviously, the law of evidence is meant to promote the accuracy of factual determinations made at trial.[35] A law of evidence that did not tend to facilitate the accurate determination of the disputed facts in would fail in its most basic purpose. The modern

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31 See e.g. *R v Johnson*, 2010 ONCA 646 at para 81, where Rouleau JA stated: "All evidence that is logically probative to some material issue at trial is relevant, and therefore admissible unless excluded by some particular rule of law." This is a simplified version of Thayer's formulation, adopted by Lamer J (dissenting) in *Morris v The Queen*, [1983] 2 SCR 190 at 201: "(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it." See also Thayer, *supra* note 4 at 530.

32 In the case of evidence led by the defence, prejudicial effect must *substantially* outweigh probative value to justify exclusion: *R v Seaboyer*, [1991] 2 SCR 577 at 611, McLachlin J.

33 *Ibid* at 621.

34 *Corbett*, *supra* note 7 at 714, La Forest J dissenting in the result.

35 *Seaboyer*, *supra* note 32 at 609.

trend—ostensibly furthered by the recourse to principles over rigid categories—has been to "remove barriers to the truth-seeking process."[36]

Bentham may or may not have been right that the surest way to reach the truth is to allow in all relevant evidence. But truth-seeking, as important as it is, has never been the sole objective of Canadian evidence law. Other objectives, like ensuring fairness to the accused and promoting adjudicative efficiency, have also informed the development of criminal evidence law. And this helps to explain the extent to which our evidence law diverges from the pure Benthamite inclusionary ideal.

Before moving on to other objectives, it is important to be precise about what truth-seeking means in the criminal law context. Most obviously, it entails convicting the guilty and acquitting the innocent. However, a system run by humans can never achieve perfect accuracy in this respect. Accordingly, the criminal law does not place equal weight on those two outcomes: as reflected in Blackstone's famous ratio,[37] avoiding wrongful convictions takes precedence over ensuring that all guilty people are convicted. The burden of proof on the Crown—beyond a reasonable doubt—necessarily means that many *likely* guilty people will be acquitted. This is exactly how the system is supposed to work, and the law of evidence reinforces this bias in a number of ways.

For instance, the accused enjoys a variety of protections against self-incrimination, both as a matter of constitutional entitlement and at common law. Very often, the accused will be the person best placed to answer the allegation; therefore, a system focused solely on seeking the truth might contemplate requiring the accused to speak to police or testify at their own trial. Nonetheless, the "affront to dignity and privacy"[38] occasioned by such a requirement would be too high a price to pay for any truth-seeking benefit that would accrue from it.

Likewise, it would often improve the accuracy of fact-finding to allow the jury access to all manner of relevant information that is ordinarily kept from it. For example, a jury would benefit from knowing that an accused charged with bank robbery had previously served a penitentiary sentence for the same offence. The universe of people who would consider robbing a bank—much less actually do so—is presumably much smaller than the general population. Identifying the accused as one of those people would thus provide the jury with a valuable tool with which to adjudicate the issue of identity. Likewise, consider an accused alleged to have sexual assaulted his girlfriend who was previously charged (but acquitted) of a sexual assault against a previous partner. Even though the prior allegation was not proved beyond a reasonable doubt, what are the chances that the same person would be falsely accused of the same crime twice by different people? Would the jury not benefit from knowing that the defendant had been accused of this before?

In both instances, the risk of a "wrongful acquittal" would probably be materially reduced by informing the jury of the accused's prior history. But the law precludes this result for reasons of policy. It is seen as unfair to make an accused defend not only the particular allegation before the court, but also their entire life that led up to the charge.

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36 *R v Levogiannis*, [1993] 4 SCR 475 at 487.

37 "[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer": W Blackstone, *Commentaries on the Laws of England*, Book IV (Oxford: Clarendon Press, 1897) ch 27 at 358, quoted by Major J (dissenting) in *R v Lepage*, [1995] 1 SCR 654 at para 45.

38 *R v Amway Corp*, [1989] 1 SCR 21 at 40, Sopinka J.

Moreover, the risk of a wrongful conviction is heightened where the jury might be distracted by prior misconduct and tempted to punish the accused for other acts. This risk might be quantitively smaller than the risk of a "wrongful acquittal" that flows from excluding the evidence, but is *qualitatively* more significant because of the premium the law places on avoiding wrongful convictions.[39]

The rule against hearsay is likewise underpinned by a set of systemic values that are sometimes in tension. Most obviously, it is predicated on a truth-seeking rationale—namely, that hearsay is less reliable than first-hand testimony. But the rule is also grounded in fairness concerns.[40] In general, fairness dictates that an accused should be able to "confront" their accuser in order to directly challenge the veracity of inculpatory evidence.[41] But not always. The Supreme Court has held that where adequate substitutes for contemporaneous cross-examination exist, or where the reliability of the evidence could not realistically be challenged, the interests of justice may favour admission.[42] In other words, the truth-seeking objective prevails over fairness objections if the relevant criteria are satisfied.

