R. v. ABBEY AND PSYCHIATRIC OPINION EVIDENCE: REQUIRING THE ACCUSED TO TESTIFY

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I. INTRODUCTION

Two issues that deserve close examination were raised by the recent Supreme Court of Canada decision in *R. v. Abbey*.[1] First, to what extent should the dependence of a psychiatrist's opinion on unproven out-of-court statements affect the weight of that opinion? Second, is it justifiable to require an accused to testify in order to provide the evidentiary basis for a psychiatrist's opinion? The first issue arose as long ago as *M'Naghten's Case*,[2] as a consequence of the general rule that experts may only give opinions on facts proven by admissible evidence.[3] The second issue, which is perhaps more novel, was not dealt with explicitly in *Abbey* but arose implicitly from the decision. Both issues are important. In discussion of them I will refer to the judgment in *Abbey* as well as to general principles of evidence. In addition, I will venture upon some general observations regarding the role of the psychiatrist in the courtroom.

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[1] [1982] 2 S.C.R. 24, 68 C.C.C. (2d) 394.

[2] 10 Cl. & F. 200, 8 E.R. 718 (H.L. 1843). The fifth question asked of Their Lordships was, *id.* at 211, 8 E.R. at 723:

> Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to the law, or whether he was labouring under any and what delusion at the time?

The answer was, *id.* at 212, 8 E.R. at 723:

> [W]e think the medical man, under the circumstances supposed, questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

See also Baron Alderson's comments in R. v. Frances, 4 Cox C.C. 57 (Cent. Crim. Ct. 1849).

[3] The rule is founded upon Lord Mansfield's judgment in Folkes v. Chadd, 3 Doug. 157, 99 E.R. 589 (K.B. 1782). In the context of psychiatric opinion evidence, the

II. Dependence of Psychiatric Opinion on Out-of-Court Statements

In *Abbey* a defence psychiatrist relied exclusively on out-of-court statements made to him by the accused in formulating his opinion as to the accused's mental state at relevant times. These statements were admitted in evidence through the psychiatrist and treated by the trial judge as factual, even though the accused never took the stand.[4] The Supreme Court of Canada held that these hearsay statements ought to have been admitted only to show the basis for the psychiatrist's opinion and that the jury should have been so instructed. The Court then went on to address the more fundamental question of whether the evidentiary value of the opinion was affected by its reliance on hearsay statements.[5]

This issue had been discussed before in the Supreme Court, although not in great detail. In the 1966 case of *City of Saint John v. Irving Oil Co.*,[6] it was argued that the opinion of a qualified land appraiser with regard to the value of a particular piece of land should not be admitted because it was based on out-of-court statements consisting of interviews the appraiser had conducted with forty-seven persons who had been parties to sales of land in the area. Mr. Justice Ritchie, in delivering the opinion of the Court, dismissed this argument summarily:

> To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.
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> The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion. . . .[7]

Later that year the Supreme Court dealt with the issue again in *Wilband v. The Queen*,[8] this time in the context of psychiatric opinion evidence. Two psychiatrists testifying in dangerous sexual offender proceedings had based their opinions in part on prison files containing

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rule was stated in R. v. Turner, [1975] 1 Q.B. 834, at 840, [1975] 1 All E.R. 70, at 76 (C.A.) as follows: "[T]hose who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence."

[4] R. v. Abbey, *supra* note 1, at 39-40, 45, 68 C.C.C. (2d) at 407, 411. The psychiatrist testified that Abbey had a manic illness called hypomania that resulted in delusions and hallucinatory experiences of a bizarre nature. He recounted in some detail what Abbey had told him during their interviews about a number of these occurrences.

[5] *Id.* at 39-46, 68 C.C.C. (2d) at 407-12.

[6] [1966] S.C.R. 581, 58 D.L.R. (2d) 404.

[7] *Id.* at 592, 58 D.L.R. (2d) at 414-15.

[8] [1967] S.C.R. 14, [1967] 2 C.C.C. 6 (1966).

another psychiatrist's report, the results of a psychological test and a hospital report. In response to the argument that the opinion was founded on hearsay and should not be admitted, Fauteux J. drew a distinction between weight and admissibility similar to that drawn in the earlier case, although he did not refer explicitly to *Saint John*:

> The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information.[9]

In neither *Saint John* nor *Wilband* was the question of the use in evidence of an opinion founded on out-of-court statements examined at any great length; and in both cases it is unclear whether evidentiary considerations were paramount. In *Saint John*, it can be argued, the very volume of the sources the appraiser had relied on precluded proving them in court.[10] *Wilband* involved the legal issue of dangerous sexual offender status where psychiatric opinion evidence was required by the *Criminal Code*;[11] in any event, as it turned out, "the information gathered from prison files was not considered by the psychiatrists as having any real significance in the formation of their opinion".[12]

These points aside, however, it appeared that through these two decisions the Supreme Court of Canada had adopted a consistent approach to the problem. It is somewhat surprising, then, and perhaps indicative of the complexity of the subject, that some members of the Court disagreed with this approach in *R. v. Lupien*,[13] the next Supreme Court decision to discuss the issue. The major issue in *Lupien* was whether experts could testify on the "ultimate issue" to be decided by the jury. One of the questions before the Court, however, was whether a psychiatrist could give an opinion with respect to the state of mind of an

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[9] *Id.* at 21, [1967] 2 C.C.C. at 11.

