Hearsay and Exceptions to Hearsay Rule

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The “hearsay rule” is often invisible in family law cases, a mere ghost-like presence in the courtroom. Hearsay is regularly received without even an objection. If there is an objection, there will often be some judicial mumbling about “weight” and the hearsay will be received “for what it’s worth”. And appeal courts readily dismiss evidence grounds of appeal, assuring all parties that the trial judge could never have relied upon any unreliable hearsay.

But the hearsay rule is a rule of admissibility, a rule of exclusion, excluding hearsay from even forming part of the court record. As the Supreme Court of Canada has repeatedly stated, hearsay is “presumptively inadmissible”.\(^1\) If evidence is hearsay, it may be admissible under an exception, but the proponent bears the burden of convincing the court that it meets the requirements of an exception. Even if hearsay is admissible under an exception, the same concerns that underpin the admissibility rule can also affect the ultimate weight of the hearsay admitted. In this sense, there is a “weight” function of the hearsay rule too, as the rule alerts us to the broader frailties of hearsay.

Interestingly enough, if you search family law decisions for references to “hearsay”, you can find many of them. Too often, it is clear that the court admitted the hearsay, but gave it no weight, e.g. “there was only hearsay evidence offered, which is not proof”. Other times the court notes that this was rank “hearsay” and hence inadmissible, suggesting highly unreliable junk. And, quite often, the “hearsay” comment flags one of the multiple sins of lousy affidavits filed by the parties, leaving us unclear whether this was a ruling on weight or admissibility.

Writing a chapter on the use of the hearsay rule in family law is a bit like describing a ghost, one that appears, disappears and then reappears in unpredictable ways. For too many family law lawyers and judges, however, the hearsay rule is treated like a really scary ghost movie, like *The Shining* or *Poltergeist* or *What Lies Beneath*. In this chapter, I hope to make the hearsay rule a more benign ghost, a friendly one like *Casper* or maybe a “good” one like in *Ghost* or *Truly, Madly, Deeply*, or at least a funny, not-so-scary one like in *Ghostbusters*.

We will start by defining what is and is not “hearsay”, the critical first step in any hearsay analysis. Next I will define the “traditional” or “categorical” hearsay exceptions, and the requirements that must be met for each exception. Third, I will canvass the new, principled approach to hearsay and the “exceptions” created and extended since the hearsay revolution began in the 1990 *Khan* case.\(^2\) Finally, I will consider the use of the

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principled approach to exclude hearsay otherwise admissible under a categorical exception.

A few words here about my approach. First, this chapter is not about the law of evidence in child protection cases. The law of evidence is treated most seriously in child protection cases within the field of family law, given their state-vs-citizen overtones, but there are also distinctive evidentiary provisions in protection statutes that are not found elsewhere in family law. I will refer to some protection cases, for their careful analysis of hearsay issues, but not too many. Second, I have made an effort to cite as many family law hearsay cases as possible, just to prove that such cases do exist and to show that some judges do treat hearsay as a rule of admissibility. Inevitably, hearsay principles are most frequently tested and stated in criminal cases, especially in the Supreme Court of Canada, but I also consider a number of civil non-family hearsay cases. Third, although child hearsay must be part of any family law hearsay analysis, this is not a chapter devoted solely to child hearsay. For the most part, this chapter will focus on the application of the hearsay rule in the traditional sphere of “private family law”, i.e. custody, access, support and property issues between spouses, partners and parents.

Every general evidence text devotes a large number of pages to hearsay issues, but most are utterly dominated by criminal law analysis and cases. I will attempt to keep the focus on hearsay issues and exceptions that occur regularly in family law cases. The general texts can be consulted for additional case citations.

1. An Advocate’s Outline of Hearsay Arguments

The structure of this chapter does reflect the basic steps of hearsay analysis. There are always two sides to hearsay, for an advocate in an adversarial system: one side wants to admit the hearsay, the other to exclude it. Simple. Not so simple for the judge, but simple for the advocate. The objective defines the steps.

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4 For an older article on just this topic, see Thompson, “Children Should Be Heard, but Not Seen: Children’s Evidence in Protection Proceedings” (1991), 8 C.F.L.Q. 1 and, more recently, Bala, Talwar and Harris, “The Voice of Children in Canadian Family Law Cases” (2005), 24 Can.F.L.Q. 221.

5 In a previous article, I covered hearsay issues as part of a much broader survey of evidence issues: “Are There Any Rules of Evidence in Family Law?” (2003), 21 Can.F.L.Q. 245. See also Thompson, “Five Vexing and Vexatious Issues in Family Law Evidence and Procedure” in Shaffer, ed., Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod (Toronto: Thomson-Carswell, 2007) at 3, especially at 28-35 on hearsay issues (the first portion of the chapter is devoted to a variety of privilege issues).

6 The leading texts would be: Paciocco and Stuesser, The Law of Evidence, 5th ed. (Toronto: Irwin Law, 2008, chapters 4 and 5; Delisle, Stuart and Tanovich, Evidence: Principles and Problems, 8th ed. (Scarborough: Thomson-Carswell, 2007), chapter 6.B; and Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed. (Markham: Butterworths, 1999), chapter 6. I will not cite to specific pages of these texts for general principles, as they can readily be found.
For the advocate seeking to admit hearsay, there are three steps in modern hearsay analysis:

(i) Is it hearsay? If it isn’t, then it’s admissible.
(ii) If it is hearsay, is it admissible under a traditional or categorical hearsay exception?
(iii) If it is hearsay and it isn’t admissible under a categorical exception, is it admissible on the principled basis of necessity and reliability?

On the first step, the burden of proof is upon the party raising the hearsay objection, the opponent. Once a statement has been shown to be hearsay, however, the burden rests upon the proponent to show that the hearsay falls within a categorical exception or can be admitted on the principled basis. The standard of proof is the normal civil standard, the balance of probabilities. To determine the admissibility of hearsay, a *voir dire* is required, i.e. an inquiry or hearing on the preliminary question of admissibility. At the end of the voir dire, the judge rules upon admissibility and the statement, evidence or document may become “admissible” and part of the record, part of the evidence upon which the judge can make his or her decision.

For the advocate seeking to exclude the hearsay, the steps are similar, but not identical and more numerous in the modern analysis:

(i) Is it hearsay? If it is, then it must fit within an exception.
(ii) If it is hearsay, is it inadmissible under any categorical exception?
(iii) If it is hearsay and it is admissible under a categorical exception, should the exception be narrowed consistent with the principles of necessity and reliability?
(iv) If it is hearsay and it is admissible under a categorical exception, is this one of those rare cases where this particular statement lacks necessity and reliability?
(v) If it is hearsay and it is not admissible under a categorical exception, can the statement be shown to lack necessity or reliability under the principled approach?

Why the extra steps? As will be explained below, the principled approach has been held to cut both ways, both to expand admissibility of hearsay on the principled approach and to restrict admissibility as the principled approach must also trump the traditional or categorical exceptions.\(^7\) Practically, steps (iii) and (iv) are rarely argued and rarely successful.

Just a reminder on onus on this side of the table. As the party raising the hearsay objection at step one, as the opponent to admissibility, you bear the burden of convincing the court that the evidence is hearsay. If it is hearsay, the burden shifts to the proponent, to show that it fits within a categorical exception. If the hearsay does fit within a categorical exception, then any argument under step (iii) or (iv) puts the burden back

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upon the opponent, and it is an especially heavy burden on step (iv). If the proponent of the hearsay gets to step (v), the burden of proving necessity and reliability rests upon the party trying to admit the hearsay.

As the two lists make clear, when it comes to arguing hearsay admissibility, neither side ever has to give up until each has become exhausted with the argument. But these steps also demonstrate that the “hearsay rule” has become more “principled”, more flexible, driven by necessity and reliability. Family law lawyers are generally familiar with the Supreme Court’s 1990 decision in R. v. Khan, even if it was a criminal case, as it was a case involving hearsay statements of a child about sexual abuse, an issue with which our family courts had struggled throughout the 1980’s in private custody and child protection cases. And, in fact, Justice MacLachlin relied heavily upon the accumulated family law case law, as the basis for the admissibility of child abuse hearsay in criminal cases.8

The Supreme Court’s revolution in hearsay law has come a long way since Khan. In its most important post-Khan decision, the Supreme Court recently restated and expanded its hearsay analysis in its 2006 decision in R. v. Khelawon.9 If you are only prepared to read one Supreme Court hearsay case per decade, then Khelawon is your case for this decade. Khelawon underpins the structure and details of this chapter.

2. Is It Hearsay?

This preliminary question is actually the hardest step in the analysis, and also one with critical consequences. If the evidence is not hearsay, then it is admissible. No need for the laborious review of hearsay exceptions, old and new. The identification of what is or is not hearsay requires a definition of “hearsay” and an understanding of the rationale and functions of the rule against hearsay.

(a) Definitions of Hearsay

A simple working definition of hearsay, one used in practice by many lawyers and judges, has two components:

(i) an out-of-court statement,
(ii) offered to prove the truth of the matters asserted in the statement.10

By “out-of-court statement” is meant anything other than what this witness says in this witness chair in this courtroom in this proceeding. Thus, a statement by this witness on another occasion is every bit as much hearsay, as an out-of-court statement by another

8 Above, note 2 at paras. 25-7.
9 Above, note 1.
person. And a “statement” can be oral or written or, in some circumstances, conduct intended as an assertion.\(^1\)

It is the second requirement, the purpose for which the out-of-court statement is offered, that distinguishes “hearsay” from “non-hearsay”. Assume the witness testifies that, on the day in question: “I called my brother in Toronto. He told me it was raining in Toronto”. If the testimony is offered to prove it was raining in Toronto that day, it is hearsay. If it is offered to prove that the brother’s telephone was working that day, or that the brother was alive that day, or even that the brother believed it was raining that day, all of these would be “non-hearsay” purposes, purposes which do not require us to rely upon the brother’s testimonial abilities. Think of it this another way: think of the brother’s words as a little cartoon balloon hanging over his head, like a cartoon character’s statement, and ask yourself, “is the statement being offered to prove the very facts asserted in that little balloon”. If it is, then it’s hearsay. This version of the hearsay rule is what we academics call the “assertion-based test”, a test that focuses upon the out-of-court “assertion” in the balloon.

