Her Majesty the Queen v. Bennett

[Indexed as: R. v. Bennett]

Court of Appeal for Ontario, McMurtry C.J.O., Armstrong J.A. and Blair R.S.J. (ad hoc) October 3, 2003

Criminal law — Charge to jury — After-the-fact conduct — Consciousness of guilt — Accused giving two statements to police about his activities and whereabouts at time of victim's death — Minor inconsistencies between statements — Trial judge instructing jury to consider whether there were material inconsistencies whether they were deliberate or innocent — Trial judge instructing jury that if they were satisfied that accused concocted alibi they were entitled to draw inference of guilt — Trial judge erring in not identifying inconsistencies that could warrant finding of concoction — Slight difference in statements not capable of supporting finding of concoction — Trial judge erring in leaving evidence of accused's demeanour with jury as evidence capable of supporting inference of guilt — Trial judge failing to give proper limiting instruction with respect to items of after-the-fact conduct where were admissible — Crown's case entirely circumstantial — After-the-fact conduct constituting critical aspect of Crown's case — Application of curative proviso inappropriate — New trial ordered.

Criminal law — Evidence — Identification evidence — Crown witness testifying that murder victim appeared to be afraid on day before her death of man standing across street — Witness identifying man as accused and describing him as being clean-shaven — Accused having beard at relevant time — Trial judge erring in leaving it open to jury to conclude that accused was person witness saw across street — Notable dissimilarity in identification evidence, absent some other inculpatory evidence, rendering identification evidence of resemblance of no probative value — Trial judge should have instructed jury to that effect and also instructed them that it was open to them to infer from witness' evidence that he had seen another man standing across street on day before victim's death and that victim appeared to be afraid of that man — Appeal from conviction allowed — New trial ordered.

Criminal law — Evidence — Physical evidence — Hair evidence — Trial judge erring in admitting evidence of hairs from murder scene that could not be eliminated as having come from accused — Prejudicial effect of evidence outweighing its probative value — Crown expert clearly expressing opinion that evidence of type 2 hair comparison, without confirming DNA evidence, is not probative of identification of donor of hair — Potential for prejudice dramatically increased by fact that Crown urged jury in closing address to draw inferences unsupported by expert's testimony based on "common sense approach" to hair evidence — Crown misleadingly stating that type 2 hairs were "all DNA'd" to accused — Trial judge's instruction to jury that Crown's suggested inference "may have gone beyond" expert's opinion significantly understated unfairness of Crown's treatment of hair evidence.

The accused was charged with first degree murder. The case against him was entirely circumstantial. It included the accused's expressed sexual interest in the victim; scalp and pubic hairs, some of which revealed a DNA match to the accused

and some of which showed microscopic similarities to his hairs, were found on the victim's bedclothes and body; various hairs and hair fragments found on the victim's bedclothes and body which had so-called "Negroid" characteristics (the accused was the only black suspect); a trace of semen found in the victim's vagina; the body was nude; she had suffered multiple, superficial cuts to her neck and significant bruising to her upper body; the accused knew how to access her apartment; and the accused's alleged inculpatory after-the-fact conduct. The hair evidence was complex. Two hundred and ninety two hairs were recovered from the victim's apartment. An expert witness, C, concluded that 13 hairs found in the victim's apartment showed different levels of microscopic similarity to the accused's known hair samples. Four hairs (type 1) were microscopically similar to the accused's hair and could have originated from him. Nine hairs (type 2) which shared some but not all of the microscopic characteristics of the accused's hair could not be eliminated as having originated from him. C also identified six "C" hairs, *i.e.* short hair fragments or limb and immature hairs that were not useful for identification purposes, but which he testified had "Negroid" characteristics. On the nine hairs submitted for DNA analysis, seven matched the accused. The accused was convicted. He appealed.

Held, the appeal should be allowed.

The trial judge erred in admitting the type 2 hair comparison evidence. The prejudicial effect of that evidence outweighed its probative value. The theory of the defence was that the accused's hairs had either been deposited directly on the victim's bedding when he sat on the bed the week before the death, or were innocently transferred onto the victim's body and bedding when, as the forensic evidence indicated, the body was moved after death. The strength of the defence theory would be reduced as the number of hairs linked to the accused and found on the bedding and body increased. C clearly expressed the opinion that evidence of a type 2 hair comparison, without confirming DNA evidence, was not probative of identification of the donor of the hair. His additional evidence to the effect that taking together the hairs that showed a type 1 and type 2 comparison to the accused's known hair samples reduced by an immeasurable amount the size of the indeterminate class who could be a donor of the type 2 hairs did not elevate the probative value of the type 2 evidence that the defence sought to exclude. Moreover, C testified that he did not compare the type 2 hairs, one with the other, so as to form any opinion as to their similarities. Hairs are not unique, and an assessment of similarities between hairs is highly subjective. The trial judge also erred in admitting the C hair evidence, which had extremely low probative value and significant potential for prejudice given the testimony regarding their racial characteristics.

The potential for prejudice from the admission of the type 2 hair comparison evidence was dramatically increased by the fact that Crown counsel in his closing address asked the jury to draw inferences unsupported by C's testimony based on a "common sense approach" to the hair evidence. Even more problematic was the fact that Crown counsel misleadingly told the jury that the type 2 hairs were, with one exception, "all DNA'd to" the accused. The trial judge instructed the jury that some of the Crown's suggested inferences "may have gone beyond [C's] opinion". This instruction significantly understated the unfairness of Crown counsel's treatment of the hair evidence.

M, a Crown witness with an extensive criminal record and a history of drug abuse, testified at trial that on the day before her death, the victim appeared to be frightened of someone, and that he observed a man leaning against a post across the street. He identified the accused as that man. He also described the man as

clean shaven. At the relevant time, the accused had a beard. A notable dissimilarity in identification evidence, absent some other inculpatory evidence, renders identification evidence of a resemblance of no probative value. The trial judge erred in leaving it open to the jury to conclude that the accused was the person M saw across the street the day before the victim was killed. The trial judge ought to have instructed the jury that M's identification evidence of the accused was worthless, not that it was "worth very, very little". Further, the trial judge ought to have instructed the jury that it was open to them to infer from M's evidence that he had seen a clean-shaven black man, and not the accused, standing across the street on the day before the killing and that the victim appeared to be afraid of that man.

After the victim's body was discovered, the accused gave two statements to the police accounting for his activities and whereabouts in the days surrounding the victim's death. There were some minor inconsistencies between the two statements. The trial judge erred in instructing the jury that based on these inconsistencies the accused had fabricated an alibi and that it was open to them to infer guilt from having concocted an alibi. The trial judge left it for the jury to determine whether there was any inconsistency and, if so, whether it was material. If an instruction permitting a jury to find concoction and to infer guilt based on that finding is to be given, a trial judge is required to identify for the jury what inconsistency in the accused's statements could warrant a finding of concoction. The inconsistency must be compelling in the sense, for example, that there is an indication that the accused was attempting to mislead investigators by fabricating an alibi. The slight differences between the accused's statements were not capable of warranting a finding of concoction. While the trial judge could have told the jury that any differences in the two statements was a factor they could take into account in deciding whether to believe either of them, there was no basis for instructing them that they could go further and use the statements as a separate piece of circumstantial evidence from which guilt could be inferred. Rather, the jury ought to have been told that if they disbelieved the alibi, they should simply discard that evidence, without more.

There were six other items of after-the-fact conduct that the trial judge left with the jury as evidence from which the Crown asked them to infer guilt. Those items of evidence were: the accused's anger at being described as someone capable of killing the victim; his failure to make certain phone calls upon learning of the victim's death; his failure to ask police the identity of the victim; the accused telling a friend of the victim's that the victim was seen going to a mall on the afternoon of her death; his desire to acquire copies of statements made to police by two of his acquaintances; and his reaction to the report that police found a silver letter opener that was missing from the victim's apartment. The first three items of evidence should not have been left with the jury as evidence from which they could infer consciousness of guilt. These forms of conduct were examples of demeanour evidence that is highly suspect and easily misinterpreted. As for the other three items, the trial judge erred in not instructing the jury that the after-the-fact conduct evidence relied on by the Crown had only an indirect bearing upon the issue of guilt, and that the jury should exercise caution in inferring guilt because the conduct might be explained in an alternative manner. In addition, he ought to have instructed the jury that they could not use this conduct to support an inference of guilt unless they rejected any innocent explanation for the conduct. This was not an appropriate case for the application of the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The Crown's case was entirely circumstantial, and the after-the-fact conduct evidence was a critical aspect of that case. In light of the trial judge's errors, and also in light of the

errors in the hair comparison evidence and the identification evidence, it could not be said that the result of the trial would necessarily have been the same.

R. v. Baltrusaitis (2002), 58 O.R. (3d) 161, 162 C.C.C. (3d) 539 (C.A.); *R. v. Boucher* (2000), 146 C.C.C. (3d) 52, [2000] O.J. No. 2373 (QL) (C.A.); *R. v. Diu* (2000), 49 O.R. (3d) 40, 144 C.C.C. (3d) 481, 33 C.R. (5th) 203 (C.A.); *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.), **apld**

Other cases referred to

Chartier v. Quebec (Attorney General), [1979] 2 S.C.R. 474, 104 D.L.R. (3d) 321, 27 N.R. 1, 48 C.C.C. (2d) 34, 9 C.R. (3d) 97; *R. v. Andrade* (1985), 6 O.A.C. 345, 18 C.C.C. (3d) 41 (C.A.); *R. v. Blazeiko* (2000), 48 O.R. (3d) 652, 145 C.C.C. (3d) 557 (C.A.); *R. v. Campbell* (1999), 139 C.C.C. (3d) 258 (Ont. C.A.); *R. v. Charemski*, [1998] 1 S.C.R. 679, 157 D.L.R. (4th) 603, 224 N.R. 120, 123 C.C.C. (3d) 225, 15 C.R. (5th) 1; *R. v. Coutts* (1998), 40 O.R. (3d) 198, 126 C.C.C. (3d) 545, 16 C.R. (5th) 240 (C.A.) [Leave to appeal to S.C.C. refused (1999), 239 N.R. 193*n*, [1998] S.C.C.A. No. 450]; *R. v. Hibbert*, [2002] 2 S.C.R. 445, 211 D.L.R. (4th) 223, 287 N.R. 111, 163 C.C.C. (3d) 129, 50 C.R. (5th) 209, 2002 SCC 39, [2002] S.C.J. No. 40 (QL); *R. v. Krishantharajah* (1999), 43 O.R. (3d) 663, 133 C.C.C. (3d) 157 (C.A.); *R. v. McInnis* (1999), 44 O.R. (3d) 772, 134 C.C.C. (3d) 515 (C.A.); *R. v. O'Connor* (2002), 62 O.R. (3d) 263, 100 C.R.R. (2d) 164, 170 C.C.C. (3d) 365, 7 C.R. (6th) 205, [2002] O.J. No. 4410 (C.A.); *R. v. Portillo* (2003), 176 C.C.C. (3d) 467, [2003] O.J. No. 3030 (QL) (C.A.); *R. v. Price* (2000), 72 C.R.R. (2d) 228, 144 C.C.C. (3d) 343, 33 C.R. (5th) 278 (Ont. C.A.); *R. v. Ruddick* (1980), 57 C.C.C. (2d) 421 (Ont. C.A.); *R. v. Wristen* (1999), 47 O.R. (3d) 95, 141 C.C.C. (3d) 1 (C.A.) [Leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 419]

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, ss. 231(5), 686(1)(*b*)(iii)

Authorities referred to

Report of the Commission on Proceedings Involving Guy Paul Morin (Toronto: Queen's Printer for Ontario, 1998) (Hon. F. Kaufman, C.M., Q.C.)

APPEAL by an accused from a conviction for first degree murder.

Delmar Doucette and *Catherine Glaister*, for appellant.
David Finley, for respondent.

The judgment of the court was delivered by

MCMURTRY C.J.O.: —

OVERVIEW

[1] The appellant appeals from his conviction for first degree murder following a trial by judge and jury. The conviction relates to the killing of Jennifer Ueberschlag, who was found dead in her apartment on Sunday, May 10, 1992. The appellant was arrested for first degree murder five years after the killing, on May 13, 1997. He was found guilty of the charge and

sentenced to life in prison with no eligibility for parole for 25 years on December 11, 1999.

[2] The Crown's case against the appellant was entirely circumstantial. It included certain expert hair comparison evidence that, in my view, the trial judge erred in admitting. In addition, there were errors in the trial judge's charge to the jury on the use that they could make of certain identification evidence and after-the-fact conduct evidence, including two statements that the appellant made to police. I am satisfied that the cumulative effect of these errors is that the conviction cannot stand and a new trial on the charge of first degree murder is required.

[3] The theory of the Crown in this case was that the appellant wanted a sexual relationship with the 18-year-old victim, whom he had met a few weeks before her death. This motivation led him to her apartment on the evening of Friday, May 8, 1992, where he asphyxiated her by shoving a cat toy in her mouth to suppress her screams. The killing occurred while he was committing or attempting to commit a sexual assault or a forcible confinement or both. The Crown's position was that the killing took place at around midnight on May 8th.

[4] The circumstantial evidence upon which the Crown's theory rested included the following areas of evidence: the appellant's expressed sexual interest in the victim; scalp and pubic hairs, some of which revealed a DNA match to the appellant and some of which showed microscopic similarities to his hairs, found on the victim's bedclothes and body; various hairs and hair fragments found on the victim's bedclothes and body had so-called "Negroid" characteristics and the appellant was the only black suspect; a trace of semen was found in the vagina (the sample was too small for DNA analysis); the body was nude; the victim had suffered multiple, superficial cuts to her neck and significant bruising to the upper body; the appellant knew how to access the victim's apartment; and the appellant's alleged inculpatory after-the-fact conduct.

[5] The appellant did not testify and the defence did not call any evidence. Defence counsel was unsuccessful on his motion for a directed verdict of acquittal and on his alternative motion to have the first degree murder charge dismissed and the case proceed on a charge of second degree murder.

[6] In his closing address to the jury, defence counsel did not deny that there was evidence that the appellant, who was age 33 at the time of the murder, had expressed sexual attraction for the victim. Nor was it denied that six of his pubic hairs were found on the bedclothes, the body and the body bag in which the victim's body was transported. However, the defence denied a

motive to use violence to satisfy the appellant's sexual interest and took the position that the presence of his hairs could be explained by a theory of innocent transfer.

[7] Defence counsel argued that the jury could not find beyond a reasonable doubt that it was the appellant who killed Ms. Ueberschlag. Counsel further argued that the jury could not convict on the charge of first degree murder because there was not sufficient evidence to establish that the victim was sexually assaulted or unlawfully confined. The defence alternatively argued that death occurred without the intent to kill and that the only possible offence upon which the jury could make a finding of guilt was manslaughter.

[8] Because of my view that a new trial is required, I will limit my discussion of the facts to those necessary to appreciate the six grounds of appeal pursued by appellant's counsel. These grounds are as follows:

(i) the trial judge erred in admitting trace evidence from the scene of the killing that was not probative and was prejudicial;

(ii) the trial judge erred in his charge to the jury by failing to instruct the jury that they must not draw the speculative and prejudicial inference that the Crown invited them to draw with respect to the trace evidence;

(iii) the trial judge erred in his charge in regard to identification evidence and erroneously allowed the jury to consider as evidence against the appellant an identification which excluded the appellant from being the person who was seen following the victim on the day before she was killed;

(iv) the trial judge erred in his charge in regard to after-the-fact conduct by erroneously allowing the jury to use after-the-fact conduct evidence against the appellant that was prejudicial and had little or no probative value;

(v) any verdict of culpable homicide is unreasonable; and

(vi) the verdict of first degree murder is unreasonable.

RELEVANT FACTS

[9] In the spring of 1992, Jennifer Ueberschlag lived alone in an apartment at 152 Homewood Avenue in Kitchener. She socialized with street youth and was introduced to the appellant through her "street dad", John MacDonald (known on the street as "Bulldog"), who was leaving town and who asked the appellant

to look after Jennifer while he was gone. The introduction occurred somewhere between two weeks and two months before her death.

[10] Jennifer's landlord, David Pawlowski, testified that the appellant had visited her building several times driving a "rusty black Cutlass" with a noisy muffler.

[11] Nicole Rowe, a close friend of Jennifer's, testified that on May 1, 1992 (about a week before the killing), Jennifer called her and asked her to come over because she was not comfortable being drunk with the appellant in her apartment. Rowe went to the apartment and while she was there, she saw Jennifer and the appellant sitting beside each other on the bed. He at one point massaged Jennifer's shoulders and tried to push her top off her shoulder. Rowe overheard the appellant ask Jennifer to go out with him and she replied that she loved Jeff [Stadelbauer], her boyfriend, who was then in jail.

[12] When Jennifer was in the bathroom, the appellant asked Rowe how he could win Jennifer over. Rowe replied she would probably not go out with anyone unless Jeff was out of the picture. Rowe testified that the appellant commented, "it could be arranged" and said "his dick ached every time he thought of her".

[13] The Crown introduced a number of witnesses who gave evidence of the appellant's whereabouts during the afternoon and evening of May 8th. None of the witnesses testified to seeing him at or near Jennifer's apartment near the time of the murder. The Crown witnesses' evidence was inconsistent on the timing of the appellant's activities on the evening of May 8th. In addition, the evidence of Charles Russell, who lived in the same house as the appellant, was totally inconsistent with that of the appellant's acquaintances and Crown witnesses, Valerie Dobbin, Michelle Klobucar, Justina Meekison and Dan Stewart, as well as Jennifer's landlord, Pawlowski.

[14] On the evening of May 8th, Jennifer was out with her parents. They dropped her at her apartment at 10 or 10:30 p.m. Rowe telephoned her at about 11:45 p.m., but there was no answer. At 11:55 p.m., James Winters, who lived in the same apartment building, awoke to the sounds of a female screaming and thumping noises. Two or three minutes later he heard another short scream. An estimated five to 30 minutes later, he heard an engine start and a vehicle leave the parking lot. When asked to describe the sound of the engine, he said that it did not sound like his own small Japanese car. He testified that he did not note any unusual sound from the car and also testified that he did not note it having a defective muffler or problems with the exhaust system.

[15] Another tenant in the building, Michael Sommers, testified that the next night, shortly after 11:45 p.m., he heard a loud car with a bad muffler come into the parking lot and stay there for approximately five or ten minutes. It drove around the back of the building and then exited the building around five or ten minutes later. About 20 minutes after the car had left, he saw a light on in Jennifer's apartment and a large shadow moving in the window. The Crown proposed that the inference to be drawn was that the appellant had returned to clean up the crime scene.

[16] On Sunday, May 10, 1992, at approximately 7:30 p.m., Jennifer Ueberschlag's nude body was found by her father and Rowe lying face down in the living room. Her face was in a bowl of liquid.

PATHOLOGY

[17] Dr. David McAuliffe, a forensic pathologist, testified that he could find no cause of death other than asphyxia. He was unable to determine the cause of the asphyxiation: there was no sign of manual or ligature strangulation. The Crown and defence theory was that a cat toy found near the body had been inserted into the victim's mouth and caused her death. The pathologist agreed that the cat toy could have obstructed the airway and caused asphyxia if it were inserted sufficiently deep.

[18] There was blunt force trauma to the victim's head, neck and arms. There were four significant bruises to the scalp and her right eye was blackened. There was massive bruising with abrasions on the left side of the face and deep bruising on the left side of the neck. There was bruising to the left and right biceps, consistent with grab marks from behind. There was a serrated abrasion on the right wrist, consistent with a defensive wound. There were 18 to 20 cuts on the neck, which were superficial and did not contribute to her death. The cuts had been inflicted before death or possibly a very short time after death. There was a serrated pattern in some of the cuts, but either a serrated or non-serrated knife could have caused them.

[19] The body had been moved postmortem. Lividity patterns indicated that the victim first lay on her back and later was moved and turned onto her front.

[20] There were no signs of trauma to the vagina or anus. Three spermatozoa were found in the vagina, a sample too small to permit DNA analysis. Normal ejaculate contains hundreds of millions of spermatozoa, which can be found for up to seven days in the vagina of a living woman and longer after death.

THE CRIME SCENE

[21] In the bedroom, the mattress was not sitting squarely on the bed frame and the headboard was at an angle. The bed was not made. There were clothes on the floor near the bed, positioned in a way that suggested the wearer had undressed and dropped them on the floor. The clothes were not damaged.

[22] Police collected hairs and fibres and took swabs and fingerprints from the apartment. The body was examined by laser and luma light in an effort to discover hairs and fibres. Fingerprinting the lower body yielded no fingerprints. Although bruising on the upper body suggested that the victim had been grabbed, the decision was made not to fingerprint the remainder of the body because the body was deteriorating and it was decided that an autopsy needed to be performed immediately.

[23] Twenty identifiable fingerprints were found in the apartment and of these, only five were identified to known individuals. The appellant's fingerprints were found on a bottle of peach schnapps in a cupboard and nowhere else.

FORENSIC EVIDENCE

[24] Kimberley Johnston of the Centre of Forensic Sciences ("CFS") received various items for forensic analysis and DNA testing, including various swabs taken from the victim's body, bedding and other areas of her apartment, the appellant's knife that he customarily carried with him and roots from several hairs.

[25] Ms. Johnston concluded that the trace amount of semen identified on vaginal swabs from the victim was insufficient to permit generation of a DNA profile. Semen was not detected on any of the swabs from the victim's bedding and body. Blood was detected on swabs of a towel from the bathroom and from the kitchen and dining room floors and carpets, but no DNA results could be obtained from these samples. Blood was not detected on the appellant's knife.

[26] Ms. Johnston performed DNA testing on eight hairs found in the apartment. DNA extracted from four of these hairs matched the appellant's DNA profile: one of the hairs was found on the right buttock of the victim, two were found on the bed sheets and one on the duvet. Another hair found on the back of the victim matched the appellant's DNA profile in three of four loci where it was tested. At the fourth locus, the appellant could not be excluded as a donor of the DNA profile.

[27] The carpet underneath where the body was found was not seized until approximately six years later. By that time, it had been cleaned and other tenants had since lived in the apartment.

Ms. Johnston's analysis of a piece of this carpet revealed a semen stain that had not originated from the appellant.

[28] Pamela Newall of the CFS also examined five items that were sent to her for DNA analysis, including a root tissue from a hair found on the carpet below the body and a hair collected from the body bag. She did not find DNA on any of the five items that she examined.

[29] Eric Crocker of the CFS undertook a microscopic examination of some 292 human hairs that were found in the apartment. The complicated evidence surrounding this hair comparison analysis will be discussed in detail below. Suffice it to say at this point that Mr. Crocker concluded that 13 hairs found in the apartment showed different levels of microscopic similarity to the appellant's known hair samples.

[30] There is nothing in the record to indicate the reason for the five-year delay between the killing of Jennifer Ueberschlag and the arrest of the appellant for her murder. It appears that the time lag is at least partially attributable to delay by the CFS which, according to the trial judge, did not perform the DNA testing until approximately five years after the death and did not do much of the microscopic comparison work until 1997.[1]

[31] Apart from this delay, other aspects of the investigation are troubling. The failure to test the carpet under the body for semen until six years after the murder and the failure to first fingerprint the upper part of the victim's body, where she was beaten and appeared to have been grabbed, gives rise to a concern that evidence going to the killer's identity may not have been collected.

APPELLANT'S STATEMENTS TO POLICE

[32] The appellant gave two statements to police. The first was a verbal statement taken by Detectives Osinga and Close at the appellant's Mill Street residence in Kitchener on May 11, 1992. They advised him of Jennifer's death and told him they would like to rule him out as a suspect and wished him to give a statement. The appellant co-operated, giving a statement and responding to police questions. Detective Close requested the appellant to provide hair, saliva and pubic hair samples and the appellant readily agreed to do so.

[33] On May 13, 1992, Detective Osinga asked the appellant over the phone to attend at police headquarters to answer a few more questions. The appellant asked if he was still a suspect and

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1 Trial judge's Pre-trial Ruling on the Hair Comparison/DNA Evidence at p. 44.

[was] told that he was. The appellant agreed to come to the station for nine o'clock the next day to give a statement. Detective Osinga testified as follows about what was said to the appellant when he arrived at the station on May 14, 1992:

> I advised Mr. Bennett that I knew he had given a partial alibi for Friday evening in his previous statement. I said we had spoken to Justine [Justina Meekison] and she seemed to back up that part of his previous statement. I said, she speaks highly of you. I advised Milton that we would want to alibi him from Friday morning, the 8th of May, until the Sunday evening. We needed to know what he had been doing during that period of time.

The appellant provided a more detailed written statement regarding his whereabouts for the time period specified by Detective Osinga.

[34] The content of the appellant's two statements are discussed below in connection with the trial judge's charge on the after-the-fact conduct evidence.

ANALYSIS

Issue 1: Did the Trial Judge Err in Admitting Trace Evidence from the Scene of the Killing that was not Probative and was Prejudicial?

[35] The defence brought a pre-trial application challenging the admissibility of certain hair comparison analysis and DNA evidence that the Crown sought to introduce at trial. On appeal, only the admissibility of some of the hair comparison evidence is at issue.

(i) *Summary of hair comparison and related DNA evidence*

[36] As noted, 292 human hairs were recovered from the victim's apartment and sent for analysis by the CFS. Eric Crocker of the CFS conducted the hair comparison analysis and testified at the *voir dire* and at trial. His report and testimony included the following terminology and analysis, as quoted verbatim from his report:

Type A-1:	Unknown scalp hairs that are microscopically similar to a known hair sample. On the basis of this microscopic similarity, these hairs could have originated from the same source as the known sample.
Type A-2:	Unknown scalp hairs that share some, but not all of the microscopic characteristics in common with a known hair sample. On the basis of the shared characteristics, these hairs cannot be eliminated as having originated from the same source as the known sample. Note: This partial similarity, while perhaps useful in an investigative sense, should not be considered to have any probative value in terms of identification.

Type A-3:	Unknown scalp hairs that are dissimilar to the known samples.
Type B-1:	Unknown body hairs that are microscopically similar to the known pubic and chest hair sample. On the basis of this microscopic similarity, these hairs could have originated from the same source as the known sample.
Type B-2:	Unknown body hairs that share some, but not all of the microscopic characteristics in common with a known pubic and chest hair sample. On the basis of the shared characteristics, these hairs cannot be eliminated as having originated from the same source as the known sample. Note: This partial similarity, while perhaps useful in an investigative sense, should not be considered to have any probative value in terms of identification.
Type B-3:	Unknown body hairs that are dissimilar to the known samples.
Type C:	Unknown hairs that include short hair fragments and clippings or limb and immature hairs that are not useful for comparison purposes.

(Underlining in original)

[37] Mr. Crocker compared the hairs found at the apartment with comparison samples from the victim, the appellant, and various other suspects and individuals known to have been in contact with the victim, including Joel Coulombe (Jennifer was to be a witness for him at his upcoming sexual assault trial), Chad Tailby (an acquaintance of Jennifer's), Jeff Stadelbauer and others. According to Mr. Crocker, a type B-2 hair similar to Joel Coulombe's body hair sample was found on the victim's pink blanket, although he testified that he had never been in Jennifer's apartment. Mr. Crocker also concluded that two type B-2 hairs similar to Chad Tailby's body hair sample were found on her pink blanket.

[38] A significant number of hairs were found on the victim's body and bedsheets and elsewhere in the apartment that, according to Mr. Crocker, were not similar to any of the known hair samples. The following unknown hairs were found on or under the victim's body or on the body bag:

right hand:	1 unknown scalp hair
left and right breast:	1 unknown scalp hair
right thigh:	1 unknown scalp hair
back:	2 unknown scalp hairs
buttocks:	1 unknown scalp hair
left buttocks:	2 unknown body hairs
body (from laser exam):	1 unknown scalp hair
body bag:	1 unknown scalp hair
carpet underneath body:	1 unknown body hair

[39] The following unknown hairs were found on the victim's bedding:

top sheet:	1 unknown scalp hair
	1 unknown body hair
bottom sheet:	2 unknown scalp hairs
pink blanket:	4 unknown scalp hairs
	3 unknown body hairs
pillow case and pillow:	1 unknown body hair

[40] In sum, Mr. Crocker's hair analysis indicated that there were three body hairs and eight scalp hairs either on or under the body and body bag that did not come from the victim, the appellant or any of the other known donors. The same is true of four body hairs and seven scalp hairs found in the victim's bedding.

[41] Mr. Crocker concluded that four body hairs found in the apartment were microscopically similar to the appellant's pubic hair sample, in other words that they were type B-1 hairs. These four hairs were described in Mr. Crocker's report as "B1MB" hairs, such abbreviation denoting the hair type and the appellant's initials. In addition, he concluded that six body hairs found in the apartment shared some, but not all of the microscopic characteristics in common with the appellant's pubic hair sample, *i.e.*, type B-2 hairs. These hairs were described in Mr. Crocker's report as "B2MB" hairs, again denoting the hair type and appellant's initials. He also concluded that three scalp hairs found in the apartment shared some, but not all of the microscopic characteristics in common with the hair sample provided by the appellant, *i.e.*, type A-2 hairs. These hairs were referred to in Mr. Crocker's report as "A2MB" hairs.

[42] These 13 hairs with some level of microscopic similarity to the appellant's known hair samples were found in the following locations:

B1MB hairs:	1 on the back of the victim
	1 on the right buttock of the victim
	1 on the body bag
	1 on the washroom floor
B2MB hairs:	1 on the back of the victim
	1 on the carpet under the victim's body
	1 on the duvet
	2 on the top sheet
	1 on the pink blanket
A2MB hairs:	2 on the duvet
	1 on the bottom sheet

[43] In Mr. Crocker's opinion, the similarities between the B1MB and B2MB hairs found in the apartment and the sample pubic hairs provided by the appellant indicated (quoting Mr. Crocker's rather inscrutable testimony on the *voir dire*), that: "if these hairs being similar to Mr. Bennett's pubic hairs, if they're not Mr. Bennett's pubic hairs, then they're not from Mr. Bennett." Or as defence counsel put it, and which Mr. Crocker accepted, "that's another way of saying if they're from Mr. Bennett, then they must be from his pubic hair . . . area."

[44] Mr. Crocker identified six C hairs, *i.e.*, short hair fragments or limb and immature hairs that are not useful for comparison purposes, which he testified had "Negroid" characteristics. The location and description of these C hairs are as follows:

LOCATION	DESCRIPTION
Victim's perineum	Negroid hair tip fragment; natural tapered tip suggests body hair.
Taping of victim's left and right breast	Hair tip fragment of indeterminate origin; some Negroid characteristics in terms of pigmentation and flatness. Negroid limb hair.
Victim's buttocks	Negroid hair tip fragment.
Top sheet	Negroid limb hair.
Pink blanket	Negroid immature hair.

[45] Mr. Crocker testified that C hairs can be readily carried on clothing and transported in and out of a particular area. He also testified that some of the C hairs with Negroid characteristics, including the one found on the victim's perineum (the area between the vagina and anus), exhibited dissimilarities to the appellant's known hair samples. In cross-examination on the *voir dire*, Mr. Crocker agreed that he was not suggesting that these C hairs came from the appellant and that they could well be from another person.

[46] As noted, Kimberley Johnston and Pamela Newall of the CFS performed DNA analysis on various hairs found by investigators.[2] Twelve hairs found in the apartment were sent for DNA

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2 The hairs sent for testing had apparent tissue associated with the root and were thus more likely to reveal a DNA profile.

testing, nine of which, according to Mr. Crocker's evidence, were either B1MB hairs or B2MB hairs. The results of Ms. Johnston and Ms. Newall's analysis in relation to these nine hairs were as follows:

B1MB Hairs

LOCATION	DNA RESULTS
Victim's back	DNA match to appellant at 3 of 4 loci
Victim's buttocks	DNA match to appellant
Body bag	No DNA result attainable

B2MB Hairs

LOCATION	DNA RESULTS
Top Sheet	DNA match to the appellant
Top Sheet	DNA match to the appellant
Duvet	DNA match to the appellant
Pink Blanket	DNA match to the victim
Victim's back	No DNA result attainable
Carpet under victim's body	No DNA result attainable

(ii) *Voir dire on the admissibility of the hair comparison evidence*

[47] In his submissions on the *voir dire*, defence counsel did not object, in my view, perhaps unwisely, to the admissibility of all of the microscopic comparison evidence of hairs that did not reveal a DNA match to the appellant. The focus of defence counsel's objection was described by the trial judge as follows:

> Mr. Ducharme does not challenge the admissibility of the evidence of those hairs from the scene found to have a DNA profile matching that of Mr. Bennett. Nor does he challenge the admissibility of the evidence of those hairs which in the opinion of Mr. Crocker had a type 1 level of comparison to known hairs of Mr. Bennett.

[48] In other words, defence counsel was seeking to exclude evidence of a connection between the appellant and the three B2MB hairs that did not reveal a DNA match to the appellant: one on the pink blanket, one on the victim's back and one from

the carpet under the victim's body. Comparison evidence regarding the three A2MB hairs on the bedding was not the focus of the submissions or the trial judge's analysis, but they are type 2 hairs and thus also subject to defence counsel's objection because there was no DNA evidence linking these hairs to the appellant. Defence counsel also objected in his submissions to the admission of evidence that six of the type C hairs had "Negroid" characteristics, "because the only possible relevance of that would be to suggest that it's [the appellant's] hair".

[49] In a ruling dated July 19, 1999, the trial judge dismissed the defence's application related to the hair comparison evidence and admitted all of the comparison evidence linking the various hairs to the appellant. Although the ruling does not specifically address the admissibility of the evidence regarding the C hairs having "Negroid" characteristics, Mr. Crocker was allowed to give evidence before the jury about the racial characteristics of the C hairs.

[50] In arriving at his decision, the trial judge extensively reviewed the *Report of The Commission on Proceedings Involving Guy Paul Morin*, 1998 by the Hon. Fred Kaufman, C.M., Q.C. ("*Kaufman Report*" or "*Report*"), which discusses issues surrounding the use or misuse of hair and fibre comparison evidence in the wrongful conviction of Guy Paul Morin. As the trial judge noted in his ruling, the *Kaufman Report* recommends at pp. 311-12 that hair comparison evidence showing only that an accused cannot be excluded as the donor of an unknown hair, or only that an accused may or may not have been the donor, is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt. This comment would apply to both the type 1 and type 2 hairs referred to in Mr. Crocker's evidence.

[51] Also noted by the trial judge is that the *Kaufman Report* refers at pp. 312-13 to a possible situation where evidence that an accused cannot be excluded as the donor of a hair left by a perpetrator may have a high degree of probative value. Such a situation would arise, for example, if there are only two likely suspects in a case and hair comparison evidence indicates that hair left by the perpetrator could have come from one suspect and could not have come from the other. The *Report* goes on to state (at p. 313):

> In the vast majority of cases, however, such evidence has extremely limited probative value: it merely permits the trier of fact to infer that the accused is one of a limitless class of persons who cannot be excluded as the perpetrator based upon this analysis.

[52] The trial judge then referred to the discussion in the *Kaufman Report* of the prejudicial effect of hair comparison evidence (at pp. 315 and 320):

> The added difficulty with hair comparison evidence is that its prejudicial effect may be substantial, since the scientific opinion brings with it an aura of respectability and infallibility. The length and complexity of the testimony which must be examined to produce the minute conclusion that the accused cannot be excluded as the donor of the unknown hair has the potential to mislead the jury and cause the testimony to acquire a prominence and importance out of all proportion to its insignificance. Any trier of fact, hearing an exhaustive detailing of the minutia of hair similarities found, could easily (and understandably) conclude that only some legal or professional restraint prevents the experts from saying that the compared hairs come from a common source.
>
> . . . . .
>
> In the least, paraphrasing *Mohan*, there is a danger that hair and fibre evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence may be accepted by the jury as being virtually infallible and having more weight than it deserves. Yet its probative value may often be insufficient to justify its reception.

[53] Finally, the trial judge noted that the *Kaufman Report* recommends against using the language "could have originated from the suspect" in scientific findings by the CFS:

> Certain language enhances understanding and more clearly reflects the limitations upon scientific findings. For example, some scientists state that an item "may or may not" have originated from a particular person or object. This language is preferable to a statement that an item "could have" originated from that person or object, not only because the limitations are clearer, but also because the same conclusion is expressed in more neutral terms. (*Executive Summary and Recommendations*, Recommendation 10 at pp. 47-48)

[54] The trial judge next reviewed in some detail Mr. Crocker's evidence on the *voir dire*, which fills almost 200 pages of transcript. As noted by the trial judge, Mr. Crocker gave the following evidence with respect to the type 2 hairs, which is reproduced here in summary form:

— a hair that reveals a type 2 match, whether of a scalp or body hair, from a microscopic point of view is not at all probative in terms of whether or not the hair came from a particular individual;

— without confirming DNA evidence, the type B2MB hairs do not tell him anything beyond the fact that the unknown hair donor and the appellant can belong to the same class of donors, a class of indeterminate size, and that is why such

classification type is not probative of identification of the donor of the hair;

— the lack of probative value in regard to one type B-2 hair is not altered if he has five type B-2 hairs, each of which are slightly different from each other but each of which has similarities to one or more hairs in the known sample; the finding of five such hairs would be of use from an investigative point of view;

— the finding of a body hair having a B-1 level of comparison to the appellant, at a different location in the apartment, does not make it any more likely that hairs with a type B-2 level of comparison to the appellant actually came from him;

— taking together all of the type B2MB hairs that were found does not make for a stronger case that they are the appellant's hairs; what it does is reduce somewhat the size of the indeterminate class of people from which the hairs could have come, but that size reduction is unquantifiable;

— the fact that three B2MB hairs generated a DNA profile matching that of the appellant does not change the probative value of the other B2MB hairs;

— considering the total number of all of the B1MB and B2MB hairs does not increase the probative value of his opinion whether the B-2 hairs are the appellant's; the combined effect of considering all these hairs together is that it would in some way reduce the size of the indeterminate class who could be the donor, but in an immeasurable way so that the class is still of indeterminate size;

— there was nothing about the type C hairs that increased the probative value of the type B-2 classification of some hairs as having possibly originated from the appellant;

— if Mr. Crocker had a hundred hairs that he categorized as having a type B-2 level of comparison to a known sample, that would tend to suggest that they came from the same individual, but he was unable to so opine on the strength of five hairs;

— Mr. Crocker did not compare the various B2MB hairs, the one with the others, so as to form any opinion as to their similarities;

— the fact that there are three B1MB hairs, three A2MB hairs and five B2MB hairs has no probative value individually in terms of whether they can be said to be the appellant's; however, viewed collectively, because they have some overlapping characteristics, the highest it can be put is that they may very well have originated from the same individual; the similarities found do not preclude the possibility that these hairs came from more than one donor;

— considering all of the type B2MB hairs together only suggests that they may have come from a single individual but that they certainly do not prove that and that is as high as his opinion can be put;

— considering the type B-1 and B-2 hairs, together with the fact that some were found to have a DNA profile matching that of the accused means that the accused may well be the individual who donated all the B-2 hairs, but that opinion would be based on the effect of the DNA identification and not on the basis of his microscopic hair comparison;

— the submission of one, six or ten type 2 hairs to a jury is prejudicial.

[55] The trial judge commented that if the only hair evidence linking the appellant to the scene consisted of those hairs having a type 2 level of comparison, he would have excluded the evidence on the basis that its low probative value was outweighed by the potential prejudicial effect. However, he concluded that the probative value of the type 2 hairs was "somewhat elevated" in this case:

> *In this case the probative value is somewhat elevated by the finding of type 1 hairs, by the finding of a DNA profile matching that of Mr. Bennett on some of these B-1 and B-2 hairs, the effect that finding may have in establishing that those hairs came from him, and by virtue of similarities said to exist between the various type 1 and 2 hairs, the available inference that all the B-2 hairs are his.* The proximity of various hairs to each other, in terms of location, may also lend some probative value. *The finding that some B-2 hairs had a negroid characteristic has some probative value, given other evidence before me that the police investigation revealed no other possibly involved persons of that racial origin, and the deceased's best friend knew of no other such acquaintances. This of course, may well be offset by the finding of negroid characteristics in some type C hairs having microscopic dissimilarities to the accused's sample hairs.*

(Emphasis added)

[56] The trial judge further explained his decision to admit the evidence of the type 2 hair linked to the appellant as follows:

> In summary, my view is that the evidence as to type 2 level of comparison has some limited probative value, that in the circumstances of this case the jury is of necessity going to hear hair comparison evidence in any event, that it is not practical to exclude type 2 level of comparison hair evidence without improperly distorting the balance of the hair comparison evidence, and that with appropriate effort by counsel and careful instruction from the court, the potential for prejudice can be satisfactorily addressed.

(iii) *Analysis of the ruling on the voir dire*

[57] In my view, the trial judge fell into error in deciding to admit the type 2 hair comparison evidence that defence counsel sought to exclude. The prejudicial effect of this evidence outweighed its probative value.