[10] Certainly considerations of this nature played a role in the judgment in *Saint John*, *supra* note 6, at 592, 58 D.L.R. (2d) at 414:

> Counsel . . . pointed out that if the opinion of a qualified appraiser is to be excluded because it is based upon information acquired from others who have not been called to testify in the course of his investigation, then proceedings to establish the value of land would take on an endless character as each of the appraiser's informants whose views had contributed to the ultimate formation of his opinion would have to be individually called.

[11] Under the provisions of the then s. 661 of the *Criminal Code*, S.C. 1953-54, c. 51, (*amended by* S.C. 1960-61, c. 43, s. 34), in dangerous sexual offender proceedings the court was required to hear evidence of at least two psychiatrists. In R. v. Lupien, [1970] S.C.R. 263, at 269-70, [1970] 2 C.C.C. 193, at 197 (1969), Mr. Justice Martland argued that *Wilband*, *supra* note 8, could be distinguished on this basis, since the purpose of a s. 661 hearing was to forecast conduct of the offender, rather than to determine his guilt on proven facts.

[12] *Wilband*, *supra* note 8, at 21, [1967] 2 C.C.C. at 11.

[13] *Supra* note 11.

accused which was predicated in part on the assumption that information obtained from him regarding his background, attitudes, feelings and beliefs was correct.[14] Mr. Justice Martland (Judson J. concurring) would have excluded the opinion on a number of grounds, including its foundation on hearsay evidence obtained from the accused himself. He distinguished *Wilband* as having dealt with a situation where psychiatric opinion evidence was required by Parliament.[15] Mr. Justice Ritchie (Spence J. concurring) disagreed. In his opinion it was not the truth of whatever statements were made to the psychiatrist that was at issue but rather the admissibility of the psychiatrist's opinion; reliance on out-of-court statements did not make the opinion inadmissible, although it could affect the weight to be given it.[16] This view simply reiterated what the Court had already stated in *Saint John*[17] and *Wilband*.[18] Mr. Justice Hall, the final member of the *Lupien* Court, agreed with Mr. Justice Ritchie that the opinion ought to have been admitted but did not elaborate.[19]

In neither *Wilband*[20] nor *Lupien*[21] did the Court discuss the question of the use of a psychiatric opinion that relied *entirely* on out-of-court statements made by the patient to the psychiatrist. Both cases suggest that the weight to be given to the opinion should be affected; but by how much? This question remained unanswered until the 1982 Supreme Court decision in *Abbey*.[22] In the interim, two Ontario Court of Appeal decisions, *R. v. Dietrich*[23] and *R. v. Rosik*,[24] further compounded the problems raised by the earlier cases.

In *Dietrich* Chief Justice Gale held that once an expert was permitted to give his opinion he ought to be permitted to give the circumstances upon which that opinion was based. He correctly pointed out that evidence of such circumstances would not be hearsay, since it would be admitted solely to show the reasons for the opinion and not as evidence of the facts contained therein.[25] He went on to suggest, however, that otherwise unproven statements admitted through a psychiatrist as evidence of the basis of the opinion would lend weight to that opinion,[26] a suggestion directly contradictory to the analysis of the

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[14] *Id.* at 266-67, [1970] 2 C.C.C. at 194-95.
[15] *Id.* at 267-70, [1970] 2 C.C.C. at 195-97. *See also supra* note 11.
[16] *Id.* at 273, [1970] 2 C.C.C. at 199-200.
[17] *Supra* note 6.
[18] *Supra* note 8.
[19] *Supra* note 16, at 278-80, [1970] 2 C.C.C. at 204-05.
[20] *Supra* note 8.
[21] *Supra* note 11.
[22] *Supra* note 1.
[23] [1970] 3 O.R. 725, 1 C.C.C. (2d) 49 (C.A.).
[24] [1971] 2 O.R. 47, 2 C.C.C. (2d) 351 (C.A. 1970).
[25] *Supra* note 23, at 741, 1 C.C.C. (2d) at 65.
[26] *Id.* at 743, 1 C.C.C. (2d) at 67:
On the other hand, the excluded evidence . . . was undoubtedly of the utmost

Supreme Court of Canada in *Wilband*[27] and of Ritchie J. in *Lupien*.[28]

