The Principled Exception and the Forgotten Criterion
Steve Coughlan*

The principled exception to the hearsay rule is routinely described as being settled by the “twin criteria”\(^1\) of necessity and reliability. In fact a third criterion is also — or at least ought to be — at play: that admitting the evidence through hearsay would not undermine any other rule of evidence. The Court has made reference to this third criterion in the past, but it has largely been ignored in both Supreme Court and lower court decisions. The recent judgement in *Couture* depends in a limited way on that question, and so it marks an opportunity to articulate the issue more clearly, which ought to be considered at least in all principled exception cases.

This third criterion is related to the issue of necessity. Necessity is hardly discussed in judgments, and often properly so: where a witness is dead there is little to say on the matter. And although classically “necessity” contemplated situations where a witness was dead, insane, or out of the country, it has been clear from the start that the principled exception encompassed a broader meaning. In *Khan* itself, where the principled exception arose, the necessity criterion was met because the child’s evidence was inadmissible, rather than because the child herself was unavailable.\(^2\) In *B. (K.G.)* the court made clear that the issue was whether the particular testimony was unavailable, even if the witness was personally present.\(^3\) Although necessity does not mean “necessary to the prosecution’s case”, it is satisfied if the evidence is “reasonably necessary”.\(^4\)

One could debate whether the standard has been relaxed too far, with the result that “easier” has replaced “necessity” as a practical matter.\(^5\) The issue to be pur-

*Faculty of Law, Dalhousie University. The author wishes to thank Rob Currie for his very helpful suggestions, and the Nova Scotia Provincial Court Judges’ Association for the fruitful discussion of necessity issues at their Spring 2007 conference.


\(^5\) For example, some courts have begun to allow prior statements of witnesses to be admitted on the principled exception even though the witness is in court and not denying the previous evidence, simply not testifying *viva voce* to all of the same facts: see for example *R. v. C. (R.)* (2005), 201 C.C.C. (3d) 71 (Ont. C.A.), though for a case not
sued here, however, is a more limited one: the use of the necessity criterion to admit evidence that is deliberately inadmissible under other rules. Of course evidence admitted under the principled exception is by definition not admissible on any other basis, or there would be no need to use the principled exception. However, there is a distinction to be drawn between evidence which merely fails to meet the requirements of an inclusionary rule of evidence, and evidence which succeeds in meeting the requirements of an exclusionary rule. We could describe both pieces of evidence as "inadmissible", but in the latter case to admit the evidence as hearsay would be to undermine another rule of evidence. The "principled exception" should not be a method of trumping all other principle-based rules.

Consider for a moment the Mohan criteria for the admission of expert evidence. The first two, relevance and necessity, are roughly parallel to the twin requirements of the principled exception. The third listed requirement, however, is "the absence of any exclusionary rule" that would otherwise operate to keep the evidence out. Such a criterion — that admitting the evidence through hearsay would not undermine any other rule of evidence — should exist for the principled exception.

It is arguable, though not entirely clear, that this general principle was articulated by the Court in Hawkins. Whatever should be made of the decision in Hawkins, in Couture the majority has clearly adopted the principle, not in general but at least in the specific context of spousal immunity. It would be desirable for the principle to be unambiguously endorsed as the third criterion for the principled exception in all cases.

In Hawkins, the plurality judgment of four members of the Court had held:

> 69 ...[t]his modern framework should also be applied in a manner which preserves and reinforces the integrity of the traditional rules of evidence. Accordingly, the new hearsay analysis should not permit the admission of statements which the declarant, if he or she had been available and competent at trial, would not have been able to offer into evidence through direct testimony because of the operation of an evidentiary rule of admissibility... the principled framework should not be applied to permit the admission of such statements for the truth of their contents through the back door. 7 (emphasis added)

permitting such evidence to be led see R. v. Campbell (2006), 207 C.C.C. (3d) 18 (B.C. C.A.).


On the face of it, this statement seems to affirm that not undermining other rules of evidence should be a third criterion for the principled exception. That does not seem, however, to have been the intent of the plurality judgment. To the extent that they considered this “back door” requirement, it was only to consider whether particular aspects of the witness’s testimony would themselves have been inadmissible hearsay had she testified to them in court. They did not discuss the possibility that admitting the witness’s testimony at all was a back door route around another rule of evidence. To the extent that the majority did consider the implications of admitting spousally immune evidence through the principled exception, it was only in the context of considering the quite different issue of a trial judge’s residual discretion to exclude evidence where its probative value is slight and it might cause undue prejudice to the accused.