Despite nearly two decades of modern hearsay law, the Supreme Court of Canada has still not committed itself to one clear definition of “hearsay”. The closest we have come is Khelawon, where Justice Charron flags the “essential defining features of hearsay” as:

\begin{enumerate}
  \item the fact that the statement is adduced to prove the truth of its contents and
  \item the absence of a contemporaneous opportunity to cross-examine the declarant.\(^1\)
\end{enumerate}

These are the same two requirements as our simple working definition, just in reverse order. The first, difficult issue gets short shrift in Khelawon. The second turns out to be just “out-of-court statement”, with an elaboration of the underlying rationale for the rule, namely the opponent’s inability to cross-examine the declarant at the time the statement was made.\(^1\)

This is the modern rationale for the hearsay rule, summarised in Khelawon, following the seminal work of Professor Morgan.\(^1\) In adversarial terms, the opponent is deprived of the opportunity to cross-examine or test the hearsay evidence, creating unfairness. For the court, the problem becomes a corresponding inability to assess the reliability of the hearsay evidence, undermining its task of accurate factfinding. Morgan proposed a slightly-different test for the identification of hearsay, flowing from its rationale: “does the offered evidence require the court to rely upon the out-of-court declarant’s perception, memory, narration or sincerity?” These are the very testimonial factors which would be tested by cross-examination. More accurately, Morgan called

\(^{11}\) Law Reform Commission of Canada, Report on Evidence (Ottawa: Information Canada, 1975), Draft Evidence Code, s. 27(2). In Khelawon, above, note 1 at para. 34, Charron J. framed this last more broadly, as “communications expressed by conduct”.

\(^{12}\) Above, note 1 at para. 35.

\(^{13}\) Ibid. at para. 36 (used for truth) and paras. 37-41 (absence of cross-examination).

\(^{14}\) Morgan, “Hearsay Dangers and the Application of the Hearsay Concept” (1948), 62 Harv. L. Rev. 177.
these four factors the four “hearsay dangers” of misperception, inaccurate memory, faulty narration or insincerity. In practical terms, going back to our brother-in-Toronto example, Morgan would encourage us to think of what questions we might want to ask of the brother about rain in Toronto, were we to get him on the stand, the questions that we would not get to ask if the hearsay statement were admitted. This “declarant-based” test for hearsay generally produces the same outcomes as the simpler “assertion-based” test, but it is a slightly broader test, calling more statements “hearsay”.

When I say that the Supreme Court has not committed itself to any specific test for hearsay, I only mean that the Court has espoused each of these two tests at different times, sometimes in the same decision. A critical point of difference between the two tests comes with “implied assertions”, statements that contain an implied assertion of fact or conduct that implies an assertion of fact, with the declarant-based test tagging these as hearsay while the assertion-based test calls them non-hearsay. That issue remains unresolved, even after Khelawon, but it need not detain us here, as we will focus on more common and more practical hearsay issues.

(b) Non-Hearsay Purposes

More important in everyday cases are the non-hearsay purposes for which out-of-court statements can be used. If a statement is used for one of these purposes, then it is not hearsay and the statement is admissible. What’s a “non-hearsay” purpose? Any purpose for which the statement is used other than for the truth of the matters asserted in the statement.

The list of non-hearsay purposes is open-ended and only a few common ones are listed here.

- a warning, e.g. “watch out for the car!”
- a threat, e.g. “I’ll kill you”
- a misrepresentation, e.g. “my company is worthless”
- operative legal language or “verbal acts”\(^{15}\), words used to form contracts, make gifts or loans, or transfer property, e.g. “I’ll buy your car for $500” or “I give you my car as a gift”
- to explain subsequent behaviour, e.g. “I got a telephone call that my child had been injured, so I left work right away and went to the school”

In each of these situations, the relevance of the statement does not rely upon the truth of the facts asserted in the statement.

There is no “fact asserted” in the first two examples. In the third, what matters is the statement was made, to prove the misrepresentation. In the fourth collection of

\(^{15}\) This is the term used by McCormick in Strong, ed., *McCormick on Evidence*, 6th ed. (St. Paul: Thomson- West, 2006), Vol. II at 133.
examples, what matters is not the accuracy or sincerity of the statement, but that it was made: if I accept your offer to buy my car, then we have a contract.

The last example requires some amplification. The out-of-court statement, the telephone call, cannot be used to prove the child was injured (that would be a hearsay purpose), but it can be used to explain why the parent left work abruptly and went to the school (the non-hearsay purpose). The parent on the witness stand can be cross-examined effectively about his or her behaviour subsequent to the phone call.

Sometimes lawyers will argue that an out-of-court statement is being offered, not for its truth, “oh no, only to prove that the statement was made”. For example, the silver-haired lawyer (seniority always seems to help this dubious method) argues that the following would not be hearsay, when stated by the father: “My daughter told me that her mother stole the jeans she was wearing.” Keep in mind that the party offering the hearsay has the burden of proving the non-hearsay purpose. Ask the silver-haired lawyer how it is relevant that this statement was made, without knowing whether the contents are true or false. In the “subsequent behaviour” example above, we can see that relevance. But not in the “stolen jeans” statement: the statement is only relevant if the jeans were stolen.

3. **Categorical Hearsay Exceptions**

There is much mythology in the law of hearsay, and some of it survives in the caricature of the bad old rule-bound hearsay days, in contrast to our good new principled and flexible approach. According to the myths, the “hearsay rule” was rigidly and technically applied to exclude highly-reliable hearsay. Hearsay exceptions were tightly-defined “pigeonholes” that admitted hearsay statements on an arbitrary and mechanical basis. And there was allegedly a long and complicated list of hearsay exceptions, incapable of being remembered except by the Einsteins of legal practice. While these are convenient “straw men (and women)” arguments for hearsay reformers, there is only a small amount of truth in this account, an account also used by the Supreme Court of Canada in its hearsay reform judgments.

Courts have always strained to admit necessary and reliable hearsay, but it was harder in times past, when courts and lawyers believed in “rules” and “exceptions” as the best way to organise legal knowledge in the interests of certainty, predictability and stability of the law. The older law of hearsay, like the older law of anything, was thus organised around a “rule”, i.e. all hearsay is presumptively inadmissible”, followed by a series of categorical “exceptions”, i.e. if the hearsay fell within a certain category of statements, it was admissible. Since the hearsay rule is a judicial construct, judges were always messing around with the scope of the “rule” and, more frequently, with the scope and application of the exceptions. As a general statement, over the years, the traditional or categorical exceptions had been expanded by the courts.
(a) **A Map of Hearsay Exceptions**

In practice there are three broad groups of traditional or categorical exceptions, and within each group there are only a few exceptions that are practically important. I will first list them off as an outline, an aerial map, then we will deal with those of importance in everyday family law. For the sake of completeness, I will add the fourth category of new “exceptions” created by the principled approach, which will be the subject of the next section. Those marked with an asterisk will be considered in this chapter.

1. **Admissions by a party:**
   - (a) statements by a party offered by opponent*
   - (b) confession to a person in authority by an accused (criminal only)
   - (c) statements of a person with common purpose (co-conspirators)
   - (d) statements by an agent or representative
   - (e) statements by a person with privity of estate or interest with party

2. **Exceptions where the out-of-court declarant is unavailable:**
   - (a) dying declarations
   - (b) declarations against interest
   - (c) former testimony*
   - (d) business records (common law origins)

3. **Exceptions not dependent on the declarant’s unavailability:**
   - (a) business records (regularly-kept records)*
     - (i) common law exception
     - (ii) statutory exceptions
   - (b) past recollection recorded*
   - (c) spontaneous statements (excited utterances, *res gestae*)
   - (d) statements about physical, mental or emotional state*

4. **New “exceptions” based on necessity and reliability:**
   - (a) child abuse hearsay, or the *Khan exception*
   - (b) *K.G.B.* statements, or prior inconsistent statements used for truth*
   - (c) “residual” power to admit specific statements if necessary and reliable*
     - (i) where declarant dead or unavailable
     - (ii) not dependent upon declarant’s unavailability

Before we work our way through the categorical exceptions, headings (1) to (3) above, we must remember Wigmore’s attempt to rationalise these exceptions, an explanation now adopted wholeheartedly by the Supreme Court of Canada. Underpinning each of the categorical exceptions, and now the new ones too, are the broad concepts of “necessity” and “reliability”. Historically, exceptions were created and modified to reflect these two concepts, starting with those exceptions where the declarant was dead, e.g. dying declarations or the older version of “declarations” against interest. Death created
the “necessity” and the additional terms of the exception offered some assurances of reliability.

These traditional exceptions operate to admit “categories” or “classes” of statements which are generally reliable, even if a particular statement might be less so. For example, a “spontaneous statement” is a statement made by a person, while under the influence of the exciting event, describing the event itself. The fact that these statements are contemporaneous and usually spontaneous, give them greater reliability, as the declarant has little time to reflect before speaking, the statements are usually brief and memorable, and the witness to the statement can be cross-examined on the circumstances surrounding the statement, usually also the scene of the events described. But, under the traditional exceptions, there is no scrutiny of the reliability of the specific hearsay statement, provided that it falls within the “category” of such generally-reliable statements.

(b) Admissions by a Party

The single most common categorical exception, and the easiest to apply, is the “admissions” exception. In family law, it would easily be the most common exception, by a wide margin. Here are the requirements that must be proved:

(i) the statement must be that of a party,

(ii) offered against the party by an opponent.

Note the second requirement: it is only when the statement is offered against the party making the statement by an adverse party that it is admissible. The party making the statement cannot offer it for the truth under this exception. “Anything you say can and will be used against you”, if you are a party. It should be noted that here we are considering what are called “informal admissions”, out-of-court statements, as contrasted to “formal admissions” made by parties in pleadings or by their counsel.