Rosik is an even more unsatisfactory decision. A defence psychiatrist had based his opinions regarding the capacity of the accused to intend murder solely on out-of-court statements made by the accused to the psychiatrist and others as to what quantity of drugs and alcohol he had ingested on the day in question.[29] The Ontario Court of Appeal divided both as to whether other persons could testify as to what the accused had told them[30] and as to whether the psychiatrist could relate what he had been told as the basis of his opinion.[31] The members of the Court gave different answers to the latter, important question.[32] Jessup J.A. followed *Dietrich*[33] and held that the basis of the opinion was admissible and did not offend the hearsay rule.[34] His judgment was subsequently relied on and quoted in *Abbey*.[35] However, he did not deal with the further question of whether the opinion of the psychiatrist would be worthless if based entirely on out-of-court statements made by the accused, although he did suggest that the trial judge could have pointed out to the jury that there was no sworn evidence for the basis of that opinion.[36] Only MacKay J.A. discussed that further issue;[37] thus, it is impossible to find any general consensus among the members of the Court on the point. *Rosik* was later appealed to the Supreme Court of

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importance to the essential defence in this case. It plainly lent weight to an opinion which, without it, might have made little impression on the jury.

[27] *Supra* note 8.

[28] In fact, in *Dietrich*, *supra* note 23, at 741, 1 C.C.C. (2d) at 64-65, Gale C.J. referred to *Lupien*, *supra* note 11, at 273, [1970] 2 C.C.C. at 199-200, where he quoted from Mr. Justice Ritchie's judgment that the reliance of a psychiatric opinion upon hearsay might reduce its weight.

[29] *Supra* note 24, at 71-73, 2 C.C.C. (2d) at 375-77. It is not clear from the facts exactly how much the psychiatrist had relied on the statements made by third persons about Rosik's drinking and drug taking; this question was not raised on appeal.

[30] The majority, *id.* at 56, 2 C.C.C. (2d) at 360 (MacKay J.A.); *id.* at 71, 2 C.C.C. (2d) at 375 (Schroeder J.A.); *id.* at 81, 2 C.C.C. (2d) at 385 (McGillivray J.A.), held that the evidence was inadmissible as it offended the rule against hearsay.

[31] *Id.* One judge, Schroeder J.A., ignored *Dietrich*, *supra* note 23, completely and held that the basis of the opinion should be excluded as offending the rule against hearsay. The other members of the Court acknowledged *Dietrich* but came to different conclusions as to its effect upon their decisions.

[32] *Rosik*, *id.* at 60-65, 2 C.C.C. (2d) at 364-69 (MacKay J.A.); *id.* at 53-54, 2 C.C.C. (2d) at 357-58 (Gale C.J.); *id.* at 70-74, 2 C.C.C. (2d) at 374-78 (Schroeder J.A.); *id.* at 81-82, 2 C.C.C. (2d) at 385-86 (McGillivray J.A.); *id.* at 84-86, 2 C.C.C. (2d) at 388-90 (Jessup J.A.).

[33] *Supra* note 23.

[34] *Rosik*, *supra* note 24, at 84-85, 2 C.C.C. (2d) at 388-89.

[35] *Supra* note 1, at 43-44, 68 C.C.C. (2d) at 410.

[36] *Rosik*, *supra* note 24, at 85, 2 C.C.C. (2d) at 389.

[37] *Id.* at 60-61, 2 C.C.C. (2d) at 364-65, where he did so only tangentially through a long quotation from J. WIGMORE, VI EVIDENCE IN TRIALS AT COMMON LAW s. 1720 (3rd ed. 1940).

Canada but the Court declined to comment on the evidentiary issues raised by the various judgments in the Court below.[38]

In *R. v. Abbey*,[39] however, the Supreme Court finally gave a definitive answer to the question of whether the evidentiary value of a psychiatric opinion is affected by its reliance on hearsay. Of the earlier cases, only *Wilband*,[40] *Dietrich*[41] and *Rosik*[42] were referred to, and then simply as support for propositions the Court had derived from first principles; the weaknesses discussed above were ignored.[43]

The judgment itself, written by Mr. Justice Dickson (as he then was) for the Court, can be reduced to two major propositions, both of which are derived from basic principles of evidence. The first proposition is that testimony by an expert as to the basis of his opinion, when that basis consists of second-hand material not proved in court, does not violate the rule against hearsay.[44] Such material is admitted into evidence not to prove the truth of its contents but to indicate the basis of the opinion. It follows that the trier of fact must be instructed not to accept any such evidence as truth of the facts stated therein.[45]

The second proposition is that the value of an expert's opinion may be affected to the extent to which it is based on second-hand material.[46] This affects the weight, rather than the admissibility of the opinion evidence, since the basis of the opinion is admissible under the first proposition.[47] Nonetheless, there is an obligation on the person tendering opinion evidence to establish through other evidence the basis upon which the opinion rests. And "[b]efore any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist".[48]

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[38] [1971] 2 O.R. 47, at 89n, 2 C.C.C. (2d) 351, at 393n (S.C.C. 1970).

[39] *Supra* note 1.

[40] *Supra* note 8.

[41] *Supra* note 23.

[42] *Supra* note 24.

[43] *Abbey*, *supra* note 1, at 42-43, 68 C.C.C. (2d) at 409-10.

