This study paper, prepared by the Evidence Project of the Law Reform Commission of Canada, is circulated for comment and criticism. The proposals do not represent the views of the Commission.

EVIDENCE

11. CORROBORATION

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1975

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

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Cat. No.: J31-7/1974

TABLE OF CONTENTS

INTRODUCTION

As a general rule the common law has developed on the basis that the testimony of a single competent witness is sufficient in law to support a verdict. However, principally within the last one hundred years, by statute, and in part by judicial decision, a number of exceptions to this general rule have been created.

Under the present law an accused cannot be convicted on the strength of the testimony of an unsworn child or of a victim of certain sexual offences unless the testimony of these witnesses is corroborated. With respect to other types of witnesses, accomplices, children who give sworn testimony, and victims in certain other sexual offences the jury must be cautioned by the judge that although they might convict on the basis of the testimony of these witnesses, it is dangerous to do so unless their testimony is corroborated. Finally, under the present law the testimony of only one witness is insufficient to sustain a conviction for perjury, treason and forgery. We recommend the abolition of all of these exceptions to the general rule that the evidence of a single competent witness is sufficient in law to support a verdict.

Historically the common law excluded much relevant evidence from judicial trials because of a fear that the evidence might be fabricated and because of a distrust of a jury's ability to evaluate it. For example, convicts, parties and interested persons were at one time all excluded from giving evidence because they were considered untrustworthy. This fear of fabricated evidence and distrust of the jury's ability to evaluate evidence was rightfully rejected in the middle of the eighteenth century and the factors that at one time affected a witness' competence to give evidence now only affect his credibility. (See Study Paper No. 1, Competence and Compellability.) This change in the rules of evidence reflected the basic principle upon which any rational system of evidence must be premised: All relevant evidence is admissible unless strong and compelling reasons demand its exclusion. This principle runs throughout all of our study papers.

Many of the most common and important requirements for corroboration or a cautionary instruction are justified on the same grounds that the ancient rules with respect to the incompetence of witnesses were justified. Namely, that the testimonies of for instance accomplices, children and victims in sexual offences is for one reason or another likely to mislead the jury. Therefore their testimony must be corroborated before it can be left for the jury to evaluate. Again, a theme that runs throughout the proposals in our study papers is that we should not premise a system of evidence on the assumption that all jurors are ignoramuses and without experience in evaluating evidence and making judgments. It is easily proved that

jurors are much more sophisticated and educated now than they were when the rules of evidence were first formulated. Whether they are now capable of evaluating the type of evidence that presently calls for corroboration can only be given a more speculative answer. However, the only empirical study of note in this area concluded not only that the jury follows and understands the evidence as well as the judge but also that the jury and the judge did not disagree significantly in determinations involving the credibility of witnesses. In particular it was found that the jury was as cautious as the judge in evaluating the testimony of young children in sex cases and the testimony of accomplices. H. Kalven and H. Zeisel, *The American Jury,* chs. 11, 13 (1966). Surely this simply confirms common sense. Most jurors will be familiar with the testimonial frailties of children, victims in sexual offences and accomplices, and if they are not, and they are not readily apparent to them, counsel will undoubtedly bring them to their attention.

The rules requiring that the testimony of certain types of witnesses be corroborated or that the jury be instructed that it is dangerous to convict on the basis of their testimony alone, are particularly difficult to justify in light of the fact that the testimony of every other witness, irrespective of how badly his credit has been impeached, is left to the jury and a verdict can be returned on the basis of it alone. Furthermore it is questionable whether one can rationally provide a fixed evaluation of a witness' testimony depending simply on whether that witness fits within a certain class of person. The Project tends to agree with Chief Baron Joy who in his monograph, Evidence of Accomplices, (1844), in commenting on a practice that had developed, perhaps in Ireland, of not sending cases to the jury when it was founded on the uncorroborated testimony of an accomplice, wrote:

> That a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had even seen that witness; before he had observed his look, his manner, his demeanour; before he had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the conviction with which it was followed; that a judge, I say, should come prepared beforehand, to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath.