A common example might help: in a divorce case, the husband testifies that his wife told him, two years ago, that she had inherited $10,000 from her aunt. An out-of-court statement, offered to prove the inheritance, so it’s hearsay. A statement by a party, the wife, offered against her by the husband, so it falls within the admissions exception and is thus admissible hearsay. Note that the same statement by the wife would be admissible if the statement was made to the husband’s brother and the brother was the witness.

Often this exception is described, wrongly, as “admissions against interest by a party”. There is no requirement that the statement be against the party’s interest, at the time it is made. That would confuse the admissions exception with a completely-different exception noted above, the exception for “declarations against interest”, which applies to statements by non-party witnesses, against their pecuniary, proprietary or penal interest at the time they are made and only admissible when the non-party witness is unavailable to testify.
Not only is there no requirement that the statement be against the party’s interest at the time it is made, this exception does not require the trial judge to assess whether or to what extent a statement is against the party’s interest at trial. It is enough that the party's statement is being offered by an adverse party against the party. The law leaves it to the adverse party to make that judgment.\(^{16}\) This approach is reflected in the various procedure rules governing use of a party’s examination for discovery at trial.\(^{17}\)

The admissions exception is a wide-ranging exception:

- there is no requirement that the party-declarant have first-hand knowledge of the facts admitted in the party’s statement
- the party’s statement can even be in the form of an opinion\(^{18}\)
- a party can adopt the statement of another person, expressly or impliedly
- the statement does not need to be made in the presence of the adverse party
- the statement can be a document disclosed in the discovery process\(^{19}\)
- there is no requirement that the party-declarant be unavailable to testify, unlike many other hearsay exceptions

There are, however, two important limitations upon the use of admissions:

- the statement is only admissible for the truth of its contents against the party making the statement\(^{20}\)
- the statement in its entirety becomes admissible, not just the damaging parts, and the statement can then be used as evidence for its truth both against and for the party making the statement\(^{21}\)

There has always been a debate about the rationale for the admissions exception to the hearsay rule, as the exception does not screen for reliability in any way. Wigmore took the view that admissions were not even hearsay, because a party could not complain about an inability to cross-examine himself or herself. The Supreme Court of Canada has supported the conventional view, that statements of a party do constitute hearsay and require an exception.\(^{22}\) The Court has recognised the different basis for the exception, most notably Justice Sopinka, who put it this way:

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at

\(^{16}\) Delisle, above, note 6 at 755.

\(^{17}\) E.g. Nova Scotia Civil Procedure Rule 18.20(2); Ontario Family Law Rule 23(13).

\(^{18}\) On both these points, see \textit{R. v. Streut}, [1989] 1 S.C.R. 1521 (accused’s opinion that the wheels he was selling to the undercover police officer were hot, ripped off by his friend).


\(^{21}\) \textit{Capital Trust Co. v. Fowler} (1921), 64 D.L.R. 289 (Ont.C.A.).

all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements.\(^{23}\)

This explains why I have treated admissions as a distinct heading under hearsay exceptions, different from those exceptions that are, or are not, dependent upon the unavailability of the hearsay declarant.

(c) **Former Testimony**

This is the most important of the categorical exceptions where the declarant is unavailable to testify. Originally these exceptions were confined to those cases where the declarant was really unavailable, namely dead. The modern approach has expanded unavailability to include: insanity, grave illness, absence from a jurisdiction where the processes of the Court might reach,\(^{24}\) and witness lost despite best efforts to locate.

The requirements for the former testimony exception were most clearly set out in *Serediuk v. Kogan*, a Manitoba appeal in a paternity case.\(^{25}\) A witness testified in the divorce action to the husband’s admissions of intercourse with Serediuk, but by the time of the paternity proceeding the witness could not be found and her evidence was needed to corroborate the mother’s evidence, as the law then stood. Freeman C.J.M. ruled that the certified transcript of the witness should have been admitted, as it met the four requirements:

1. identity of the parties, or more specifically identity of the party against whom the former testimony is being offered;
2. identity of issue;
3. full opportunity for cross-examination; and
4. unavailability of the witness to testify.

McCormick has argued that the first three of these requirements should not be applied mechanically, but should recognise the underlying concern that there must have been at the earlier occasion a person that cross-examined the witness with a similar motive and interest as the party against whom the testimony is now offered.\(^{26}\)

Not included in this four-part list is the most important element implicit in the exception: the hearsay takes the form of “former testimony”, which is sworn, accurately recorded, and taken in a courtroom with all its solemnity and protections. Wigmore went

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\(^{26}\) McCormick, above, note 15, II at 348, 354.
so far as to argue that former testimony wasn’t even hearsay, as there was cross-
examination on the prior occasion, but the conventional analysis properly treats this as
hearsay subject to an exception. But, when it comes to reliability, former testimony is
probably one of the most reliable kinds of hearsay.

(d) Business Records

Early in the history of hearsay an exception was created for statements made
under a business duty, mostly for clerical records, where the Bob-Cratchit-like clerk was
now deceased and there was no other way to prove the records. Just another hearsay
exception where the out-of-court declarant was now unavailable to testify.

The common law exception for business records was widened by the Supreme
Court of Canada in its earliest hearsay reform decision in 1970 in Ares v. Venner. Before and after this decision, Canadian provinces had created broad statutory exceptions
for business records in their Evidence Acts, all except Alberta and Newfoundland and
Labrador. I will therefore begin with the statutory exceptions, and then the common
law.

The statutory exceptions all maintain the availability of the common law
exception, although it is not often used in these jurisdictions. In three jurisdictions,
Ontario, Manitoba and P.E.I., the party offering a business record under the statutory
exception must give seven days’ notice to the other parties. In the rare cases where the
notice requirement is not met, a party can thus resort to the common law exception,
which does not require any advance notice. All of this, of course, is subject to any notice
required under the procedure rules governing disclosure and production of documents.

Before we reach the hearsay exceptions, it is important to distinguish between
“authentication” of business records and their admissibility as hearsay. Authentication
amounts to proof that, say, a doctor’s records are what they purport to be, i.e. an original
or acceptable copy of the complete records of the doctor about a certain patient,
established either by agreement or through the doctor or someone in the doctor’s office.
The hearsay exception, either statutory or common law, requires additional proof, to
make the contents of the records admissible, as described below.

(i) Statutory Business Records Exceptions

The term “business records” in these statutes is slightly misleading. “Business”
is defined very broadly, to include “every kind of business, profession, occupation,

27 Delisle, above, note 6 at 826.
29 In this part, I have drawn from my earlier article, “Any Rules”, above, note 5, at 299-303.
30 The relevant provisions of the various Evidence Acts are: British Columbia, R.S.B.C. 1996, c. 124, s. 42;
Saskatchewan, R.S.S. 2006, c. E-11.2, s. 50; Manitoba, R.S.M. 1987, c. E150, s. 49; Ontario, R.S.O. 1990,
c. E.23, s. 35; New Brunswick, R.S.N.B. 1973, c. E-11, s. 49; Prince Edward Island, R.S.P.E.I. 1988, c. E-
11, s. 32; Nova Scotia, R.S.N.S. 1989, c. 154, s. 23; Northwest Territories, R.S.N.W.T. 1988, c. E-8, s. 47;
Yukon Territory, R.S.Y. 2002, c. 78, s. 39.
calling, operation or activity, whether carried on for profit or otherwise”.\textsuperscript{31} McCormick more accurately describes these as “regularly kept records”, which reflects both the scope of activities covered and the basis for their reliability. These Canadian provisions were based upon an American model provision, the so-called “Commonwealth Fund Act”, originally drafted by Professor Morgan.\textsuperscript{32}

To satisfy the statutory exceptions, a proper foundation must be laid by proof of the following facts, through a witness knowledgeable about the record-keeping system involved:

(i) the record must be made in the usual and ordinary course of the business, kept in some regular fashion;\textsuperscript{33}
(ii) the record must be made contemporaneously with the act recorded, i.e. “at the time… or within a reasonable time thereafter”;\textsuperscript{34}
(iii) the record must be of an “act, transaction, occurrence or event” or an “act, condition or event”, i.e. a record of “fact”, which can include observation, but not expert opinion;
(iv) the maker of the record need not have personal knowledge of the matter recorded, so long as the maker of the record is acting under a business duty and the informant is either acting under a business duty or the informant’s statement is otherwise admissible under the hearsay rule and its exceptions.

The leading business records decision, and still the decision that most comprehensively states the law is the 1977 Ontario case, Setak Computer Services Corp. v. Burroughs Business Machines Ltd.\textsuperscript{35} All of the above four requirements are discussed in Setak.

The last two of the four requirements warrant some elaboration. The business records exception is not confined to clerical or accounting records. Records often include observations, like the nurses’ notes of the patient’s “blue toes” in Ares v. Venner. That observation falls comfortably into the realm of “lay opinion”, the mix of fact and low-level impression that lay witnesses can use in testifying in court. Admittedly, family law cases often involve somewhat more subjective kinds of observations, especially in describing “facts” like the interaction between parent and child. What is abundantly clear from the case law is that the business records exception cannot be used to admit expert opinion.\textsuperscript{36} The statutory language speaks of “facts” or “acts” or “events”. Further, there

\textsuperscript{31} E.g. Ontario, s. 35(1)(a).
\textsuperscript{32} Delisle, above, note 6 at 816; McCormick, above, note 15, II at 304-5.
\textsuperscript{33} Some of the statutes impose what is called a “double course-of-business” requirement, as in Ontario or Nova Scotia: the record must be made in the usual and ordinary course of any business and it must be in the usual and ordinary course of the business to make such a record. These provisions have been read so broadly that this statutory language seems too elaborate and technical.
\textsuperscript{36} To mention just a few: Setak, ibid. at 653 (D.L.R.); V.(S.), above, note 34; Adderly v. Bremner (1967), 67 D.L.R. (2d) 274, [1968] 1 O.R. 621 (Ont.H.C.); Kolesar v. Jeffries (1976), 68 D.L.R. (3d) 198, 12 O.R.
are detailed rules governing expert evidence, requiring reports, proof of qualifications, discovery before trial, and cross-examination at trial, and the business records exception should not be used to permit an end-run around those rules.