[44] *Id.* at 43, 68 C.C.C. (2d) at 410.

[45] *Id.* at 44, 68 C.C.C. (2d) at 411.

[46] *Id.* at 43, 68 C.C.C. (2d) at 409, quoting from *Wilband*, *supra* note 8, at 21, [1967] 2 C.C.C. at 11. *Abbey*, *id.* at 44, 68 C.C.C. (2d) at 411; *see* note 47 *infra*.

[47] *Abbey*, *id.* at 44, 68 C.C.C. (2d) at 411: "The problem, however, as pointed out by Fauteux J. in *Wilband* resides not in the admissibility of the testimony but rather the weight to be accorded to the opinion."

[48] *Id.* at 46, 68 C.C.C. (2d) at 412 (Dickson J.). This comment would appear to contradict the decision of the Supreme Court of Canada in *Saint John*; *see* note 6 and accompanying text *supra*. That case involved a land appraiser who had based his opinion, apparently exclusively, on a large number of interviews with persons not before the Court. The Supreme Court's decision implied that, although the weight the opinion was to be given *might* be reduced because of frailties of its sources, the reduction would not be that significant. One reason to distinguish the land appraiser from the psychiatrist might be the large number of witnesses who would have to be called to substantiate the latter's opinion (*see* note 10 *supra*). Another might be that the very

It is this last statement that causes problems, because it appears to contradict earlier parts of the judgment. If the opinion of an expert, including his testimony as to the basis of that opinion, is admissible under the first proposition, what does it mean to say that if the basis is not independently proven the opinion should be given "no weight"? Does this mean that the trial judge must instruct the jury to disregard the evidence? If so, is that not equivalent to ruling the evidence inadmissible? How can evidence be admissible and yet entitled to no weight? Was Mr. Justice Dickson's statement an unintentional error, *obiter*, or simply wrong?

Two reasons can be identified for the use of the word "weight" in that final sentence. First, psychiatrists typically base their opinions on a number of factors, including the subject's demeanour, his reactions to questioning, and his past history. The situation in *Abbey*, where the psychiatrist based his opinion exclusively on what the accused related to him of past events,[49] is the exceptional case. Normally a psychiatrist bases his opinion on a number of factors, some of which are easily proved through other evidence or through the psychiatrist himself, and some of which are not. Furthermore, it may be impossible for the psychiatrist to demonstrate how his opinion might change if the unprovable factors were removed. A rule that refused to admit psychiatric opinion evidence unless the entire basis for the opinion were proved would be too rigid; it might make it impossible for psychiatrists to testify at all. From this viewpoint a rule based on weight is preferable to one based on admissibility, since weight is a more flexible concept, capable of existing in varying degrees.

In this regard I think it is revealing that the judgment in *Abbey* relied on the statement reproduced earlier in this article from Fauteux J.'s judgment in the *Wilband*[50] case. The *Wilband* excerpt stands primarily for the proposition that testimony from the psychiatrist as to the second-hand nature of much of the material on which he has based his opinion does not offend the hearsay rule. However, it also suggests that how the opinion is used will depend on the *degree* to which it is based on hearsay. The more the opinion relies on second-hand evidence, not otherwise proved, the less weight the opinion must be given.

I suggest that this is what Mr. Justice Dickson meant to say in the last paragraph of *Abbey*. His problem arose from the fact that *Abbey* was such an unusual case: a psychiatrist was basing his opinion entirely on

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number of sources relied on by the appraiser would provide its own evidentiary safeguard: the hearsay dangers discussed later in this paper might be less worrisome if the number of declarants were large. In any event, the *Abbey* judgment did not refer to *Saint John* nor indeed to expert evidence in general, but confined itself to psychiatric evidence.

[49] *Abbey*, *id.* at 28-29, 68 C.C.C. (2d) at 398-99.

[50] *See* note 9 and accompanying text *supra*.

second-hand evidence, not otherwise proved.[51] *Wilband*[52] had suggested the use of the word "weight"; logic suggests that the opinion cannot be of any use at all to the trier of fact if no part of the premise can be proved. Hence, the use of the words "no weight" in Dickson J.'s judgment.

Mr. Justice Dickson should have said that in such an extreme case the opinion becomes completely irrelevant once the proponent has failed to prove the premise. It should, therefore, be ruled inadmissible at that point. After all, there is really no difference in principle between the situation in *Abbey* and one where the psychiatrist answers a hypothetical question based on a fact situation which is never proved to have taken place, or where the psychiatrist offers an opinion as to someone who turns out to be the wrong person. In all these cases the evidence is irrelevant. Since all evidence must be logically probative to be admissible,[53] the opinion evidence in these cases should be removed from the consideration of the trier of fact.[54]

In effect, I am suggesting that the closing words of *Abbey* should be interpreted so as to make sense when viewed in the context of the decision as a whole. The extent to which the opinion of the psychiatrist rests on second-hand evidence goes to the weight and not to the admissibility of the opinion into evidence, with one exception, which arises in an unusual situation such as existed in *Abbey*: if the psychiatrist's opinion is based entirely on second-hand evidence not otherwise proved it is irrelevant, and therefore inadmissible; it cannot be considered by the trier of fact.