The goal of promoting trial efficiency also informs a number of evidentiary rules. These range from the straightforward (for example, pursuant to s 7 of the *Canada Evidence Act*, neither side can call more than five expert witnesses without leave of the court) to the frequently misunderstood. The collateral facts rule is in the latter category. Although often wrongly invoked to limit cross-examination perceived as tangential, it places limits on the ability of a party to call evidence *contradicting* answers earlier given in cross-examination. The opposing party can call contradictory evidence only if it bears directly on the issues at stake in the litigation; it cannot do so if the matter goes only to credibility.[43] A system concerned only with truth-seeking might choose to allow such efforts, since they may in fact yield more accurate results. But our law recognizes that reasonable boundaries have to be placed on the ability of either side to chase the resolution of tangential issues down rabbit holes.

V. DEFINING RELEVANCE AND MATERIALITY

As mentioned earlier, relevance is a categorical precondition to admissibility. Although irrelevant evidence sometimes finds its way into a trial through error or oversight, it is never admissible.

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39 In the first example concerning prior convictions, the general rule of inadmissibility can be displaced if the Crown meets the stringent test for admission of similar fact evidence: *Handy*, *supra* note 8. Admissibility arises at the point at which the benefit to truth-seeking entailed by the evidence is seen to outweigh concerns about trial unfairness and wrongful conviction. With respect to the second example (the prior acquittal), this would never be admissible because of the Charter guarantee against double jeopardy and the doctrine of issue estoppel: *R v Mahalingan*, 2008 SCC 63, [2008] 3 SCR 316.

40 *Khelawon*, *supra* note 17 at para 3.

41 Indeed, the "confrontation clause" of the Sixth Amendment has been interpreted by the US Supreme Court to forbid the admission of most hearsay evidence in a criminal trial: *Crawford v Washington*, 541 US 36 (2004). As will be seen in Chapter 6, "Hearsay," the Canadian approach is less categorical.

42 *Khelawon*, *supra* note 17 at para 42.

43 *R v AC*, 2018 ONCA 333 at para 46; *R v MacIsaac*, 2017 ONCA 172.

The relevance of a piece of evidence must be assessed in relation to the fact or facts it seeks to prove or disprove. No piece of evidence is relevant or irrelevant in the abstract; rather, it must be relevant to a "material fact." A fact is material if it is "*in issue* according to the governing substantive and procedural law and the allegations contained in the indictment."[44] In other words, materiality is determined by what is legally and factually in dispute between the Crown and defence.

Relevance is a matter of "everyday experience and common sense."[45] Evidence is relevant if "as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence or non-existence of another fact more probable than it would be otherwise."[46] Or, as formulated by Doherty JA in *Watson*:

> Relevance … requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A." If it does then "Fact A" is relevant to "Fact B." As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and *prima facie* admissible.[47]

Sometimes, longer chains of inference are necessary to establish relevance. For example, in *Watson*, the accused was charged with murder. He claimed that he went with two associates to the deceased's place of business. He stayed outside while the associates confronted the deceased. The Crown alleged that the accused was party to a planned and deliberate killing. The contested piece of evidence was testimony that the deceased habitually carried a handgun ("Fact A"). This was relevant to the defence assertion that the deceased was armed when confronted by the accused's associates ("Fact B"). That is, evidence of the deceased's habit of carrying a gun made it more likely that he was carrying one on the occasion in question than if this evidence had not been adduced. This, in turn, made it more likely that the fatal event was the product of a spontaneous altercation with an armed individual ("Fact C"), as opposed to a planned and deliberate killing as alleged by the Crown. Notably, the connection between Fact A and Fact C is indirect; the former gains its relevance through an intermediate proposition.

Relevance is a binary concept: evidence is either relevant or it is not (notwithstanding that there may be reasonable disagreement about which label applies in any given instance).[48] Accordingly, the threshold for relevance is modest. The existence of Fact A

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44 *R v Candir*, 2009 ONCA 915 at para 49, Watt JA (emphasis added).

45 *R v Jackson*, 2015 ONCA 832 at para 120, Watt JA.