The fourth requirement identifies another issue lurking within business records: multiple hearsay. Often the maker of the record does not have personal knowledge of the act or event, but is informed about it by another person who does have such knowledge. Not everything written down in a record is admissible, as Setak explained carefully. Much depends upon who the informant is, and the hearsay status of the statement by the informant to the maker of the record, according to Justice Griffiths:

The Act was intended to make admissible records which, because they were made pursuant to a regular business duty, are presumed to be reliable. The mere fact that recording of a third party statement is routine imports no guarantee of the truth of the statement, and to construe section 36 [now s. 35 of the Ontario Evidence Act] as admitting hearsay evidence of any third party would make the section an almost limitless dragnet for the introduction of random testimony from volunteers outside of the business whose information would be quite beyond the reach of the usual test of accuracy. In my opinion, section 36 of The Evidence Act should be interpreted as making hearsay statements admissible when both the maker of the writing or the entrant of the record, and the informant or informants, if more than one, are each acting in the usual and ordinary course of business in entering and communicating an account of an act, transaction, occurrence or event.37

Following this logic, one nurse can observe the patient’s “blue toes” and inform another nurse, who in turn writes down his or her colleague’s observation in the hospital record, and that record can be used as admissible evidence of the colour of the toes. Both nurses are acting under a business duty, to be careful in what they observe, say and write down as part of the work of the organization. The same is not true for a nurse’s note of what is said by a person outside of the organization, like a relative of the patient who visits the patient in the hospital. Thus, in these multiple hearsay situations, the first question is whether each step in the chain, from one informant to another informant to the maker of the record, are operating within the “business” or organization and under a “business duty”.38

If the informant is outside of the “business” or organization, there is another possible route to admissibility of the multiple hearsay. First, does the statement by the

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37 Setak, above, note 35 at 653.
informant to the maker of the record fall within another categorical hearsay exception? For example, any statement by a party and entered into the records by the nurse would be admissible against the party under the admissions exception. Thus, the husband’s statement to the nurse at the hospital would be admissible if offered by the wife in the family law case, but not at the instance of the husband. Another exception might be that for statements about physical, mental or emotional state. Second, is the statement by the informant from outside of the “business” admissible on the principled basis on grounds of necessity and reliability?

The statutory business records exceptions reflect the broad concepts of necessity and reliability that provide the common core to most hearsay exceptions. Necessity flows from the sheer numbers of individuals that take part in preparing and maintaining the records of an organization, that would otherwise have to be located and called to testify. Reliability derives from the regularity and care with which records are kept, and from the organization’s reliance upon such records in conducting its work.

(ii) The Common Law Business Records Exception

The common law exception continues to be important. First, it is still the only basis for admissibility in the provinces of Alberta and Newfoundland and Labrador. Second, the common law provides a back-up in Ontario, Manitoba and P.E.I. in those cases where proper notice has not been given. Third, and this is important, the common law exception is not confined to written records, as are the statutory exceptions, and can extend to include oral declarations made under a business duty.

One of Canada’s leading hearsay cases is Ares v. Venner. Central to this medical negligence case were nurses’ notes in the hospital records and the proper scope of the common law exception for business records. The Supreme Court ruled that the hearsay rule was judge-made law, law which could be modified and updated by judges. Twenty years later, Ares v. Venner would become the foundation for the judicial revolution in Canadian hearsay law. The Court modified the traditional common law exception, to look like this afterwards, in a frequently-quoted summary by Ewart [with little annotations]:

(i) an original entry [or an oral statement]
(ii) made contemporaneously [with the thing recorded]
(iii) in the routine
(iv) of business
(v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it [varied by Monkhouse below]
(vi) who had a duty to make the record, and
(vii) who had no motive to misrepresent [possibly removed].

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39 Above, note 28.
Prior to *Ares*, the common law had required that the recorder be deceased or otherwise unavailable to testify. That requirement was removed, as the nurses who made the notes were available to testify at trial in *Ares*. Further, *Ares* ruled that observation could be an act that was recorded. Finally, there was that element of lay opinion in the nurses’ notes, describing the patient’s toes as “blue”, “bluish pink”, “cool” and “cold”, permissible under the common law exception.

Despite Ewart’s summary, it is not at all clear from Justice Hall’s reasons in *Ares* that the seventh requirement is still there. Note that the statutory exceptions do not require proof of “no motive to misrepresent” as one of their foundational requirements, and some of that thinking may have slopped over into the common law exception. The conventional textbook view is that *Ares* left this common law requirement untouched, but a close reading of *Ares* suggests that it may no longer be necessary, especially now that *Starr* can be used to weed out the occasional really unreliable business record entry.\(^{41}\)

There is one other important adjustment to Ewart’s summary of the law above, as a result of the *Monkhouse* decision of the Alberta Court of Appeal.\(^{42}\) The recorder or maker of the record, ruled the Court, need not have personal knowledge of the thing recorded, provided that both the recorder and the informant are operating in the course of the business. In this respect, *Monkhouse* modified the common law exception to mirror the approach of the statutory exception in multiple hearsay cases. Of interest, the *Monkhouse* case had a family law angle: the accused was convicted of perjury, for lying to the court in a maintenance enforcement hearing about his income. His income was proved through his employer’s payroll records, starting with the time card filled out by the accused, then transcribed by another employee onto time sheets, which were sent to the central payroll office as the basis for the paycheques issued. In the criminal case, only the payroll manager testified, based upon extracts of the records in the central payroll office.

**(e) Past Recollection Recorded: An Individual Records Exception**

The statutory and common law business records exceptions involve a very broad reading of “business”, but not so broad as to incorporate personal records of employees not kept under a business duty.\(^{43}\) Equally, an individual without a “business” cannot satisfy either of these exceptions. In family law, this means that records of access visits

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\(^{41}\) As was done in *R. v. Kennedy*, [2008] N.S.J. No. 549, 2008 NSPC (N.S. Prov.Ct.). Note that the British Columbia statutory business records exception expressly contains a “motive” rider, above, note 30, s. 42(4): “Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.”

\(^{42}\) Ibid.

\(^{43}\) *Setak*, above, note 35 at . For an odd case that draws this line, see *R. v. Wilcox* (2001), 192 N.S.R. (2d) 159, 152 C.C.C. (3d) 157 (N.S.C.A.), where an employee was directed by the employer *not* to keep certain fisheries records, but the employee nonetheless kept his own manual records for his own protection. There was no “duty” to keep the records under the common law exception and no “usual and ordinary course of business” under the statutory exception (s. 30 of the *Canada Evidence Act*), so Cromwell J.A. resorted to the principled approach to admit the records.
kept by parents would not qualify, for example, nor might personal or household financial records.\(^{44}\)

Where the records are prepared by an individual and the individual has some memory of the events recorded, then the parent or spouse on the stand can “refresh” his or her present memory with use of the records as an “aide-memoire”.\(^{45}\) But what if the individual’s memory is not refreshed? For example, if the question is what was the child’s condition upon returning from an access visit six months ago?

Here is where the old concept of “past recollection recorded” comes in handy, as it is in fact a categorical hearsay exception. In order for the parent’s notes or records to become admissible hearsay under this exception, the following foundational requirements must be proved:

(i) the witness must have no present memory of the matters recorded
(ii) the original record must be used, if it is available
(iii) the record must have been made at or near the time of the events recorded
(iv) the record must have been made by the witness or, if it was made by another, it must have been verified by the witness at or near the time of the events recorded
(v) the witness must now vouch for the record, i.e. testify to its accuracy, on the stand

If these requirements are met, then the record becomes an exhibit and can be used for the truth of its contents.

Looking to the familiar twin factors underpinning hearsay exceptions, there is necessity here, as the witness on the stand has no present memory, and there is reliability, as the record is contemporaneous, accurate and sworn to be accurate by the in-court witness, a witness who is available for some cross-examination.

In the family law setting, there is a good example of this exception in *Hartland v. Rahaman*.\(^{46}\) In that case, the custodial mother took daily notes in a journal “of the negative behaviours of the child around the days of access”, on the advice of her paediatrician, from mid-December 2000 until the June 2001 trial. The mother was found by Justice Campbell to have “no independent memory of any day specific behaviour” except for one incident. The record would have been admissible under the exception for past recollection recorded, except the court found the mother’s journal to be unreliable and hence excluded under the principled approach of *Starr*, discussed below.

\(^{44}\) A self-employed carpenter’s business records would qualify under the exceptions, but not the carpenter’s notes of visits with his children or his records of grocery purchases.

\(^{45}\) The leading Canadian case on present memory revived and past recollection recorded is *R. v. Wilks* (2005), 35 C.R. (6th) 172, 201 C.C.C. (3d) 11 (Man.C.A.), which elaborates upon the main points addressed on these topics by the Supreme Court of Canada in *R. v. Fliss*, [2002] 1 S.C.R. 535.

(f) Statements About Physical, Mental or Emotional State, including Children’s Wishes and Preferences

The most common use of this exception is to prove a person’s “state of mind”, and thus it is frequently labelled as the “state of mind” exception. But the exception is quite broad, admitting a person’s statements about their physical health, their mental or emotional state, their present intention to do a future act, and a child’s wishes or preferences. As all of these issues arise regularly in family law, this is an important categorical exception.

This is not an exception that is dependent upon the unavailability of the declarant. In most cases, the declarant making the out-of-court statement will be available to testify, but the earlier and contemporaneous statement of a person’s then-existing “state of mind” is viewed to be as good, or even better, than today’s sworn evidence. And, practically, there is often no other way to determine a person’s physical, mental or emotional state. This category of statements is seen as reliable for a mixture of reasons: the statement is contemporaneous with the condition, often spontaneous, often made to health professionals for treatment purposes. Significantly, in most instances, the witness who hears the statement can also observe the actual condition and mood of the declarant as the statement is made, to assist in assessing the accuracy and reliability of the statement.