[58] The defence's theory was that the appellant's hairs associated with the body and bedding were found there for an innocent reason: his hairs had either been deposited there directly, as he had been sitting on the bed the week before the death, or through innocent transfer, as lividity patterns showed that the body was moved after death and Mr. Crocker accepted that hairs could be transferred to a body if it was sticky. The strength of the defence's theory would be reduced as the number of hairs linked to the appellant and found on the bedding and the body increased.

[59] The only possible relevance of the type 2 hair comparison evidence was to establish the identity of the killer. The inference going to identity would have to be that the finding of six type 2 hairs (three of which were scalp hairs and three body hairs) on the victim's body and bedding, which were linked by Mr. Crocker's evidence to the appellant, combined with the six pubic hairs found on or near the body and on the bedding which defence counsel conceded belonged to the appellant, supported the inference that the appellant was the killer.

[60] I am of the view that the probative value of the impugned type 2 evidence was not elevated to the extent found by the trial judge. Having said that, in fairness to the trial judge, I would agree entirely with his comment that, "Mr. Crocker's opinion as to the probative value of the type 2 hairs was, with respect, something less than crisp." However, Mr. Crocker clearly expressed the opinion that evidence of a type 2 hair comparison, without confirming DNA evidence, is not probative of identification of the donor of the hair. He also testified that the fact that three B2MB hairs generated a DNA profile matching that of the accused does not change the probative value of the other B2MB hairs. His additional, and rather obscure, testimony to the effect that taking together the hairs that showed a type 1 and type 2 comparison to the appellant's known hair samples reduced by an

immeasurable amount the size of the indeterminate class who could be the donor of the type 2 hairs did not, in my view, significantly elevate the probative value of the type 2 evidence that the defence sought to exclude.

[61] Moreover, to the extent that the trial judge found that the probative value of the type 2 hair comparison evidence was elevated by virtue of similarities said to exist between the various type 1 and 2 hairs, Mr. Crocker's testimony was that he did not compare the type 2 hairs, one with the other, so as to form any opinion as to their similarities. In addition, the *Kaufman Report* indicates that an assessment of similarities between hairs is highly subjective (at p. 88):

> The characteristics of a person's hairs vary from hair to hair, and they may differ even within a single hair on a person's body. Hair comparisons are *not* akin to fingerprint comparisons. Hairs are not unique, and the assessment of the similarities, differences and importance of hair characteristics is highly subjective. Efforts to quantify, through statistical analysis, the probability that a person was the donor of an unknown hair are not generally accepted in the forensic community — in my view, with good reason.

(Emphasis in original; underlining added)

[62] A further concern I have with the trial judge's analysis is with his conclusion that the Negroid characteristics of the B2MB hairs increased their probative value. This conclusion is premised on the assumption that there was a finite group of people who could have left these hairs. However, there was not a discrete group of people who could have been the killer in this case. As defence counsel pointed out in his submissions on the *voir dire*, it had not been established that Jennifer did not have any other black acquaintances. Jennifer's landlord could not say, quoting the trial Crown's language, if there had been any "negro visitors" to the apartment during the time prior to Jennifer's death. Nicole Rowe and Jennifer's parents admitted that they did not know all of Jennifer's acquaintances. And as defence counsel further argued in his pre-charge submissions, it had not been proven that "no other black person could get into the apartment on the night" in question.

[63] Finally, I am of the view that the trial judge erred in concluding that if he excluded the type 2 evidence objected to by defence counsel, he would improperly distort the balance of the hair comparison evidence. The trial judge articulated this concern as follows:

> For understandable reasons, Mr. Ducharme does not seek the exclusion of the evidence of the finding of all these hairs. The finding of hair bearing dissimilarity to any of the known samples, and the finding of hair having a similarity to other known persons and suspects has relevance to his defence. If

> evidence as to the finding of many other hairs in the apartment is admissible, as is evidence that when microscopically examined some of these hairs were found to have similarity to the hair of other known persons, or to be microscopically dissimilar to any of the known persons, how can such evidence be sensibly placed before the jury without the evidence of a purported B-2 level of comparison of others to Mr. Bennett? Without distorting the evidence?

[64] In my opinion, had defence counsel's position been accepted, Mr. Crocker would not have been put in a difficult position in explaining the evidence to the jury, nor would the evidence have been distorted. Crown counsel could have been permitted to call evidence regarding the type 1 hairs that were microscopically similar to the appellant's, as well as the type 2 body hairs that revealed his DNA profile. For the remaining six A2MB and B2MB hairs, Mr. Crocker could simply have testified that these hairs were found, but that he could not be sure who these hairs came from, instead of being permitted to testify that the appellant could not be excluded as the donor of these hairs. Such an approach would have avoided the strong potential for prejudice associated with this type of evidence, as identified at p. 315 in the *Kaufman Report*: "Any trier of fact, hearing an exhaustive detailing of the minutia of hair similarities found, could easily (and understandably) conclude that only some legal or professional restraint prevents the experts from saying that the compared hairs come from a common source."

[65] For these reasons, I conclude that the trial judge erred in admitting the type 2 evidence which the defence sought to exclude. Before turning to the next ground of appeal, I also express the opinion that the trial judge further erred in admitting the C hair evidence in this case. Counsel for the appellant did not press this issue on appeal, however, in view of my disposition that a new trial is required, I think it is appropriate to address it.

[66] In his submissions on the *voir dire*, defence counsel argued that the C hairs should not be admitted. The trial judge said the following about this evidence:

> While type C hairs are not suitable for comparison in Mr. Crocker's opinion, he did conduct some microscopic comparison of those hairs and found the majority of them to exhibit negroid characteristics but to be dissimilar to the known hairs of Mr. Bennett. One of these C hairs was found on the perineum of the victim. The fact that he observed dissimilarities in characteristics as between the known Bennett hairs and these unknown C hairs was not mentioned in his report.

[67] In my view, the type C hairs had extremely low probative value and had significant potential for prejudice given the

testimony regarding their racial characteristics. As previously mentioned, Mr. Crocker's evidence was that type C hairs can be readily carried on clothing and transported in and out of a particular area. He also testified that he was not suggesting that these Negroid C hairs came from the appellant and said that they could well have come from another person. He expressed the view in cross-examination that the C hairs in this case do not have any value because they were isolated hair fragments, as opposed to a grouping of numerous similar hair fragments.

[68] On the other hand, the potential for prejudice was significant given that the appellant is a black man and the evidence was that several type C hairs, including the one found on the victim's perineum, exhibited Negroid characteristics. Even though Mr. Crocker testified that most of the six C hairs exhibited dissimilarities to the appellant's known samples, the jury could well have inferred that as the only known black suspect in the case, these hairs must have been his. For these reasons, the trial judge erred in not excluding the evidence regarding the racial characteristics of the C hair from the jury's consideration.

Issue 2: Did the Trial Judge err in his Charge by Failing to Instruct the Jury that they must not Draw the Speculative and Prejudicial Inference that the Crown Invited them to Draw with Respect to the Trace Evidence?

[69] There is a real possibility that the jury misused the hair comparison evidence in this case.

[70] In his ruling on the *voir dire*, Glithero J. expressed confidence that any prejudice from the type 2 hair evidence could be reduced or eliminated at trial:

> Such potential prejudice [of the microscopic hair comparison evidence] can in my opinion be very much reduced, if not eradicated, by the proper examination and cross-examination of Mr. Crocker, by the introduction of such other expert evidence as the defence may see fit to elicit, and by my best efforts to carefully instruct the jury as to the limitations on the probative value of this evidence.

[71] The potential for prejudice from the type 2 hair comparison evidence was dramatically increased by the way that Crown counsel in his closing address asked the jury to use this evidence. The Crown urged the jury to draw inferences unsupported by Mr. Crocker's testimony based on a "common sense approach" to the hair evidence:

> But as a matter of common sense, if you find DNA on one of those B-2 hairs, as was done here, that would seem to make it pretty compelling that it was from Mr. Bennett. *Were you to find two hairs together, one being a B-1*

and one being a B-2, for instance, it would seem highly likely that the same person deposited those there.

And as Mr. Crocker said in his evidence that while you may have this . . . this indeterminate class is the phraseology that's used, if you find a number of hairs that vary between each other, but are all very similar to a known sample, it's the fact we have different hairs all narrowing toward a single sample that tends to narrow the range of this indeterminate group.

And he also went on to say that, in response to a suggestion by my friend, if you had six hairs in exactly the same place, what that would suggest to you, using this logic, is that all six individual hairs probably came from a single individual. And, of course, he's being very careful not to say they would come from Mr. Bennett, or anybody else, but a single person. And that's a pretty logical, common sense approach.

And in this particular case, we not only have that type of thing, but we also have DNA on some of those hairs, and the fact they're Negroid.

(Emphasis added)

[72] The *Kaufman Report* noted at p. 315 that the Crown used the type of argument based on common sense in the Morin trial:

Any trier of fact, hearing an exhaustive detailing of the minutia of hair similarities found, could easily (and understandably) conclude that only some legal or professional restraint prevents the experts from saying that the compared hairs come from a common source. *Indeed, Mr. McGuigan very persuasively suggested in his jury address that, apart from the experts, a "common sense" approach to the hair and fibre evidence led inexorably to the conclusion that Christine Jessop had been in the Morin Honda.*

(Emphasis added)

[73] Even more problematic in this case is that Crown counsel was misleading and imprecise in the way that he dealt with the hair evidence in his closing argument. For example, he told the jury: "And the B-2's were, I believe, perhaps one exception, all DNA'ed to Mr. Bennett". Having said that, he went on to tell the jury that they could double check for themselves the numbers and locations of the hairs, as the jurors evidently had with them a chart of the evidence. However, at another point in his closing, the Crown stated in quite an inflammatory manner that all of the B-2 hairs were attributed by DNA to the appellant:

And so let's then use common sense. And where these items are found when you look at the B2 hairs, etcetera, and in conjunction with B1 hairs, or DNA'ed hairs, and the lack of other Negroids in Jen's life. And then look as well, when you look at the DNA, at the other commonsensical type approach that these hairs, the body hairs, the pubic hairs left behind with Mr. Bennett's DNA profile on them and bearing some, if not all microscopic similarities to his hair, are attributed, at least by DNA, to a person whose dick ached every time he thought about Jennifer, and who was in fact over there looking for her.

[74] And again near the end of his closing, the Crown told the jury:

> And then you look at all . . . the fact that of all the hairs you find in the apartment, you find two A-2 hairs, which some would suggest we don't even look at A-2 hairs, scalp hairs. I think it's obvious you should look at them.
>
> *But then you find all of these body hairs. And you find them only on the body, in the bedclothes, or in the body bag, or under, with the exception of one in the washroom, with DNA that's linked to him. And they are pubic hairs.*

(Emphasis added)

[75] In his charge, the trial judge told the jury that in Mr. Crocker's opinion, type 2 levels of comparison ought not be included in reports that go to the jury and that they are not probative. He said the following about the Crown's address to the jury on using this evidence:

> Mr. Russell made submissions to you as to the significance of the type 2 comparison hairs and the C hairs. He urged you to draw certain inferences and use the evidence you have in a way that may go beyond Mr. Crocker's opinion as to the use that should be made of it.
>
> I give you this caution, acknowledging that you are the finders of facts, not me.

[76] The trial judge went on to tell the jury in regard to Mr. Crocker's evidence:

> I would suggest to you that his opinions you can accept, you can reject, but I do not know that you can go adding much to them because you were not given the tools which he used in order to formulate his opinions so as to be able to build your own blocks, if I can put it that way, and go beyond what he gave you in terms of opinion.

[77] He asked the jury to look at the charts before them on the hair evidence and proceeded to summarize the location and type of hairs found in the apartment as indicated in Mr. Crocker's report.

[78] In fairness to the trial judge, crafting an appropriate instruction on the use of the hair evidence in this case was not a simple task and the trial judge went to great lengths to be fair in his charge. However, in my view, the trial judge failed to provide the careful instruction regarding the hair evidence, which he acknowledged on the *voir dire* was required.

[79] The hair evidence in this case was a morass. It is not safe to assume that the jury was not misled on its significance. The trial judge instructed the jury that some of the Crown's suggested inferences "may have gone beyond Mr. Crocker's opinion". Yet this instruction significantly understated the unfairness of Crown counsel's treatment of the hair evidence. Crown counsel misstated the expert evidence by suggesting to the jury that they

could infer that finding one B-1 hair together with a B-2 hair makes it "highly likely that the same person deposited those there". Mr. Crocker's evidence did not support such an inference. In addition, Crown counsel's suggestion that all of the type 2 hairs had been "attributed, at least by DNA, to a person whose dick ached every time he thought about Jennifer" misstated and oversimplified the evidence in a way that was capable of seriously misleading the jury to draw unwarranted inferences adverse to the appellant.

[80] The case against the appellant, which was based entirely on circumstantial evidence, cannot be described as an overwhelming one. In this context, the hair comparison evidence was a very important element of the Crown's case. In view of my ultimate disposition directing a new trial, I think it might be of value to give some direction on how the hair evidence ought to be dealt with in this case.

[81] First of all, as explained above, the evidence that certain C hairs revealed Negroid characteristics should not be admitted as evidence for the jury to consider. All that Mr. Crocker should be permitted to say is that various C hairs were found, but that they are not useful for comparison purposes.

[82] Second, the type 2 hair comparison evidence related to the three body hairs and three scalp hairs that were not linked by DNA to the appellant should not be admitted.

[83] Third, I question the wisdom of a concession by defence counsel that the type 1 hairs without a DNA match to the appellant are his hairs. One of these hairs was on the washroom floor and one was found on the body bag. This concession appears to be unwarranted in light of the expert's evidence that a type 1 comparison is not evidence that a hair is definitely that of the known donor, only that it may or may not have come from him. Mr. Crocker acknowledged that he used language that was frowned on by the *Kaufman Report* when he defined the type 1 hairs in his report as hairs that "*could have* originated from the same source as the known sample" (emphasis added). As noted, the *Kaufman Report* recommends that the phrase "may or may not" have originated from a particular person is preferable to "could have" originated from that person. The *Report* also recommends that:

> Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

[84] Kaufman concluded at p. 323 that it was not appropriate for him "to articulate any hard and fast rules" as to when hair

comparison evidence should be admitted in a criminal trial. I am not prepared to say that the type 1 comparison evidence should not have been admitted in the circumstances of the other forensic evidence in this case.[3] However, in my view, the jury should be instructed that Mr. Crocker's evidence that certain hairs found at the crime scene are "microscopically similar" to hairs donated by the accused is not to be taken as expert testimony that the found hairs definitely came from the accused. The jury should further be instructed that the inconclusiveness of this evidence is a matter of weight for them to assess in the context of the other pieces of circumstantial evidence relied on by the Crown.

[85] Fourth, as the trial judge properly did, the jury should be reminded of the four hairs that yielded a DNA profile matching that of the accused as well as the fifth hair that had a DNA profile matching his at three of four loci. They should also be reminded of Ms. Johnston's testimony of the population frequency statistics regarding DNA. And further, as the trial judge did in this case, the members of the jury should be instructed to apply their own common sense and good judgment in assessing this evidence.

[86] Fifth, the jury should be instructed that the presence on the body and bed sheets of hair linked by DNA to the appellant had to be considered along with the evidence that a number of head and body hairs that did not come from either the victim or the appellant were also found on the victim's body and her bedding. The trial judge should remind the jury of the number and location of these hairs, as well as the expert's opinion on the type of such hairs, *i.e.*, whether they are body or scalp hairs.

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3 In *R. v. Portillo*, [2003] O.J. No. 3030 (QL), 176 C.C.C. (3d) 467 (C.A.), Doherty J.A. was not prepared to find that the trial judge erred in law in failing, on his own initiative, to exclude hair comparison evidence that was based only on microscopic similarities. Defence counsel at trial had not objected to the admission of evidence that certain hairs were microscopically similar to the hairs of the appellants and deceased. *Portillo* does not refer to the type 1 and 2 categories used by Mr. Crocker, however, it appears that the hairs at issue would fall into Mr. Crocker's type 1 category, because they are hairs that "were microscopically similar to the hairs of the appellants and deceased": see para. 44. In refusing to find that the trial judge erred in admitting this evidence, Doherty J.A. stated that "the fact that hairs which were a DNA match to the appellants were found on the deceased could add to the probative value of the evidence that certain other hairs found at the scene were microscopically similar to the appellants' hairs, and at the same time diminish the potential prejudice. In any event, the trial judge was not asked to exclude the evidence."

[87] Sixth, with respect to the numerous hairs found in the apartment that did not exhibit any similarities to the appellant's known hair samples, Mr. Crocker could be permitted to give evidence regarding which of these hairs showed a type 1 relationship to the other known donors of the hair samples, including the deceased. For those hairs that showed a type 2 relationship to the other known donors of the hair samples, Mr. Crocker should only be permitted to testify that he cannot be certain who these hairs came from. For the remaining hairs, he should simply be permitted to testify that these hairs were dissimilar to all of the known hair samples.

[88] Finally, the record indicates that the jury had a chart that set out the hair evidence in this case. The chart will of course need to be modified in light of my decision. It is worth emphasizing that some sort of written aid, preferably one that is less confusing than the one found on this record, is required to help the jury in sorting out the admissible hair evidence in this case.

Issue 3: Did the Trial Judge Err in his Charge in Regard to Identification Evidence and did he Erroneously Allow the Jury to Consider as Evidence Against the Appellant an Identification which Excluded the Appellant from Being the Person who was Following the Victim on the day Before she was Killed?

[89] This ground of appeal relates to the evidence of Dennis Morningstar, a Crown witness with an extensive criminal record and a history of drug abuse. Morningstar testified that on May 6, 1992, he saw the appellant holding Ms Ueberschlag's hand at a youth drop-in centre called Oasis. He also testified that in the late afternoon or evening of May 7, 1992, Ms Ueberschlag visited him at his house on Waterloo St. and appeared to be scared and nervous. She called a friend to pick her up. He testified that he saw the appellant standing across the street, leaning against a post and wearing a Walkman. Morningstar agreed with the proposition put to him in cross-examination that the man across the street was "clean shaven, no beard". However, the evidence of the other trial witnesses was consistent that at the time in question, the appellant had a beard.

[90] In his statement to police in July 1992, Morningstar mentioned having seen the appellant at Oasis on May 6, but he did not mention having seen the appellant outside his house on the following day. He first told police about the May 7th sighting over four years later, in December 1996. At the preliminary inquiry, he was not able to identify the appellant as being the man he saw

standing across the street on May 7, 1992. At trial, he identified the appellant as that man.

[91] The Crown, in his closing address, conceded with respect to Morningstar that "there were obviously a number of huge gaps or errors in his evidence" and acknowledged that the jury may find his "evidence to be totally worthless in that sense, in terms of his identification". Crown counsel went on to give several reasons for not rejecting his evidence out of hand, including that Morningstar did not hear a lot of defence counsel's questions, that Morningstar had mentioned seeing the appellant at Oasis in his July 1992 statement to police and that he testified "in this court that he was certain that that was the man and said that he hadn't seen the beard because the man had his head down across the way. But that that was the guy, and that as he walked away, he turned his face back, and he recognized him."

[92] In the trial judge's charge to the jury, after bringing up the topic of Morningstar's evidence, the trial judge warned the jury in general terms of the dangers of identification evidence. He summarized Morningstar's testimony and commented as follows:

> I am instructing you that you ought to be exceedingly careful with respect to this evidence because I suggest it has a number of real concerns to it. It is very easy to point to someone who is sitting in an enclosure in the courtroom and say that is the man because you are picking out of a line up of one.
>
> On a previous occasion, this witness was unable to pick the same man out in the same circumstances at a time that was closer to the event. . . .
>
> *I would suggest that those are matters of real concern and, in addition, he has sworn before you that the man across the street did not have a beard. All of the evidence you had before you, as I appreciate it, is that Mr. Bennett had a beard back in May of 1992. Where a witness describes a person in a way inconsistent with a prominent feature of their appearance, I would suggest to you that it is identification which is worth very, very little and that you ought to be very cautious in accepting the rather bare assertion of that is the man when he points to a line up of one here in the courtroom.*

(Emphasis added)

[93] Counsel for the appellant contends that the trial judge's charge was inadequate because he did not instruct the jury that Morningstar's evidence exonerated the appellant in the limited sense that his evidence indicated that Ms Ueberschlag appeared to be afraid of a black man other than the appellant on the day before her death. Trial counsel had asked for such an instruction during the pre-charge conference, relying on *Chartier v Quebec (Attorney General)*, [1979] 2 S.C.R. 474, 9 C.R. (3d) 97. In *Chartier*, at p. 494 S.C.R., p. 138 C.R., Pigeon J. for the majority stated:

> The appellant was not "positively identified" by the witness Holland . . . , since the latter said: "I recognize him by his posture, build, facial features, stomach, etc., but the only thing that is different is that his hair was grey at the time of the incident."
>
> In order for this statement to be an identification, it would have been necessary to establish that the Appellant had had grey hair at the time of the incident, otherwise the witness Holland was not identifying the Appellant, but rather exonerating him. *Regardless of the number of similar characteristics, if there is one dissimilar feature there is no identification.*

(Emphasis added)

[94] This court in *R. v. Boucher* (2000), 146 C.C.C. (3d) 52, [2000] O.J. No. 2373 (QL) (C.A.), at pp. 57-58 C.C.C. applied *Chartier* to conclude that a notable dissimilarity in identification evidence, absent some other inculpatory evidence, renders the identification evidence of a resemblance of no probative value. In *Boucher*, this court quashed a committal against three accused on charges of robbery and related offences. The Crown's case depended on a nexus being shown between certain pants worn by one of the robbers and the clothing worn by one of the accused on the day of the robbery. If the description of the pants matched, the pants could provide the requisite link to the robbery. However, the pants worn by the robber were described by a bank customer as being all black, while the pants worn by the accused were described by another witness as having a white stripe running the length of the leg. At p. 58 C.C.C., Rosenberg J.A. stated:

> In view of the dissimilar feature of the pants, there was no identification, merely a resemblance. In the absence of some other inculpatory evidence, a resemblance is no evidence. If there were other inculpatory evidence it may be that a trier of fact would have good reason for finding that the customer's testimony was unreliable. Since there was no other evidence, the dissimilarity at worst renders the resemblance of no probative value and possibly stands as an exculpatory feature.

[95] In my view, the trial judge erred in leaving it open for the jury to conclude that the appellant was the person Morningstar saw across the street the day before Jennifer was killed. Morningstar's evidence that the man across the street was "clean shaven, no beard" constitutes a notable dissimilarity in the identification evidence. Again, quoting *Boucher*, at p. 58 C.C.C., "In the absence of some other inculpatory evidence, a resemblance is no evidence . . . Since there was no other evidence, the dissimilarity at worst renders the resemblance of no probative value and possibly stands as an exculpatory feature."

[96] There was no evidence other than Morningstar's testimony that the man across the street was the appellant. Accordingly, the

trial judge ought to have instructed the jury that Morningstar's identification of the appellant was worthless, not that it was "worth very, very little". Further, the trial judge ought to have instructed the jury that it was open to them to infer from Morningstar's evidence that he had seen a clean-shaven black man, and not the appellant, standing across the street on the day before the killing and that Jennifer appeared to be afraid of that man. In fairness to the trial judge, the *Boucher* decision was released after the trial took place.

Issue 4: Did the Trial Judge Err in his Charge in Regard to After-the-Fact Conduct by Erroneously Allowing the Jury to use After-the-Fact Conduct Evidence Against the Appellant that was Prejudicial and had Little or no Probative Value?

[97] The appellant contends that the trial judge erred in leaving with the jury various items of after-the-fact conduct evidence from which they could infer a consciousness of guilt on the part of the appellant. The first area of evidence relates to the appellant's two statements to police, while the other areas relate to the appellant's behaviour and reaction to various events after the killing.

I. *The alibi evidence*

[98] Crown counsel led the appellant's two statements to police through his examination-in-chief of Detective Close. The statements were introduced as exhibits over defence counsel's objection.

[99] In the first statement, which was given in response to the police's expressed intention of trying to rule out the appellant as a suspect, the appellant said that the last time he talked to Jennifer was on Thursday (May 7). He said that he went to her house on Friday (May 8) with Dan (Stewart) and Justine (Meekison) with a bottle of tequila and no one was there. They waited for half an hour and no one showed up so they left. He tried to call her Friday night, a few times on Saturday and once on Sunday afternoon but there was no answer. He went to Elora Gorge with the kids (whom he lived with) on Sunday. On the afternoon of May 10, Nicole Rowe had called him and asked if he had seen Jennifer. He told her that he last talked to Jennifer on Thursday and that he had not seen her since. He said he then got kind of worried about her and so he phoned a mutual friend, Michelle, to ask if she had seen her. She said that she thought she saw Jennifer on the bus headed for Fairview (a shopping mall) on Friday but she wasn't sure. He called Rowe and told her this and that was the last he heard until he heard her address on the radio.

[100] In response to police questioning about when he was at Jennifer's apartment on Friday, he indicated that "it was still light — 7 or 7:30, I'm not sure". He was asked what he did after leaving the apartment and replied, "We came here [the home on Mill Street] and we drank for a bit. We went and dropped Dan and Justine off at Wizards and I came back here." He said that this was "at 9:30-10".

[101] After responding negatively to the question if he ever had sexual relations with Jennifer, the appellant said "An hour or so later I went back down to Wizards to find Chris Corbett. She lives at the Y too. I didn't find Chris, so I talked to Justine for a while and then I came back here about 11:30-12." He was asked if he had ever been in Jennifer's apartment and he replied "Ya, a couple of times." Finally, he was asked if he knew who would want to kill Jennifer and he replied that he had "no idea . . . she seemed alright to me."

[102] The appellant's second statement was given at police headquarters after the police told him that he was still a suspect and in response to their request that he alibi himself from Friday morning until Sunday evening. The appellant wrote that he got up Friday at about 8:30 to get the kids he had been watching off to school and then went back to sleep until about 1 p.m. He watched TV most of the afternoon, got supper ready, cleaned up around the house until about 7 and went to Fairview Mall to see Michelle. They went to a friend of her's house until about 8 or 8:30. He left and went downtown to the pool hall (Wizards), where he saw Justine and Dan and asked if they wanted to get drunk because he had tequila. They went to the park where he and Dan drank, but they left because there were too many cops. They went to Jen's house, he knocked, but there was no answer so they sat in the car for awhile. A man he had seen before (this was Jennifer's landlord) offered them pizza and asked a lot of questions. So they left and went to the house where he was staying, drank some more, and then he dropped them off at Wizards. He then went to his friend Bozer's house on Waterloo St., but no one was home. He returned to the pool hall and stayed for about 15 minutes and then went home and watched T.V. the rest of the night. He stayed around the house all day Saturday and Saturday night and went to bed at about 10 p.m. because he, the kids and Miz (Mitsy Roy) were to go to Elora on Sunday. They got up at 4 a.m. and left the house at 7 a.m. and got back at 1:30 p.m. He went to sleep until supper at 8 p.m.

[103] A comparison of the two statements reveals some minor differences in the appellant's version of his whereabouts on Friday May 8, 1992. He indicated in the first statement that

he went to Jennifer's apartment when it was "still light", around 7 or 7:30. In contrast, in the second statement he did not give a time when he arrived at her apartment, but his chronology indicates that it was some time after 8 or 8:30. In addition, in the first statement the appellant said that he went to the pool hall to find Chris Corbett, but he did not refer to this in his second statement. In the second statement, the appellant said that he went to his friend Bozer's house, which he had not mentioned in the first statement. Finally, in the first statement he told police that he returned home at about 11:30-12, whereas in the second statement, he did not indicate what time he went home.

[104] The trial judge in his charge to the jury stated there were various items of evidence of things done by the appellant from which the Crown was urging them to draw an inference of guilt, one of which involved the discrepancies in the appellant's two statements regarding his whereabouts on the evening of May 8th. The trial judge described the Crown's position on the significance of the statements as follows:

> The Crown says that the explanations by Mr. Bennett for his whereabouts on the evening of May 8 are different in those two statements. The Crown argues that the inconsistency in the explanations is such that at least one of them cannot be true. The Crown argues that at least one of them is therefore a deliberate falsehood as to his whereabouts during the evening of the killing and the Crown argues that is something from which you can infer guilt because the Crown says it is more likely that a guilty person would lie about his whereabouts than would an innocent person.

[105] After going over the gist of the statements, the trial judge gave the following instruction:

> If, having regard to all of these circumstances, you are satisfied that Mr. Bennett was deliberately fabricating or concocting a false alibi in making these statements to the police, and if you are also satisfied that this fabrication or concoction emanated from a sense of guilt for the crime on his part, then you would be entitled to consider that as circumstantial evidence of involvement.

[106] The trial judge stressed that disbelief of the alibi evidence is not proof of concoction. He told the jury that the Crown must prove deliberate concoction. He also told them to consider all of the circumstances surrounding the creation of the statements, whether there were material inconsistencies between them and if so, whether the inconsistencies were deliberate or innocent. He finished his instruction on this point as follows:

> It is only if you are satisfied that the evidence is actually concocted, that is deliberately fabricated, that you would be entitled to draw an inference of guilt from that evidence.

[107] Appellant's counsel argued that the appellant did not give himself an alibi in the sense of being with someone else at the time of the murder. Counsel further argued that, considering the Crown's theory was that the killing took place at approximately 11:55 p.m. on the Friday night, the appellant did not give himself a clear alibi in either statement because he left open the possibility that he was out on the town at the time of the murder. In the first statement, the appellant placed himself at home at "around 11:30-12", while in the second statement, he did not give a time when he got home.

[108] While I accept that the appellant did not give himself a strong alibi in the sense of being with someone else at the time of the killing, or being in a location far removed from the scene of the crime at the critical time, I would agree with the respondent that the appellant did give an alibi in the sense that his statements indicate that he was not at the crime scene at the time of the murder.

[109] Counsel for the appellant went on to argue that even if the statements could be taken as providing an alibi, the jury ought to have been told that they could not infer guilt from the statements because there was no extrinsic evidence of concoction in this case. Counsel pointed to a series of cases from this court, which he says establish that the issue of concoction in connection with an alibi should only be raised when there is extrinsic evidence that the alibi has been concocted, citing *R. v. Coutts* (1998), 40 O.R. (3d) 198, 126 C.C.C. (3d) 545 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 450; *R. v. Krishantharajah* (1999), 43 O.R. (3d) 663, 133 C.C.C. (3d) 157 (C.A.); *R. v. Campbell* (1999), 139 C.C.C. (3d) 258 (Ont. C.A.); *R. v. Wristen* (1999), 47 O.R. (3d) 95, 141 C.C.C. (3d) 1 (C.A.), leave to appeal refused [2000] S.C.C.A. No. 419; *R. v. Price* (2000), 144 C.C.C. (3d) 343, 33 C.R. (5th) 278 (Ont. C.A.); *R. v. Diu* (2000), 49 O.R. (3d) 40, 144 C.C.C. (3d) 481 (C.A.); *R. v. Blazeiko* (2000), 48 O.R. (3d) 652, 145 C.C.C. (3d) 557 (C.A.); and *R. v. O'Connor* (2002), 62 O.R. (3d) 263, 170 C.C.C. (3d) 365 (C.A.).

[110] The respondent submits that there was no need to adduce extrinsic evidence of concoction in this case because Crown counsel was relying on a material inconsistency between the two statements, citing the decisions of this court in *R. v. Ruddick* (1980), 57 C.C.C. (2d) 421 (Ont. C.A.), at p. 440, leave to appeal to S.C.C. refused (1981), 57 C.C.C. (2d) 421*n*; *R. v. Andrade* (1985), 18 C.C.C. (3d) 41 (C.A.) at pp. 66-69 C.C.C.; and *R. v. McInnis* (1999), 44 O.R. (3d) 772, 134 C.C.C. (3d) 515 (C.A.), at pp. 786-87 O.R., pp. 533-34 C.C.C.

[111] The cases cited by the appellant draw a distinction between statements made by an accused which are disbelieved

and therefore rejected and statements that can be found to have been concocted in an effort to avoid conviction. The former have no evidentiary value, while the latter can constitute circumstantial evidence of guilt. In *Coutts*, *supra*, Doherty J.A. observed, at p. 203 O.R., p. 551 C.C.C. that this distinction is:

> . . . essential to ensure that the trier of fact properly applies the burden of proof in cases where statements of an accused are tendered or an accused testifies. If triers of fact were routinely told that they could infer concoction from disbelief and use that finding of concoction as evidence of guilt, it would be far too easy to equate disbelief of an accused's version of events with guilt and to proceed automatically from disbelief of an accused to a guilty verdict. That line of reasoning ignores the Crown's obligation to prove an accused's guilt beyond reasonable doubt. *By limiting resort to concoction as a separate piece of circumstantial evidence to situations where there is evidence of concoction apart from evidence which contradicts or discredits the version of events advanced by the accused, the law seeks to avoid convictions founded ultimately on the disbelief of the accused's version of events.*

(Emphasis added; citations omitted)

Doherty J.A. went on to hold that a jury should only be instructed that they may find that an accused's statement is concocted and, therefore, capable of constituting circumstantial evidence of guilt, where there is some evidence of actual concoction.

[112] In the case at bar, the differences between the two statements in this case, as even Crown counsel acknowledged in his closing address to the jury, were slight. The Crown in his closing treated the inconsistency as being that the appellant mentioned going to Bozer's place only in his second statement:

> And his alibi, if you will, is slightly different. Not a huge difference, but his whereabouts are clearly differentiate . . . different to a certain extent from the one statement to the other in that he has himself going to Waterloo Street to look for his friend, Bozer, in the second statement, which hadn't been in the first statement.

[113] On appeal, the Crown now contends that the inconsistency lies in the fact that in the first statement, the appellant potentially had himself out on the town at 11:30-12, and thus he would have had the opportunity to kill the victim, whereas in the second statement, he tightened up the timing to have himself home earlier. I cannot agree with this interpretation. In his second statement, the appellant gave no indication of the timing of his whereabouts any time after 8:30 p.m. on the night of the murder. He said that "he went home and watched TV for the rest of the night", but did not try to pin down when he returned home on the night of the killing.

[114] In his charge, the trial judge said on several occasions that the Crown's position was that the two accounts were different.

However, the trial judge did not attempt to indicate to the jury the nature of the inconsistency between the two statements. Instead, he left it for the jury to determine whether there was any inconsistency, and if so, whether it was material.

[115] In my view, if an instruction permitting a jury to find concoction and to infer guilt based on that finding is to be given, the trial judge is required to identify for the jury what inconsistency in the accused's statements could warrant a finding of concoction. The inconsistency must be compelling in the sense, for example, that there is an indication that the accused was attempting to mislead investigators by fabricating an alibi. As Martin J.A. stated in *R. v. Andrade*, *supra*, at p. 67 C.C.C.: "the giving of contradictory statements by an accused with respect to his whereabouts at the critical time may in some circumstances constitute evidence upon which the jury is entitled to find that one or both statements are fabricated".

[116] The trial judge, in my view, erred in instructing the jury that they were entitled to find that the appellant had fabricated an alibi, and that it was open to them to infer guilt from his two statements. The slight differences between his statements were not capable of warranting a finding of concoction. While the trial judge could have told the jury that any differences in the two statements was a factor they could take into account in deciding whether to believe either of them, there was no basis for instructing them that they could go further and use the statements as a separate piece of circumstantial evidence from which guilt could be inferred. Rather, the jury ought to have been told that if they disbelieved the alibi, they should simply discard that evidence, without more: see *R. v. Hibbert*, [2002] 2 S.C.R. 445, 163 C.C.C. (3d) 129, at paras. 61 and 67.

II. *Other after-the-fact conduct evidence*

[117] The appellant identified six other items of after-the-fact conduct that the trial judge left with the jury as being evidence from which the Crown asked them to infer guilt. The items of evidence were: the appellant's anger at a neighbour for telling police that he thought the appellant was capable of killing Jennifer; the appellant telling Nicole Rowe that Jennifer was seen going to a mall on the afternoon of her death; his failure to make certain phone calls upon learning of Jennifer's death; his failure to ask police if Jennifer was the victim; his desire to have copies of statements made to police by his acquaintances, Justina Meekison and Dan Stewart; and his reaction to the report that police had found a silver letter opener that was missing from Jennifer's apartment.

[118] In my view, the trial judge should not have left three of these items of evidence with the jury as evidence from which they could infer consciousness of guilt: the appellant's anger at being described as someone capable of killing the victim, his failure to make certain phone calls and his failure to ask police if Jennifer was the victim. These forms of conduct are examples of demeanour evidence that is highly suspect and easily misinterpreted. Regarding the remaining items, the trial judge erred in not instructing the jury more fully on the limitations of this evidence and in what circumstances it is permissible to draw an inference of consciousness of guilt from it.

[119] Given the importance of this evidence in the context of the Crown's circumstantial case against the appellant, I will describe in some detail the impugned areas of evidence. I then set out the trial Crown's closing arguments to the jury in regard to each, as well as the trial judge's instructions on the use that the jury could make of this evidence.

(i) *Anger at being described by Doug Hiltz as someone who could kill*

[120] The Crown witness, Doug Hiltz, lived across the street from the home where the appellant was staying and he also knew Ms Ueberschlag. Hiltz testified to having two encounters with the appellant after Jennifer's death. The first was on May 12, 1992. That day, the police arrived at Hiltz's house and questioned him. Hiltz told the police that he thought the appellant was capable of killing Jennifer. The appellant, who had seen the police across the street, came over to ask Hiltz what he told them. Hiltz testified that the appellant got upset when Hiltz told him what he said, and then left.

[121] The second encounter occurred a week or two later. Hiltz testified that there had been rumours circulating downtown that he was telling people that the appellant had killed Jennifer. The appellant confronted Hiltz about the rumours and told him that once it was all done and over with, he and Hiltz were going to have a talk and it was not going to be a friendly talk.

[122] The Crown in closing said the following about the evidence of the appellant's conduct towards Doug Hiltz:

> And you look at how he approached Doug Hiltz, a fellow he'd drunk tequila with the day before, when he knows that the police were over there and . . . and Hiltz candidly said well sure he'd be mad at me. I said anybody's capable of a homicide. But then later, when he hears Hiltz may have been starting rumours, he says well we're going to . . . we're going to talk about this later, and it's not going to be nice.

[123] In his charge to the jury, the trial judge repeated Hiltz's evidence regarding his two encounters with the appellant and instructed them as follows:

> It is for you to say whether these things were said and, if so, what importance, if any, attaches to them. Take all the circumstances into account. Question the reasonableness of the reactions attributed to Mr. Bennett.
>
> All of this evidence is for you to consider. I must say I would suggest, in my submission to you, it is not very hard to understand why someone would be upset if the police had been told by a neighbour of theirs that well, he might have done it because anybody can do it if they have their buttons pushed, and anyone might be upset if they find out somebody else has been spreading rumours about them being involved in a killing.
>
> It may well be that not only anybody might be upset by these things. It may well be that an innocent person would be more upset than a guilty one. These are all matters for you to consider and upon which to apply your good sense and judgment.

(ii) *Conversation about Ms Ueberschlag going to a mall*

[124] Nicole Rowe testified that on the Sunday after Jennifer's death and before her body was found, she paged the appellant to ask if he had heard from Jennifer. The appellant called her about 15 minutes later and said that he went by to drop off a television for Jennifer on Friday at around 7 p.m. and that no one answered. In response to questions put to her in cross-examination, Rowe recalled the appellant telling her that he had heard from Michelle that she thought she had seen Jennifer on a bus going to the mall. Rowe admitted that the conversation about Michelle could have occurred in a second phone call, but she remembered it being in the same call. She testified that the appellant did not tell her anything more about Michelle, or what her last name was, or who she was.

[125] Michelle Klobucar, another Crown witness, was a friend of the appellant's who testified that she had never known of Jennifer and that the appellant had not called her to ask if she had seen her.

[126] In his closing address, Crown counsel said:

> Was that just an instance of Bennett feigning, faking, an interest in Jennifer to let it appear that he was concerned for her well being and making the inquiries that Nicole Rowe would so obviously want him to do, and that this call back in regard to talking to a mutual friend was merely to convince Nicole of that fact?
>
> Because if Bennett was the killer, of course, he already knew that Jennifer was dead. And so this would be pure pretext.

[127] The trial judge discussed the Crown's position on this evidence and instructed the jury as follows on how to use it:

The Crown asks you to infer that Mr. Bennett was lying when he allegedly told Nicole Rowe when she called him on the Sunday afternoon that he had talked to some girl named Michelle who said she had seen Jen going towards Fairview mall on a bus on the Friday. The Crown's position is that this Michelle must be Michelle Klobucar and that Michelle Klobucar did not testify to any such conversation with Mr. Bennett but rather said that when she spoke to him on the Saturday, he did not have much time to speak to her and sort of brushed her off.

It is for you to say whether or not these remarks were made. It is for you to say what weight, if any, to attach to them. The Crown's requested inference is that Mr. Bennett said this just to sort of throw everybody off the track and make him look as though he was concerned when in fact he had been the killer.