46 *Ibid* at para 122. Similarly, according to the US *Federal Rules of Evidence*, r 401, evidence is relevant if (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

47 *R v Watson* (1996), 30 OR (3d) 161 at 172, Doherty JA. Another useful formulation is as follows: "The fact sought to be proved is termed the 'principal fact'; the fact which tends to establish it, 'the evidentiary fact.' When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below, and evidentiary facts with respect to those above them": *Jones v Donaghey*, 2011 BCCA 6 at para 17, quoting from *R v White* (1926), 45 CCC 328 (BCCA), adopting a passage from SL Phipson, ed, *Best on Evidence*, 12th ed (London: Sweet & Maxwell, 1922).

48 *Jackson*, *supra* note 45 at para 123, Watt JA. As pointed out by Watt JA, it is strictly incorrect to speak of evidence as "highly" or "minimally" relevant, however ubiquitous such references may be.

need only make Fact B *slightly* more likely than if Fact A had not been adduced. In *Watson*, evidence that the deceased habitually carried a gun (Fact A) did not definitively establish that he was armed on the occasion in question. Still less did it establish that he was the aggressor or disprove the accused's involvement in a planned and deliberate killing. But it did not need to. Its relevance lay in the recognition that it made it *somewhat* more likely that the deceased was armed, which in turn *somewhat* raised the likelihood of an unanticipated armed confrontation rather than a planned ambush.

The concept of relevance just discussed is sometimes referred to as "logical relevance," as distinct from "legal relevance." Logical relevance is solely concerned with whether the evidence in question makes the existence or non-existence of a material fact more likely. It is not concerned with the costs or benefits of admitting the evidence. Legal relevance goes further and asks whether logically relevant evidence is "sufficiently probative to justify its admission despite the prejudice that may flow from its admission."[49] For instance, under the *Mohan* test for admission of expert evidence, the "relevance" criterion is one of legal relevance: not only must the evidence be logically relevant, but it must also be sufficiently probative to outweigh the burdens its admission will place on the trial process.[50]

Legal relevance is something of a misnomer, because it brings in cost–benefit considerations that, while important, are not really about relevance at all. In other words, they are about policy rather than logic applied to experience. That said, this distinction between logical and legal relevance is useful because of the frequency with which lawyers and judges invoke the concept of relevance in ways that transcend its purely logical sense.

For instance, it is often said that an accused's prior criminal history is "irrelevant" to the question of guilt or innocence. But no one would deny that in many circumstances, the fact that the accused committed crimes in the past *does* make it somewhat more likely, as a matter of logic and common sense, that they committed the crime in question. Past behaviour is not a perfect guide to future conduct, but we reasonably rely on it all the time in our daily lives. Subject to exceptions,[51] the law excludes this kind of evidence, not because it is logically irrelevant but because its admission will exact too great a cost in terms of the accused's right to be presumed innocent and to be judged on a specific allegation rather than their general character.[52] In other words, its probative value—while often significant—is normally exceeded by its prejudicial effect.

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49 *R v Abbey*, 2009 ONCA 624 at para 82, Doherty JA.

50 *R v Mohan*, [1994] 2 SCR 9 at 20-21, Sopinka J; *Abbey*, *ibid* at paras 88-84.

51 Prior discreditable conduct can be admitted exceptionally under the similar fact evidence rule: *Handy*, *supra* note 8. Further, if the accused testifies, they can usually be cross-examined on their criminal record for the purpose of challenging their credibility: *Corbett*, *supra* note 7. See also Chapter 7, "Character Evidence."

52 *Handy*, *ibid* at paras 31-40.

VI. UNDERSTANDING PROBATIVE VALUE AND PREJUDICIAL EFFECT

We have already reviewed the basic principle that all relevant evidence is admissible unless excluded by a specific rule of law or policy. What general principle underpins the exclusion of relevant evidence? At a high level of generality, the unifying principle is this:

> Evidence should be excluded if its probative value is exceeded by its prejudicial effect.

This principle both underpins most of the established exclusionary rules and creates a free-standing exclusionary jurisdiction that can be exercised where no specific rule is engaged.[53] At one level, it can seem self-evident: evidence should be excluded if it causes more harm than good. How could it be otherwise? In order to give the general principle meaningful content, we must understand what is meant by "probative value" and "prejudicial effect." Both terms contain implicit value judgments and cannot be understood without reference to those values.