Here are the basic requirements that must be met for this category of statements to be admissible under the exception.47

(i) a statement asserting a condition or state
(ii) the statement must describe a contemporaneous physical, mental or emotional state of the declarant
(iii) the statement may not describe the cause of the state, whether it be past or present events
(iv) the mental state can include a person’s present intention to do a future act
(v) the statement must not be made under circumstances of suspicion.

Although many of these statements may be made to doctors and other health professionals, the exception is not tied down to statements made for the purpose of diagnosis or treatment. Any lay witness can recount such statements, as any witness can describe the condition and mood of the declarant while making the statement, under the lay opinion rule. The hallmark of this exception is the contemporaneity of the statement with the feeling.

To give an example, a father’s friend testifies: “Joe [the father] told me at the time that he was depressed. Joe was just moping around, not doing much.” Joe’s statement is describing his contemporaneous condition. His friend can observe his demeanour and behaviour, to provide a cross-check on the reliability of his stated mood.

And the same reasoning applies, obviously, to statements by a child about his or her physical, mental or emotional state, e.g. to prove a child’s fear of a parent.48

There is a critical limit upon this exception: it can never be used to describe the cause of the physical, mental or emotional state, or the events giving rise to the state. The “state of mind” exception cannot become a vehicle to look backwards to the past. For example, in my earlier example, the child’s statement, “Mommy stole these jeans for me”, cannot be admitted on the pretense that it proves the child’s “state of mind”, i.e. her belief that the jeans were stolen.

The fifth requirement above was first added by the Supreme Court of Canada in 2000 in R. v. Starr49 and confirmed in 2009 in R. v. Griffin.50 This now adds an element of threshold reliability as a requirement for admissibility under the categorical exception, adding to the burden on the party seeking to admit the statement. This may have significant implications for children’s wishes and preferences.

(i) Present Intention to Do a Future Act

“Intention” can be a state of mind proved through this exception, looking forward rather than backward in time. The statement, “I intend to go to Ottawa tomorrow”, can be offered to prove the declarant’s contemporaneous or present intention to go to Ottawa. The statement can also be used as some evidence, however weak, that the declarant did in fact go to Ottawa the next day.

This issue was the focus of the Supreme Court of Canada’s major hearsay decision in R. v. Starr.51 There the deceased Cook had said, to his erstwhile girlfriend, “I have to go and do an Autopac scam with Robert”, offered by the Crown to prove that Cook had gone to wreck a car for insurance purposes and that the accused Starr had the same intention and had gone with Cook. The Court ruled that Cook’s present intention to go wreck a car could not be used to prove Starr’s intention to do the same or to prove that Starr in fact went too. At most Cook’s statement could be used to prove Cook’s intent and actions.

The Court went one step further too, ruling that any statement about present intention to do a future act under the “state of mind” exception must not be made under “circumstances of suspicion”, an added foundational requirement. In Starr, Cook made the statement to his erstwhile girlfriend, in just such circumstances and hence it was inadmissible under the exception.

49 Supra, note 42.
51 Above, note 7.
(ii) Children’s Wishes and Preferences

What about a child’s statements about which parent he or she wishes to live with, the child’s wishes and preferences? The “state of mind” exception provides a simple route to the admissibility of these hearsay statements. The above foundational requirements must be met, most notably that the child is stating his or her contemporaneous wishes, i.e. “I want to live with Dad”. Or the child can say, “I like two sleeps at Dad’s, but not three”. What is not admissible is the child’s statement, “on my last sleep at Dad’s, he slept on the couch with his girlfriend”.

There is therefore no need to resort to fancy “necessity-and-reliability”, Khan analysis, just to admit the child’s wishes and preferences. The good old “state of mind” exception can do the trick, provided the minimal requirements set out above have been met.52

The Supreme Court has recently added a requirement that the statement not be made in “circumstances of suspicion”. The traditional approach had been that any in-court witness could report the child’s wishes and preferences, as admissible hearsay under the “state of mind” exception. Any concerns about unreliability would only go to reduce the weight of this evidence. Many judges consider a parent’s report of the child’s wishes to be of little probative value. The child will usually say to each parent what each parent wants to hear. Now “unreliability” has become a consideration that affects admissibility under this exception.

Based upon Starr and Griffin, all parental reports of the child’s wishes could be treated as having been inherently made under “circumstances of suspicion” and hence no longer admissible under the “state of mind” exception. The ability of judges to rule such statements inadmissible might discourage parents from asking their children questions about their preferences. Statements of wishes to relatives or friends of either parent might also be treated as inadmissible on the same approach. Wishes and preferences could still be admissible from more reliable sources, e.g. assessors, other professionals or even trusted and uninvolved lay witnesses.

Alternatively, the courts could take a narrower and more nuanced view of what constitute “circumstances of suspicion”, admitting some but not all instances of children’s wishes stated to parents and relatives. Under this narrower approach, only the more egregious examples of parents pressuring and pumping kids would actually be excluded as inadmissible. The garden-variety parental reports of preferences could still be admitted (and probably still be given relatively little weight). This narrower approach has one disadvantage compared to the broader source-based approach stated above: it would require the court to inquire into the surrounding “circumstances” of each instance where a parent (or relative) seeks to report a child’s wishes or preferences in the courtroom.

52 Most notably, this was done in Stefureak v. Chambers (2004), 6 R.F.L. (6th) 212 (Ont.S.C.J.), a decision sometimes followed by others. I discussed these cases in “Five Vexing Issues”, above, note 5 at 29.

53 For example, see the analysis of Blishen J. in C.A.S. of Ottawa v. S.E., [2005] O.J. No. 2087 (Ont.S.C.J.) (statements about preferences during access visits recorded by access supervisor).
Whatever the approach to “circumstances of suspicion”, one thing is clear. You do not need complicated hearsay analysis under Khan to admit a child’s statements about his or her wishes and preferences. The “state of mind” exception is available.

4. The Principled Approach, to Admit Hearsay

Starting with its 1990 decision in R. v. Khan, and continuing right up to the present, the Supreme Court has been developing the principled approach to hearsay, relying upon necessity and reliability as its twin guides to admissibility. If hearsay is not admissible under a categorical hearsay exception, a court can proceed to the next step, to determine whether a particular statement is admissible, as both necessary and reliable.

In this sense, where a party is seeking to admit hearsay, the principled approach works like a “residual exception”.

In deciding admissibility, a judge must determine whether it is necessary to resort to hearsay and whether the hearsay statement demonstrates “threshold reliability”, on a statement-by-statement basis. What makes this an individualized inquiry is the assessment of the “threshold reliability” of the particular statement sought to be admitted. The Supreme Court has still not adequately defined this term “threshold reliability”, but it has been clear that the test is not one of “ultimate reliability”. Ultimate reliability involves the end-of-case weighing and fact-finding kind of reliability, after all the evidence is admitted. The question for “threshold reliability” is whether a particular statement is sufficiently reliable to be admitted.

Despite the Court’s insistence that the principled approach requires a flexible and individualized analysis, the regular use of hearsay statements in certain situations has produced something like the categorical exceptions: child abuse hearsay, also dubbed “the Khan exception”; and certain prior inconsistent statements under “the K.G.B. exception”. To be blunt, in day-to-day practice, it’s tiring and unproductive for lawyers and judges to keep reinventing the hearsay wheel. Inevitably, recurring cases lead to more specific guidance for these two kinds of frequently-used hearsay. Unlike the traditional exceptions, these new category-like exceptions maintain a large element of individualized determination of reliability.

In R. v. Khelawon, the Supreme Court of Canada reviewed its post-Khan hearsay jurisprudence, modified some aspects of it, and set out a comprehensive framework for assessing hearsay under the principled approach. Necessity was not the focus of Khelawon, as the witness there died before trial. For our preliminary purposes here, Justice Charron identified two different, but not mutually exclusive, ways to satisfy the reliability requirement for hearsay:

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55 Khelawon, above, note 1 at para. 103, 50-55.
(i) the circumstances in which the statement is made provide sufficient comfort in its truth and accuracy (the contents-based test); and

(ii) there are adequate substitutes for testing the evidence that permit the court to assess reliability at trial (the process-based test).^57

*Khan* is the prime example of the first test, as the court must directly assess, at least for threshold reliability purposes, the truthfulness of the statement. *K.G.B.* is the best example of the second test, where the prior statements are obtained and preserved in a careful fashion and the declarant is available for some cross-examination at trial. The second, process-based test should be considered first, as it is simpler to apply, compared to the contents-based test. The two tests are not mutually exclusive, but can be blended.

(a) **The Child Abuse Hearsay Exception**^58

In *Khan*, the Supreme Court limited its ruling to “hearsay evidence of a child’s statement on crimes committed against the child”, but immediately added this caution: “This does not make out-of-court statements by children generally admissible.”^59 For the most part, in family law cases, the *Khan* exception has been used to introduce evidence of sexual or physical abuse, hence my reference to “child abuse hearsay”.

The facts of *Khan* are known to most lawyers. Little Tanya, then 3 ½ years old, accompanied her mother to visit Dr. Khan, the family doctor. Tanya was briefly alone with Dr. Khan. Half an hour later, in response to an innocuous question from her mother, Tanya recounted that Dr. Khan had “peed in my mouth”. There was also a spot on Tanya’s sleeve, determined to be a mix of semen and saliva. At trial, Tanya was found not competent to testify and her statements to her mother were held to be inadmissible hearsay. The Ontario Court of Appeal reversed on both issues and ordered a new trial. The Court of Appeal would have admitted the hearsay under the exception for “spontaneous statements”. The Supreme Court of Canada upheld the Court of Appeal, but refused to stretch the categorical exception, preferring to adopt a more principled approach. The hearsay was necessary, on the assumption that Tanya was unable to testify for this part of their judgment. Tanya’s statement to her mother:

… was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence.^60

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^58 This section draws heavily upon my earlier article, “Any Rules”, above, note 6 at 290-8.

^59 Above, note 2 at para. 33.

^60 Ibid. at para. 34. The other considerations were identified in para. 30.
In general terms, MacLachlin J. had earlier referred to other considerations, “such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement”.

