

Revamping the Law of Prior Consistent Statements: *R. v. Khan*

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An evidence revolution has been afoot for some years with the gradual ascendancy of a principled approach to admissibility in favour of the traditional rules-and-exceptions approach.

Marking the latest milestone in the revolution is the new analytical framework for admitting prior consistent statements articulated by Justice David Doherty in *R. v. Khan*.¹

For well over two centuries, since the famed trial of Thomas Hardy for high treason,² the rule at common law has been that a witness's prior consistent statement is presumptively inadmissible. Such statement is thought to be self-serving, easy to manufacture, and so, lacking probative value. It also constitutes hearsay when tendered to prove the truth of matter asserted.³

As with many evidence rules, there is an assortment of exceptions to this general exclusion, such as to rebut an allegation of recent fabrication, identification evidence, pure narrative, and narrative as circumstantial evidence. When a prior consistent statement comes in under an exception, it is admitted for a restricted purpose. The purposes differ among exceptions. For example, a prior consistent statement adduced to refute a suggestion of recent fabrication can only be used to show that the witness's story did not change as a result of a new motive to lie, and not for the truth of its contents. If a prior consistent statement is admissible under a hearsay exception, it will not be excluded by the general rule against prior consistent statements.

Against this backdrop comes *R. v. Khan*. The case involves a police officer charged with sexually assaulting a woman he was transporting to the police station. He searched her three times. On the third occasion, Khan pulled her top away, then looked at her chest while shining a flashlight on it. When the complainant arrived at the station and was told by another officer that she would be searched, she burst: "I've already been searched three times. Why are they searching me again?" The complainant testified at trial.

Is her prior consistent out-of-court statement about having thrice been searched admissible?

Seven judges had four different opinions, bringing to the fore the complexity and confusion in this area of law. The trial judge, Justice Bruce Frazer of the Ontario Court of Justice, admitted the statement under the *res gestae* exception and the principled approach to the hearsay rule, opening the door for it to be used for the truth of what was said. According to Justice Mary

¹ 2017 ONCA 114

² *R. v. Hardy* (1794), 24 St. Tr. 199

³ *R. v. Dinardo*, 2008 SCC 24 at para. 36

Vallee, the summary conviction appeal judge, however, there was no available route to admission and the evidence should have been excluded.

The majority of the Court of Appeal, in reasons penned by Justice William Hourigan, sided with the trial judge in admitting the statement, though pursuant to a different exception - the narrative as circumstantial evidence exception - for the limited purpose of assessing the veracity of the complainant's in-court testimony.

In concurring reasons, Doherty J.A. agreed with letting the statement in, but rather than to wrangle with the existing exceptions, he seized on the opportunity to revamp the admissibility framework to bring it closer to the broader considerations of relevance, materiality and probative value. The 'black letter rule-list of exceptions' regime was jettisoned, and a principled analysis introduced.

Doherty J.A.'s principled approach involves a two-stage inquiry:

1. For what purpose is the prior consistent statement offered? The purpose must be relevant to a material issue in the case.
2. Does the statement have some probative value in respect of the purpose for which it is offered? For example, if a prior consistent statement is said to be relevant to the complainant's credibility, the party offering it must demonstrate how it is relevant to the complainant's credibility. If the statement is adduced to prove as true the statement's contents, then it must be established that it is admissible hearsay.

The principled approach may not be any easier to apply, but it is "much more likely to focus the minds of counsel and the trial judge on exactly what the evidence is said to do and the ability of the evidence to further that stated purpose".⁴ It is also more likely to further evidence law's underlying objective of letting in evidence that helps more than it hurts. An out-of-court statement that furnishes little insight into credibility or other matters at issue distracts, wastes time, and increases the risk of a decision based on inaccurate and/or irrelevant information. Under the principled analysis, it would be filtered out, even if it were to technically fit under a traditional exception.

The reform advanced by Doherty J.A. has been a while coming. The existing law, with its many exceptions and associated rules of restricted admissibility, is difficult to learn and apply, and at times seems disconnected from any overarching principles. It is, in a word, complex. Complexity tends to create problems of inconsistency and hinders access to justice. Writing seven years earlier, Justice Sharpe noted in *obiter* in *R. v. Edgar* that the law is ripe for reform: "I agree with the submission that the gradual abandonment of the traditional 'black letter rule-list of exceptions' approach to the law of evidence in favour of the principled approach invites

⁴ *R. v. Khan*, *supra* note 1 at para. 59

reconsideration of the law relating to the admissibility of an accused's prior consistent statements.”⁵

Doherty J.A.’s approach, ground-breaking as it is, constituted a minority opinion. It remains to be seen whether, as persuasive authority, it will gain traction with jurists to come.

⁵ *R. v. Edgar*, 2010 ONCA 529 at para. 22