I do not know what benefit there would be to telling somebody that you had been told that Jen was seen during the day Friday when that is before the time of the murder. It does not seem relevant in terms of trying to suggest to anyone that that means the murder did not occur or anything like that.

These are matters that you are asked to consider and that you are asked to use as a basis upon which to draw an inference. As I have said now several times, consider all of the circumstances and my instructions to you on how to handle circumstantial evidence.

(iii) *Failure to make certain phone calls*

[128] In his closing, Crown counsel said the following about the appellant's failure to telephone certain people upon learning of Jennifer's death:

And in terms of his reaction, does it make a great deal of sense when Nicole Rowe had phoned him up asking if he has some . . . seen Jennifer around, when Bulldog had asked him to look after Jen? And my friend brought out in cross-examination that he could have found out Bulldog's phone number and that type of thing, that he doesn't talk to Nicole Rowe again after that, doesn't say what happened Nicole? Or I just found out, this is terrible. Or that he doesn't call Bulldog and let him know what's happened, the fellow that introduced them, and the fellow who asked him to look after Jennifer, and he makes no reference to that? Does that seem at all logical?

[129] The trial judge dealt with this evidence in his charge as follows:

Lastly, the Crown argues that the accused man did not act appropriately after the death by not phoning certain people, for instance, Bulldog, who was as you will know Jen's street dad before he moved to Chatsworth, and the inference you are asked to make is that it would be reasonable that Mr. Bennett would have called Bulldog, that Mr. Bennett would have called Nicole Rowe, that Mr. Bennett would have asked people about what had happened.

Those are all matters for you to consider. Consider, on the basis of the evidence you have, what reasonable inferences arise, if any, from such evidence. Consider whether or not any explanation suggests itself to you from

all of the circumstances. Again, it is for you to say what, if any, inferences you are prepared to draw from such evidence, but you should only do so if in your view the requested inference is a reasonable one arising from all of the evidence.

You will bear in mind that a person might, when faced with circumstances such as you may feel were facing Mr. Bennett at the time, namely that it is clear that in respect to some of these matters he by that time had been questioned by police, indicated that he was a suspect, told that he was not believed. It may well be that there are some elements of panic or embarrassment or fear of false accusation or some other such considerations that should be taken into account.

(iv) *Utterances to the police on May 11, 1992*

[130] Crown counsel in his closing attached much significance to the appellant's reaction to a call from Detective Close on Monday, May 11, 1992 advising that he would like to talk to the appellant about the death of a friend of his, the identity of whom he testified he did not disclose over the phone. Crown counsel asked the jury to infer guilt because, although the appellant asked Det. Close who the deceased was, he did not ask specifically whether it was Jennifer. Counsel's argument on the point is quite lengthy, but particularly significant are the following passages:

When a police officer calls you up and says I want to talk to you about the death of a friend of yours, well that narrows the indeterminate class presumably to friends. And if Bennett was concerned about Jen, as he indicated in his statement to the police, if he called her Saturday, had called her Friday, and now you're getting a call from Sunday night from somebody that obviously wouldn't be particularly fond of you, Nicole Rowe, who's asking if he's seen her, and obviously worried about her, and he says he's worried, what would the first reaction be when a police officer calls? It's not Jennifer. . . .

But wouldn't you at least twig to that and say something, please don't tell me it's Jennifer? I've been worried about her. Her friend, Nicole's worried about her. Unless you already knew exactly who it was . . .

But the lack of curiosity on his part as to what happened to her seems inconceivable. . . . Wouldn't you want to know something about what happened? The police are calling you about the death of a friend of yours. What would be the first and most logical thing you would want to ask? What happened?

[131] The trial judge instructed the jury on the use of this evidence as follows:

As with the written statements, it is for you to determine whether these things were said. It is for you to determine, if said, whether there is anything about them that warrants the drawing of any inference as requested by the Crown. In so considering, take into account any explanation which in your view reasonably arises from the evidence, having regard to all of the circumstances. It is for you to say what weight, if any, is to be attached to this evidence.

(v) *Appellant's desire to have copies of statements made to police by Meekison and Stewart*

[132] Justina Meekison testified that the appellant approached her and said he wanted to get a copy of the statements that she and Dan Stewart had given to police.[4] She recalled telling the appellant that he was able to see the statements from his lawyer. She further recalled the appellant saying that his lawyer needed the statements from her because the police could change what she had said. She testified that the appellant told her that he didn't do it and the only reason he was a suspect was because he had charges against him.

[133] Crown counsel said the following about this encounter to the jury:

> And Bennett's been told that Meekison supports his story, and he's been asked by the police officers to flesh out the rest of the weekend. We need to alibi you for the rest of the weekend. So why does he go back to Meekison on May the 20th in order to get her statement to the police, and that of her boyfriend, Dan Stewart? Why focus on her? Because the killer knows that the important time is Friday night, Saturday morning. Not Saturday. Not Sunday.
>
> . . . . .
>
> But when Bennett's been told that you're okay, Ms. Meekison supports your story. She thinks you're a good guy on the . . . when they come to talk to him on May 14th, why go back and talk to her? Why worry about the police changing his statement? She says to him, well can't your lawyer get this? He says, well no, I have to, the police could change it around, presumably to suit their purposes.
>
> Why go back to her unless he's really worried about the people he's with Friday night, and not to Russell, whom he . . . could alibi him for Saturday and Sunday as well, unless he knew when Jennifer was killed?

[134] In his charge, the trial judge told the jury that the Crown asked them to draw an inference adverse to the accused based on the evidence that he asked Meekison for copies of her statements to the police and those of her boyfriend Stewart. He repeated Meekison's evidence and then instructed the jury as follows:

> It is for you to say whether these things were said. It is for you to consider all of the circumstances, consider any explanations that arise as to why things might be said. It is for you to determine whether these comments mean anything or merit the drawing of any inference.

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4 She told the police that this had happened, and they fitted her with a body-pack and microphone to record her further conversation with the appellant. However, the recording was very poor quality and in addition, the police lost the tape.

> . . . You may well be of the view that it is not surprising that Mr. Bennett would want to see what a witness or witnesses has told the police about an event in which he is alleged to have been involved, given that the police had already told him that they did not believe his denial.
>
> These are matters for you to consider and upon which to apply your good judgment and common sense. You are entitled to draw the requested inference if you think it to be a reasonable one, having considered all of the circumstances.

(vi) *Letter opener*

[135] Following the murder, rumours were circulating in the community that the victim's silver letter opener with a grim reaper on the handle, which was missing from her apartment, was the murder weapon. A photo of a similar letter opener was in the local newspaper on June 23, 1992. The missing letter opener was never recovered.

[136] In August 1992, police purchased a similar letter opener. They showed a photograph of it to Renee Biddiscombe, the appellant's girlfriend at the time of the murder, who was 15 years old and heavily addicted to crack cocaine and heroin. Police informed Ms Biddiscombe that they were investigating the murder of Jennifer Ueberschlag and told her that the appellant was the prime suspect in the killing. Police asked if she had seen the letter opener in the appellant's possession. They also told her that the appellant was married and showed her a copy of his marriage licence.

[137] Ms Biddiscombe testified that she was upset to learn that the appellant was married. She also testified that she assumed the letter opener was the murder weapon and confronted the appellant. She told him that the police thought he was the prime suspect in the killing and that they showed her the photo of a letter opener with a grim reaper handle. His response was that the police were trying to frame him and break them up.

[138] Ms Biddiscombe further testified that one morning in November 1992, when "she was very strung out", police stopped her and showed her a grim reaper letter opener in what looked like an evidence bag. They asked if she had seen it before, and she said only in the photo that they had shown her before. Police told her that the victim "didn't die pretty".

[139] Ms Biddiscombe said she was upset and went to see the appellant, who was in jail on unrelated charges. She told him that the police had shown her the letter opener. Ms Biddiscombe testified that after telling the appellant this, he replied "how the fuck did they find that, how the fuck did they find that?", looked very shocked and became agitated. She asked him if he didn't do

it, why was he so upset and he remarked that the police "are trying to frame me and, now they've found that, now they can".

[140] The Crown in his closing referred to Renee Biddiscombe's evidence as "perhaps the most important evidence of all" and, later, as "absolutely a critical piece of evidence". He went into considerable detail in his closing about this evidence, but the most pertinent passages are the following:

> But it's Mr. Bennett's reaction that's critical to this. What he does is he goes how the fuck did they find that? How the fuck did they find that? Not, where did they find that. For somebody who might have been worried about being framed for something he didn't do, it's a pretty significant distinction. . . .
>
> He says how the fuck did they find that? In other words, I thought I'd hidden it so well, it was gone forever. How the fuck did they find that?
>
> Now, why would anybody make the link between the finding of the letter opener, and him being in trouble, and him being framed, unless they knew what the link was? Why would he automatically assume that the finding of the letter opener would in any way shape or form, connect him to the crime, unless he had taken it and he knew its significance . . .

[141] The trial judge put to the jury the Crown's position that the appellant's reaction supported the inference that he had taken the letter opener and hidden it. He also repeated the defence position that there was nothing to this evidence given the rumours on the street that the letter opener was supposedly tied in with the killing and that the appellant had said to people on many occasions that he was worried about being framed by the police. The trial judge then said:

> These are all matters for you to consider. Consider all of the circumstances. Consider what inferences reasonably arise from those circumstances and be careful in drawing inferences in the sense that you are taking that extra step of making sure that the inference you are requested to draw is indeed a reasonable one arising from the circumstances.

III. *Analysis of the charge on the after-the-fact conduct evidence*

[142] Counsel for the appellant submits that if the trial judge had left only some of this after-the-fact conduct evidence to the jury, his error might have been harmless in isolation. However, in leaving all these items to the jury as evidence from which they could infer consciousness of guilt, the cumulative effect was highly prejudicial, particularly in a case where the Crown's case was entirely circumstantial.

[143] The respondent acknowledges that the first and third items of evidence relied on by Crown counsel as circumstantial evidence of guilt were weak arguments (*i.e.*, the appellant's anger at being described by Doug Hiltz as someone who could kill and

his failure to make certain telephone calls) and that the reliance on the fourth item was a doubtful argument (*i.e.*, the appellant's failure to ask police if Jennifer was the victim in the May 11th phone conversation). According to the respondent, it was open for the Crown to argue and for the jury to conclude that the remaining items of evidence constituted evidence of consciousness of guilt.

[144] The trial judge did not have the benefit of this court's recent decisions on consciousness of guilt evidence in *R. v. Diu* (2000), 49 O.R. (3d) 40, 144 C.C.C. (3d) 481 (C.A.), *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.) and *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161, 162 C.C.C. (3d) 539 (C.A.). In *Diu*, Sharpe J.A. observed, at p. 74 O.R., p. 519 C.C.C. that, "[i]t has long been recognized that in certain circumstances, the conduct of an accused after a crime has been committed may provide circumstantial evidence of the accused's culpability with respect to that crime". He went on to state, at p. 74 O.R., p. 520 C.C.C. that "it has also been repeatedly recognized that evidence of after-the-fact conduct is often highly ambiguous . . . There is often a serious risk that the jury may fail to consider alternative explanations for the after-the-fact conduct and erroneously infer guilt." Sharpe J.A. concluded:

> It is, therefore, important for the trial judge to ensure, by careful jury instructions, that the jury does not misuse the evidence. Accordingly, there is a well-developed body of jurisprudence to the effect "that juries be carefully instructed that there may be alternative explanations for the accused's conduct and that, in such cases, the accused's conduct is not capable of supporting an inference of consciousness of guilt." See *Jenkins*, *supra*, at p. 471 [(1996), 107 C.C.C. (3d) 440 (Ont. C.A.)].
>
> In general, the trial judge should instruct the jury that the evidence of the accused's after-the-fact conduct has only an indirect bearing upon the issue of guilt, and that the jury should exercise caution in inferring guilt because the conduct might be explained in an alternative manner: *Arcangioli*, *supra*, at pp. 299-300 [(1994), 87 C.C.C. (3d) 289], citing *Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C.). The trial judge should also instruct the jury that the evidence of the accused's after-the-fact conduct can only be used to support an inference of guilt where they have rejected any innocent explanation for the conduct: *Peavoy*, *supra*, at p. 238 [(1997), 117 C.C.C. (3d) 226 (Ont. C.A.)].

[145] In *Baltrusaitis*, *supra*, the court considered whether the trial judge erred in leaving with the jury evidence of the accused's demeanour on learning of his brother's death, his failure to ask questions about the circumstances of the death and his failure to inform police of a recent meeting with his brother, as after-the-fact conduct capable of supporting an inference of guilt. Moldaver J.A. wrote, at p. 182 O.R., pp. 561-62 C.C.C.:

I agree with the appellant that the three impugned items of evidence should not have been left to the jury as after-the-fact evidence capable of supporting an inference of guilt because the probative value of this type of evidence is highly suspect and easily misinterpreted. The point was recently addressed by this court in *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.), at p. 81 where Rosenberg J.A. stated as follows:

> The probative value of this type of evidence [unusually calm reaction by the accused upon being confronted with an allegation of sexual abuse] is highly suspect. In the two recent cases of Susan Nelles and Guy Paul Morin use of the accused's demeanour was found to have played a part in the wrongful prosecution. *The Report of the Commission on Proceedings Involving Guy Paul Morin*, 1998, vol. 2, pp. 1142 to 1150, contains an extensive discussion of the dangers of admitting such demeanour evidence. The expert and other evidence introduced at the Commission strongly suggests that this evidence can be highly suspect and should be admitted at a criminal trial with caution. *Perceptions of guilt based on demeanour are likely to depend upon highly subjective impressions that may be difficult to convey to the jury and in any event the significance of the reaction will often be equivocal.*

(footnotes omitted)

The concerns expressed by Rosenberg J.A. apply with equal force to this case. In my view, rather than leaving the impugned items of evidence to the jury as evidence capable of supporting an inference of guilt, the trial judge should have told the jury to ignore them. With respect, his failure to so instruct the jury constituted error.

(Emphasis added)

[146] As explained in *Diu*, it has long been recognized that the accused's after-the-fact conduct can give rise to a circumstantial inference of guilt; however, it is incumbent on the trial judge to ensure by careful instruction that the jury does not misuse such evidence. Moreover, as explained in *Levert* and *Baltrusaitis*, there are some types of post-offence conduct evidence that the trial judge is required to remove from the jury's consideration altogether.

[147] In my view, as I stated earlier, the trial judge should not have left the following items of demeanour evidence with the jury as being capable of supporting an inference of guilt: the appellant's anger at being described as someone who could kill, the appellant's failure to call certain people after Jennifer's killing and the appellant's failure to ask police if the victim was Jennifer. The trial judge ought to have told the jury that these items of evidence were not capable of supporting the inference of guilt urged by the Crown and that they should ignore them. These items of demeanour evidence are of the type that this court in *Levert* and *Baltrusaitis* described as having highly suspect probative value and are easily misinterpreted.

[148] With respect to the remaining items of after-the-fact conduct evidence, in my view, it was open to the trial judge to leave

these items with the jury. However, the trial judge ought to have instructed the jury that the after-the-fact conduct evidence relied on by the Crown has only an indirect bearing upon the issue of guilt, and that the jury should exercise caution in inferring guilt because the conduct might be explained in an alternative manner. In addition, he ought to have instructed the jury that they must not use this conduct to support an inference of guilt unless they rejected any innocent explanation for the conduct: *Diu*, *supra*.

[149] Such a carefully worded instruction was required because two of the three remaining items of evidence had limited probative value on the issue of the identity of the killer. Regarding the evidence that the appellant asked for copies of Meekison and Stewart's statements to police, Crown counsel's argument was that the appellant asked Meekison for her statement because he knew that the important time was Friday night. The Crown's argument ignores that Meekison and Stewart were not providing an alibi for the appellant at the time of the killing, but only for earlier that evening. Moreover, there was no evidence to the effect that the appellant was asking Meekison to change her story or to assist him in providing an alibi for the time of the killing. While there may be some probative value in the appellant's act of asking a witness for statements made to police, in my view, the trial judge needed to more carefully instruct the jury on the limitations of this evidence as a basis for drawing the inference requested by the Crown. It was not enough to simply instruct the jury that they were entitled to draw the requested inference if they thought it was a reasonable one.

[150] The trial judge indicated in his charge that the appellant's statement about someone named Michelle having possibly seen Jennifer on the bus going to Fairview Mall on Friday afternoon was of questionable relevance to the identity of the killer. The trial judge nonetheless left it as evidence for the jury to consider and to decide whether to draw the inference that the appellant was trying to look concerned when in fact he was the killer. In my view, the jury should again have been told to be very cautious in drawing this inference, particularly considering that it had not been established which "Michelle" the appellant was referring to in his statement to police and considering that it was clearly established that Jennifer was alive at the time of the reported trip to the mall.

[151] The evidence of the appellant's reaction to the finding of the letter opener was characterized by Crown counsel as being perhaps the most important piece of evidence and absolutely critical to its case. In my view, it was incumbent on the trial judge to

carefully instruct the jury of the need for caution in using this evidence to draw an inference of guilt. The trial judge repeated to the jury the defence position that an innocent explanation of the evidence of the appellant's reaction was available given the widespread (albeit erroneous) rumours that the letter opener was the murder weapon and in light of his belief that the police were trying to frame him for the killing. The trial judge ought to have gone further and instructed the jury that they must not use this conduct to support an inference of guilt unless they rejected any innocent explanation for the conduct.

[152] The respondent submits that if it is found that the trial judge ought not to have left any of these items with the jury as potential inculpatory after-the-fact conduct, this court should apply the curative *proviso* in s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. I am not prepared to do so. The Crown's case was entirely circumstantial and the after-the-fact conduct evidence was a critical aspect of its case against the appellant. The jury was improperly permitted to make a finding of a concocted alibi and to draw an inference of guilt therefrom. As well, three items of after-the-fact conduct evidence were improperly allowed to go to the jury as inculpatory evidence and three other items were put to the jury without an adequate cautionary instruction. I am unable to say in light of these errors, and also in light of the errors that I previously identified in connection with the hair comparison evidence and the identification evidence, that the result of the trial would necessarily have been the same.

Issue 5: Any Verdict of Culpable Homicide is Unreasonable

[153] Counsel for the appellant submits that any finding that the appellant killed Jennifer Ueberschlag is unreasonable. At the close of the Crown's case, defence counsel brought a motion for a directed verdict of acquittal on the basis that there was no evidence upon which a reasonable jury properly instructed could conclude that the appellant was the person who caused the death. In the alternative, defence counsel moved for an order directing that the appellant be acquitted of first degree murder and that the case proceed as one of second degree murder.

[154] On the motion for a directed verdict, the trial judge observed that in a case involving circumstantial evidence, the assessment whether or not there is a rational explanation for the circumstantial evidence other than the guilt of the accused is a question for the jury, citing the majority's opinion in *R. v. Charemski*, [1998] 1 S.C.R. 679, 123 C.C.C. (3d) 225, at pp. 683-84 S.C.R., pp. 229-30 C.C.C. After reviewing the evidence at some

length, the trial judge concluded that given the possible inferences that could be drawn from the evidence, it was possible that the jury could find that the appellant was the attacker.

[155] I am not able to say that the trial judge erred in this assessment. Although this was not a strong circumstantial case, there was evidence capable of supporting the inference that the appellant killed Jennifer. I would not give effect to this ground of appeal.

Issue 6: The Verdict of First Degree Murder is Unreasonable and Unsafe

[156] Counsel for the appellant submits in the alternative that the verdict of first degree murder is unreasonable. In dismissing the defence motion for an order directing that the case proceed as one of second degree murder only, the trial judge concluded that there was some evidence upon which a properly instructed jury acting reasonably could find that the killing occurred while the killer was committing or attempting to commit one of the forms of sexual assault or forcible confinement delineated in s. 231(5) of the *Criminal Code*.

[157] Again, I am not prepared to interfere with this finding. Although the evidence that a sexual assault had occurred was not overwhelming, there was some evidence upon which a properly instructed jury acting reasonably could conclude that there was a sexual assault during which the victim was killed. The trial judge identified this evidence as the accused's interest in the victim, the finding of the trace of semen, the body was nude, the state of the bedroom and the finding of hairs consistent with pubic hairs of the accused on the nude body.

[158] I reach the same conclusion with respect to the issue of unlawful confinement. The trial judge was mindful that evidence of assaultive behaviour does not automatically equate to unlawful confinement. He concluded that it was open to the jury to conclude that the killer had assumed control over the liberty of the deceased in a way over and above that which would flow as purely part of a straight assault. I am not prepared to interfere with that finding, given the nature of the injuries to the deceased, and particularly the multiple superficial cuts to the neck, the significant bruising to the face and upper body and the evidence of asphyxiation.

CONCLUSION

[159] For the reasons given, I am satisfied that the appellant is entitled to a new trial. Accordingly, I would allow the appeal,

quash the conviction and order a new trial on the charge of first degree murder.

Appeal allowed.

Bekah et al. v. Three for One Pizza

[Indexed as: Bekah v. Three for One Pizza]

Superior Court of Justice, Karakatsanis J. September 26, 2003

Contract — Franchise agreement — Franchisee — Prospective franchisee — Disclosure statement — Rescission — Purchaser of franchise in transaction that has not yet closed qualifies as franchisee — Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, ss. 5, 6.

A purchaser of a franchise in a transaction that has not yet closed is a franchisee within the meaning of the *Arthur Wishart Act (Franchise Disclosure)* and is entitled to the right of rescission that is available if the franchisor does not provide a disclosure statement.

Cases referred to

1368741 Ontario Inc. v. Triple Pizza (Holdings) Inc., [2003] O.J. No. 2097 (QL) (S.C.J.); *MAA Diners Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.* (2003), 30 B.L.R. (3d) 279, [2003] O.J. No. 430 (QL), [2003] O.T.C. 105 (S.C.J.)

Statutes referred to

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, ss. 1 "franchisee", 3-7

MOTION for a judgment at the commencement of trial.

B. Hanuka, for plaintiff.
J. Chidley-Hill, for defendant.

KARAKATSANIS J. (orally): — This is a motion for judgment brought at the commencement of trial. Counsel agreed that if the motion were unsuccessful, we would proceed with the trial on the claim that the agreement was conditional upon financing as added in the amended statement of claim. Counsel also agreed on the documents that form the evidence for this motion, and they have been marked as Exhibits 1 through 9.

This motion for judgment turns upon the interpretation of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3. The Act is designed to ensure that franchisors provide full disclosure to respective franchisees. If disclosure is not made, a franchisee has the right to rescind the franchise agreement and is

107 O.A.C. 15, 123 C.C.C. (3d) 1, 38 O.R. (3d) 175, 15 C.R. (5th) 359, [1998]
O.J. No. 428

1998 CarswellOnt 390

R. v. Terceira

Her Majesty The Queen, Respondent and John Terceira, Appellant

Ontario Court of Appeal

Brooke, Finlayson, McKinlay JJ.A.

Heard: November 17-19, 1997
Judgment: February 9, 1998
Docket: CA C15459

Counsel: Russell Silverstein and David M. Tanovich, for the appellant.

Carol A. Brewer, Michal Fairburn and Shawn Porter, for the respondent.

Subject: Criminal; Evidence

Evidence --- Opinion evidence -- Opinion evidence in particular matters -- Identification -- DNA evidence

Accused convicted of first degree murder based in part on DNA evidence which linked accused to crime scene and described statistical likelihood that another might have same DNA pattern as accused -- Accused appealed from conviction on basis that trial judge improperly admitted DNA evidence and improperly instructed jury with respect thereto -- Expert's qualifications, reasonable reliability of procedures employed to generate results, and potential for unfair prejudice by admission of numerical evidence considered by trial judge on voir dire -- Probative value of numbers reflecting statistical rarity not outweighed by potential for prejudice, particularly given that defence experts presented alternate ranges of statistical rarity to jury on trial proper -- Instructions to jury explicitly addressed concern that jury might be overwhelmed by DNA evidence and properly directed accused to apply standard of proof to totality of circumstantial evidence including DNA evidence -- Evidence properly admitted -- Appeal dismissed.

Evidence --- Examination of witnesses -- Previous statements -- Admissibility

Accused convicted of first degree murder -- Defence was alibi -- Before arrest accused made four exculpatory statements to police concerning past presence in room where body was found -- Accused first claimed that he had been in room only once while helping another retrieve football from roof -- Accused later claimed he had found body while smoking drugs in boiler room several days before its discovery by police -- When arrested accused again claimed he had found body in boiler room several days before police -- Accused maintained same position in trial testimony -- Crown introduced first four statements as evidence of consciousness of guilt -- Accused sought permission to introduce last statement, as

evidence of first explanation as to why his hair and fibres were found near scene, to show that he provided exculpatory statement on arrest when first confronted with all incriminating evidence, as basis to cross-examine officers concerning interrogation on arrest, and to rebut anticipated allegation of recent fabrication by Crown -- Permission properly denied -- Nothing brought statement outside scope of traditional rule prohibiting introduction of prior consistent statements -- Statement one of several made well after accused aware of status as suspect and so similar in substance to earlier statements that no new or helpful information would be gained by its admission -- Time elapsed from first to last statement too long to make all five part of continuum -- Appeal dismissed.

Evidence --- Examination of witnesses -- Refreshing memory -- Methods -- Hypnosis

Accused convicted of first degree murder -- Crown witness whose testimony rebutted accused's alibi was referred by police to psychologist to refresh memory through hypnosis -- Before hypnosis, police advised witness of alleged "errors" in recollection -- On voir dire to determine admissibility of witness' evidence, defence declined to take issue with reliability of hypnosis as means of refreshing memory -- On appeal from conviction accused challenged admissibility of witness' testimony on basis that Crown had failed to call psychologist who conducted hypnosis -- Accused not readily permitted on appeal to reverse tactical decision to deal with testimony as issue of witness tainting rather than issue concerning reliability of hypnosis as scientific technique -- Accused did not object to Crown's failure to call psychologist at trial nor had accused called that or any other psychologist -- Even if testimony hypnotically induced, that fact irrelevant to admissibility of testimony given that accused did not question reliability of hypnosis at trial -- Effect of hypnosis was a matter of weight to be decided by jury -- Witness effectively cross-examined by defence as to possible police tainting -- Jury instructed at defence request to exercise caution in assessing testimony due to hypnosis -- Testimony properly admitted -- Appeal dismissed.

Evidence --- Examination of witnesses -- Rebuttal evidence -- By prosecution

Accused convicted of first degree murder -- Autopsy revealed that victim had skull injury and that **asphyxia** was **cause** of **death** -- Crown theory was that victim was manually asphyxiated -- In face of evidence that victim suffered head injury six weeks before death, Crown expert testified that skull injury developed post mortem but hypothetically acknowledged link between head injury, epilepsy, and **asphyxia** on cross-examination -- On re-examination Crown expert testified that victim had no prior healing head injury of sufficient magnitude to cause seizure six weeks later -- Defence expert later testified that victim suffered from pre-existing growing fracture which may have resulted in seizure and consequent **asphyxia** -- Crown properly permitted to call second expert in reply to testify that victim had neither growing nor healing fracture, that injury observed on autopsy was post mortem arifact, and that victim's death unrelated to any head injury -- Response by first expert to hypothetical questions premised on pre-existing fracture did not require Crown to eliminate possibility that **asphyxia** resulted from facture not evident to first expert -- Only when defence expert affirmatively advanced theory of pre-existing injury did it take on real significance and present jury with alternative **cause** of **death** which could impact verdict -- Crown did not split case -- Appeal from conviction dismissed.

Evidence --- Circumstantial evidence -- In criminal matters -- Standard of proof (Rule in Hodge's Case) -- Viewing totality of evidence

Accused convicted of first degree murder largely on basis of circumstantial evidence including DNA match and statements by accused indicating consciousness of guilt -- Accused appealed on basis that trial judge erred in failing to instruct jury to apply reasonable doubt standard individually to evidence of DNA match and consciousness of guilt -- Evidence of DNA match and consciousness of guilt subject to same standards as all other circumstantial evidence -- Jury to consider to totality of evidence, including evidence of DNA match and consciousness of guilt and apply reasonable doubt standard to totality of the evidence -- Trial judge's instruction complied with applicable standards -- Appeal dismissed.

The accused was charged with first degree murder in connection with the alleged smothering of a young girl. Her body

was found in the boiler room of the apartment building where the accused worked as a janitor. She had been sexually assaulted. The accused denied being in the building on the afternoon the murder was alleged to have occurred, claiming that he had gone home sick in the morning. DNA matching of semen found in and near the boiler room, together with other blood, hair, and fibre evidence, however, linked him to the murder.

In the five weeks before his arrest, the accused made four exculpatory statements to police. On October 23, 1990, he told police that he had been in the boiler room only once while assisting another janitor in retrieving a football from the roof. One week later, when confronted with incriminating evidence and the suggestion that he had borrowed another janitor's keys, he claimed that he had discovered the body while smoking drugs in the boiler room several days before it was found by police. When he was finally arrested on December 3, and confronted with more detailed forensic evidence, he again maintained his alibi and claimed that he had found the body after the death and before its discovery by police. He maintained that position at trial.

At trial, the Crown adduced all but the last of the accused's statements to show consciousness of guilt. The accused sought permission to adduce the December 3 statement as evidence of his first explanation as to why his hair and fibres were found near the scene, to show that he provided an exculpatory statement on arrest when first confronted with all incriminating evidence, as a basis to cross-examine officers concerning interrogation on arrest, and to rebut an anticipated allegation of recent fabrication by the Crown. The trial judge found it to be a prior consistent statement which added nothing to the evidence and which, as such, was inadmissible. He offered to revisit the ruling in the event allegations of recent fabrication were raised.

To rebut the accused's alibi, the Crown called a tenant in the building who claimed to have seen the accused working at the building on the afternoon in question. Because the tenant's first statements to police suggested that she was recalling the events of a day other than that in issue, police arranged for her to be hypnotized by a psychologist to assist her in refreshing her memory, advising the tenant, before her appointment, of the "errors" in her memory. After a voir dire in which the defence focused primarily on the question of police tainting, the trial judge found the tenant's testimony to be admissible. Neither the Crown nor the defence called an expert on hypnosis to testify on the voir dire or that the trial proper.

While maintaining that the accused was not in the building at the time of the killing, the defence nonetheless challenged the **cause** of **death**. An autopsy revealed **asphyxia** as the cause. The Crown's theory was that the accused had caused the **asphyxia** by placing his hands over the victim's mouth. In face of evidence that the victim had suffered a head injury six weeks before her death, the Crown forensics expert testified that the head injury he observed at the autopsy was a post-mortem development. While acknowledging a link between head injuries, epileptic seizures and **asphyxia** in response to hypothetical questions on cross-examination, the Crown expert testified on re-examination that the victim had no prior healing head injury of sufficient magnitude to cause a seizure six weeks later.

The defence forensic expert later testified that an epileptic seizure, stimulated by a pre-existing growing fracture of the skull, may have caused the asphyxia. He theorized that the victim may have suffered a spontaneous seizure, coincident in time with the sexual assault on her or that the sexual assault could have acted as a catalyst for the possible seizure. The Crown, over defence objections, was then allowed to call a pediatric neurosurgeon in rebuttal. He testified that the skull injury observed at the autopsy was neither a growing nor a healing fracture but rather a post-mortem artifact. He further testified that even if the victim had suffered a head injury six weeks before her death, her death was unrelated to it.

The admissibility and reliability of the DNA evidence was also contested. The parties disputed, in particular, the standard applicable to the admission of novel scientific evidence. After a voir dire in which he considered, among other things, the qualifications of the Crown's DNA expert, the reasonable reliability of the match criteria relied on by her, the reasonable reliability of the method used to calculate the statistical rarity of a match in the general population, and whether the probative value of match statistics was outweighed by their potential for unfair prejudice, the trial judge admitted the DNA evidence, which included quantitative statistical expressions of match significance.

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The accused was convicted and appealed on grounds that the trial judge erred in admitting the DNA evidence and instructing the jury with respect thereto; in refusing to admit the accused's prior consistent statement; in admitting the hypnotically refreshed testimony, particularly in the absence of expert evidence concerning hypnosis; in permitting the Crown to call a second expert in reply on the issue of causation, thus allowing the Crown to split its case, and in failing to instruct the jury to apply the reasonable doubt standard individually to the evidence of consciousness of guilt.

Held: The appeal was dismissed.

DNA profiling is a comparatively new method of providing identification evidence for use in criminal cases. DNA evidence is used essentially for two purposes. The first use of DNA evidence is as evidence that the suspect's DNA "matches" the DNA found in blood, semen or tissue recovered at a crime scene. In this way, the DNA evidence serves an exclusionary purpose. In the absence of further qualifications, a "match" is no more than a failure to exclude a suspect's DNA from the crime scene.

The second branch of the analysis of DNA evidence involves the application of population genetics. Probability statistics are introduced in an attempt to bolster the significance of a "match". The scientist determines, according to an established database of known DNA samples, the statistical likelihood that another individual person would have the same DNA pattern as that of the suspect. Simply stated, this second branch considers the statistical likelihood of a random DNA match.

The criteria for the admissibility of expert testimony are relevance, necessity in assisting the trier of fact, the absence of an exclusionary rule, and a properly qualified expert.

Expert evidence which advances a novel scientific technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether is is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

In assessing the admissibility of the expert opinion in this case, the tension was between its probative value and its prejudicial effect. Because the court was confronted with what was at time of trial perceived to be a novel scientific technique, the the threshold issue of reliability i.e. whether the science itself was valid, was also a concern.

With respect to DNA testing, the threshold of reliability is met where the trial judge is satisfied as the reliability of DNA profiling as a novel scientific technique. The trial judge here need not have been satisfied beyond a reasonable doubt that the testimony of the expert with respect to the particular testing performed, as reflected in the her conclusions, was reliable. Given that the technology existed and was generally accepted in the scientific community, the contest as to the validity of its application to the particular case was a matter for the jury to assess.

It is wrong to lay down a structure that must be adhered to in every case in determining whether the threshold of reliability is met. It should be left to the judgment of the trial judge as to how far he or she must go in meeting the threshold in a particular case.

Before admitting the evidence the trial judge addressed the following issues: the expert's qualifications and ability to testify as to DNA profiling, matching, and statistics; the reasonable reliability of match criteria; the reasonable reliability of the method used to calculate the statistical rarity of a match in the general population; whether the probative value of the numbers was outweighed by the potential for unfair prejudice; whether the database used yielded reasonable reliable results having regard to the accused's ethnic origin; whether the challenge to the continuity of the samples went to weight or admissibility of test results; and whether the expert was entitled to rely on certain scientific reports alleged to be hearsay.

In addressing these issues the trial judge properly relied on the plaintiff's curriculum vitae which amply supported the finding that the expert possessed the requisite expertise. He correctly dealt with the remaining issues generally as going to the weight, and not the admissibility of the evidence.

Having accepted the expert's credentials and defence concessions as to the validity of the technology she was attempting to apply, the extent to which her evidence was subject to criticism was not a matter for the trial judge to consider with respect to admissibility. His scrutiny of her testimony was limited to satisfying himself that it was sufficiently reliable to be received, not that he was satisfied beyond a reasonable doubt, or indeed to a lesser standard of proof, that her conclusions were sound and could be acted upon as proven.

This was an unusual case in which to argue that that the probative value of the numbers reflecting the statistical rarity of a match in the general population was outweighed by the potential for unfair prejudice, particularly given that competing experts representing both sides had provided alternnate ranges of statistical rarity which varied widely. It would be difficult to translate the figures the experts were prepared to use into neutral language. The fact that there were competing figures which differed so radically should be before the jury for its assessment. The range of numeric frequency determined by the various experts was fertile ground for cross-examination. There should not be an absolute prohibition against the introduction of specific match figures. The matter should be left to the discretion of the trial judge in the particular case. That discretion was properly exercised here.

The balance of probabilities standard of proof was the appropriate one to apply on the voir dire. The issue of reliability respecting novel scientific theory or technique relates strictly to a question of the admissibility of evidence where proof on a balance of probabilities is an acceptable standard. This is not an inculpatory statement made by an accused to a person in authority. The same standard, balance of probabilities, applies to the qualification of a an expert witness even where the science is novel.

At the conclusion of the evidence, the trial judge should instruct the jury in the normal way as to the limits of the expert evidence and the use to which it can be put. Additionally, in the case of DNA evidence, he or she would be well advised to instruct the jury not to be overwhelmed by the aura of scientific infallibility associated with scientific evidence. The trial judge should tell them to use their common sense in their assessment of all of the evidence on the DNA issue and determine if it is reliable and valid as a piece of circumstantial evidence.

The trial judge here dealt explicitly in his charge with the concern that the jury might be overwhelmed by DNA profiling evidence, pointing out that the forensic lab in this case had only recently begun to do DNA work, instructing them to consider the evidence challenging the conduct of the tests and their results, and then to assess whether, as a whole, the profiling was reliable as a piece of circumstantial evidence. The trial judge's instruction made it clear that the procedures employed in DNA profiles simply generated statistics. The charge contained specific instructions explaining how the statistical evidence should and should not be used, and indicated that the DNA evidence was but one piece of circumstantial evidence in this case. As such, it should be treated like any other piece of circumstantial evidence. The trial judge was thus not required to instruct the jury to apply the reasonable doubt standard to it individually. There was no basis on the record for an inference that the jury would have used the statistics as a predictor of the likelihood of guilt.

Prior consistent statements have traditionally been regarded as irrelevant and superfluous. English courts have adopted a limited exception to the rule against prior consistent statements, whereby such statements are admissible for the limited purpose of showing the reaction of the accused when first taxed with incriminating facts. The circumstances necessary to invoke that exception did not exist here, and this was not, an appropriate case to re-examine the basic thinking behind the traditional rule.

The trial judge's finding that the December 3 statement in issue was but one of a number of exculpatory statements made after the accused was well aware of his status as a suspect was fully supported by the record. Moreover, the statement

was so similar in substance to earlier statements that no new or helpful information would be provided by its admission. The time elapsed from the first statement to the one in issue was too long to support a suggestion that the five statements were part of a continuum. The trial judge's invitation to revisit his ruling in the event the Crown raised the issue of recent fabrication was never accepted by the defence despite its position that the Crown cross-examined the accused on all five statements. The defence had not objected to that line of questioning and did not ask to re-examine on the statement in issue.

On the voir dire, the defence objected to the tenant's testimony on the basis that it was tainted by information provided by the police, and not by what took place during hypnosis. Defence counsel on the voir dire had declined to take issue with the reliability of hypnosis as a means of refreshing testimony. The evidence before the trial judge on that issue was that hypnosis was accepted within the medical profession as a means of refreshing memory. Having regard to defence counsel's attack on the reliability of DNA testing as a scientific technique, it was reasonable to infer that he had made a strategic decision to deal with the tenant's testimony as an issue of witness tainting. The court does not readily allow an accused to reverse such a tactical decision on appeal.

No effect should be given on appeal to the defence's challenge to the admissibility of the tenant's testimony on that basis that the Crown had not called the psychologist who had conducted the hypnosis. It had not objected at trial to the Crown's decision not to do so. Moreover, it did not ask the judge to call him, did not choose to call him as a defence witness, and did not call a defence expert on hypnosis. Even if the tenant's evidence was hypnotically induced, this had nothing to do with its admissibility, particularly given that the reliability of hypnosis was not questioned by the defence. The effect of the hypnosis on tenant's memory was thus properly a matter going to weight to be decided by the jury. Defence counsel had cross-examined the tenant vigorously on the theme that her evidence was tainted. Moreover, on defence request the trial judge had instructed the jury to exercise special caution in assessing the tenant's evidence due to the fact that she had been hypnotized.

The trial judge may only receive reply evidence which, while of some relevance to the allegations from the outset, takes on real significance only in light of a position advanced during the case for the defence. Defence evidence that conflicts with Crown evidence related to an essential issue opens the door to reply evidence only where the Crown could not foresee the need to lead the evidence as part of its case.

The Crown had not split its case. The fact that its first expert had answered certain hypothetical questions on the premise that there was a pre-existing fracture did not place an onus on the Crown to chase down and eliminate the possibility that **asphyxia** had resulted from a fracture which was not evident to its first expert. Only when the defence pathologist put this theory forward affirmatively did it take on real significance and present the jury with a **cause** of **death** the could have effected the verdict.

The expert called in reply was not called to testify concerning matters which merely confirmed or reinforced earlier evidence adduced in the Crown's case which could have been brought before the defence was made.

Evidence of consciousness of guilt should not be considered in isolation and should not have the standard of proof beyond a reasonable doubt applied to it separately from the rest of the evidence. The trial judge's instruction relating to that evidence thus complied with applicable standards.