III. Requiring the Accused to Testify

This interpretation resolves the difficulties that arise in the closing words of the judgment;[55] it is consistent as well with the general evidentiary rules underlying the decision.[56] One major problem remains, however. To what extent does the obligation of the proponent of opinion evidence to establish the basis of the opinion through other evidence force the accused to take the stand? In many instances the psychiatrist's opinion is based largely on facts related to him by the accused. Since a

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[51] *Supra* note 1, at 28-29, 68 C.C.C. (2d) at 398-99.

[52] *Supra* note 8.

[53] J. Thayer, A Preliminary Treatise on Evidence at the Common Law 264-66 (1898).

[54] This, of course, contradicts the judgment of Ritchie J. in *Saint John* with respect to the evidence of a land appraiser; *see* note 6 and accompanying text *supra*. As indicated in note 48 *supra*, there are several reasons not to apply this analysis to an expert who relies upon a great number of sources.

[55] *See* notes 48-50 and accompanying text *supra*.

[56] *Abbey*, *supra* note 1, at 39-41, 68 C.C.C. (2d) at 407-09.

significant number of those facts consist of the accused's feelings about or reactions to external events it is not possible to prove them by means of evidence other than that of the accused himself. The *Abbey* decision forces the accused either to tender the evidence of the psychiatrist alone, and have it be given little or no weight by the trier of fact, or to take the stand himself to confirm the premise on which the opinion is based. What problems arise when the accused is required to testify in this way?[57]

To answer this question it is necessary to differentiate between the use of psychiatric opinion evidence in an insanity plea and its use in a defence of lack of *mens rea*. In an insanity plea the burden of proof has shifted to the accused.[58] To meet this burden he may have to take the stand, but by pleading insanity he has acknowledged his involvement in events; consequently the risk that he may incriminate himself by testifying is not a concern. Moreover, it must be remembered that the insanity plea and use of medical opinion evidence on that issue evolved at a time when the accused was unable to testify.[59] Reliance on medical evidence alone may not be as justifiable today, given that the accused is now able to testify and that the consequences of an insanity verdict are much less severe.

Is there *anything* troublesome in requiring the accused to give evidence to verify the basis of the opinion of a defence psychiatrist? The following points are worth considering. First, if the accused does have a serious mental disorder it may be unfair to expect him to establish through his own evidence the substance of what took place earlier between himself and the psychiatrist. Second, in considering whether the accused should take the stand there may be other concerns besides the

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[57] An interesting issue, not considered here, is the impact of *Abbey*, *id.*, on the use of psychiatric opinion evidence by the Crown. Since such evidence is usually offered in reply, after defence psychiatrists have testified, the question may not be of much practical significance. However, one can conceive of situations where the Crown might offer psychiatric evidence in chief; in those situations *Abbey* would preclude the reception of such evidence, if based solely on information received from the accused during an interview.

Would statements made by the accused to a Crown psychiatrist be receivable as admissions? I would suggest not: statements by the accused about his past, his reactions to external events and his motivation have no direct bearing on his guilt or innocence. Of course, if the accused were to speak to the psychiatrist about the offence, any inculpatory statements would be admissions and a claim of privilege would probably fail; *see* R. v. Stewart, 21 A.R. 300, 54 C.C.C. (2d) 93 (C.A. 1980), *leave to appeal denied* 23 A.R. 270n, 54 C.C.C. (2d) 93n (S.C.C. 1980).

[58] *Criminal Code*, R.S.C. 1970, c. C-34, sub. 16(4).

[59] At common law the accused was not considered competent to testify; *see* P. McWILLIAMS, CANADIAN CRIMINAL EVIDENCE 900-01 (2nd ed. 1984). This bar was removed for some offences by s. 216 of *The Criminal Procedures Act*, R.S.C. 1886, c. 174, but was not removed completely until the passage of *The Canada Evidence Act, 1893*, S.C. 1893, c. 31. The use of medical evidence seems to have been well established by the time of M'Naghten's Case, *supra* note 2. *See also In re* Dyce Sombre, 1 Mac. & G. 116, 41 E.R. 1207 (Ch. 1849).

fear that the accused might incriminate himself.[60] For instance, an accused could be prejudiced by the disclosure, under section 12 of the *Canada Evidence Act*,[61] of a serious criminal record, even if it was related in some manner to his present mental illness. Or the accused's inarticulateness or anxiety could be interpreted by the jury as a sign of guilt rather than of mental illness. Finally, the reasons given above for lack of concern about self-incrimination on an insanity plea are not applicable when the primary defence is the absence of *mens rea*. In such a situation defence counsel, in addition to directing their energies towards an acquittal on the basis that the accused lacked the requisite intent, may wish to exploit weaknesses in other areas of the Crown's case. These alternative routes to acquittal disappear once the accused is required to testify in order to provide the basis for psychiatric opinion evidence, since he can then be asked questions about any other element of the charge.