Before the court can admit the child’s statements, there must be a voir dire. The party seeking to admit the child’s statements bears the burden of proving both necessity and reliability. There is a mass of case law, both criminal and civil, that gives guidance on both branches and there is only space to summarize it here.

(i) **Necessity**

By “necessity” is meant that the evidence would otherwise be unavailable, either because the witness is not available to testify or because the witness on the stand cannot or does not provide evidence of the same quality. The test is “reasonably necessary” under modern hearsay law.61

At one point, there was a debate whether “necessity” was really necessary in family law cases, with the Manitoba Court of Appeal taking the view that it was not.62 That debate is largely over, as most family law courts outside Manitoba have followed *Khan* and required proof of some form of “necessity”. The test for necessity in family law cases is quite flexible, broader than the test used in criminal cases, especially given the general bias against children testifying in family courts.

A number of grounds can create necessity, even in criminal cases, where the child is expected to testify in court:

(i) “normal” unavailability, just like an adult witness, i.e. illness, absent from Canada, refuses to be sworn or to testify;63
(ii) not competent to testify;64
(iii) trauma or harm to the child, proved by expert evidence;65
(iv) unable to give meaningful evidence, as when the child “freezes”;66
(v) unable to give a full, frank and accurate account;67

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61 *Khelawon*, above, note 1 at para. 78, drawing upon the analysis in *K.G.B.*
(vi) the child recants on the stand.\(^{68}\)

The most common ground relied upon in family courts is number (iii) above. For young children, counsel usually concede that it would be harmful for the child to testify.\(^{69}\) If harm is an issue, expert evidence is not hard to obtain. Family law judges appear prepared to accept generalized statements of “likely harm” to the child, often not much more than the harm or stress that is experienced by an adult witness or an older child.\(^{70}\)

In some jurisdictions, the protection statute addresses the admissibility of child hearsay, maintaining a reliability requirement, but substituting a “best interests” test for the necessity test, notably in Nova Scotia, British Columbia and Saskatchewan.\(^{71}\) Some of that thinking slides over to the private family law sphere, with the necessity test relaxed to something like a best interests test. And it’s rarely found to be in a child’s best interests to testify in a courtroom.

(ii) Reliability

Under this modern exception, the child’s statement must be proved to be reliable, in the sense of “threshold reliability”. Because the statements are about child abuse, the analysis of reliability looks closely at the process of disclosure, investigation and interviewing.\(^{72}\) And the analysis is informed by our current expert knowledge about the behaviours of abused children and the circumstances that can surround abuse.

There exist a number of helpful catalogues of factors to consider in assessing reliability, sometimes in cases,\(^{73}\) more often in articles.\(^{74}\) For my part, I have organized the various factors found in the case law into six groupings, with sub-headings:\(^{75}\)


\(^{68}\) Which would give rise to use of the K.G.B. exception, discussed below.


\(^{71}\) Children and Family Services Act, S.N.S. 1990, c. 5, s. 96(3); Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, s. 67(b); Child and Family Services Act, S.S. 1989, c. C-7.2, s. 28(3).


\(^{73}\) One of the more comprehensive listings is found in G.(J.A.) v. R.(R.J.), [1998] O.J. No. 1415 (Ont.Gen.Div.) at para. 17 per Robertson J.


\(^{75}\) “Any Rules”, above, note 6 at 295-6.
(1) Circumstances Surrounding the Statement
   (a) spontaneity
   (b) leading questions or prompting
   (c) timing/recency

(2) The Adult In-Court Reporter
   (a) objectivity/bias
   (b) recording or note-taking
   (c) presence of custody dispute
   (d) preparation for interview of child

(3) The Child
   (a) no reason or motive to fabricate
   (b) age of child
   (c) intelligence and maturity
   (d) details of demeanour

(4) The Contents of the Statement
   (a) spontaneous reproduction
   (b) sufficient detail
   (c) coherence
   (d) precocious knowledge of sexual acts
   (e) consistency over time

(5) Child Behaviours Accompanying the Statement
   (a) initial denial
   (b) recantation
   (c) sexual behaviours
   (d) gestures

(6) Relationship of Statement of Other Reliable Evidence
   (a) corroboration by real or physical evidence
   (b) consistency with other testimony

Many decisions are quite cursory on threshold reliability, while others are more
detailed. A good recent example of the latter, and a case often cited, is *C.A.S. of Ottawa-
Carleton v. L.(L.)*, a decision of Justice Blishen. Of the nine statements or groups of
statements offered in that case about sexual and physical abuse, statements by two
children aged 5 and almost 3, essentially eight were admitted, including statements to
protection workers, to one foster mother and in videotaped interviews by the police.
Certain unrecorded, less reliable statements to one of the foster mothers were excluded.
Many of the factors listed above are identified in the course of this ruling after a voir dire.

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76 Above, note 69. For another careful hearsay decision of Justice Blishen, see *C.A.S. of Ottawa v. M.S.*, above, note 48 (physical abuse).
Similar reliability factors were cited in an especially careful and detailed analysis by Justice Sherr in *C.A.S. of Toronto v. K.F.*, where the statements of a five-year-old “just barely” met the test of threshold reliability, but then were eventually given little weight and no finding of sexual abuse was made. One of the many frailties identified by Justice Sherr was the protection worker’s recording of the child’s statements in his notes, without writing down the questions that elicited the answers, especially in light of the considerable prompting of the child required in the videotaped statements.

There has been an observable tendency to admit child abuse hearsay in family laws cases merely because it is videotaped or audiotaped. That approach should be reconsidered in light of *Khelawon*, where Charron J. stated of the deceased witness’ videotaped statement to the police:

> There is the police video – nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more.

There must be more than a videotape to satisfy threshold reliability. The videotape provides the court with some substitutes for live testimony, namely an accurate record and demeanour, but that alone is not enough for admissibility, as *Khelawon* demonstrates.

(iii) Scope of the Exception

It is clear that the *Khan* analysis applies to a child’s statements about physical or sexual abuse, and the bulk of the cases involve such issues. But *Khan* expressly did not make all of a child’s out-of-court statements admissible. What limits are there on the scope of this exception?

The question is raised by a string of recent protection cases, where there were assorted issues of domestic violence, alcohol or drug abuse, and neglect. One example would be *C.A.S. of Ottawa v. S.E.*, another hearsay decision by Justice Blishen. Admitted on the status review were statements of a five-year-old, made in successive

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78 These concerns of Sherr J. are supported by Moore and Wasser, “Social Science and Witness Reliability: Reliable Science Begets Reliable Evidence” (2006), 33 C.R. (6th) 316. “Verbatim notes” have been revealed to under-report both the details provided by the child and the interviewer’s utterances, such that answers to leading questions are recorded as if they are unprompted responses.

79 *C.A.S. of Renfrew County v. R.G.*, [2004] O.J. No. 6060, 2004 ONCJ 436 (Ont.C.J.) (videotaped statements admitted, but little or no weight due to leading and prompting). In *K.F.*, ibid., the parents consented to the admissibility of the videotaped statements, only contesting the others, but in the end all deserved little weight.

80 Above, note 1 at para. 106.

interviews by a protection worker, about these conditions in the home. The statements were not videotaped or audiotaped, but the worker took detailed written notes. In particular, the statements were offered to prove the details of specific incidents of the father’s drunkenness and the parents’ pushing and shoving each other.

Even if we accept that “the Khan exception” is just a specific application of the principled approach to a child’s statements, it is not obvious that the “exception” should be extended as far as it has been by cases like S.E. There are two issues lurking within this attempt to expand the scope of admissibility. First, there is a greater “necessity” to statements about sexual abuse and physical abuse, as there may be no other way to prove these forms of abuse and we have some guidance in assessing the reliability of these statements from the sexual abuse literature. There is not the same “necessity” in the proof of home conditions, drunkenness, domestic violence, neglect etc. Second, we object to parents “pumping” their children for details of the other parent or the foster home, but these cases permit agency workers to do the same thing, albeit as part of their investigative mandate. If we are concerned about the interests of children, there is a trade-off involved here, which should be discussed more openly. There is something awkward about this pre-trial questioning of children by one party, knowing that the child will not be called to testify, in order to generate and preserve hearsay to prove events at trial.

(b) The K.G.B. Exception

In R. v. K.G.B., the Supreme Court of Canada identified a sub-set of prior inconsistent statements of a witness that provided adequate substitutes for reliability assessment such that they should be admitted when a witness on the stand recanted his or her testimony. A prior inconsistent statement that is not admissible under K.G.B. cannot be used for the truth of the matters asserted in the statement, but only to impeach the credibility of the witness’ sworn testimony on the stand. Obviously, where the witness recants, most of the necessary detail is found in the prior statement, and not in the testimony on the stand. It is the recanting by the witness that creates the “necessity” under this exception. For obvious reasons, the “K.G.B. exception” is probably now the most common instance of admitting criminal hearsay under the principled approach.

In criminal cases, “K.G.B. statements” are often taken in domestic assault cases, as well as for other major crimes, usually videotaped or audiotaped. Such statements can thus be made available in child protection cases. In addition, if a child does testify in a family law case and recants on the stand, the “K.G.B. exception” can be used to admit the child’s prior statement, without need to resort to the more detailed Khan analysis.

Neither of these family law uses is that common, so I will only flag the K.G.B. admissibility requirements here:

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82 Above, note 56. At least this case has a memorable set of initials.
83 In two instances where an older child testified and recanted, courts went through the more elaborate child abuse hearsay exception, when the simpler K.G.B. exception was available: G.A. v. C.A.S. of Cape Breton-Victoria, above, note 81 (children 14 and 13 testified), and Re V.C., [2007] S.J. No. 740, 2007 SKPC 107 (Sask.Prov.Ct.)(18-year-old testified).
(i) the witness must testify, but give testimony inconsistent with his or her previous statement
(ii) the prior inconsistent statement must be accurately recorded, preferably in video or audio form
(iii) the prior statement must be made under oath or affirmation and with a proper warning of amenability to prosecution for lying, or alternatively just made to the police
(iv) if the prior statement is made to a “person in authority”, it must be “voluntary” (as defined in the criminal law of confessions) and it must not bring the administration of justice into disrepute.