Cases considered by Finlayson J.A.:

> Frye v. United States (1923), 293 F. 1013 (U.S. D.C. Ct. App.) -- referred to
>
> R. v. Abbey, [1982] 2 S.C.R. 24, 138 D.L.R. (3d) 202, 43 N.R. 30, 39 B.C.L.R. 201, 29 C.R. (3d) 193, 68 C.C.C. (2d) 394, [1983] 1 W.W.R. 251 (S.C.C.) -- considered

R. v. B. (K.G.), 19 C.R. (4th) 1, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 148 N.R. 241, 79 C.C.C. (3d) 257 (S.C.C.) -- applied

R. c. Béland, 79 N.R. 263, (sub nom. R. v. Béland) 9 Q.A.C. 293, (sub nom. R. v. Béland) [1987] 2 S.C.R. 398, (sub nom. R. v. Béland) 36 C.C.C. (3d) 481, (sub nom. R. v. Béland) 60 C.R. (3d) 1, (sub nom. Béland v. R.) 43 D.L.R. (4th) 641, [1987] 2 R.C.S. 398 (S.C.C.) -- considered

R. v. Biddle, 36 C.R. (4th) 321, 22 O.R. (3d) 128 (note), 178 N.R. 208, 96 C.C.C. (3d) 321, 79 O.A.C. 128, [1995] 1 S.C.R. 761, 123 D.L.R. (4th) 22, [1995] 1 R.C.S. 761 (S.C.C.) -- distinguished

R. v. Campbell (1977), 38 C.C.C. (2d) 6, 17 O.R. (2d) 673, 1 C.R. (3d) 309 (Ont. C.A.) -- applied

R. v. Corbett, [1988] 1 S.C.R. 670, [1988] 4 W.W.R. 481, 85 N.R. 81, 28 B.C.L.R. (2d) 145, 41 C.C.C. (3d) 385, 64 C.R. (3d) 1, 34 C.R.R. 54, [1988] 1 R.C.S. 670 (S.C.C.) -- applied

R. v. Court (1995), 23 O.R. (3d) 321, 99 C.C.C. (3d) 237, 81 O.A.C. 111 (Ont. C.A.) -- not followed

R. v. Egger, 21 C.R. (4th) 186, 15 C.R.R. (2d) 193, 141 A.R. 81, 46 W.A.C. 81, 45 M.V.R. (2d) 161, [1993] 2 S.C.R. 451, 153 N.R. 272, 82 C.C.C. (3d) 193, 103 D.L.R. (4th) 678, [1993] 2 R.C.S. 451 (S.C.C.) -- considered

R. v. Johnston (1992), 69 C.C.C. (3d) 395, 12 C.R. (4th) 99 (Ont. Gen. Div.) -- considered

R. v. Lavallee, [1990] 4 W.W.R. 1, 67 Man. R. (2d) 1, [1990] 1 S.C.R. 852, 108 N.R. 321, 76 C.R. (3d) 329, 55 C.C.C. (3d) 97, [1990] 1 R.C.S. 852 (S.C.C.) -- applied

R. v. Melaragni (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.) -- considered

R. v. Melnichuk (1995), 104 C.C.C. (3d) 160, 87 O.A.C. 336 (Ont. C.A.) -- referred to

R. v. Melnichuk, [1997] 1 S.C.R. 602, 209 N.R. 321, 114 C.C.C. (3d) 503, 99 O.A.C. 218, 146 D.L.R. (4th) 686 (S.C.C.) -- applied

R. v. Mohan, 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note), [1994] 2 R.C.S. 9 (S.C.C.) -- applied

R. v. Morin, 66 C.R. (3d) 1, [1988] 2 S.C.R. 345, 88 N.R. 161, 30 O.A.C. 81, 44 C.C.C. (3d) 193, [1988] 2 R.C.S. 345 (S.C.C.) -- applied

R. v. Parsons (1977), (sub nom. Charette v. R.) 17 O.R. (2d) 465, (sub nom. Charette v. R.) 37 C.C.C. (2d) 497, (sub nom. Charette v. R.) 40 C.R.N.S. 202, (sub nom. Charette v. R.) 80 D.L.R. (3d) 430, (sub nom. Charette v. R.) 33 N.R. 161 (Ont. C.A.) -- applied

R. v. Scardino (1991), 6 C.R. (4th) 146, 46 O.A.C. 209 (Ont. C.A.) -- applied

R. v. Small (September 11, 1991), Forestell J. (Ont. Gen. Div.) -- not followed

R. v. Storey (1968), 52 Cr. App. R. 334, 112 Sol. Jo. 417 (Eng. C.A.) -- distinguished

R. v. U. (F.J.), 42 C.R. (4th) 133, 101 C.C.C. (3d) 97, 128 D.L.R. (4th) 121, 186 N.R. 365, 85 O.A.C. 321, [1995] 3 S.C.R. 764 (S.C.C.) -- considered

R. v. White (1996), 108 C.C.C. (3d) 1, 49 C.R. (4th) 97, 29 O.R. (3d) 577, 91 O.A.C. 321 (Ont. C.A.) -- applied

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally -- referred to

APPEAL by accused from conviction on charge of first degree murder.

The judgment of the court was delivered by *Finlayson J.A.*:

1 The appellant was tried in the Ontario Court (General Division) before the Honourable Mr. Justice A. Campbell and a jury on a plea of not guilty to an indictment charging that the appellant:

> on or about the 14th day of October in the year 1990, at the Municipality of Metropolitan Toronto, in the Toronto Region did kill Andrea Atkinson and thereby commit First Degree Murder, contrary to the Criminal Code.

2 On February 4, 1993, after fifty-six days of trial and three days of jury deliberation, the appellant was convicted of first degree murder. He was sentenced to life imprisonment with minimum parole eligibility after twenty-five years.

Overview of the facts

3 On October 14, 1990, shortly after 9:00 a.m., Andrea Atkinson said goodbye to her mother, Ruth Windebank and left her apartment to play outside. She was last seen outside the apartment building at 9:30 a.m. by Rosemaria Lorengard. Around 11:00 a.m., Andrea's mother began looking for her. Over the next two hours, she checked with neighbours, with Andrea's friends and around the apartment building. She found no sign of her daughter. Sometime after 1:30 p.m., Ruth Windebank called 911 and reported that her daughter had gone missing.

4 During the next nine days, an extensive search was conducted for Andrea. On October 23, 1990, her body was discovered by accident by Elese Roberts, a janitor, and John Clarke, a maintenance supervisor, in the sixth floor boiler room of the apartment building where she and her mother lived. Forensic examinations established that she had been sexually assaulted (there was a tear and bruising to her vagina, and semen was found on her leotards). The **cause** of **death** was determined to be **asphyxia.**

5 The appellant worked as a janitor at the apartment building where Andrea lived. He was working on October 14, 1990. Two residents of the apartment building, Frank Burkett and Corinna MacNaughton, saw him at the building after Andrea was last seen alive. The Crown alleged that the appellant saw Andrea in the area and lured her to the sixth floor where he sexually assaulted and smothered her. He then hid the body behind a hot water tank in the boiler room. He was charged with murder on December 3, 1990.

6 The appellant had demonstrated his interest in Andrea by speaking to her on occasion and by ruffling her hair with his hand. According to Andrea's mother, Andrea had liked the appellant and often talked about him. He was her hero. The appellant had once chased away some boys who were bothering Andrea and her friends. Michelle Martin, Andrea's

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best friend, agreed that Andrea "looked up" to the appellant following this intervention on her behalf.

7 Curiously, the location of the boiler room on the sixth floor where the rape and murder of the victim took place was not well known, even to occupants of the apartment building. This is most clearly evidenced by the fact that the police, despite a massive search effort, failed to discover that there was a sixth floor with such a room on it.

8 The appellant knew about the boiler room's existence. He had keys to it and admitted that he went there on occasion to smoke drugs. While other janitors in the building had keys, the appellant was the only one scheduled to work the day the victim went missing.

9 Forensic evidence linked the appellant to the murder in the following ways:

> (a) Hair, fibre, blood and DNA evidence, which matched the appellant, was left on the floor at the attack site and on the victim's clothing.
>
> (b) A mixed blood and semen stain was found on the concrete floor outside the boiler room at the base of the stairs. The semen found on the floor was sufficient in quantity to conduct both conventional serology and DNA testing. Semen was also found on a great deal of the victim's clothing. A semen stain found in her leotards was of sufficient quality and quantity to conduct DNA testing.
>
> (c) DNA testing indicated that the victim's blood was mixed with the appellant's semen. The victim bled from a "severe" tear to her vaginal area, which was one by two by three centimetres in size. The tear extended almost to her anus. Dr. McAuliffe, who conducted the autopsy, found bruising to the membrane of the vagina, suggesting that the injury had occurred prior to death.
>
> (d) Numerous blue fibres consistent with blue fibres from the outer portion of the sweat pants that the appellant wore to work on October 14, 1990 were found on Andrea's clothing and on the floor outside the boiler room.

10 The Crown relied on the appellant's conduct following Andrea's disappearance as evidence of consciousness of guilt on his part. In some of his earlier pre-arrest statements to the police, the appellant had lied about the number of times he had been in the boiler room and in the area outside the boiler room:

> • (a) On October 23, 1990, in a statement to Constables Aitchison and McPhearson, the appellant maintained that he had been in the boiler room area only once to help another janitor retrieve a football which was on the roof.
>
> • (b) On October 30, 1990, in a statement to Detectives Gauthier and McNamara, the appellant maintained that he had only been in the boiler room area once. The appellant was then confronted with incriminating evidence and a suggestion that another janitor lent him his keys, whereupon he admitted that he had discovered Andrea Atkinson's body in the boiler room while smoking some drugs several days before her ultimate discovery by Roberts and Clarke.

The Crown alleged that the appellant had lied to the police on October 30, 1990 when he told them that he had "discovered" Andrea's body a few days after her disappearance. The Crown suggested that this was a fabrication to explain away the fibre and forensic evidence when he was confronted with it.

11 It was the theory of the defence that the appellant had nothing to do with the sexual assault and murder of Andrea Atkinson. The defence rested on alibi. The appellant alleged that he attended work on the morning of October 14, 1990 but that he became ill and left by 9:30 a.m. He maintained that he arrived home at 11:00 a.m., went to bed, and stayed

there until 4:00 p.m. He then received a telephone call from a friend and tenant at the apartment building who told him that Andrea had gone missing. The appellant's mother and grandmother testified at trial to support the alibi. Both of these witnesses, Maria Mendes and Maria Terceira, had their credibility undermined by prior inconsistent statements put to them in cross-examination. While the defence challenged the cause of death, suggesting that the victim may have died from the onset of an epileptic seizure triggered by a pre-existing "growing fracture" of the skull, the defence position remained unequivocal that the appellant was not present in the apartment building at the time of the killing and that he did not commit the murder.

Issues

12 There were a number of grounds for appeal which were abandoned and one, relating to the right to challenge for cause, was simply reserved pending the outcome of appeals on this issue presently before the Supreme Court of Canada. I propose to deal with the following issues to which the Crown was called upon to respond during the hearing of this appeal.

(1) The admissibility of the DNA evidence and the instruction to the jury with respect thereto.

(2) The admissibility of a prior consistent statement given to the police by the appellant.

(3) The admissibility of hypnotically refreshed testimony.

(4) The propriety of permitting the Crown to call Dr. Humphries in reply.

(5) The instruction to the jury on consciousness of guilt.

(1) The DNA evidence

13 By way of summary, this issue involves the appellant's submission that the trial judge failed to properly determine, as a preliminary matter, the admissibility of the DNA evidence proffered by the Crown. Specifically, case law has required that certain threshold determinations be made by a trial judge in the absence of the jury before certain evidence can be offered at trial for closer scrutiny.

14 I am grateful to Matthews, Pink, Tupper and Wells, the authors of *The Expert, A Practitioners Guide*, (Toronto: Carswell, 1995) at Vol.1, Ch.12, Forensic DNA Typing Evidence, pp.12-1 and following, for a readable overview of DNA evidence. The introduction is reassuring:

> DNA (Deoxyribonucleic Acid) typing may have caught the legal community by surprise, but it is merely an extension of the rapid evolution of molecular biology that began gaining momentum over the last twenty years. In 1995, the science and its forensic application are anything but novel, although forensic scientists are continuously seeking new means to improve sensitivity of detection, increase efficiency, and concomitantly decrease time of analysis.

15 DNA profiling is a comparatively new method of providing identification evidence for use in criminal cases. DNA evidence is used essentially for two purposes. The first use of DNA evidence is as evidence that the suspect's DNA "matches" the DNA found in blood, semen or tissue recovered at a crime scene. In this way, the DNA evidence serves an exclusionary purpose. In the absence of further qualifications, a "match" is no more than a failure to exclude a suspect's DNA from the crime scene. The debate at trial with respect to the determination of a match, as was the case during the trial of this matter, will often focus on the methodology used to determine a match. The second branch of the analysis of DNA evidence involves the application of population genetics. Probability statistics are introduced in an attempt to

bolster the significance of a "match". The scientist determines, according to an established database of known DNA samples, the statistical likelihood that another individual person would have the same DNA pattern as that of the suspect. Simply stated, this second branch considers the statistical likelihood of a random DNA match. Cross-examination of the expert tendering DNA evidence serving this second purpose will usually focus on the methodology used to calculate the numbers reflecting the frequency of the DNA pattern. The DNA evidence in the present case was used by the Crown for the above two purposes.

16 The DNA testing in the case in appeal took place between November 1990 and May 1991, and in the submission of the appellant, DNA profiling was then a novel scientific technique. This trial took place prior to the decision of the Supreme Court of Canada in *R. v. Mohan* (1994), 29 C.R. (4th) 243 (S.C.C.) and accordingly the trial judge did not have the benefit of the judgment of Sopinka J. calling for special scrutiny in dealing with novel scientific theory or technique. However, the trial judge did hold an extensive *voir dire* before admitting this evidence and on that hearing the defence challenged in detail the reliability and validity of the opinions offered by the Crown's experts. The appellant challenges the sufficiency of the trial judge's consideration as a result of the *voir dire* with respect to the admissibility of the DNA evidence.

17 Both Crown and defence counsel on the DNA *voir dire* devoted a considerable portion of their submissions to a discussion of the standard to be applied in relation to the admission of novel scientific evidence. Crown counsel discussed the standard of "relevancy and helpfulness" as well as "relevancy and reliability". Defence counsel made submissions in favour of the adoption of the more restrictive "Frye" test articulated by the United States Supreme Court in *Frye v. United States*, 293 F. 1013 (U.S. D.C. Ct. App. 1923) . Both counsel explicitly referred the trial judge to the decision in *R. v. Johnston* (1992), 69 C.C.C. (3d) 395 (Ont. Gen. Div.) wherein Langdon J. adopted a "reliability" standard. The trial judge characterized the defence position on the *voir dire* as urging "that the Crown has not produced sufficient evidence on the *voir dire* to support the reliability and admissibility of Pamella Newall's techniques in analysis...". The foregoing demonstrates that the trial judge was aware that initial determinations of reliability would be required before the proposed DNA evidence could be proffered at trial. Moreover, the appellant concedes that the trial judge recognized that reliability was a preliminary finding of fact that would need to be made before the proposed DNA evidence was admissible.

18 As it turns out, the precedential value of the DNA testing conducted in the present case is limited because it is conceded by all counsel that whatever its strengths and weaknesses in 1990-91, the techniques employed in this case are no longer in use. Accordingly, since the DNA testing was unique to this case, I do not propose to deal with the particularity of it. In the view I take of this opinion evidence, it is only the judicial process that led to its admissibility and the instructions to the jury with respect to its use that I need to consider.

19 Relying upon the judgment of the Supreme Court of Canada in *R. v. Mohan, supra*, counsel for the appellant submits that before the jury can be permitted to hear the evidence of DNA testing, the trial judge is required as a matter of law to conduct what he calls a "Mohan type hearing" in order to satisfy himself beyond a reasonable doubt as to the reliability of the evidence adduced by the experts for the Crown. By this counsel for the appellant suggests that the trial judge must satisfy himself as to the acceptance of the technology in the scientific community, the expertise of the Crown witnesses in that field, and the accuracy of the tests carried out pursuant to that technology, among other factors. All this to the criminal standard of proof. Then, and only then, can the same evidence be recalled for the consideration of the jury.

20 I have some considerable difficulty with this submission which, with respect, reflects a misreading of *Mohan, supra*. In my opinion, the rules laid down by Sopinka J. in *R. v. Mohan, supra*, do not signify a departure from the common law rules relating to the admission of opinion evidence in a criminal trial, nor do they purport to do so. The four criteria for the admissibility of expert testimony are derived from case law. They are set out by Sopinka J. as follows at p. 252:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of an exclusionary rule;

(d) a properly qualified expert.

21 Prior to *Mohan*, when relevant expert opinion evidence has been proffered, Canadian courts focused on two factors in determining its admissibility: the special knowledge criterion and the expertise criterion. In *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.), Dickson J. provided the following formulation of the "special knowledge" requirement for the admissibility of expert evidence at p. 409:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": (*R. v. Turner* (1974), 60 Cr. App. R. 80, at p. 83, *per* Lawton L.J.).

22 The judgment of McIntyre J. is to much the same effect in *R. c. Béland* (1987), 36 C.C.C. (3d) 481 (S.C.C.) at p.493:

> The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inferences which may be drawn from, proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the trier of fact, there is no need for expert evidence and an opinion will not be received.

23 In *Mohan*, *supra*, Sopinka J. quoted the above passage by Dickson J. from *R. v. Abbey, supra*, and went on to discuss the criteria of necessity at p. 254:

> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey, supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village) v. Smith*, [1931] S.C.R. 672, at p. 684, this court ... stated that in order for expert evidence to be admissible, "[t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".
>
> As in the case of relevance, the need for the evidence is assessed in light of its potential to distort the fact-finding process.... The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.
>
> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

> These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquard*, [1993] 4 S.C.R. 223, per McLachlin J.

24 It is to be observed that the word "reliable" is not listed among Sopinka J.'s four criteria. It is, however, discussed under "relevance" under his "cost-benefit analysis" as to whether expert evidence that is otherwise logically relevant may be excluded on the basis that its probative value is overborne by its prejudicial effect. He says at p.252:

> While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *R. v. Morris*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. *The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.*
>
> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and having more weight than it deserves. [Emphasis added.]

25 As an introduction to his conclusion with respect to novel scientific theory or technique. Sopinka J. (at pp.252-53) quotes with approval the language of Moldaver J. in *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.). Moldaver J. had applied "a threshold test of reliability" to such novel evidence and asked himself the following questions, among others:

> (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
>
> (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

26 Sopinka J. picks up on this phrase "threshold test of reliability" with respect to novel scientific theory or technique. The focus of attention in this court by counsel was on the following summary by Sopinka J. at p. 255:

> In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

27 This statement of the law is clearly one of general application, but much of what is later said by Sopinka J. is specific to *Mohan* itself. In that case, the impugned evidence was that of a psychiatrist proffered by the defence who was prepared to testify as to the psychosexual profiles of those persons likely to have committed the sexual assaults of which the accused, a physician, stood charged. The thrust of the testimony was that the perpetrator of the offences alleged to have been committed would be part of a limited and unusual group of individuals and that the accused did not fall within that narrow group. In beginning his analysis of the ruling of the trial judge rejecting the admission of this evidence, Sopinka J. made reference to the competing exclusionary rules. He said at p. 251:

> The admissibility of the rejected evidence was analyzed in argument under two exclusionary rules of evidence:

> (1) expert opinion evidence, and (2) character evidence. I have concluded that, on the basis of the principles relating to exceptions to the character evidence rule and under the principles governing the admissibility of expert evidence, the limitations on the use of this type of evidence require that the evidence in this case be excluded.

28 Accordingly, the contest in *Mohan* as to admissibility was between the introduction of the novel opinion of the expert and the prohibition against introducing evidence which is directed towards demonstrating that the accused person has or has not an abnormal propensity to commit the crime in issue. The trial judge had ruled that the proposed evidence was inadmissible as going beyond evidence of general reputation and did not fall within the proper sphere of expert testimony. It was against this background that Sopinka J. stated at p. 264:

> Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioral characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt...

29 In the appeal before this court, there is no conflict with the rules relating to character evidence as such. Rather, the tension is between the probative value of the opinion evidence versus its prejudicial effect in the sense that its effect on the jury may be out of proportion to its reliability. *Mohan*, *supra*, stands as authority for the proposition that expert evidence which may be logically probative of an issue at trial may be nonetheless excluded in certain circumstances. Additionally, in light of the judicial reasoning from *Mohan*, *supra*, since we are confronted with what was at the time of trial perceived to be a novel scientific theory or technique, we are concerned with the threshold issue of reliability, i.e. is the science itself valid. As I understand *Mohan*, with reference to the case in appeal, the requirement of a basic threshold of reliability as a precondition to admissibility is met where the trial judge is satisfied as to the reliability of DNA profiling as a novel scientific technique. Where the Crown and defence part company is with respect to the extent of the inquiry necessary to establish this precondition.

30 Our task is considerably narrowed by the concession of appellant's counsel that he is not suggesting that DNA profiling has not been found reliable in other jurisdictions. The appellant does not take issue with the microbiological aspects of DNA profiling. No general concern was raised at trial about the ability of the Centre of Forensic Science ("CFS") to extract DNA from biological substances and to isolate and remove regions on human chromosomes which are suitable for testing nor to determine whether any two samples were a "match" one to the other. Nor is counsel for the appellant suggesting that the process used by the CFS in this case, involving RFLP or "restriction fragment length polymorphism" analysis, is not an accepted methodology for DNA profiling. Rather, the complaint was that the DNA laboratory was only established by the CFS a few months prior to the testing in this case and there was no general acceptance of its specific methodology used to determine the statistical likelihood of a random match. The attack was not upon the technology of DNA profiling *per se* but upon the ability of the CFS, notably its principal expert Pamella Newall, to reliably utilize it. In addition, the appellant challenged the introduction of the probability figures as their prejudicial effect would exceed the probative value of presenting quantitative statements of random match probability as opposed to qualitative measures.

31 The issue respecting admissibility is further narrowed by the decision of the defence at trial to withhold its evidence casting doubt upon the accuracy of the technology employed by the CFS until after the trial judge had ruled the Crown's evidence admissible. Accordingly, much of the argument in this court on the reliability of the Crown's evidence is based on evidence that the trial judge did not hear on the *voir dire*. The focus of the attack on the ruling of the trial judge as to admissibility can be dealt with under three headings:

- (a) the sufficiency of Ms. Newall's credentials in this specific area as revealed from her cross-examination;

- (b) her reliance upon hearsay reports and the results of tests performed by others; and

• (c) the trial judge's failure to make findings as to her credibility and the weight to be given to her evidence.

32 I think I should state briefly my position on these issues and then develop my reasoning later. As to (a) above, counsel for the appellant took us through the attacks made during the *voir dire* on the scientific validity of the evidence of Ms. Newall and invited the court to re-assess the reliability of her evidence. However, it is not the function of an appellate court to retry these factual issues and substitute our findings for those of the trial judge or make findings where he has declined to do so. As to (b) above, there is abundant authority for the proposition that an expert can rely upon hearsay reports and tests that are within the scope of his or her expertise. Finally, as to (c) above, I do not think that it was appropriate for the trial judge to do anything more than he did in assessing the reliability of this expert testimony. Specifically, I do not agree that the trial judge was obliged to be satisfied beyond a reasonable doubt that the testimony of Ms. Newall with respect to the DNA testing by the CFS, as reflected in the form of her conclusions, was reliable. Given that the technology existed and was generally accepted in the scientific community, the contest as to the validity of its application to the particular case was in the last analysis a matter for the jury to assess. An important distinction must be drawn between assessing the reliability of a methodology and determining the propriety of the application of the methodology in particular factual circumstances. The latter determination is strictly for the jury, while the former threshold determination is the responsibility of the trial judge.

33 The issue comes down to what is encompassed in the requirement that the trial judge is to satisfy himself that the DNA evidence (accepting it as novel) meets a basic threshold of reliability. For myself, I think it is a mistake for this court to lay down a structure that must be adhered to in every case involving novel scientific theory or technique. We have seen too many trials unnecessarily delayed because of rigid formalism in the consideration of problems relating to the admissibility of evidence. I would prefer to leave it to the judgment of the trial judge as to how far he must go in meeting this threshold of reliability in the particular case. This said, trial judges confronted with evidence of novel scientific theory or technique may seek guidance in satisfying their threshold test of reliability in light of previous caselaw. Specifically, *Johnston*, *supra* and *Melaragni*, *supra* list factors which, in addition to others which may arise on the particular facts of a case, are helpful measures of reliability. Where as here, the issues have been narrowed by the very proper concessions of counsel, it is hardly necessary to listen to an extended presentation of the general acceptance of DNA profiling as a reliable technique for what has been called "genetic fingerprinting". I think that the trial judge focussed on the issues as outlined by counsel. Specifically, the trial judge considered and scrutinized the reliability of the determination of the match and the calculation of the frequency of a random match. In doing so, he had to consider in overview the nature of the proposed evidence and its foundation in science. He had to consider whether Pamella Newall, the Crown's expert who was a research forensic biologist at the CFS, had the necessary expertise to enable her to express an opinion in this field. In this case, as I have stated, the existence of the technology itself was not in issue. The dispute was restricted to the specific nature and content of the expert evidence in this field as adduced through the testimony of Pamela Newall. In short, the trial judge was required in the case on appeal to make an inquiry as to whether Ms. Newall's evidence met a threshold of reliability. If it met this threshold and was otherwise admissible according to the four criteria for expert evidence set out by Sopinka J. in *Mohan*, *supra*, then it was up to the jury to determine its ultimate validity and reliability. Case law is very clear that the *voir dire* should not be seen as usurping the role of the jury as final arbiters of the merit of proposed evidence.

34 Campbell J. gave oral reasons for admitting the DNA testing evidence. He indicated that he intended to give further reasons at a later date but they were not forthcoming. However, his oral reasons set out eight points which he addressed:

1. The qualifications of Ms. Newall, a Crown Forensic Scientist, to testify about various aspects of the technical aspects of DNA profiling and the declaration of a match.

2. The ability of Ms. Newall trained in biology to give expert evidence about the interpretation of human population statistics.

3. Whether the match criteria relied upon by the Ontario Centre of Forensic Sciences is reasonably reliable and, therefore, admissible.

> 4. Whether the method used by Ms. Newall in the C.F.S. to calculate numerically the statistical rarity of a match in the general population is reasonably reliable and, therefore, admissible.
>
> 5. Whether the probative value of those numbers is out-weighed by its potential for unfair prejudice.
>
> 6. Whether the C.F.S. database yields reasonably reliable results having regard to the racial or ethnic origin of this accused.
>
> 7. Does the challenge to the continuity of forensic samples go to the weight or admissibility of the tests yielded from the samples.
>
> 8. Is it inadmissible hearsay for Ms. Newall to refer to the results of the FBI computer process applied to the autorads, or to testify about her reliance on Professor Weir's equilibrium test of the C.F.S. database or as to her conversation with Professor Jefferies.

35 Campbell J. referred to Ms. Newall's extensive *curriculum vitae* and to the fact that she had been qualified in other court cases in Ontario. He had no doubt as to her qualifications. He need only have been satisfied that she possessed sufficient skill, knowledge or experience concerning the subject matter of her expertise and that the proffered opinion would likely aid the trier of fact in reaching a just determination. This condition is satisfied if the witness possesses special knowledge "going beyond that of the trier of fact" (*Mohan, supra*, at p. 255). Ms. Newall's *c.v.* amply supports this finding. This satisfies items (1) and (2) above of the issues identified by the trial judge.

36 Campbell J. dealt with the other grounds on the basis generally that the attacks on Ms. Newall's evidence went largely to weight and interpretation and not admissibility. With this I agree. Having accepted her credentials and defence concessions as to the validity of the technology she was attempting to apply, the extent to which her evidence was subject to criticism was not a matter for the trial judge to consider with respect to admissibility. He had to hear her testimony in order to scrutinize it, but his scrutiny was limited to satisfying himself that it was sufficiently reliable that it should be received, not that he was satisfied beyond a reasonable doubt, or indeed to a lesser standard of proof, that her conclusions were sound and could be acted upon as proven. Such complaints related to weight and were properly a matter for the jury. This point recalls my distinction, introduced earlier in this judgment, between scrutiny of the methodology and the assessment of the application of a methodology. Whether her conclusions were reasonable on the facts was entirely a matter for the jury to decide as triers of fact.

37 I do propose to deal with items (5) and (8) since they were the subject of considerable discussion in this court. As to (8), the alleged inadmissible hearsay, I am satisfied that the opinion evidence of Ms Newall was admissible notwithstanding that the Crown did not call as witnesses the technicians and other persons upon whose research and reports she relied. Specifically, I do not accept the appellant's submission that there was an obligation on the Crown to tender evidence that did not rely on hearsay statements and reports within the scope of her expertise: a burden not carried by an expert when testifying before the jury. To the extent that her opinions could be criticised for reliance upon other persons work, it was only the sufficiency of her testimony that was engaged, not its admissibility. This matter was dealt with by Wilson J., writing for the majority of the court in *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.) at 130:

> In my view, as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

38 There is a further analysis of the admissibility of opinion evidence in *Lavallee* by Sopinka J. He picks up on Wilson J.'s summary of the Supreme Court's decision in *R. v. Abbey, supra*, and explains the philosophical basis for

distinguishing between classes of hearsay that are relied upon by expert witnesses. His reproduction of Wilson J.'s summary is at p. 131:

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

39 As Sopinka J. points out, the combined effect of numbers 1, 3 and 4 above is that an expert opinion relevant in the abstract but based entirely upon unproven hearsay (as in the case of statements from the accused) is admissible but entitled to no weight. He goes on to say at p. 132:

> The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*) and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*). [Emphasis added.]

40 I had occasion to deal with opinion evidence in an earlier appeal, *R. v. Scardino* (1991), 6 C.R. (4th) 146 (Ont. C.A.) and am taking the liberty of repeating what I said at p. 153:

> In my view, there is no error in the trial judge's charge. Indeed, it is clear that she patterned her instruction on *Kirkby* [*R. v. Kirkby*, 47 C.R. (3d) 97 (Ont. C.A.)], which in turn relied upon *Abbey*. If any problem arose from *Abbey*, it was a tendency on the part of some judges to rule that before an expert's opinion was admissible in evidence, *all* the facts upon which the opinion was based must be proved in evidence. *Kirkby*, however, makes it clear that the burden is not that onerous. An expert's opinion is admissible in evidence, notwithstanding the absence of proof in some areas relied upon by the expert. However, the weight to be given to the opinion in such cases is diminished, sometimes to the point where the opinion can be given no weight at all. In my opinion, this view is supported by the recent decision of the Supreme court of Canada in *Lavallee*, *supra*.

41 As to Campbell J.'s item (5), the question of whether the probative value of the numbers reflecting the statistical rarity of a match in the general population is outweighed by its potential for unfair prejudice, I would comment firstly that this is an unusual case to raise that argument. While only the Crown called evidence on the DNA profile on the *voir dire*, competing witnesses testified before the jury: Pamella Newall and Dr. Waye for the Crown; Dr. Libby, Dr. Mueller and Mr. Coonan for the defence. Accordingly, the jury was not confronted by a single monolithic expression of match significance. The different experts who testified about statistics expressed differing views of the significance of the matches. The experts' views differed largely in how conservative one must be in order to ensure that the significance of a match is not overstated.

42 Additionally, the DNA evidence was not restricted to one sample. There were samples of blood and semen taken outside the boiler room where the victim was found and further samples from the victim's leotards. The jury was given frequency numbers that ranged from one in 1,500 to one in 1.8 million. The appellant concedes the admissibility of qualitative expressions of match significance (such as "rare" or "common") without the specifics afforded by statistics where DNA evidence is admitted showing a match between the DNA found on the crime scene and the DNA of a suspect, counsel for the appellant objects simply to the admission of the numbers themselves. In this case, it would be

difficult to translate the figures the experts were prepared to use into neutral language, but all that aside, why would the defence want to do so? The fact that there are competing figures which differ so radically should be before the jury for its assessment. The range of numeric frequency determined by the various experts was fertile ground for cross-examination. This is a classic case for the application of the language of Dickson C.J.C. in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.) at 400:

> The very strength of the jury system is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury instructions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything with a careful explanation as to any limitations on the use to which they may put that information.

43 I do not believe that there should be an absolute prohibition against the introduction of specific match figures. The appellant correctly notes that the case law reflects conflicting conclusions as to the admissibility of DNA probability statistics. It was justifiable to admit the probability statistics in this case, and it might be in others. I would leave the matter to the discretion of the trial judge in the particular case.

44 As I indicated earlier, Campbell J. did not have the benefit of the reasons of Sopinka J. in *Mohan*, *supra*, but his ruling on the admissibility of the DNA evidence was in the face of objections to its validity and reliability which the trial judge acknowledged in setting out the issues on the *voir dire*. Accordingly, it is clear that he was satisfied at least that it was reliable enough that he could not preclude its admission into evidence. Indeed, there is much force to the argument of the Crown that with the concessions as to the reliability of the DNA technology in the abstract, novelty was not in issue, and the dispute as to whether it was properly applied by the Crown's experts in the particular case was exclusively within the province of the jury. I do not have to go that far, but if my interpretation of what was required of the trial judge by *Mohan* is correct, it is apparent that the argument in this appeal was somewhat academic given the thoroughness with which the reliability of the DNA evidence was canvassed prior to its admission into evidence.

45 As to the issue of the appropriate standard of proof on the *voir dire*, the trial judge, to the extent that he made findings of fact, applied the standard of a balance of probabilities. This is apparent from his reliance upon the trial decision in *R. v. Johnston* (1992), 69 C.C.C. (3d) 395 (Ont. Gen. Div.). He was correct in doing so. The issue of reliability respecting novel scientific theory or technique relates strictly to a question of the admissibility of evidence where proof on a balance of probabilities is an acceptable standard: see *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.). This is not an inculpatory statement made by an accused to a person in authority (*B. (K.G.)*, *supra* at p. 297) nor is it the establishment by the Crown of "facts which trigger a presumption with respect to a vital issue relating to guilt or innocence" (*R. v. Egger* (1993), 21 C.R. (4th) 186 (S.C.C.) at p. 202).

46 The same standard, balance of probabilities, applies to the qualification of a an expert witness even where the science is novel. The trial judge need not be satisfied that one expert witness is qualified on a balance of probabilities and as to another beyond a reasonable doubt. Ms. Newall's qualifications as an authority on DNA testing were not questioned *per se*. To the extent that they were, Campbell J. left no doubt that he accepted her as eminently qualified in the field.

47 It must be remembered that we are dealing with the admissibility of the opinion of an expert witness with respect to one piece of circumstantial evidence relevant to the identity of the perpetrator of a crime. I can think of no justification for imposing a special burden of proof upon the Crown with respect to these DNA experts. This after all is still identification evidence. Scientific methods of identification, including analysis of bodily fluids such as blood, semen, saliva, hair, as well as fingerprints, footprints, dental impressions, and striations on bullets, all depend upon the ability to match samples, one to another. DNA profiling differs from this earlier technology only in its increased power to discriminate between individuals.

48 I think that the fundamental error propounded by the counsel for the appellant is his submission that *Mohan* has introduced, as a pre-condition to admissibility, a new standard of proof in the scrutiny of opinion evidence that relates to a novel scientific theory or technique. If the submissions of the appellant are to be accepted, there would be a burden upon the Crown to satisfy the trial judge beyond a reasonable doubt that its proffered evidence was reliable. Additionally, in giving testimony on the *voir dire*, the expert could not rely upon opinions and tests supplied by others that are within the field of the his or her expertise, a restriction that is contrary to all established authority.

49 The combination of these two changes would award to DNA evidence a special status not accorded to the opinions of experts generally in criminal trials. Counsel for the appellant submits that this result is justified because DNA evidence is so overwhelmingly compelling that it is dispositive of the guilt or innocence of the appellant. He submits that DNA evidence justifies introducing as a matter of procedure an hermetically sealed trial within a trial wherein reliability must always be separately assessed to the criminal standard of proof beyond a reasonable doubt as a pre-condition to admissibility. He relies on the words of Sopinka J. in *Mohan*, *supra*, where he states at p.255: "The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle".

50 The notion that a *voir dire* is held to pass on the sufficiency of evidence has been rejected by this court in wire tap cases in *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), at 500-01. There Dubin J.A. for a panel of five judges made the point that the suggestion that the trial judge must hear all the evidence led with respect to each recorded conversation and weigh that evidence "would be to misconceive the purpose of a *voir dire*, and confuse the respective functions of a Judge and jury in a criminal trial ... A *voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility".

51 This point is emphasized by what was said recently by the Supreme Court of Canada in *R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.) on the content of and standard of proof in a *voir dire* as it applied to a statement made to the police by a complainant in a sexual assault case which she later retracted at trial. At pp. 119-120, Lamer C.J.C. repeated what he said on this subject in *R. v. B. (K.G.), supra*, that the *voir dire* is to be held so that the trial judge can be satisfied on a balance of probabilities that the initial statement was not the product of coercion in any form. He then said at p. 120:

> The trial Judge at this stage is not making a final determination about the ultimate reliability and credibility of the statement. The trial judge need not be satisfied that the prior statement is true and should be believed in preference to the witness's current testimony.
>
> If the trial judge determines that the statement meets the threshold reliability criterion and is thus substantively admissible, he or she must direct the trier of fact to follow a two step process in evaluating the evidence....

52 The appellant relies upon the accepted onus on the Crown in determining the admissibility of confessions. The onus is described by Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at 359 as follows:

> The present law in Canada and the U.K. is that the prosecution must prove voluntariness beyond a reasonable doubt. This view is based on the reasoning that since a confession is potentially determinative of the issue of guilt or innocence, the criminal standard of proof should be maintained.

53 The appellant also relies on *R. v. Egger, supra*, a breathalyser case, where the Supreme Court of Canada held that the standard of proof for the service on the accused of a Certificate of Analysis and a Certificate of Qualified Technician within the times proscribed by the *Criminal Code* was to the criminal standard of beyond a reasonable doubt before the Crown could rely upon the presumption in the certificate as to the blood-alcohol content of the accused's blood. However, this does not engage a question of the admissibility of evidence. As Sopinka J. stated at p. 202:

107 O.A.C. 15, 123 C.C.C. (3d) 1, 38 O.R. (3d) 175, 15 C.R. (5th) 359, [1998]
O.J. No. 428

> The issue here is very different from a question of admissibility of evidence. The effect of satisfying the burden of proving preliminary facts to the admissibility of evidence is only that the evidence is admitted: it determines neither the weight of the evidence nor the guilt of the accused. This occurs in the next step in the process during which the Crown must establish its legal burden. When admission of the evidence may itself have a conclusive effect with respect to guilt, the criminal standard is applied. This accounts for the application of this standard with respect to the admission of confessions (see *Ward v. R.*, [1979] 2 S.C.R. 30 at p. 40, per Spence J., for the Court, and *R. v. Rothman*, [1981] 1 S.C.R. 640, at pp. 670, 674-675, per Martland J., for the majority, and at p. 696, per Lamer J. (as he then was), concurring).

54 To return to the quotation from *Mohan* as to the need for stricter scrutiny the closer the evidence gets to "an ultimate issue", the ultimate issue with respect to DNA profiling is not guilt or innocence as with a confession. It is but one piece of circumstantial evidence which taken alone may prove very little. In the case in appeal, much of the hair, fibre, blood and DNA evidence which puts the appellant at the scene of the crime is, on its face, relatively neutral given that the appellant was one of the janitors for this apartment building and had a prior innocent association with the victim. It gains greater significance, however, when considered in the light of the appellant's progression of statements as to his limited access to the crime scene as evidence of consciousness of guilty and the statement's of Crown witnesses, among other factors present at the trial. The defence scoffs that without this and the other forensic evidence there would not be a case for the appellant to meet. That may or may not be the case in the matter that is before us, but I can think of other cases where DNA profiling and other forensic evidence was in the last analysis superfluous. The fact that the DNA evidence may be more important to the strength of the Crown's case in this instance is not a reason for raising the level of scrutiny on the *voir dire* as to admissibility. The defence should properly concentrate, as it did here, in attempting to cast doubt upon its accuracy in the presence of the jury.

55 The real concern of the defence arises out of the accuracy of the DNA testing. It is the high degree of probability of the matches that creates the "mystic infallibility" of the DNA evidence in the eyes of the jury. However, the concern as to accuracy is to a large degree offset by the availability of the DNA samples for independent sampling at the instance of the defence. In the case on appeal, the samples relied upon by the Crown were available for further testing. In my review of the record of the *voir dire*, I did not find any suggestion by defence counsel that the quality of the DNA samples that were tested prohibited the samples from being examined or tested further. In fact, during the trial judge's ruling, the admissibility of the DNA evidence was considered in the context of a number of separate headings. Under the heading, "Depletion of Sample Material", the trial judge ruled as follows:

> The defence does not proceed with any potential Charter motion relating to unavailability through depletion of sample material for further testing.