A. PROBATIVE VALUE

Probative value[54] represents the extent to which the evidence actually assists in establishing the proposition for which it is tendered. A precondition for this assessment is a determination that the evidence is directed toward a material fact; if it is not, the analysis need go no further. For instance, the bad character of the accused is never a material fact, so evidence directed only toward establishing this proposition is simply irrelevant.[55]

Where the evidence is directed toward a material fact, probative value must be assessed with reference to the rest of the evidence and the positions of the parties. Sometimes the same piece of evidence can take on dramatically different probative value when these variables change. For instance, consider a scenario where the accused has fled the scene of a violent altercation leading to a charge of aggravated assault. Flight might be powerful evidence of the accused's consciousness of guilt. In other words, the evidence of flight may have substantial probative value on the issue of identity. After all, why would an innocent person flee the scene? Although alternative explanations can be proffered—perhaps the accused had an outstanding arrest warrant for an unrelated incident—the existence of alternative explanations does not rob the evidence of its probative value. Or, to be more precise, the existence of alternative explanations does not nullify the *potential* of the evidence to be accorded probative value depending on the jury's view of the facts.[56]

However, the analysis of probative value will change significantly if the accused takes the stand and admits to assaulting the complainant, but denies having caused the most significant injuries. In essence, the accused has acknowledged committing common

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53 *R v Collins*, 2001 CanLII 24124, 160 CCC (3d) 85 at para 19 (Ont CA), Charron JA.

54 There is an unfortunate trend in some recent judicial decisions of using the term "probity" as a synonym for probative value: see e.g., *R v Durham Regional Crime Stoppers Inc*, 2017 SCC 45, [2017] 2 SCR 157 at paras 43-47. "Probity" refers to moral uprightness and is not the noun form of the adjective "probative." If a new coinage is required, "probativity" would be preferable.

55 *Handy*, *supra* note 8 at para 71.

56 *R v White*, [1998] 2 SCR 72.

assault but denied committing aggravated assault. In *Arcangioli*, the Supreme Court held that on these facts, the jury should have been instructed that the accused's flight from the scene had *no* probative value because the action was *equally* explicable by his consciousness of guilt for either of the two offences, one of which he admitted.[57]

Assessments of probative value will depend to a significant extent on the judge or jury's background assumptions about human behaviour. Even on the narrow question of when flight from the scene can support an inference of consciousness of guilt, much judicial ink has been spilled and contradictory results have been reached. In *White 2011*, the Supreme Court split three ways on whether and how the accused's lack of hesitation in fleeing the scene of a shooting could undermine his claim that his gun went off accidentally.[58] Justice Rothstein took it as common sense that a person whose gun discharges accidentally will probably evince surprise, which will in turn manifest in hesitation before leaving the scene.[59] According to Justice Binnie, this assumption "relies too heavily on the witnesses' power of observation and interpretation, and will often involve a series of speculative inferences from a failure to perform as the onlooker thinks 'normal' to a conclusion of guilt of a particular offence."[60] For her part, Justice Charron came down in the middle, agreeing with many of the concerns expressed by Binnie J about this kind of evidence but with Rothstein J that any error in the jury instructions was of no significance on the facts of the case.

The differing views in *White 2011* demonstrate the extent to which assessments of probative value can be highly contestable. One person's common sense may be another person's unwarranted assumption. Distinguishing one from the other—and persuading the court of the validity of the distinction being drawn—is the goal of much of the trial lawyer's work.

Assessing the credibility and reliability of the evidence is generally a matter for the trier of fact, not the trial judge in their gatekeeper role. In other words, determining the probative value of the evidence is normally a matter of evaluating the quality of the inferences to which it gives rise if accepted, not whether or not it will actually be believed. That said, there are circumstances in which the strength or frailty of the evidence is inseparable from a proper assessment of its probative value. For instance, where the Crown seeks to tender extraneous evidence of the accused's prior discreditable conduct under the similar fact evidence rule, the trial judge determining admissibility must consider whether the evidence of the other alleged acts is reasonably *capable* of belief.[61] Evidence not meeting that threshold could not displace the general presumption of inadmissibility.

B. PREJUDICIAL EFFECT

"Prejudicial effect" measures the extent to which reception of the evidence will distort the trial by undermining fundamental principles like the presumption of innocence and the right to be tried on one's actions rather than character. Evidence can also be

57 *R v Arcangioli*, [1994] 1 SCR 129.

58 *White 2011*, *supra* note 19.

59 *Ibid* at paras 73-74.

60 *Ibid* at para 142.