These remarks are equally apt to the present practice of requiring corroboration or warning triers of fact that it is dangerous to convict in the absence of corroboration. Considering the endless diversity in the credit of witnesses a fixed rule estimating in advance the worth of a particular witness ought to be imposed with great caution and only when we are satisfied that a particular class deserves such blanket condemnation. The proponent of a deviation from the normal method of examining the credit of each witness on an individual basis thus needs to satisfy a heavy burden. Similarly, the proponent of a rule requiring an absolute quantity of evidence prior to conviction of a particular crime has the burden of establishing the need for such discriminatory treatment; why it is permissible to convict a person of murder on the testimony of a single uncorroborated witness and not permissible to convict a person of forgery, for instance, on like evidence.

A danger of the corroboration requirement is that it might produce, as suggested by Wigmore, reliance upon a rule of thumb. Wigmore asserted "(The Requirement) seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges.... This statutory rule... tends to produce reliance upon a rule of thumb." Wigmore, Evidence, para. 2061 (3d. ed. 1940). No rule of thumb for determining factual issues is a substitute for a thorough exploration of the credibility of a witness by carefully scrutinizing all the factors that might impair the worth of his testimony. If a witness' credibility appears good, and his testimony is believed by the trier of facts, that alone should be sufficient to support a verdict. If a witness' credibility is in doubt the mere presence of corroborative evidence should not lead to its unquestioned acceptance. Not surprising to many perhaps, an empirical study done in England tends to suggest that if a jury is given the present cautionary instruction on the danger of convicting on uncorroborated evidence, they will be more likely to convict than if they had not received any special instruction. L. S. E. Jury Project, Juries and the Rules of Evidence, [1973] Crim. L. R. 208.

Aside from the likely false assumptions upon which our present rules of corroboration rest, the futility of estimating the credit of a proposed witness simply by placing him in a broad category, and the dangers of a strict corroboration requirement, a case for the abolition of the present rules can be supported by their sheer complexity. The rules have provided a fertile field for technical appeals of questionable merit. The classic definition of corroboration in criminal cases is that given by Lord Reading C.J. in *R. v. Baskerville,* [1916] 2 K.B. 658, 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

This judicial expression has all the force of a statute in Canada and together with later judicial glosses we have moved from a wise practice of viewing the evidence of some witnesses with circumspection to a complex technical rule filled with pitfalls for the unwary. It is beyond the dimensions of this paper to fully illustrate the enormous superstructure that has been erected on the original basic proposition that the evidence of some witnesses should be approached with caution. A thorough reading of any of the Canadian articles in this area will reveal the subtleties, variations, inconsistencies, and great complexities that have emerged from the case law in this area. See for example, Branca, Corroboration, in Salhany, R.E., and Carter, R.J., Studies in Canadian Criminal Evidence 133 (1972); Mahoney, Corroboration Revisited, in Canadian Bar Association, Studies in Criminal Law and Procedure 133 (1973); Savage, Corroboration, 6 Crim. L. Q. 159, 282 (1963-64).

In the remainder of this paper we will briefly review the law with respect to the testimony of accomplices, victims in sex cases, children and the requirements of corroboration for the offences of perjury, treason and forgery.

ACCOMPLICES

Beginning in the 18th century English trial judges commonly warned the jury of the particular weakness inherent in the testimony of accomplices. As noted by Lord Abinger in *R. v. Farler,* (1837) 173 E.R. 418:

> It is a practice which deserves all the reverence of the law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance . . . . The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others.

This practice became a rule of law only in this century. *R. v. Baskerville, supra; Davies v. D.P.P.* [1954] A.C. 378 (H.L.); *Gouin v. R.* [1926] S.C.R. 539. Under the present law when there is evidence in the case that a witness testifying for the prosecution might be found to be an accomplice the trial judge is required to instruct the jury that it is within their legal province to convict but that it is dangerous to convict on the uncorroborated testimony of an accomplice. He may also advise them not to convict upon such evidence. This rule must be followed with almost mathematical precision without regard to the nature of the charge, the circumstances of the case, or the personality of the accomplice. Thus, while it was discretionary for the individual judge in the 19th century to give some form of warning, it became in the 20th century mandatory for the judge to give a warning of a certain content; a conviction following a failure to give such a warning will almost invariably be quashed on appellate review.