56 In the case before the court, the defence had its own experts who testified before the jury. They were critical of various technical matters leading up to the creation of the autorads, the misreading of the bands, the lack of control, the relative newness of the CFS' experience in DNA typing, the accuracy of the match probabilities and other matters. I think the language of Moldaver J. in *R. v. Melaragni, supra*, is applicable. He said at p. 354:

> I am equally convinced that the jury will not be overwhelmed by the "mystic infallibility" of the evidence. I have no doubt that the jury will carefully consider cross-examination designed to weaken or destroy the worth of the proposed evidence. I have every confidence that the jury will pay close attention to an opposing expert, and I am equally confident that the jury will follow legal instruction regarding the worth of expert evidence in general and this evidence in particular.

57 Campbell J. dealt explicitly in his charge with the concern that the jury might be overwhelmed by DNA profiling evidence:

> The DNA tests in this case were conducted soon after The Centre of Forensic Labs opened itself for DNA case

> work. And there is evidence that challenges the conduct of the DNA tests and evidence that challenges the results. These are reasons for you to take a good close look at the DNA evidence, yourself, all the evidence you've heard from the Crown and the defence, and scrutinize it to see if you consider it reliable as a piece of circumstantial evidence. You have obviously followed it closely, spent a lot of time in court looking at the autorad projections, various aspects of the bands and their measurement and interpretation. You've seen those from both sides. I don't intend to repeat all of that. You have part of it, or small parts of it, anyway, in some of the material in front of you. You followed it very closely. I am confident you will use your common sense, you won't be overwhelmed by any aura of scientific authority advanced by any of the DNA witnesses. The assessment of the evidence really does boil down to a common sense assessment of the evidence, of the various opinions that you have heard, your assessment.

58 A further point must be made on the ultimate issue. This DNA evidence does not tend to establish conclusively the identity of the perpetrator of the crime. In a given case, it can only eliminate conclusively a suspect. DNA profiles are designed to determine if the appellant's genetic makeup is consistent with the genetic makeup of the samples taken at the scene of the crime. In order to indicate the degree of consistency, the expert witness will normally provide both quantitative and qualitative statements directed at the probability of randomly matching an individual in the population to the DNA samples present at a crime scene. The problem with using qualitative modifiers such as rare, unlikely and remote is that they are awkward and fail to convey the potency of a match. For this reason, the scientific community seems to prefer to use specific figures, as in this case. On the other hand, the underlying concern of the defence is that the jury will be permitted to fall into what is referred to as "the prosecutor's fallacy": equating the probability of a random match with the probability of the appellant's innocence. In other words, the concern is that the jury will convert the statistics into something approaching the ultimate issue. The conclusion that may be drawn from probability statistics is that it is rare or common to find this pattern among known DNA samples; one cannot make the leap to conclude that as a result of a match frequency the DNA found on a scene is that of a particular suspect.

59 However, counsel for the appellant acknowledges that their was no prosecutorial fallacy in this case and the instruction to the jury makes plain that the procedures employed in the DNA profiles simply generated statistics. The trial judge was very clear in his instructions to the jury as to how it should use them. The jury charge includes explicit instructions explaining both how the statistical evidence should not be used (e.g. only one in 3.7 million people have this profile) and how it should be used (i.e. to provide an understanding of the degree or rarity of the profile). Moreover, the trial judge told the jury that the DNA evidence was just one piece of circumstantial evidence in this case. On this record, there is no basis for an inference that the jury would have used the statistics as a predictor of the likelihood of guilt.

60 As noted above, my opinion is that the process of arriving at the point where a trial judge is satisfied as to the threshold of reliability for novel scientific theory or technique should be a flexible one. While I am cognizant that the standard of scrutiny varies depending upon how close the evidence approaches an opinion on an ultimate issue, I think that, once again, this evaluation is particular to the facts of the case. DNA matches do not decide an ultimate issue, they are a significant piece of circumstantial evidence that in this case, taken with the other evidence, support the theory of the Crown that the appellant was at the scene of the crime on the date in question and that he sexually assaulted the victim.

61 The last point relating to DNA evidence considers the appellant's objection to the trial judge's instruction on the DNA evidence. I believe that I have reviewed the subject indirectly, because the most significant objections related to reassertions of the arguments that the basis for the opinion evidence of the Crown had not been established. I have considered the instruction in its entirety and have reviewed the arguments of the appellant's counsel. In my view there is no substance to these objections. The instruction was in accordance with the judgments in *Abbey* and *Lavalee*, *supra*.

62 I will deal with one specific objection. In the charge to the jury, the trial judge's lengthy instructions concerning DNA evidence contained the following passage:

> I turn to DNA as circumstantial evidence. Remember it's only one form of circumstantial evidence. You do not apply the standard of proof beyond a reasonable doubt to the individual pieces of circumstantial evidence upon

> which the Crown relies. I say it again. I will say it at least one more time: Don't get bedazzled or unduly swayed by some of the large numbers used in the DNA evidence. Remember, also, the burden of proof is always on the Crown, the burden never shifts, there is never any obligation on the defence to prove anything.

63 At trial, defence counsel objected to this aspect of the charge, suggesting that Campbell J. ought to have directed that jury that "if the experts are in a quandary and the jury is in a quandary then they are simply to set it aside." In my opinion, the trial judge was correct in declining to instruct the jury in the manner suggested by defence counsel. The appellant submits that DNA evidence should be treated differently from other forms of circumstantial evidence and that the jury ought to be instructed that the reasonable doubt standard applies to this individual piece of evidence. This approach to expert evidence, and DNA evidence in particular, is inconsistent with the judgment of the Supreme Court of Canada in *R. v. Morin* (1988), 44C.C.C. (3d) 193 (S.C.C.). In that case, Sopinka J. held at pp. 210-11:

> The argument in favour of a two-stage application of the criminal standard ... is wrong in principle and unworkable in practice. In principle, it is wrong because the function of a standard of proof is not the weighing of individual items of evidence but the determination of ultimate issues. Furthermore, it would require the individual member of the jury to rely on the same facts in order to establish guilt. The law is clear that the members of the jury can arrive at their verdict by different routes and need not rely on the same facts. Indeed, the jurors need not rely on a single fact except the ultimate conclusion.
>
> I conclude from the foregoing that the facts are for the jury to determine subject to an instruction by the trial judge as to the law.... [T]he law lays down only one basic requirement: during the process of deliberation the jury or other trier of fact must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt. Beyond this injunction it is for the trier of fact to determine how to proceed. To intrude in this area is ... an intrusion into the province of the jury.

Summary respecting admissibility of novel science

64 I do not believe that the judgment of the Supreme Court of Canada in *Mohan* intended to introduce a new format for the conduct of a *voir dire* for the scrutiny of novel scientific theory or techniques in order to establish a threshold of reliability. The screening process is directed to the issue of the admissibility of the novel expert testimony, not the determination of its ultimate reliability. I can see nothing in recent authority which indicates a change in the traditional role of the trial judge in assessing the reliability of proffered evidence before ruling on its admissibility. He or she is not the trier of fact and should not invade the province of the jury by making findings of fact on the ultimate issues. The trial judge's function is limited to an overview of the evidence proffered in order to be satisfied that it reflects a scientific theory or technique that has either gained acceptance in the scientific community, or if not accepted, is considered otherwise reliable in accordance with the methodology validating it. The trial judge will be required to hear sufficient evidence to determine reliability as a preliminary matter. Moreover, the trial judge must not pass judgment on the particular application of the methodology by the expert. This is a question of weight to be determined by the jury. The trial judge must restrict his inquiry to determining whether the proposed novel scientific technique or theory has a foundation in science, as determined. The nature and scope of the evidence necessary for the trial judge to reach the threshold determination will vary according to the type of evidence proffered and the concessions made by counsel. As a result, it would be unwise to define the threshold test of reliability with the precision advanced by the scientific community. Rather, the threshold test of reliability must remain capable of adaptation to changing circumstances and realities. Reliability is best determined under the scrutiny of the trial judge as guided by the demands and particularities of the case. Simply stated, the threshold test of reliability is met when the trial judge, having reviewed certain evidence presented by counsel, feels that the novel scientific technique or theory is sufficiently reliable to be put to the jury for its review.

65 At the conclusion of the evidence, the trial judge in his instruction should advise the jury in the normal way as to the limits of the expert evidence and the use to which it can be put. Additionally, in the case of DNA evidence, he or she

would be well advised to instruct the jury not to be overwhelmed by the aura of scientific infallibility associated with scientific evidence. The trial judge should tell them to use their common sense in their assessment of the all of the evidence on the DNA issue and determine if it is reliable and valid as a piece of circumstantial evidence.

(2) The admissibility of a prior consistent statement given to the police by the appellant.

66 On December 3, 1990, shortly after noon, the appellant was arrested for the first degree murder of Andrea Atkinson. At 12:52 p.m., he was interviewed by the arresting officers, Detectives Gauthier and McNamara and made an exculpatory statement. The appellant had previously provided four statements to the police, two on October 23, 1990, one on October 25, 1990, and another on October 30, 1990. The Crown introduced all of the appellant's statements at trial except for the December 3rd statement.

67 The defence wanted to introduce the appellant's exculpatory statement of December 3, 1990 as part of its case for essentially four reasons:

> (i) to show the jury that the Appellant provided an exculpatory statement when he was arrested and at a time when the police first confronted him with all the forensic and other evidence that incriminated him;
>
> (ii) because the appellant offered for the first time an explanation as to why his hairs and fibres were found on the sixth floor, an explanation that was consistent with his testimony at trial; and,
>
> (iii) as a basis to cross-examine the detectives concerning the manner in which they cross-examined the appellant during the statement that he gave after his arrest in the context of their overall investigation of the Appellant;
>
> (iv) to rebut the Crown's allegation of recent fabrication

68 The defence position at trial was that the statement was admissible as a continuation of the appellant's earlier statements; as part of the *res gestae*; in order to rebut the prosecution's anticipated allegation of recent fabrication; as a prior consistent statement in accordance with the decision in *R. v. Small* (September 11, 1991), Forestell J. (Ont. Gen. Div.) and in order for the appellant to make full answer and defence.

69 The Crown points out that the appellant's December 3, 1990 statement to Detective Sergeant Gauthier and Detective McNamara was made seven weeks after Andrea was murdered and forty days after her body was discovered. The appellant had made his initial statements to the police and first provided bodily samples more than a month after he was advised that he was a suspect in a murder investigation and "may be charged with murder". The statement in issue was made more than two weeks after a search warrant was executed at the Terceira residence and about 30 minutes after his arrest.

70 The trial judge held that the statement was inadmissible. He also refused to allow the defence to inform the jury of the fact that the appellant was questioned when he was arrested, and that he provided a statement. He ruled that:

> The defence proffered by the Appellant was the same in each of his statements, namely "I didn't do it". His alibi was put forward from the outset. The Appellant was confronted with the presence of his hair and semen in the course of his October 30, 1990 statement. Although the police had more to confront the Appellant with on December 3, his complete denial of guilt was identical on each occasion and there is no new explanation by the accused in December 3 that was omitted from the earlier statements.

71 Campbell J. stated that he was bound by the decision of the Ontario Court of Appeal in *R. v. Campbell* (1977), 38

C.C.C. (2d) 6 (Ont. C.A.) the principles of which had been affirmed by the Supreme Court of Canada in *R. c. Béland, supra*, at p. 489-91 and therefore declined to follow *R. v. Small, supra*. He also expressed a willingness to revisit his ruling in the event that the Crown raised the issue of recent fabrication, either expressly or impliedly.

72 In *Campbell, supra*, this court held that defence counsel was not entitled to elicit the accused's prior exculpatory statements during cross-examination of the police and custom officials to whom they were made, and equally that he should have been precluded from narrating his prior statements during his own testimony. The position in Canada has traditionally been that prior consistent statements are irrelevant and superfluous. Although the appellant's counsel acknowledges that statements by an accused have generally been ruled inadmissible in Canada, he submits that certain of the authorities relied upon by Martin J.A. of this court in *Campbell, supra*, do not support the *ratio* of the decision. He submits that Martin J.A. ought to have adopted the English exception to the rule against prior consistent statements. He refers to a number of these authorities starting with *R. v. Storey* (1968), 52 Cr. App. R. 334 (Eng. C.A.) wherein the English Court of Appeal dealt with a voluntary exculpatory statement by the accused that had been introduced by the Crown as part of its case. The court held that such a statement was admissible simply to show the reaction of the accused when he or she was "first taxed with incriminating facts" but is not admissible for the truth of its contents. Subsequent cases in England have expanded the *Storey* exception to permit exculpatory statements by an accused to show reaction or attitude not restricted to statements made by the accused when the accused is "first taxed" with "incriminating facts" during the "first encounter with the police".

73 In my view, *Storey* is distinguishable on its facts from the case in appeal. In any event I do not think that this is an appropriate case to re-examine the basic thinking behind *Campbell* as we were invited to do by counsel for the appellant. The ruling by the trial judge that the statement of December 3, 1990 is but one of a number of exculpatory statements made after the appellant was well aware of his status as a suspect is fully supported by the record. Moreover, as noted by the trial judge, the December 3, 1990 statement was so similar in substance to earlier statements that no new or helpful information would be provided by admission of the December 3, 1990 statement during the trial proper. The time that had elapsed from the first statement to the one in issue was too long to support a suggestion that the five statements were part of a continuum. The invitation of the trial judge to re-visit his ruling in the event that the Crown raised the issue of recent fabrication was never accepted by the defence despite the position now advanced that the Crown cross-examined the appellant on all five statements made by the appellant. Further, no objection was taken by the defence to this line of questioning nor did the defence ask to re-examine on the fifth statement. I would not give effect to this objection.

(3) The admissibility of hypnotically refreshed testimony.

74 The appellant's evidence as to his whereabouts at the time of Andrea's disappearance was supported by the testimony of his mother and grandmother. They testified that the appellant was home shortly after 11:00 a.m. on the day Andrea went missing. David Belanger, who lived in the same apartment building, gave evidence that he saw Andrea alive at 12:00 p.m. that day. To rebut the appellant's alibi, the Crown calied two tenants who claimed to have seen the appellant working at the apartment building around 1:30 p.m.

75 One of these witnesses was Corinna MacNaughton. MacNaughton gave statements to the police on October 28, 1990 and November 11, 1990 which contained a number of aspects which suggested that she was recalling the events of another day. In light of the importance of MacNaughton's evidence, the police arranged for her to see Dr. Matheson, a psychologist, in order for her to be hypnotized as a way of improving her memory. Before her visit with Matheson, the police advised her of "errors" in her memory of the events of the day that Andrea disappeared. Following her hypnosis, MacNaughton gave a third statement to the police which was consistent with the testimony she provided at trial. At trial, she testified that the hypnosis helped her remember the details of that day:

> Just certain details: Cleaners that I thought I had seen that day that I did, in fact, see that day -- that I didn't see that day, it was just a different day that I had seen it.

76 The defence objected to the admissibility of what counsel for the appellant now describes as MacNaughton's hypnosis induced testimony. Counsel argued that her evidence was now unreliable having been tainted by the hypnosis and by the police telling her that certain events she was recalling were impossible. A *voir dire* was held. Dr. Matheson was called by the Crown as well as Constable Johnston who had interviewed MacNaughton. Dr. Matheson explained the process of hypnosis.

77 It is evident that while defence counsel objected to the testimony of MacNaughton, it was on the basis that her evidence was tainted, not by what took place during the hypnosis, but by information that had been provided to her by the police. At no time did trial counsel challenge the validity of hypnosis as a reliable scientific technique nor did he challenge Dr. Matheson's expertise in the area of forensic hypnosis.

78 The primary focus of defence counsel, in his cross-examination and submissions during the *voir dire*, was on the tainting of MacNaughton's evidence by the police. Constable Johnston acknowledged that, during an interview prior to the hypnosis, the police drew to Ms. MacNaughton's attention certain inaccuracies in her recollection and "corrected her". Dr. Matheson testified that Ms. MacNaughton's memory "might" have been altered by the police correction, but that any such alteration was independent of what had occurred in the hypnosis session. During his submissions, defence counsel relied upon tainting of the witness's memory by the police, but did not suggest that her recollection had been affected by the hypnosis itself.

79 Defence counsel on the *voir dire* declined to take issue with the reliability of hypnosis as a means of refreshing memory. To the extent that there was any evidence provided during the *voir dire* which spoke to the issue of reliability of hypnosis, the evidence before the trial judge during the *voir dire* on the issue was that hypnosis was accepted within the medical profession and by professional bodies as a means of refreshing memory. Furthermore, having regard to defence counsel's attack on the reliability of DNA testing as a scientific technique, it seems reasonable to infer that he made a strategic decision to deal with MacNaughton's testimony as an issue of witness tainting. The court does not readily permit an appellant to reverse such a tactical decision on appeal.

80 During the trial proper, defence counsel conducted an effective cross-examination of Corinna MacNaughton in which he repeatedly pointed out inconsistencies between her statements to the police and her testimony at trial, impeached her credibility through use of the transcript of her hypnosis session with Dr. Matheson, and highlighted deficiencies in her recollection which were unaffected by hypnosis. Further, during the testimony of MacNaughton and Constable Johnston, defence counsel brought out the areas in which the police had "corrected" her recollection.

81 The complaint is further made that while Dr. Matheson was available to be called by either party when the MacNaughton testimony was presented to the jury, there was an obligation upon the Crown to call the psychologist. The Crown at trial took the position that since the defence focus had been on police tainting during the *voir dire*, rather than any tainting specific to the hypnotic interview, it chose not to call Dr. Matheson as a witness at trial. The transcript is equivocal as to whether defence counsel acquiesced in this position. However, it is clear that defence counsel did not object to the Crown's decision, did not ask the learned trial judge to call Dr. Matheson as a witness, did not choose to call the doctor as a defence witness, and chose not to call a defence expert on hypnosis.

82 I have some difficulty in understanding what the argument on appeal has to do with the admissibility of Corinna MacNaughton's evidence. Even accepting that it was "hypnotically induced", this has nothing to do with whether she should be permitted to testify before the jury, particularly in light of the fact that the reliability of hypnosis was not questioned by defence counsel. As a result, in the present case, the effect of hypnosis on the memory of the witness was properly a matter going to weight to be decided by the trier of fact. The Crown put all its cards on the table on the *voir dire* and the defence determined that the witness was vulnerable to the suggestion that her evidence was tainted. Defence counsel cross-examined her vigourously on this theme before the jury and asked for and received from the trial judge an instruction to the jury as to the special caution that should be exercised in assessing her evidence due to the fact that she had been hypnotized. I would not give effect to this ground of appeal.

107 O.A.C. 15, 123 C.C.C. (3d) 1, 38 O.R. (3d) 175, 15 C.R. (5th) 359, [1998]
O.J. No. 428

(4) The propriety of permitting the Crown to call Dr. Humphries in reply.

83 While the experts agreed that there was substantial indicia of asphyxia as the cause of Andrea's death, the defence disputed the condition that may have triggered the asphyxia. The Crown position was that the appellant had caused the asphyxia by placing his hands over Andrea's mouth. The defence position was that Andrea had suffered an epileptic seizure triggered by the sexual assault and a pre-existing head injury. According to the defence, it may have been the seizure which caused the asphyxia. Consequently, assuming the jury was satisfied that the appellant was the assailant, there was evidence which if believed could lead to a verdict of manslaughter as opposed to murder.

84 At trial, the Crown called Dr. Noel McAuliffe, a pathologist from the Forensic Pathology Branch of the Chief Coroner's Office, who had performed the autopsy on Andrea. He testified that he had been informed, at the preliminary inquiry, of a head injury that Andrea had suffered six weeks prior to her death. It was his opinion that the injury he observed at the autopsy was not related to this earlier injury. The skull injury he observed at the autopsy was a post-mortem development caused by a build up of gas pressures. He was cross-examined by the appellant's counsel about the link between head injuries, epileptic seizures and asphyxia:

> Q. And that type of bump or injury pre-existing, one of the side effects, I am suggesting to you, could very well have been the onsetting of a seizure, an epileptic seizure?
>
> A. Certainly head injuries have the potential to initiate epilepsy, that's right.
>
> Q. And people who suffer seizures may, in fact, never exhibit visible brain abnormality or that sort of thing, is that correct?
>
> A. That would be true in the majority of cases, yes.
>
> Q. And when one has a seizure which results in death that death would be by way of asphyxia?
>
> A. Yes.

85 The Crown re-examined Dr. McAuliffe regarding the defence position. The Crown elicited from Dr. McAuliffe that Andrea had no prior head injury of sufficient magnitude to cause a seizure six weeks later:

> The emergency chart would suggest that the injury was interpreted as nothing above absolutely trivial. An examination was made and noted and a code for billing OHIP was inserted. It would seem to be an absolutely trivial matter.... If there was a report of a fracture on an X-ray taken, at the time, I would think it would still have absolutely no relationship to the enormous fracture that we now see. I don't -- I don't believe for a moment that this child can be carrying on about her business for the intervening, almost two months with a fracture to the extent that I found at the autopsy.

86 The Crown called no further witnesses in its own case regarding this issue. The defence called as part of its case Dr. James Ferris, a forensic pathologist from the University of British Columbia. Dr. Ferris challenged the opinion of Dr. McAuliffe. In his opinion, the skull injury noted by McAuliffe at the autopsy resulted from a pre-existing injury to Andrea's head, an injury which could have triggered an epileptic seizure which in turn could have caused the asphyxia.

87 The Crown sought to call Dr. Robin Humphries, a paediatric neurosurgeon from the Hospital for Sick Children, in reply. The trial judge ruled that he could testify in reply. The trial judge was of the opinion that Dr. Ferris, in his evidence, had introduced, for the first time, the issue of Andrea having suffered a "growing" fracture. In his opinion, Dr.

McAuliffe had only been cross-examined by the appellant's counsel concerning the possibility of a "healing" fracture. Campbell J. ruled, in part, as follows:

> This theory of an injury which had healed leaving a brain injury underlying the fracture site which later resulted in some sort of spontaneous death through asphyxiating of epilepsy was, in my view, quite different from the evidence of Dr. Ferris. Although Dr. Ferris did on a couple of occasions refer to it as a "healing injury".
>
> The impact of Dr. Ferris' evidence, and it's overall impression, was quite different from the picture put in cross-examination. The most forceful part of his evidence was his testimony that it was a particular thing that was never put to Dr. McAuliffe, that is a growing fracture.

88 Dr. Humphries' evidence in reply was that Andrea's skull injury observed by Dr. McAuliffe was neither a growing or healing fracture. He agreed with Dr. McAuliffe that it was a post-mortem artifact. Dr. Humphries further testified that even if Andrea had suffered a head injury six weeks prior to her death, her death was unrelated to it.

89 The test for reply evidence was recently articulated in *R. v. Melnichuk* (1997), 114 C.C.C. (3d) 503 (S.C.C.); rev'g (1995), 104 C.C.C. (3d) 160(Ont. C.A.) at 172, 174, where the dissenting judgement of Doherty J.A. of this court was subsequently adopted by Sopinka J., for the majority of the Supreme Court of Canada:

> The case law recognizes ... that a trial judge may receive reply evidence which, while of some relevance to the allegations from the outset, takes on real significance only in light of a position advanced during the case for the defence.
>
> Defence evidence that conflicts with Crown evidence related to an essential issue opens the door to reply evidence only where the Crown could not foresee the need to lead the evidence as part of its case.

90 I tend to agree with the appellant that the introduction of the distinction between a "healing fracture" as opposed to a "growing fracture" was something of a red herring. The evidence led through Dr. McAuliffe was that Andrea had died as a result of asphyxiation, not any kind of a head injury. Possibly due to the degree to which her body had decomposed, he was unable to determine the mechanism by which she had asphyxiated.

91 On the other hand, the defence pathologist, Dr. Ferris, would have classified the **cause** of **death** as "undetermined." He did not agree that the signs of **asphyxia** were so significant that it could be definitively pronounced the **cause** of **death**. Even assuming that Andrea did asphyxiate, Dr. Ferris testified that an epileptic seizure, stimulated by what he described as a pre-existing "growing fracture" of the skull, may have caused the **asphyxia.** Dr. Ferris was unequivocal that Andrea was suffering from a pre-existing "growing fracture" and that this anti-mortem injury *may* have resulted in a seizure. He theorized that Andrea may have suffered a spontaneous seizure, coincident in time with the sexual assault on her or that the sexual assault could have acted as a catalyst for the possible seizure.

92 Contrary to the submissions of the appellant, the Crown was not splitting its case. The fact that Dr. McAuliffe had responded to certain hypothetical questions on the premise that there was a pre-existing fracture did not place an onus on the Crown to chase down and eliminate this possibility that the **asphyxia** had resulted from a fracture which was not evident to Dr. McAuliffe. It was not until the defence pathologist, Dr. Ferris, put this theory forward affirmatively that it took on "real significance" and presented the jury with an alternative **cause** of **death** which could have impacted on the verdict.

93 The appellant relied upon the decision of the Supreme Court of Canada in *R. v. Biddle* (1995), 36 C.R. (4th) 321 (S.C.C.), at 328-334 where, in upholding the judgment of this court, it held *inter alia* that "rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made". This case has no application. In *Biddle*, the Crown sought to change its case

to meet an alibi defence of which it was apprised after it had closed its case. Had the defence made available to the Crown before the close of its case a medical report of Dr. Ferris setting out his opinion and indicated that the defence proposed to call Dr. Ferris if necessary, the trial judge's ruling might well have been different. Here, the Crown was not changing its postion, it was maintaining it by reacting to a defence witness who suggested a different cause of death.

(5) The instruction to the jury on consciousness of guilt.

94 The appellant contends that the instruction on consciousness of guilt was erroneous, as it failed to direct the jury to apply the standard of proof beyond a reasonable doubt to the evidence of the appellant's lies to the police. The recent decision of *R. v. White* (1996), 108 C.C.C. (3d) 1 (Ont. C.A.) is dispositive of this issue. In *White* this court, sitting as a panel of five specifically to reconsider this issue, reversed its earlier decision of *R. v. Court* (1995), 99 C.C.C. (3d) 237 (Ont. C.A.) and held that evidence of consciousness of guilt should not be considered in isolation, and should not have the standard of proof beyond a reasonable doubt applied to it separately from the rest of the evidence. In my opinion, the trial judge's charge met the standard set out in *White* and contains no reversible error.

Disposition

95 Accordingly, for the reasons stated, I would dismiss the appeal.

Appeal dismissed.

END OF DOCUMENT

ROE v. MINISTRY OF HEALTH AND OTHERS. WOOLLEY v. SAME.

[COURT OF APPEAL (Somervell, Denning and Morris, L.JJ.), March 22, 23, 24, 25, April 8, 1954.]

Hospital—Negligence—Liability for negligence of members of staff—Specialist anaesthetist—Spinal anaesthetic administered to patients—Contamination of drug in ampoules—Molecular flaws in ampoules.

On Oct. 13, 1947, each of the plaintiffs underwent a surgical operation at the Chesterfield and North Derbyshire Royal Hospital. Before the operation in each case a spinal anaesthetic consisting of Nupercaine, injected by means of a lumbar puncture, was administered to the patient by the second defendant, a specialist anaesthetist. The Nupercaine was contained in glass ampoules which were, prior to use, immersed in a phenol solution. After the operations the plaintiffs developed spastic paraplegia which resulted in permanent paralysis from the waist downwards. In an action for damages for personal injuries against the Ministry of Health, as successor in title to the trustees of the hospital, and the anaesthetist, the court found that the injuries to the plaintiffs were caused by the Nupercaine becoming contaminated by the phenol which had percolated into the Nupercaine through molecular flaws or invisible cracks in the ampoules, and that at the date of the operations the risk of percolation through molecular flaws in the glass was not appreciated by competent anaesthetists in general.

HELD: having regard to the standard of knowledge to be imputed to competent anaesthetists in 1947, the anaesthetist could not be found to be guilty of negligence in failing to appreciate the risk of the phenol percolating through molecular flaws in the glass ampoules and, a fortiori, there was no evidence of negligence on the part of any member of the nursing staff.

Per curiam: The anaesthetist was the servant or agent of the hospital authorities who were, therefore, responsible for his acts.

Gold v. *Essex County Council* ([1942] 2 All E.R. 237) and *Cassidy* v. *Ministry of Health* ([1951] 1 All E.R. 574), considered.

Since the plaintiffs had been unable to establish negligence on the part of any of the defendants they were precluded from recovering damages.

AS TO LIABILITY OF HOSPITAL FOR NEGLIGENCE OF ITS SERVANTS OR AGENTS, see HALSBURY, Hailsham Edn., Vol. 22, p. 320, para. 605; and FOR CASES, see DIGEST, Vol. 34, p. 550, Nos. *86*, *87*.

Cases referred to:

(1) *Gold* v. *Essex County Council*, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; 2nd Digest Supp.

(2) *Cassidy* v. *Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.

(3) *Mahon* v. *Osborne*, [1939] 1 All E.R. 535; [1939] 2 K.B. 14; 108 L.J.K.B. 567; 160 L.T. 329; Digest Supp.

(4) *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392; [1950] A.C. 185; 114 J.P. 172; 2nd Digest Supp.

(5) *Baker* v. *Market Harborough Industrial Co-operative Society*, (1953), 97 Sol. Jo. 861.

(6) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest, Replacement, 38, *185*.

(7) *Hay (or Bourhill)* v. *Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 1942 S.C. (H.L.) 78; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

(8) *Woods* v. *Duncan, Duncan* v. *Hambrook, Duncan* v. *Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420 n.; [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 2nd Digest Supp.
(9) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
(10) *Stansbie* v. *Troman*, [1948] 1 All E.R. 599; [1948] 2 K.B. 48; [1948] L.J.R. 1206; 2nd Digest Supp.
(11) *Lewis* v. *Carmarthenshire County Council*, [1953] 2 All E.R. 1403; 118 J.P. 51.
(12) *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.
(13) *King* v. *Phillips*, [1953] 1 All E.R. 617; [1953] 1 Q.B. 429.
(14) *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663.
(15) *Liesbosch, Dredger* v. *Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; sub nom. *The Edison*, 149 L.T. 49; Digest Supp.
(16) *Jones* v. *Livox Quarries, Ltd.*, [1952] 2 Q.B. 608; 3rd Digest Supp.
(17) *Bolton* v. *Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of MCNAIR, J., dated Nov. 12, 1953.

The plaintiffs, Cecil Henry Roe and Albert Woolley, were patients in the Chesterfield and North Derbyshire Royal Hospital. On Oct. 13, 1947, surgical operations were performed on them, in each case a spinal anaesthetic consisting of Nupercaine being administered by injection by lumbar puncture. In each case the Nupercaine was aspirated from a glass ampoule. The glass ampoules containing the Nupercaine had been kept for twelve or more hours in a glass jar containing a one-in-forty solution of phenol, before which they had been immersed for about twenty minutes in a one-in-twenty phenol solution. The anaesthetic was administered by the second defendant, Dr. Graham. After the operations each plaintiff developed spastic paraplegia which resulted in permanent paralysis from the waist downwards.

In an action for damages for personal injuries, the plaintiffs alleged negligence on the part of the Ministry of Health (the successor in title of the trustees of the hospital), and/or Dr. Graham as the anaesthetist, and/or the manufacturers of the Nupercaine, Ciba Laboratories, Ltd. They contended that, as against the first two defendants, the maxim res ipsa loquitur applied inasmuch as paralysis did not ordinarily follow a spinal anaesthetic properly administered; alternatively that, as against the Ministry, on the basis that Dr. Graham was in law the servant or agent of the Ministry, the injuries were caused by the negligent injection of the contents of a glass ampoule of Nupercaine contaminated by phenol; that, on the basis that Dr. Graham was not in law the servant or agent of the Ministry, the contamination occurred through the negligent mishandling of the ampoules by the theatre staff, and, further, that the failure to detect the contamination was due to the failure to employ an effective system of differential colouring in the phenol solution. Further, as against Dr. Graham, it was contended that he negligently injected the contents of an ampoule of Nupercaine contaminated by phenol, that he failed to make any proper examination for cracks in the ampoules, and failed to adopt and maintain an effective system of differential colouring in the phenol solution. During the trial of the action the third defendants were dismissed therefrom on an admission by counsel for all parties that no liability was alleged against them. MCNAIR, J., found that the Ministry had fulfilled its duty by supplying a competent anaesthetist and trained theatre staff, and that the plaintiffs' injuries were caused by the injection of Nupercaine contaminated with phenol which had percolated into the ampoules by means of invisible cracks or molecular flaws in the glass. On those facts he held that neither Dr. Graham, nor, a fortiori, the theatre staff could be guilty of negligence in failing to appreciate the risk of such percolation on the basis of medical

knowledge at the date of the operations; nor could Dr. Graham be guilty of negligence in failing to apply a differential colour test which might have disclosed a risk which, in common with many other anaesthetists, he did not appreciate as a possibility. He held further (i) that the Ministry was not responsible for the acts of Dr. Graham who, as a specialist, was in a position comparable with that of a visiting surgeon or physician for whose acts a hospital does not assume responsibility in law, and (ii) that where an operation was under the control of two persons not in law responsible for the acts of each other, the doctrine of res ipsa loquitur could not apply to either person since the res, if it spoke of negligence, did not speak of negligence against either person individually.

Elwes, Q.C., and *John Hobson* for the plaintiffs.

Berryman, Q.C., *Marven Everett, Q.C.*, and *J. S. L. Macaskie* for the Ministry of Health, the first defendant.

Hylton-Foster, Q.C., and *Cumming-Bruce* for the second defendant, Dr. Graham.

Faulks and *Syrett* for the third defendants, Ciba Laboratories, Ltd.

Cur. adv. vult.

Apr. 8. The following judgments were read.

SOMERVELL, L.J.: The two plaintiffs in these consolidated actions were both anaesthetised by a spinal anaesthetic for minor operations on Oct. 13, 1947, at the Chesterfield and North Derbyshire Royal Hospital, now represented by the first defendant, the Ministry of Health. The results were tragic in that both men were and have since remained paralysed from the waist downwards. Each claims in negligence. The second defendant is the anaesthetist, and one of the issues was whether the principle respondeat superior was applicable as between the hospital and him. The spinal anaesthetic used was Nupercaine, manufactured and supplied by the third defendants, Ciba Laboratories. It was supplied in glass ampoules, one of which was used for each patient. The suggestion that the Nupercaine in the two ampoules in question must have been defective or contaminated before delivery to the hospital was, after investigation, abandoned at the trial. The third defendants were, therefore, not concerned in the substantive appeal. The learned judge found for the defendants and the plaintiffs appeal. He found that the damage had been caused by phenol which had percolated into the ampoules from a solution in which the two ampoules, with others, had been immersed. There was difference of opinion among the experts, but this finding was accepted by all counsel before us as the explanation, and the question, therefore, is whether this percolation was caused by the negligence of the defendants or either of them. The ampoules were about five inches high, one inch in diameter, narrowing towards the top to a neck about $\frac{1}{4}$ inch in diameter, and swelling out slightly above the neck and then tapering. The ampoule was opened by filing and then breaking at the neck. Each contained twenty c.c. of Nupercaine. As delivered by the makers the outside and label were not sterilised. They were to be treated, as a notice on the box stated, as " frankly septic ". The needle of the syringe could be inserted through the neck when the ampoule had been opened without coming in contact with the outside of the ampoule. The ampoule would be held by the sister and the syringe by the anaesthetist and there was a possibility of accidental contact.

It is plain that this possibility exercised a good many anaesthetists round about 1946. There was at the hospital Dr. Pooler, the senior anaesthetist; the second defendant; and a resident anaesthetist who was clearly of a lesser status and who is not concerned in this case. In 1947 Dr. Pooler and Dr. Graham discussed the danger of sepsis as described above, and the importance of sterilising the ampoules. Dr. Pooler in fact started, for his cases, the method which was used by Dr. Graham at the date of the operations on the plaintiffs. That was to immerse the ampoules in a one-in-twenty solution of phenol for twenty minutes and then in a one-in-forty solution for twelve or more hours. On the learned judge's finding a quantity of this phenol solution, sufficient to cause the paralysis,

percolated through a crack in each ampoule, sufficient Nupercaine being left to anaesthetise each patient. There was no precise evidence as to the amount of phenol solution necessary to cause the injuries, but probably about one-fifth of the volume of the Nupercaine. Each plaintiff had an injection of ten c.c. If about one-fifth was phenol solution one would expect anaesthesia and injury.

Dr. Graham appreciated the possibility of cracks and the great danger of phenol solution if injected into the spine. He examined each ampoule for cracks before taking its contents or part of them into the syringe. The learned judge accepted his evidence that he made such an examination carefully in these cases. " I did not believe for one moment that I could have missed a crack " he said. Was he negligent in so believing ? The learned judge deals with this matter in the following paragraph:

> " It is now clear that phenol can find its way into an ampoule of Nupercaine stored in a solution of phenol through cracks which are not detectable by the ordinary visual or tactile examination which takes place in an operating theatre—these cracks were referred to in the evidence as ' invisible cracks '—or through molecular flaws in the glass. The attention of the profession was first drawn to this risk in this country by the publication of Professor MACINTOSH'S book on LUMBAR PUNCTURE AND SPINAL ANAESTHESIA in 1951. In 1947 the general run of competent anaesthetists would not appreciate this risk. (See the evidence of Dr. Macintosh, Day 3, 18, 19, 42-E; of Dr. Organe, Day 8, 61; and of Dr. Cope, Day 9, 25). Dr. Graham certainly did not appreciate this as a risk. I accordingly find that, by the standard of knowledge to be imputed to competent anaesthetists in 1947, Dr. Graham was not negligent in failing to appreciate this risk, and, a fortiori, the theatre staff were not negligent."

I accept this. Although leading counsel for the plaintiffs did not accept these findings, his main attack on Dr. Graham was based on a different matter. There was evidence that in some hospitals where the immersion system was used the disinfecting liquid, whether a phenol solution or surgical spirit, was stained a deep tint with methylene blue or some other dye. Professor MACINTOSH described the liquids he had seen as the colour of ink. This would make it easier, of course, to detect percolation. It was a method used by Ciba Laboratories and was known to analytical chemists. A certain amount of confusion arose from the fact that the two solutions of phenol in which the ampoules were immersed were coloured, though not deeply. This was not done as a precaution against percolation. The-one-in twenty phenol solution was coloured a light blue and the one-in-forty a light pink for general purposes of identification and not as a precaution against cracked ampoules. As a precaution for this latter purpose the colouring was, as Professor MACINTOSH said, quite inadequate. Dr. Graham gave certain answers which might have meant he was relying on colour to detect cracks. If so, it should have been deeper. I agree with the submission of leading counsel for Dr. Graham that, taking his evidence as a whole, he was not so relying. If, of course, he had seen that the liquid in an ampoule was pink, he would at once have realised there had been substantial percolation. He was, however, relying on his visual inspection. Leading counsel for the plaintiffs submitted that once the plaintiffs had shown that this precaution was taken in some other hospitals the onus passed to Dr. Graham or the hospital to explain why it was not adopted in the present case. If the onus did so pass, I think it was discharged. Leading counsel for Dr. Graham conceded in the course of the trial and before us that if there had been deep tinting it would probably have disclosed any dangerous percolation. The learned judge, who had many difficult matters to deal with, of which he has relieved us, did not, I think, fully appreciate this concession. However, the other reasons which he gives, in my opinion, justify his finding, with which I agree, that Dr. Graham was not negligent. Dr. Graham had never heard of deep tinting as a precaution. There had been

a reference in American publications to colouring, but the only paper traced on " immersion " in this country made no reference to deep tinting as an ingredient of the process. On one occasion Dr. Graham found an ampoule which had been cracked or broken at the top. I do not think this assists either side. Leading counsel for Dr. Graham submitted, I think with force, that, if anything, it confirmed Dr. Graham's view that cracks would be visible. The actual method of immersion without deep tinting was introduced and used in the first instance by his senior, Dr. Pooler. Dr. Graham was entitled to place some reliance on that. It would obviously be wrong to infer negligence from the fact only that it was used in some other hospitals. I felt at one time that as Dr. Pooler had started the system it would have been right that the hospital should have called him. They were, however, submitting that he was not their servant, and on that basis it was, I think, reasonable for them not to call him. If it had been obvious or accepted that he was their " servant " for this purpose, it might well have been a matter for comment if he had not been called.

It is well to consider the nature of the allegation here made with regard to Dr. Graham's interests as well as his duties. If a man driving a motor car is late for an urgent appointment he has, at any rate, a motive for taking a risk. What, however, is the suggested act of negligence here ? It is a failure to instruct a sister to put dye into a solution of phenol. It imposes no burden on the doctor except the speaking of a sentence. He or Dr. Pooler would have every motive for putting this minor burden on the nursing staff if either had any idea that it might prevent injury to his patients. There is, in my opinion, on the evidence no justification for finding that Dr. Graham was negligent in this matter.