However, discussion of whether using the principled exception to admit spousally immune evidence would undermine the spousal immunity rule was not completely absent from Hawkins: Justice Major dissented on the basis that using the principled exception to override spousal incompetence violated the “back door” rule articulated by the majority. Justice L’Heureux-Dubé, concurring in the result with the plurality, disagreed with Justice Major’s argument. But there is no clear majority opinion on this particular issue.

In Couture, on the other hand, five judges unambiguously articulate the forgotten third criterion, at least in the specific context of the interplay between the principled exception and spousal immunity. They say:

63 ... Hence, as was done in Hawkins, hearsay evidence may be admitted under the principled approach if it meets the twin criteria of necessity and reliability and if its admission would not undermine the spousal incompetence rule or its rationales. (emphasis in original)

A large part of the dispute between the majority and the minority in Couture concerns whether the decision here not to admit spousally immune evidence actually amounts to overturning Hawkins, as the minority claim. The minority in Couture prefer to consider the interplay with spousal immunity as the plurality in Hawkins did — as a question to be addressed only at the residual discretion stage (see para. 134). The interesting issue, however, is not whether Couture is consistent with Hawkins. Rather, it is whether the approach in Couture of con-

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8The notion that evidence might be “double hearsay” and that an analysis of the hearsay rule might therefore be needed at two stages is of course correct and sometimes a part of courts’ analyses (see for example R. v. Mapara, [2005] 1 S.C.R. 358, 28 C.R. (6th) 1), and the statement from Hawkins clearly includes that situation. But the policy issue is not limited only to that situation.

9The question is not straightforward. In Hawkins Justice Major and two others held that the spousal immunity rule would be undermined, while Justice L’Heureux-Dubé and one
sidering the interplay with other rules of evidence as an initial criterion for satisfying the principled exception, rather than as a residual discretion question after the evidence has been found to be admissible, is the right one. I suggest that the Couture approach is clearly preferable. The twin requirements are really triplets: necessity, reliability, and that permitting the evidence to be led does not undermine another rule of evidence.

At present, courts are inclined to see the unavailability of testimony through the operation of the rules of evidence as having only one significance: to show that the necessity criterion is met. In fact a more searching analysis is often necessary. Not every piece of evidence made inadmissible under some other rule should be prevented from coming in as hearsay: such reasoning would threaten to eliminate the principled exception entirely. But it equally ought not to be the case that evidence can come in under the principled exception no matter what the competing rule. It is therefore important to consider, independently of the issues of necessity and reliability, whether use of the principled exception on particular facts will undermine another rule of evidence.

There were two admissibility issues in Hawkins: the spousal immunity rule, and s. 715 of the Criminal Code, which permits preliminary inquiry testimony to be admitted at trial in some circumstances. These two situations — competing privileges or immunities, and statutory provisions making evidence admissible under certain conditions — are worth discussing separately. They provide a good basis both to show that necessity and reliability are not alone sufficient considerations to decide whether hearsay can come in on a “principled basis”. They show the need for explicit consideration of the forgotten third criterion, and provide a basis for discussing some of the competing considerations which arise when applying it.

Competing Privileges and Immunities

Many courts had assumed on the authority of Hawkins that the inadmissibility of evidence due to spousal immunity would always satisfy the necessity requirement.\textsuperscript{10} Couture seems to mean that it was only on the particular facts of Hawkins, where the testimony was originally made while it was not barred by that

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immunity, that such testimony could come in. But if spousal incompetence is meant to protect only the relationship, not the content of any communication, then the spousal immunity rule might not be undermined by admitting the evidence as hearsay in either case. The evidence must have been overheard by someone else for there to be the possibility of hearsay being called at all, and overheard spousal communications are not protected.

If that latter argument is correct, though, what about using the principled exception to admit evidence protected by solicitor/client privilege? The accused cannot be called to testify to admitting to the crime to his or her lawyer, but could evidence that the accused confessed to his or her lawyer be admitted on the basis of the principled exception? On the one hand that seems a surprising, perhaps shocking suggestion. On the other hand, at common law overheard solicitor/client communications, like spousal communications, are not privileged, so perhaps the same argument which could apply there might apply here. On yet a third hand, the Court has been at great pains in recent years to protect solicitor/client privilege, holding that it should be breached only when the “innocence at stake” exception is met. Can the necessity to call evidence by way of hearsay really be made out on the basis that the evidence was deliberately made unavailable for policy reasons?