In *K.G.B.*, Chief Justice Lamer set out the ideal requirements for a reliable prior inconsistent statement, e.g. videotaping, but acknowledged the possibility of “appropriate substitutes”, some of which were suggested by Justice Cory in his concurring reasons. In *K.G.B.*, the police had obtained videotaped statements from a number of young persons about a fatal stabbing, statements which they all recanted at trial.

The burgeoning *K.G.B.* case law quickly expanded to the broader “Cory limits”. In practice, any form of accurate recording will suffice, including written statements.84 Mere notes of a police officer are not, however, sufficient.85 The requirement of oath or affirmation plus warning was intended by Lamer C.J.C. to replicate the circumstances under which in-court testimony is taken, but Justice Cory was prepared to accept any statement made in circumstances where the witness was subject to criminal prosecution for lying, such as making false statements to police officers.

In *Khelawon*, Charron J. reminded us that “the most important contextual factor in B.(K.G.) is the availability of the declarant”, to be cross-examined in court.86 The process test set out in *K.G.B.* is less demanding than the substantive test, precisely because the witness is available for some cross-examination. That was not the case in *Khelawon*, as the victim of the alleged assault had died, of other causes, and was not available for cross-examination on his prior statements.

In a recent case involving a *K.G.B.* statement, *R. v. Devine*, the Supreme Court emphasized that the opportunity to cross-examine the witness in court must be a “real” or “meaningful” opportunity.87 A witness with “no recall” or little responsiveness would not be sufficient. Something more than a warm body on the stand is required.

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84 As the Supreme Court itself acknowledged in *R. v. U.(F.J.*), [1995] 3 S.C.R. 764 (the police officer’s tape recorder had malfunctioned).
86 Above, note 1 at para. 76.
87 [2008] S.C.J. No. 36, 2008 SCC 36. The statement in *Devine* was taken under oath, after a warning and videotaped by the police.
Admissibility under the Principled Approach, After Khelawon

Apart from the well-trodden ground of child abuse hearsay and K.G.B. statements, the principled approach proceeds on an individualized, statement-by-statement basis, provided the party offering the hearsay can prove the twin requirements of necessity and reliability. These two “should not be considered in isolation”, suggested Justice Charron in Khelawon, implying that the greater the reliability the less the necessity required and vice versa.  

Khelawon now provides the most complete statement of the Supreme Court’s principled approach, reviewing and explaining the cases that have been used to admit hearsay since Khan. On its facts, the real issue in Khelawon was threshold reliability. Khelawon was the manager of a retirement home. Five of the residents claimed that the accused had assaulted them. By the time of trial, four had died and the last was no longer competent to testify. At trial, the Crown offered ten hearsay statements, four of them videotaped statements to the police. The trial judge admitted three of the videotaped statements and convicted the accused of aggravated assault (and uttering death threats) on one resident and assault causing bodily harm and assault with a weapon on another resident. Khelawon was sentenced to 4 ½ years in prison. The Ontario Court of Appeal set aside the convictions and entered acquittals, as the video statements were held to be inadmissible. The Supreme Court dismissed a Crown appeal against the acquittal on the aggravated assault charge, agreeing the victim Skupien’s video statement was inadmissible.

Necessity was obviously satisfied, as Skupien had died and could not testify at trial. Further, Khelawon was not a K.G.B.-type case, that would fall within the second, process-based approach to hearsay admissibility. No, it was a contents-based argument, based upon the truth and accuracy of Skupien’s statement. A number of factors were considered by Justice Charron, in finding his video statement unreliable in the threshold sense. He was elderly and frail. His mental capacity was at issue. His injuries might have been caused by a fall, given his medical records. He was encouraged to make a statement by a disgruntled employee of the home. Skupien had his own issues with the management of the home too. There was no oath. It was not clear whether Skupien understood the consequences for the accused of making the police statement. The statements of the other complainants “posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien’s allegations”.

88 Above, note 1 at para. 46.
89 Along the way, Justice Charron notes that hearsay admissibility in the criminal context “may take on a constitutional dimension”, in light of the section 7 right of an accused to a fair trial: ibid. at paras. 47-49. I note this here as section 7 is engaged by child protection proceedings and possibly a few other family law proceedings: Thompson, “Rounding Up the Usual Criminal Suspects, and a Few More Civil Ones: Section 7 After Chaoulli” (2007), 20 N.J.C.L. 129 at 149-51.
90 In the Court of Appeal, Blair J.A. had dissented on a point of law, as he would have held the video statement of Skupien admissible, so the appeal went to the Supreme Court as of right. Justice Rosenberg wrote for the majority, with Armstrong J.A. concurring: (2005), 26 C.R. (6th) 1, 194 C.C.C. (3d) 161 (Ont.C.A.).
91 Above, note 1 at paras. 107-8.
Apart from the specifics of Skupien’s statement, there is not much help with assessing threshold reliability. The Court in \textit{Khelawon} did clear up some confusion left by \textit{Starr} in 2000. \textit{Starr} had stated that a judge could only consider “the circumstances surrounding the statement itself” in determining threshold reliability, and not the declarant’s general reputation for truthfulness, nor any prior or subsequent consistent or inconsistent statements, nor any corroborating or conflicting evidence.\footnote{Above, note 7 at paras. 215, 217. Most family law lawyers never read \textit{Starr}, only \textit{Khan}, and thus won’t be confused by the Supreme Court’s backtracking in \textit{Khelawon}, unlike the criminal lawyers.} That limitation was never really applied in family law hearsay cases, but it was controversial elsewhere. That narrow view was rejected in \textit{Khelawon}:

> the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.\footnote{Above, note 1 at para. 4.}

This new “more functional” approach avoids artificial limits on the voir dire, but leaves us a bit baffled about how to draw the line between “threshold” reliability and “ultimate” reliability. Does this mean “anything goes” at the voir dire stage under the principled approach?

In two post-\textit{Khelawon} decisions, the Court has not added much to the functional approach to threshold admissibility. In \textit{R. v. Couture}, the hearsay statements by the wife were excluded to avoid undermining the spousal incompetency rule and also on grounds of unreliability.\footnote{[2007] S.C.J. No. 28, 2007 SCC 28.} What made them unreliable? There were two statements to the police, but only the second, less important one was videotaped and not the first, pivotal one. At the time the statements were made, the wife and her husband were estranged, the family law angle in this case. Finally, the wife was recounting admissions to two murders by the husband, made to her before marriage when she was his counsellor in prison, admissions made to her by the husband eight years earlier.

More helpful is \textit{R. v. Blackman}, a case involving statements made by the deceased son to his mother and held to be admissible.\footnote{[2008] S.C.J. No. 38, 2008 SCC 37.} The 18-year-old son told her that he had been shot and wounded in 2001 by the accused, in retaliation for the son’s stabbing of the accused’s brother in 2000. These statements provided evidence of the accused’s motive for shooting the son. Critical to the finding of reliability was the absence of any motive for the son to lie to his mother. While some of us might question the reliability of anything said by an 18-year-old male to his mother, not the Supreme Court, which found...
the son “had nothing to gain by telling this story falsely to his mother”.96 Further, any difficulties with the mother’s evidence were matters properly left to weight, because the mother was available to be cross-examined at trial.97

These two cases reinforce just how important “motive to lie” is to the analysis of threshold reliability. Below, I have tried to set out the factors commonly considered by the courts under the principled approach to determine threshold reliability, before and after Khelawon. The first two factors seem to be considered in every hearsay case, while the rest arise only in some. Needless to say, the list is not exhaustive. The second heading, “motive to lie”, requires some elaboration afterwards.

(i) The “Record” of the Hearsay Statement
(in order of declining reliability)
Best: transcript of prior sworn testimony (oath, accuracy, cross-examined)98
videotape (better if under oath, or at least warning, accuracy, demeanour)99
videotape (accuracy, demeanour)100
Next: audiotape (accuracy, tone of voice, no demeanour)101
written, signed, verbatim statement
Next: detailed notes, signed by declarant or otherwise verified by declarant102
detailed notes, not signed103
Worst: partial notes104
oral testimony of witness

(ii) Motive to Lie
three possibilities:
(a) proved motive to lie
(b) proved “no motive to lie”, i.e. motive not to lie
(c) no evidence of motive one way or another, “a neutral consideration”

(iii) Spontaneity/Contemporaneity105
no opportunity to fabricate, no time to think
no prompting

96 Ibid. at para. 43.
97 Ibid. at para. 50.
99 K.G.B., above, note 56; Khelawon, above, note 1; Devine, above, note 88.
100 Couture, above, note 94.
101 Ibid.
102 Chappell, above, note 85.
104 Ibid.
105 Khan, above, note 2 (both); R. v. Mapara, [2005] 1 S.C.R. 358 (co-conspirators’ exception); Couture, above, note 94 (contemporaneity).
(iv) Corroboration:
physical evidence\textsuperscript{106}
striking similarities in independent statement of another\textsuperscript{107}

(v) Inconsistent/Consistent Statements
prior inconsistent statements can undercut threshold reliability
no inconsistent statements can help

(vi) Contents of Statement Against Own Interest\textsuperscript{108}

(vii) Health and Mental Condition of Declarant\textsuperscript{109}

(viii) Declarant’s Character for Truthfulness\textsuperscript{110}

These are the factors identified by the Supreme Court hearsay decisions from Khan on, during the era of the principled approach.