While these arguments may on their face appear legitimate, they are not compelling, as can be demonstrated by a closer examination of the evidentiary issues underlying the reception of out-of-court statements as evidence of the basis of a psychiatrist's opinion. The discussion that follows will focus on the unique qualities of both the type of evidence at issue and the particular witness, the psychiatrist, who relates that evidence to the court.

To begin with, it might be worth recalling the rationale behind our general evidentiary rule excluding hearsay evidence. That rationale has two parts. First, the reception into evidence of out-of-court statements does not give any guarantee of either the sincerity of the declarant or his powers of memory and perception.[62] Second, the failure to provide these guarantees means that the statement of the declarant is not logically probative of the facts stated therein. This general rule can be regarded as nothing more than a restatement of the principle that evidence must be relevant to be admissible.[63]

Furthermore, many of the exceptions to the hearsay rule can be seen as situations where the memory and perception of the declarant are

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[60] *See* LAW REFORM COMMISSION OF CANADA, COMPELLABILITY OF THE ACCUSED AND THE ADMISSIBILITY OF HIS STATEMENTS, STUDY PAPER 5, at 8 (1973).

[61] R.S.C. 1970, c. E-10.

[62] In his classic article, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948), Morgan identified four dangers in accepting hearsay evidence: use of language, sincerity, memory and perception. For my purposes I am ignoring potential problems with regard to use of language or ambiguity.

[63] This is perhaps a controversial analysis of the hearsay rule; *see* R. CROSS, EVIDENCE 479 (5th ed. 1979). My analysis is based on the premise that the relevance of oral evidence is conditional on the competence of its source. Where nothing is known about the memory and perception powers of an individual declarant, the condition is not met. *See* Wright v. Tatham, 5 Cl. & F. 670, at 689-90, 7 E.R. 559, at 566 (H.L. 1838) (Coleridge J.).

adequately guaranteed without the necessity of his appearing in court.[64] The "sincerity" rationale, on the other hand, plays less of a role in some hearsay exceptions.[65] In part this may be because of a recognition that cross-examination of the declarant will usually be an inadequate means of guaranteeing sincerity,[66] or it may be based on an implicit presumption that people are usually sincere, in the absence of a reason not to be. Arguably, there may be good reasons to disregard that presumption of sincerity, when considering the main hearsay exception, confessions.[67] In the more usual hearsay situation, however, the out-of-court statement is taken to accurately reflect the belief of the declarant; the main problem is whether his powers of memory and perception are adequately enough guaranteed that we can be confident that his belief is logically probative of the truth of the matters asserted in the statement.

Using this evidentiary analysis we can now begin to examine the problems inherent in the reception in evidence of out-of-court statements made to a psychiatrist and relied on in his opinion. First, problems of memory and perception are particularly serious when the basis of the opinion rests on statements made by third parties about the accused. These problems may actually be more acute than in the usual case, because the declarant will often be describing ephemeral impressions of the mental state of the accused.[68] Thus, it makes sense that the hearsay rule prevents the acceptance of such statements as proof of their contents. What consequences does this have for the opinion itself? Since it would be illogical to refuse to accept such statements as proof of their contents but then to rely on an opinion based on their truth, it follows that unless the statements are independently proven the psychiatrist's opinion is irrelevant and hence inadmissible.[69]

What about the situation where the psychiatrist relies on statements of an accused rather than those of a third party? Presumably the accused tells the psychiatrist about his own past, his reactions and impressions in particular situations, and his thoughts in general about himself and the world around him. Since the accused is relating events of which he has

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[64] *See* Mutual Life Ins. Co. v. Hillmon, 12 S. Ct. 909 (1892); Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

[65] Hence, we admit out-of-court declarations to prove states of mind in spite of the dangers of insincerity; *see* Sollars v. State, 316 P. 2d 917 (Nev. 1957).

[66] *Supra* note 62, at 185-88.

[67] Certainly one rationale for the voluntariness rule in confessions is the danger that induced or coerced admissions might be untrue; *see* Boudreau v. The King, [1949] S.C.R. 262, at 269-70, [1949] 3 D.L.R. 81, at 87-88 (Rand J.). Whether other rationales exist for the rule is a matter of some complexity; *see* Rothman v. The Queen, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97.

[68] There may also be difficulties of ambiguity, or use of language; *supra* note 62.

[69] This is, of course, an oversimplification. Given the analysis of *Abbey* offered earlier (*supra* notes 51-57 and accompanying text), it will only be in the exceptional case, when the entire opinion is based on hearsay, that it will be inadmissible; in most cases, hearsay elements will only affect the weight to be given to the opinion.

personal knowledge, there is some assurance that problems of memory and perception will not occur.[70] More important, what the accused is relating for the most part has to do with his state of mind; impressions and reactions based on the external world but nevertheless internal to the accused. His memory and perception of these must necessarily be better than of events taking place outside him.