The learned judge found that the hospital was not liable in law for Dr. Graham's acts of negligence, if any. I will set out the passage in which the learned judge states the position of Dr. Pooler and Dr. Graham:

> " In October, 1946, he was, with Dr. Pooler who had taken his diploma of anaesthesia some years earlier, appointed as a visiting anaesthetist to the hospital. He and Dr. Pooler between them were under obligation to provide a regular anaesthetic service for the hospital, it being left to them to decide how to divide up the work. In fact, apart from emergencies, they worked at the hospital on alternate days. The hospital set aside a sum of money out of their funds derived from investments, contributions and donations for division among the whole of the medical and surgical staff including visiting and consulting surgeons as the participants might decide. Dr. Graham participated in this fund but otherwise received no remuneration from the hospital. He was at all times allowed to continue his private anaesthetic practice."

The learned judge referred to *Gold* v. *Essex County Council* (1) and *Cassidy* v. *Ministry of Health* (2). He assimilated Dr. Pooler and Dr. Graham to the " consulting physicians or surgeons " referred to by LORD GREENE, M.R., in *Gold's* case (1) ([1942] 2 All E.R. 242). The line suggested in that case and in *Cassidy's* case (2), in the judgments of SINGLETON, L.J., and myself, may not be a very satisfactory one, but I would have regarded Dr. Pooler and Dr. Graham as part of the permanent staff and, therefore, in the same position as the orthopaedic surgeon in *Cassidy's* case (2). Like him they are, of course, qualified skilled men controlling as such their own methods. The positions of surgeons and others under the National Health Service Act will have to be decided when it arises. The position of hospitals under that Act may or may not be different from when they were voluntary or municipal hospitals. Having regard to my conclusion with regard to Dr. Graham, the matter is relevant only on the alleged application of res ipsa loquitur. The learned judge said that principle could not apply to a case where the operation is, as he held here, under the control of two persons not in law responsible for each other. Our attention was drawn to some observations in *Mahon* v. *Osborne* (3) which suggest this is too widely stated. As to the maxim itself, I agree, with respect, with what was said by

LORD RADCLIFFE in *Barkway* v. *South Wales Transport Co., Ltd.* (4) ([1950] 1 All E.R. 403):

> " I find nothing more in that maxim than a rule of evidence, of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence."

In medical cases the fact that something has gone wrong is very often not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who could throw light on what happened were not called. Having come to the conclusion that the hospital was responsible for Dr. Graham, the judge's reason (which is applicable in certain cases) for excluding the maxim has not operated on my mind.

I will now turn to the second main submission by leading counsel for the plaintiffs. Invisible cracks are none the less cracks and would not have been there if the ampoules had been carefully handled by the nursing staff. Therefore, there must have been negligent handling. And, of course, if the submission is to succeed, that negligent handling must have caused the injury. A number of experiments were conducted to try to crack ampoules in the way in which they must have been cracked on the findings. It was, of course, possible to break them if handled sufficiently roughly. It was found very difficult to produce an invisible or not easily visible crack except by thermal methods. It would be a very speculative basis on which to find some unidentified nurse negligent. I think, however, making assumptions in the plaintiffs' favour, the submission fails on causation. I will assume that a nurse knocked two ampoules together as she was placing them in the basin and this " rough " handling caused the " invisible " cracks. It would obviously be inadvertent, and, I will assume, negligent. The duty as such not negligently to mishandle equipment would be a duty owed by the hospital. If an ampoule were dropped and broken there would clearly be no breach of any duty to a patient. In the case I am assuming, having knocked the ampoules, the natural inference is that the nurse would look to see if they were cracked. This is what every normal person who has dropped or knocked something does. Is it broken ? As the learned judge has found there was no visible crack and the nursing staff had no reason to foresee invisible cracks, the nurse would reasonably assume no harm had been done and would let the ampoule go forward. The duty which the nursing staff owed to the plaintiffs was to take reasonable care to see that cracked or faulty ampoules did not reach the operating theatre. That duty would not, in my opinion, be broken in the circumstances and on the assumption as set out above. For these reasons I would dismiss the appeal.

DENNING, L.J.: No one can be unmoved by the disaster which has befallen these two unfortunate men. They were both working men before they went into the Chesterfield Hospital in October, 1947. Both were insured contributors to the hospital, paying a small sum each week, in return for which they were entitled to be admitted for treatment when they were ill. Each of them was operated on in the hospital for a minor trouble, one for something wrong with a cartilage in his knee, the other for a hydrocele. The operations were both on the same day, Oct. 13, 1947. Each of them was given a spinal anaesthetic by a visiting anaesthetist, Dr. Graham. Each of them has in consequence been paralysed from the waist down.

The judge has said that those facts do not speak for themselves, but I think they do. They certainly call for an explanation. Each of these plaintiffs is entitled to say to the hospital: " While I was in your hands something has been done to me which has wrecked my life. Please explain how it has come to pass."

The reason why the judge took a different view was because he thought that the hospital authorities could disclaim responsibility for the anaesthetist, Dr. Graham: and, as it might be his fault and not theirs, the hospital authorities were not called on to give an explanation. I think that reasoning is wrong. In the first place, I think that the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants or anaesthetists selected and employed by the patient himself. I went into the matter with some care in *Cassidy's* case (2) and I adhere to all I there said. In the second place, I do not think that the hospital authorities and Dr. Graham can both avoid giving an explanation by the simple expedient of each throwing responsibility on the other. If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation: see *Baker* v. *Market Harborough Industrial Co-operative Society* (5).

I approach this case, therefore, on the footing that the hospital authorities and Dr. Graham were called on to give an explanation of what has happened. But I think they have done so. They have spared no trouble or expense to seek out the cause of the disaster. The greatest specialists in the land were called to give evidence. [HIS LORDSHIP then stated the facts as found by the learned judge and continued:] That is the explanation of the disaster, and the question is: Were any of the staff negligent? I pause to say that once the accident is explained, no question of res ipsa loquitur arises. The only question is whether on the facts as now ascertained anyone was negligent. Leading counsel for the plaintiffs said that the staff were negligent in two respects: (i) in not colouring the phenol with a deep dye; (ii) in cracking the ampoules.

I will take them in order: (i) The deep tinting. If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would, no doubt, have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here. Dr. Graham sought to escape the danger of infection by disinfecting the ampoule. In escaping that known danger he, unfortunately, ran into another danger. He did not know that there could be undetectable cracks, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles. The judge acquitted Dr. Graham of negligence and we should uphold his decision. (ii) The cracks. In cracking the ampoules, there must, I fear, have been some carelessness by someone in the hospital. The ampoules were quite strong and the sisters said that they should not get cracked if proper care was used in handling them. They must have been jolted in some way by someone. This raises an interesting point of law. This carelessness was, in a sense, one of the causes of the disaster; but the person who jolted the ampoule cannot possibly have foreseen what dire consequences would follow. There were so many intervening opportunities of

inspection that she might reasonably think that, if the jolting caused a crack, it would be discovered long before any harm came of it. As SOMERVELL, L.J., has pointed out, she herself would probably examine the ampoule for a crack, and seeing none, would return it to the jar. The anaesthetist himself did, in fact, examine it for cracks, and, finding none, used it. The trouble was that nobody realised that there might be a crack which you could not detect on ordinary examination. What, then, is the legal position ?

It may be said that, by reason of the decision of this court in *Re Polemis & Furness, Withy & Co.* (6), the hospital authorities are liable for all the consequences of the initial carelessness of the nurse, even though the consequences could not reasonably have been foreseen. But the decision in *Re Polemis* (6) is of very limited application. The reason is because there are two preliminary questions to be answered before it can come into play. The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see *Hay (or Bourhill)* v. *Young* (7) and *Woods* v. *Duncan* (8) ([1946] A.C. 426, per LORD RUSSELL OF KILLOWEN, and ibid., 437 per LORD PORTER). The second question is whether the neglect of duty was a " cause " of the injury in the proper sense of that term; and causation, as well as duty, often depends on what you should foresee. The chain of causation is broken when there is an intervening action which you could not reasonably be expected to foresee: see *Woods* v. *Duncan* (8), ibid., 421, per VISCOUNT SIMON; ibid., 431, per LORD MACMILLAN; ibid., 442, per LORD SIMONDS. It is even broken when there is an intervening omission which you could not reasonably expect. For instance, in cases based on *M'Alister (or Donoghue)* v. *Stevenson* (9), a manufacturer is not liable if he might reasonably contemplate that an intermediate examination would probably be made. It is only when those two preliminary questions—duty and causation—are answered in favour of the plaintiff that the third question, remoteness of damage, comes into play. Even then your ability to foresee the consequences may be vital. It is decisive where there is intervening conduct by other persons: see *Stansbie* v. *Troman* (10); *Lewis* v. *Carmarthenshire County Council* (11). It is only disregarded when the negligence is the immediate or precipitating cause of the damage, as in *Re Polemis* (6) and *Thorogood* v. *Van Den Berghs & Jurgens, Ltd.* (12). In all these cases you will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same question which is this: Is the consequence fairly to be regarded as within the risk created by the negligence ? If so, the negligent person is liable for it: but otherwise not. Even when the three questions are taken singly, they can only be determined by applying common sense to the facts of each particular case: see as to duty, *King* v. *Phillips* (13) ([1953] 1 All E.R. 620, 624); as to causation, *Stapley* v. *Gypsum Mines, Ltd.* (14), and as to remoteness, *Liesbosch, Dredger* v. *Edison S.S.* (15) ([1933] A.C. 460, per LORD WRIGHT). Instead of asking three questions, I should have thought in many cases it would be simpler and better to ask the one question: Is the consequence within the risk ? and to answer it by applying ordinary plain common sense. That is the way in which SINGLETON and HODSON, L.JJ., approached a difficult problem in *Jones* v. *Livox Quarries, Ltd.* (16) ([1952] 2 Q.B. 613, 618), and I should like to approach this problem in the same way.

Asking myself, therefore, what was the risk involved in careless handling of the ampoules, I answer by saying that there was such a probability of intervening examination as to limit the risk. The only consequence which could reasonably be anticipated was the loss of a quantity of Nupercaine, but not the paralysis of a patient. The hospital authorities are, therefore, not liable for it. When you stop to think of what happened in this case, you will realise that it was a most

extraordinary chapter of accidents. In some way the ampoules must have received a jolt, perhaps while a nurse was putting them into the jar or while a trolley was being moved along. The jolt cannot have been very severe. It was not severe enough to break any of the ampoules or even to crack them so far as anyone could see. But it was just enough to produce an invisible crack. The crack was of a kind which no one in any experiment has been able to reproduce again. It was too fine to be seen, but it was enough to let in sufficient phenol to corrode the nerves, whilst still leaving enough Nupercaine to anaesthetise the patient. And this very exceptional crack occurred, not in one ampoule only, but in two ampoules used on the self-same day in two successive operations; and none of the other ampoules was damaged at all. This has taught the doctors to be on their guard against invisible cracks. Never again, it is to be hoped, will such a thing happen. After this accident a leading text-book, Professor MACINTOSH ON LUMBAR PUNCTURE AND SPINAL ANAESTHESIA, was published in 1951 which contains the significant warning:

> "Never place ampoules of local anaesthetic solution in alcohol or spirit. This common practice is probably responsible for some of the cases of permanent paralysis reported after spinal analgesia."

If the hospitals were to continue the practice after this warning, they could not complain if they were found guilty of negligence. But the warning had not been given at the time of this accident. Indeed, it was the extraordinary accident to these two men which first disclosed the danger. Nowadays it would be negligence not to realise the danger, but it was not then.

One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure. I agree with my Lord that these appeals should be dismissed.

MORRIS, L.J., stated the facts and continued: The evidence adduced at the hearing showed that it was only in very rare cases that any untoward consequence followed on spinal anaesthetic injection. In the nature of things the plaintiffs could not know, nor be expected to know, exactly what took place in preparation for and during their operations. When they proved all that they were in a position to prove they then said: "res ipsa loquitur". But this convenient and succinct formula possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying: "I submit that the facts and circumstances that I have proved establish a prima facie case of negligence against the defendant." It must depend on all the individual facts and the circumstances of the particular case whether this is so. There are certain happenings that do not normally occur in the absence of negligence and on proof of these a court will probably hold that there is a case to answer. (For a valuable discussion of this topic see an article by Dr. ELLIS LEWIS: 1951, 11 CAMBRIDGE LAW JOURNAL, p. 74). Where there are two or more defendants it may be that the facts proved by a plaintiff are such as to establish a prima facie case against each defendant. Thus, in *Mahon* v. *Osborne* (3), MACKINNON, L.J., said ([1939] 1 All E.R. 553):

> "Five persons were concerned in the operation on Mar. 4—Mr. Osborne, the surgeon, the anaesthetist, Nurse Ashburner, as chief or theatre nurse, Nurse Edmunds, and Nurse Callaghan. The plaintiff, having no means of

knowing what happened in the theatre, was in the position of being able to rely on the maxim res ipsa loquitur so as to say that some one or more of these five must have been negligent, since the swab was beyond question left in the abdomen of the deceased. In fact, she sued Mr. Osborne, the surgeon, and Miss Ashburner, the chief nurse. One or other of them, or perhaps both, must have been negligent, but it was for the plaintiff to establish her case against either or both."

Difficulties may arise, however, if a plaintiff only proves facts from which the inference is that there may have been negligence either in defendant A. or in defendant B. So, in the present case it was said that unless Dr. Graham was the servant or agent of the hospital the position at the close of the plaintiffs' cases was that if a prima facie case of negligence was established it was merely a case that pointed uncertainly against either Dr. Graham or the hospital. I do not think that it is necessary to consider whether, if Dr. Graham was not the servant or agent of the hospital and if no evidence at all had been called on behalf of the defendants, it could have been asserted that a prima facie case was made out both against Dr. Graham and against the hospital, for I have come to the conclusion that Dr. Graham was the servant or agent of the hospital.

In *Gold* v. *Essex County Council* (1) LORD GREENE, M.R., pointed out ([1942] 2 All E.R. 242) that in cases of this nature the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. He added (ibid.):

> " Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf; and this is equally true whether or not the obligation involves the use of skill."

In the present cases the learned judge held that both plaintiffs were contributors for hospital and surgical treatment under a contributory scheme run by the hospital, so that they made some contributions which were received by the hospital for their treatment. The exact details of the scheme which the hospital had run were not before us and they might not have added materially to the facts proved. While the requisite standard of care does not vary according to whether treatment is gratuitous or on payment the existence of arrangements entitling the plaintiffs to expect certain treatment might be a relevant factor when considering the extent of the obligation assumed by the hospital. In his judgment in *Gold* v. *Essex County Council* (1) LORD GREENE, M.R., analysed the position of the various persons in the " organisation " of the hospital to which the plaintiff in that case resorted for free advice and treatment. He said (ibid.):

> " The position of the nurses again . . . if the nature of their employment, both as to its terms and as to the work performed, is what it usually is in such institutions, I cannot myself see any sufficient ground for saying that the respondents do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse."

This passage conveniently demonstrates a contrast. A hospital might assume the obligation of nursing: it might, on the other hand, merely assume the obligation of providing a skilful nurse. But the question as to what obligation a hospital has assumed becomes, as it seems to me, ultimately a question of fact to be decided having regard to the particular circumstances of each particular case: the ascertainment of the fact may require in some cases inference or deduction from proved or known facts. In the present case we are concerned only with the position of Dr. Graham in 1947 in this voluntary hospital.

The general position in regard to nurses would appear to be reasonably uniform and clear. In the case cited above LORD GREENE, M.R., said (ibid., 243):

" Nursing, it appears to me, is just what the patient is entitled to expect

from the institution and the relationship of the nurses to the institution supports the inference that they are engaged to nurse the patients. In the case of a nursing home conducted for profit, a patient would be surprised to be told that the home does not undertake to nurse him. In the case of a voluntary hospital with the usual nursing staff his just expectation would surely be the same. The idea that in the case of a voluntary hospital the only obligation which the hospital undertakes to perform by its nursing staff is, not the essential work of nursing but only so-called administrative work appears to me, with all respect to those who have thought otherwise, not merely unworkable in practice but contrary to the plain sense of the position."

On the principles so clearly enunciated the court in that case held that the hospital had assumed the obligation of treating a patient who sought treatment by Grenz rays and of giving the treatment by the hand of a competent radiographer. That was the natural and reasonable inference to be drawn from the way in which those running the hospital conducted their affairs and from the nature of the engagement of the radiographer.

If a patient in 1947 entered a voluntary hospital for an operation it might be that if the operation was to be performed by a visiting surgeon the hospital would not undertake so far as concerned the actual surgery itself to do more than to make the necessary arrangements to secure the services of a skilled and competent surgeon. The facts and features of each particular case would require investigation. But a hospital might in any event have undertaken to provide all the necessary facilities and equipment for the operation and the obligation of nursing and also the obligation of anaesthetising a patient for his operation. The question in the present case is whether the hospital undertook these obligations. In my judgment, they did. There can be no doubt that they undertook to nurse the plaintiffs and to provide the necessary facilities and equipment for the operations. I think they further undertook to anaesthetise the plaintiffs. The arrangements made between the hospital and Dr. Pooler and Dr. Graham, together with the arrangements by which a resident anaesthetist was employed, had the result that the hospital provided a constantly available anaesthetic service to cover all types of cases. It is true that Dr. Pooler and Dr. Graham could arrange between themselves as to when they would respectively be on duty at the hospital, and each was free to do private work. But these facts do not negative the view, to which all the circumstances point, that the hospital was assuming the obligation of anaesthetising the plaintiffs for their operations. I consider that the anaesthetists were members of the "organisation" of the hospital: they were members of the staff engaged by the hospital to do what the hospital itself was undertaking to do. The work which Dr. Graham was employed by the hospital to do was work of a highly skilled and specialised nature, but this fact does not avoid the application of the rule of "respondeat superior". If Dr. Graham was negligent in doing his work I consider that the hospital would be just as responsible as were the defendants in *Gold* v. *Essex County Council* (1) for the negligence of the radiographer or as were the defendants in *Cassidy* v. *Ministry of Health* (2). I have approached the present case, therefore, on the basis that the defendants would be liable if the plaintiffs' injuries were caused by the negligence either of Dr. Graham or by the negligence of someone on the staff who was concerned with the operation or the preparation for it. On this basis if negligence could be established against one or more of those for whom the hospital was responsible it would not matter if the plaintiffs could not point to the exact person or persons who had been negligent.

It was not suggested that Dr. Graham was negligent in using Nupercaine, nor that there was anything faulty in the manner of his injection. But it was said that the evidence pointed to the fact that the quantity of phenol which must

have found its way into the Nupercaine had passed through cracks of dimensions which would not have eluded a careful examiner. This view depended in part on an estimate as to the percentage of phenol admixture which would be damaging and in part on evidence as to the results of experiments to ascertain the rate at which phenol might percolate through cracks. But it seems unlikely that Dr. Graham in two successive operations would fail to detect cracks which could be observed or felt. The learned judge, having seen and heard Dr. Graham, whose evidence he said was given " in a very careful and forthright manner ", rejected the suggestion that Dr. Graham had failed to detect cracks which could have been seen. I do not think that this finding can be disturbed and, accordingly, the matter must be considered on the footing that phenol had found its way into the ampoules through cracks not ordinarily detectable. On this basis it is clear that if the phenol solution had been tinted with some vivid colouring any escape of the solution into the ampoules would have been readily apparent. This was at all times frankly conceded by leading counsel for Dr. Graham. The question arises whether Dr. Graham was negligent in not arranging for the deep-tinting of the phenol solution. The phenol solution as used in the hospital was in fact coloured although not vividly. This colouring was part of the routine adopted in the hospital to denote and to identify phenol. It was Dr. Pooler who first introduced in the hospital the system of immersing the ampoules in phenol solution. Dr. Graham considered the matter for some time before he followed the lead given him by his senior and more experienced colleague on whose opinion he greatly relied. When Dr. Graham adopted the new method he realised full well, as he unhesitatingly admitted, that if a glass ampoule became cracked there could be resultant percolation of phenol solution which would be a " terribly serious danger ". It was for that reason that he felt it necessary after changing over to the new method to examine carefully for cracks. But Dr. Graham was most emphatic in his evidence that in 1947 he had no knowledge at all that there might be in an ampoule some kind of a crack which was not visible but which yet permitted percolation. He firmly believed that there was no danger provided that there was no crack that could be seen on proper inspection: he never conceived the idea of a crack that he could not see. I read his evidence when taken in its entirety as showing that he was not relying on seeing some discoloration as a warning that there had been percolation, but that he was convinced that danger could only arise if there was a crack that could be seen and that such danger could be fully averted by careful inspection. It is now known that there could be cracks not ordinarily detectable. But care has to be exercised to ensure that conduct in 1947 is only judged in the light of knowledge which then was or ought reasonably to have been possessed. In this connection the then-existing state of medical literature must be had in mind. The question arises whether Dr. Graham was negligent in not adopting some different technique. I cannot think that he was. I think that a consideration of the evidence in the case negatives the view that Dr. Graham was negligent and I see no reason to differ from the conclusions which were reached on this part of the case by the learned judge.

A B C D E F G

But it is further said that there must have been negligent mishandling of the ampoules on the part of some member or members of the staff of the hospital. On behalf of the plaintiffs it was urged that the ampoules must have arrived intact and in good order at the hospital and must have been carelessly handled at a later stage when they were being made ready and available for operative use. There was much evidence which supported the contention that ampoules could only have been damaged if they were mishandled. Even so, it is problematical as to when and where and in what circumstances these two ampoules became damaged. But as the case now stands an acceptance of the finding of fact of the learned judge that Dr. Graham carefully examined the ampoules used and that there were no cracks which would by such examination have

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been revealed involves that the offending cracks were not d ectable ones. If the view is correct that an anaesthetist in 1947 was not negli nt in not knowing of the risk of seepage through what have been called " invisible cracks " it follows, I think, that members of the theatre staff could not be expected to know of any such risk. In his speech in *Bolton* v. *Stone* (17) LORD PORTER said ([1951] 1 All E.R. 1081):

A " It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence."

If some member of the staff had in fact mishandled the ampoules in question, then the position was either that the damage was not seen after an actual inspec-
B tion or that an inspection would have been unavailing: since no detectable damage to them was caused there was no reason to foresee that there was any risk in leaving such ampoules amongst those from which an anaesthetist would select and no reason to contemplate that any injury would be likely to follow. Although there must be abiding sympathy with the two plaintiffs in their grievous and distressing misfortunes, I consider that the judgment of the learned judge was
C correct.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the plaintiffs); *Berrymans* (for the first defendant, the Ministry of Health); *Hempsons* (for the second defendant, Dr. Graham); *Swepstones* (for the third defendants).

D [*Reported by* MISS PHILIPPA PRICE, *Barrister-at-Law.*]

GALLOWAY *v.* GALLOWAY.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 8, 29, 30, April 13, 1954.]

E *Divorce—Custody—Child born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 26 (1).

Infant—Maintenance—Infant born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (*c.* 25), *s.* 26 (1).

Per JENKINS and HODSON, L.JJ., SINGLETON, L.J., dissentiente: The term " children " in s. 26 (1) of the Matrimonial Causes Act, 1950, does not
F include a child born out of wedlock in circumstances which prevent the child being legitimated by the subsequent marriage of the parents under the provisions of the Legitimacy Act, 1926, and, therefore, on the dissolution of the parents' marriage, no order for the custody or maintenance of the child can be made.

Harrison v. *Harrison* ([1951] 2 All E.R. 346) and decision of MORRIS, L.J.,
G in *Packer* v. *Packer* ([1953] 2 All E.R. 127), approved.

Decision of DENNING, L.J., in *Packer* v. *Packer* (ibid.), not approved.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 26 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 413.

Cases referred to:

H (1) *Harrison* v. *Harrison*, [1951] 2 All E.R. 346; [1951] P. 476; 115 J.P. 428; 27 Digest, Replacement, 664, *6289*.

(2) *R.* v. *Totley (Inhabitants)*, (184), 7 Q.B. 596; 14 L.J.M.C. 138; 5 L.T.O.S. 196; 9 J.P. 583; 115 E. R. 614; 28 Digest 139, *3*.

(3) *Woolwich Union* v. *Fulham Parish Union*, [1906] 2 K.B. 240; 75 L.J.K.B. 675; 95 L.T. 337; *affd.* H.L., sub nom. *Fulham Parish* v. *Woolwich Union*, [1907] A.C. 255; 76 L.J.K.B. 739; 97 L.T. 117; 71 J.P. 361; 37 Digest 255, *503*.

2000 WL 1445011 (Ont. S.C.J.), 2000 CarswellOnt 4990, [2000] O.J. No. 5029

2000 CarswellOnt 4990

R. v. Murie

Her Majesty The Queen and Susan Murie

Ontario Superior Court of Justice

Browne J.

Heard: November 13, 2000
Judgment: December 12, 2000
Docket: None given.

Proceedings: additional reasons at (December 12, 2000), No docket given. (Ont. S.C.J.); additional reasons at (December 19, 2000), No docket given. (Ont. S.C.J.)

Counsel: *Marie Potter*, for Crown

Anil Kapoor and *Ava Arbuck*, for Accused, Susan Murie

Subject: Criminal

Criminal law --- Offences against the person and reputation -- Manslaughter -- Sentencing -- Adult offenders -- Principles

Mother who suffered ongoing post-partum depression killed her two-year-old child by asphyxiation -- Mother spent three years in psychiatric hospital prior to entering plea of guilty to manslaughter -- Mother sentenced to time served plus two years conditional -- Rehabilitation was primary goal when crime resulted from mental illness -- Cases concerning sentencing for infanticide, setting five-year sentence as guideline, were useful although not directly analogous -- Appropriate sentence, absent time served, would be six years -- Not appropriate to give two-for-one credit for time served since conditions of pre-trial detention were not as harsh as they often are -- Mother was entitled to four years' credit for three years' "dead-time" -- Mother had benefited from her detention in hospital, and incarceration in prison setting would hinder, rather than advance, rehabilitation already attained -- Immediate release into community with probation would not be adequate sanction, given gravity of crime -- Conditional sentence appropriate because mother had low risk of re-offending and did not pose risk to community -- Stringent conditions, amounting to house arrest under close supervision, were appropriate because of high risk of relapse into depression -- Guilty plea was significant mitigating factor.

Cases considered by *Browne J.*:

R. v. Brake, 2000 NFCA 37, 190 Nfld. & P.E.I.R. 201, 576 A.P.R. 201 (Nfld. C.A.) -- referred to

R. v. Charlette (1993), 88 Man. R. (2d) 13, 51 W.A.C. 13 (Man. C.A.) -- referred to

R. v. Drudge (1988), 25 O.A.C. 312 (Ont. C.A.) -- referred to

R. v. Dykstra (January 15, 1991), Doc. CA012628 (B.C. C.A.) -- referred to

R. v. Fell (1990), 40 O.A.C. 139 (Ont. C.A.) -- referred to

R. v. Grimmer (1999), 219 N.B.R. (2d) 150, 561 A.P.R. 150 (N.B. Q.B.) -- considered

R. v. Harris (1993), 88 Man. R. (2d) 157, 51 W.A.C. 157 (Man. C.A.) -- referred to

R. v. Irving (December 19, 1990), Doc. CA012494 (B.C. C.A.) -- referred to

R. v. Johnson (November 27, 1995), Moldaver J. (Ont. Gen. Div.) -- considered

R. v. Laberge (May 3, 1995), Doc. Edmonton Appeal 9403-0125-A (Alta. C.A.) -- referred to

R. v. Lavoie (1987), 78 A.R. 327 (Alta. C.A.) -- referred to

R. v. M. (C.A.), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500 (S.C.C.) -- considered

R. v. P. (A.P.) (August 5, 1992), Vaillancourt Prov. J. (Ont. Prov. Div.) -- referred to

R. v. Peters (October 10, 1995), Doc. London 3456 (Ont. Gen. Div.) -- considered

R. v. Proulx, [2000] 4 W.W.R. 21, 2000 SCC 5, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) -- referred to

R. v. Sinclair (1997), 118 Man. R. (2d) 249, 149 W.A.C. 249, 10 C.R. (5th) 316, [1998] 2 W.W.R. 228 (Man. C.A.) -- referred to

R. v. Smith (May 29, 1986), Doc. Vancouver CA005176 (B.C. C.A.) -- referred to

R. v. Sriskantharajah (1994), 90 C.C.C. (3d) 559, 72 O.A.C. 170 (Ont. C.A.) -- referred to

R. v. Szola (1977), 33 C.C.C. (2d) 572 (Ont. C.A.) -- referred to

R. v. Turner (1997), 185 N.B.R. (2d) 190, 472 A.P.R. 190 (N.B. C.A.) -- referred to

R. v. Valiquette (1990), 78 C.R. (3d) 368, 37 Q.A.C. 8, 60 C.C.C. (3d) 325 (Que. C.A.) -- considered

R. v. Vaudreuil (1995), 98 C.C.C. (3d) 316, 59 B.C.A.C. 71, 98 W.A.C. 71 (B.C. C.A.) -- considered

R. v. W. (D.E.) (February 21, 1995), Doc. London 3015 (Ont. Gen. Div.) -- considered

R. v. W. (L.W.), 2000 SCC 18, 143 C.C.C. (3d) 129, 32 C.R. (5th) 58, 184 D.L.R. (4th) 385, 252 N.R. 332, [2000] 1 S.C.R. 455, 134 B.C.A.C. 236, 219 W.A.C. 236 (S.C.C.) -- considered

R. v. Watt (1988), 27 O.A.C. 238 (Ont. C.A.) -- referred to

R. v. Won (November 9, 1993), Moldaver J. (Ont. Gen. Div.) -- referred to

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 100 [am. R.S.C. 1985, c. 11 (1st Supp.), s. 2 (Sched., item 1(2)); am. R.S.C. 1985, c. 27 (1st Supp.), s. 14; am. R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 6(4), (5)); am. 1990, c. 16, s. 2; am. 1990, c. 17, s. 8; am. 1991, c. 40, s. 12; am. 1992, c. 51, s. 33; am. 1993, c. 28, s. 78 (Sched. III, item 27); am. 1995, c. 22, s. 10 (Sched. I, items 6, 7)] -- considered

s. 233 -- referred to

s. 718 [rep. & sub. 1995, c. 22, s. 6] -- referred to

s. 742.1 [rep. & sub. 1995, c. 22, s. 6; am. 1997, c. 18, s. 107.1] -- referred to

s. 742.1(b) [rep. & sub. 1997, c. 18, s. 107.1] -- referred to

s. 742.2 [en. 1995, c. 22, s. 6] -- referred to

s. 742.3(1) [en. 1995, c. 22, s. 6] -- referred to

Regulations considered:

Mental Health Act, R.S.O. 1990, c. M.7

Application of Act, R.R.O. 1990, Reg. 741

Form 3

SENTENCING of accused on conviction for manslaughter.

***Browne J.*:**

Reasons on Sentencing

1 Further to an indictment dated February 24, 1999, Susan Murie has been before the court charged that she committed second degree murder December 16, 1997, the victim being her daughter who was at the time of her death just short of two years of age.

2 Murie was arrested December 16, 1997 and has not been at liberty since that date, most of the time when she has been without liberty being spent in the St. Thomas Psychiatric Hospital, in particular, she has been in the St. Thomas Psychiatric Hospital from December 31, 1997 to date.

3 She was originally charged with first degree murder. For reasons dated February 10, 1998 given following a preliminary

inquiry, Murie was ordered to stand trial, not for first degree murder but on a charge of second degree murder. Subsequently, the Crown sought to obtain an order by way of certiorari committing Murie for trial on a charge of first degree murder, that application was dismissed December 15, 1999.

4 Murie has retained different counsel and terminated retainers on a voluntary basis except recently where a retainer ended involuntarily. The matter was scheduled for trial September 11, 2000, unfortunately her counsel of choice was tragically killed in a motor vehicle accident before that trial date which necessitated the retention of a new counsel and the rescheduling of the trial commencement date to October 30, 2000.

5 On October 30, 2000 before jury selection there was a re-election and a plea of guilty to manslaughter. An agreed Statement of Facts was presented and accepted with a conviction being registered.

6 Arguments were made in the context of a sentencing hearing November 13, 2000. The material before the court on that date included the agreed Statement of Facts, sentencing material including a "background of Susan Murie and current prognosis", the material being of assistance in lieu of a pre-sentence report or the calling of witnesses. At the request of Mr. Williams, the father of the child, the Crown read his Victim Impact Statement.

7 On September 26, 2000 there was a bail review hearing which was not successful, the result being that Murie was remanded to the psychiatric hospital pending trial approximately five weeks later. The evidence on the bail hearing included an affidavit of Dr. Paul Max and his examination and cross-examination. That material was before me in the sentencing hearing.

8 In accepting the plea and in the context of the facts presented, I was advised that there was no question of the fitness of Murie to stand trial. I was advised further that there was no defence of a mental disorder available. Expressed differently, the presumption in s. 16 that every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility was not in question or in issue. The registration of the conviction was on the basis of an unlawful act manslaughter involving diminished capacity.

9 The Crown is unable to find any record. The background materials set out that Murie was charged and convicted of impaired driving. The year was 1992, incorrectly described as 1990 in the background paper. This acknowledged record is dated and of no assistance or weight in the sentencing considerations.

10 In a nutshell, the defence position is that sentence should be time served. It is argued that conclusion is arrived at on the basis of Murie having been without liberty for three years and she should receive a two for one credit or the equivalent of six years. From this it appears to be argued six years is an appropriate sentence. The result in the requested disposition of a sentence of time served coupled with the position that there be the equivalent of a six year credit, is also founded upon the position that rehabilitation is complete without further supervisory requirement.

11 The Crown's position put briefly is that time spent in hospital is not sufficient; that there should be further custodial time served in the penitentiary with a prohibition under s. 100 and the requirement that a DNA sample be furnished. When pressed by myself the Crown indicated that the penitentiary time should be in the range of eight to ten years less credit for time served. When further pressed as to the credit to be given, the Crown's position was that credit should be on the basis of more than one for one but less than two for one, the rationale being that the real time served was not the usual custodial time as it has been time spent in hospital not a penal institution.

12 I am grateful to counsel for their assistance in furnishing, in support of their arguments, case briefs. All of the cases have been considered but not necessarily referred to in the reasons to follow. I will attach as an appendix to these reasons, a listing of the cases which have been considered even if not specifically referred to.

13 I am going to reproduce the agreed Statement of Facts in full. As I understood it, part of the reply argument advanced by defence counsel was that I should infer from the agreed facts that Murie had attempted suicide December 16, 1997. In my

exchange with counsel, I indicated I was not comfortable with making that kind of an inferential conclusion when there was an agreed statement of facts which on my interpretation falls short of agreement that there was a suicide attempt. It is clear that on December 16, 1997 Susan Murie overdosed on prescription drugs and that can be described as self-injury. Frankly, I don't think anything turns on whether I infer that self-injury went so far as to be a suicide attempt or not but for greater certainty, as indicated, I reproduce the entirety of the agreed Statement of Facts. I do not infer that the overdose of December 16, 1997 was a suicide attempt.

Statement of Facts

1. In 1997, Susan Murie, her common-law spouse, Victor Williams, and their daughter Destiny Williams (D.O.B. Dec. 30, 1995) were residing at 17 Marmora Drive in London.

2. Victor Williams stated that he and Susan Murie had lived in a common law relationship for approximately six years.

3. Susan had an operation for a deviated septum on October 10th, 1996. Destiny was nine months old at that time. Victor Williams and Cheryl Riehl, Susan's sister, both described a significant change in Susan's behaviour from that time on. They described Susan as becoming increasingly anxious and depressed, suffering from anxiety attacks along with a number of concerns about her physical well-being, including heart problems and bones growing in her mouth. Prior to October 1996, Susan was on maternity leave from work. From October 1996 on, Susan has been on disability and has not returned to work.

4. Following the birth of Destiny in December 1995 and up to Destiny's death on December 16th, 1997, Susan of her own volition attended the Emergency Department 22 times. Initially, she presented with difficulties breathing, which was later diagnosed as anxiety. Her operation for a deviated septum occurred in October 1996 (out-patient surgery). Following that operation, Susan was admitted to hospital as a psychiatric patient six times:

Date:	Hospital	Diagnosis
December 6-18th, 1996	Stratford General Hospital	Atypical depression with significant anxiety and obsessive features, suicidal thoughts, inability to function at home.
February 18-20th, 1997	Startford General Hospital	Same diagnosis as above.
March 24-April 4th, 1997	St. Mary's Hospital	Depression and anxiety
June 2-13th, 1997	London Health Sciences Centre	Chronic depression, postpartum with anxiety disorder - unipolar depression with secondary anxiety disorder

July 2-18th, 1997	London Health Sciences Centre	Depression, anxiety, and suicidal ideation
November 21-December 16, 1997	London Health Sciences Centre	Depression following a suicide attempt by ingestion of prescribed medication

On two of her other visits she asked to be admitted (March 9ht, 1997 and September 9th, 1997), but wasn't diagnosed with any acute problems warranting admission at the time.

5. Victor Williams testified that throughout this time period, Susan would be better for a while, and then be back to the depression and anxiety.

6. On November 4th, 1997 Susan attended at University Hospital in London as a result of a suicide attempt some three days prior (she had ingested approximately 70 pills from medications previously prescribed to her). Dr. McCrank placed Susan for admittance for the first available bed. She was admitted as a psychiatric in-patient on November 21st, 1997 by Dr. McCrank because of her long and complicated history. Susan remained an in-patient up until Destiny's death.

7. Victor Williams recalled that around October 8, 1997, the gas exhaust vents leading from the hot water heater and the furnace from the house were plugged. An employee of the Union Gas Co. testified at the preliminary inquiry that there was a garbage bag sticking out of the vent. There was no police investigation of the incident.

8. In December of 1997, Victor Williams described an incident where the smoke alarm in their house was activated at 4:30 a.m. When he got up, Susan was already downstairs. She stated she took an oven mitt off the stove which had been smoldering. Victor Williams thought he might have had actually set the mitt on fire himself or that someone might have come in through the back door from the rooming house and put the mitt on the burner, as he had left the doors open while hanging Christmas lights that evening.

9. Victor Williams testified that it was not unusual for Susan to bathe with Destiny. Approximately two months before Destiny's death, she became reluctant to get into the bathtub. He did not attach any significance to this at the time.

10. On December 15th, 1997, Susan had not returned to the hospital from her weekend pass. Victor Williams returned home early at about 2:30 p.m. When he entered the house, there was a strong odour of natural gas. The front door of the residence was locked.

11. Victor went down into the basement where he found that the gas line to the hot water heater had been cut. He could hear a "hissing noise" from upstairs. Susan claimed she could not smell the gas due to a cold, nor had she apparently heard the "hissing noise".

12. The City Police investigated. They found no evidence of forced entry nor any evidence of who cut the line. The officer recorded the incident as a break and enter after discussing Victor's concerns about the rooming house next door to their residence. Susan was not a suspect at that time in this matter.

13. A Union Gas supervisor who examined the cut gas line indicated he had never seen a cut gas line in his career. He also indicated there was a potential for an explosion.

14. On Tuesday December 16, 1997, Victor Williams left for work at approximately 7:00 a.m. He returned around 4:30 p.m. He did not see Susan or Destiny when he initially entered the home. Victor went to the upstairs bedroom he shared with Susan Murie and found Susan and Destiny on the bed. He thought they were sleeping.

15. Victor called out to Susan to wake her. (He was going to bring her back to University Hospital as she had been out on a weekend pass). After calling twice with no response, Victor shook Susan and she finally woke up. In his experience, Susan was easy to awaken, but on this day he had some difficulty, which was unusual. Susan was not responding appropriately to his questions and seemed confused, sort of different than normal.

16. He looked down at Destiny and observed her eyes were closed and her lips were blue, he did not notice any marks or anything unusual. Victor pulled the blankets off her and saw that she was not breathing. She was also not wearing any clothes.

17. Victor shook Susan again asked her what was going on. She responded that nothing was; she and Destiny had taken a bath and gone to bed.

18. Victor tried to revive Destiny but was not successful. He called 911. Ambulance, fire department and police representatives all arrived at 17 Marmora.

19. Efforts at the scene by the police, then the fire department, and finally the ambulance attendants to resuscitate Destiny were unsuccessful. The paramedics at the scene noted that Destiny was very pale, cool to the touch and that her legs and arms were beginning to stiffen. Mr. Prior, a fireman at the scene, looked down Destiny's throat and didn't see anything there that was out of place or unusual; he didn't see any marks on her body. Another fireman, Mr. Miliken, inserted an airway tube into Destiny's throat and started pushing air into her. Mr. Hopper, a paramedic at the scene, does not recall anything unusual about her face except that she was very pale and somewhat catatonic. The efforts at the scene by the police, firemen and paramedics included CPR, intubation of her airway, the insertion of an IV for medication, and the use of defibrillator pads. Destiny was transported to Children's Hospital where she was pronounced dead at 5:18 p.m.

20. The upstairs bedroom where Destiny was found was described as being messy. The bed was very wet and the bedroom window was open. Destiny was clean but some lipstick-type marks were noted on her body. A half empty beer bottle was beside the bed.