“Motive to lie” has become so important in the Court’s reliability analysis that it deserves some specific attention. In Khan, MacLachlin J. just mentioned, as one factor, that little Tanya had “no motive to falsify her story”, little more.\textsuperscript{111} It was the Smith case that brought motive to lie to the forefront, as the deceased’s critical statement to her mother on the telephone was undermined by her motive to lie, by her desire not to go home with a man suggested by her mother.\textsuperscript{112} In Starr, the motive to lie for the deceased Cook was his need to explain the presence of another woman in his car, to his erstwhile girlfriend.\textsuperscript{113} In Khelawon, Skupien had “issues” with the nursing home management, as did his friend, the disgruntled cook, which provided a motive to lie for Skupien.\textsuperscript{114} The wife in Couture derived her motive to lie from her estrangement from her husband, the accused.\textsuperscript{115} And, of course, in Blackman, the 18-year-old trouble-making son was held to have no motive to lie to his mother about his criminal activities.\textsuperscript{116}

In Blackman, the Court drew upon the helpful analysis of “motive to lie” in R. v. Czibulka, an Ontario Court of Appeal decision.\textsuperscript{117} Justice Rosenberg set out the three alternative situations identified above, and succinctly noted about the third: “The absence of evidence of motive to fabricate is not the same as evidence of the absence of a

\textsuperscript{106} Khan, ibid. (semen on sleeve).
\textsuperscript{107} U.(F.J.), above, note 103.
\textsuperscript{108} Blackman, above, note 95 (recognized, but not applicable there).
\textsuperscript{109} Khelawon, above, note 1
\textsuperscript{111} Above, note 2 at para. 34.
\textsuperscript{112} Above, note 110 at para. 42.
\textsuperscript{113} Above, note 7 at paras, 178-9.
\textsuperscript{114} Above, note 1 at para. 107.
\textsuperscript{115} Above, note 94 at para. 101.
\textsuperscript{116} Above, note 95 at para. 43.
motive to fabricate.”118 Where there is no evidence about motive to lie, “motive is in effect a neutral consideration.”119 It is therefore error to treat no evidence of motive to lie as a factor supporting threshold credibility.

In all this discussion of “motive to lie”, note that motive derives from relationships, either the relationship between the out-of-court declarant and the in-court witness reporting the statement or, sometimes, the relationship between the out-of-court declarant and the person described in the statement. Judges make broad statements about the impact of relationships upon the declarant’s behaviour in a particular situation: women lie to their mothers (Smith), men lie to their girlfriends (Starr), estranged wives lie about their husbands (Couture), and, astonishingly, young men don’t lie about their criminal activities to their mothers (Blackman).

In arguing reliability under the principled approach, the starting point must always be these two central factors: what is the record of the hearsay statement? is there a motive to lie on the part of the declarant? At the admissibility stage, the issue is only “threshold reliability”, sufficient reliability to allow the hearsay statement to become part of the trial record and to be then weighed for its “ultimate reliability”.120 Unfortunately, to date, the Supreme Court has not adequately explained the difference between these two forms of reliability, nor has it provided any workable definition of “threshold reliability” that can guide the conduct of the voir dire.

5. Limiting Admissibility of Hearsay Under the Categorical Exceptions

In Khelawon, the Court reaffirmed the primacy of the principled approach, such that necessity and reliability can be used to trump the traditional or categorical exceptions, in one of two ways:

(a) “A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability. The exception can be modified as necessary to bring it into compliance.”
(b) “In ‘rare cases’, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances.”121

You may recall that, in Starr, the Court modified the “state of mind” exception, to add a requirement that a statement of “present intention” not be made in “circumstances of suspicion”.122

118 Czibulka, ibid. at para. 35.
119 Ibid. at para. 41.
Starr made hearsay reform a two-way street, as a means not only to admit more
hearsay, but also to exclude some hearsay. In practice, the principled approach has
proven to be pretty much a one-way street. And Starr’s two routes of restricting
admissibility have mostly proven to be dead ends.

First, if a hearsay statement falls within a categorical exception, then the burden
of proof on the voir dire is upon the hearsay opponent, to prove that the exception should
be modified or the individual hearsay statement excluded.123

Second, until Starr, the Court had more often modified existing exceptions to
expand hearsay admissibility.124 In one case, other than Starr, the Supreme Court did
narrow an existing exception, in Khan itself, where the Court narrowed the exception for
“spontaneous statements” (a.k.a. “excited utterances” or, if you’re old, “res gestae”) to
only those statements that are contemporaneous with the events described.125 To narrow
an existing exception seems to require the lawyer to convince a judge, not only that this
particular statement is unreliable, but that all such statements are unreliable. But don’t
despair, look at Starr itself, which introduced the “no circumstances of suspicion” test.
What’s that, other than a requirement that such statements possess threshold reliability?

Third, more often the lawyer using Starr will prefer to argue that this is one of
those “rare cases” under (b) above, where a particular statement, otherwise admissible
under the categorical exception, should nonetheless be excluded, usually on grounds of
unreliability. There are two examples, one straight from the family law files and another
involving business records.

First we go back to Hartland v. Rahaman, the case discussed above where the
mother had kept daily notes in a journal of her child’s behaviours on access days, held to
fall within the exception for past recollection recorded by Justice Campbell.126 Despite
that, the entire journal was held to be inadmissible, as the father’s counsel:

… was also able, through cross-examination, to show a significantly high enough
incline to exaggerate and mislead… as well as a very large antagonism
towards Mr. Rahaman, such that it is reasonable to infer a motivation by Ms.
Hartland to misrepresent or distort to some extent the circumstances of the
behaviour reported. I also find that the Hartland/Dr. Carson’s plan to write only
the negative behaviours only on certain days pre- and post-access taints the

122 In the subsequent case of Mapara, ibid., the Court refused to modify the “co-conspirator’s exception” or
to exclude any statements there that were otherwise admissible under the exception.
123 Starr, above, note 7 at paras. 211-214.
124 Ares v. Venner, above, note 28 (common law business records exception, death not required, observation
as act and likely removal of motive to misrepresent); R. v. O’Brien, [1978] 1 S.C.R. 591 (statement against
pecuniary interest exception, expanded to include statements against penal interest).
125 Above, note 2. The 30-minute delay was too long, as such delays would “deform it beyond recognition”. It
was held to be “conceptually undesirable” to broaden the categorical exception.
126 Above, note 46.
probative value of the evidence to such an extent as to render it highly suspect or of little use to establish a link between access and the behaviours.127

Only one tiny error should be noted in Justice Campbell’s analysis. He appears to place the burden of proving “sufficient indicia of reliability” upon the mother,128 but Starr makes clear that it was up to the father in this case to show the opposite, that the notes were unreliable.

The second case worth noting involves business records, a print-out of a computer screen, offered by the Crown in a fisheries prosecution in R. v. Kennedy.129 The categorical exception involved was the common law exception for business records.130 The record included a comment, entered by a former employee of the monitoring company, that read “James called to suspend”, relevant to whether the accused had an operating vessel monitoring system on his vessel, as required by the fishery regulations. Campbell Prov.Ct.J., another Campbell, ruled the document inadmissible, as neither necessary nor reliable. There was no evidence of the employee’s unavailability as to this crucial bit of evidence, especially as the comment appeared to be an incomplete record of an important conversation.

Which categorical exceptions are most susceptible to these “rare case” arguments for individual statements? Admissions will be a candidate, as the Supreme Court has already applied the Starr analysis to the co-conspirators’ branch of this exception.131 Business records would be a prime candidate, under both the common law and statutory exceptions. If Ares v. Venner did remove any need to prove “no motive to misrepresent” as a condition of admissibility under the common law exception, then this approach would bring back a concern for reliability, with the burden on the party opposing admissibility to show unreliability, not a bad compromise. The statutory exceptions are framed so broadly that this approach might provide a useful escape valve on admissibility.

6. Conclusion: A Shift in the Family Law Approach to Hearsay

Historically, family law lawyers and judges treated the hearsay rule and its exceptions as a technical impediment to “getting at the truth”, that is, if they thought about hearsay at all. In particular, some of us are still tied to the past, to the days before

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127 Ibid. at para. 47 (emphasis in original).
128 Ibid. at paras. 45-47.
130 The statutory business records exception, section 30 of the Canada Evidence Act, did not apply, as the Crown had failed to give seven days’ notice of the record and Campbell Prov.Ct.J. was not prepared to waive the notice requirement: ibid. at paras. 35-58.
131 Mapara, above, note 121 at paras. 20-1. For a “rare case” where the specific statements of a co-conspirator were excluded under Starr, see R. v. Simpson, [2007] O.J. No. 4510, 2007 ONCA 793 (Ont.C.A.). The Court held that the co-conspirator should have been called as a witness, rather than his hearsay statements being introduced through an undercover police officer.
Khan, to rules that denied children a chance to be heard and to be protected from abuse. There is no longer any need for this hostility under the modern, principled approach.

The hearsay rule need not be a ghost-like presence in family law. The new approach admits any hearsay that is necessary and sufficiently reliable, either through a categorical exception or through the principled approach. Any hearsay excluded under the modern approach is by definition unnecessary, unreliable, unfair or distorting to fact-finding, hardly the kind of stuff any courts should be admitting and using. Necessity is tied closely to fairness, to ensuring an opportunity to cross-examine a witness wherever possible. And reliability is tied closely to the integrity of the trial and the fact-finding process.\(^\text{132}\)

One last point: even if hearsay is held to be admissible, it can still be excluded under the trial judge’s overriding discretion to weigh the probative value of the hearsay evidence against the competing concerns of undue prejudice, confusion of issues, unfair surprise and consumption of time. That discretion is not specific to the hearsay rule, as it applies to all forms of evidence offered in the courtroom, so that it is not the subject of this chapter. But this overriding discretion has frequently been referred to in the Supreme Court’s hearsay decisions, so it should not be forgotten.\(^\text{133}\)

The ghost of the hearsay rule has reappeared in family law cases, probably for good. I hope the description in this chapter has made it less scary, more friendly, to hearsay users. The next stage is for lawyers and judges to use the hearsay principles to fashion a distinctive family law approach to hearsay, one that recognizes the additional purposes that should shape evidence law in family cases: to assure the best interests of a child; to reduce conflict; and to maintain, restructure and encourage family relationships.\(^\text{134}\)

\(^{132}\) Khelawon, above, note 1 at para. 49.
\(^{133}\) E.g. Starr, above, note 7 at paras. 187-8; Khelawon, above, note 1 at para. 49.
\(^{134}\) These and other purposes of evidence law are discussed in “Any Rules”, above, note 5 at 246-58.