It is a question of law for the trial judge to determine, whether the witness might be an accomplice for the purposes of the rule and a question for the jury whether he is in fact an accomplice. *R. v. Gauthier* (1954) 108 C.C.C. 390 (Ont. C.A.). It will be a defect fatal to the conviction if the trial judge fails to elaborate for the jury as to who in law could be an accomplice and to direct their attention to facts which would support such a finding with respect to certain witnesses. *MacDonald v. The King* [1947] S.C.R. 90, 94; *Vigeant v. The King* [1930] S.C.R. 396, 399. The question of who in law can be an accomplice for the purpose of the rule has produced considerable case law and has not yet been satisfactorily resolved.

The mandatory requirement that a caution be given in all cases involving accomplice testimony can be criticized for a number of reasons: the caution that must be given to the jury can in some cases become so complicated that juries probably have great difficulty understanding it, with the result that it impedes rather than assists rational deliberation on the evidence; the complexity of the required instruction also means that judges themselves frequently make errors with respect to the instruction and technical appeals result; in many cases the motives that might

lead an accomplice to give false evidence are not present in the case, and yet the cautionary instruction is still required; the rule assumes that jurors will be misled by the testimony of an accomplice who has a motive to lie, but will not be misled by the testimony of another witness who is not an accomplice, even though such a witness may have an even more compelling but obscure motive to lie.

VICTIMS IN SEX CASES

An accused cannot be convicted of the following offences upon the testimony of only one witness, usually the victim, unless such testimony is corroborated: sexual intercourse with the feeble minded, incest, seduction, sexual intercourse with step-daughter etc. or female employee, procuring defilement, procuring, and procuring a feigned marriage. Criminal Code, R.S.C. 1970, ch. C-34, s. 139(1), 195(3), 256. In cases involving the following offences if the only evidence implicating the accused is the testimony of the victim the judge must instruct the jury that ". . . it is not safe to find the accused guilty in the absence of . . . corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.": rape, attempt to commit rape, sexual intercourse with a female under fourteen, and indecent assault on a female. Criminal Code, R.S.C. 1970, ch. C-34, s. 142.

It is difficult to discern any rationale underlying the different stringencies of proof for the various sexual offences in the Criminal Code. We will deal with them together, using rape as an illustration.

A number of justifications have been put forward by the courts and commentators justifying the need in rape cases for corroboration or at least a mandatory caution to the jury in the absence of corroboration. Firstly, it is argued that false accusations of rape are much more frequent than untrue charges of other crimes. A woman, it is said, may accuse an innocent man of raping her: because having consented to intercourse she then feels ashamed of herself and bitter at her partner; in order to protect her name or reputation if it becomes known that she had intercourse with the accused; for purposes of blackmail, jealousy, revenge or notoriety. But as well as being prone to deliberately fabricating rape charges it is assumed that women are susceptible to fantasize about rape, and often confuse a fantasized attack with a real one. Secondly, it is alleged that in sexual offences the defence may lack supporting evidence for its side of the story, an allegation of rape, it is contended, is hard to disprove. Finally, there is a fear that the emotion of outrage that is occasioned by the nature of sexual offences often endangers the presumption that an accused is assumed innocent until proven guilty. The jury may convict the accused solely because of the sympathy it feels towards the victim.

The English Criminal Law Revision Committee, although they recommended that no mandatory requirement for a warning should apply in the case of the testimony of an accomplice, concluded that special precautions should be retained in sexual offences. In justifying the distinction between its suggested reform with respect to accomplices and victims in sex cases the Committee noted:

> . . . the reason for the requirement in sexual cases is quite different from that in the case of an accomplice. In sexual cases it is the danger that the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a girl's refusal to admit that she consented to an act of which she is now ashamed. In the case of an accomplice any special danger that there may be in relying on the witness' evidence is apparent from the fact that he is an accomplice or it can be easily made apparent by the defence. In the case of a sexual offender the danger may be hidden. Moreover the nature of the evidence may make the jury too sympathetic to the complainant and so prejudice them against the accused.
>
> (Report on Evidence (General) 1972, Amnd. 4991, paras. 186-188)

This proposal was made despite the recognition that in many instances sexual offences are committed in circumstances in which corroboration is difficult or impossible to obtain and that the character and credibility of the complainant may vary infinitely from case to case. We are not persuaded that the defects in a complainant's testimony are so well hidden and immune from defense efforts to make them apparent that the distinction ought to be made. Indeed, if these defects are hidden as well as the Committee suggests it is difficult to justify the branch of the existing warning that tells a jury that it may convict if it believes the witness.