21. In the bathroom on the second floor, the bathtub was a half to two-thirds full of water. The toilet had toilet paper in it and there was an upside down photograph in the water in the toilet bowl. There were writings in a waxy type substance in the bathroom. Some of the writings were: "don't want to live in phyc?", "D? mask wants to kill fam", "save Des [illegible text]" "not suicide", "he had gun", "I not the nuts one". There were three empty beer bottles in the bathroom.

22. Two empty pill bottles were found. One was a prescription for Clonazepam. (Clonazepam is also known as Rivotril). The other was for Tylenol number 3.

23. The emergency personnel who attended 17 Marmora took note of Susan Murie during their time there. She was described as looking disheveled. She "sort of looked stoned". She was described as dazed, calm and somewhat incoherent, by various witnesses. One officer noted, "At some points she was fine, and other points where she would seem disoriented and she might stumble, but there was other points where she'd be walking perfectly fine". At times she gave appropriate answers to questions and at other times, she did not. Several times she went to sit in a chair and

almost fell. She appeared to be under the influence of some substance. There was no smell of alcohol on her breath. One officer stated it was almost as if she wasn't there.

24. Susan Murie was taken to Children's Hospital and then transferred to University Campus. Neurological testing was conducted and blood was drawn from her and screened. No neurological abnormalities were noted. She had toxic levels of Tylenol in her bloodstream. She also tested positive for the presence of benzodiazepines (Rivotril/Clonazepam are benzodiazepines).

25. When Ms. Murie was assessed by doctors at University Campus during the late evening of December 16, they found her to be drowsy but oriented, withdrawn and detached. She denied suicidal ideation and was co-operative. She admitted taking Rivotril and Tylenol, giving differing amounts of how many pills she had taken (at one point she had said 10 then 12; at another point 7, at another approximately 20, and at another 10-15). After consultation, the psychiatrists decided to hold Susan on a Form 3 under the *Mental Health Act* (Certificate of Involuntary admission) because they were concerned she might harm herself.

26. During the course of the investigation into Destiny's death, Susan Murie made utterances and responded to questions concerning what had happened. Initially she denied harming her daughter or wishing to harm her. She stated Destiny was the only thing that kept her going. She wanted her baby back and said she could not live without her. While at 17 Marmora, Susan informed her husband and later the paramedics that she and Destiny had taken a bath and fallen asleep. When she woke up, Destiny was unconscious.

27. When questioned by police, Susan recalled that Destiny was under water for a while. Destiny was on Susan's stomach with her face under water being held. Susan had the feeling Destiny was being choked. Susan acknowledged Destiny fought back. Some of the comments Susan made included that she was disappointed with herself, that she was a bad mother. Susan was asked whether anyone was around when Destiny was on her tummy, under the water, Susan responded, "No, nobody." She also stated that she was so depressed.

28. Susan gave the following account to her husband, sister and others: An intruder with a balaclava and a gun had entered the residence. He may have been a psychiatric patient she knew previously. He told Susan to take the pills. He ordered her into the bathtub and Destiny was given to her. The man held Destiny down, between Susan's legs, under the water. She recounted how she (Susan) was in and out of consciousness. She was in a fog. She thought that man would kill her. She has no recollection of how she and Destiny ended up in the bed.

29. She admitted to writing some of the words and phrases in the bathroom with make up.

30. Dr. Michael Shkrum performed the post-mortem examination of Destiny Williams on December 17th and 18th. Destiny appeared to have been in good health with no evidence of any serious disease process or fractures. There was no evidence of child abuse. On Destiny's face, specifically on the cheek, nose, lips and under the chin, she had blunt trauma injuries. Dr. Shkrum could not say what caused the injuries although they are consistent with the following: an obstruction to the nose and mouth such as a hand being placed over the nose and mouth, Destiny falling forward and hitting her face, and vigorous medical resuscitation attempts.

31. The cause of death was asphyxia. One form of asphyxia is termed mechanical asphyxia, which is smothering or suffocation, where there is an obstruction at the level of the nose and mouth. Another form of mechanical asphyxia would be drowning. In Dr. Shkrum's opinion, it is possible that Destiny Williams could have been smothered or drowned. He could not exclude the possibility that both or one of these occurred.

32. Colleen Brann was a registered nurse and a friend of Susan Murie. In February or March of 1996 or early 1997, Colleen loaned Susan a nursing textbook entitled "The Encyclopaedia and Dictionary of Medicine, Nursing and Allied Health". Colleen had never loaned this book before. Colleen had referred to this textbook as an expanded

medical dictionary explaining diseases, symptoms and drugs.

33. After Destiny Williams' funeral, Colleen Brann and Cheryl Riehl went to the Williams' residence and retrieved Ms. Brann's book. Cheryl Riehl then left the book for a number of months at her husband's residence. Eventually, Colleen retrieved the book. On or about August 7th, 1998 Colleen had occasion to refer to the text for research. She found that some pages were missing, some were folded and some pages were underlined.

34. Specifically, the topics of suicide, suffocation, forensic, morgue, acromegaly and child abuse were underlined. The suffocation section highlighted gas, carbon monoxide, drowning and poison.

35. Colleen Brann testified that the encyclopaedia was a very expensive text and that she never underlined or marked it. she also testified that when she loaned the book to Susan it was not underlined or ripped. Victor Williams had never seen Susan write in the dictionary, nor had any other person seen her do so.

36. Alex Duch, an identification officer with the City of London Police Department examined Colleen Brann's book. He tested the book for fingerprints, and found Susan's prints on two pages. On page 912, under the heading of "pain", he found the right index fingerprint of Susan. On page 909, under the heading of "pacemaker", he found a latent fingerprint belonging to Susan. He did not find Colleen's prints on any of the pages. He did find another fingerprint for which he did not have a known comparison. He also found a complete page ripped out of the book that the police later discovered referred to depression.

37. On December 16th, 1997, Susan Murie was arrested for the murder of Destiny Williams.

14 Murie's date of birth is April 22, 1960. She quit school at grade 10. She used drugs, including marijuana and cocaine at an earlier age but has not used illicit drugs since 1992. She has had various factory jobs, worked as a waitress and since 1992 or 1993 to October 1996 she worked at the Ford Plant at Talbotville, In October 1996 she underwent surgery for a deviated nasal septum. That operation was some form of negative catalyst and she has not worked since that time. We have Destiny's date of birth December 30, 1995. It is not clear on the material exactly when work stopped in the context of the pregnancy and birth, but it is clear that she was on some leave and/or disability leave at the time of the October 1996 surgery and did not return to work thereafter.

15 Dr. Paul Max was the psychiatrist treating Murie at the London Health Sciences Centre on two admissions, June 2-13 and July 2-18, 1997. The agreed diagnosis from the Statement of Facts is chronic depression, postpartum with anxiety disorder - unipolar depression with secondary anxiety disorder and depression, anxiety, and suicidal ideation.

16 In his oral evidence, Dr. Max responded with a reference to this particular time frame as follows: "My diagnosis of record was masked postpartum depression". When asked about medications prescribed during this time frame from the summer of 1997, Dr. Max responded as follows:

> Yes, she had been treated with medications before she came to my referral and I exposed her to some medications as well, which were primarily anti-depressants but also some anxiety-reducing agents. We tried a couple, she didn't like them, she had trouble tolerating them, she discontinued them and eventually discontinued me.

Expressed differently, Murie made the decision to discontinue using the particular prescribed medication and she fired her doctor.

17 Coincidentally, Dr. Max was hired in May 2000 by the St. Thomas Psychiatric Hospital to provide services in what is referred to as their Forensic Program taking over as part of the assignment the case load of a Dr. Jaychuk. Murie was included in that case load. Dr. Max had access to the hospital records and the records of the psychiatrist who preceded him. He testified that a Dr. Jaychuk had stopped drug therapy approximately one year previously (June 23, 1999). From the transcript of Dr. Max's examination in-chief there is the following:

Q. Now you indicate in paragraph six of your affidavit, sir, that it's your opinion that she can be safely released into the community. What is the foundation for that opinion, sir?

A. That's a clinical judgment and it emanates from a review of the records of the hospital and the psychiatrist who preceded me had agreed to stop his drug therapy a year before. So she had been in a state of improvement - I'm not sure I would call it recovery - but certainly stabilization and improvement to the extent that she requested that she not receive any more drug therapy and he acceded to that request. So he, I have to assume, felt that she was not at that point at a sufficient risk to object and to insist that she get treatment.

Q. What was the name of that doctor?

A. Dr. Jaychuk.

Q. Carry on, sorry.

A. So it was his view preceding my arrival that she no longer required that form of treatment and I respected his views. I concurred with that view and my reasons for concurring were that she no longer presented with the usual features of depression and hadn't for some time and those can be broken down into a disturbance of her mood, she didn't appear depressed, she didn't volunteer feeling depressed, she did not appear depressed. There were no behaviours which were typical of depressed mood. In addition she didn't have the usual, what we call, vegetative symptoms that go with significant depression and those are things like sleep disturbance, appetite disturbance, physical symptoms. Those were absent, so she appeared to be what we would call "in remission". And I've not seen any evidence since that time of any of those phenomena. There has been a transient upset stage that I encountered and observed when she had to deal with the death of her previous lawyer and that was a very traumatic event and she was upset at that time but it was transient and she responded to that. The other significant component of feeling that she could be released from hospital, there was one episode of self-injury in February of 1999, according to the records, and she took an excess number of self-prescribed over-the-counter pills. That was February of 1999. There has been no evidence of self-injury since that time. I don't believe there have been any threats of self-injury since that time, nor have there been any threats of injury to anyone else and that is physical injury.

Q. In paragraph seven, sir, of your affidavit -- page 17 of the record, Your Honour-- you indicate there that it's your opinion that Ms. Murie would be at greater risk if she were incarcerated at a penal institution. Can you explain that for His Honour?

A. She's currently in a medium secure facility and she functions effectively within that system. She's not happy about it but she can function within that system, and that system gives her a certain degree of freedom. The ward is a large ward. She can go off the ward accompanied for specific purposes. She can go on the grounds, accompanied for specific purposes. She can't go off the ward on her own. The population of the ward is a reasonably stabilized population. There's not too much ... well there's a great deal of supervision. A penal institution, on the other hand, I think would be much more confining, would be probably less tolerant in that its staff is penal institution staff as opposed to a mixture of security staff and health care staff and knowing her sensitivity, her vulnerability, I would think that she would find it very, very confining, very difficult and she has a history of becoming depressed under conditions where she's not in control and she has a history of self-injury that precedes the index offence as well. I think that the risk of those recurring are much greater than they would be in the community.

18 The episode of self-injury February 1999 is referred to by Dr. Max in cross-examination as follows:

Q. The one incident that you recalled for us of self-injury, did that happen before or after Dr. Jaychuk stopped treating her?

A. Before.

Q. Before.

A. Uh, it was before. That was February of 1999, I believe. Let me just validate that. I have a copy of a note of Dr. Jaychuk of June 23rd at which time she requested discontinuance of her drug therapy and he indicated he was prepared to do that. The overdose or the inappropriate use of an excess amount of unprescribed medication occurred on February 25th of 1999.

Q. Do you know as she was in the secure setting in the hospital at that time frame how it was that she had access to the non-prescribed medication?

A. It's my understanding that she got them in the mail from a family member. I'm not disputing that she should not have received it but she did.

Q. Do you know which family member or is that...

A. I don't have any knowledge of that.

Q. Do you know what the medication was?

A. No. I believe it was the equivalent of over-the-counter medication, one that anybody could buy.

Q. And do you know what quantity Ms. Murie took?

A. Well this is hearsay but I'll quote an excerpt from Dr. Jaychuk's note if you allow me to. She remembers she consumed approximately 95 "Awake" pills. That's capital "A" W-A-K-E. She states that she had her sister send the pills through the mail approximately three to four weeks earlier.

Q. I'm not familiar with Awake although I imagine I understand what they are supposed to do...

A. It's probably caffeine.

Q. Do you know whether taking too many Awake can result in death or irreparable damage to one's system?

A. I would suspect that with sufficient amounts it could, especially if they had some physical vulnerability. If it's caffeine, for instance, and it's a massive amount of caffeine that can affect heart function and that could be fatal in someone who was vulnerable but...

Q. But that did not happen on this occasion?

A. No, it did not.

Q. No reoccurrences of that since that time?

A. There's no documentation of any further self-injurious behaviour since that time.

19 Murie has not received active treatment since June 23, 1999.

20 Dr. Max expressed the opinion that she does not now need to be in hospital. The position he advanced on the bail review was that she should be released into the community. That position did not prevail on the bail review as she was remanded into custody. I do not know the reasons that were given on that bail review hearing. I just have an endorsement dealing with the result. Dr. Max would have released Murie from hospital in June 1999 but it is clear from the totality of his evidence that the release would be in a context of concern for where she would reside, with whom would she reside, and the kind of help and/or supervision which would be available.

21 The suggestion advanced was that she reside with her step-grandfather. Dr. Max testified as follows:

> Q. In your opinion what would be the type of accommodation that you would consider to be suitable for the community?
>
> A. Apart from the physical aspect, I mean she needs to be in a fairly, you know, in a home of some kind or accommodation, physical accommodation of some kind. I think that she needs to ... I think we all need to feel certain that there is someone there who will observe her and who will recognize that there's some obligations that go with being associated with her, namely, the obligations to supervise her wellbeing, to look for evidence of recurrence of her illness, to look for evidence of potential harm to others and who would feel responsible enough and honest enough to report even his granddaughter and I think anybody, regardless of family connection, I think would have to have that kind of an assignment before I would feel comfortable about supervision.
>
> Q. When you say "look for evidence" of a recurrence of her disorder, what would be the tell-tale signs that the person should look for?
>
> A. Should be observant of her moods, whether she appears happy or unhappy, should be aware and observant of her handling of anger, that she was able to control that, observant of the fact that she can become fairly anxious and to be able to observe that and that's not terribly difficult. I mean one can determine that from simply observing some looking from the voice, from body language, from impulsivity and to give her an opportunity to talk and to share whatever she was thinking and feeling, so that he could link that together. He should also be required to observe possible self-injury, so looking for excessive drowsiness, incoordination, slurred speech. Anything of that nature which might suggest the ingestion of some kind of substance.
>
> Q. In your view, does one require any special training to be able to discharge that task?
>
> A. I think he would require some pretty clear education. He would have to be directed, I think, as to what to observe. Beyond that education, I wouldn't think any more training than a family member would be exposed to.

22 Dr. Max was asked his opinion as a psychiatrist if Murie were in a penal institution what effect would there be upon her mental wellbeing. He responded that there would be a negative effect. Dr. Max was cross-examined as to whether Murie's clinical depression could predictably re-emerge. He responded with some statistics which were indicative of a substantial risk of recurrence. On re-examination, in dealing with the same subject matter, Dr. Max made a distinction between organic innate mental illness and indicated the percentages related to that kind of mental illness and he indicated that the mental illness of Murie was one of depression in response to life events or stresses. His evidence on re-examination was in support of a conclusion that she did not suffer from organic mood disorder indicating that "no one has called any of these episodes a recurrence, unipolar depression or a reoccurrence bipolar depression." That is at conflict with the Agreed Statement of Facts for the admission June 2-13, 1997 with the agreed diagnosis including unipolar depression with a secondary anxiety disorder. After indicating that the statistics that he gave applied to organic conditions, Dr. Max continued

> I'm basically not minimizing the potential for significant risk at some point, particularly when life events are important but I'm not stating it as a clear predictability of what is going to happen to her but I'm also not minimizing the fact that

> there is a significant risk and for some people it's that high in the absence of life events. And she tends to be reactive to life events, so there is a risk.

23 Notwithstanding that there has not been active treatment since June 1999, the stay at the St. Thomas Psychiatric Hospital has led to significant rehabilitation. That rehabilitation is not perfect (nor perhaps could it be), but it is significant. Having said that, there remains a significant risk there may be an end of remission and re-emergence of depression. There is a significant risk of relapse. The disposition made today must recognize the rehabilitation to date and the risk to that rehabilitation if incarceration is to follow even if that risk is only a possibility.

24 The Crown started out her submissions by the reality that this is a difficult case in which to determine a fit and just sentence. Murie took the life of her nearly two-year-old daughter. Destiny was entitled to the trust and protection that one would want from a loving and caring parent. A child of two years of age had no way to effectively resist, although Destiny did struggle or, in the words of the Agreed Statement, she "fought back". But as could be reasonably expected, that resistance was of no consequence. Destiny was smothered or drowned, the possibility being that the causes of death were both or one of those factors.

25 In *R. v. Vaudreuil* (1995), 98 C.C.C. (3d) 316 (B.C. C.A.), Chief Justice McEachern sets out the following:

> What then is the appropriate sentence in such a case? The *Criminal Code* wisely gives judges a wide discretion in sentencing for manslaughter. The range is truly from a suspended sentence to life imprisonment. While there are always exceptions, sentences for inadvertent manslaughter seldom exceed six years.

26 In *R. v. Grimmer* (1999), 219 N.B.R. (2d) 150 (N.B. Q.B.), the trial court discussed sentencing principles involving a consideration of degrees of culpability of the unlawful act in contrast to being over-emotional and/or giving over emphasis to vengeance or retribution. In consideration of the concept of culpability, and specifically with reference to manslaughter where sentences range from a discharge to life imprisonment, a scale of culpability may be of some assistance. In *R. v. W. (D.E.)* (February 21, 1995), Doc. London 3015 (Ont. Gen. Div.), a sentencing decision by myself in 1995, I indicated on the particular facts of that case that those facts were near murder as opposed to being at the other end of the scale, a mere accident. The argument of the defence had been that the death was purely accidental.

27 I have referred to vengeance and retribution. In my view vengeance has no part to play in determining a just and fit sentence. With respect to retribution as a goal of sentencing I quote the following from Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), at 554, 557, 559.

> It has been recognized by this Court that retribution is an accepted, and indeed important, principle in sentencing in our criminal law.
>
> . . . . .
>
> Retribution in a criminal context, by contrast, [to vengeance] represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.
>
> . . . . .
>
> ...the meaning of retribution must be considered in conjunction with the other legitimate objectives of sentencing, which include (but are not limited to) deterrence, denunciation, rehabilitation and the protection of society.

28 Many of the cases to which I am referred deal with infanticide defined in s.233, as the causing of a death of a newborn child by its mother where "she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequence on the birth of the child her mind is then disturbed". The punishment for infanticide is a term of imprisonment not exceeding five years. Destiny was not an infant in the context of s. 233 but the facts herein as they involve postpartum depression are analogous to many infanticide cases. I find infanticide cases of assistance. I find the five year sentence a helpful guide. My conclusion is that the request by the Crown for a penitentiary term of eight to ten years, subject to credit for time served, is excessive. In my view, such a sentence would, in a culpability range, be closer to murder. If this case were before me for sentencing in a timely way subsequent to December 1997 without consideration of dead time, my sentence would be six years. For a similar approach or comment see the decision of Moldaver J., in *R. v. Johnson* (November 27, 1995), Moldaver J. (Ont. Gen. Div.) para. 18 and of Donnelly J., in *R. v. Peters* (October 10, 1995), Doc. London 3456 (Ont. Gen. Div.) para. 23.

29 Six years appears to be compatible with the position advanced by the defence, but I have not yet addressed what credits should be given. The defence position is that giving credits on a two for one basis would result in a disposition of time served. The mathematical result of the defence position is that a two for one credit equals six years and that, it is argued, is sufficient. Defence counsel also point out that credit may be less than two for one and refers to the decisions of Donnelly J., in *R. v. Peters* supra for an example of a credit of one point seven to one. It was not argued that three years, without further credit, was a fit and just sentence.

30 In *R. v. W. (L.W.)* (2000), 143 C.C.C. (3d) 129 (S.C.C.), Madam Justice Arbour for the court at p. 148 provides the following assistance:

> I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A. in *Rezaie* at p. 105, where he noted that:
>
> > ...provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis... Although a fixed multiplier may be unwise, absent justification, sentencing judges should give some credit for time spent in custody before trial (and before sentencing). [Citations omitted.]
>
> In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to education, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

31 The position advanced by the defence is not solely based on the application of a two-for-one credit for time served, but also on the position advanced that rehabilitation has been successful, that rehabilitation is the primary aspect in this case to be considered in the context of s. 718 and in the context of the case law argued. Dealing here with the credits to be applied for presentence dead time served, it is my position that the descriptions quoted from the transcript of the hospital confinement, the distinction that Dr. Max makes between hospital incarceration and penal institution incarceration, support my conclusion that there has not been the harshness of detention attracting a two to one ratio credit. It is true that dead time does not attract remission. I accept the broad position advanced by the Crown that the ratio should not be two for one but should exceed one for one. For the purposes of these reasons, I regard the presentence dead time as being in fact 36 months and I would give credit for a minimum of four years which takes the disposition out of the penitentiary range.

32 Whether one takes the approach I have identified of commenting upon what I regard as a fit and just sentence and then factor in consideration for dead time, or simply takes the approach of considering a fit and just sentence, the result is likely to be the same. In any event, in this case on whatever approach in considering all of the factors applicable to this case, I reject a penitentiary term.

33 Section 718 deals with the purpose and principles of sentencing underlining that the fundamental purpose is to contribute to respect for the law and the maintenance of a just, peaceful and safe society, with the sanctions imposed to address one or more of listed objectives, including to denounce unlawful conduct, to deter the offender and other persons from committing offences, to assist in rehabilitating offenders, to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

34 I will review some of the cases to which I have being referred commencing with *R. v. Valiquette* (1990), 60 C.C.C. (3d) 325 (Que. C.A.). This case involved a first degree murder charge where a three-year-old boy was killed by his mother. The initial sentence was 10 years. The sentence on appeal was that of substitution of a suspended sentence with probation for three years. The probation order required a transfer to a mental hospital facility for treatment. From p.331 Justice Rothman for the Court provides:

> Persons suffering from severe mental illness of this kind do not, in my respectful opinion, require exemplary sentences to deter them from repeating the offence. Nor is a severe sentence imposed on a mentally ill person of much value for purposes of general deterrence. Mothers, generally, do not need exemplary sentences to deter them from killing their young children. And most people understand that the mentally ill require treatment and supervision, not punishment.
>
> Appellant has been in prison now for some 20 months. From Dr. Fugere's report, there seems little likelihood that appellant would present a danger to anyone except, perhaps, herself. To keep her in prison merely because she may have tendencies towards severe depression or even suicide is unacceptable.
>
> In the circumstances of the present case, I do not see that any useful purpose can be served by a sentence of imprisonment. Appellant requires psychiatric treatment and, perhaps, close supervision for a time. But this can more appropriately be accomplished at a mental hospital than in a prison.
>
> I would therefore maintain the appeal and set aside the sentence of imprisonment.
>
> I would substitute a suspended sentence and direct that appellant be released on the conditions of a probation order, to remain in effect for three years which, in addition to the usual conditions found in probation orders, shall contain the following conditions:
>
> > (1) That appellant be transferred immediately to l'Institut Philippe Pinel de Montreal for psychiatric evaluation and treatment;
> >
> > (2) That appellant accept such psychiatric evaluation and treatment at l'Institut Philippe Pinel, or at such other institution as its medical direction shall designate, at such intervals and in such manner as he or she may direct.

35 The Crown Attorney in addressing aggravating and mitigating factors referred to the taking of the life of a two-year-old child by its mother as the ultimate breach of trust, a violation of dependency, a violation of the vulnerability of a two-year-old child. The Crown pointed to the Agreed Facts of the child fighting back and notwithstanding those actions, death resulted. The sanction imposed must be one to clearly denounce the unlawful act of a mother taking the life of her two-year-old child. The sanction must also recognize that diminished capacity existed in part because of post partum depression.

36 A favourable factor is, of course, the guilty plea to manslaughter. Destiny's father has been spared the necessity of giving

evidence at trial, the state is saved the time, expense and the uncertainty of trial. Murie has been employed and hopefully can return at some time to employment. Murie indicated in her comments that there was employment available, although particulars were not given. I have already touched upon the great strides that have been made in the context of rehabilitation. The guilty plea must be looked at in the reality of the three years that have transpired, and in the reality that with the plea the charge of second degree murder becomes moot. The sanction must recognize the harm done to victims and, without intending to be all-inclusive, that includes Destiny's father and relatives. The sentence must balance the interest of Murie and interests of society, inclusive of those parts of society that I have tried to identify as victims. Mr. Williams, in his victim impact statement, touches upon the obvious that whatever happens in sentencing that Murie must live with the results of her actions and that even if she were to spend the balance of her days in jail, that would not be enough to undo what has been done. There is nothing that the sanction imposed by a Court can do to bring a life back. Mr. Williams acknowledges in what I regarded as a very healthy way, that he continues to reside in the same residence regarding it as the place where his daughter lived, not the place where she died.

37 It is important to be reminded that the accepted plea to the offence of manslaughter takes away the element of intent that is required for second degree murder. The agreed statement of facts must be considered in sentencing in that context. The sentencing must be sentencing for manslaughter and not a left handed or backdoor sentencing for second degree murder using careful and different vocabulary.

38 The defence position being that sentence should be simply time served would have Murie return immediately to the community. Probation was not discussed. Would probation in such circumstances be sufficient. In my view, no. Probation would furnish a transition and an opportunity for some supervision. Given my finding that there is a significant risk of relapse, I conclude that probation without more would not further the positive direction of rehabilitation. I am not satisfied that probation without more would convey the denouncement of Murie's conduct to the community and recognize respect for the law, nor for the maintenance of a just, peaceful and safe society. I reject a disposition of time served plus probation as being adequate for the purposes of sanction.

39 Neither counsel argued the contemplation of a conditional sentence. Although not orally argued, defence counsel placed in their book of authorities as the first case *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.) dealing with conditional sentences pursuant to s. 742.1 and as I have indicated at the outset, all the cases have been considered.

40 Further to s. 742.2, before imposing a conditional sentence, the Court shall consider whether s. 100 is applicable. There was no dispute between counsel as to the application of s. 100, both counsel were in agreement that there be a prohibition further to the wording of s. 100 for a period of 10 years and an order shall go accordingly.

41 Under s. 742.1(b) I must as a condition precedent, consider the following factors. Firstly, the risk of the offender reoffending and, secondly, the gravity of the damage that could ensue in the event of reoffending. For the purposes of sentencing, I do not take into account the impaired driving record. Murie has no other children. The risk of reoffending is remote. There is no suggestion that she was ever a risk to anyone other than her two-year-old child and herself. Having given a negative response to the first factor, it is not necessary to further pursue the second factor under s. 742.1(b).

42 I find that the community would not be endangered by Murie serving her sentence in the community.

43 In my view, a conditional sentence lacking incarceration will complement the positive rehabilitation that has been realized to date and to enhance the realistic expectations that positive rehabilitation will continue to reduce the significant risk of relapse. I do not mean relapse in the sense of reoffending, but relapse in the sense of mental illness. In my view, a conditional sentence, coupled with probation, should further rehabilitation. The terms of conditional sentence will include house arrest with exceptions.

44 I have rejected a penitentiary term in this case and I have rejected probationary measures without more. I recognize and take into account that a conditional sentence is not subject to remission and that all the time will be real time.

45 The conditional sentence which I intend to impose must be considered with my earlier comments dealing with a six year

incarceration and subject further to my comments that credit for dead time would be at least four years. My intention is that in the totality this sentencing constitute significant denunciation, significant deterrence to the community generally and as stated in *R. v. Valiquette*, the community will generally understand that those with postpartum depression require treatment, supervision, rehabilitation in priority to punishment.

46 The Crown has asked that the sentencing disposition include a DNA order to further the best interests of the Administration of Justice. That request was resisted. I am not satisfied that the circumstances of this case should trigger the giving of a DNA test or DNA sample as being a furtherance of the best interests of the Administration of Justice. The application for a DNA sample is dismissed.

47 Subject to Murie and her step-grandfather agreeing to accept the terms of a conditional sentence, there shall be a conditional sentence as follows: Conditional sentence of one year, including the compulsory conditions as in s. 742.3(1) and additional conditions including:

- to abstain from the consumption of alcohol or other intoxicating substances;

- to abstain from the consumption of drugs except in accordance with a medical prescription.

- to remain at the residence of her step-grandfather except when absent accompanied by her step-grandfather for medical appointments or attending with her supervisor. She shall be remanded to the St. Thomas Psychiatric Hospital until such time as her step-grandfather attends with appropriate staff at that facility to obtain the education or instruction as contemplated by Dr. Max and then released further to these conditions.

- She shall deposit with her family practitioner a copy of the Conditional Sentence Order.

- She shall attend (with her step-grandfather) at a family practitioner at least once a month or as otherwise directed by that practitioner to monitor the state of depression.

- Her family practitioner should not prescribe drugs in an amount exceeding safe usage by a person having a history of overdose use of prescription drugs.

- The family practitioner shall report in writing once a month to the supervisor.

- Police officers shall be at liberty to attend the residence of the step-grandfather at reasonable times and be permitted reasonable access to ascertain that the conditions herein including residency are satisfied.

- The Conditional Sentence Order shall be carried by Murie on those occasions when she is absent from her step-grandfather's residence.

The Conditional Sentence shall be followed by a two-year period of probation, terms of which shall be:

- to keep the peace and be of good behaviour.

- Report as required

- To accept medical and psychiatric treatment as may be recommended.

- To report any change of address.

• To contact the family physician at least once in three-month intervals or otherwise as recommended by the family physician.

48 If there is not agreement to the terms and conditions of the Conditional Sentence, disposition shall be a sentence of two years less one day followed by probation on terms as outlined for a two year period.

Appendix

General Principles

R. v. Proulx (2000), 140 C.C.C. (3d) 449 (S.C.C.)

R. v. W. (L.W.) (2000), 143 C.C.C. (3d) 129 (S.C.C.)

Manslaughter

Regina v. Szola (1977), 33 C.C.C. (2d) 572 (Ont. C.A.)

R. v. Smith ((May 29, 1986)), Doc. Vancouver CA005176 (B.C. C.A.)

R. v. Drudge (1988), 25 O.A.C. 312 (Ont. C.A.)

R. v. Valiquette (1990), 60 C.C.C. (3d) 325 (Que. C.A.)

R. v. Fell (1990), 40 O.A.C. 139 (Ont. C.A.)

R. v. P. (A.P.) (August 5, 1992), Vaillancourt Prov. J. (Ont. Prov. Div.)

R. v. Harris (1993), 88 Man. R. (2d) 157 (Man. C.A.)

R. v. Sriskantharajah (1994), 90 C.C.C. (3d) 559 (Ont. C.A.)

R. v. W. (D.E.) (February 21, 1995), Doc. London 3015 (Ont. Gen. Div.)

R. v. Vaudreuil (1995), 98 C.C.C. (3d) 316 (B.C. C.A.)

R. v. Peters (October 10, 1995), Doc. London 3456 (Ont. Gen. Div.)

R. v. Johnson (November 27, 1995), Moldaver J. (Ont. Gen. Div.)

R. v. Turner (1997), 185 N.B.R. (2d) 190 (N.B. C.A.)

R. v. Grimmer (1999), 219 N.B.R. (2d) 150 (N.B. Q.B.)

R. v. Brake, 2000 NFCA 37, 190 Nfld. & P.E.I.R. 201, 576 A.P.R. 201 (Nfld. C.A.)

R. v. Irving ((December 19, 1990)), Doc. CA012494 (B.C. C.A.) 091/024/013

R. v. Dykstra ((January 15, 1991)), Doc. CA012628 (B.C. C.A.) 091/031/052

R. v. Charlette (1993), 88 Man. R. (2d) 13 (Man. C.A.) 093/175/080

R. v. Laberge ((May 3, 1995)), Doc. Edmonton Appeal 9403-0125-A (Alta. C.A.) 095/136/017

R. v. Lavoie (1987), 78 A.R. 327 (Alta. C.A.)

R. v. Watt (1988), 27 O.A.C. 238 (Ont. C.A.)

R. v. Sinclair (1997), [1998] 2 W.W.R. 228 (Man. C.A.)

R. v. Won ((November 9, 1993)), Moldaver J. (Ont. Gen. Div.)

Order accordingly.

END OF DOCUMENT

1992 WL 1335714 (Ont. Gen. Div.), 1992 CarswellOnt 2200

1992 CarswellOnt 2200

R. v. Malboeuf

Her Majesty The Queen, Crown and Pierre Malboeuf, Accused

Ontario Court of Justice (General Division)

McWilliam J.

Judgment: February 24, 1992
Docket: None given.

Counsel: A. Berzins and L. Dupont, for Crown.

P. McCann and F. Giamberardina, for Accused.

Subject: Evidence

Evidence --- Exclusionary rules -- Admissibility of character evidence -- In criminal matters -- General.

McWilliam J.:

A. Circumstances Leading to the Deceased's Disappearance

1 1. The deceased, Valda Champagne-Marks lived in the basement apartment of a house at 137 Spadina Avenue in Ottawa with her two daughters while her mother, Mrs. Champagne, lived on the first floor. She was 33 years of age, and had been separated since the end of 1987.

2 2. On the morning of Friday, December 2, 1988, Ms. Champagne-Marks left for work at Hinton Animation at approximately 7:40. She had been dating a fellow employee Norman Lemire for about 15 months. They had a sexual relationship and were in love. They last had sex, vaginal intercourse and fellatio, on Tuesday or Wednesday when he stayed overnight in her apartment. Sometimes love making included consensual acts of bondage, but only when she was drinking. Hands were tied up with nylons, and they once used handcuffs. Lemire was told that she did bondage with her husband, and that she liked anal intercourse. Lemire said he demurred. The nylons for bondage left no marks and were easy to get out of.

3 3. A celebration began at Hinton Animation at 4:00 p.m. on December 2, 1988 because Hinton Animation had won an award for a television programme they had created. Mae Clifford, a friend of the deceased's drank a bottle of

champagne; Ms. Champagne-Marks had a bit less to drink at that point. At 7:00 p.m. Ms. Clifford and Ms. Clifford's boyfriend, Peter Stringer, met Norman Lemire, at a bar called Ozzie's. Ms. Champagne-Marks drank approximately a half dozen rye drinks and became quite intoxicated.

4 4. Ms. Clifford and Ms. Champagne-Marks danced at Ozzie's during the evening, and at one point sat with two other men at another table. She was flirting. Ms. Clifford noticed that Mr. Lemire had left around 9:00 p.m. as he got fed up with the flirting. Eventually Ms. Clifford and Ms. Champagne-Marks rejoined Mr. Stringer. Ms. Champagne-Marks brought a stranger with her to the table. The stranger was later identified as the accused. At one point the accused was showing the women polaroid pictures he had of nude women since they were in the "art business". The four all talked at the table.

5 5. During the evening, Ms. Champagne-Marks had mentioned going to Hull. Ms. Clifford and Mr. Stringer left at around 1:30 a.m. They offered Ms. Champagne-Marks a ride home; however, she refused. Ms. Champagne-Marks remained at Ozzie's with the accused. She had no money (Mae Clifford had loaned her $10.00 earlier in the evening). The accused was described by Peter Stringer as sober, soft spoken and mild mannered.

6 6. The deceased had been wearing old blue jeans, an old faded, blue sweatshirt, a beige coat, sport socks and running shoes on December 2, 1988. None of the clothing (except for the shirt and panties) identification, or car keys of the deceased were ever found. Her mother said when the deceased stayed out at night, she invariably called. No call was made advising that she was staying out. She carried no purse, and usually kept ID and money in her jeans pocket.

7 On the evening of December 1, Ms. Champagne-Marks had dinner with her mother. She was wearing a short night gown and her mother noticed no scratches or bruises. Lemire and Mae Clifford saw none either on the evening of December 2, 1988.

B. The Discovery of the Body

8 7. Maxine Mangotich and her mother found the deceased's body at approximately 8:30 to 8:45 on the morning of December 3 lying between their car and the front wall at 429 Daly Street in Ottawa. She testified that no one walking on Daly Street would have seen the body. The deceased was lying on her side, facing toward the ground in almost fetal position, with her legs extended. She was wearing panties and something like an undershirt pulled up beneath her arms as if someone had dragged her there. A multi-coloured blanket was placed over the body. The body was located 80 feet from the nearest door to the Applicant's apartment building - the front door at 430 Daly Avenue and 156 feet from the farthest door of the building, an address at 227 Charlotte Street. Obviously, the accused's apartment building is on a corner, the southeast corner of the intersections of Charlotte Street and Daly Avenue in Sandy Hill. Her mother testified that Ms. Champagne-Marks did not know anyone in Sandy Hill.

9 8. Dr. James Dickson, a coroner, attended at the scene of the discovery of the body on December 3, 1988 at 9:15 a.m. In Dr. Dickson's opinion the deceased had been dead between four and ten hours before he arrived. When the body was turned over, two white clasp-like objects were found embedded in the deceased's back, underneath her shirt. They were bra clasps. A gold object fell from her body when she was moved, and it matched the gold earring in her ear.

C. Pathological Evidence

10 9. Dr. Frederick Jaffe performed an autopsy on the body of the deceased on December 4, 1988. Dr. Jaffe is a pathologist on the staff of the Forensic Pathology Branch of the Solicitor General of Ontario and has practised Forensic medicine since 1951. During that time he has performed approximately 6,000 medical-legal autopsies.

11 On *external* examination the following significant findings were present:

(1) Both wrists showed longitudinal bruising, strongly suggestive of rope marks, and it strongly suggests that the wrists had been tied shortly before death, or perhaps even at time of death.

(2) Small pre-mortem abrasion on bridge of nose.

(3) Various rather faint, old bruises on left leg and right knee.

(4) A pre-mortem bruise involving big toe on right foot.

(5) An indistinct bruise, which appeared to be recent, on the neck, on the left side.

(6) Both eyes showed many tiny pinpoint heamorrhages in the lower lids.

(7) Faecal material was present on the sole of one foot.

12 On internal examination, as the skin of the head was reflected (1) again he saw the tiny, pin point haemorrhages (2) as well three larger areas of hard, bleeding, suggesting 3 separate, blunt object caused impacts to the head, two at back and one on right side.

13 These three larger areas of bleeding were indicative of impacts of moderate severity, and "certainly they might have perhaps temporarily stunned an individual," especially an intoxicated person. The skin over these areas was not injured, nor was there any deep damage to these areas of bleeding. They were caused pre-mortem. Skull and brain were not damaged. Lungs had no injury. X-rays revealed no injuries. She appeared in good health and had no natural diseases. There was no heart attack or stroke.

14 He took special care at the time of autopsy to examine tissues of the neck, but he found no injury, except the one bruise on the skin.

15 Microscopic examination showed a slight abnormality of the lungs, but no other significant finding. That finding is supportive of asphyxia, but would be insufficient without the pin point haemorrhages.

16 He found no injuries to genital organs or rectum. Her blood alcohol level at the time of death was 195 milligrams per 100 millilitres of blood. The urine had traces of marijuana. No other drugs were found.

17 10. Dr. Jaffe's opinion was that the cause of death of the deceased was acute asphyxia, which is a sudden lack of oxygen to the body. Asphyxia can be caused by a number of different mechanisms. They are:

(a) strangulation;

(b) forcing something down the windpipe;

(c) putting a plastic bag over the person's head;

(d) smothering; and

(e) traumatic asphyxia: the compression of the chest.

18 11. Asphyxia was not caused by the following:

(a) strangulation, either manual or by ligature, because an examination of the neck tissues found no indication of compression of the next or fracture of the hyoid bone and there was no protrusion of the eyes and tongue;

(b) forcing something down the windpipe - Dr. Jaffe could see no indication of this;

(c) a forced or violent smothering - because there was no laceration or bruising of the inside of the lips and no indication of compression of the nose;

(d) a forced or violent compression of the chest.

19 There was no crushing of the chest.

20 12. The only possible cause of the asphyxia, therefore, were the following:

(a) a plastic bag over the deceased's head;

(b) a gentle smothering;

(c) traumatic asphyxia if done gently.

21 There was nothing found during the autopsy, in terms of signs of violence towards the neck and so on that indicated someone attacked the deceased and tried to kill her.

22 13. Plastic bags over the head have been used in certain sexual practices, particularly of the auto-erotic type. Some people find it pleasant and sexually stimulating. A fair number of accidents occur this way. The lack of oxygen produced by the use of the plastic bag is not distressful and people may allow themselves to go to sleep and to die without ever struggling against it resulting in accidental death.

23 14. If the asphyxia was caused by smothering, the smothering would have to have been gentle. However, if someone was intending to kill by smothering usually a "fair deal of force" would be used and one would see overt signs of such force. Gentle smothering as a cause of asphyxia appears inconsistent with an intentional homicide, and is, arguably, more consistent with accidental death occurring during the course of sex, where the deceased is in a face-down position with her face in bedclothes, a pillow or soft mattress and intoxicated, Mr. McCann argues.

24 15. Traumatic asphyxia, on the other hand, as a cause of death in homicide cases, is a phenomenon encountered by Dr. Jaffe only once in his career: that being the case where a main was alleged to have hugged his wife to death. Traumatic asphyxia of such a nature as to not leave any marks, while a rare phenomenon in homicide cases, could be caused accidentally by a person sitting on the chest of the deceased, as, for example, during some form of sexual activity, where the deceased is intoxicated.