This point can perhaps be made clearer by use of an example. Assume that the accused has told the psychiatrist that when he was a teenager he saw a horrible car accident; that accident had a tremendous impact on him, and as a result he developed a fear of automobiles. Since the issue is the mental state of the accused, the psychiatrist and the court as well are not concerned with how far the accused was from the scene when the accident took place, whether his vision was obscured by a tree, or whether he remembered the details of the accident correctly. What is of concern is whether the accused is correct in saying that the accident had this effect on him, and whether he remembers this effect accurately. The danger of errors of perception is decreased because the problems of the outside world have been removed. Inconsistencies of memory are lessened because the memory consists of a recall of reactions and of impressions of events rather than of the events themselves.

It should be added that to make the accused take the stand and be subjected to cross-examination may not be any guarantee of his powers of memory and perception when it is his thought processes that are at issue. In the usual case the examiner can point out to the witness that if he had stood where he said he had, the tree would have obscured his view. How can this be done with issues of mental state? Do we have a clear enough picture of how the mind works to enable us to conclude that the witness cannot be remembering his reactions correctly, or that what he is perceiving as his impressions could not have been the case? If we do not, then cross-examination is not a very effective tool in this area and does not provide the usual guarantees.

To recapitulate, I am suggesting that when an accused is interviewed by a psychiatrist, there are not the same problems of memory and perception associated with the statements he makes that would be the case if they were made by a third person. There are three reasons for this. First, the accused has personal knowledge of the events related. Second, since it is not events *per se* but the internal reactions and impressions of the accused that are of concern, problems of memory and perception are not as great. Finally, any dangers that do exist would not be likely to be exposed by the accused's taking the stand.

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[70] I will not deal in this article with the argument that the psychiatrist cares only about belief and that therefore memory and perception problems do not exist at all. If that were correct, we would not have a hearsay problem at all. I suggest that psychiatrists are typically concerned both with how a person viewed an event and reacted to it at the time and how he now believes he viewed and reacted to it.

If this is correct, it is necessary to look further for a reason to justify the exclusion of out-of-court statements made to a psychiatrist by an accused and used by that psychiatrist as the basis for his opinion. We have up to now ignored the danger that the out-of-court statement may not accurately reflect the declarant's belief. And, in fact, this is what happens in most of the exceptions to the hearsay rule; the evidence is receivable on the basis of guarantees of memory and perception, while sincerity problems are ignored.[71] But what about the confessions rule? This can be seen as an area where the primary concern is sincerity — our rule of thumb that out-of-court statements can be presumed to reflect belief does not hold when the statement has been made to a police officer. One could suggest that a similar situation exists here. The accused may find the consequences of an insanity plea preferable to a jail term. Or he may wish to promote a defence of lack of *mens rea* that will exonerate him completely. In either case he has a vested interest in answering the psychiatrist in a certain manner; as a result, the danger that self-serving statements will be made justifies the invalidation of our presumption of sincerity in the same way as it does with confessions.

The easiest way to guarantee the sincerity of the declarant would be to require that he take the stand (even assuming the inadequacies of cross-examination as a testing device). However, because of our concerns about forcing the accused to testify, it might be worth considering whether there are any ways to avoid this. I suggest that there are two possible arguments to this end, both of which focus on the role of the psychiatrist.[72]

First, it could be argued that the psychiatrist would normally rely on this type of evidence in other contexts, for example, in making a diagnosis on the basis of which a treatment program will be set up. If the psychiatrist, an expert, would normally rely on hearsay evidence of this nature in treating patients, why shouldn't the court?

The flaw in this argument is that it suggests that all hearsay evidence should be admissible, not just that given to a psychiatrist by an accused. After all, everyone relies to some extent on statements relayed to him through third parties. There is nothing about an expert that makes him any different. If the court has decided to exclude hearsay evidence in general it cannot single out as an exception evidence given to a psychiatrist by an accused simply because the psychiatrist would normally rely on it.[73]

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[71] *Supra* notes 62-68 and accompanying text.

[72] In the discussion that follows I assume for simplicity's sake that there is only one psychiatrist testifying. My conclusions also apply to the situation where there are opposing psychiatrists or even where the testimony is being given as a result of a court-ordered examination.

[73] We would also remember that a criminal trial is not an ordinary procedure for the conduct of human affairs but one that concentrates on a designated act. For a useful

A second, more compelling argument is that the psychiatrist has an ability to separate truth from fiction that should be taken into account by the rules of evidence.[74] On a very basic level, this argument really amounts to a suggestion that the psychiatrist's experience in dealing with people should be acknowledged. But, if experience is such an important factor, why shouldn't the judge make all the findings of credibility in jury trials?[75] Why not allow the psychiatrist to interview every potential witness and testify as to the believability of each? If we are not prepared to acknowledge experience in the conduct of the trial as a whole, it would be anomalous to make use of it in one particular area of evidence only.