61 *Handy*, *supra* note 8 at para 134.

prejudicial to the Crown—for instance, where it compromises the truth-seeking function of the trial by encouraging reliance on pernicious myths or stereotypes as a basis for acquittal.[62]

Evidence is *not* prejudicial simply because it will tend to incriminate the accused. The question is whether the evidence operates unfairly, not merely unfortunately.[63] In the jurisprudence concerning the general exclusion of evidence of the accused's prior discreditable conduct, the law recognizes two forms of prejudice: moral prejudice (the risk that the trier of fact will be inflamed by the accused's bad character)[64] and reasoning prejudice (the risk that the trier of fact will be distracted from their proper focus by the bad character evidence).[65] Although specific to the context of discreditable conduct evidence, this breakdown provides a useful framework for thinking about prejudicial effect more generally. That is, evidence can operate prejudicially by (1) casting the accused in an unfair light or (2) otherwise distorting the fact-finding process. Distinguishing what counts as "unfair" from what is merely unfortunate is a value-laden exercise that draws on both common law and Charter principles.

Likewise, the weighing of probative value and prejudicial effect is a subjective, normative exercise that does not lend itself to mathematical precision. As Binnie J noted in *Handy*, probative value and prejudicial effect are two variables that "do not operate on the same plane." Probative value "goes to proof of an issue," while prejudicial effect concerns "the fairness of the trial."[66] Weighing these things against each other has something of the character of asking whether a particular bag of garbage smells worse than a particular sunset looks beautiful. That said, a measure of certainty and predictability is provided by the common law method of treating like cases alike. Where precedent offers little guidance, the admissibility decision involves a large measure of discretion that will typically be afforded deference on appeal.[67]

As already indicated, the courts have recognized a residual jurisdiction to exclude evidence whose probative value is exceeded by its prejudicial effect, even where the evidence is relevant and does not offend any particular exclusionary rule.[68] Although this discretion was originally limited to circumstances where the probative value of the evidence was "trifling,"[69] it has broadened in scope since the enactment of the Charter to provide more robust protection of the fundamental right to a fair trial.[70]

Even where a statutory provision expressly authorizes the admission of evidence, courts have imputed a residual discretion to exclude it in circumstances where admission would create unfairness to the accused. For instance, in *Corbett*, the Supreme Court affirmed the constitutionality of the section of the *Canada Evidence Act* allowing

62 *R v Darrach*, 2000 SCC 46, [2000] 2 SCR 443 at para 24.

63 *Handy*, *supra* note 8 at para 139; *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33 at para 65.

64 *Handy*, *ibid* at paras 31, 100, 139; *Shearing*, *ibid* at para 64.

65 *Handy*, *ibid* at paras 100, 144-46; *Shearing*, *ibid* at para 65.

66 *Handy*, *ibid* at para 148.

67 *Hart*, *supra* note 15 at para 110.

68 *Seaboyer*, *supra* note 32; *Morris*, *supra* note 31.

69 *The Queen v Wray*, [1971] SCR 272 at 293, Martland J.

70 *R v Harrer*, [1995] 3 SCR 562 at para 13, La Forest J, and at para 41, McLachlin J.

the accused to be cross-examined on his prior criminal record. However, the Court read in a discretion to edit or exclude the record in circumstances where admission would impair the fairness of the trial.[71] A similar discretion was recognized in *Potvin*,[72] where the Court upheld the *Criminal Code* provision permitting the admission of a witness's preliminary inquiry testimony where the witness is unavailable at the time of trial.

For evidence led by the defence, the threshold for exclusion is higher: in order to exclude relevant defence evidence, its prejudicial effect must *substantially* outweigh its probative value.[73] This higher threshold reflects the presumption of innocence and the premium the system places on preventing wrongful conviction.[74] Excluding relevant—and therefore potentially exculpatory—defence evidence from the jury's consideration is a dangerous proposition if it is not undertaken with judicious restraint. This is what caused the Court in *Seaboyer* to strike down the original version of the "rape shield" law, which barred evidence of the complainant's prior sexual history: in addition to barring improper reliance on myths and stereotypes, it prohibited legitimate uses of prior sexual conduct that did not engage any improper reasoning.[75]

Put differently, courts have a "residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist."[76] The limits to this discretion will be reached at the point identified by *Seaboyer*: that is, where the prejudicial effects of the evidence substantially outweigh its probative value. The residual discretion does not open the floodgates to otherwise inadmissible evidence at the behest of the defence. For instance, unreliable hearsay tendered by the defence must still be excluded because unreliability is the very "danger" the exclusionary rule aims to guard against.[77]

VII. BURDENS AND STANDARDS OF PROOF

Evidence is about proof, or lack thereof. The specific rules that make up the law of evidence therefore cannot be understood in isolation from these questions: Who has to prove what? And to what degree of certainty?