25 16. Dr. Jaffe also identified a number of relatively minor injuries or marks on the deceased's body. These included longitudinal bruising on both wrists suggesting the deceased's wrists had been tied within 15 to 30 minutes before death. However, there were no abrasions associated with these marks. Had the deceased struggled against the ligatures one would expect to find abrasions.

26 17. A trace amount of semen was found in a vaginal washing from the deceased. The semen amount was too small to obtain a conclusive grouping. A trace amount of semen was found on a swab obtained from the right upper thigh of the deceased of an insufficient amount for grouping. A trace amount of semen was sound on an oral swab and in the

deceased's underwear, insufficient for grouping. The deceased's sweatshirt contained human bloodstains which could not be grouped. A stain on the upper left chest could be a small droplet but the other stains were contact stains, the result of a transfer from something which is bloody to the surface of the fabric. The contact stains were light surface stains.

27 19. Semen can possibly persist on an oral swab for up to eight hours, that is up to eight hours after a deposit in the mouth of a live person who has functioned normally during that time. In the vagina, normally spermatozoa can persist for up to 48 hours; however, in some rare occasions spermatozoa have been found several days after having been deposited.

D. Hair and Fibre Evidence

28 20. Numerous scalp hairs removed from the deceased's body, clothing and the body bag were similar to those of the accused. Also, three public hairs from the body of the deceased, the underpants and body bag and bedsheets were found to be similar to those of the accused. A number of animal hairs present on items relating to the deceased were microscopically similar to animal hairs found on items that had come from Mr. Malboeuf's apartment.

29 21. Fibres found on Ms. Champagne-Marks' body, her clothing and in the body bag and sheets were consistent with fibres of a multi-coloured carpet in the accused's apartment. Body hairs removed from items in his apartment (a green blanket and yellow rope) were microscopically similar to known public hairs from the deceased.

30 22. The deceased's blue sweatshirt had been cut and torn. The ribbed material around the neck opening had been cut and from the bottom edge of this ribbing the sweatshirt had been torn down to the waist material. The ribbed waist material had also been cut. There were additional (horizontal) tears in the upper left chest area and in the mid to lower right side area. Fibres from the blue sweatshirt were compared with light blue fibres found in the apartment. They were found to be consistent.

E. Accused's Conversations with Others

31 23. In June, 1989, the accused told a friend, Lena Gardner, that he and the deceased had met at a bar on the evening of December 2, 1988, and had gone to his apartment by taxi. Along the way he and the deceased stopped at a bank machine. The accused told Ms. Gardner that he had "shooed her out" since it was getting late. Ms. Gardner asked the accused if he "got lucky" and he answered "no".

32 24. During the evening of December 5 and morning of December 6, 1988, the accused was questioned several times by Sgts. Fahey and Sheppard. He stated that he had been with a woman named Gretchen at the Gilmour bar, then they had gone to Ozzie's. The deceased had asked him to dance. He was more tired than drunk. The accused does not recall leaving but recalls ordering a pizza on Wellington Street and eating it in a cab. The accused and "Val", as he recalled her name, wanted to go to Hull, but it was too late. He had to work, so she became angry and left. She was "plastered" he said and was at his apartment for 15 minutes. The accused denied they had sexual relations during first interview, but said he could not remember in a second interview; "that things went black."

33 26. He recalled waking up and going to work. When asked again if he had intercourse with the deceased he stated, "I couldn't get it up". She wanted to, but he couldn't. When asked "What did you do?" the accused stated, "We came in, put the pizza down. She took my clothes off, I took her clothes off". He said he had tied up a few girlfriends before, including Karen Kramer. He said she tied her hands and popped cut of it. "Q. When was the last time you tied up a girl? A. She liked it, she wanted to.

F. Psychiatric Evidence

34 Dr. John Bradford is Director of Sex Behaviours Clinic at Royal Ottawa Hospital. His expertise was acknowledged

by Mr. McCann for the accused as an expert in forensic psychiatry as it relates to human sexual behaviour. He testified at voir dire and in a special examination in the Crown Attorney's Board Room on November 25, 1991. That transcript is Exhibit M.

35 He defined sexual sadism as a sexual deviation where a person "has intense sexual urges and sexually arousing fantasies which involve real and not simulated acts of psychological and physical suffering. And the person has acted on these urges or is distressed by them and it is something that can often occur with the onset of sexually deviant fantasies in adolescence and these then can manifest into sexual acts later on and in its worst case scenaric can lead to serious sexual violence". (M-2) The doctor said it was a "pretty rare condition certainly in its fullest form among sexual offenders". (M-3)

36 The physical evidence alone, he said, pointed to Ms. Champagne-Marks' death being a "sexually motivated homicide" and it had "sexual sadism in relation to it". (M-4) Those factors were that she was partially clad when found, had ligature marks on both wrists, evidence that one leg was bound or restrained in some way, and the cause of death was asphyxia.

37 Asphyxia, as a cause of homicide, occurs very commonly in sexually sadistic murders. The hallmark of these homicides is that the perpetrator likes the victim to be powerless, unconscious and uses asphyxiation as a way of terrorizing and subduing them. In his opinion there is physical evidence of non-consensual restraint. These are: the head injuries, the bruising in the scalp, the injury to the one toe which he considered important and some minor injuries around the face, and the nose particularly, which would be compatible with suffocation with a soft object. The torn, terry cloth sweatshirt could have been cut after Ms. Champagne-Marks was restrained or the cutting of her sweatshirt could have been part of a sadist ritual. He said it was unlikely she would have consensually allowed her sweatshirt to be cut up if she planned on going home. The absence of sexual intercourse, as the physical evidence suggests in this case, is a common place in sexually motivated homicides because often the perpetrator is sexually impotent. It is the domination and violence which is erotic, not the sex act itself. That is why sex acts in sadistic murders often involve foreign objects being put in the vagina or the anus and rather than have sexual intercourse the perpetrator masturbates over the body or beside the body. Frequently this occurs when the victim is unconscious and sometimes even post-mortem. In this case there is evidence of the sperm being on different parts of the body without being intra vagina. Bondage is the key to sexual sadism: particularly non-consensual bondage and Dr. Bradford said he had interviewed Carole Proulx and Terry Trevael, and had read the evidence of Karen Kremer. He concluded the accused was interested in bondage. From them he also learned that the accused may be impotent or partially impotent, and had difficulty achieving erection. So the doctor concluded regular consensual sex is not erotic enough for him. Sexual sadism tends to escalate going from fantasies to acting out.

38 His artwork gives a sense of what his sexual interests are, what his sexual fantasies are. It can be a mirror on one's thoughts and fantasies. Some of his art work reveals women being victimized, domination or bondage themes, women with their clothes cut, cross-dressing and transvestism, a woman masturbating with a man who is cross dressed as a transvestite. Dismemberment is also part of his drawings. Some of his art work related to religious denominations or distortions of religion with sexual sadism. He had borrowed a satanic bible, and marked it in a certain way -- mostly to do with satanic rituals. He had two black candles and one white candle in his apartment. He had a sword, and his basement apartment was poorly lit.

39 The two hooks shown in the pictures above the bed may have been for self bondage in conjunction with the mirror beside the bed. It often occurs during cross dressing, Dr. Bradford said. He thought the evidence was consistent with the accused's interests in satanic themes at least.

40 The accused's apartment contained a wig, and female clothes, false breasts, all part of transvestism which itself is commonly associated with sexual sadism.

41 In necrophilia/lust murder Dr. Bradford said non-consensual asphyxia is the vehicle used by perpetrators to make their victims unconscious, and in that way "it sort of memics necrophilia which is sex after death". (M-16)

42 Asphyxia is a specific feature of severe sexual sadism such as necrophilia/lust murder, and may be associated with bondage or other sadist acts.

Cross Examination

43 Dr. Bradford agreed with Mr. McCann that he could not make a diagnosis that Mr. Malboeuf was a sexual sadist because he has had no clinical contact with him. Therefore he is unable "in a strict diagnostic category" to say the accused is a sexual sadist, but Dr. Bradford did "outline the features on the physical evidence, the features from the information that" he was able to gather "that would point towards him being a sexual sadist." A diagnosis pursuant to DSM 3 R would require an interview and a sexual behaviour assessment to medically establish its criteria. What he has done in this case is to make a profile, not a diagnosis mainly for those reasons.

44 His specialty is not in giving opinions on causes of death, but it does expose him to reviewing such opinions and taking them into account on its forensic side. So the mechanisms causing death are in the province of the forensic pathologist. He agreed that Dr. Jaffe's mechanisms of death of use of a plastic bag, gentle smothering with a soft material, and the possibility of compression of the chest, if done gently, are the possible ways. Essentially Dr. Bradford agreed that there was a possibility that bondage here might have been consensual, but the more absence of ligature marks indicating non struggle would not conclusively decide the issue if Ms. Champagne Marks was already unconscious when tied up. But even face down suffocation in a soft bed is a possibility. "Any number of possible scenarios" could have led to her death, to use Mr. McCann's words adopted by Dr. Bradford. Dr. Bradford resisted Mr. McCann's suggestion that the physical evidence only points to sexual sadism when it is assume Mr. Malboeuf is a sexual sadist. The torn clothing and the ligature marks and the bruising to the head can be assessed by the jury Mr. McCann argued. As he said (M - 34): "we don't need a psychiatrist to tell us that."

45 Dr. Bradford replied: "No. Except, though, that I think sexual practices come into it and if people are not aware of - - I mean, for example, in terms of say necrophilia and last murder, it is a very phenomenon, so a lot of physicians, whatever, you know, are not familiar with it. So if you are dealing with something rarely, then I think it does become an issue in terms of trying to understand the possibilities as one of the possibilities in this instance as a cause of death." He then reviewed his "hallmark" point of asphyxia, bondage, the cut sweat shirt, etc. He then said that "understanding how these people operate and work" is important, and because such homicides are rare, commonplace inferences might be misleading.

46 Dr. Bradford described a sexually motivated crime as one in which the act of homicide is itself the erotic act driving the crime. And on the evidence in this case necrophilia/lust murder is the closest sub category it fits into, characterized in sense by a lack of physical evidence. The lack of any obvious mechanism leads to the conclusion that necrophilia/lust murder is one of the ways she could have died, along with many others. Dr. Bradford agreed that Ms. Proulx was consensual bondage, and the least disturbing. Ms. Trevail and Ms. Kremer were non consensual bondage. Both were bound when they fell asleep. Dr. Bradford thought there were reasonable grounds why bondage might have been consented to, so non consensual bondage moved the analysis closer to sexual sadism. It is also evidence of escalation. The Kremer incident he thought involved more coercion.

47 Turning to satanism Dr. Bradford thought it was less significant that other factors, for example, bondage. And his drawings do show evidence of interest in devils. Dr. Bradford said (M - 84) about satanism generally: "I mean there are elements of it that are there and the elements that are not there. But I see it as really an associated feature or something like that, you know, may come into, you know, an extra interest in the type of bondage that he likes. It's another slant on it. So I don't see it was more important than that, except it fits in."

Q. Okay, So it is another little tidbit I suppose --

A. Yes.

48 Counsel and witness then sparred for a few pages on whether the glass was half full or half empty on the indicia of satanism in Mr. Malboeuf's apartment. Satanism as a belief system might be important for sexual sadists to justify sexual self indulgence. By the same token, the doctor admitted there are many satinists who are not sexual sadists.

49 Absent a diagnosis based on interviews and a sexual behaviours assessment, all that Dr. Bradford can say is that there is some evidence that points towards sexual sadism based on the three main areas discussed in cross examination: bondage and the associated impotency, satanism and the art work in the apartment.

Bondage

50 Bondage can be part of the sexual fantasies of 30 per of the population according to surveys in the literature, and a much smaller group practice consensual bondage to heighten eroticism. That percentage may be as high as IC. Consensual bondage is not sadism, it is play acting. Dr. Bradford only sees four or five cases a year involving consensual bondage. A sadist believes in real suffering, humiliation and confinement. Strangulation, either by ligature or manually, is the normal methodology to cause death. Smothering is much less frequently used. His date base of 1,300 cases produced 14 to 16 cases and Toronto came up with a further 10 to 12. Ottawa had one case, and three possible cases. The FBI data base turned up only 36 cases.

51 This very rarity produces a division between Mr. McCann and Dr. Bradford, for each sees it as the starting point of his analysis, one negatively and one positively. Mr. McCann sees hallmark injuries for sexually sadistic crimes as generally involving strangulation and mutilation. Dr. Bradford sees a lack of injuries in a 33-year-old healthy woman beyond asphyxia as hallmark for the sub category, necrophilia/lust murder.

Crown's Position

52 The Crown has two positions, one an alternate to the other. Its first position is that the accused took to his apartment in Sandy Hill Ms. Champagne Marks sometime after bar closing hours on December 3, 1988. Attempts were made at love making, and the accused could not perform. The victim fell asleep, and she was then tied up to fulfil his sexual fantasy. He then began ritualistically to cut up and rip off her sweatshirt. She woke up in bondage, panicked, and banged her head and toe attempting to get rid of her ties. The accused asphyxiated her with a pillow, or, possibly, even her own sweatshirt, and masturbated over her body. He then deposited her body outside 429 Daly Street, and destroyed her clothing.

53 Alternatively, she initially consented to bondage, but the ritual went far beyond what she was prepared to put up with and panic set in. Suffocation occurred, and then the accused proceeded as in the first scenario.

Applicable Law

54 Mr. Justice Pratte stated for the majority in the Supreme Court of Canada in *Cloutier v. The Queen* (1979) 48 C.C.C. (2d) 1 at p. 28:

> The general rule as to the admissibility of evidence is that it must be relevant.... For one fact to be relevant to another, there must be a connection of nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter (Cross, Evidence, 4th ed. (1974), p. 16).

> Thus, apart from certain exceptions which are not applicable here, evidence is not admissible if its only purpose is to prove that the accused is the type of man who is more likely to commit a crime of the kind with which he is charged; such evidence is viewed as having no real probative value with regard to the specific crime attributed to the accused: there is no sufficient logical connection between the one and the other.

55 Later he said at p. 30:

> The relevance of a fact that is sought to be introduced in evidence must of course be determined in accordance with the nature of the case and the various questions at issue.

56 And finally at p. 32 he said:

> In the case at bar, I do not think it can be said that the use of marijuana is in itself a fact 'seriously tending, when reasonably viewed, to establish motive for the commission' of the crime of importation with which he is charged.

In other words to prove someone is a consuming buyer does not make him an importing seller, or convert a user into a trader.

57 In a general sense Mr. McCann argues that the jury does not need Dr. Bradford to do its job. His expertise, concerning which the law allows him to opine, is irrelevant to the central issues in the case.

58 As Dickson, J., as he then was, said in *R. v. Abbey* (1982) 68 C.C.C. (2d) 394 at p. 409:

> An expert's function is precisely this: to provide the judge and jury with a ready made inference which the judge and jury due to the technical nature of the facts, are unable to formulate. 'An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. (*R. v. Turner*, [1974] 60 Cr. App. R. 80 at p. 83, per Lawton, L.J.)

59 That last statement is the reason why the expert should be always a helpmate and never an oracle. So in *Regina v. Audy (No. 2)*, [1977] 34 C.C.C. (2d) 231 the trial judge refused to hear a psychologist's views regarding perception and eye witness identification. Judges and juries need no help as fact finders in this area. Similarly in *Regina v. French* (1977) 37 C.C.C. (2d) 201 a psychiatrist was unable to give his opinion that a Crown witness suffered from a character defect when a jury member could come to same conclusion, and the difference between himself and the jury member on the issue was only "a matter of degree".

60 I accept the statement in Mr. McCann's brief that "expert evidence that attempts to reconstruct a crime from facts before the Court is conjecture and not the proper subject of expert evidence." He cites *Regina v. Kuzmack* (1954) 10 C.C.C. 338 for that proposition. I am not sure that factually the case if now apposite, but the principle is sound. To put it another way, or expert cannot be brought into the witness box to take all facts in the case under his purview, tidily arrange them into evidentiary gastronomic delight, and invite the trier of fact to ingest them whole.

61 As MacKinnon, J.A., as he then was, said in the French case, supra, at p. 211:

> The Courts must be chary of limiting of usurping the jury's duty and function in this area (he was referring to the assessing of witnesses' credibility). It is not 'empty rhetoric' to speak of the 'usurpation' of the function of

> the jury in these circumstances. If the evidence were admitted and the jury instructed to weigl: it, it would not be surprising if the members of the jury were so impressed by the credentials and knowledge of the expert witness that heir own possibly contrary view of the witness' evidence would be overborne by that of the expert.

62 Later he said at p. 212:

> "This is not a case like *Toohey v. Metropolitan Police Com'r* (1965) A.C. 595, or *R. v. Hawke* (1975), 22 C.C.C. (2d) 19, 7 O.R. (2d) 145, 29 C.R.N.S. 1 where the indicia of mental illness would not be apparent to the jury." In such circumstances the witness' limitations in giving a true and reliable account to the jury could be pointed out by expert evidence. But in the case at bar MacKinnon, J.A. said there was to use his words "no hidden fact for medical science to reveal."

63 Mr. Berzins for the Crown emphasized those cases were the expert's evidence was admitted. In *Regina v. Fougere* (1988) 40 C.C.C. (3d) 355 the N.B. Court of Appeal said the trial judge was right to allow a police officer to give expert testimony as to the meaning of the argot of the illicit drug trade. But the court drew the line at the expert testifying as to the inferences as to what was intended when the jargon was used.

64 In *R. v. Joyal* (1990) 55 C.C.C. (3d) 233 the Quebec Court of Appeal allowed the Crown to call expert evidence in reply to demonstrate the improbability of the accused's story.

65 He said he was not selling the drugs as a trafficker, but buying them as a consumer. The drugs seized were 223 grams. The officer said such an amount would not be part of a retail level transaction. The court said that opinion would be relevant and admissible. A jury could not be expected to know such a nuance of drug marketing from normal experience.

66 Mr. Berzins argued that the jury in this case could use the assistance of Dr. Bradford, and ought not be limited as to the cause of death to the evidence of the pathologist. The significance of non consensual bondage without Dr. Bradford might be assessed within a stereotypical straightjacket. The completion of the sexual act, as described by the doctor, may explain the location and amounts of semen found on the body.

67 Essentially Dr. Bradford wants to testify as to inferences from facts which indicate the death of Mr. Champagne-Marks was a sexually motive crime. Mr. McCann argues that the facts ought to be weighed differently. That the central issue concerning the cause of death is proof of intent, and that the physical application of the mechanisms of asphyxia referred to by Dr. Caffe may well be consistent with accidental or unintentional death. The weight of this argument will be known at the end of the day. But admissibility is prospective. I am unable to see why the pathologist's evidence as to the cause of death cannot be examined in the light of the further scientific observations of the psychiatrist, shaped by his own discipline. It will be for the jury to weigh the respective possibilities against the criminal standard of proof beyond a reasonable doubt. Obviously, if I felt that the proposed evidence of Dr. Bradford as to cause of death violated the standards of the Wray case i.e. that the jury's mind would be poisoned by the proof of mere trifles, then I would have no hesitation in ruling it inadmissible. I find that in the unusual circumstances of this case, and the asphyxia induced death, that Doctor Bradford's evidence on the cause of death ought to be no hesitation in ruling it inadmissible. I find that in the unusual circumstances of this case, and the asphyxia-induced death, that Doctor Bradford's evidence on the cause of death ought to be heard conjunctively with Dr. Jaffe's.

68 I might add a small caveat. The bruise on the right toe ought to be proved by Dr. Jaffe, and its possible causation by him as well. It does not seem to me that Dr. Bradford ought make the toe hold of his theory, his finding that unconscious bondage is established by the kicking bruise to the right toe. If he is dressed in cross examination he might go so far as to say some of the injuries to the body strike him as consistent with that possibility.

69 The inference here is a bruise possibly caused by kicking. A jury member is as capable as a psychiatrist of making

that narrow inference. But a lay person would not be aware of sexually caused deaths brought about by the mechanisms talked about by Dr. Bradford. For that reason the jury cannot be denied his expertise. There may be other examples where the narrow inference can be made by the jury, and counsel should take care. The Abbey case, supra, makes it clear that the factual foundation must be laid before expert opinion is of value.

Propensity

70 I turn now to the law of propensity.

71 For policy reasons the common law, uncharacteristically, turns it back on the perception expressed in the aphorism, once a thief, always a thief. Evidence of propensity to commit crimes is inadmissible when it stands for no more. On the other hand, if such evidence is relevant to an issue in the case it may be admissible for that purpose, but inadmissible for other reasons. This has been called the doctrine of multiple admissibility.

72 There are two fundamental principles governing the admissibility of evidence of propensity.

> (1) It is not sufficient to establish that the accused is a member of an abnormal group with the same propensities as the perpetrator. An accused who is homosexual does not the perpetrator of a homosexually-driven crime make. The accused must share some distinctive feature with the perpetrator.
>
> (2) Even if the distinctive feature branch of the rule is satisfied, the evidence will still be excluded if its prejudicial effect "overbears" its probative value.

73 When *R. v. Morin* (1988) 44 C.C.C. (3d) 193 was in the Court of Appeal (1987) 36 C.C.C. 50 at p. 64, Mr. Justice Cory said that psychiatric evidence with respect to the personality traits or psychological characteristics of the accused is admissible for the purpose of proving identify provided that:

> 1. the offence is one which indicates that it was committed by a person with abnormal psychological characteristics;
>
> 2. the abnormal psychological characteristics are possessed only by a member of a special or extraordinary class of persons;
>
> 3. the issue of identity is relevant to the case;
>
> 4. the evidence is not excluded by a policy rule; e.g. does not violate the propensity rule;
>
> 5. the evidence falls within the proper sphere of psychiatric evidence.

74 Whether the evidence is psychiatric or similar fact both must pass the more probative than prejudicial test. It must be established that the probative value on the issue (e.g. identity) outweighs its prejudicial effect on the propensity question. As Sopinka, J. said in Morin, supra, at p. 218:

> In sum, if the evidence's sole relevance or primary relevance is to show disposition, then the evidence must be excluded.

75 He continued:

> Relevance is very much a function of the other evidence and issues in the case .... in order to be relevant on the

> issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioral trait with the perpetrator .... a (n) [identifying] badge or mark. Similarly, psychiatric evidence that the male accused had a strong inclination to choke his female partner during intercourse would be relevant on the issue in a murder case in which death ensued to the female victim as a result of strangulation during intercourse with the perpetrator.

This part of the judgment was quoted in *Regina v. Wright* (1990) 56 C.C.C. (3d) 503 where evidence of post murder sex with a prostitute was admitted. There the accused exhibited a proclivity to strangle the prostitute during intercourse, and the victim had been also strangled while being raped both vaginally and anally.

76 In *R. v. Robertson* (1987) 33 C.C.C. (3d) 481 at p. 500, Madame Justice Wilson said:

> The degree of probative value required varies with the prejudicial effect of the admission of the evidence. The probative value of evidence may increase if there is a degree of similarity in circumstances and proximity in time and place. However, admissibility does not turn on such a striking similarity.

77 Then, too, a trial judge cannot overlook the injunction of Mr. Justice Sopinka in *R. v. Morin*, supra, at p. 218:

> It is difficult and arguable undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence. Relevance is very much a function of the other evidence and issues in a case.

78 After detailing the differences between the sexual assaults on the accused's natural child contrasted with those of his foster child, McLachlin, J. said for the majority in *R. v. B. (C.R.)*, [1990] 55 C.C.C. 1 at p. 28:

> The fact that in each case the accused established a father-daughter relationship with the girl before the sexual violations began might be argued to go to showing, if not a system or design, a pattern of similar behaviour suggesting that the complainant's story is true. The question then is whether the probative value of the evidence outweighs its prejudicial effect. While I may have found this case to have been a borderline case of admissibility if I had been the trial judge, I am not prepared to interfere with the conclusion of the trial judge, who was charged with the task of weighing the probative value of the evidence against its prejudicial effect in the context of the case as a whole.

79 Mr. Justice Sopinka dissented for himself and Lamer, J., as he then was. He said the probative value of the evidence must be identified, and the trial judge failed to do it. Since the evidence was relevant, according to the majority, to support the credibility of the complainant, that, Sopinka, J. observed, is "to say no more than the evidence supports guilt. That could equally be said if the evidence was admitted for the purpose of showing that the appellant was guilty because he engaged in similar conduct on a prior occasion. More specific identification is required." In addition, he said collaboration between the two girls might explain the coincidence. The relationship of father daughter he considered "neutral" and he reiterated the "differences" observed by McLaughlin, J.

80 The major difference between the majority and the minority could be the level of respect to be accorded a trial judge's decision in a "borderline" case.

81 Where the trial judge fails to weight the probative value of the evidence against its prejudicial propensity a new trial will be ordered: *R. v. C. (M.H.)*, [1991] 63 C.C.C. 385 (SCC). In this case a former wife complained that ten years earlier the accused forced her to have sexual intercourse with a dog. Evidence was presented at the trial through the accused's subsequent common law spouse of his "peculiar sexual predilections." No objection was raised to this evidence at trial. It was: (1) requests that she submit to intercourse with a dog; (2) remarks related to intercourse with a bull and (3) requests that the common law spouse engage in sexual acts involving a cucumber and body oils and foams.

82 McLachlin, J. said had the trial judge addressed the problem, he would have decided that the evidence of cucumbers and oils:

> possesses no probative force taking it cut of the realm of mere evidence of disposition. It shares no specific common features with the evidence on the charges before the jury. At best, it is evidence of the appellant's particular sexual taste or fantasies...
>
> The other evidence is more problematic, involving as it does, requests (or in the case of the bull, a rather fantastic suggestion) that the appellant's subsequent spouse submit to sexual intercourse with animals. It can be argued that the suggestion that one's spouse should participate in such unnatural acts is so remarkable that the separate incidents might be viewed as highly similar, giving the evidence sufficient probative force to take it out of the category of mere evidence of disposition. However, rather than deciding at this level whether the probative force of the evidence outweighs the potential prejudice of inducing the jury to convict for reasons unrelated to its logical force, I think the best course in this case is to leave the decision to the trial judge on the new trial.

83 In *Regina v. Millar* (1989) 49 C.C.C. (3d) 193 the Ontario Court of Appeal considered similar fact evidence in relation to the cause of death. The accused's nine-week-old son died as a result of a subdural haemorrhage caused by shaking. The Crown's theory was the accused used more force than he knew was need, or because he was frustrated or angry. The defence theory was he shook too hard because the baby stopped breathing and he panicked. The Crown adduced evidence of other injuries caused to the baby some time before, and expert evidence to say such injuries were consistent with child abuse, and intentional infliction.

84 Mr. Justice Morden put the issue this way:

> What is in dispute is the competence of an expert medical witness to express an opinion, on the inferences that can be drawn from several injuries, on the likelihood of the injury in question being intentionally or accidentally caused. Mr. Gold submitted that the giving of evidence of this kind in this case resulted in the issue being decided not by the jury but by experts.

85 Morden, J.A. said such experts would be helpful to the jury in their deliberations, and that the jury would not as easily draw the necessary inferences without their expertise. I have already concluded that a jury faced with these facts would be equally helped by psychiatric evidence.

86 I must weigh the probative force of the evidence and see if it outweighs its prejudical effect, and decide if it "tends" to prove a fact in issue. In *Regina v. Wood* (1987) 39 C.C.C. (3d) 212 Kerans, J.A. said at p. 223:

> Were the issue open to me, I would hesitate to endorse a rule that requires the trial judge to assess the degree of possible prejudicial effect and then balance it against the probative force of the evidence.

87 He would have preferred that propensity evidence have *compelling* probative force. Clearly on the "outweighing test" that is too high a standard. At p. 225 he offered this guide to trial judges:

> 1. Be satisfied that the evidence is relevant, in the sense that it has logically probative significance is terms of an issue before the court. The Crown does not meet this test merely by demonstrating striking similarities. Rather, the decision must be made by reference to the fact in issue it is said to prove, and the cogency of the inference the Crown will invite the jury to draw.
>
> 2. Assess the degree of likelihood that the jury will engage in forbidden reasoning when it hears the evidence, and thus the degree of likelihood the the accused will be fairly tried.

3. If the risk of prejudice exists, weigh the evidence, and assets how compelling it is in your opinion in proof of the inferences sought by the Crown.

4. Balance the weight against that prejudice, and admit the evidence only if its probative force outweights the risk of the jury convicting unfairly.

88 The Crown wishes to call three former women friends of the accused to testify, principally, that he engaged in sexual acts involving bondage. On one occasion the bondage was consensual. On the other two, the bondage was performed while the women were asleep. During bondage the accused's state of sexual arousal was heightened. Normally, the durability of his erections barely sufficed for intercourse. These acts by the accused, particularly the non-consensual bondage while the women were sleeping, constitutes, at least, discreditable conduct if not criminal acts. Such discreditable conduct nevertheless falls under the rubric of "bad disposition," as in *R. v. Robertson*, (1987) 33 C.C.C. (3d) 481 where evidence of a sleazy pickup attempt and veiled threats by the accused to the victim's roomate were admitted in a sexual assault case. The evidence of Karen Kremer is also relevant on one reading of the accused's statement that she is the last woman he tied up, and that it was consensual because she enjoyed it. She, of course, denies that. All of this evidence of bondage is relevant to the ligature marks on the wrists of Valda Champagne-Marks, and to the Crown's theory that she may have been unconscious when she was tied up by the accused in his apartment for reasons of sexual bondage and even more probably unconscious when she died by asphyxiation. This evidence will be the factual corner stone for the opinion of Dr. Bradford, combined with physical findings taken from the body and the alleged scene of the crime, that the death of Ms. Champagne-Marks came as a result of a sexually moltivated, sadistic/lust murder. I am satisfied that this evidence has logically probative significance in terms of identity, motive, and to rebut accident, irrespective of whether or not the accused testifies as to accidental cause. I am not convinced that the jury will engage in forbidden reasoning when it hears this evidence. The evidence is clearly an adjunct to the evidence of Dr. Jaffe. Other possibilities are discussed in his evidence. The jury will have to weigh those possibilities, including those which might flow from her 195 milligram alcohol reading, and the accused's statements, as well as where and when her body was found, and all the circumstances of the case.

89 Dr. Bradford's evidence is that asphyxia is a common cause of death in sexually sadistic murders. The perpetrator requires that the victim be unconscious and powerless, and asphyxia is the method of terrorizing and subduing them. In his view the state of the body, and its physical injuries, are consistent with such a pattern. The absence of semen, vaginally and anally, is commonplace in such killings. The act is erotic because of its domination and violence, not its sexual content.

90 Sperm may be found on different parts of the body because often the perpetrator masterbates on the body. Dr. Bradford concluded from the accused's art work and the evidence of the three women that the accused is interested in bondage, as well as cross-dressing and transvestitism.

91 It is apparent from the cross-examination of Dr. Bradford that he does not exclude other possible causes of death, including accident. But that does not make his opinion any less relevant. It could mean that the jury will not accept this opinion, but that ultimate question is for them to weigh.

92 The evidence that the accused is interested in bondage in itself is not too highly prejudicial. If thirty per cent of adults fantasize about it, and if, perhaps, one out of ten, or even twenty, might engage in consensual bondage, then the jury ought not to ignore their sworn duty. Titillating some may find it, but condemnatory per se; I should think not. I am not ignoring that Dr. Bradford said non-consensual bondage is crossing the divide which separates sexual play acting from sadistic deviance. The jury's finding will depend to a considerable degree on its view of the evidence of the three women, its reliability, and if what followed when they woke up helps convince them that bondage was a factor in the death of Valda Champagne-Marks. Of course, part of that finding will necessarily require the assessing of the art work of the accused found in his apartment, and his needs as a tatoo artist. Dr. Bradford admits that pictorial analysis is not

commonly used in clinical psychiatry, except for children who are unable to verbalize their feelings. Obviously, the evidence of the three women is relatively, in my view, much more important than that of the art work. Subject to the views of counsel which I will seek before charging the jury, I would propose to tell the jury that. In other words the evidence of the art work may support somewhat the evidence of the three women, but certainly cannot be used conversely. What we look at and what we draw may indicate our fantasy lives. What we do is infinitely more important for the criminal law. I would also propose to warn the jury, again subject to the views of counsel, that their function concerning the art work is not to be arbiters of good taste or good style. Mr. Malbeouf is on trial for first degree murder, and the jury is not the acquisitions committee at the Louvre. For the reasons I have outlined, I have concluded that evidence from the alleged crime scene, the apartment of the accused, including drawings and art work found there, and evidence of his past relationships may indicate sadist sexual interests on the part of the accused. In my view its probative force outweighs the risk of a jury convicting the accused unfairly. Given the rarity, in absolute terms, of death caused by asphyxia in possible circumstances of non-consensual bondage, Dr. Bradford is right in my view when he says commonplace inferences in such cases might very well be misleading.

Satanism

93 It is the opposite fear I have with the evidence concerning satinism. There is not a lot of it. There are some devil drawings found in the apartment. We have evidence of two black candles and a white one. A wooden sword and a machetue were found above the bed. The accused was given a copy of a satanic bible which Karen Kremer said was not underlined when she gave it to him, but is now. Ms. Duval, an assistant crown attorney, said Ms. Kremer told her it was underlined when the accused got the satanic bible. The underlining was important to Dr. Bradford. The only part of Exhibit K, "The Satanic Bible" which is underlined is the chapter entitled "The Satanic Ritual" which begins at p. 129. The underlined parts refer to:

> 1. "A nude woman is used as the altar in satanic rituals because women are the natural passive receptor, and represents the earth mother."
>
> 2. For large group rituals a "trapezoidal altar" 3 to 4 feet high and about 6 feet long "can be specially constructed for the woman to lie upon.
>
> 3. "The symbol of Baphomet is place on the wall above the altar.
>
> 4. "Only black and white candles are to be used in Satanic ritual. Never more than one white candle, but as many black candles as are required to illuminate the ritual chamber may be used." At least one black candle is placed to the left and one white candle to the right, and the white one represents the "hypocrisy" of white light magicians. Candle power is the only source of light.
>
> 5. A bell is to be used and rung nine times, and its tone should be loud and penetrating rather than soft and tinkling.
>
> 6. The chalice shall be made of "anything but gold. Gold has always been associated with white-light religions and the Heavenly Realm."
>
> 7. Whatever drink is the most stimulating may be used as the Elixir of Life.
>
> 8. A sword is used ceremonially during the "Invocation to Satan" and to call forth the "four Princes of Hell." For private rituals, if a sword cannot be obtained, a long knife, cane or similar staff may be used.
>
> 9. A phallus is used to seek the benediction of the house and is necessary only for organized group rituals.

> 10. A gong is used to call on the forces of darkness in organized group rituals.
>
> 11. Parchment or plain paper may be used for the requests which are then burnt in the black or white candle as appropriate. Curses are burnt in the flame of the white candle and blessings and charms in the black candle.

94 As Dr. Bradford said some elements are there, e.g. candles, sword, and, obviously the bible, but, it would seem there is no gong, chalice or phallus (although some of those were only required for group rituals). Dr. Bradford said it was an

> associated feature or something like that, you know, may come into, you know, an extra interest in the type of bondage that he likes. It's another slant on it. So I don't see it was more important than that, except it fits in.

95 And then Mr. McCann helpfully suggested:

> Q. Okay, so it is another little tidbit I suppose--
>
> A. Yes.

96 Tidbit means delicate bit. Doubless Mr. McCann stresses the bit and Dr. Bradford the delicate or choice. The evidence on the underlining is conflicting. It is apparent from a cursory reading of other parts of the Satanic Bible that Satanism as a belief system might be important for sexual sadists to justify sexual self indulgence. Equally, the doctor agrees there are many, many satanists who are not sexual sadists. I agree with Dr. Bradford that the evidence "fits," and it has logically probative significance, especially if the jury concludes that the accused underlined the ritual part of the book, and probably in any event. Is there any likelihood that the forbidden reasoning will be used? That the accused is guilty because he is a satanist? Satanism is certainly not a main stream belief system in this country. Indeed its underpinings are anti-religious in the sense that there is no duty to any ethical imperative higher than one's self indulgence and self interest. It considers itself to be rationally hedonistic. "Satanism is a religion of the flesh, rather than the spirit, therefore an altar of flesh is used in Satanic ceremonies." (The Satanic Bible, p. 135). If one considers that many satanists are not sadists, then to rule admissible evidence of the accused's possible interest in satanism would violate the principle in *R. v. Morin*, supra. There evidence that the accused was a simple schizophrenic did not constitute admissible evidence that he was involved in violent behaviour against a nine-year-old girl simply because some simple schizophrenics acted violently sometimes. As Sopinka J. said in the Morin case, supra, at p. 218:

> The greater the number of persons in society having these tendencies, the less relevant the evidence on the issue of identity and the more likely that its prejudical effect predominates over its probative value.

97 The evidence of satanism is to help establish that the accused is a satanist, and the death of Valda Champagne-Marks may have resulted from a satanic ritual which got turned into a sadistic/lust murder. Many satinists are not sadists. Therefore the danger referred to by Sopinka, J. exists: that the prejudicial effect of the jury accepting that the accused may be a satarist involved with rituals on the altar of a woman's body outweighs its probative value on the issue of how the accused came to her asphyxia-induced death. It is, in my view, a dangerous tidbit whose choice effects cannot be controlled. After weighing the evidence, including that involving underlining, and Dr. Bradford's frankness as to the indicia of satanism which were and were not in the accused's apartment, I must, to use the words of Kerans, J.A., "admit the evidence only if its probabive force outweighs the risk of the jury convicting unfairly." I am unable to do that. To contrast this ruling with the one I made on the bondage and propensity evidence of Dr. Bradford: He shares his satanism (assuming he is one for these purposes) with many; he shares his non consensual sadism (assuming again) which may have induced death by asphyxia with very few persons on a global scale. This is not the normal "strikingly similar" analysis engaged in, for example, in the Wood case, supra. But it is a case which, in my view, falls outside the strictures of the Morin case, supra for part of the evidence and within it for another part.

98 I have attached two pages under the heading "Evidence Sought to be Admitted" as Appendix A to these reasons. These questions were given to me as an aide memoire by the Crown. I would allow Dr. Bradford to express his opinions on all of the questions, except question 13. Notwithstanding the court's approval, the Crown must exercise some caution so that questions are made as particular as possible when this case is referred to. In the Millar case, supra, the Court of Appeal said for the expert to constantly refer to child abuse was to express his findings in the most conclusory terms possible. The court would have preferred phraseclogy like "consistent with being intentionally caused." In effect, such responses show appropriate respect for the jury as the trier of fact chosen by Parliament in this case, and enhance the scientific discipline of the expert.

99 Finally, I would like to thank counsel for their submissions and their research which I found most helpful.

Appendix "A"

Evidence Sought to be Admitted

1. Dr. Bradford

(A) Specifically

(1) Considering crime scene evidence, opinion that death resulted from a sexually sadistic act, most likely necrophilia or lust murder.

(2) Considering crime scene evidence, opinion that sexual sadism was a factor in V.M. Champagne's death.

(3) Considering evidence of past relationships and physical findings in P. Malboeuf's apartment, opinion that Pierre Malboeuf fits the profile of a sexual sadist.

(4) Considering evidence of past relationships and physical findings in P. Malboeuf's apartment, opinion that Pierre Malboeuf has characteristics of a sexual sadist.

(5) Considering evidence of past relationships, opinion that Pierre Malboeuf has sexual sadistic interests.

(6) Considering evidence of past relationships, opinion that Pierre Malboeuf has interest in non-consensual bondage.

(7) Considering evidence of physical findings at P. Malboeuf's apartment, opinion that these reveal an interest in sexual sadism.

(B) Generally

(8) Describe sexual sadism, including necrophilia and lust murder

-what factors are relevant in identifying a death as a sexually sadistic nomicide;

-what characteristics and interests may be exhibited by a sexual sadist.

(9) Testify about sexual acts and behaviour that may result in asphyxial death.

(10) Testify about bondage, including non-consensual bondage.

(11) Testify about impotence, including activities and behaviour which one may indulge in to heighten sexual arousal.

(12) Testify generally about a person's drawings being indicative of their sexual interest and fantasies.

(13) Testify generally about the role of "rituals" in certain types of sexual activity, including satanic ritual.

-type of paraphernalia that may be used.

(14) Testify generally about cross-dressing as a sexual paraphilia.

(15) Testify generally about the effect of drug abuse on sexual activity.

Physical Items and Past Sexual Relations

(16) Evidence of Carole Proulx, Terry Trevail and Karen Kramer with respect to bondage and drug use.

(17) *All* physical findings made in Pierre Malboeuf's apartment, including art work, and satanic and cross-dressing paraphernalia.

(18) All art work found in accused's apartment.

(19) Satanic Ritual paraphernalia.

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