But even apart from the danger that the jury might be misled by the testimony of the victim in a rape case, recent research suggests that the assumptions underlying the requirement, the frequency of false charges due to psychological disturbances in females, and the fear that the jury will be sympathetic to the victim in a sex case and thus predisposed to convict the accused, are false. Most of the recent studies are conveniently collected and discussed in Comment, The Rape Corroboration Requirement: Repeal Not Reform, 81 Yale Law Journal 1365 (1972). For further references see Chappell, Geis, Fogarty, Forcible Rape: Bibliography, 65 Journal of Criminal Law and Criminology, 248 (1974).

CHILD WITNESSES

Though children may be sworn as witnesses their testimony is viewed with such caution that the trial judge may be required to give a warning with respect to such a testimony, similar to the warning given about the testimony of accomplices. *Horsburgh v. The Queen,* [1967] S.C.R. 746. The rationale for such a warning was given in *Kendall v. The Queen* [1962] S.C.R. 469:

> The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility.

Besides the cautionary warning respecting children who testify under oath certain statutory provisions provide that the evidence of an unsworn child cannot support a conviction unless such evidence is corroborated. Criminal Code, R.S.C. 1970, c. C-34, s. 586; *Juvenile Delinquents Act,* R.S.C. 1970, c. J-3, s. 19; *Evidence Act,* R.S.C. 1970, c. E-10, s. 16(2).

The different treatment afforded children who qualify to take the oath and those who give unsworn testimony is hard to justify. The dangers inherent in the testimony of children result largely from nondeliberate distortion in their perception, memory and narration. Even the assumption that a child who does not understand the nature of the oath is more prone to tell deliberate lies than one who does is questionable. However we would go further than simply requiring for instance a mandatory caution for the testimony of all children, sworn and unsworn. We recommend that even such a caution no longer be a mandatory requirement. In some situations children make excellent witnesses—they are close observers, and most if not all people are familiar with the danger that children are easily led by suggestion and because of their great imaginations, sometimes fantasize stories. There is certainly no evidence that jurors are likely to be misled by the testimony of children. However as mentioned in an earlier study paper, Study Paper #1, Competence and Compellability, the Law Reform Commission is currently sponsoring a study on the evidence of children generally. Obviously, in our recommendations to the Commission we will consider not only the responses we receive to this paper, but also the results of that empirical study.

PERJURY

Perjury is one of the few offences that requires corroboration. Criminal Code, R.S.C. 1970, c. C-34, s. 123. The history of this requirement, that something more than the testimony of a single witness is necessary to convict an accused of perjury, is fully explored in 7 Wigmore, Evidence sec. 2040 (3d. ed., 1940). Briefly, the explanation resides in the fact that the crime of perjury was dealt with originally almost exclusively in the Court of Star Chamber. The procedure in the Court of Star Chamber followed the ecclesiastical or civil law approach. That approach, in force on the Continent until the time of Napoleon, was based on a numerical system of proof. Normally, a single witness would not be sufficient to establish a fact and the weight of a particular person's testimony, depending on the dispute, was assigned a numerical value, sometimes in fractions. It is not surprising then that the Court of Star Chamber demanded two witnesses for the crime of perjury. With the abolition of the Star Chamber and the transfer of its jurisdiction to the Court of King's Bench the long established practice of requiring two witnesses in perjury prosecutions was accepted in the common law courts despite those courts' clear general rejection in the 17th century of the ecclesiastical numerical system. The common law acceptance of this apparent anomalous exception was explained by Wigmore on the basis that the crime of perjury was the one crime where a quantitative theory had some logical base at the time it was adopted. In this period of development in the law of evidence a person accused of a crime was not permitted to testify. Thus in most criminal cases the oath taken by a witness for the prosecution was unopposed by the defence. But in a charge for perjury the accused had previously given evidence under oath, thus in such cases it was often "oath against oath". The common law at this time although it had not adopted the numerical system, gave great reverence to the taking of an oath. So, Wigmore contends, it was perhaps not unsurprising that the common law retained the requirement of two oaths, or two witnesses, for the prosecution of perjury.