The "burden of proof" refers to the identity of the party that bears the onus of proving the proposition to the relevant standard. The "standard of proof" is the degree to which a proposition must be proven in order to satisfy the relevant legal test.

Burdens of proof are either *persuasive* or *evidential*. A persuasive burden requires the proponent to actually prove the proposition at issue to the requisite standard. The Crown's burden of proving the elements of an offence beyond a reasonable doubt is

71 *Corbett*, *supra* note 7.

72 *R v Potvin*, [1989] 1 SCR 525.

73 *Seaboyer*, *supra* note 32 at 611.

74 *R v Grant*, 2015 SCC 9, [2015] 1 SCR 475 at para 19.

75 *Seaboyer*, *supra* note 32.

76 *R v Williams*, 1985 CanLII 113, 18 CCC (3d) 356 at 378 (Ont CA), Martin JA, quoted with approval by Cory J in *R v Finta*, [1994] 1 SCR 701 at 854. See also *R v Folland* (1999), 132 CCC (3d) 14 at para 48 (Ont CA), Rosenberg JA; *R v Post*, 2007 BCCA 123 at paras 85-87, Finch CJ.

77 *R v Kimberley* (2001), 157 CCC (3d) 129 (Ont CA) at paras 80-81, Doherty JA.

a persuasive burden. The burden on the defence to prove the "not criminally responsible" defence on a balance of probabilities is also a persuasive burden. By contrast, the burden on the accused to put a defence "in play" by pointing to some evidence in the record that could reasonably support it is an evidential burden.

A. THE BURDEN OF PROOF ON THE CROWN

The ultimate burden of proof, always on the Crown, is to prove the accused's guilt to the standard of beyond a reasonable doubt. This means that *each essential element* of the offence must be proved beyond a reasonable doubt for a finding of guilt to be made. Where an affirmative defence is raised—and determined by the judge to have an air of reality—the Crown must *dis*prove it beyond a reasonable doubt.

What is "proof beyond a reasonable doubt"? Despite the vast amounts of judicial and academic ink that has been spilled in search of an answer, a consensus definition has remained elusive. Instead, Canadian courts have mainly settled for defining it by what it is *not*.[78] Reasonable doubt is not an "ordinary" or "everyday" concept.[79] Beyond the single adjective "reasonable," it should not be further qualified as a "haunting" or "serious" or "substantial" doubt.[80] Proof beyond a reasonable doubt is most certainly not the same as proof on a balance of probabilities. Nor is it proof to an absolute or mathematical certainty—something that is all but impossible in human affairs. However, the standard of proof beyond a reasonable doubt lies much closer to absolute certainty than to a balance of probabilities.[81]

The equation of proof beyond a reasonable doubt with "moral certainty" is arguably one of the more promising formulations. It helpfully conveys that proof of guilt must be sufficiently certain to justify the morally significant act of condemning a person as a criminal and potentially depriving them of liberty. But it, too, has been disapproved by the Supreme Court as unhelpful and potentially misleading.[82] Neither should the judge give the jury examples of what might constitute proof beyond a reasonable doubt in everyday life.[83] Jurors should not be told that a reasonable doubt is doubt for which they can give a reason, because this may discourage an inarticulate juror from giving effect to a valid and sincerely held doubt.[84]

In *Lifchus*, the Supreme Court provided authoritative guidance on how reasonable doubt should be explained to juries. In so doing, it abandoned the traditional view that

78 The judicial aversion to definition may stem in part from the uncomfortable recognition that although wrongful convictions are to be avoided at (almost) all costs, total certainty is impossible. It would therefore appear inevitable that wrongful convictions will happen. No one has any hesitation in affirming that proof on a balance of probabilities means 50 percent plus one, but few jurists would wish to quantify proof beyond a reasonable doubt. Should it be calibrated at 90 percent certainty, 95 percent, 99 percent? Ultimately, perhaps this is the wrong question, because proof beyond a reasonable doubt speaks to the subjective attitude of the trier of fact (being "sure") rather than an objective assessment of probabilities.

79 *R v Lifchus*, [1997] 3 SCR 320 at para 23, Cory J.

80 *Ibid* at para 26.

81 *R v Starr*, 2000 SCC 40, [2000] 2 SCR 144 at para 242, Iacobucci J.

82 *Lifchus*, *supra* note 79 at para 25.

83 *R v Bisson*, [1998] 1 SCR 306.