It sounds initially unlikely that any court would find necessity to be made out due to solicitor/client privilege: to say that the evidence is necessary because the accused cannot be compelled to testify at his or her own trial would seem to violate the right to silence. And yet, in considering the co-conspirator’s exception to the hearsay rule in Mapara, the Court recently concluded that:

18 ... The criterion of necessity poses little difficulty. As stated in Chang, “necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy” (para. 105).

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11Intervening lower court decisions had recognised the difficulty of the issue but had reached a variety of conclusions. See for example R. v. Phan, [2000] O.J. No. 2223 (C.J.) acknowledging the contradiction between the two rules and following the reasoning of Justice L'Heureux-Dube in Hawkins, or R. v. P. (E.T.), [2000] M.J. No. 629 (Prov. Ct.) concluding that “[i]f procuring a sworn and video-taped statement from a spouse in advance of trial means that the evidence is admissible regardless of the competency of the witness at the time the statement is taken, then the rule is effectively gutted.”(para. 26).

12This is part of Justice L’Heureux-Dubé’s argument in Hawkins.

13Justice Major raises this point as an in terrorem argument in Hawkins.

It is not obvious that the first two of these three reasons differ in any significant way from necessity arising as a way around solicitor/client privilege. Indeed, there is a pretty good argument that there was an issue in Mapara beyond the simple question of necessity: was the administrative convenience (no doubt considerable) of not holding separate trials a sufficient reason to depart from the presumption of inadmissibility of hearsay evidence?

Similarly, what of informer privilege? Again, the Court has held that evidence exposing the identity of an informer should be admitted only when the “innocence at stake” exception is met. Once again, therefore, one could quite easily say the necessity to introduce the evidence by way of hearsay was made out by its inadmissibility due to informer privilege. One would hope, though, that such a claim would be summarily rejected.

Even more extreme, perhaps, are the immunities created by ss. 38ff and 39 of the Canada Evidence Act, protecting information that might threaten national security or “confidences of the Queen’s Privy Council” — that is, cabinet secrecy. Section 39, for example, permits the Clerk of the Privy Council to refuse an order for production of information by certifying in writing that it is secret, in which case “disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.”. If one gets into the right frame of mind, that certification forbidding production of original documents is an extremely strong argument that the unavailability of the evidence meets the necessity criterion for admitting it through hearsay. From a different (and far more sensible) frame of mind, the certification is a very clear indication that no matter what any rules of evidence might say, that particular information is not to be disclosed.

But what is actually wrong with the argument “the Clerk of the Privy Council will not give me this information, therefore it is necessary for me to get it from somewhere else”? In fact, nothing at all is wrong with the argument — if the only question is necessity. That is the real point here. It is not that none of these privileges could ever, in any circumstances, be overridden by the principled exception: some could, sometimes. But deciding which, and when, is not a question that can be answered simply by asking “is the necessity criterion met?”. Rather, the only consideration which can properly come to grips with the issues is the forgotten third requirement, whether “permitting the evidence to be led does not undermine other rules of evidence”.

The privileges discussed so far are class privileges. Many of the same questions could arise in dealing with case-by-case privileges as well. And noteworthy in that context is the fourth criterion for recognizing such privileges, “that the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litiga-
In discussing the forgotten third criterion for the principled exception, that question seems like the central consideration in deciding whether the rules of evidence would be undermined or not. Explicitly acknowledging and addressing this question, rather than simply making passing reference to the necessity of the evidence, would allow these two rules of evidence to work in harmony.

Failure to Meet Statutory Requirements

Various statutory provisions permit the admission of particular evidence if particular conditions are met: breathalyser certificates, business records, preliminary inquiry testimony, and so on. Sometimes it is clear that these provisions are meant to be read as “this is one way to admit the evidence”. On other occasions it is clear that the provisions mean “this is the only way to admit the evidence”. Sometimes it isn’t clear which of those two readings is the correct one. Simply to assume that necessity is met when evidence is not available because of a failure to satisfy particular statutory requirements is to fail to see that there are relevant differences between statutes.

In Lemay, for example, the British Columbia Court of Appeal was faced with an application to admit certain business records which did not satisfy the admissibility requirements of ss. 29 and 31 of the Canada Evidence Act. They concluded that the records were nonetheless admissible under the principled exception, and their decision was undeniably correct. In that instance, they were aided by s. 36 of the Canada Evidence Act:

36. This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act or existing at law.

Hence it was clear that one could not infer that the statutory provision was intended to mean “admit the evidence only if these requirements are met”: the statute explicitly asserted that that was not the case.