A more powerful version of this argument takes care of these objections. If we remember that the issue before the court is the mental state of the accused, and acknowledge the psychiatrist's ability to understand the workings of the mind, we may have to conclude that he will not usually be fooled. The psychiatrist has more than just his experience with people against which to measure the accused's statements; he can also utilize his knowledge, presumably of a sophisticated sort, as to how the mind actually works. Fabrication by an accused will not succeed unless he can duplicate in some way the manner in which the psychiatrist expects the mind to work. This may be impossible.

Does this mean that the rules of evidence should be changed to allow for the unique role of the psychiatrist as a witness? Surely the answer to this question is no. It is necessary to distinguish between the argument that a hearsay problem does not exist because the nature of the evidence itself provides sufficient guarantees and the argument that a hearsay problem does not exist because a *person* provides those guarantees. The above proposition is an example of the latter type of reasoning, and

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discussion of this point in the context of character evidence, *see* Hartt, *Character Evidence*, in STUDIES IN CANADIAN CRIMINAL EVIDENCE 259, at 261-62 (R. Salhany & R. Carter eds. 1972).

[74] *See* LAW REFORM COMMISSION OF CANADA, OPINION AND EXPERT EVIDENCE, STUDY PAPER 7, at 32-33 (1973).

[75] Because the judge is allowed to comment on the credibility of the witnesses, it might be suggested that we take this argument into account. A recent, notable example of the use of this power occurred in the Jeremy Thorpe trial in England. According to a newspaper account, the judge in his summation poured scorn on three Crown witnesses:

> He called Mr. Bessell a humbug, Mr. Newton a chump and said Mr. Scott was hysterical, warped, a fraud, a sponger, a whiner, a parasite, a crook, spineless, neurotic and a liar.
>
> "But of course he could still be telling the truth (this time). It is a question of belief."

The Globe and Mail (Toronto), 23 June 1979 at 5, col. 6. For a discussion of the limits of this judicial power, *see* R. v. Pavlukoff, 106 C.C.C. 249, at 266, 10 W.W.R. (N.S) 26, at 41-2 (B.C.C.A. 1953) (O'Halloran J.A.) and R. v. Cavanagh, 15 O.R. (2d) 173, at 180-81, 75 D.L.R. (3d) 189, at 196-97 (C.A. 1976) (Evans J.A.).

essentially amounts to a suggestion that the psychiatrist, because of his abilities, ought to be allowed to take over the jury's task of deciding credibility in a case involving the mental state of the accused; it is a suggestion that the psychiatrist, in a limited context, become the thirteenth juror. Why should we do this when we do not allow him to determine the issue of mental state itself? Why leave the decision on insanity or mental incapacity to the jury at all? Presumably the answer to these questions is that we do not allow trial by expert because of our conception of justice. Justice requires judgment by twelve of one's peers, or at a minimum judgment by someone who is distinguished only by his knowledge of the law, not by his expertise in any other area. If the psychiatrist, then, has to be kept out of the jury box in determining the final issue, he must also be kept out at intermediate stages. Our sense of justice forbids allowing him to decide whether the accused is telling the truth or not.[76]

IV. CONCLUSION

If we accept that the psychiatrist cannot be used as juror, we are left with a hearsay problem. It was argued above that the presumption of sincerity does not hold when the accused is making statements to a psychiatrist. How can it be guaranteed that the accused believes what he is saying? If there are no guarantees, the inference cannot be made that the statement of the declarant is true. As a result, the statement is irrelevant and must be excluded unless another way can be found to guarantee sincerity. And, since the opinion of the psychiatrist is based on an irrelevant statement, it too is irrelevant and must be excluded.

This is where one must return to the ruling in *Abbey*. The result of that rule is that the accused may have to take the stand in order to guarantee the sincerity of what he has told the psychiatrist. But, as has been demonstrated, if he does not do so the psychiatrist's opinion, to the extent that it is premised on his statements, is irrelevant. The correct way to view *Abbey*, then, is as an interference with the right to silence, but one that is justified by the basic principle of evidence that all evidence is inadmissible unless logically probative or relevant to an issue in the case. In any criminal proceeding the accused must adduce relevant evidence to

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[76] One way to get around this rebuttal might be to suggest that accused persons, realizing the risk of failure, will not usually attempt to deceive psychiatrists. The guarantee would then depend, not on the ability of the psychiatrist to separate truth from falsehood, but on the perception of this ability by others. This assumption, however, will likely not hold when the stakes are high.

establish a defence, absent any weaknesses in the Crown's case. In the case of insanity that evidence will have to satisfy the trier of fact on the balance of probabilities; for other defences the evidence need only raise a reasonable doubt. But whatever the burden the accused must still meet it with relevant, admissible evidence. And in many instances that evidence will have to come from the accused himself to be admissible. *Abbey*, rather than infringing the rights or privileges of the accused, is properly seen as simply one instance of the application of this fundamental principle.