The historical reason for requiring corroboration in cases of perjury has disappeared. However, the requirement is now defended for a different reason. It is contended that if the requirement is abolished it would have the effect of discouraging persons from giving evidence in court. A potential witness might fear that he would be unduly harassed by a charge of perjury brought by an unsuccessful party, and that in a subsequent prosecution for perjury it would be simply his testimony against his prosecutor's. However, eliminating the corroboration requirement does not make the prosecution's task any easier than a prosecution for any other serious crime such as murder or robbery; the trier of fact must still be satisfied of guilt beyond a reasonable doubt. Moreover, if the removal of the corroboration requirement better enables the prosecution of false witnesses and thus "discourages persons from giving (false) evidence" then the purpose of having a crime called perjury is fulfilled.

TREASON

Treason is another offence that requires corroboration. Criminal Code, R.S.C. 1970, c. C-34, s. 47(2). The English rule was not judicially fashioned but was enacted by statute in 1547. 7 Wigmore, Evidence sec. 2036 (3d. ed., 1940).

Blackstone expressed the following reason for the rule:

> to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Wigmore elaborated on this policy reason:

> The true solution seems to depend on the relative proportion, in experience, of two elements, namely, the likelihood of false accusations, as compared with the harm of a guilty person's escape. When the former is large, and the latter is small, then the two-witness rule may be justified as being often effective, and seldom harmful when not effective. Now for treason this relation does seem to exist. In times of bitter political division, the dominant political party has the strongest motive and the amplest means of securing false testimony, to rid itself of its opponents; while the harm of a real traitor escaping judicial punishment is relatively small, because treason, when it is confined to a few individuals, can never really endanger the state, and, when it represents a wide-spread opinion in the community, there will be ample array of witnesses to prove its acts. The rule of two witnesses, then, seems to rest on justifiable grounds of policy.
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> 7 Wigmore, Evidence sec. 2037 (3d. ed., 1940).

It is anomalous that while corroboration is required for treason it is not required for any other offences against national security. We tend to agree with the English Criminal Law Revision Committee (11th Report, supra, para. 195) who said that they could determine no possible reason to continue the requirement of corrobotation in the English Treason Act. If the Government is ever as bent on convicting a person of treason as Wigmore hypothesized, the corroboration requirement will be of no protection to the accused.

FORGERY

Forgery is the final offence for which corroboration is required. Criminal Code, R.S.C. 1970, c. C-34, s. 325(1). The requirement is even more anomalous for this offence than it is for the preceding two offences.

The section in our criminal code requiring corroboration for forgery was originally taken from section 54 of the Forgery Act, (1869) 32-33 Vict. Ch. 19. To understand the passage of the English provision it is necessary to recall that until the middle of the 19th century, persons interested in the outcome of litigation were considered too untrustworthy, because of their interest in the outcome of the action, to testify. The Evidence Act of the Province of Canada (1852) 16 Vict. Ch. 19, s. 1, provided that thereafter persons interested in the matter in question could testify but maintained the prohibitions respecting the parties to the litigation. The ability of parties to testify did not exist until 1869. The Evidence Act, S.O. 33 Vict. Ch. 13. Section 54 of the Forgery Act of 1869 then is seen as one of the first pieces of legislation permitting interested persons to testify, with their interest left to affect the weight of their testimony rather than to operate as a complete bar. The proviso within s. 54 requiring corroboration should be viewed therefore as exhibiting the caution with which the legislators were then making this reform. It is important to note that the requirement of corroboration in section 54 of the English Act only applied with respect to the testimony of interested persons. With the enactment of the Criminal Code in 1892 the reason for the initial proviso appears to be forgotten and we find corroboration required for a conviction of forgery regardless of the character of the witness. Since we no longer reject witnesses as incompetent because of interest, the original reason for the corroboration requirement in forgery cases is gone. Its retention is impossible to justify in the absence of such a requirement with respect to other serious crimes in the Criminal Code.

In conclusion we note that the weight to be given to evidence must depend upon quality not pre-determined quantity; that there is no evidence to suggest that juries are less capable of weighing this kind of evidence than any other kind; that appellate review for the sufficiency of evidence, and the necessity of proof beyond a reasonable doubt are the ultimate protections for the innocent; and that the abolition of these rigid and complicated rules will in no way infringe upon counsel and the judge's right to give a caution to the jury appropriate to the circumstances of each individual case.