In Hawkins, the Supreme Court concluded that, although the witness’s preliminary inquiry evidence did not qualify for admission under s. 715 of the Code (a statutory exception to the hearsay rule specifically designed for prior testimony), nonetheless that evidence was admissible. They reasoned that s. 715 had never been intended to be a “comprehensive code” on the admissibility of former testimony. Therefore one could not conclude that the failure to meet those particular conditions of admissibility meant that the evidence was intended to be excluded. Again, this is a perfectly rational argument: less undeniable, given the absence

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15 See for example McClure, para. 29.

of any equivalent to s. 36 of the Canada Evidence Act, but nonetheless perfectly reasonable.

What about s. 258(1) of the Code, allowing evidence of a person's blood alcohol level to be proven through the use of a certificate? If there is a failure to satisfy the conditions necessary for using a certificate, it is still open to the Crown to try to prove blood alcohol level through other means: they have simply lost the convenience of relying on the certificate. But what, in theory, prevents the Crown from still attempting to rely on the certificate itself, introducing it not because the statutory requirements are met, but because the evidence is necessary and reliable? The evidence is likely to be reasonably necessary, after all, and a flaw in the certificate is unlikely to affect the underlying reliability of the test itself. And that approach would simply model what was done in Lemay and Hawkins.

Similarly, what about ss. 278.1-278.91 of the Code, creating strict rules for the production and disclosure of complainant and witness medical, psychiatric and other records to an accused in a trial for a sexual offences? Again in theory, there is no reason that either party could not assert that the failure to satisfy the specific statutory conditions for admissibility does not lead to the conclusion that the evidence is inadmissible, but rather to the conclusion that admission on a hearsay basis is necessary.\(^1^7\)

However, given the long history of breathalyser law and insistence on strict compliance with technical requirements of the Code, and the particular history (through O'Connor,\(^1^8\) Bill C-46, and Mills\(^1^9\)) of the counselling records provisions, it is difficult to imagine any court deciding other than that those provisions do create "comprehensive codes" of their particular subject matter. The sections do not literally say "and if these conditions are not met, do not admit the evidence", but that intention seems clear.

In that event the evidence certainly should not be admitted by means of the principled exception. Again, though, the reason for that would not be that admitting the evidence through hearsay was not necessary: the necessity analysis would be the same as in Lemay and Hawkins. Rather the evidence should not be admitted because of relevant differences in the nature of the statutory provisions not satisf-

\(^1^7\)Strictly the issue here would be whether the record should be admitted to the in camera hearing in front of a judge to determine whether it should be disclosed to the accused, rather than admitted at trial, but the same underlying issue applies. Section 278.2 specifically states that no record shall be produced to the accused except in accordance with these Code provisions. However, although the provisions provide criteria for a judge to use in deciding whether to examine the records, they do not explicitly state that the judge cannot examine the records if those criteria are not met.


fied. Using the principled exception in the latter cases would undermine other rules of evidence, where it would not do so in the former. Accordingly the important discussion would occur in the context of the third, not the first, criterion.

Conclusion

This issue is not one which will always need to be considered at length: probably the result will be obvious most of the time. However, that is equally true of the necessity criterion, which nonetheless is explicitly considered in every case. And to date when this question should have arisen, courts have generally been content to do no more than refer to the inadmissibility of evidence under other rules as satisfying the necessity requirement, which is to miss the issue entirely. As noted at the start, “inadmissibility” in this context conceals an ambiguity.

Sometimes “inadmissibility” simply means that the admissibility of the evidence has not been established — no rule specifically says the evidence can go in, but it means nothing more than that. On the other hand sometimes “inadmissibility” means that a positive determination has been made that the evidence should not be admitted. In dealing with privileges and immunities, it would be necessary to consider the precise protection intended to be afforded to determine when there is simply a failure to include, and when there is a policy decision to exclude. In the context of statutory provisions, it would be necessary to analyse whether the section was meant to be a comprehensive code on the subject area to see whether there is just a failure to admit or a decision to exclude.

But although that analysis is essential when the principled exception interacts with other rules of evidence, simply asking whether admission of the evidence is necessary fails to get at any of these issues. It goes without saying that the reliability criterion will be of no assistance on the issue either. What is needed is explicit consideration of the forgotten third requirement, that permitting the evidence to be introduced will not undermine other rules of evidence. Frequently, perhaps normally, the answer will still be “yes, the hearsay should be admitted”. But without consideration of that issue, a question of real significance will have been missed.