84 *Lifchus*, *supra* note 79 at paras 28-30; *R v Grant*, 2016 ONCA 639 at para 110, Laskin JA.

reasonable doubt is self-defining and the less said about it the better.[85] Rather, following *Lifchus*, the trial judge must explain how the standard of proof beyond a reasonable doubt relates to the presumption of innocence. The Court provided the following model charge, which is now, with minor modifications, routinely delivered to criminal juries at the end of trial:

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

This precise formulation is not sacrosanct, so long as the fundamental ideas are conveyed—namely, that the standard of proof is inextricably intertwined with the presumption of innocence;[86] that a reasonable doubt can arise from evidence or lack of evidence;[87] and that if the accused is only "probably" guilty, they must be acquitted.[88] In *Starr*, the Supreme Court encouraged trial judges to situate proof beyond a reasonable doubt between the balance of probabilities on one hand and absolute certainty on the other, while making clear that it lies much closer to the latter than to the former.[89] This clarification, while helpful, is not mandatory.[90]

Ultimately, the simplest formulation is probably the closest to the truth: to be satisfied beyond a reasonable doubt is to be *sure* that the accused is guilty.

The Crown need not prove each constitutive fact beyond a reasonable doubt: it must only discharge that burden with respect to the elements of the offence.[91] In a jury trial, individual jurors may take different factual pathways to guilt beyond a reasonable

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85 See e.g. *R v Campbell*, 1977 CanLII 1191, 38 CCC (2d) 6 at 25 (Ont CA), Martin JA.

86 *Lifchus*, *supra* note 79 at para 27.

87 *R v Anderson* (2003), 179 CCC (3d) 11 (Ont CA).

88 *Lifchus*, *supra* note 79 at para 36; *R v Avetysan*, 2000 SCC 56, [2000] 2 SCR 745 at para 14, Major J.

89 *Starr*, supra note 81 at para 242.

90 *R v Archer* (2005), 202 CCC (3d) 60 at paras 36-38 (Ont CA), Doherty JA.

91 *R v Morin*, [1988] 2 SCR 345. This includes disproving a defence that has been put in play.

doubt.[92] Accordingly, it is a mistake to relate the standard of proof to individual items of evidence.

By the same token, defence evidence need not be "believed" or "accepted" before it can give rise to a reasonable doubt. Therefore, it is an error to proceed on the basis that the trier of fact should exclude from consideration evidence that has not been accepted, or that the case should be decided only on "proven facts."[93]

Similarly, when the accused testifies, the ultimate question is not whether they are believed or are deemed more credible than witnesses for the Crown. It is whether the Crown's case, as a whole, proves the charge beyond a reasonable doubt. This, of course, is the *W(D)* principle, named after the most-cited decision in Canadian criminal law. In that case, Cory J enunciated the familiar formula relating the assessment of credibility to proof beyond a reasonable doubt:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.[94]

Almost as familiar to criminal lawyers as the *W(D)* formula itself is the customary disclaimer that it is not a "magic incantation."[95] The words themselves are not sacrosanct, but the underlying principle is. A criminal trial is not a credibility contest. The accused's evidence does not have to be affirmatively believed in order to give rise to a reasonable doubt. A state of uncertainty is enough. The three "steps" of *W(D)* are not three sequential stages that a trier of fact must pass through in that order; rather, they describe three possible conclusions a trier of fact could reach on a reasoned consideration of conflicting evidence.[96]

It is now broadly accepted that an equivalent direction should be given in cases where the accused does not testify, but where there is defence evidence requiring credibility findings that could give rise to a reasonable doubt on an essential element of the offence.[97] However, where acceptance of the defence evidence would not necessarily lead to an acquittal, the standard *W(D)* instruction will be inappropriate. This can arise where either an element of the offence itself or an applicable defence has an objective component. In such cases, acceptance of the accused's evidence can be entirely consistent with a finding of guilt if, for example, the accused acted unreasonably in a relevant way.[98]

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92 *R v Thatcher*, [1987] 1 SCR 652, 1987 CanLII 53.

93 *R v Miller* (1991), 68 CCC (3d) 517 (Ont CA); *R v Bui*, 2014 ONCA 614 at paras 24-28, Simmons JA.

94 *R v W(D)*, [1991] 1 SCR 742 at 758.

95 *R v S(WD)*, [1994] 3 SCR 521 at 533; *R v JHS*, 2008 SCC 30, [2008] 2 SCR 152.

96 *R v JE*, 2012 ONSC 3373 at paras 17-20.

97 *R v BD*, 2011 ONCA 51 at para 114; *R v Cuthill*, 2018 ABCA 321 at para 94.

98 *R v Baptiste*, 1998 CanLII 14999, 108 BCAC 103 at para 29 (BCCA); *R v Nieto*, 2007 MBCA 82 at para 47; *R v Sadiqi*, 2013 ONCA 250 at para 21.

B. BURDENS OF PROOF ON THE DEFENCE

The accused never has to prove anything beyond a reasonable doubt. Normally, the accused need only raise a reasonable doubt on an element of the offence in order to be entitled to an acquittal. Exceptionally, however, the accused is required to establish a defence on a balance of probabilities in order to secure an acquittal: not criminally responsible by reason of mental disorder is the prime example,[99] and the defence of non-mental disorder automatism is another.[100]

More commonly, as seen above, the accused bears an evidential burden to put a defence in play, thereby activating the Crown's burden to disprove it beyond a reasonable doubt. An evidential burden is not a burden of proof, in that it does not require the accused to prove anything.[101] It merely requires the accused to adduce or point to some evidence that raises an "air of reality" to the defence in question.[102] The evidence in question can come from the Crown's case or from the defence. In determining whether the evidentiary burden has been met, the trial judge does not decide whether the defence will or should succeed, only whether it is *capable* of succeeding—which normally means raising a reasonable doubt.[103] If there is direct evidence on every element of a defence, it must be put to the jury, since it is up to the jury to accept or reject such evidence.[104] If the evidence is circumstantial—or where there is an objective element that involves normative evaluation rather than factual proof—the trial judge engages in a "limited weighing" to determine whether the evidence is reasonably capable of supporting the necessary inferences.[105]

It can sometimes be challenging to distinguish between what counts as an element of the offence that the Crown must always prove, and what counts as an element of a defence that the Crown must only disprove when the accused meets their evidential burden. Nowhere was this more evident than in *Morrison*,[106] where the Court entertained a Charter challenge to the "reasonable steps" requirement applicable to the Internet child luring offence in Code s 172.1. The Court upheld the provision against a Charter challenge on the basis that—all appearances to the contrary—it does *not* allow for a conviction solely on the basis that the accused failed to take reasonable steps to ascertain the interlocutor's age. Rather, it only limits the circumstances in which the accused can discharge their evidential burden to put their honest belief in play. The Crown always bears the ultimate burden of proving that the accused *subjectively believed* the interlocutor was underage.[107] The distinction is a fine one, to say the least.[108]

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99 Code s 16(2), upheld as a reasonable limit on the presumption of innocence in *R v Chaulk*, [1990] 3 SCR 1303.

100 *R v Stone*, [1999] 2 SCR 290.

101 *R v Fontaine*, 2004 SCC 27, [2004] 1 SCR 702.

102 *R v Cinous*, 2002 SCC 29, [2002] 2 SCR 3 at para 52; *R v Schwartz*, [1988] 2 SCR 443 at 466.

103 *Cinous*, *ibid* at para 54; *R v Mayuran*, 2012 SCC 31, [2012] 2 SCR 162 at para 21.

104 *Cinous*, *ibid* at para 88; *R v Gauthier*, 2013 SCC 32, [2013] 2 SCR 403 at para 25.

105 *Cinous*, *ibid* at paras 89-90; *R v Cairney*, 2013 SCC 55, [2013] 3 SCR 420 at para 21.

106 *R v Morrison*, 2019 SCC 15, [2019] 2 SCR 3.

107 *Ibid* at paras 74-91.

108 See also *R v Carbone*, 2020 ONCA 394, applying the *Morrison* approach to the "reasonable steps" requirement for the mistake-of-age defence on a charge of invitation to sexual touching.

Fortunately, most offences involve fewer statutory gymnastics, and the interplay of the burdens is more straightforward. If the accused discharges their evidential burden to put the defence in play, the ultimate burden reverts to the Crown. Usually this means that the Crown must prove all the elements of the offence beyond a reasonable doubt *and* must also disprove at least one element of a live defence to the same standard. For example, if the accused is charged with murder and has raised self-defence, the Crown must prove (1) that the accused caused the death of the deceased and did so with one of the required states of mind, *and* (2) (a) that the accused did not believe on reasonable grounds that force was being used against them *or* (b) that the accused's use of force was not done for the purpose of self-defence *or* (c) that the force employed was not reasonable in the circumstances.[109] At the level of principle, a killing carried out in self-defence (or pursuant to any other lawful justification or excuse) is not murder. It therefore makes sense that, if self-defence (or another defence) is in play, the Crown must disprove it beyond a reasonable doubt.

109 Code s 34(1); *R v Hebert*, [1996] 2 SCR 272 at para 23.